To be Argued by:
ROBERT A. SPOLZINO
(Time Requested: 15 Minutes)

Supreme Court of the State of New York
Appellate Division – Second Department

Docket No.:
2024-04378

ORAL CLARKE, ROMANCE REED, GRACE PEREZ, PETER RAMON, ERNEST TIRADO and DOROTHY FLOURNOY,

Plaintiffs-Respondents,

-against-

TOWN OF NEWBURGH and TOWN BOARD OF THE TOWN OF NEWBURGH,

Defendants-Appellants.

BRIEF FOR PLAINTIFFS-RESPONDENTS

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PRELIMINARY STATEMENT

This is an action under the recently adopted John R. Lewis New York Voting Rights Act. The defendants, the Town of Newburgh ("the Town") and the Town Board of the Town of Newburgh ("the Town Board" and, collectively with the Town, "appellants"), appeal from an order of the Supreme Court, Orange County (Maria S. Vazquez-Doles, J.), dated May 17, 2024, which denied their motion to dismiss complaint. This brief is submitted on behalf of plaintiffs-respondents Oral Clarke, Romance Reed, Grace Perez, Peter Ramón, Ernest Tirado, and Dorothy Flournoy (collectively, "respondents").

QUESTIONS PRESENTED

(1) On March 15, 2024, the Town Board adopted a resolution purporting to avail itself of the 90-day statutory safe harbor provision set forth in Election Law § 17-206(7)(b). That resolution is the basis for the motion to dismiss the complaint. The Town Board "suspended" its resolution on April 8, 2024. Should the appeal be dismissed as academic? Yes.

(2) The Town Board's March 15, 2024 resolution is the sole basis for

the motion to dismiss the complaint. The complaint alleges that the resolution was not duly adopted because the special meeting of the Town Board at which the resolution was adopted was not duly called. Appellants provide no documentary evidence in their motion to dismiss to controvert the allegations in the complaint with respect to the failure to notice the special meeting as required. Accepting the allegations in the complaint as true, should the Supreme Court have denied the motion to dismiss on the ground that the Town Board never duly adopted the March 15, 2024 resolution? Yes.

(3) Election Law § 17-206(7)(b) prohibits a plaintiff from commencing an action under NYVRA for 90 days if the municipality "pass[es] a resolution affirming: (i) the political subdivision's intention to enact and implement a remedy for a potential violation of this title; (ii) specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy; and (iii) a schedule for enacting and implementing such a remedy." The resolution the Town Board adopted on March 15, 2024 did not commit the Town to implement any remedy for its at-large method of electing Town Board members. Instead, it merely committed the Town to *investigate* whether remedial action was warranted. Did the Supreme Court

correctly conclude that the March 15, 2024 resolution did not trigger the safe harbor provision of Election Law § 17-206(7)(b)? Yes.

SUMMARY OF ARGUMENT

This is one of the first lawsuits filed under the newly enacted John R. Lewis Voting Rights Act of New York, or New York Voting Rights Act ("NYVRA"). *See* Election Law § 17-200 *et seq*. The purpose of this action is to remedy the longstanding disenfranchisement of minority communities residing within the Town of Newburgh resulting from the Town's at-large system of electing Town Board members. NYVRA expressly prohibits the use of at-large voting systems where there is racially polarized voting or where, "under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired." Election Law § 17-206(2)(b)(i). At-large voting systems have been struck down in other jurisdictions under similar statutes. *See Portugal v. Franklin Cnty.*, 530 P.3d 994, 1004 (Wash. 2023), *cert. denied sub nom. Gimenez v. Franklin Cnty., WA*, 144 S. Ct. 1343 (2024); *Higginson v. Becerra*, 786 F. App'x 705, 706 (9th Cir. 2019), *cert. denied* 140 S. Ct. 2807 (2020); *Sanchez v. City of Modesto*, 145 Cal.App.4th 660, 667 (Cal. 2006), *cert. denied*

552 U.S. 974 (2007). The complaint here alleges, and respondents are prepared to prove, vote dilution under NYVRA.

In order to encourage and allow municipalities to resolve NYVRA claims quickly and efficiently, NYVRA provides that a municipality that commits to remedy a potential violation is given a 90-day "safe harbor" period, free from suit, to take the remedial action. The resolution invoking the "safe harbor" must affirm three things: "(i) the political subdivision's intention to enact and implement a remedy for a potential violation of this title; (ii) specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy; and (iii) a schedule for enacting and implementing such a remedy." Election Law § 17-206(7)(b).

Here, the Town Board's resolution did none of the things the statute requires. It committed *to investigate* whether the minority communities in the Town were illegally disenfranchised, not to fix that disenfranchisement. It identified specific steps it *might* take *if* it determined there was a violation, not steps it planned to take to "facilitate approval and implementation" of the remedy. And it established no schedule for actually doing anything about the disenfranchisement. Committing to study the problem is not committing to fix it.

The Supreme Court correctly denied the motion to dismiss the complaint because, having failed to commit to ***remedy*** the potential violation, the Town did not do what the statute requires. The Supreme Court could have denied the motion on two alternative grounds. First, after the motion was made but before it was decided, the Town Board "suspended" even the limited commitment it made to investigate the potential violation. Because it did so, its motion, and this appeal, are academic. Second, the motion fails to controvert the allegations in the complaint that the resolution, which is the sole basis for the motion, was not duly adopted and, therefore, is ineffective. For all of these reasons, the appeal should be dismissed or the order of the Supreme Court should be affirmed.

STATEMENT OF FACTS

A. New York Voting Rights Act

The New York State Legislature adopted the John R. Lewis Voting Rights Act of New York, otherwise known as the New York Voting Rights Act ("NYVRA"), in 2022. R.46. It became effective on July 1, 2023. R.125.

NYVRA is historic legislation, which seeks to safeguard the rights of minority voters to participate in the democratic process. Dissatisfied by the erosion of voting rights protections under the federal voting rights act, the

New York State Legislature has followed in the footsteps, and expanded upon, voting rights statutes enacted in states such as Washington and California by proactively expanding remedies available to disenfranchised voters. R.127-128. NYVRA is an unequivocal expression of New York's commitment to becoming a national leader in voting rights at a time when other states are doing just the opposite. R.128.

NYVRA formally declares that it is the public policy of the State of New York to "[e]ncourage participation in the elective franchise by all eligible voters to the maximum extent" and "[e]nsure that eligible voters who are members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political processes of the state of New York, and especially to exercise the elective franchise." Election Law § 17-200. The statute also provides that "all statutes, rules and regulations, and local laws or ordinances related to the elective franchise shall be construed liberally in favor of (a) protecting the right of voters to have their ballot cast and counted[,] (b) ensuring that eligible voters are not impaired in registering to vote, and (c) ensuring voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process in registering to vote and voting." Election Law § 17-202.

As relevant here, NYVRA prohibits a "political subdivision," such as a town, from utilizing a method of election that "impair[s] the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections, as a result of vote dilution." Election Law §§ 17-204, 16-206(2)(a). A "protected class" is defined as "a class of eligible voters who are members of a race, color, or language-minority group." Election Law § 17-204(5). An "at-large" method of election refers to, among other things, "a method of electing members to the governing body of a political subdivision . . . in which all of the voters of the entire political subdivision elect each of the members to the governing body." Election Law § 17-204(1). A political subdivision using an at-large method of electing members to its governing body violates NYVRA's prohibition against vote dilution if either "voting patterns of members of the protected class within the political subdivision are racially polarized" or "under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired." Election Law § 17-206(2)(b)(i).

Recognizing that irreparable harm to voters results when elections are held under unlawful conditions, NYVRA provides for expedited pretrial

and trial proceedings as well as an automatic calendar preference. Election Law § 17-216. This preference mitigates the risk that incumbent officials, who often benefit from the unlawful conditions challenged under NYVRA, will expend public funds to delay remedying the disenfranchising conditions. *See id.*

NYVRA does, however, give local governments the opportunity to avoid the expense of litigation by committing to voluntarily correct unlawful methods of election. Except in circumstances not relevant here, NYVRA requires prospective plaintiffs to send a notification letter to the clerk of a political subdivision asserting that the political subdivision may be in violation of NYVRA. Election Law § 17-206(7). The prospective plaintiffs must wait 50 days after sending that letter before commencing a lawsuit. *Id.* § 17-206(7)(a). If, during those 50 days, the political subdivision adopts a "NYVRA resolution," affirming "(i) the political subdivision's intention to enact and implement a remedy for a potential violation of [NYVRA]; (ii) specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy; and (iii) a schedule for enacting and implementing such a remedy," the plaintiffs must wait an additional 90 days to commence a lawsuit. *Id.* § 17-206(7)(b).

B. The Town of Newburgh.

The Town of Newburgh is a political subdivision in Orange County. R.47. The Town Board is the legislative and policy-making authority within the Town and is composed of a Town Supervisor and four councilmembers.[1] R.47, 52. Councilmembers are elected in at-large elections, R.52, meaning that every registered voter residing in the Town may vote for every office which is on the ballot for a given election. *See* Election Law § 17-204(1). Because councilmembers are elected to staggered, four-year terms every two years, there are two councilmember seats on the ballot each general election. R.53. General elections for Town Board are held in odd-numbered years, with the next general election scheduled for November 2025. R.69.

The Town's population has risen dramatically in the past decades and nearly 32,000 people now call Newburgh home. R.47. Much of that increase is attributable to the rapidly expanding Black and Hispanic communities. R.47. According to available data from the most recent census, the Town's population is approximately 61 percent White, 25 percent Hispanic, and 15

[1] One of the four seats on the Town Board is currently vacant because an incumbent passed away after this lawsuit was commenced. R.99-100. The Town has indicated that the seat will be filled by special election in November 2024.

percent Black. R.51. Those minority communities are particularly prominent in the areas of the Town immediately adjoining the City of Newburgh. R.47.

But despite these substantial minority populations, to respondents' knowledge, every person ever elected to the Town Board has been White. R.47-48, and no person of color has ever been elected to the Town Board. R.53. The current Town Board members, for example, are all White Republicans. R.53. This is no coincidence. Rather, as respondents allege in this action, the ubiquity of White Town Board members is the result of the Town's at-large elections, which dilute the voting power of the Town's minority communities. R.70-72.

On January 26, 2024, respondents sent the Town a notification letter, informing it of their allegations of the Town's violations under NYVRA and their intention to commence a lawsuit. R.56, 79-83. In that letter, respondents stated that they were Hispanic and African American voters residing in the Town. R.79. They informed the Town of the pertinent provisions of NYVRA and that Hispanic and African American voters in the Town are less able to elect their candidates of choice when compared to white voters. R.79-80. Specifically, respondents stated that this was because of "significant and persistent patterns of racially polarized voting with respect to African

American and Hispanic voters . . . demonstrat[ing] that the voting preferences and choices of African American and Hispanic voters differ markedly from those of white voters in the jurisdiction," and because "under the totality of the circumstances, the African American and Hispanic communities are less able to elect candidates of their choice and their ability to influence the outcome of elections is impaired." R.79. In their letter, respondents advised the Town about NYVRA's safe harbor provision and urged the Town to take action voluntarily to fix its electoral process. R.80-81.

Weeks passed with the Town Board taking no discernable action in response to the notification letter. Although the Town Board held regular meetings on February 13, 2024 and March 11, 2024, there was no mention of NYVRA or changes to the Town's method of electing councilmembers. R.100. But then, at noon on March 15, 2024—one day before the 50-day waiting period for respondents to commence an action under NYVRA expired—the Town Board apparently held a special meeting and adopted what the Town purported to be a NYVRA-compliant resolution ("the March resolution"). R.56, 84-86.

The March resolution asserted that the Town was availing itself of NYVRA's safe harbor provision, directed the Supervisor and Town Attorney

to work with outside counsel and "authorized experts it retains in the review and investigation of" the Town's at-large election system "to determine whether any potential violation of the NYVRA may exist and to evaluate potential alternatives to bring the election system into compliance with the NYVRA should a potential violation be determined to exist." R.85. According to the March resolution, that investigation's findings would be reported to the Town Board within 30 days and, "[i]f, after considering the findings and evaluation and any other information that may become available to the Town . . . the Town Board concludes that there may be a violation of the NYVRA, the Town Board affirms that the Town intends to enact and implement the appropriate remedy(ies)." R.85-86. No schedule was set forth as to when the Town Board would make its determination, providing only that if the Town Board found that "there may be a violation of the NYVRA . . . the Town Board shall cause a written proposal of the selected remedy(ies) . . . to be prepared and presented to the Town Board within ten (10) days of the Town Board's finding of the potential violation." R.86. Then, within 30 days thereafter, the Town Board would "conduct at least two (2) public hearings within a thirty (30) day timeframe at which the public shall be invited to provide input regarding the NYVRA Proposal and

the proposed remedy(ies) set forth therein." R.86. Following the last public hearing, "the Town Board shall approve the completed NYVRA Proposal" within 90 days of the March resolution. R.86.

C. This action.

On March 26, 2024, respondents commenced this action by filing their summons and complaint. R.45-78. The complaint alleges that the Town is violating Election Law § 17-206(2) because the Town's method of election dilutes the votes of Black and Hispanic voters in the Town both due to racially polarized voting and under the totality of the circumstances. R.70-72. The complaint specifically alleges that its claims are subject to expedited judicial review and an automatic calendar preference. R.69-70. Expediency is critical because the nomination process for the next general election held for Town elections—to be held in November 2025—will begin in or around February 2025 and any remedy, such as a districting plan, would need to be implemented before that nomination process begins so that the next election is not tainted by the same unlawful conditions that are the subject of this action. R.69-70.

The complaint acknowledged the Town's March resolution, but expressly alleged that the respondents were not required to wait for the

additional 90-day safe harbor period to pass before commencing this action because (1) the March resolution did not satisfy the requirements of Election Law § 17-206(7) to trigger the safe harbor protection and (2) upon information and belief, the resolution was void and of no effect as it was not duly adopted at a duly called Town Board meeting. R. 56-57. On April 8, 2024, the Town Board "suspended" its resolution and all efforts to implement a remedy (the "April resolution"). R.33; App. Brf. at 11-12.

D. Appellants' motion to dismiss.

On April 16, 2024, appellants moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). R.20-91. The motion did not address the substance of respondents' allegations whatsoever. Instead, appellants argued only that the March resolution was sufficient to invoke NYVRA's safe harbor and, therefore, the lawsuit was premature. R.34-40.

In opposition to the motion, respondents raised three arguments as to why the March resolution did not trigger the safe harbor provision and was not a proper basis to delay the action. First, they argued that the March resolution did not satisfy the requirements of Election Law § 17-206(7)(b) because it did not affirm the Town's intention "to enact and implement a remedy for a potential violation of [NYVRA]," identify "specific steps" for

implementing a remedy, or set forth a schedule for enacting and implementing a remedy. R.105-110. Second, respondents argued that the March resolution was void and of no effect because the meeting at which it was adopted was not duly noticed. R.110-111. Third, respondents argued that appellants' motion was academic because the April resolution had effectively rescinded the March resolution by suspending all efforts to implement a remedy, eliminating any possibility that the Town could implement a remedy with 90 days of the March resolution. R.111-112.

While the motion was pending, the Attorney General of the State of New York sought leave to participate as *amicus curiae* and filed a brief in opposition to the motion to dismiss. R.179-193. Echoing several points in Respondents' opposition papers, the Attorney General argued that the March resolution was insufficient to avail the Town of NYVRA's statutory safe harbor period, R.185-188, and that appellants' interpretation of the safe harbor provision would subvert NYVRA's purposes. R.189-192.

In reply, R.194-208, appellants reiterated their claims that the March resolution was sufficient to avail the Town of the statutory safe harbor, R.197-205, and claimed that the special meeting at which the resolution was adopted was properly called pursuant to § 27-1 of the Town's municipal

code, R.205-206, but did not provide any documentary proof or even a sworn statement from someone with personal knowledge establishing that written notice to the Town Board members was provided in accordance with the Town's code. Appellants also claimed that Respondents' commencement of litigation enabled the Town to suspend its efforts towards implementing a remedy while still availing itself of NYVRA's safe harbor protection. R.206-207.

E. The order appealed from.

By order dated May 17, 2024, the Supreme Court denied the motion to dismiss the complaint. R.5-19. There, the Supreme Court reasoned:

> [T]he resolution that [appellants] passed does not satisfy the three elements in the Act because it lacks the intention to enact and implement specific remedies, the steps to accomplish that process, and a timetable for implementation. [Appellants'] resolution is bereft of any remedy, specific or otherwise, for [respondents'] claims. Instead, [appellants] enacted only a plan to investigate whether a violation of the Act is ongoing, a process that the Act does not authorize and that does not satisfy the requirements to trigger the 90-day safe harbor.

R.5-6.

Focusing on the text of the March resolution, the Supreme Court observed that, by using the word "if" before affirming its intent to enact and implement remedies, the Town expressly made its intention to act

contingent on it first concluding, based on an investigation, that the Town may be violating NYVRA. R.15. The Supreme Court reasoned:

> The Board resolution calls for an investigative act not an intentional or remedial act. The Board Resolution's delay of an intention to enact and implement – past the 50 days – finds no support in the plain wording of the Act. The plain wording of the Act requires an expression of intent to enact and implement the appropriate remedies by [appellants] within the 50 days, not on some date after that 50-day window expires.

R.15.

Accordingly, the Supreme Court held that the March resolution did not demonstrate the Town's "intention to enact and implement a remedy for a potential violation" of the statute, in compliance with the first element of Election Law § 17-206(7)(b). R.17. Although not necessary to its determination, the Supreme Court also concluded that the March resolution did not set forth "specific steps" for implementing remedies, R.17-18, or a schedule for doing so. R.18. In conclusion, the Supreme Court denied the motion to dismiss because Appellants had not met their burden of demonstrating compliance with NYVRA. R.18-19.

F. Proceedings before this Court.

Appellants filed a notice of appeal, R.2-3, and moved this Court

for: (i) a stay of all proceedings before the Supreme Court pending a resolution of this appeal; (ii) expedited briefing; and (iii) a calendar preference. *See* Docket No. 2024-04378, NYSCEF Doc. No. 3. Respondents opposed the application to stay lower court proceedings pending appeal but consented to expedited briefing and a calendar preference. *See* Docket No. 2024-04378, NYSCEF Doc. No. 6. By order dated July 3, 2024, this Court denied the motion for a stay, but granted expedited briefing and a calendar preference. *See* Docket No. 2024-04378, NYSCEF Doc. No. 7.

ARGUMENT

I

Appellants have rendered this appeal academic by effectively rescinding the March resolution

The Town Board's decision in the April resolution to "suspend" the March resolution effectively did away with even the limited commitment the Town Board made ***to investigate*** the potential NYVRA violation and eliminated any chance there might have been of implementing a remedy within the 90-day safe harbor period. Appellants acknowledge that. *See* App. Brf. at 11-12. Having thus eliminated any chance that the Town would

implement a remedy by June 13, 2024, the final day of what would have been the safe harbor period if the March resolution qualified as a NYVRA resolution, appellants cannot now ask this Court effectively to re-instate what they, themselves, abandoned.

To begin with, this appeal is now academic because more than 90 days have passed since the March resolution with the Town no closer to implementing any remedy for the NYVRA violation. This Court does not consider "questions which, although once active, have become academic by the passage of time or by a change in circumstances." *144-80 Realty Assocs. v. 144-80 Sanford Apartment Corp.*, 193 A.D.3d 723, 724 (2d Dep't 2021) (internal quotation marks omitted).

The April resolution makes clear that appellants never had any intention of actually committing to cure the potential NYVRA violations, as the invocation of the safe harbor provision requires. Nothing in NYVRA authorizes a political subdivision to invoke the safe harbor provision, as appellants claim they have done, then suspend the remedial efforts they allegedly committed to take. Their action only underscores that the March resolution was never anything more than a delaying tactic to maintain the status quo. NYVRA does not permit that.

Had appellants truly wanted to investigate the potential NYVRA violation, as they claim, they would simply have moved forward with that investigation and implemented remedies within 90 days of the March resolution, regardless of the commencement of the action. Or they could have asked the Supreme Court to stay their obligation to answer or otherwise respond to the complaint while they did so. But they did neither.

The April resolution thus establishes that the March resolution was a sham and that appellants' sole goal was to delay the imposition of any remedy until after the beginning of the 2025 election cycle. Respondents properly refused to take the bait and wait, futilely, for appellants to take any meaningful action toward a remedy. Futile acts are not required. *See East End Resources, LLC v. Town of Southold Planning Bd.*, 135 A.D.3d 899, 901 (2d Dep't 2016) (property owner need not pursue a variance application where they can establish that an application would be futile); *Kaplan v. Madison Park Group Owners, LLC*, 94 A.D.3d 616, 619 (1st Dep't 2012) (party to a contract may sue if the other party repudiates their obligations "without having to futilely . . . wait for the other party's time for performance to arrive"), *lv. denied* 19 N.Y.3d 1012 (2012) and 20 N.Y.3d 858 (2013); *Papandrea-Zavaglia v. Arroyave*, 75 Misc.3d 541, 546 (Civ. Ct. Kings Cnty. [Bruce E. Scheckowitz, J.]

2022) ("Requiring landlord to wait 180 days . . . is an unnecessary exercise in futility").

The deadline for appellants to act has now passed. As a result, the motion to dismiss is now academic. Allowing appellants to obtain dismissal of the complaint on the basis of a resolution that they never had any intention of honoring would be an absurd application of NYVRA, which must be avoided. *See People v. Schneider*, 37 N.Y.3d 187, 196 (2021), *cert. denied* 142 S. Ct. 344 (2021). Appellants' arguments before the Supreme Court that the commencement of a lawsuit essentially restarted the safe harbor period is unsupportable. R.206-207.

II

Appellants failed to establish that the March resolution was duly adopted at a properly called Town Board meeting

"On a motion to dismiss pursuant to CPLR 3211, . . . [w]e accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). "[D]efendants bear the burden of establishing that the complaint fails to state a viable cause of action." *Connolly v. Long Is. Power Auth.*, 30 N.Y.3d

719, 728 (2018). Appellants failed to carry that burden here.

Appellants' motion to dismiss the complaint was based solely on the March resolution. The moving papers did not address the legality of the meeting at which the resolution was adopted. In opposition, Respondents cited the allegation in the complaint that the March resolution "was not duly adopted at a duly called meeting of the Town Board," R.56, because the two days' notice of a special meeting of the Town Board, required by Town Law § 62(2), was not given. R.110-111. Failure to give the required notice makes a resolution adopted at the meeting null and void. *See McGovern v. Tatten*, 213 A.D.2d 778, 780 (3d Dep't 1995) ("Only one day's notice of the special meeting was given. Accordingly, the resolution to resume maintenance of the disputed road is null and void"); *Matter of Plumley v. Cnty. of Oneida*, 57 A.D.2d 1062, 1062 (4th Dep't 1977) (meeting called with insufficient notice "was a nullity and legislation passed at the meeting was void").[2]

In their reply, appellants asserted that Town Law § 62(2) did not apply

[2] The exception to this general rule, which applies where all councilmembers had actual notice of the special meeting, attended, and participated, *see Phillips v. Cnty. of Monroe*, 18 Misc.3d 1127(A), at *2 (Sup. Ct. Monroe Cnty. [Kenneth R. Fisher, J.] 2007), is not applicable here because the March resolution identifies that two councilmembers were absent from the meeting. R.86.

because the Town superseded Town Law § 62 with section 27-3 of the Newburgh Town Code, which permits the town supervisor to call a special meeting "by causing a written notice, specifying the time and place thereof, to be served upon each member of the Board personally at least one hour prior to the meeting; or by leaving a notice at his residence or place of business with some person of suitable age and discretion at least 24 hours before the time of the meeting or by mailing such notice to the residences of the members of the Board at least 72 hours before such meeting." R.205-206.[3] But even while making that assertion, appellants submitted no evidence that that the town supervisor provided written notice of the special meeting to the Town Board members.

The Supreme Court denied appellants' motion to dismiss without addressing the validity of the March resolution. Had it reached the issue, however, the Supreme Court would have had to assume that the factual allegations in the complaint are true and, in the absence of any documentary proof, or even a factual assertion, that the required notice was given, would

[3] Chapter 27 of the Town's Municipal Code can be viewed at https://ecode360.com/9609548#9609548.

have been required to deny the motion solely on this basis, without reaching whether the substance of the March resolution satisfied the statutory requirements.

Precisely when and how the Town Board members were notified of the special meeting remains a mystery. Appellants offered nothing to establish that the meeting was properly called and did not actually claim that it had been. R.205-206. They merely claimed that there were insufficient factual allegations in the complaint to support that contention. R.206. But relying on that claim erroneously shifts the burden to the plaintiffs at the CPLR 3211 stage.

Dismissal under CPLR 3211(a)(1) is appropriate "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002). Appellants did not offer any documentary proof to "utterly refute" the complaint's allegation that the meeting was not duly called. They did not even provide an affirmation of someone with personal knowledge of the facts to establish that the notices had ever been sent. *See Warrington v. Ryder Truck Rental, Inc.*, 35 A.D.3d 455, 456 (2d Dep't 2006) ("affirmation that is not based upon personal knowledge

is of no probative or evidentiary significance"). Since appellants failed to meet their burden to refute the complaint's allegation that Town Board's March 15, 2024 meeting was not duly called, the conclusion that the March resolution is null and void is inescapable and, therefore, the motion to dismiss, which is entirely dependent on the validity of the March resolution, could have been denied on this basis alone, and the order should be affirmed for that reason.

III

The March resolution did not trigger NYVRA's safe harbor protection because it does not satisfy Election Law § 17-206(7)(b)

The March resolution does not satisfy the requirements of Election Law § 17-206(7)(b) in three ways: it does not commit the Town to enact and implement a remedy, it does not identify specific steps that the Town will take to implement a remedy, and it does not provide a schedule for doing so. The plain text of the March resolution commits the Town only to investigate whether it is in violation of NYVRA, not to implement a remedy for such violation. The March resolution, therefore, is insufficient to trigger the NYVRA safe harbor period, and the Supreme Court properly denied the Town's motion to dismiss the complaint.

A. Dismissal of the complaint would be inconsistent with NYVRA.

"The primary consideration of courts in interpreting a statute is to ascertain and give effect to the intention of the Legislature." *Riley v. Cnty. of Broome*, 95 N.Y.2d 455, 463 (2000) (internal quotation marks omitted). "'[W]hen the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used.'" *People v. Williams*, 19 N.Y.3d 100, 103 (2012), quoting *People v. Finnegan*, 85 N.Y.2d 53, 58 (1995) (additional citations omitted), *reargument denied* 85 N.Y.2d 968 (1995), *cert. denied* 516 U.S. 919 (1995). A court may consider extrinsic evidence of the legislature's intent, such as legislative history, only where the legislative intent cannot be discerned from the plain language of a statute. *See People v. Cypress Hills Cemetery*, 208 A.D.2d 247, 251 (2d Dep't 1995). The same rules apply to resolutions adopted by local governments. *See Town of Massena v. Niagara Mohawk Power Corp.*, 45 N.Y.2d 482, 490 (1978) ("Words employed in the resolution will be construed according to their ordinary and plain meaning in the absence of a clear intent to the contrary expressed in the enactment").

The Legislature made its intent in enacting NYVRA clear. Recognizing that among all the rights secured to citizens of the United States, the right to

vote is unique because it is "'preservative of all rights,'" *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966), quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), the statute unequivocally states that the public policy of the state is both to "[e]ncourage participation in the elective franchise by all eligible voters to the maximum extent" and "[e]nsure that eligible voters who are members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political processes of the state of New York, and especially to exercise the elective franchise." Election Law § 17-200.

To achieve its purpose, NYVRA expressly requires expedited proceedings. *See* Election Law § 17-216. This is because, as the Legislature recognized, disenfranchised voters are irreparably harmed every time an election is held under unlawful conditions. *Id.* Another reason for expedited proceedings is that, because public officials often benefit from unlawful conditions, they may expend significant public resources defending unlawful conditions and delay the litigation for as long as possible. *See id.* ("Because of the frequency of elections, the severe consequences and irreparable harm of holding elections under unlawful conditions, and the expenditure to defend potentially unlawful conditions that benefit incumbent officials, actions brought pursuant to this title shall be subject to

expedited pretrial and trial proceedings and receive an automatic calendar preference").

NYVRA's notification letter and safe harbor procedure must be read in this context. Read in conjunction with the statute's overriding purpose of remedying voter disenfranchisement, the safe harbor provision is clearly not designed to delay the determination of NYVRA claims, but to facilitate the avoidance of protracted and costly litigation where a local government, in response to the notice letter, has committed to remedy the disenfranchisement that has been brought to its attention. *See* Election Law § 17-206(7). The safe harbor procedure must be construed in that light, as the canons of construction require.

B. The March resolution does not satisfy the three requirements of Election Law § 17-206(7)(b).

To avail itself of NYVRA's safe harbor, a political subdivision must pass a resolution affirming three things: "(i) the political subdivision's intention to enact and implement a remedy for a potential violation of this title; (ii) specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy; and (iii) a schedule for enacting and implementing such a remedy." Election Law § 17-206(7)(b). A

NYVRA safe harbor resolution must, therefore, be a commitment "to enact and implement a remedy." It is not sufficient, contrary to appellants' claim here, for a municipality to commit only to *investigate* whether a violation has occurred. That is not sufficient to satisfy the statutory requirement.

1. The resolution does not declare the Town's intention to enact and implement a remedy.

Local government resolutions must be construed in accordance with their plain meaning. *See Town of Massena*, 45 N.Y.2d at 490. Here, the March resolution provides that the Town will ***investigate*** respondents' allegations and ***might*** implement a remedy after conducting an "investigation" of its at-large method of election. R.85. The plain text of the March resolution demonstrates that the Town has not declared its "intention ***to enact and implement a remedy*** for a potential violation of [NYVRA]," which is what NYVRA requires to invoke the safe harbor provision. Election Law § 17-206(7)(b) (emphasis added). The March resolution does not specify what the investigation would entail and does not even identify the purported "authorized experts" who would carry out that investigation. R.85. In relevant part, the March resolution states:

> ***If,*** after considering the findings and evaluation and any other information that may become available to the Town—including,

> without limitation, any analysis that Abrams Fensterman may provide following the adoption of this Resolution, ***the Town Board concludes that there may be a violation of the NYVRA***, the Town Board affirms that the Town intends to enact and implement the appropriate remedy(ies).

R.85-86 (emphasis added).

This language is not a commitment to remedy a NYVRA violation. It is, at most, a conditional statement of the Town Board's intention to implement some remedy if the Town Board first finds that there may be a violation of NYVRA. By retaining unfettered discretion to determine whether a violation of NYVRA may exist and, consequently, whether the Town will do anything about it, the Town Board has carefully avoided making the actual time-sensitive commitment to remedy the faulty election system that NYVRA requires to trigger the safe harbor period. If the resolution were a contract, it would be unenforceable because the promise it purports to contain is illusory. *See Chiapparelli v. Baker, Kellog & Co.*, 252 N.Y. 192, 200 (1929) ("Where a promisor retains an unlimited right to decide later the nature or extent of his performance, the promise is too indefinite for legal enforcement. The unlimited choice in effect destroys the promise and makes it merely illusory"), citing Williston on Contracts, § 43; *cf. Matter of Brown & Guenther v. North Queensview Homes, Inc.*, 18 A.D.2d 327, 330 (1st Dep't 1963)

("A promise that is too uncertain in terms for possible enforcement is an illusory promise") (internal quotation marks omitted).

The Supreme Court correctly appreciated that NYVRA requires more than the empty promise the Town Board made in the March resolution. Because the Town's commitment to enact and implement a remedy is made wholly contingent on the Town Board first finding that a violation of NYVRA may exist, it is, in essence, a disguised delay tactic. In other words, the Town has not actually made any commitment at all and is not entitled to the safe harbor period that NYVRA provides to those who seek to comply.

a. Appellants' reading of Election Law § 17-206(7)(b) is not consistent with its text.

Throughout their brief, appellants argue that their commitment to investigate is all that is required of a political subdivision to avail itself of the statutory safe harbor period. *See* App. Brf. at 14-28. They claim that the Supreme Court's reading of Election Law § 17-206(7)(b) reads the word "potential" out of the statute. *See id.* at 20. They are incorrect.

Election Law § 17-206(7)(b)(i) requires that, in order to avail itself of NYVRA's safe harbor, a political subdivision must pass a resolution affirming "the political subdivision's intention to enact and implement a

remedy for a potential violation of this title." Under appellants' theory, the statute's language allows a municipality to make use of the statutory safe harbor if a NYVRA resolution provides for a "potential" remedy rather than a firm commitment to "enact and implement" a remedy. *See* App. Brf. at 20-22. But that reading ignores the fact that the word "potential" precedes and describes the word "violation" rather than the word "remedy" in the statute. *See* Election Law § 17-206(7)(b)(i). It is a well-established principle of statutory construction that words and phrases in a statute are modified "by the specific words which precede it; in the vernacular, it is known by the company it keeps." *People v. Illardo*, 48 N.Y.2d 408, 416 (1979). Accordingly, the word "potential" in this provision must be referring to a potential ***violation*** of NYVRA, not a potential ***remedy*** for a NYVRA violation.

As the Supreme Court determined, respondents' reading is far more consistent with the statute than the reading urged by appellants. The entire goal of the statutory scheme's short time periods and strict schedule for compliance is to immediately implement remedies to voting rights violations so that they are not repeated in future election cycles. By allowing a political subdivision to avail itself of the statutory safe harbor period through a firm commitment to enact an actual remedy for a potential

violation, the safe harbor provision furthers NYVRA's overarching purpose of encouraging voter participation "to the maximum extent" and ensuring that minority voters "have an equal opportunity to participate in the political processes of the state." Election Law § 17-200. Under this construction, municipalities are encouraged to modify their outdated electoral systems voluntarily to achieve that purpose. And by providing that a political subdivision needs only to find that there may be a ***potential*** violation in its NYVRA resolution, the statute allows the political subdivision to remedy the disenfranchisement without admitting that the existing method of election is unlawful.

By contrast, appellants' interpretation allows a political subdivision to stall a lawsuit by committing to remedy the potential violation only if it first finds that there is a violation. This cannot be reconciled with the plain language of the statute, which allows the political subdivision the benefit of the safe harbor provision only by affirming its "intention to enact and implement a remedy." Election Law § 17-206(7)(b)(i). This would also permit political subdivisions to delay NYVRA suits with empty promises to investigate, in direct conflict with NYVRA's mandate that proceedings be subject to expedited judicial review. *See* Election Law § 17-216. Indeed, that

precise lack of commitment has allowed NYVRA cases to languish in other municipalities that have received NYVRA notices. For example, as the Attorney General noted below, the Town of Mount Pleasant passed a similar resolution to Newburgh's, but then allowed the safe harbor period to lapse without implementing any remedies. R.190-191. This delayed the Mount Pleasant plaintiffs in their pursuit of a remedy, and that litigation continues to this day. R.191; *see also Serratto v. Town of Mount Pleasant*, Westchester County Index No. 55442/2024.[4] An interpretation of the statute that allows for such tactics cannot be correct, especially because NYVRA, when providing for expedited proceedings, specifically recognizes the risk that incumbent officials who benefit from unlawful conditions will expend public funds defending those conditions and delaying remedies. *See* Election Law § 17-216.

b. Appellants' reading of Election Law § 17-206(7)(b) ignores NYVRA's statutory scheme.

Moreover, as the Attorney General explained in their *amicus* brief before the Supreme Court, appellants' interpretation would effectively

[4] This Court may generally take judicial notice of matters of public record. *See Headley v. New York City Transit Auth.*, 100 A.D.3d 700, 701 (2d Dep't 2012).

eliminate the distinction between the 50-day mandatory waiting period set forth in Election Law § 17-206(7)(a) and the 90-day safe harbor period found in Election Law § 17-206(7)(b). R.185-188. By setting forth two discrete waiting periods, the Legislature clearly intended for each to have distinct purposes. The mandatory 50-day period is designed "to allow a political subdivision to investigate the allegations, assess whether there is a potential violation, and if so, determine whether to voluntarily remedy the potential violation or face litigation." R.185. On the other hand, the 90-day safe harbor provision "gives a political subdivision that has confirmed a potential violation time to implement a remedy without fear of litigation." R.185. To receive the benefit of an additional 90-day immunity from being sued, a political subdivision must, therefore, satisfy the three requirements of Election Law § 17-206(7)(b). This requires an affirmation of the political subdivision's "intention to enact and implement a remedy." Election Law § 17-206(7)(b).

Ignoring that distinction, the March resolution treats the 90-day safe harbor as merely an extension of the 50-day waiting period by committing the Town only to undertake an investigation. R.85. But the safe harbor period was not intended to supply additional time to conduct a preliminary

investigation. NYVRA does not authorize a political subdivision to extend its immunity from a lawsuit merely by committing to "investigate." Because the word "investigate" is excluded from NYVRA's safe harbor provision, *see* Election Law § 17-206(7)(b), this Court must assume that the legislature intended to exclude it. *See Commonwealth of the N. Mariana Is. v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55, 60 (2013) ("failure of the legislature to include a term in a statute is a significant indication that its exclusion was intended").

Therefore, preliminary investigation into the merits of allegations raised in a notification letter must be carried out during the initial 50 days a municipality has to avail itself of the safe harbor. Otherwise, NYVRA's distinction between the initial 50-day waiting period and the 90-day safe harbor period would be meaningless, as every municipality could simply pass a noncommittal resolution in response to every NYVRA notification letter. Again, as discussed by the Attorney General below, the Town of Mount Pleasant already embarked on that noncommittal path and stalled a NYVRA lawsuit only to later resist any remedial efforts. R.190-191. The only reading of NYVRA's safe harbor provision that is consistent with the statute's clear legislative purpose is one that requires a firm commitment

from the municipality to enact a remedy within 50 days after the receipt of a notification letter.

c. Contrary to appellants' contentions, respondents' reading of Election Law § 17-206(7)(b) does not lead to absurd results.

Ultimately, appellants rest on the argument that the Supreme Court's interpretation of Election Law § 17-206(7)(b) would lead to "unreasonable results." App. Brf. at 22. Of course, appellants are correct that this Court must presume that the Legislature did not intend this statute to produce unreasonable or unjust results. *See Cluett, Peabody & Co. v. J.W. Mays, Inc.*, 5 A.D.2d 140, 149 (2d Dep't 1958), *aff'd* 6 N.Y.2d 952 (1959). But it is not the Supreme Court's interpretation that would lead to unreasonable or absurd results, it is appellants' interpretation. It would be clearly inconsistent with the intent of NYVRA and its specific requirement that proceedings be expedited to allow incumbent officials to stall voting rights litigation by three months with a hollow resolution. *See* Election Law § 17-216. By requiring expedited proceedings, the Legislature specifically acknowledged the risk posed by incumbent officials who are incentivized to keep the existing electoral system in place for as long as possible.

Appellants' claims that the Supreme Court's interpretation imposes an

"irrational burden" on municipalities, App. Brf. at 3, fundamentally mischaracterizes NYVRA's notification and safe harbor procedure. NYVRA already treats political subdivisions more favorably than almost all litigants by requiring a plaintiff to send a notification letter and wait 50 days before commencing a lawsuit. *See* Election Law § 17-206(7)(a). The safe harbor provides an additional benefit to a political subdivision that truly intends to improve its flawed electoral system by granting an additional 90-day period to enact the remedy. *See* Election Law § 17-206(7)(b). But to receive that benefit, a political subdivision must first commit that it will take action. The Town did not.

To be clear, the notification and safe harbor provisions do not force political subdivisions to do anything. *See* App. Brf. at 3. If a municipality is convinced that its method of election is lawful, it need not take any action whatsoever in response to a notification letter. A notification letter that truly provides no factual support for its allegations, as appellants seem to fear, *see* App. Brf. at 22-23, can simply be ignored. But that clearly is not the case in municipalities like Newburgh, where it does not appear that a person of color has ever held elected office. R.53, 63. Respondents informed the Town Board of this stark reality in their notification letter. R.79-80.

Nor is it unrealistic for a political subdivision to commit to implementing a remedy within 50 days after receiving a notification letter. Appellants' claim is that it is too short a time to "obtain counsel and other experts, analyze the factual and legal validity of the alleged NYVRA violation(s), decide whether the allegations are legally correct (that is, whether there is actually a NYVRA violation), determine whether the political subdivision plans to remedy the alleged violation(s), evaluate the potential remedies, choose a remedy, and adopt a NYVRA resolution." App. Brf. at 22. But political subdivisions have been on notice of the requirements of NYVRA since its enactment in June 2022. R.125. They presumably have attorneys and experts they can rely on to do any analysis required. Moreover, many of these steps simply require Town officials to cast a vote, like many acts they take as elected officials. And, as discussed previously, *supra* p. 34-35, a political subdivision does not need to first determine definitively that it is violating NYVRA before committing to modify its electoral system. A remedy set forth in a NYVRA resolution also does not need to be set in stone, considering a political subdivision can modify its proposal in response to public comments. *See* Election Law § 17-206(6)(b).

Despite the Town's argument that 50 days is simply not enough time

to do what is required under the Supreme Court's interpretation, under its own March resolution, the Town would have been required to do all those same things and, in addition, implement a remedy, within 90 days. R.84-86. By the Town's own logic, that would not be possible, especially considering that implementing a districting plan requires at least four public hearings, a process that NYVRA contemplates may take as long as 75 days. *See* Election Law § 17-206(6)(a)-(b). If, according to the Town, 50 days is an unreasonable time in which to investigate NYVRA allegations and commit to taking remedial measures, the Town cannot possibly claim that it would have been able to do those things and then also enact and implement a remedy during the 90-day safe harbor period.

At bottom, the Supreme Court's determination that NYVRA requires a commitment by the Town to enact and implement a remedy was clearly correct. Because the March resolution did not do so, the Town did not properly avail itself of the statutory safe harbor protection.

2. The resolution does not identify "specific steps" that the Town intended to take to implement a remedy.

For substantially the same reasons, the March resolution does not identify "specific steps the subdivision will undertake to facilitate approval

and implementation of . . . a remedy." Election Law § 17-206(7)(b)(ii). Appellants cannot claim that they have identified specific steps toward "facilitat[ing] approval and implementation of . . . a remedy" when they did not commit to implementing a particular remedy at all. And because the Town had not even engaged in any analysis of its at-large system prior to passing the March resolution, it did not even suggest what remedies might be considered or identify what experts would have assisted in developing a remedial plan. R.84-86. Nearly everything the Town Board identified in the March resolution was simply a step toward implementing an investigation, not toward implementing any remedy.

The only items identified in the March resolution that could be considered specific steps towards implementing remedies are the public hearings or the Town's pledge to send an approved NYVRA proposal to the Attorney General's civil rights bureau, which would occur only after the Town Board determined that the Town may be in violation of the law. R.86. But NYVRA already requires a political subdivision to do these things in various circumstances. Election Law §§ 17-206(6), (7)(c)(i), (ii). Essentially then, the March resolution provided only that the Town intended to follow the procedures set forth by the statute. Such empty platitudes are not the

"specific steps" that must be identified to comply with NYVRA's safe harbor provision.

3. The Town's purported schedule does not comply with NYVRA.

Finally, the "schedule" contained in the March resolution does not satisfy Election Law § 17-206(7)(b). Again, because the Town made no genuine commitment to implement a remedy, the Town had no obligation to act in accordance with any timeline specified in the resolution. But even if the Town had made such a commitment, the March resolution still would not comply with NYVRA. When a political subdivision properly utilizes NYVRA's safe harbor, it has 90 days from the date of the resolution to implement the remedy. *See* Election Law § 17-206(7)(b). The March resolution would not come close to allowing the Town to implement a remedy within that time. It provides, first, that the findings and evaluations of the Town's investigation into the NYVRA claim must be reported to the Town Board within 30 days. R.85-86. No time frame is then specified, however, for the Town Board to evaluate those findings, along with any other information, and reach a conclusion about whether there may be a violation of NYVRA. Then, if the Town Board determines that there may be such a violation, a NYVRA proposal would have to be submitted to the

Town Board within 10 days, R.86, and, within 30 days of receiving that proposal, the Town Board would hold at least two public hearings on the proposal. R.86.

Under this timeline, 70 days would be taken up to investigate the claims, prepare and submit a NYVRA proposal, and conduct public hearings. The "schedule" fails to account for any time necessary for the Town Board to consider the results of the investigation and determine whether there is a possible violation of NYVRA. It also does not leave any time or create any mechanism for the Town Board to modify a NYVRA proposal based on issues raised by voters during the public hearings. Deliberations on both the initial determination of whether there is a potential NYVRA violation and modifications to the NYVRA proposal after the public hearings would almost certainly require more than 20 days. If not, there would surely be no time for additional public hearings on a modified proposal.

Drawing districts, a potential remedy for NYVRA's violations arising from at-large election systems, would not just be unlikely under the Town's schedule, it would be impossible. When a political subdivision implements a new or revised districting plan as a remedy under NYVRA, four public

hearings are required, not two. *See* Election Law § 17-206(6). Before drawing a districting plan, "the political subdivision shall hold at least two public hearings over a period of no more than thirty days." *Id.* § 17-206(6)(a). A political subdivision must then publish at least one plan and "hold at least two additional hearings over a period of no more than forty-five days, at which the public shall be invited to provide input." *Id.* § 17-206(6)(b). A draft districting or redistricting plan "shall be published at least seven days before consideration at a hearing." *Id.* And, if the draft plan is revised following a hearing, the revised version must be published and made available for the public "at least seven days before being adopted." *Id.* The March resolution does not account for or allow any time to hold two meetings both before and after drawing a districting plan. Therefore, the Town never would have been able to implement a districting plan within 90 days if they first must conduct the investigation called for in the March resolution.

Ultimately, the inherently unreasonable timeline set forth in the Town's NYVRA safe harbor resolution only establishes the Town's intention not to remedy NYVRA violations that are the subject of this lawsuit. The conditional nature of the resolution, the absence of any specific remedial measures, and a schedule that makes it impossible to adopt any remedy

within the statutory time frame all evidence the Town's intent not to comply with NYVRA. This is not at all the scenario the Legislature contemplated when it enacted the safe harbor provision of NYVRA. The purpose of the safe harbor provision is to give a political subdivision time within which to remedy the violation. It was not intended merely as an additional delay. A 90-day safe harbor here would have served NYVRA's purpose if the Town had already conducted its investigation and committed to implementing a remedy. But it is simply not feasible both to investigate and implement a remedy in 90 days. The Town's "schedule" is, therefore, insufficient to invoke the safe harbor provisions of NYVRA.

Because the March resolution does not satisfy any of the three requirements of Election Law § 17-206(7)(b), the Supreme Court's order should be affirmed.

CONCLUSION

For all these reasons, the Supreme Court's order should be affirmed in all respects.

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New York Official Reports

252 N.Y. 192, 169 N.E. 274

FERNANDO G. CHIAPPARELLI, Respondent,
v.
BAKER, KELLOGG & COMPANY, INC., Appellant.

Court of Appeals of New York.
Argued October 21, 1929.

Decided November 19, 1929.

CITE TITLE AS: Chiapparelli v Baker, Kellogg & Co.

***192 Contract**

Commissions -- Insufficiency of conversation to make bargain, either absolute or conditional -- Action for commissions -- Plaintiff cannot recover where negotiations were tentative and he never bound himself to perform -- Delivery of documents no consideration for alleged unilateral contract where plaintiff testified they were delivered to defendant to form an opinion of a proposed loan

1. A conversation between the plaintiff and the president of the defendant does not indicate any intention presently to make a bargain either absolute or conditional, where, at its opening, the plaintiff announced that he would not be interested in talking to a foreign State with reference to a proposed loan unless he was sure defendant was seriously interested, whereupon the president asked him if he would assist in securing the loan and plaintiff stated he had all the necessary data with him and upon the president suggesting that a telegram might be sent to the Governor of the foreign State to see if plaintiff could negotiate the deal, asked as to his compensation if the business was arranged, and, upon being asked what he would want, stated a percentage of the face value of the loan; to which the president responded 'satisfactory,' whereupon plaintiff turned over to the president papers showing the resources of the foreign State, not of a personal or confidential nature, but such as might be easily procured elsewhere and which were of value only in enabling a banker to form an impression that he might or might not be interested in considering a loan.

2. Defendant having subsequently negotiated a loan to the foreign State, plaintiff cannot recover in an action for commissions, where it appears that, a few weeks after the conversation, he wrote defendant stating that he assumed it was not interested in the proposed loan and requesting the return of his papers, with which request defendant promptly complied, and where, upon cross-examination, plaintiff admitted that the defendant's president had told him it would inform him if it wished to go into the matter and that he had stated he would not agree to negotiate the loan until the defendant offered to take it. The negotiations were wholly tentative and plaintiff never bound himself, even conditionally, to negotiate with officers of the foreign State in reference to the proposed loan.

***193** 3. A contention that the delivery by plaintiff to the defendant's president of the documents, referred to in the conversation between them, was the consideration given by the former for the promise made by the latter, and that a unilateral contract was thereby formed, cannot be sustained where plaintiff, himself, testified they were delivered 'to the bank for an opinion of the loan.'

Chiapparelli v. Baker, Kellogg & Co., 226 App. Div. 866, reversed.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 12, 1929, affirming a judgment in favor of plaintiff entered upon a verdict.

Harold H. Corbin and *Edward J. Bennett* for appellant.

The minds of the parties never met upon any contract. There was, at best, only a conditional offer of the plaintiff's services in conducting negotiations which, owing to the failure of the conditions, never became an actual offer and which was, in any event, never accepted. (*Pomeroy v. Newell*, 117 App. Div. 800; *Heller v. Pope*, 250 N. Y. 132; *Arliss v. Brenon Film Corp.*, 230 N. Y. 390; *Petze v. Morse Dry Dock & Repair Co.*, 125 App. Div. 267; *Mandell v. Guardian Holding Co., Inc.*, 200 App. Div. 767; *Fowler v. Hoschke*, 53 App. Div. 327; *Meltzer v. Flying Fan, Inc.*, 224 App. Div. 41; *McVickar v. Roche*, 74 App. Div. 397.)

Samuel C. Steinhardt and *Walter S. Newhouse* for respondent.

KELLOGG, J.

The plaintiff, Fernando Chiapparelli, was a member of an Italian mission sent to the United States in the year 1915. He represented the Italian government in this country from the year 1915 to the year 1919 and was in charge of the financial department of the mission. His official duties brought him into contact with many important New York banking houses. ***194** In the year 1924 he was employed by the banking house of F. J. Lisman & Company to procure for them the financing of foreign loans. In the service of that company he was sent to Austria in 1924, where he spent the months of September and October. In Vienna he met a Dr. Rintelen, who was the Governor of Styria, one of the nine provinces of the Republic of Austria. Rintelen was interested in obtaining a loan of five million dollars for his province. On his suggestion, Chiapparelli visited Styria. At Graz, the capital of Styria, he procured written data concerning the resources of the province, and obtained from the provincial government options for Lisman & Company to make to Styria a loan of four million or five million dollars, and take over the bonds of the province at a stated figure. On Chiapparelli's return to New York, Lisman & Company determined not to take on the loan. Chiapparelli left their service and attempted to interest other banking houses in the loan to Styria. Mr. Owen, of Hornblower, Miller & Garrison, general counsel for the defendant herein, introduced Chiapparelli to two responsible New York houses, but they proved not to be interested in the matter. At this time the Styrian options had long since expired. Nevertheless, Chiapparelli retained confidence in his ability to reinstate himself with the government officers of Styria so that he might have the financing of the loan on favorable terms. He says: 'I could provide the business any time I could find a banking house *ready to do it*.' He told Mr. Owen that, although the Styrian option had expired, 'He felt that his relations with Governor Rintelen were such that he could get it restored if he had a banking house actually *prepared to take the contract*.' In July, 1925, Chiapparelli was introduced to Mr. Bromley, the vice-president of the banking house of Baker, Kellogg & Company, Inc., the defendant herein.

Baker, Kellogg & Company, Inc., had already become interested in Styrian loans. At this time they had ***195** under negotiation a loan of five million dollars to a Styrian hydro-electric company, known as 'Stewag,' to be guaranteed by the Styrian government. That the various provinces of the Republic of Austria were sadly in need of financing was commonly known to New York bankers. On June 15th a meeting of bankers, including a representative of the defendant, occurred, at which loans to the various Austrian provinces, including Styria, were discussed. It was recommended at the meeting that all loans to the separate provinces be held in abeyance, pending an arrangement whereby a joint loan to all the provinces might be negotiated. A representative of Baker, Kellogg & Company had already visited Styria where he had discussed with Governor Rintelen, not only the loan to Stewag, but to the province of Styria itself. On June 21, 1925, Bromley called upon Chiapparelli to see if he could be of assistance to the defendant in procuring, through his influence with Governor Rintelen, a governmental guaranty of the proposed Stewag loan. Chiapparelli told him that this would be impossible until a loan to the province of Styria itself had been arranged. Of this fact the defendant was already cognizant. Chiapparelli then attempted to interest Bromley in the provincial loan itself. Bromley said that the matter might prove interesting and asked Chiapparelli to bring his data to the office and talk with Mr. Luitweiler, the president of the defendant.

On the 25th day of June Chiapparelli and Luitweiler met in the latter's office. The opening words of their conversation are significant. Chiapparelli spoke to Luitweiler as follows: 'I would not be interested in telling to the Government of Styria about this provincial loan unless I was sure that his [Luitweiler's] house was seriously interested.' Luitweiller then spoke as follows: 'He asked me if I could assist him in securing this loan and support his desire for this loan with the Governor ***196** Rintelen.' Chiapparelli told Luitweiler that he had with him all the data, which he had collected for Lisman & Company, to start the foundation of the business and to find out whether the business would be possible or not. Luitweiler said that 'it would be interesting to send a telegram to the Governor Rintelen; that he would see if I could go there and negotiate for them the deal, if they would decide to do it.' Chiapparelli said: 'What would be my compensation if the business will be arranged?' Luitweiler said: 'How much would you want?' Chiapparelli replied that he would be satisfied if he had 'one per cent commission on the face value of the loan when it was completed.' To this Luitweiler answered, 'Satisfactory.' Chiapparelli said he would turn over all the papers, in reference to the loan, which he had gathered for Lisman & Company, and, taking them from his brief case, handed them to Luitweiler.

After the conversation had with Luitweiler, the defendant delayed for nearly a month to notify Chiapparelli whether it was or was not interested in the Styrian loan. Chiapparelli, growing impatient at the delay, on July 22d, 1925, wrote the defendant as follows: 'Gentlemen: I assume that you are not interested in the loans for the Province of Styria, which was the object of several conferences between your good selves and me the early part of June. As I am leaving for Europe next Saturday, kindly return to me the official papers and data

pertaining to the above mentioned loan, which were left in your office at the request of Mr. J. C. Luitweiler. To avoid delay, I will appreciate it if you will address the papers to me, and deliver same to Mr. Owen's office.' Complying with the request thus made, the defendant at once returned the papers to Chiapparelli which he had left with Luitweiler.

In January or February, 1926, the defendant negotiated a loan of five million dollars to the Province of Styria. The plaintiff claimed that he was entitled, under the ***197** terms of an agreement alleged to have been made with the defendant on June 25, 1925, to a commission of one per cent upon the amount loaned, or $50,000. A verdict in his favor for that amount, with $9,000 added for interest, was returned by a jury, and a judgment therefor, entered upon the verdict, has been affirmed by the Appellate Division.

A familiar rule of law has been expressed by Professor Williston in the following terms: 'Since an offer must be a promise a mere expression of intention or general willingness to do something on the happening of a particular event or in return for something to be received does not amount to an offer.' (Williston on Contracts, § 26.) It is, also, said by Professor Williston: 'Frequently negotiations for a contract are begun between parties by general expressions of willingness to enter into a bargain upon stated terms and yet the natural construction of the words and conduct of the parties is rather that they are inviting offers, or suggesting the terms of a possible future bargain than making positive offers.' (§ 27.)

We think that neither Chiapparelli nor Luitweiler, in the conversation of June 25, 1925, indicated by their words any intention presently to make a bargain either absolute or conditional. Chiapparelli opened the conversation by stating that he would not be interested in talking to the Governor of Styria about the loan unless he was sure that Baker, Kellogg & Company, Inc., represented by Luitweiler, 'was seriously interested.' Luitweiler said that 'he would see if' Chiapparelli 'could go there and negotiate for them the deal, if they would decide to do it.' On cross-examination Chiapparelli said of this conversation: 'I told Mr. Luitweiler that I had all the papers completed to give him the possibility of starting the loan, and decide to do it or not.' Again, when asked, 'As a matter of fact, Captain, you were told by Mr. Luitweiler, that if they considered ***198** the subject sufficiently interesting to go into it, that they would let you know,' he answered, 'Yes.' Luitweiler says of the conversation with Chiapparelli: 'I asked him at that time whether he desired to take up such matter again. He said: ' No, I do not, until such time as a banking house makes a firm offer for the business.' I should explain by that that the banking house says in advance: 'We will take this loan.' And he said: 'If you, Baker, Kellogg & Company, will say: 'Yes, we will take this loan,' then I will agree to negotiate it for you.' That Chiapparelli made these statements to Luitweiler is not denied by him. Neither are the statements inconsistent with the testimony of Chiapparelli in reference to the conversation. We think it entirely clear that the negotiations did not pass the invitation stage; that they were wholly tentative; that Chiapparelli never bound himself, even conditionally, to carry on negotiations for a loan with the officers of the Styrian government; that he reserved the right to make a decision until he could sense, from future expressions made by Baker, Kellogg & Company, Inc., how deep an interest in the proposed loan was taken by it; that Luitweiler never obligated his company to employ Chiapparelli either absolutely or conditionally; that the matter of the employment of Chiapparelli, as well as the assumption of the Styrian loan, was reserved by him for future consideration by his company.

If we assume, however, that Luitweiler, acting for the defendant, promised a commission to Chiapparelli, on condition that the defendant determined to take on the Styrian loan, even then we cannot perceive that the promise ever emerged from the offer stage to become and remain a binding obligation.

It is suggested that the delivery by Chiapparelli to Luitweiler of the documents, referred to in the conversation between them, was the consideration given by the former for the promise made by the latter, and that ***199** a unilateral contract was thereby formed. The papers delivered consisted of the options granted by the Province of Styria to Lisman & Company, which had expired; various documents containing statistics as to the natural resources of the province, all of which were procurable for the asking at the governmental offices of Styria; a copy of a resolution of the provincial government refusing to guarantee a loan to Stewag; a copy of a letter from Governor Rintelen inviting Chiapparelli to GRAZ to discuss the foreign loan; and a tourists' guide to Styria showing many picturesque scenes. No information of a personal or confidential nature was contained in the documents. Nothing was shown which might not have been, upon request, made known to the entire world. The documents had value, therefore, not for the purpose of effectuating a loan to Styria, but only for the purpose of enabling a banker, to whom they might be exhibited, promptly to form an impression that he might or might not become interested in giving consideration to the loan. Chiapparelli himself says this. He was asked: 'You feared that they might use them to close this loan themselves?' He answered, 'Oh, no.' Again, he was asked: 'You didn't?' He answered: 'No; these papers

would not answer to close the deal. Those papers were given to the bank for an opinion of the loan. They had gotten the opinion already.' In view of the nature of the papers and the purpose of their delivery to Luitweiler, as expressed by Chiapparelli himself, the suggestion made that their delivery to Luitweiler for the defendant constituted a consideration for the promise said to have been made, seems entirely vain, and may not be accepted.

We think it clear from the proof that, assuming a present promise was in fact made by the defendant, that promise was offered in exchange either for (1) services to be performed by Chiapparelli in negotiating the loan, or (2) for his contemporaneous promise to perform such services. Thus Chiapparelli stated, as we have noted, ***200** that Luitweiler asked him if he 'could assist him in securing this loan;' 'he would see if I could go there and negotiate for them the deal.' In answer to the question, 'And what is it that you say you were to do?' Chiapparelli said, 'Help them in negotiating this loan in Austria, if they were going to send me there, and get in touch immediately with the Governor of Styria in order to smooth over the difficulties, whatever they were, if there were any at that time.' Again, he said that the defendant was to 'use me as negotiator, if they were going ahead and close the deal.' Once more, he said that Luitweiler stated that he would 'Possibly send me there to negotiate for the firm.' Granted that the consideration for the alleged promise to be furnished by Chiapparelli was either the one or the other of the two alternatives stated, it is self-evident that the consideration, named in the first alternative, never gave rise to a binding promise on the part of the defendant. Chiapparelli, it is conceded, performed no services whatsoever in negotiating the Styrian loan for the defendant. Consequently, no act was done by him in exchange for the alleged promise, and, therefore, no unilateral contract ever arose. It remains to be considered whether a promise by Chiapparelli to perform the services, the second alternative mentioned, constituted a consideration which made binding the alleged promise of the defendant.

Where a promisor retains an unlimited right to decide later the nature or extent of his performance, the promise is too indefinite for legal enforcement. The unlimited choice in effect destroys the promise and makes it merely illusory. (Williston on Contracts, § 43.) 'If definite enough to be interpreted plainly, but giving the promisor an unlimited option, such a promise may be assented to by the parties but will not serve as consideration for a counter promise.' (Id.) We may pass the question whether the alleged promise of the defendant to pay for Chiapparelli's services, made on the express condition ***201** that the defendant might subsequently decide to take on the Styrian loan, involved an unlimited option to become bound to Chiapparelli, or not to become bound, as the promisor might choose, and, therefore, was illusory. Doubtless, if the promise was not withdrawn, and the event occurred, viz., the making of a determination favorable to the loan, the continuing offers of the parties might have ripened into enforcible obligations. However, it may be doubted whether, pending the decision to be made, Chiapparelli's promise to perform the services ever became a binding obligation. The only consideration therefor would have been the defendant's promise to employ Chiapparelli, in case the defendant chose to negotiate for the loan. This was an event, the happening of which was entirely at the defendant's command. In effect, the defendant had said to Chiapparelli, 'I will use your services, and make payments therefor if I choose to use and pay for them.' Assuming that such was the character of the defendant's promise, then the promise of Chiapparelli, being unsupported by a valuable consideration, was a mere offer revocable at will. In any event, it was clearly an implied term of the agreement, if one there was, that the defendant should render its decision within a reasonable time. If it was not so rendered, Chiapparelli was entitled to withdraw from the bargain made. Chiapparelli waited for thirty days. He then wrote the defendant, as we have noted, that he assumed that the defendant was not interested in the Styrian loan, and demanded that it return to him the documents which he had delivered to Luitweiler. The letter manifested an election on Chiapparelli's part to declare that, owing to the unreasonable delay of the defendant, he withdrew his offer to perform the services. The defendant acquiesced in the election and withdrawal by returning the papers to Chiapparelli as requested. Certainly, if Chiapparelli was no longer bound to the defendant by his promise, as we think must be clear, ***202** the defendant was no longer bound to Chiapparelli by its promise. Indeed, if ever there had been a contract, it had thus been abrogated by the acts of both the parties thereto.

For all these reasons we think that the plaintiff failed to establish a cause of action in contract against the defendant.

The judgments should be reversed and the complaint dismissed, with costs in all courts.

CARDOZO, Ch. J., POUND, CRANE, LEHMAN, O'BRIEN and HUBBS, JJ., concur.

Judgments reversed, etc.

169 N.E. 274

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New York Official Reports

5 A.D.2d 140, 170 N.Y.S.2d 255

Cluett, Peabody & Co., Inc., Appellant-Respondent,

v.

J. W. Mays, Inc., Respondent-Appellant.

Supreme Court, Appellate Division, Second Department, New York
January 6, 1958

CITE TITLE AS: Cluett, Peabody & Co. v J. W. Mays, Inc.

HEADNOTES

Trademarks, Trade Names and Unfair Competition
Violation of Fair-Trade Agreement

General Business Law (§ 369-b), declaring that willfully and knowingly advertising, offering for sale or selling commodity at less than ***141** prices in fair-trade agreement is unfair competition, is not violated where merchandise so sold was acquired without knowledge that it was subject to fair-trade agreement.

(1) Plaintiff entered into a fair-trade agreement with a New York City department store retailer, other than defendant, providing for minimum prices for the sale in New York State at retail of some of its varieties of men's shirts. More than two years after the execution of the fair-trade agreement, defendant purchased approximately 147 dozen of men's shirts manufactured by plaintiff, of the varieties covered by plaintiff's fair-trade agreement, and put them on sale and advertised them at prices less than the minimum price stipulated in plaintiff's agreement. The trial court found that, at the time of its purchase of the shirts, defendant did not know that they were subject to a fair-trade agreement. It had such knowledge when it sold them. Section 369-b of the General Business Law provides: "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section three hundred sixty-nine-a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby." The Referee improperly ruled that defendant could sell the shirts in question at any price if plaintiff refused to buy them back at the cost to defendant. If in fact the law is violated by the sale of fair-traded merchandise, with knowledge at the time of sale that it is so price-fixed, such a decision would frustrate the statutory purpose.

(2) The statute is not violated where defendant acquired the merchandise without knowledge that it was subject to a fair-trade agreement although it had such knowledge at the time the goods were offered for sale. Section 369-b does not prohibit the mere advertising, offering for sale or selling of a commodity at less than the price stipulated in a fair-trade agreement. It is the doing of these things knowingly and willfully which is declared to be unfair competition.

(3) It must be presumed that the Legislature intended no unjust or unreasonable result in the enactment of a statute. Moreover, the statute must be construed, if possible, not only to avoid the conclusion that it is unconstitutional, but also to avoid grave doubts that it may be so. To construe the statute other than to require knowledge at the time of purchase by persons not parties to the contract would cast doubt on the constitutionality of the statute.

(4) The shirts have been disposed of and the questions have become abstract. Nevertheless, the questions are important and are likely to arise with frequency and should be decided by the courts. Defendant's motion to dismiss the appeal is denied.

SUMMARY

Appeals from a judgment of the Supreme Court, entered May 9, 1957 in Kings County, upon a decision of a Special Referee (Meier Steinbrink, Spec. Ref.), enjoining defendant from advertising, offering for sale or selling at retail in New York State certain articles of clothing or wearing apparel manufactured by plaintiff at less than the price stipulated in plaintiff's fair-trade contract, with the exception that defendant may offer to sell to plaintiff the balance of stock on hand at the cost to it, and, in the event of plaintiff's failure to purchase said balance on hand, defendant could dispose thereof at any price obtainable without reference to the fair-trade agreement. ***142**

APPEARANCES OF COUNSEL

James A. Thomas, Jr., and *Stephen Rackow Kaye* for appellant-respondent.
Milton Kunen, Sidney A. Diamond and *Donald H. Balleisen* for respondent-appellant.

OPINION OF THE COURT

Nolan, P. J.

We are required on this appeal to determine whether or not the provisions of article XXIV-A of the General Business Law (Fair Trade Law) were properly invoked against respondent-appellant (hereinafter referred to as defendant) under the circumstances disclosed by the record before us and, if so, whether it was proper to grant a conditional injunction against defendant, restraining it from selling articles of merchandise at less than their fair-trade prices.

Cluett, Peabody & Co., Inc. (hereinafter referred to as plaintiff), sued defendant to enjoin discount sales and advertising in violation of a fair-trade contract covering men's shirts manufactured by plaintiff, and bearing its registered trade-mark. After trial, an injunction was granted enjoining defendant from selling such merchandise below the prices fixed therefor in plaintiff's fair-trade contract "except that as to the said shirts* * * defendant may offer to sell to plaintiff the balance of the stock now on hand at the cost to it* * * and in the event of the failure of plaintiff, within ten days from date hereof, to purchase said balance on hand, then defendant may dispose thereof at any price obtainable, without reference to the fair trade agreement." Plaintiff appeals from the quoted portion of the judgment; defendant appeals from the entire judgment. Defendant has also moved to dismiss plaintiff's appeal on the ground that it is academic.

There is little dispute as to the facts, with one exception, and they are succinctly stated in the Referee's decision. On January 28, 1955 plaintiff entered into a fair-trade agreement with a New York City department store retailer (other than defendant) providing for minimum prices for the sale in New York State at retail of some but not all of its varieties of men's shirts. Notice of the establishment of a fair-trade price-maintenance agreement was given by plaintiff to its many New York State customers and a general press release dated July 27, 1956 seems to have resulted in three short news items published about August 1, 1956 to the effect that plaintiff, starting August 1, would fair trade certain of its varieties of shirts.

Defendant owns and operates three large cash-and-carry department stores. On March 13, 1957 it purchased from an exporter, Colamerica Company, approximately 200 dozen men's shirts manufactured by plaintiff of which approximately 147 ***143** dozen were of the varieties covered by plaintiff's fair-trade agreement. The shirts were delivered to defendant on March 15. They were put on sale and prominently featured in defendant's advertisements on April 5 and 12, at prices considerably less than the minimum prices stipulated in plaintiff's agreement. When the matter was brought to plaintiff's attention, it promptly notified defendant by registered mail that certain of its shirts were subject to a fair-trade contract with minimum resale prices specified. Defendant continued to advertise and sell the shirts, including those price-fixed, at prices below the specified minimums, and this action followed.

The disputed issue of fact, above referred to, was whether or not, at the *time of its purchase* of the shirts, defendant knew that they were subject to a fair-trade agreement. Defendant asserted that it had no such knowledge, its president, Shulman, and its men's wear buyer, Baruchin, who negotiated the purchase, testifying to that effect. Plaintiff offered no proof of direct knowledge on the part of defendant, but claims that defendant must have known of the fair-trade agreement. That contention may be disposed of summarily. The trial court found to the contrary and that finding is supported by the evidence. For the purposes of this appeal, it must be held that defendant had no knowledge, actual or constructive, of the fairtrade agreement at the time it purchased the shirts in question in March, 1957. Concededly, it had such knowledge when it sold them.

It is plaintiff's contention that it met every requirement of the statute for full and effective injunctive relief, and that the conditions and limitations imposed by the Referee, respecting the return of the merchandise or its sale below the fair-trade price, were erroneous and effected a complete frustration of the statutory purpose. Defendant contends that no injunctive relief whatever was warranted, and that in any event plaintiff's appeal should be dismissed as academic since the goods which are the subject of plaintiff's appeal have been disposed of.

Defendant states without contradiction that the shirts were tendered to plaintiff as required by the judgment, that the tender was refused, and that the shirts were then sold at reduced prices to expedite their removal from stock. At

present, defendant has none of such shirts in stock and sells none.

It is of course the general rule that the court will not decide questions which have become abstract because of a change in circumstances affecting the case after the decision below. (*Matter of Adirondack League Club v. Black Riv. Regulating Dist.*, 301 N. Y. 219, 222.) However, an exception is made where ***144** questions of importance are presented, which are likely to arise with frequency. (*Matter of Lyon Co. v. Morris*, 261 N. Y. 497, 499; *Matter of Glenram Wine & Liquor Corp. v. O'Connell*, 295 N. Y. 336, 340; *Matter of Rosenbluth v. Finkelstein*, 300 N. Y. 402, 404.) In our opinion, this is such a case. The primary question presented is whether or not the Fair Trade Law may be successfully invoked against one who has established that he purchased merchandise in ignorance of the fact that it was subject to resale price restrictions under a fair-trade agreement to which he was not a party. Plaintiff urges that lack of knowledge at the time of purchase is immaterial if there was such knowledge at the time of offering for sale, while defendant contends that lack of knowledge at the time of purchase is a complete defense. There is also presented, if the Fair Trade Law may be enforced against such a purchaser, the question whether the goods may be sold at any price if the manufacturer who seeks to enforce his statutory rights refuses to buy them back. Neither question appears to have been decided by any appellate court in this State, although the former was presented in *Oneida v. Macher Watch Co.* (254 App. Div. 859). Under the circumstances, we believe that we should deny defendant's motion to dismiss the appeal (see *Cluett, Peabody & Co. v. J. W. Mays, Inc.*, 5 A D 2d 770, decided herewith) and should pass upon the merits.

The determination of the appeals by both parties depends upon whether plaintiff established a cause of action under section 369-b of the General Business Law, which provides: "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section three hundred sixty-nine-a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby." If such a right of action was established there is no authority for the learned Referee's ruling that defendant could sell the shirts in question at any price, if plaintiff refused their return. As plaintiff argues, and defendant apparently concedes, the "closing-out " exception contained in the statute (General Business Law, §369-a, subd. 2, par. [a]), is inapplicable (cf. *Remington Arms v. Harris Berger, Inc.*, 208 Misc. 561), although defendant asserts that the determination was proper, to achieve substantial justice between the parties. We do not agree that justice requires such a result. If in fact the law is violated by the sale of fair-traded merchandise, with knowledge at the time of sale that it is so price-fixed, regardless ***145** of whether there was such knowledge at the time of acquisition, the decision under review frustrates the statutory purpose. It would permit any retailer, under similar circumstances, to sell below the minimum fair-trade price, if the manufacturer refused to repurchase the goods at the retailer's cost. In effect, the manufacturer could only maintain its prices by repurchasing from a retailer the goods which were to be sold in violation of the fair-trade contract. The statute contemplates no such obligation on the part of the manufacturer, and in our opinion there is no warrant for imposing such a duty upon it. (Cf. *Bridgeport Brass Co. v. Modell's Sporting Goods Co.*, 8 Misc 2d 714.)

If knowledge at the time of sale, as distinguished from knowledge at the time of acquisition, is sufficient to show that there was a knowing and willful violation of the statute, plaintiff should be entitled to full and unconditional relief. We are therefore of the opinion that the determinative question in the case is whether a violation of the statute is shown where the defendant acquired merchandise without knowledge that it was subject to a fair-trade agreement, although such knowledge was present at the time the goods were offered for sale. In our opinion that question should be answered in the negative.

It has been stated that "Plaintiff's cause of action depends upon defendant's knowledge of the existence of the resale price maintenance system and of the price stipulated by the trademark owner. By the almost unanimous interpretation of the Fair Trade Acts in state and federal courts, the defendant must have had this knowledge *at the time he acquired the goods*" (1 Callmann on Unfair Competition and Trade-Marks [2d ed.], p. 489). (Emphasis supplied.) And it has been held, with respect to identical provisions of our original Fair Trade Law (L. 1935, ch. 976), that "The entire theory of the statute is that it applies only to merchandise acquired after knowledge. Were it otherwise, the statute would permit price fixing by fiat, and it is due to the fact that this is not the tenor of the statute that it is constitutional." (*Seagram-Distillers Corp. v. Seyopp Corp.*, 8 Misc 2d 778.) Similar views have been expressed by our own courts, and those of other jurisdictions. (See *Oneida v. Macher Watch Co.*, N. Y. L. J., April 8, 1938, p. 1706, col. 3, affd. 254 App. Div. 859, supra.; *Frankfort*

Distilleries v. Stockman, N. Y. L. J., March 29, 1941, p. 1411, col. 5; *Shryock v. Association of United Fraternal Buyers*, 135 Pa. Superior Ct. 428; *Lionel Corp. v. Grayson-Robinson Stores*, 15 N. J. 191; *James Heddon's Sons v. Callender*, 29 F. Supp. 579.) A contrary view has been expressed in Wisconsin (see *Calvert's Distillers* ***146** *Corp. v. Goldman*, 255 Wis. 69). We are in accord with the views expressed in our own State in the cases heretofore cited.

Section 369-a of the General Business Law declares that a contract shall be legal, which provides that a buyer of a commodity bearing the label, trade-mark, brand or name of the owner or producer, may not resell it except at the price stipulated by the vendor. To this extent section 369-a has made no change in the common law, as declared in this State in respect of commodities in intrastate commerce. No statute was required to effect that result. (*Port Chester Wine & Liq. Shop v. Miller Bros.*, 253 App. Div. 188; *Marsich v. Eastman Kodak Co.*, 244 App. Div. 295, affd. 269 N. Y. 621; *Bourjois Sales Corp. v. Dorfman*, 273 N. Y. 167, 170-171.) Section 369-b, however, goes much further. It creates a new cause of action by which the restrictive provisions of such contracts may be enforced against those who are not parties to the fair-trade agreements. We believe that the provisions of this section should be strictly construed, but, of course, they must receive a construction consistent with their purpose to protect the good will of the owner or producer from injury when his trade-mark or name is employed in the sale of goods. There are, however, limits beyond which the Legislature may not go to effect that purpose. However important the object of the statute may appear to be, it is subject nevertheless to constitutional requirements.

Section 369-b does not prohibit the mere advertising, offering for sale or selling of a commodity at less than the price stipulated in a fair-trade agreement. It is the doing of these things knowingly and willfully which is declared to be unfair competition. We do not believe that this language is so clear that it allows no room for construction, or that it may receive the liberal interpretation contended for by plaintiff. It is not necessary for the purposes of this appeal to discuss the standard which has often been employed in testing the constitutional validity of price-fixing legislation, i.e., that in the absence of an emergency such validity is dependent on whether or not the particular business involved is "affected with a public interest" (cf. *Olsen v. Nebraska*, 313 U.S. 236; *Darweger v. Staats*, 267 N. Y. 290, 308; *Doubleday, Doran & Co. v. Macy & Co.*, 269 N. Y. 272, 281). We accept, for our purposes, the rule stated in *Nebbia v. New York* (291 U.S. 502, 537) that, so far as due process is concerned and in the absence of other constitutional restriction, the Legislature is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted ***147** to its purpose. It may be conceded also that the protection of the good will of the producer of identified goods, created or enlarged by trade-marks, labels or brands, from injury through unfair competition is a legitimate legislative purpose and that price restriction, adopted as an appropriate means to that end and not as an end in itself, is constitutionally permissible. (Cf. *Old Dearborn Distr. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183.) We are not concerned with the wisdom of the policy, or the adequacy or appropriateness of the law enacted to forward it (*Nebbia v. New York*, supra.; *Olsen v. Nebraska*, supra.). The legislative power is, nevertheless, not unlimited. Due process is satisfied only if the law passed has a reasonable relation to a proper legislative purpose and is neither arbitrary nor discriminatory (*Nebbia v. New York*, supra.; *Defiance Milk Prods. Co. v. Du Mond*, 309 N. Y. 537, 541). Although legislative price-fixing powers are constitutionally limited, there is in this State no such limitation upon the fixing of resale prices, under legislative leave, by contract between the parties. It does not follow, however, that price restrictions contained in such a contract may be enforced by legislative fiat against one who not only never gave his assent thereto, but who purchased identified goods in complete ignorance of such restrictions. The question presented here is quite different from that which was decided by the United States Supreme Court in *Old Dearborn Distr. Co. v. Seagram-Distillers Corp.* (supra.), in which the constitutionality of an Illinois Fair Trade Act similar to our own statute was sustained, and in which it was said (pp. 193-194):

"It is first to be observed that § 2 reaches not the *mere* advertising, offering for sale or selling at less than the stipulated price, but the doing of any of these things *wilfully* and *knowingly*. We are not called upon to determine the case of one who has made his purchase in ignorance of the contractual restriction upon the selling price, but of a purchaser who has had definite information respecting such contractual restriction and who, with such knowledge, nevertheless proceeds wilfully to resell in disregard of it.

"Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were

not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent ***148** liability under § 2 of the law by which such acquisition was conditioned.

"Here, the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it." (Emphasis in original.)

No principle of fair dealing requires a similar determination in the instant case. As against a retailer who has accepted goods with a notice of minimum resale prices and with actual or presumptive knowledge of the law which authorized the restriction, it may well be argued that he has entered into at least an implied contract to maintain the prices stipulated, or in any event, that he is in no position to complain that a price-fixing statute is unreasonable or arbitrary insofar as it enforces against him only those restrictions on resales to which he has voluntarily subjected himself. When it is sought however to enforce such contractual restrictions against those who are not parties to the contract and who have not assented to the scheme or subjected themselves thereto by acquisition of commodities with notice of restriction on their resale, the situation is entirely different, and the reasons which justify legislative compulsion against those who acquire identified commodities with notice have no application. The latter case does not involve the enforcement against a purchaser of property of a definite obligation assumed as a condition of his purchase. Moreover, the restrictions sought to be enforced without his assent would be formulated, not by the Legislature, but by private persons, not bound by any official duty and uncontrolled by any standard or rule prescribed by legislative action. The constitutional validity of a law is to be tested, not by what has been done under it, but by what may, by its authority, be done (*Stuart v. Palmer*, 74 N. Y. 183, 188; *People ex rel. Beck v. Graves*, 280 N. Y. 405, 410). It seems obvious that price restrictions imposed under authority so delegated may be so arbitrary as to have no reasonable relation to the legislative purpose, and that their enforcement by law would be repugnant to the due process clauses of the Federal Constitution (U. S. Const., 14th Amdt., § 1) and those of our own Constitution (N. Y. Const., art. I, §6) which guarantee due process and which vest the legislative power of the State in the Senate and the Assembly (N. Y. Const., art. III, §1; *Darweger v. Staats*, 267 N. Y. 290, supra.; cf. *Matter of Concordia Collegiate Inst. v. Miller*, 301 N. Y. 189; *Eubank v. City of Richmond*, 226 U.S. 137; *Carter v. Carter Coal Co.*, 298 U.S. 238, 311). ***149**

We do not read this statute as attempting to go that far. We do not ascribe to the Legislature an intention to delegate its functions, to deny due process, or to impose an unreasonable or unjust burden on those who purchase identified commodities in good faith, without notice of resale restrictions, and who might have exercised a choice not to buy, if placed on notice thereof.

It is always presumed in regard to a statute that no unjust or unreasonable result was intended by the Legislature and, if a particular application of a statute in accordance with its literal sense will produce or occasion injustice, another and more reasonable interpretation should be sought (*Matter of Meyer*, 209 N. Y. 386; *Matter of United Parcel Service v. Joseph*, 272 App. Div. 194). Consequences cannot alter statutes, but may help to fix their meaning (*Matter of Rouss*, 221 N. Y. 81, 91). Moreover, it is our duty to construe the statute, if possible, not only so as to avoid the conclusion that it is unconstitutional, but also so as to avoid grave doubts on that score (*People v. Barber*, 289 N. Y. 378, 385; *Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 267).

We conclude, under the circumstances here disclosed, that the advertising and sale of the shirts in question, without knowledge of the resale restrictions contained in plaintiff's fair-trade agreement, did not amount to unfair competition within the meaning of the statute, and that defendant established a complete defense to the cause of action asserted in the complaint.

We do not consider *Bourjois Sales Corp. v. Dorfman* (273 N. Y. 167, supra.) authority to the contrary. The appeal in that case involved the sufficiency of a complaint, which was stated to be "in no way different" from that before the Supreme Court in *Old Dearborn Distr. Co. v. Seagram-Distillers Corp.* (299 U.S. 183, supra.). A similar question was presented in *National Distillers Prods. Corp. v. Seyopp Corp.* (253 App. Div. 793) and on reargument in *Seagram-Distillers Corp. v. Seyopp Corp.* (8 Misc 2d 778, supra.). We find no conflict between the holding in the latter cases that complaints were sufficient, although they did not allege knowledge of fair-trade restrictions at the time of purchase of identified commodities, and our determination that lack of such knowledge may be established as a defense. Neither have we overlooked the conclusion reached in *Old Dearborn Distr. Co. v. Seagram-Distillers Corp.* (supra.) that a provision of the Illinois Fair Trade Act similar to section 369-b of our own statute did not involve, as against the appellants in

that case, an unlawful delegation of legislative power. That conclusion was based on the premise heretofore stated that the ***150** appellants had acquired identified commodities with knowledge of the restrictions imposed by fair-trade agreements, and that such restrictions already imposed with their knowledge ran with the acquisition and conditioned it. Moreover, it did not purport to decide any question of statutory validity under a State Constitution.

The judgment should be reversed on the law, with costs, and the complaint should be dismissed, with costs. The findings of fact should be affirmed.

Murphy, J.

(Dissenting).

All that is required under section 369-b of the General Business Law to justify an injunction is that defendant did willfully and knowingly (1) advertise, (2) offer for sale, or (3) sell, any commodity at less than the price stipulated in any contract entered into pursuant to section 369-a. It is undisputed that defendant knew that the commodity was price-fixed at the time that defendant sold it. Defendant is, therefore, subject to restraint under the second and third clauses of the statute. There is nothing in the statute which justifies withholding the remedy because the defendant did not know that the commodity had been fair-traded as of the time the defendant acquired it.

In *Seagram-Distillers Corp. v. Seyopp Corp.* (8 Misc 2d 778) Mr. Justice Steuer in 1938 at the New York County Special Term cited *Old Dearborn Distr. Co. v. Seagram-Distillers Corp.* (299 U.S. 183) as authority that a "Plaintiff acquires rights only where merchandise is sold which has been acquired after notice." That question was expressly left open in the *Old Dearborn* case (supra., p. 193). Subsequently, Mr. Justice Steuer granted reargument and on reargument *granted* a temporary injunction. On the basis of the dubious authority of the *Seagram-Distillers* case (supra.) it has been held that an injunction was warranted only where the purchaser had knowledge at the time of acquisition (*James Heddon's Sons v. Callender*, 29 F. Supp. 579; *Frankfort Distilleries v. Stockman*, N. Y. L. J., March 29, 1941, p. 1411, col. 5, Hooley, J., at the Kings County Special Term). It was also invoked in *Oneida v. Macher Watch Co.* (N. Y. L. J., April 8, 1938, p. 1706, col. 3, affd. 254 App. Div. 859), but that affirmance may have been predicated on the ground that denial of a temporary injunction was discretionary. The same result was approved in a casual dictum in *Lionel Corp. v. Grayson-Robinson Stores* (15 N. J. 191).

The foregoing is all of the authority in support of the theory that an injunction will not lie where the merchandise was acquired without knowledge. *Shryock v. Association of United* ***151** *Fraternal Buyers* (135 Pa. Superior Ct. 428), cited by the majority, is inapplicable because there an injunction was denied where the defendant had no knowledge of the contract as of the time it sold the commodity.

To the contrary, it was pointed out in *Calvert Distillers Corp. v. Goldman* (255 Wis. 69) and in *Barron Motor v. May's Drug Stores* (227 Iowa 1344, 1346) that there was no provision in the pertinent fair trade act which rendered it inapplicable because the purchase had been made prior to receiving notice.

The soundness of the legislative omission to make knowledge at the time of acquisition a prerequisite for issuance of an injunction is illustrated by the facts under consideration. Plaintiff had entered into the fair-trade contract on January 28, 1955, had sent notices to each of its 400 customers in the metropolitan area and a press release to 17 newspapers and magazines in that area, as well as a notice to the trade generally. If, despite such notice, a defendant, as here, can successfully claim lack of knowledge that the commodity was price-fixed, then the efficacy of the statute is seriously curtailed.

The courts cannot read into a plainly worded statute a provision which would be helpful in establishing constitutionality. That would be judicial legislation (*Meltzer v. Koenigsberg*, 302 N. Y. 523; *People ex rel. Doctors Hosp. v. Sexton*, 267 App. Div. 736, 740, affd. 295 N. Y. 553).

The judgment should be modified by striking from the decretal paragraph thereof everything beginning with the word "except" and ending with the word "agreement", and as so modified the judgment should be affirmed.

Wenzel and Beldock, JJ., concur with Nolan, P. J.; Murphy, J., dissents and votes to modify the judgment by striking from the decretal paragraph thereof everything beginning with the word "except" and ending with the word "agreement", and to affirm the judgment as so modified, in opinion. Kleinfeld, J., not voting.

Judgment reversed on the law, with costs, and complaint dismissed, with costs. The findings of fact are affirmed.

170 N.Y.S.2d 255

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21 N.Y.3d 55, 990 N.E.2d 114, 967
N.Y.S.2d 876, 2013 N.Y. Slip Op. 03018

**1 Commonwealth of the
Northern Mariana Islands, Appellant
v
Canadian Imperial Bank of Commerce,
Respondent, William H. Millard, Defendant,
The Millard Foundation, Intervenor.

Court of Appeals of New York
Argued March 18, 2013

Decided April 30, 2013

CITE TITLE AS: Commonwealth
of the N. Mariana Is. v Canadian
Imperial Bank of Commerce

SUMMARY

Proceeding, pursuant to NY Constitution, article VI, § 3 (b) (9) and Rules of the Court of Appeals (22 NYCRR) § 500.27, to review a question certified to the New York State Court of Appeals by the United States Court of Appeals for the Second Circuit. The following questions were certified by the United States Court of Appeals and accepted by the New York State Court of Appeals: "1. May a court issue a turnover order pursuant to N.Y. C.P.L.R. § 5225(b) to an entity that does not have actual possession or custody of a debtor's assets, but whose subsidiary might have possession or custody of such assets? 2. If the answer to the above question is in the affirmative, what factual considerations should a court take into account in determining whether the issuance of such an order is permissible?"

HEADNOTES

Creditors' Suits
Turnover Order
Banking Entity Must Have Actual Possession or Custody of Assets Sought

(1) For a court to issue a postjudgment turnover order pursuant to CPLR 5225 (b) against a banking entity, that entity itself must have actual, not merely constructive, possession or custody of the assets sought. It is not enough that the banking entity's subsidiary might have possession or custody of a judgment debtor's assets. A special proceeding for a turnover order is the procedural mechanism devised by the legislature to enforce a judgment against an asset of a judgment debtor, held in the "possession or custody" of a third party (CPLR 5225 [b]). The plain language of section 5225 (b) refers only to "possession or custody," excluding any reference to "control," whereas the predecessor statute referred to "possession" and "control" and made no mention of custody. The exclusion of the word "control" signaled a purposeful legislative modification of the applicable scope of turnover statutes. When the legislature has sought to encompass the concept of "control" it has done so explicitly, evincing a legislative intent to exclude consideration of "control" from those sections from which it is omitted. Consequently, because "possession, custody or control" has been construed to encompass constructive possession, then, by contrast, legislative use of the phrase "possession or custody" contemplates actual possession.

Creditors' Suits
Turnover Order
Banking Entity Must Have Actual Possession or Custody of Assets Sought

(2) For a court to issue a postjudgment turnover order pursuant to CPLR 5225 (b) against a banking entity, that entity itself must have actual, not **56 merely constructive, possession or custody of the assets sought. *Koehler v Bank of Bermuda Ltd.* (12 NY3d 533 [2009]), which addressed whether, under CPLR article 52, a New York court could order a bank over which it had personal jurisdiction to deliver out-of-state stock certificates to a judgment creditor, does not require a different reading of CPLR 5225 (b). *Koehler* does not interpret the meaning of the phrase "possession or custody," and is only significant in holding that personal jurisdiction is the linchpin of authority under CPLR 5225 (b). It should not be so broadly construed as to require that a garnishee be compelled to direct another entity, which is not

subject to this state's personal jurisdiction, to deliver assets held in a foreign jurisdiction.

RESEARCH REFERENCES

Am Jur 2d, Executions and Enforcement of Judgments §§ 564, 584, 636, 637.

Carmody-Wait 2d, Enforcement of Judgments §§ 64:362–64:366, 64:368, 64:369, 64:371, 64:372.

McKinney's, CPLR 5225 (b).

NY Jur 2d, Creditors' Rights and Remedies §§ 425, 445; NY Jur 2d, Enforcement and Execution of Judgments §§ 100, 264–266, 270, 271.

Siegel, NY Prac §§ 510, 515.

ANNOTATION REFERENCE

See ALR Index under Attachment or Garnishment; Banks and Banking.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: turnover /2 order /s possession custody /s asset & bank

POINTS OF COUNSEL

Kobre & Kim LLP, New York City (*Michael S. Kim* and *Melanie L. Oxhorn* of counsel), for appellant.
I. CPLR 5225 (b)'s postjudgment enforcement remedy may be applied under circumstances where assets are held by a garnishee's subsidiary but the garnishee is determined to have the actual, practical ability to direct or control their disposition. (*Koehler v Bank of Bermuda Ltd.*, 12 NY3d 533; *Merkling v Ford Motor Co.*, 251 App Div 89; *United States v First Nat. City Bank*, 379 US 378; *Allied Mar., Inc. v Descatrade SA*, 620 F3d 70; *JW Oilfield Equip., LLC v Commerzbank, AG*, 764 F Supp 2d 587.) II. A court considering whether to issue a turnover order to a garnishee whose subsidiary has actual possession or custody of ***57** assets should determine whether the garnishee has the actual, practical ability to control the subsidiary's disposition of them. (*Bellomo v Pennsylvania Life Co.*, 488 F Supp 744; *Frummer v Hilton Hotels Intl.*, 19 NY2d 533; *In re Citric Acid Litig.*, 191 F3d 1090; *First Natl. City Bank of N.Y. v Internal Revenue Serv. of U.S. Treasury Dept.*, 271 F2d 616; *Koehler v Bank of Bermuda Ltd.*, 12 NY3d 533.)
Skadden, Arps, Slate, Meagher & Flom LLP, New York City (*Scott D. Musoff, Timothy G. Nelson* and *Gregory A. Litt* of counsel), for respondent.
I. A bank that holds no property or accounts of the relevant debtor should not be compelled to turn over money or assets deposited at its foreign subsidiary banks. (*Sundail Constr. Co. v Liberty Bank*, 277 NY 137; *In re Delaney*, 256 NY 315; *Greenberg, Trager & Herbst, LLP v HSBC Bank USA*, 17 NY3d 565; *Brigham v McCabe*, 20 NY2d 525; *Solicitor for Affairs of His Majesty's Treasury v Bankers Trust Co.*, 304 NY 282; *Cruz v TD Bank, N.A.*, 855 F Supp 2d 157; *Grain Traders, Inc. v Citibank, N.A.*, 960 F Supp 784; *Bradford v Chase Natl. Bank of City of N.Y.*, 24 F Supp 28; *Middle E. Banking Co. v State St. Bank Intl.*, 821 F2d 897; *Geler v National Westminster Bank USA*, 770 F Supp 210.) II. The turnover statutes could validly be applied to corporate affiliates only if veil-piercing were established. (*Moreau v RPM, Inc.*, 20 AD3d 456; *Insurance Co. of N. Am. v EMCOR Group, Inc.*, 9 AD3d 319; *Frummer v Hilton Hotels Intl.*, 19 NY2d 533; *Bellomo v Pennsylvania Life Co.*, 488 F Supp 744; *Comprehensive Sports Planning v Pleasant Val. Country Club*, 73 Misc 2d 477; *IRB-Brasil Resseguros, S.A. v Inepar Invs., S.A.*, 20 NY3d 310; *Tri City Roofers v Northeastern Indus. Park*, 61 NY2d 779; *Western Union Telegraph Co. v Pennsylvania*, 368 US 71; *JPMorgan Chase Bank, N.A. v Motorola, Inc.*, 47 AD3d 293; *Harris v Balk*, 198 US 215.)

OPINION OF THE COURT

Rivera, J.

Two questions certified to us by the United States Court of Appeals for the Second Circuit raise issues as to whether a judgment creditor can obtain a CPLR article 52 turnover order against a bank to garnish assets held by the bank's foreign subsidiary. We hold that for a court to issue a postjudgment turnover order pursuant to CPLR 5225 (b) against a banking entity, that entity itself must have actual, not merely constructive, possession or custody of the assets sought. That is, it is not enough ***58** that the banking entity's ****2** subsidiary might have possession or custody of a judgment debtor's assets.

In 1994, plaintiff, the Commonwealth of the Northern Mariana Islands (the Commonwealth), obtained two separate tax judgments in the United States District Court for the Northern Mariana Islands against William and Patricia Millard (the Millards) for unpaid taxes in the respective

amounts of $18,317,980.80 and $18,318,113.41. The Millards, who had previously resided in the Commonwealth since 1987, relocated before the Commonwealth was able to obtain the judgments.[1]

In March and April 2011, the Commonwealth registered the tax judgments in the United States District Court for the Southern District of New York[2] and commenced proceedings as a judgment creditor, pursuant to Federal Rules of Civil Procedure rule 69 (a) (1) and CPLR 5225 (b), seeking a turnover order against garnishees holding assets of the Millards. As relevant here, the Commonwealth named Canadian Imperial Bank of Commerce (CIBC), a Canadian bank headquartered in Toronto, with a branch in New York, as a garnishee under the theory that the Millards maintained accounts in subsidiaries of CIBC, namely, CIBC FirstCaribbean International Bank Limited (CFIB) or CFIB's affiliates in the Cayman Islands. According to the Commonwealth, CFIB is a 92% owned-and-controlled direct subsidiary of CIBC.

The Commonwealth moved, by order to show cause, for a turnover order against CIBC and a preliminary injunction, on the ground that "CIBC has the control, power, authority and practical ability to order [CFIB] to turn over funds on deposit in the name of the Millards." In support, the Commonwealth referred to the 92% ownership of CFIB, and other indicia of control, asserting that CIBC imposed a governance structure upon CFIB that "affords the parent company full oversight of the risk and control framework of all [of CFIB's] operations." The Commonwealth further argued that the overlap in significant personnel, and CIBC's oversight of CFIB's compliance with various legal requirements, such as the Sarbanes-Oxley Act, demonstrated CIBC's ability to exert actual, practical control over CFIB's operations. In opposition, CIBC contended that CFIB is a "legally separate and independent entit[y]" and that, ***59** absent an information sharing agreement, "CIBC is unable to access accounts or account information held by [CFIB] or its subsidiaries."

The District Court denied the motion and maintained a previously issued restraining order that precluded CIBC from engaging in certain activity related to the Millards' ****3** accounts. While the District Court found the Commonwealth's "practical ability to control" argument colorable, it observed that the scope of the phrase "possession or custody," contained in CPLR 5225 (b), was an issue suited for this Court's consideration.

Upon appeal, the Second Circuit determined that for the reasons set forth in the District Court's opinion, the resolution of the case turned on unresolved issues of New York law, and certified the following questions to this Court:

> "1. May a court issue a turnover order pursuant to N.Y. C.P.L.R. § 5225(b) to an entity that does not have actual possession or custody of a debtor's assets, but whose subsidiary might have possession or custody of such assets?
>
> "2. If the answer to the above question is in the affirmative, what factual considerations should a court take into account in determining whether the issuance of such an order is permissible?" (693 F3d 274, 275 [2d Cir 2012]).

We accepted the certified questions and now answer the first in the negative, and as a consequence refrain from answering the second as academic.[3]

Under CPLR article 52, a special proceeding for a turnover order is the procedural mechanism devised by the legislature to enforce a judgment against an asset of a judgment debtor, held in the "possession or custody" of a third party. Section 5225 (b) provides, in pertinent part:

> "Upon a special proceeding commenced by the judgment creditor, *against a person in possession or custody of money or other personal property in which the judgment debtor has an interest*, or against a ***60** person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff."

(1) The Commonwealth contends that the phrase "possession or custody" inherently encompasses the concept of control, and, therefore, section 5225 (b) is applicable to garnishees ****4** with constructive possession of a judgment debtor's assets. As such, the Commonwealth proposes that an actual, practical control test—i.e., whether the bank could practically order its subsidiary to turn over the assets of the judgment debtor—should be adopted by this Court as the appropriate standard. We find the Commonwealth's interpretation of section 5225 (b) unpersuasive for the reasons that follow.

In determining the expanse of section 5225 (b) our "starting point" is "the language itself, giving effect to the plain meaning thereof" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]). "[W]here the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208 [1976], citing *Bender v Jamaica Hosp.*, 40 NY2d 560 [1976]). Moreover, "[i]t is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Majewski*, 91 NY2d at 583, citing *Patrolmen's Benevolent Assn.*, 41 NY2d at 208).

The plain language of section 5225 (b) refers only to "possession or custody," excluding any reference to "control." The absence of this word is meaningful and intentional as we have previously observed that the failure of the legislature to include a term in a statute is a significant indication that its exclusion was intended (*see People v Finnegan*, 85 NY2d 53, 58 [1995] ["We have firmly held that the failure of the Legislature to include a substantive, significant prescription in a statute is a ***61** strong indication that its exclusion was intended"]; *Pajak v Pajak*, 56 NY2d 394, 397 [1982] ["The failure of the Legislature to provide that mental illness is a valid defense in an action for divorce based upon the ground of cruel and inhuman treatment must be viewed as a matter of legislative design. Any other construction of the statute would amount to judicial legislation"]; *see also* McKinney's Cons Laws of NY, Book 1, Statutes § 74). Accordingly, we interpret the omission of "control" from section 5225 (b) as an indication that "possession or custody" requires actual possession.

The language of the predecessor statute to section 5225 (b) and the legislation enacting the CPLR lend additional support to the view that "possession or custody" does not include constructive possession. Prior to the 1962 legislation enacting the CPLR, the relevant turnover statutes referred to "possession" and "control" and made no mention of custody (*see* Civil Practice Act §§ 793, 796). Civil Practice Act § 796, the predecessor statute to section 5225 (b), provided in relevant part that

> "[w]here it appears from the examination or testimony taken in a special proceeding authorized by this article that the judgment debtor has in his possession or under his control money or other personal property belonging to him, or that money or one or more articles of personal property capable of delivery, his right to the possession whereof is not substantially disputed, are in the possession or under the control of another person, the court in its discretion and upon such a notice given to such persons as it deems just, or without notice, may make an order directing the ****5** judgment debtor or other person immediately to pay the money or deliver the articles of personal property to a sheriff designated in the order."

Section 5225 (b) and other related provisions were enacted to include the "possession or custody" language, thus making a clear distinction between the prior references to "possession" and "control." It is a well settled tenet of statutory construction that "[t]he Legislature, by enacting an amendment of a statute changing the language thereof, is deemed to have intended a material change in the law" (McKinney's Cons Laws of NY, Book 1, Statutes § 193). The exclusion of the word "control" signaled a purposeful legislative modification of the ***62** applicable scope of turnover statutes. The Commonwealth would have us construe section 5225 (b) to include that term, but "[a] court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit" because "the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended" (McKinney's Cons Laws of NY, Book 1, Statutes § 74). In other words, we cannot read into the statute that which was specifically omitted by the legislature.

The Commonwealth argues that the legislature simply substituted "custody" as the functional equivalent of "control." However, we read the statute both based on its plain meaning and in context, and it is clear that the legislature did not pen one word anticipating that another would be "read into" the CPLR. When the legislature has sought to encompass the concept of "control" it has done so explicitly, evincing a legislative intent to exclude consideration of "control" from those sections from which it is omitted. For example, CPLR 3111, which concerns the production of discovery materials, provides that "books, papers and other things in the possession, custody or control of the person to be examined" should be produced. CPLR 3119 (a) (4) (ii) similarly provides that a subpoena may be used to order a person to produce discovery "in the possession, custody or control of the person" (*see also* CPLR 2701, 3120, 3122-a, 5224). We are led to the conclusion that the legislature considered "control" and "custody" to refer to distinct concepts (*see People v Elmer*, 19 NY3d 501, 507 [2012] [observing that the legislature is presumed to know the distinction between terms used in legislation]; *Easley v*

New York State Thruway Auth., 1 NY2d 374, 379 [1956] ["Legislatures are presumed to know what statutes are on the books and what is intended by constitutional amendments approved by the Legislature itself"]; McKinney's Cons Laws of NY, Book 1, Statutes § 222).

As these sections of the CPLR indicate, in a documentary discovery context, with expansive rules of disclosure, it is reasonable to conclude that the legislature would employ a broader "possession, custody or control" standard. Indeed, various courts have interpreted "possession, custody or control" to allow for discovery from parties that had practical ability to request from, or influence, another party with the desired discovery documents. As such, courts ****6** have interpreted "possession, custody or control" to mean constructive possession (*see* ***63** *Bank of New York v Meridien BIAO Bank Tanzania Ltd.*, 171 FRD 135, 146 [SD NY 1997] [" '(C)ontrol' does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action"]; *see also In re NASDAQ Market-Makers Antitrust Litig.*, 169 FRD 493, 530 [SD NY 1996]).

Consequently, because "possession, custody or control" has been construed to encompass constructive possession, then, by contrast, legislative use of the phrase "possession or custody" contemplates actual possession. Notably, sections of the CPLR pertaining to the disposition of property utilize the narrower "possession or custody" standard. For example, CPLR 1320, which concerns the attachment or levy of personal property, is limited to property "in the defendant's possession or custody." CPLR 6214 and 6215 similarly limit the levy of personal property to items within the "possession or custody" of the defendant (*see also* CPLR 1321, 1325, 2701, 5222, 5225, 5232, 5250, 6219). This distinction supports the view that the legislature has applied a higher standard to insure the proper disposition of property (*see* CPLR 5209; *JPMorgan Chase Bank, N.A. v Motorola, Inc.*, 47 AD3d 293 [1st Dept 2007]).

The Commonwealth argues that this distinction is of no moment, speculating that the legislature blindly duplicated the standards of the Federal Rules of Evidence when enacting the CPLR. However, "[w]hen different terms are used in various parts of a statute or rule, it is reasonable to assume that a distinction between them is intended" (*Matter of Albano v Kirby*, 36 NY2d 526, 530 [1975]). Consequently, the distinction cannot be simply disregarded, and this Court is required to construe the entire CPLR in a manner that harmonizes these variations (*see* McKinney's Cons Laws of NY, Book 1, Statutes §§ 97, 98). In light of these differences, the most reasonable way to interpret these provisions is to conclude that "possession, custody or control" contemplates constructive possession, whereas "possession or custody," by its omission of the term "control," refers to actual possession. Accordingly, a section 5225 (b) turnover order cannot be issued against a garnishee lacking actual possession or custody of a judgment debtor's assets or property.

(2) Finally, our decision in *Koehler v Bank of Bermuda Ltd.* (12 NY3d 533 [2009]) does not require a different reading of ***64** section 5225 (b). In that case, we addressed whether, under CPLR article 52, a New York court could order a bank over which it had personal jurisdiction to deliver out-of-state stock certificates to a judgment creditor. The Court noted that unlike prejudgment attachment, which requires jurisdiction over property, "postjudgment enforcement requires only jurisdiction over persons" (12 NY3d at 537). As such, "CPLR 5225 (b) applies when the property is not in the judgment debtor's possession" and "contemplate[s] an order, directed at a defendant who is amenable to the personal jurisdiction of the court, requiring ****7** him to pay money or deliver property" (*id.* at 541). Accordingly, "a New York court with personal jurisdiction over a defendant may order him [or her] to turn over out-of-state property regardless of whether the defendant is a judgment debtor or a garnishee" (*id.*).

Notably, *Koehler* does not interpret the meaning of the phrase "possession or custody," and is only significant in holding that personal jurisdiction is the linchpin of authority under section 5225 (b) (*see also Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 312 [2010]). Indeed, many cases have held that a turnover order is given effect through a court's exercise of personal jurisdiction over a party. Thus, in *Starbare II Partners v Sloan* (216 AD2d 238 [1st Dept 1995]), albeit a section 5225 (a) case, the New York court had the authority to order a judgment debtor to turn over paintings he owned, but stored in New Jersey. In *Miller v Doniger* (28 AD3d 405 [1st Dept 2006]), the judgment debtor, who was in New York, was directed to turn over his out-of-state Wachovia bank accounts to the judgment creditor. Similarly, in *Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.* (41 AD3d 25 [1st Dept 2007]), the Appellate Division observed that "a turnover order merely directs a defendant, over whom the New York court has jurisdiction, to bring its own property into New York" (41 AD3d at 31). Thus,

"[h]aving acquired jurisdiction of the person, the court [ ] can compel observance of its decrees by proceedings *in personam* against the owner within the jurisdiction" (*Koehler*, 12 NY3d at 539). However, in these cases, the garnishee was directed to deliver assets already within its possession. No case supports the Commonwealth's attempt to broadly construe *Koehler* and require that a garnishee be compelled to direct another entity, which is not subject to this state's personal jurisdiction, to deliver assets held in a foreign jurisdiction. Such an expansion is inconsistent with the plain language and scope of section 5225 (b).

***65** Accordingly, certified question No. 1 should be answered in the negative and certified question No. 2 not answered as academic.

Chief Judge Lippman and Judges Graffeo, Read, Smith and Pigott concur.

Following certification of questions by the United States Court of Appeals for the Second Circuit and acceptance of the questions by this Court pursuant to section 500.27 of the Rules of Practice of the New York State Court of Appeals (22 NYCRR 500.27), and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified question No. 1 answered in the negative and certified question No. 2 not answered as academic.

FOOTNOTES

Footnotes

1 In 2010, the Commonwealth learned that the Millards had renounced their United States citizenship and resided in the Cayman Islands.

2 The Commonwealth also registered the judgments in the United States District Court for the Southern District of Florida.

3 On appeal CIBC contends that the Commonwealth incorrectly moved pursuant to CPLR 5225 (b) rather than CPLR 5227, arguing that the latter is the applicable section to turnover orders involving bank deposits as the "debt" owed by the bank to the customer. We have no cause to address the applicability of section 5227, and limit our analysis to the issues concerning CPLR 5225 (b) presented by the Second Circuit's certification to this Court.

New York Official Reports

135 A.D.3d 899, 26 N.Y.S.3d 79, 2016 N.Y. Slip Op. 00476

**1 East End Resources, LLC, Respondent

v

Town of Southold Planning Board et al., Appellants.

Supreme Court, Appellate Division,
Second Department, New York
2014-00226, 41341/08
January 27, 2016

CITE TITLE AS: East End Resources, LLC v Town of Southold Planning Bd.

HEADNOTES

Courts
Ripeness Doctrine
Finality of Administrative Action—Summary Judgment

Civil Rights
Federal Civil Rights Claim
Denial of Land-Use Permit Application—Summary Judgment

Municipal Corporations
Notice of Claim
Failure to Serve Notice of Claim

Proceeding against Body or Officer
Mandamus
Summary Judgment

Smith, Finkelstein, Lundberg, Isler & Yakaboski, LLP, Riverhead, NY (Frank A. Isler and Christopher B. Abbott of counsel), for appellants.
Amato Law Group, PLLC, Garden City, NY (Christopher M. Read, Richard S. Keenan, and Keith W. Corso of counsel), for respondent.

In a hybrid action, inter alia, to recover damages for violation of constitutional rights pursuant to 42 USC § 1983, and proceeding pursuant to CPLR article 78, inter alia, in the nature of mandamus to compel the Town of Southold Planning Board to conduct a public hearing pursuant to Town Law § 274-a (8) on the plaintiff/petitioner's site plan application, the appeal is from an order of the Supreme Court, Suffolk County (Molia, J.), dated September 30, 2013, which denied the motion of the Town of Southold Planning Board, Town of Southold Town Board, Town of Southold Planning Department, and Town of Southold Town Clerk for summary judgment dismissing the third, fifth, sixth, seventh, and eighth causes of action.

Ordered that the notice of appeal is deemed to be an application for leave to appeal, and leave to appeal is granted (*see* CPLR 5701 [c]); and it is further,

Ordered that the order is modified, on the law, by deleting the provision thereof denying those branches of the appellants' motion which were for summary judgment dismissing the third, fifth, seventh, and eighth causes of action, and substituting therefor a provision granting those branches of the motion; as so modified the order is affirmed, with costs to the appellants.

In 2002, the plaintiff/petitioner East End Resources, LLC (hereinafter East End), entered into a contract of sale to purchase approximately 6.75 acres of real property (hereinafter the parcel) located in the Hamlet of Southold. Shortly after the contract of sale was executed, the Town of Southold Town Board (hereinafter the Town Board) enacted a moratorium precluding all residential site plan approvals. After the moratorium expired, East End submitted a site plan application to the Town of Southold Planning Board (hereinafter the Planning *900 Board), seeking approval for the construction of a 24-unit senior housing development on the parcel, which is in the Hamlet's business zoning district. Subsequently, on October 21, 2008, East End submitted an amended site plan application.

East End commenced this hybrid action and proceeding, alleging that the Planning Board, Town Board, Town of Southold Planning Department, and Town of Southold Town Clerk (hereinafter collectively the appellants) deliberately and systematically delayed review of its site plan **2 application. In the third cause of action, East End sought relief pursuant to CPLR article 78 in the nature of mandamus to compel the Planning Board to conduct a public hearing on its application pursuant to Town Law § 274-a (8). In the fifth through eighth causes of action, East End sought to

recover damages for the violation of its due process and equal protection rights under both the United States and the New York State Constitutions. The appellants moved for summary judgment dismissing the third and the fifth through eighth causes of action, and the Supreme Court denied the motion.

The Supreme Court properly denied that branch of the appellants' motion which was for summary judgment dismissing the fifth through eighth causes of action, made on the ground that those causes of action were not ripe for judicial review. "To determine whether a matter is ripe for judicial review, it is necessary 'first to determine whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied' " (*Matter of Town of Riverhead v Central Pine Barrens Joint Planning & Policy Commn.*, 71 AD3d 679, 681 [2010], quoting *Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 519 [1986]). "The concept of finality requires an examination of the completeness of the administrative action and a pragmatic evaluation of whether the 'decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury' " (*Church of St. Paul & St. Andrew v Barwick*, 67 NY2d at 519, quoting *Williamson County Regional Planning Comm'n v Hamilton Bank of Johnson City*, 473 US 172, 193 [1985]).

In the area of land use, "[a] final decision exists when a development plan has been submitted, considered and rejected by the governmental entity with the power to implement zoning regulations" (*S&R Dev. Estates, LLC v Bass*, 588 F Supp 2d 452, 461 [SD NY 2008]; *see Waterways Dev. Corp. v Lavalle*, 28 AD3d 539, 540-541 [2006]; *Goldfine v Kelly*, 80 F Supp 2d 153, 159 [SD NY 2000]). The finality rule, however, is not "mechanically applied" (***901** *Murphy v New Milford Zoning Commn.*, 402 F3d 342, 349 [2d Cir 2005]). In this regard, "[a] property owner, for example, will be excused from obtaining a final decision if pursuing an appeal to a zoning board of appeals or seeking a variance would be futile. That is, a property owner need not pursue such applications when a zoning agency lacks discretion to grant variances or has dug in its heels and made clear that all such applications will be denied" (*id.* at 349; *see Matter of Counties of Warren & Washington, Indus. Dev. Agency v Village of Hudson Falls Bd. of Health*, 168 AD2d 847, 848 [1990]; *Sherman v Town of Chester*, 752 F3d 554, 561 [2d Cir 2014]; *Southview Assoc., Ltd. v Bongartz*, 980 F2d 84, 98 [2d Cir 1992]; *Catcove Corp. v Heaney*, 685 F Supp 2d 328, 333 [ED NY 2010]). Additionally, an exception to the finality requirement exists where the municipal entity uses "repetitive and unfair procedures in order to avoid a final decision" (*Sherman v Town of Chester*, 752 F3d at 561; *see Palazzolo v Rhode Island*, 533 US 606, 621 [2001]).

Here, the appellants demonstrated their prima facie entitlement to judgment as a matter of law dismissing the fifth through eighth causes of action on the ground that they were not ripe for judicial review by demonstrating that the Planning Board had not made a final decision on East End's application. In opposition, East End raised a triable issue of fact as to whether the appellants would continue to use repetitive and unfair procedures so as to avoid making a final decision on the application (*see Matter of Counties of Warren & Washington, Indus. Dev. Agency v Village of Hudson Falls Bd. of Health*, 168 AD2d at 848; *Sherman v Town of Chester*, 752 F3d at 562-563; *Del Monte Dunes at Monterey, Ltd. v City of Monterey*, 920 F2d 1496, 1506 [9th Cir 1990]; *Catcove Corp. v Patrick Heaney*, 685 F Supp 2d at 333). Since this was the only ground the appellants raised for dismissing the sixth cause of action, which alleged a violation of East End's right to equal protection under the United States Constitution, the Supreme Court properly denied that branch of their motion which was for summary judgment dismissing the sixth cause of action.

The Supreme Court, however, should have granted that branch of the appellants' motion which was for summary judgment dismissing the fifth and seventh causes of action for another reason. In those causes of action, East End alleged that it had a cognizable property interest in the approval of the application that was injured in violation of its right to due process under both the United States and New York State Constitutions. However, as the Planning Board has significant discretion in reviewing site plan applications (*see* Southold ***902** Town Code § 280-129), East End does ****3** not have a cognizable property interest in the approval of a particular site plan application (*see Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 629-630 [2004]; *Orange Lake Assoc., Inc. v Kirkpatrick*, 21 F3d 1214, 1224-1225 [2d Cir 1994]; *Gagliardi v Village of Pawling*, 18 F3d 188, 192-193 [2d Cir 1994]; *RRI Realty Corp. v Incorporated Vil. of Southampton*, 870 F2d 911, 918-919 [2d Cir 1989]). Consequently, the appellants established their prima facie entitlement to judgment as a matter of law dismissing the fifth and seventh causes of action on the ground that East End did not have a cognizable property interest in the approval of the application. In opposition, East End failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Additionally, the Supreme Court should have granted that branch of the appellants' motion which was for summary judgment dismissing the eighth cause of action, which alleged a violation of East End's right to equal protection under the New York State Constitution. The appellants demonstrated that East End failed to serve a timely notice of claim upon them, which is a condition precedent to the assertion of this claim (*see* General Municipal Law § 50-i). In opposition, East End failed to raise a triable issue of fact. Its contention that the verified complaint/petition was the functional equivalent of a notice of claim is without merit (*see Varsity Tr., Inc. v Board of Educ. of City of N.Y.*, 5 NY3d 532, 536 [2005]; *Davidson v Bronx Mun. Hosp.*, 64 NY2d 59, 61 [1984]; *Davis v City of New York*, 250 AD2d 368, 369-370 [1998]).

The Supreme Court also should have granted that branch of the appellants' motion which was for summary judgment dismissing the third cause of action on the ground that it had been rendered academic. That cause of action sought relief pursuant to CPLR article 78 in the nature of mandamus to compel the Planning Board to conduct a public hearing on the application pursuant to Town Law § 274-a (8). The appellants made a prima facie showing of their entitlement to judgment as a matter of law dismissing that cause of action by demonstrating that the Planning Board had conducted a public hearing on the application, thereby rendering that cause of action academic (*see Matter of Pordum v Nyquist*, 42 NY2d 958, 958-959 [1977]; *Matter of Newton v Police Dept. of City of N.Y.*, 183 AD2d 621, 621 [1992]). East End failed to raise a triable issue of fact, as it did not address this branch of the appellants' motion in its papers filed in opposition to the motion (*see Reimold v Walden Terrace, Inc.*, 85 AD3d 1144, 1146 [2011]; *Corley v Country Squire Apts., Inc.*, 32 AD3d 978, 978 [2006]). ***903**

In light of our determination, we need not address the parties' remaining contentions. Dillon, J.P., Hall, Cohen and Barros, JJ., concur.

April 15, 2024

144 S.Ct. 1343
Supreme Court of the United States.

James GIMENEZ, Petitioner,

v.

FRANKLIN COUNTY, WASHINGTON, et al.

No. 23-500
|

Case below, 530 P.3d 994.

Opinion

Petition for writ of certiorari to the Supreme Court of Washington denied.

All Citations

144 S.Ct. 1343 (Mem)

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98 N.Y.2d 314, 774 N.E.2d 1190, 746
N.Y.S.2d 858, 2002 N.Y. Slip Op. 05518

Paul A. Goshen, on Behalf of Himself and
All Others Similarly Situated, Appellant,
v.
Mutual Life Insurance Company
of New York et al., Respondents.
Walter Scott et al., on Behalf of Themselves
and All Others Similarly Situated, Appellants,
v.
Bell Atlantic Corporation et al., Respondents.

Court of Appeals of New York
92
Argued June 4, 2002;

Decided July 2, 2002

CITE TITLE AS: Goshen v
Mutual Life Ins. Co. of N.Y.

SUMMARY

Appeal, in the first above-entitled action, by permission of the Court of Appeals, from so much of an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered August 9, 2001, as affirmed that portion of an order of the Supreme Court (Beatrice Shainswit, J.), entered in New York County, granting a motion by defendants for summary judgment dismissing the claim of plaintiff Paul A. Goshen.

Appeal, in the second above-entitled action, by permission of the Court of Appeals, from so much of an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered May 10, 2001, as (1) reversed that portion of an order of the Supreme Court (Herman Cahn, J.), entered in New York County, denying a motion by defendants to dismiss the complaint, (2) granted the motion, and (3) directed the entry of judgment in favor of defendants dismissing the complaint.

Goshen v Mutual Life Ins. Co. of N.Y., 286 AD2d 229, affirmed.

Scott v Bell Atl. Corp., 282 AD2d 180, modified.

HEADNOTES

Consumer Protection
Deceptive Acts and Practices
Injury Outside of New York

(1) An allegedly deceptive scheme that originates in New York but injures a consumer in a transaction outside the state does not constitute an actionable deceptive act or practice under General Business Law § 349 (a). The statutory reference to deceptive practices in "the conduct of any business, trade or commerce or in the furnishing of any service in this state" unambiguously evinces a legislative intent to address commercial misconduct occurring within New York. "[I]n this state" can only modify "the conduct of any business, trade or commerce [or] the furnishing of any service." The statutory phrase "deceptive acts or practices" refers not to the mere invention of a ***315** scheme or marketing strategy, but rather to the actual misrepresentation or omission to a consumer. Thus, to qualify as a prohibited act under the statute, the deception of a consumer must occur in New York. To apply the statute to out-of-state transactions would lead to an unwarranted expansive reading of the statute, contrary to legislative intent, and potentially lead to the nationwide, if not global, application of section 349.

Consumer Protection
Deceptive Acts and Practices
Injury Outside of New York

(2) "Hatching a scheme" or originating a marketing campaign in New York in and of itself does not constitute an actionable deceptive act or practice under General Business Law § 349. The origin of any advertising or promotional conduct is irrelevant if the deception itself--that is, the advertisement or promotional package--did not result in a transaction in which the consumer was harmed. Consequently, plaintiffs

who cannot allege that they were deceived in New York do not state cognizable causes of action under the statute.

Consumer Protection
False Advertising
Knowingly Deceptive Promotional Representations of Internet Service

(3) Plaintiffs have sufficiently stated a claim for deceptive acts and practices or false advertising under General Business Law §§ 349 and 350 where they allege that defendants' so-called "high speed" Internet service was defective owing to malfunctions largely or wholly within defendants' control, that defendants knew this to be the case, and that defendants' promotional representations were therefore knowingly deceptive. Defendants' documentation illustrating a 30-day trial period and the contractual terms and conditions, including a product disclaimer, does not bar plaintiffs' claims for deceptive trade practices at the pleading stage of the proceedings, as such documentation does not establish a defense as a matter of law.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Advertising § 3; Consumer and Borrower Protection §§ 284-288, 302, 305.

McKinney's, General Business Law § 349 (a); § 350.

NY Jur 2d, Consumer and Borrower Protection §§ 6, 8, 14, 15.

ANNOTATION REFERENCES

Who is a "consumer" entitled to protection of state deceptive trade practice and consumer protection acts. 63 ALR5th 1.

POINTS OF COUNSEL

Milberg Weiss Bershad Hynes & Lerach LLP, New York City (*Barry A. Weprin, Melvyn I. Weiss* and *Mark T. Millkey* of counsel), *James, Hoyer, Newcomer, Forizs & Smiljanich, P.A.,* Tampa, Florida, *Bonnett, Fairbourn, Freidman & Balint, P.C.,* ***316** Phoenix, Arizona, *Parry, Deering, Futscher & Sparks P.S.C.,* Covington, Kentucky, and *Hubbard & Biederman, L.L.P.,* Dallas, Texas, for appellant in the first above-entitled action.

General Business Law § 349 affords a private right of action to "any person" injured by deceptive acts or practices "in this state." (*Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals,* 97 NY2d 86; *Master Cars v Walters,* 95 NY2d 395; *Matter of Lloyd v Grella,* 83 NY2d 537; *Pfizer Inc. v Government of India,* 434 US 308; *Hartford Ins. Co. of Midwest v Halt,* 223 AD2d 204; *Karlin v IVF Am.,* 93 NY2d 282; *Blue Cross & Blue Shield of N.J. v Philip Morris, Inc.,* 178 F Supp 2d 198; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank,* 85 NY2d 20; *Morelli v Weider Nutrition Group,* 275 AD2d 607; *New York Pub. Interest Research Group v Insurance Info. Inst.,* 140 Misc 2d 920, 161 AD2d 204.)

Dewey Ballantine LLP, New York City (*Karvey Kurzweil, Richard W. Reinthaler, James P. Smith III* and *John E. Schreiber* of counsel), and *Michael C. Dorf* for respondents in the first above-entitled action.

I. On its face, General Business Law § 349 (a) applies only to consumer transactions occurring in New York. (*Padula v Lilarn Props. Corp.,* 84 NY2d 519; *Scott v Bell Atl. Corp.,* 282 AD2d 180; *Ewen v Thompson-Starrett Co.,* 208 NY 245; *Matter of May,* 280 App Div 647, 305 NY 486; *People v Craig,* 151 Misc 2d 442; *Gaidon v Guardian Life Ins. Co. of Am.,* 94 NY2d 330; *Karlin v IVF Am.,* 93 NY2d 282; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank,* 85 NY2d 20; *Petitt v Celebrity Cruises,* 153 F Supp 2d 240; *Pacific Express Co. v Seibert,* 142 US 339.) II. Well-settled principles of statutory construction dictate that use of the general term "any person" in General Business Law § 349 (h) cannot expand the geographic reach of the statute and must be construed to mean "any person in New York." (*Padula v Lilarn Props. Corp.,* 84 NY2d 519; *Ewen v Thompson-Starrett Co.,* 208 NY 245; *Matter of May,* 280 App Div 647; *People v Craig,* 151 Misc 2d 442.) III. The relevant legislative history further underscores that General Business Law § 349 was enacted to protect *New York* consumers, not to regulate transactions entered into by New York businesses anywhere in the world. IV. Sound public policy considerations compel the conclusion that General Business Law § 349 applies only to consumer transactions consummated in New York. (*Ohralik v Ohio State Bar Assn.,* 436 US 447; *State of New York v General Motors Corp.,* 547 F Supp 703; *Kelley v Carr,* 442 F Supp 346.) V. Plaintiffs' interpretation of General Business Law § 349 ***317** cannot have been intended by the Legislature, and cannot be adopted by this Court, since it would run the risk that the statute would be held unconstitutional under the Commerce Clause. (*Matter of State of New York v Colorado State Christian Coll. of Church of Inner Power,* 76 Misc 2d 50; *Karlin v IVF Am.,* 93 AD2d

282; *Metropolitan N.Y. Retail Merchants Assn. v City of New York,* 60 Misc 2d 805; *People v Lipsitz,* 174 Misc 2d 571; *Morelli v Weider Nutrition Group,* 275 AD2d 607; *Alliance of Am. Insurers v Chu,* 77 NY2d 573; *Pennoyer v Neff,* 95 US 714; *BMW of N. Am. v Gore,* 517 US 559; *Healy v Beer Inst.,* 491 US 324; *Brown-Forman Distillers Corp. v New York State Liq. Auth.,* 476 US 573.)

Cleary, Gottlieb, Steen & Hamilton, New York City (*Mitchell A. Lowenthal, Evan A. Davis* and *J.J. Gass* of counsel), and *Victoria E. Fimea,* Washington D.C., for American Council of Life Insurers, amicus curiae in the first above-entitled action. I. General Business Law § 349 does not apply to transactions effected or services furnished outside New York. (*Circuit City Stores v Adams,* 532 US 105; *Thornton v American Kennel Club,* 182 AD2d 358; *Foti v Immigration & Naturalization Serv.,* 375 US 217.) II. Applying General Business Law § 349 to out-of-state transactions would be bad policy unlikely to be endorsed by the Legislature. (*Cooney v Osgood Mach.,* 81 NY2d 66; *H.S.W. Enters. v Woo Lae Oak,* 171 F Supp 2d 135; *Federal Trade Commn. v National Cas. Co.,* 357 US 560; *Federal Trade Commn. v Travelers Health Assn.,* 362 US 293; *Brogdon ex rel. Cline v National Healthcare Corp.,* 103 F Supp 2d 1322; *Gaidon v Guardian Life Ins. Co. of Am.,* 94 NY2d 330; *In re Prudential Ins. Co. of Am. Sales Practices Litig.,* 975 F Supp 584; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank,* 85 NY2d 20; *In re Baldwin-United Corp. [Single Premium Deferred Annuities Ins. Litig.],* 770 F2d 328; *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,* 134 F3d 133.)

Stamell & Schager, LLP, New York City (*Jason L. Solotaroff* of counsel), *Abbey Gardy, LLP (Joshua N. Rubin* of counsel), and *Law Offices of Mark S. Kaufman (Mark S. Kaufman* of counsel), for appellants in the second above-entitled action. I. The money-back trial period did not cure the misrepresentations as a matter of law. II. Disclaimers that do not contradict written representations do not immunize the disclaiming party from liability for violations of sections 349 and 350 of the General Business Law. (***318** *Gaidon v Guardian Life Ins. Co. of Am.,* 94 NY2d 330; *Danann Realty Corp. v Harris,* 5 NY2d 317; *Steinhardt Group v Citicorp,* 272 AD2d 255; *Grumman Allied Indus. v Rohr Indus.,* 748 F2d 729; *Manufacturers Hanover Trust Co. v Yanakas,* 7 F3d 310; *Dornberger v Metropolitan Life Ins. Co.,* 961 F Supp 506; *Price Bros. Co. v Olin Constr. Co.,* 528 F Supp 716; *Kalisch-Jarcho, Inc. v City of New York,* 58 NY2d 377; *Colnaghi, U.S.A. v Jewelers Protection Servs.,* 81 NY2d 821; *Sommer v Federal Signal Corp.,* 79 NY2d 540.) III. The court below erred in exempting New York businesses who deceive out-of-state consumers from General Business Law § 349 liability. (*Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale,* 87 NY2d 410; *Matter of Capital Newspapers, Div. of Hearst Corp. v Whalen,* 69 NY2d 246; *Roth v Michelson,* 55 NY2d 278; *Cohen v Lord, Day & Lord,* 75 NY2d 95; *Karlin v IVF Am.,* 93 NY2d 282; *Hart v Moore,* 155 Misc 2d 203; *People v Lipsitz,* 174 Misc 2d 571; *Taylor v American Bankers Ins. Group,* 267 AD2d 178; *State of New York v Camera Warehouse,* 130 Misc 2d 498.)

Davis Polk & Wardwell, New York City (*Guy Miller Struve, Nancy B. Ludmerer, D. Scott Tucker, Amy V. Garcia* and *Edmund Polubinski III* of counsel), *Robert Ernst* and *Richard H. Wagner* for respondents in the second above-entitled action.

I. The court below correctly applied the objective standard set forth in this Court's decision in *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank* (85 NY2d 20). (*Karlin v IVF Am.,* 93 NY2d 282; *S.Q.K.F.C., Inc. v Bell Atl. TriCon Leasing Corp.,* 84 F3d 629; *Citipostal, Inc. v Unistar Leasing,* 283 AD2d 916; *Jaslow v Pep Boys--Manny, Moe & Jack,* 279 AD2d 611; *Maltz v Aetna U.S. Healthcare,* 270 AD2d 68; *Against Gravity Apparel v Quarterdeck Corp.,* 267 AD2d 44; *Porr v NYNEX Corp.,* 230 AD2d 564, 91 NY2d 807; *Brower v Gateway 2000,* 246 AD2d 246.) II. Plaintiffs' attacks upon the decision of the court below are inconsistent with the objective standard set forth in *Oswego* and are without merit. (*S.Q.K.F.C., Inc. v Bell Atl. TriCon Leasing Corp.,* 84 F3d 629; *Hill v Gateway 2000,* 105 F3d 1147, 522 US 808; *Bischoff v DirecTV, Inc.,* 180 F Supp 2d 1097; *Brower v Gateway 2000,* 246 AD2d 246; *Against Gravity Apparel v Quarterdeck Corp.,* 267 AD2d 44; *People v Lipsitz,* 174 Misc 2d 571; *Citipostal, Inc. v Unistar Leasing,* 283 AD2d 916; *Metzger v Aetna Ins. Co.,* 227 NY 411; *Worcester Ins. Co. v Hempstead Farms Fruit Corp.,* 220 AD2d 659; *Gaidon v Guardian Life Ins. Co. of Am.,* 94 NY2d 330.) III. The Attorney General's criticisms of the decision of the court below based upon Federal Trade Commission ***319** cases are also lacking in merit. (*Aronberg v Federal Trade Commn.,* 132 F2d 165; *Kraft, Inc. v Federal Trade Commn.,* 970 F2d 311; *Holloway v Bristol-Myers Corp.,* 485 F2d 986; *Karlin v IVF Am.,* 93 NY2d 282; *Federal Trade Commn. v Sterling Drug,* 317 F2d 669; *Brower v Gateway 2000,* 246 AD2d 246; *Montgomery Ward & Co. v Federal Trade Commn.,* 379 F2d 666.) IV. The court below correctly dismissed the claims asserted by persons who were not furnished with Digital Subscriber Line service in this state. (*Majewski v Broadalbin-Perth Cent. School Dist.,* 91 NY2d 577; *Tompkins v Hunter,* 149 NY 117; *State of New York v Mobil Oil Corp.,* 38 NY2d 460; *Matter of Trump-Equitable Fifth Ave. Co. v Gliedman,* 57 NY2d 588; *Baker v Walter Reade Theatres,* 37 Misc 2d

172; *Bowlus v Alexander & Alexander Servs.,* 659 F Supp 914; *International Tel. Prods. v Twentieth Century-Fox Tel. Div.,* 622 F Supp 1532; *Holmes v Securities Inv. Protection Corp.,* 503 US 258; *Meachum v Outdoor World Corp.,* 235 AD2d 462; *Ewen v Thompson-Starrett Co.,* 208 NY 245.)

Eliot Spitzer, Attorney General, New York City (*Caitlin J. Halligan, Daniel Smirlock, Thomas G. Conway, Kenneth Dreifach, Jane M. Azia* and *Robert H. Easton* of counsel), for Attorney General of the State of New York, amicus curiae in the first and second above-entitled actions.

I. General Business Law §§ 349 and 350 protect all consumers, New Yorkers and non-New Yorkers alike, from deceptive acts or practices or false advertising that originates or occurs at least in part in New York. (*Kelly v Robinson,* 479 US 36; *People v Owusu,* 93 NY2d 398; *Majewski v Broadalbin-Perth Cent. School Dist.,* 91 NY2d 577; *Matter of Schmidt v Roberts,* 74 NY2d 513; *Ewen v Thompson-Starrett Co.,* 208 NY 245; *State of New York v Camera Warehouse,* 130 Misc 2d 498; *People v Lipsitz,* 174 Misc 2d 571; *Matter of Orvis Co. v Tax Appeals Trib. of State of N.Y.,* 86 NY2d 165, *cert denied sub nom. Vermont Info. Processing v Commissioner, N.Y. State Dept. of Taxation,* 516 US 989; *Phillips Petroleum Co. v Shutts,* 472 US 797; *Weinberg v Hertz Corp.,* 116 AD2d 1, 69 NY2d 979.) II. *Scott* also misconstrued what may constitute a deceptive claim or false advertisement under prevailing principles of consumer protection law. (*Kraft, Inc. v Federal Trade Commn.,* 970 F2d 311, 507 US 909; *Thompson Med. Co. v Federal Trade Commn.,* 791 F2d 189, 479 US 1086; *Charles of the Ritz Distribs. Corp. v Federal Trade Commn.,* 143 F2d 676; *Federal Trade Commn. v Gill,* 71 F Supp 2d 1030, 265 F3d 944; *In re National Credit Mgt. Group,* 21 F Supp 2d 424; ***320** *Federal Trade Commn. v US Sales Corp.,* 785 F Supp 737; *Matter of Lefkowitz v E.F.G. Baby Prods.,* 40 AD2d 364; *Aronberg v Federal Trade Commn.,* 132 F2d 165; *Benrus Watch Co. v Federal Trade Commn.,* 352 F2d 313, 384 US 939; *Guggenheimer v Ginzburg,* 43 NY2d 268.)

O'Melveny & Myers LLP, Washington D.C. (*Walter Dellinger, John H. Beisner* and *Marc E. Isserles* of counsel), and *National Chamber Litigation Center (Robin Conrad* of counsel), for Chamber of Commerce of the United States of America, amicus curiae in the first and second above-entitled actions.

I. The place of injury is the critical factor in determining whether General Business Law §§ 349 and 350 apply. (*Play Time v LDDS Metromedia Communications,* 123 F3d 23; *Chisholm v House,* 183 F2d 698; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank,* 85 NY2d 20; *Attorney Gen. of Md. v Dickson,* 717 F Supp 1090; *Connecticut Pipe Trades Health Fund v Philip Morris, Inc.,* 153 F Supp 2d 101; *Hastings v Fidelity Mtge. Decisions Corp.,* 984 F Supp 600; *Pacamor Bearings v Minebea Co.,* 918 F Supp 491; *People v Cintron,* 75 NY2d 249; *FGL & L Prop. Corp. v City of Rye,* 66 NY2d 111; *Ewen v Thompson-Starrett Co.,* 208 NY 245.) II. Money-back trial periods are highly relevant to the question of consumer deception. (*Brower v Gateway 2000,* 246 AD2d 246; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank,* 85 NY2d 20; *S.Q.K.F.C., Inc. v Bell Atl. TriCon Leasing Corp.,* 84 F3d 629.)

Rice & Justice, Albany (*John Carter Rice, Lawrence P. Justice* and *Bradley F. Rice* of counsel), for Business Council of New York State, Inc., amicus curiae in the first and second above-entitled actions.

I. Sections 349 and 350 of New York's General Business Law create a private right of action for consumers injured in transactions occurring within the state. (*People v Owusu,* 93 NY2d 398; *Majewski v Broadalbin-Perth Cent. School Dist.,* 91 NY2d 577; *Tompkins v Hunter,* 149 NY 117; *Gaidon v Guardian Life Ins. Co. of Am.,* 94 NY2d 330; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank,* 85 NY2d 20.) II. In determining whether or not there has been a violation of section 349 of the General Business Law, the courts should not view the statements complained of in isolation, but should consider the total circumstances and information available to the consumer. (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank,* 85 NY2d 20; *Citipostal, Inc. v Unistar Leasing,* 283 AD2d 916; *Sands v Ticketmaster-New York, Inc.,* 207 AD2d 687, 85 NY2d 904; ***321** *Lewis v Hertz Corp.,* 181 AD2d 493, 80 NY2d 893; *Against Gravity Apparel v Quarterdeck Corp.,* 267 AD2d 44; *Brower v Gateway 2000,* 246 AD2d 246; *Hill v Gateway 2000,* 105 F3d 1147, 522 US 808.)

OPINION OF THE COURT

Ciparick, J.

(1) On these appeals we are once again called upon to determine the applicability of New York's Consumer Protection Act. General Business Law § 349 (a) prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." An issue common to both appeals is whether an allegedly deceptive scheme that originates in New York, but injures a consumer in a transaction outside the state, constitutes an actionable deceptive act or practice under General Business Law § 349 (a). An additional issue in *Scott* is whether the New York plaintiffs have sufficiently stated a claim for deceptive acts and practices, or false advertising,

under General Business Law § 349 (h) or § 350. In the circumstances presented, we answer the first question in the negative and the second in the affirmative.

I.

A. The *Goshen* Action

Plaintiffs in this action are insurance policy purchasers who claim to be the victims of a deceptive scheme contrived and implemented by defendants Mutual Life Insurance Company of New York and its wholly owned subsidiary, MONY Life Insurance Company of America (MONY). Defendants have extensive ties to New York and conduct business in the state. Plaintiffs purchased "vanishing premium" policies from defendants at various times before starting this action. A "vanishing premium" would allegedly allow consumers to make periodic premium payments at a rate that would yield investment income to permit premium payments to decline until the obligation to make payments vanished entirely without affecting coverage (*see Gaidon v Guardian Life Ins. Co. of Am.,* 94 NY2d 330 [1999]). Plaintiffs claim that the vanishing premium is a deceptive scheme based on the artificial inflation of projected policy dividends.

Plaintiff Paul A. Goshen, a Florida resident, used the cash surrender proceeds of his MONY life insurance policy to purchase a vanishing premium policy. Plaintiff claims that a MONY sales agent induced him to surrender his prior policy in ***322** order to purchase the vanishing premium policy using a deceptive sales presentation to illustrate its potential economic benefits. Plaintiff, believing the sales information to be true, ultimately purchased a vanishing premium policy through a MONY representative in Florida.

Plaintiff's complaint alleged several causes of action, including "deceptive trade practices." Following commencement of the action, Supreme Court granted defendants' motion for summary judgment and dismissed the action in its entirety, and the Appellate Division affirmed. On appeal, this Court reinstated only plaintiff's General Business Law § 349 cause of action, holding that an issue of fact remained as to whether defendants' acts were misleading to a "reasonable consumer," and remitted the matter to Supreme Court (*see Gaidon,* 94 NY2d at 344). On remittal, defendants sought dismissal as to plaintiff Goshen. Supreme Court granted the motion and dismissed Goshen's claim because he purchased his policy in Florida. The Appellate Division affirmed, and we granted plaintiff leave to appeal (97 NY2d 609 [2002]). We now affirm.

B. The *Scott* Action

Plaintiffs here, as in *Goshen,* collectively seek relief for acts that they allege are deceptive. Plaintiffs are consumers who subscribed to defendants' Digital Subscriber Line (DSL) Internet service. Defendants are Delaware corporations with principal places of business in New York and Virginia. Plaintiffs Walter Scott, David Solomon and Eric Wu are New York residents. The remaining plaintiffs--Alvarez & Co., Inc., John F. Latuperissa, Andrew Boncek and Greg Howard--are out-of-state residents.

In 1999, defendants initiated a significant marketing campaign to promote its DSL service. Through their Web site and various forms of print media, defendants advertised the service as

"FAST--High speed Internet access up to 126X faster than your 56K modem.

"DEDICATED--You're always connected--no dialing in and no busy signals, ever! ...

"SIMPLE--Works on your existing phone line and our self-installation kit can be set up in minutes."

Defendants' Web site also made representations, in the form of a customer testimonial, about the quality of the technical support ***323** services. The DSL service had a 30-day money-back guarantee, and the Internet Access Service Agreement contained several disclaimers, including a representation that "the service is provided on an 'as is' or 'as available' basis."

Plaintiffs subscribed to defendants' DSL service and were dissatisfied with its performance. They allege that, contrary to defendants' representations, the service was slow and unreliable and that customer service was woefully inadequate. Plaintiffs claim that the DSL connection "rarely, if ever, approaches the high speed" expressly represented by defendants. Plaintiffs further maintain that the "set up in minutes" self-installation kits are actually unusable by a substantial number of purchasers who are forced to wait for weeks or months to be connected. Finally, plaintiffs contend that defendants' technical support service is inadequate to support DSL service and well below the quality represented by defendants. According to the complaint, these alleged deceptions injured plaintiffs by precipitating their purchase of a service that they are not receiving and causing them to

spend inordinate time attempting to resolve problems with defendants' technical support personnel.

Plaintiffs commenced this action alleging, among other things, violations of General Business Law §§ 349 and 350. Defendants promptly moved to dismiss the complaint under CPLR 3211 (a) (1) and (7), and plaintiffs sought leave to amend their second amended complaint to add a claim for fraudulent inducement. Supreme Court denied defendants' motion and granted plaintiffs leave to amend, finding the pleadings sufficient to defeat defendants' CPLR 3211 motion. The Appellate Division reversed on the law, dismissing plaintiffs' complaint. We granted plaintiffs leave to appeal (97 NY2d 698 [2002]). On this appeal, plaintiffs seek reinstatement of their General Business Law §§ 349 and 350 claims. We now modify the order of the Appellate Division and reinstate these claims for only the New York plaintiffs.

II.

New York's Consumer Protection Act--General Business Law article 22-A--was enacted to provide consumers with a means of redress for injuries caused by unlawfully deceptive acts and practices (*see* General Business Law §§ 349, 350; *see also, Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank,* 85 NY2d 20 [1995]). This legislation, much like its federal counterpart, the Federal Trade Commission Act ***324** (15 USC § 45), is intentionally broad, applying "to virtually all economic activity" (*Karlin v IVF Am.,* 93 NY2d 282, 290 [1999]). The statute seeks to secure an "honest market place" where "trust," and not deception, prevails (*Oswego,* 85 NY2d at 25, quoting Mem of Governor Rockefeller, 1970 NY Legis Ann, at 472).

General Business Law § 349 provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful" (General Business Law § 349 [a]).[1] The Attorney General is afforded broad enforcement powers under the statute (*see* General Business Law § 349 [f], [g]). Unlike private plaintiffs, the Attorney General may, for example, seek injunctive relief without a showing of injury (*see* General Business Law § 349 [b]). In an attempt to broaden the effectiveness of the statute, in 1980 a private right of action was provided to "any person who has been injured by reason of any violation of this section" (General Business Law § 349 [h]).

Under General Business Law § 349 (h) "[a] prima facie case requires ... a showing that defendant is engaging in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof" (*Oswego,* 85 NY2d at 25). Additionally, the allegedly deceptive acts, representations or omissions must be misleading to "a reasonable consumer" (*Oswego,* 85 NY2d at 26; *see also, Karlin,* 93 NY2d 282; *Gaidon,* 94 NY2d 330).

The novel issue before us today concerns the territorial reach of General Business Law § 349: can "hatching a scheme" or originating a marketing campaign in New York in and of itself constitute an actionable deceptive act or practice under the statute, or does the statute also require that the consumer be deceived in New York? We conclude that the transaction in which the consumer is deceived must occur in New York.

We reach that conclusion by first looking to the words of the statute. The reference in section 349 (a) to deceptive practices in "the conduct of any business, trade or commerce or in the furnishing of any service *in this state*" (emphasis added) unambiguously evinces a legislative intent to address commercial ***325** misconduct occurring within New York. Indeed, an examination of the text of General Business Law § 349 leads us to conclude that "in this state" can only modify "the conduct of any business, trade or commerce [or] the furnishing of any service." The phrase "deceptive acts or practices" under the statute is not the mere invention of a scheme or marketing strategy, but the actual misrepresentation or omission to a consumer (*see Gaidon,* 94 NY2d 330; *Oswego,* 85 NY2d 20). Thus, to qualify as a prohibited act under the statute, the deception of a consumer must occur in New York.

Legislative history also supports that reading of the statute. Attorney General Robert Abrams' 1980 memorandum to Governor Hugh Carey described the law as adding "significant new protection to consumers in this state" (Bill Jacket, L 1980, ch 346; *see also* Mem of Attorney General, 1963 NY Legis Ann, at 106 [noting that General Business Law § 350 "borrows the substantive standards of the Federal Trade Commission Act and applies them to intrastate transactions in New York"]). To apply the statute to out-of-state transactions in the case before us would lead to an unwarranted expansive reading of the statute, contrary to legislative intent, and potentially leading to the nationwide, if not global application of General Business Law § 349 (*see Oswego,* 85 NY2d at 26 [striking a balance between protecting consumers and avoiding a "potential ... tidal

wave of litigation against businesses ... not intended by the Legislature"]). Furthermore, the interpretation out-of-state plaintiffs would have us adopt would tread on the ability of other states to regulate their own markets and enforce their own consumer protection laws.

Lastly, we note that our General Business Law analysis does not turn on the residency of the parties. As both the text of the statute and the history suggest, the intent is to protect consumers in their transactions that take place in New York State. It was not intended to police the out-of-state transactions of New York companies, nor was it intended to function as a per se bar to out-of-state plaintiffs' claims of deceptive acts leading to transactions within the state. We next apply these principles to the facts before us.

III.

Plaintiff in *Goshen* contends that the elaborate "vanishing premium" concept was conceived and orchestrated in New York prior to any dissemination to potential consumers. Therefore, plaintiff would have us hold that actionable deceptive conduct ***326** occurred in New York at the time MONY developed or devised a potentially deceptive plan, regardless of its implementation. Similarly, plaintiffs in *Scott* allege that they have adequately stated a claim under General Business Law § 349.

(2) Plaintiffs in both appeals ignore a basic point with regard to General Business Law § 349. The origin of any advertising or promotional conduct is irrelevant if the deception itself--that is, the advertisement or promotional package--did not result in a transaction in which the consumer was harmed. In *Oswego,* we required "[p]roof that defendant's acts are directed to consumers" in order to maintain a claim under section 349 (*Oswego,* 85 NY2d at 25). Again in *Gaidon* our analysis involved transactions with consumers (94 NY2d 330).

Plaintiff in *Goshen* concedes that he received MONY's information in Florida. He purchased his policy and paid his premiums in Florida, through a Florida insurance agent. Plainly, for purposes of section 349, any deception took place in Florida, not New York. Out-of-state plaintiffs in *Scott* similarly cannot allege that they were deceived in New York. Thus, their complaint does not state any cognizable cause of action (*see Leon v Martinez,* 84 NY2d 83 [1994]).

As to the New York plaintiffs, however, the allegations are sufficient to withstand a CPLR 3211 (a) (7) challenge. In the context of a CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction (*see Leon,* 84 NY2d 83; *see also* CPLR 3026). Indeed, we accord plaintiffs "the benefit of every possible favorable inference" (*Leon,* 84 NY2d at 87; *see also Rovello v Orofino Realty Co.,* 40 NY2d 633, 634 [1976]).

(3) Turning to defendants' CPLR 3211 (a) (1) motion to dismiss on the ground that the action is barred by documentary evidence, such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*see Leon,* 84 NY2d at 88). Defendants produced documentation illustrating the 30-day trial period and the contractual terms and conditions, including the product disclaimer. These documents do not, however, bar plaintiffs' claims for deceptive trade practices at this stage of the proceedings, as they do not establish a defense as a matter of law. Plaintiffs assert that the service they purchased was defective due to malfunctions largely or wholly within defendants' control. They further assert that defendants knew this to be the case and that defendants' promotional representations were therefore knowingly ***327** deceptive. As pleaded this is sufficient. Thus, defendants' motion to dismiss pursuant to CPLR 3211 (a) (1) and (7) was improperly granted as to the New York plaintiffs and their General Business Law §§ 349 and 350 claims should be reinstated.

Accordingly, in *Goshen v Mutual Life Insurance Company of New York,* the order of the Appellate Division, insofar as appealed from, should be affirmed with costs. In *Scott v Bell Atlantic Corporation,* the order of the Appellate Division, insofar as appealed from, should be modified in accordance with this opinion, without costs, and, as so modified, affirmed.

Chief Judge Kaye and Judges Wesley, Rosenblatt, Graffeo, Green[2] and Ritter[2] concur; Judges Smith and Levine taking no part.

In *Goshen v Mutual Life Ins. Co. of N.Y.:* Order, insofar as appealed from, affirmed, with costs.

In *Scott v Bell Atl. Corp.:* Order, insofar as appealed from, modified in accordance with the opinion herein, without costs, and, as so modified, affirmed. ***328**

Footnotes

1 General Business Law § 350 provides that "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful." The standard for recovery under General Business Law § 350, while specific to false advertising, is otherwise identical to section 349.

2 Designated pursuant to NY Constitution, article VI, § 2.

2 Designated pursuant to NY Constitution, article VI, § 2.

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New York Official Reports

100 A.D.3d 700, 954 N.Y.S.2d 136, 2012 N.Y. Slip Op. 07630

****1** Doreen Headley, Appellant

v

New York City Transit Authority et al., Respondents.

Supreme Court, Appellate Division, Second Department, New York
November 14, 2012

CITE TITLE AS: Headley v New York City Tr. Auth.

HEADNOTE

Judgments
Collateral Estoppel
Identical Issues—Bus Accident

Gary B. Pillersdorf & Associates, P.C., New York, N.Y. (Paul A. Hayt of counsel), for appellant.
Wallace D. Gossett, New York, N.Y. (Armienti, DeBellis, Guglielmo & Rhoden, LLP [Vanessa M. Corchia], of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Kings County (Ash, J.), dated April 7, 2011, as denied her cross motion for summary judgment on the issue of liability.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and the plaintiff's cross motion for summary judgment on the issue of liability is granted.

The plaintiff was a passenger on a bus operated by the defendant Vincent P. Washington and owned by the defendant New York City Transit Authority. The plaintiff testified at her deposition that she saw Washington start to eat a piece of candy, and begin to choke immediately thereafter. Washington subsequently lost control of the bus and collided with another bus which was stopped at a bus stop, and then with a light pole on the sidewalk. The plaintiff allegedly sustained injuries as a result, and thereafter commenced this action against the defendants. In the order appealed from, the Supreme Court, inter alia, denied the plaintiff's cross motion for summary judgment on the issue of liability.

"The doctrine of collateral estoppel . . . precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]; *see Lester v New York State Off. of Parks Recreation, & Historic Preserv.*, 87 AD3d 561, 563 [2011]; *Mose v Sangiovanni*, 84 AD3d 1041 [2011]). Collateral estoppel effect will be given only to matters actually litigated and determined in a prior action or proceeding (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456 [1985]; *Lester v New York State Off. of Parks Recreation, & Historic Preserv.*, 87 AD3d at 563; *Simpson v Alter*, 78 AD3d 813, 814 [2010]). It must be shown that the identical issue was decided in the prior action or proceeding, is decisive in the present action, and that the party to be precluded from relitigating the issue had a full and fair opportunity to contest it (*see Kaufman v Eli Lilly & Co.*, 65 NY2d at 455; *Lester v New York State Off. of Parks Recreation, & Historic Preserv.*, 87 AD3d at 563; *Nachum v Ezagui*, 83 AD3d 1017 [2011]). ****2** ***701**

Here, the plaintiff established her prima facie entitlement to judgment as a matter of law on the issue of liability by demonstrating, pursuant to the doctrine of collateral estoppel, that the defendants were precluded from litigating the issue of their liability with respect to the subject accident (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449 [1985]; *Ryan v New York Tel. Co.*, 62 NY2d 494 [1984]; *JPMorgan Chase Bank v Ezagui*, 90 AD3d 714 [2011]). Specifically, the plaintiff submitted an order dated May 14, 2010, from another action commenced by a fellow bus passenger, and involving the same accident, wherein that plaintiff's motion for summary judgment on the issue of liability against the defendants was granted.

In opposition, the defendants failed to raise a triable issue of fact. The defendants relied upon, inter alia, an order dated January 29, 2010, from a separate action commenced by yet another fellow bus passenger, and also involving the same accident, wherein that plaintiff's motion for summary judgment on the issue of liability against the defendants was denied. However, in an order dated July 9, 2012, the

Supreme Court, upon renewal, granted that plaintiff's motion for summary judgment on the issue of liability against the defendants. This Court may, in general, take judicial notice of matters of public record (*see e.g. Hunter v New York, Ontario & W. R.R. Co.*, 116 NY 615, 621-622 [1889]; *Matter of Winona Pi. [Winona Pa.]*, 86 AD3d 542, 543 [2011]; *Matter of Santiago v New York State Div. of Parole*, 78 AD3d 953 [2010]; *Matter of Fells v Hansell*, 77 AD3d 941, 942 [2010]; *High v City of White Plains*, 227 AD2d 525 [1996]; *Matter of Chasalow v Board of Assessors of County of Nassau*, 176 AD2d 800, 804 [1991]). Since the order dated July 9, 2012, in effect, vacated the order dated January 29, 2010, the defendants have not shown the existence of conflicting orders on the issue of their liability to the plaintiff herein so as to avoid the application of collateral estoppel (*see Creinis v Hanover Ins. Co.*, 59 AD3d 371, 376 [2009]; *cf. Gaston v American Tr. Ins. Co.*, 11 NY3d 866 [2008]).

Accordingly, the Supreme Court should have granted the plaintiff's cross motion for summary judgment on the issue of liability. Skelos, J.P., Leventhal, Chambers and Lott, JJ., concur.

786 Fed.Appx. 705 (Mem)
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally
governing citation of judicial decisions issued on or after
Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Don HIGGINSON, Plaintiff-Appellant,

v.

Xavier BECERRA, in his official capacity as Attorney General of California; City of Poway, Defendants-Appellees, California League of United Latin American Citizens; et al., Intervenor-Defendants-Appellees.

No. 19-55275
|
Argued and Submitted November 5, 2019 Pasadena, California
|
FILED December 4, 2019

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Appeal from the United States District Court for the Southern District of California, William Q. Hayes, District Judge, Presiding, D.C. No. 3:17-cv-02032-WQH-MSB

Before: MURGUIA and HURWITZ, Circuit Judges, and GUIROLA,[*] District Judge.

***706** MEMORANDUM[**]

Don Higginson appeals the district court's dismissal on remand of his complaint for failure to state a claim. *See Higginson v. Becerra*, 363 F. Supp. 3d 1118 (S.D. Cal. 2019).[1] We have jurisdiction under 28 U.S.C. § 1291. Agreeing with the decision of the California Court of Appeal in *Sanchez v. City of Modesto*, 145 Cal.App.4th 660, 51 Cal. Rptr. 3d 821 (2006), we affirm.

In June 2017, the City of Poway, California received a letter from a private attorney threatening a lawsuit, claiming the City had violated the California Voting Rights Act ("CVRA"), Cal. Elec. Code §§ 14025–32. In response, the City Council determined that instead of defending the threatened litigation and incurring significant expenses in doing so, it would adopt a resolution that would transition the City from at-large to district-based elections.

Higginson's complaint alleges that he, a resident of the City, lives in a racially gerrymandered electoral district because: (1) "[t]he City would not have switched from at-large elections to single-district[ ] elections but for the prospect of liability under the CVRA;" and (2) "[t]he CVRA makes race the predominant factor in drawing electoral districts" by compelling a political subdivision to "abandon its at-large system based on the existence of racially polarized voting and nothing more."

Reviewed de novo and viewed in the light most favorable to him, the allegations of the operative complaint fail to plausibly state that Higginson is a victim of racial

gerrymandering. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1149 (9th Cir. 2019) (stating standard of review). Racial gerrymandering occurs when a political subdivision "intentionally assign[s] citizens to a district on the basis of race without sufficient justification." *Abbott v. Perez*, —— U.S. ——, 138 S. Ct. 2305, 2314, 201 L.Ed.2d 714 (2018) (citing *Shaw v. Reno*, 509 U.S. 630, 641, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993)). Plaintiff alleges no facts concerning the City's motivations for placing him or any other Poway voter in any particular electoral district. *See Bethune-Hill v. Va. State Bd. of Elections*, —— U.S. ——, 137 S. Ct. 788, 797, 197 L.Ed.2d 85 (2017) ("[A] plaintiff alleging racial gerrymandering bears the burden 'to show ... that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.' ") (quoting *Miller v. Johnson,* 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995)). Similarly, he fails to cite any language in the CVRA that mandates how electoral districts can or should be drawn. *See* Cal. Elec. Code §§ 14025–32.

The operative complaint does not allege that the City or the CVRA "distribute[d] burdens or benefits on the basis of individual racial classifications." ***707** *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007). Although a finding of racially polarized voting triggers the application of the CVRA, it is well settled that governments may adopt measures designed "to eliminate racial disparities through race-neutral means." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, —— U.S. ——, 135 S. Ct. 2507, 2524, 192 L.Ed.2d 514 (2015); *see also Bush v. Vera*, 517 U.S. 952, 958, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race.").

Because Plaintiff's allegations do not trigger strict scrutiny, *see Cooper v. Harris*, —— U.S. ——, 137 S. Ct. 1455, 1464, 197 L.Ed.2d 837 (2017), and he does not contend the City lacked a rational basis for its actions, *see FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314–15, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993), he fails to state a claim for relief. He also therefore was not entitled to injunctive relief. *See Short v. Brown*, 893 F.3d 671, 675–76 (9th Cir. 2018).

AFFIRMED.

All Citations

786 Fed.Appx. 705 (Mem)

Footnotes

* The Honorable Louis Guirola, Jr., United States District Judge for the Southern District of Mississippi, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1 We previously held that Plaintiff has standing to assert an as-applied challenge to the City's adoption of Map 133, the district-based electoral map adopted by the City in October 2017. *Higginson v. Becerra*, 733 F. App'x 402, 403 (9th Cir. 2018).

New York Official Reports

94 A.D.3d 616, 942 N.Y.S.2d 522, 2012 N.Y. Slip Op. 03086

****1** David P. Kaplan et al., Respondents-Appellants

v

Madison Park Group Owners, LLC, et al., Defendants, and David Lipman, Appellant-Respondent.

Supreme Court, Appellate Division, First Department, New York
650136/10, 7260
April 24, 2012

CITE TITLE AS: Kaplan v Madison Park Group Owners, LLC

HEADNOTE

Vendor and Purchaser
Contract for Sale of Condominium
Anticipatory Breach Did Not Arise—Party Already in Material Breach

Judd Burstein, P.C., New York (Judd Burstein of counsel), for appellant-respondent.
Braunstein Turkish LLP, Woodbury (William J. Turkish of counsel), for respondents-appellants.

Order, Supreme Court, New York County (James A. Yates, J.), entered January 12, 2011, which, to the extent appealed from, denied plaintiffs' motion for partial summary judgment on their cause of action for a declaratory judgment and for dismissal of ***617** defendant David Lipman's counterclaims for a declaratory judgment and breach of contract, and denied Lipman's cross motion for partial summary judgment on his counterclaim for a declaratory judgment and for dismissal of plaintiffs' causes of action for breach of contract, rescission of the parties' agreements, unjust enrichment, and ancillary damages, unanimously modified, on the law, to the extent of granting plaintiffs' motion and declaring that they are entitled to the return of their contract deposit in the sum of $622,500, plus interest, and otherwise affirmed, without costs.

Defendant David Lipman is the contract vendee of two condominium units that were being sold by defendant Madison Park Group Owner, LLC (MPGO). By written agreement dated October 30, 2008, Lipman assigned his rights under the twin November 2007 purchase agreements to plaintiffs. Pursuant to the assignment, plaintiffs agreed to be bound by and assume Lipman's obligations under the purchase agreements including the obligation to close on the purchase of the premises and pay the purchase price. As required by the agreements, plaintiffs deposited $622,500 with an escrow agent. By letter dated June 19, 2009, the sponsor duly advised plaintiffs of a July 27, 2009 closing date. Plaintiffs, however, did not appear for the closing. Paragraph 13 of each purchase agreement defined "[p]urchaser's failure to close title on the date, hour and place specified by the Sponsor pursuant to Section 5 hereof" as a default. Paragraph 13 also provided that "[s]ponsor shall notify purchaser in writing of such default and advise Purchaser that he has thirty (30) days after Sponsor gives written notice to the Purchaser to cure such default." Paragraph 13 further gave the sponsor the right to retain the purchaser's deposit as liquidated damages if the default was not timely cured. Similarly, the assignment agreement gave Lipman the right to keep plaintiffs' deposit as liquidated damages in the event of the seller's failure to close title because of plaintiffs' uncured default. By letter dated July 29, ****2** 2009, plaintiffs also advised MPGO of their decision to purportedly terminate the agreement and requested a return of their deposit. The import of this letter is determinative.

On or about March 12, 2010, the Department of Law accepted for filing the 17th amendment to the condominium's offering plan. Pursuant to that amendment, the sponsor offered all purchasers under executed purchase agreements the right to rescind their agreements and obtain refunds of their contract deposits. This measure was taken because of the disclosure of a foreclosure action that had been brought against the sponsor. Invoking a provision of the assignment agreement, plaintiffs, on ***618** March 22, 2010, notified Lipman of their decision to rescind the purchase agreements pursuant to the 17th amendment and demanded that he instruct the escrow agent to refund their deposit.

Plaintiffs moved for summary judgment on their sixth cause of action for a judgment declaring that they are entitled to a return of their deposit plus a dismissal of Lipman's

counterclaims. Lipman cross-moved for summary judgment on his first counterclaim for a declaration that he is entitled to keep plaintiffs' deposit as liquidated damages. Both motions were denied.

Lipman correctly asserts that there was no lawful excuse or legitimate basis for plaintiffs' failure to attend the July 27, 2009 closing. Plaintiffs therefore defaulted under the purchase agreements and the assignment agreement. However, plaintiffs contended, and the motion court correctly found, that Lipman's contractual right to retain the deposit was never triggered because neither Lipman nor the sponsor sent plaintiffs the default notices required by paragraph 13 of each purchase agreement. The next question is whether plaintiffs' July 29, 2009 letter gave rise to an anticipatory breach of the purchase agreements.

The motion court found that plaintiffs repudiated the agreements by issuing the July 29, 2009 letter but also found issues of fact as to whether certain alleged design changes in the common elements of the premises relieved plaintiffs of their obligation to close on the law date. That issue is irrelevant because the July 29, 2009 letter was not a repudiation of the agreements. The letter added nothing to plaintiffs' July 27 default and merely confirmed the default, if it did anything at all.

By definition an anticipatory breach cannot be committed by a party already in material breach of an executory contract. It is well settled that an anticipatory breach of a contract is one that occurs before performance by the breaching party is due. For example, in *Norcon Power Partners v Niagara Mohawk Power Corp.* (92 NY2d 458 [1998]) the Court of Appeals defined an anticipatory repudiation as one that occurs "prior to the time designated for performance" (*id.* at 462-463). Consistently, in *American List Corp. v U.S. News & World Report* (75 NY2d 38 [1989]) the Court defined an anticipatory breach in terms of "a wrongful repudiation of the contract by one party before the time for performance" (*id.* at 44). Applying New York law, the United States Court of Appeals for the Second Circuit held that "[a]nticipatory repudiation occurs when, before the time for performance has arisen, a party to a contract declares his inten ***619** tion not to fulfill a contractual duty" (*Lucente v International Bus. Machs. Corp.*, 310 F3d 243, 258 [2d Cir 2002] [citations omitted]). The rationale behind the doctrine of anticipatory breach is that it gives the nonrepudiating party an opportunity to treat a repudiation as an anticipatory breach without having to futilely tender performance or wait for the other party's time for performance to arrive (*see Cooper v Bosse*, 85 AD2d 616, 618 [1981]). As noted above, plaintiffs were in default as of July 27, 2009, two days before the letter was sent. Once plaintiffs defaulted on July 27, Lipman did not have to tender performance or wait for a law date because ****3** he could have resorted to the contractual remedies for plaintiffs' breach set forth under paragraph 13. Accordingly, the July 29, 2009 letter did not give rise to an anticipatory repudiation because it was not issued "prior to the time designated for performance" within the meaning of *Norcon* and the other cases cited above. Concur—Friedman, J.P., DeGrasse, Freedman and Abdus-Salaam, JJ.

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86 S.Ct. 1717
Supreme Court of the United States

Nicholas de B. KATZENBACH, Attorney General of the United States, et al., Appellants,
v.
John P. MORGAN and Christine Morgan.
NEW YORK CITY BOARD OF ELECTIONS, etc., Appellants,
v.
John P. MORGAN and Christine Morgan.

Nos. 847, 877.
|
Argued April 18, 1966.
|
Decided June 13, 1966.

Synopsis

Action by voters of New York City seeking declaratory judgment and injunction restraining compliance with Voting Rights Act of 1965. A statutory three-judge court for the United States District Court for the District of Columbia, 247 F.Supp. 196, granted the declaratory and injunctive relief requested, and appeals were taken directly to the United States Supreme Court which noted probable jurisdiction. The Supreme Court, Mr. Justice Brennan, held that section of Voting Rights Act of 1965 providing that no person who has successfully completed sixth primary grade in American school in which predominant language is other than English shall be disqualified from voting under any literacy test, as applied to prohibit enforcement of election laws of New York requiring ability to read and write English as condition of voting, was proper exercise of powers granted to Congress by enforcement section of Fourteenth Amendment and, by force of supremacy clause, New York English literacy requirement cannot be enforced to extent that it is inconsistent with Voting Rights Act.

Reversed.

Mr. Justice Harlan and Mr. Justice Stewart dissented.

For dissenting opinion see 86 S.Ct. 1731.

See also 86 S.Ct. 1728.

West Headnotes (12)

[1] **Election Law** Literacy tests
Federal Preemption Elections

Section of Voting Rights Act of 1965 providing that no person who has successfully completed sixth primary grade in American school in which predominant language is other than English shall be disqualified from voting under any literacy test, as applied to prohibit enforcement of election laws of New York requiring ability to read and write English as condition of voting, was proper exercise of powers granted to Congress by enforcement section of Fourteenth Amendment and, by force of supremacy clause, New York English literacy requirement cannot be enforced to extent that it is inconsistent with Voting Rights Act. Voting Rights Act of 1965, § 4(e), 42 U.S.C.A. § 1973b(e); U.S.C.A.Const. art. 6, cl. 1 et seq.; Amend. 14, § 5; Const.N.Y. art. 2, § 1; Election Law N.Y. §§ 150, 168.

44 Cases that cite this headnote

[2] **United States** Eligibility and qualification

Qualifications established by states for voting for state officers and members of most numerous branch of state legislature also determine who may vote for United States representatives and senators. U.S.C.A.Const. art. 1, § 2.

1 Case that cites this headnote

[3] **Election Law** Power to Restrict or Extend Suffrage

States have no power to grant or withhold voting franchise on conditions forbidden by Fourteenth Amendment or any other provision of constitution, and such exercises of state power are no more immune to limitations of Fourteenth Amendment than any other state action. U.S.C.A.Const. Amend. 14.

5 Cases that cite this headnote

[4] **Constitutional Law** Qualifications of Voters

Election Law Literacy tests

Section of Voting Rights Act of 1965 providing that no person who has successfully completed sixth primary grade in American school in which predominant language is other than English shall be disqualified from voting under any literacy test can be sustained as appropriate legislation to enforce equal protection clause even though judiciary has not decided that application of English literacy requirement prohibited by that action is forbidden by equal protection clause itself. Voting Rights Act of 1965, § 4(e), 42 U.S.C.A. § 1973b(e); U.S.C.A.Const. Amend. 14.

22 Cases that cite this headnote

[5] **Constitutional Law** Equal Protection Clause, enforcement of

Congress is authorized to enforce prohibitions of equal protection clause by appropriate legislation, and some legislation is contemplated to make amendment fully effective. U.S.C.A.Const. Amend. 14.

63 Cases that cite this headnote

[6] **Constitutional Law** Enforcement of Fourteenth Amendment

Rule that all means which are appropriate, which are plainly adapted to legitimate end, and which are not prohibited, but are consistent with letter and spirit of constitution, are constitutional is standard measuring what constitutes appropriate legislation under enforcement clause of Fourteenth Amendment. U.S.C.A.Const. Amend. 14, § 5.

68 Cases that cite this headnote

[7] **Constitutional Law** Enforcement of Fourteenth Amendment

Enforcement clause of Fourteenth Amendment is positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure guarantees of such amendment. U.S.C.A.Const. Amend. 14, § 5.

85 Cases that cite this headnote

[8] **Constitutional Law** Enforcement of Fourteenth Amendment

Power of Congress under enforcement clause of Fourteenth Amendment is limited to adopting measures to enforce guarantees of amendment, and such clause grants Congress no power to restrict, abrogate, or dilute, such guarantees. U.S.C.A.Const. Amend. 14, § 5.

40 Cases that cite this headnote

[9] **Constitutional Law** Elections

It was not for court to review congressional resolution of various conflicting considerations involved in enactment of section of Voting Rights Act of 1965 providing that no person who has successfully completed sixth primary grade in American school in which predominant language is other than English shall be disqualified from voting under any literacy test, and it was sufficient that court was able to perceive basis upon which Congress might resolve conflict as it did. Voting Rights Act of 1965, § 4(e), 42 U.S.C.A. § 1973b(e).

32 Cases that cite this headnote

[10] **Constitutional Law** Constitutionality of Statutory Provisions

In deciding constitutional propriety of limitations in reform measure, Supreme Court is guided by principles that statute is not invalid under constitution because it might have gone further than it did, that legislature need not strike at all evils at same time, and that reform may take one step at a time, addressing itself to phase of problem which seems most acute to legislative mind.

69 Cases that cite this headnote

[11] **Constitutional Law** Voters, candidates, and elections

Election Law Literacy tests

Fact that section of Voting Rights Act of 1965 providing that no person who has successfully completed sixth primary grade in American school in which predominant language is other than English shall be disqualified for voting under any literacy test prohibits enforcement of English literacy requirement only for those educated in school located within United States jurisdiction in which language of instruction is other than English and not for those educated in schools beyond territorial limits of United States in which language of instruction is other than English did not establish that section itself worked invidious discrimination in violation of Fifth Amendment. Voting Rights Act of 1965, § 4(e), 42 U.S.C.A. § 1973b(e); U.S.C.A.Const. Amend. 5.

19 Cases that cite this headnote

[12] **Constitutional Law** Qualifications of Voters

Election Law Literacy tests

Section of Voting Rights Act of 1965 providing that no person who has successfully completed sixth primary grade in American school in which predominant language is other than English shall be disqualified from voting under any literacy test, as applied to prohibit enforcement of election laws of New York requiring ability to read and write English as condition of voting, is appropriate legislation to enforce equal protection clause. Voting Rights Act of 1965, § 4(e), 42 U.S.C.A. § 1973b(e); Const.N.Y. art. 2, § 1; Election Law N.Y. §§ 150, 168; U.S.C.A.Const. Amend. 14, § 5.

11 Cases that cite this headnote

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****1719 *642** Sol. Gen. Thurgood Marshall and J. Lee Rankin, New York City, for appellants.

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Opinion

***643** Mr. Justice BRENNAN delivered the opinion of the Court.

[1] These cases concern the constitutionality of s 4(e) of the Voting Rights Act of 1965.[1] That law, in the respects pertinent in these cases, provides that no person who has successfully completed the sixth primary grade in a public school in, or a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English shall be denied the right to vote in any election because of his inability to read or write English. Appellees, registered voters in New York City, ****1720** brought this suit to challenge the constitutionality of s 4(e) insofar as it pro tanto prohibits ***644** the enforcement of the election laws of New York[2] requiring an ability to read and write English as a condition of voting. Under these laws many of the several hundred thousand New York City residents who have migrated there from the Commonwealth of Puerto Rico had previously been denied the right to vote, and appellees attack s 4(e) insofar as it would enable many of ***645** these citizens to vote.[3] Pursuant to s 14(b) of the Voting Rights Act of 1965, appellees commenced this proceeding in the District Court for the District of ****1721** Columbia seeking a declaration that s 4(e) is invalid and an injunction prohibiting appellants, the Attorney General of the United States and the New York City Board of Elections, from either enforcing or complying with ***646** s 4(e).[4] A three-judge district court was designated. 28 U.S.C. ss 2282, 2284 (1964 ed.). Upon cross motions for summary judgment, that court, one judge dissenting, granted the declaratory and injunctive relief appellees sought. The court held that in enacting s 4(e) Congress exceeded the powers granted to it by the Constitution and therefore usurped powers reserved to the States by the Tenth Amendment. 247 F.Supp. 196. Appeals were taken directly to this Court, 28

U.S.C. ss 1252, 1253 (1964 ed.) and we noted probable jurisdiction. 382 U.S. 1007, 86 S.Ct. 621, 15 L.Ed.2d 524. We reverse. We hold that, in the application challenged in these cases, s 4(e) is a proper exercise of the powers granted to Congress by s 5 of the Fourteenth Amendment[5] and that by force of the ***647** Supremacy Clause, Article VI, the New York English literacy requirement cannot be enforced to the extent that it is inconsistent with s 4(e).

[2] **[3]** Under the distribution of powers effected by the Constitution, the States establish qualifications for voting for state officers, and the qualifications established by the States for voting for members of the most numerous branch of the state legislature also determine who may vote for United States Representatives and Senators, Art. I, s 2; Seventeenth Amendment; Ex parte Yarbrough, 110 U.S. 651, 663, 4 S.Ct. 152, 28 L.Ed. 274. But, of course, the States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment, or any other provision of the Constitution. Such exercises of state power are no more immune to the limitations of the ****1722** Fourteenth Amendment than any other state action. The Equal Protection Clause itself has been held to forbid some state laws that restrict the right to vote.[6]

***648** **[4]** **[5]** The Attorney General of the State of New York argues that an exercise of congressional power under s 5 of the Fourteenth Amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce. More specifically, he urges that s 4(e) cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides—even with the guidance of a congressional judgment—that the application of the English literacy requirement prohibited by s 4(e) is forbidden by the Equal Protection Clause itself. We disagree. Neither the language nor history of s 5 supports such a construction.[7] As was said with regard to s 5 in Ex parte Com. of Virginia, 100 U.S. 339, 345, 25 L.Ed. 676. 'It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective.' A construction of s 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment.[8] It would confine the legislative power ***649** in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of s 1 of the Amendment. See Fay v. People of State of New York, 332 U.S. 261, 282—284, 67 S.Ct. 1613, 1624—1625, 91 L.Ed. 2043.

Thus our task in this case is not to determine whether the New York English literacy requirement as applied to deny the right to vote to a person who successfully completed the sixth grade in a Puerto Rican school violates the Equal ****1723** Protection Clause. Accordingly, our decision in Lassiter v. Northampton County Bd. of Election, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072, sustaining the North Carolina English literacy requirement as not in all circumstances prohibited by the first sections of the Fourteenth and Fifteenth Amendments, is inapposite. Compare also Guinn v. United States, 238 U.S. 347, 366, 35 S.Ct. 926, 931, 59 L.Ed. 1340; Camacho v. Doe, 31 Misc.2d 692, 221 N.Y.S.2d 262 (1958), aff'd 7 N.Y.2d 762, 194 N.Y.S.2d 33, 163 N.E.2d 140 (1959); Camacho v. Rogers, 199 F.Supp. 155 (D.C.S.D.N.Y.1961). Lassiter did not present the question before us here: Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under s 5 of the Fourteenth Amendment? In answering this question, our task is limited to determining whether such ***650** legislation is, as required by s 5, appropriate legislation to enforce the Equal Protection Clause.

[6] **[7]** By including s 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, s 8, cl. 18.[9] The classic formulation of the reach of those powers was established by Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 421, 4 L.Ed. 579:

'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Ex parte Com. of Virginia, 100 U.S., at 345—346, 25 L.Ed. 676, decided 12 years after the adoption of the Fourteenth

Amendment, held that congressional power under s 5 had this same broad scope:
'Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.'

***651** Strauder v. West Virginia, 100 U.S. 303, 311, 25 L.Ed. 664;Virginia v. Rives, 100 U.S. 313, 318, 25 L.Ed. 667. Section 2 of the Fifteenth Amendment grants Congress a similar power to enforce by 'appropriate legislation' the provisions of that amendment; and we recently held in State of South Carolina v. Katzenbach, 383 U.S. 301, 326, 86 S.Ct. 803, 817, 15 L.Ed.2d 769, that '(t)he basic test to be applied in a case involving s 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States.' That test was identified as the one formulated in McCulloch v. Maryland. See also James Everard's Breweries v. Day, 265 U.S. 545, 558—559, 44 S.Ct. 628, 631, 68 L.Ed. 1174 (Eighteenth Amendment). Thus the McCulloch v. Maryland standard is the measure of what constitutes 'appropriate legislation' under s 5 of the Fourteenth Amendment. Correctly viewed, s 5 is a positive grant of legislative power ****1724** authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.

[8] We therefore proceed to the consideration whether s 4(e) is 'appropriate legislation' to enforce the Equal Protection Clause, that is, under the McCulloch v. Maryland standard, whether s 4(e) may be regarded as an enactment to enforce the Equal Protection Clause, whether it is 'plainly adapted to that end' and whether it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'[10]

***652** There can be no doubt that s 4(e) may be regarded as an enactment to enforce the Equal Protection Clause. Congress explicitly declared that it enacted s 4(e) 'to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English.' The persons referred to include those who have migrated from the Commonwealth of Puerto Rico to New York and who have been denied the right to vote because of their inability to read and write English, and the Fourteenth Amendment rights referred to include those emanating from the Equal Protection Clause. More specifically, s 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement.

[9] Section 4(e) may be readily seen as 'plainly adapted' to furthering these aims of the Equal Protection Clause. The practical effect of s 4(e) is to prohibit New York from denying the right to vote to large segments of its Puerto Rican community. Congress has thus prohibited the State from denying to that community the right that is 'preservative of all rights.' Yick Wo v. Hopkins, 118 U.S. 356, 370, 6 S.Ct. 1064, 1071, 30 L.Ed. 220. This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community.[11] Section ***653** 4(e) thereby enables the Puerto Rican minority better to obtain 'perfect equality of civil rights and the equal protection of the laws.' It was well within congressional authority to say that this need of the Puerto Rican minority for the ****1725** vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. There plainly was such a basis to support s 4(e) in the application in question in this case. Any contrary conclusion would require us to be blind to the realities familiar to the legislators.[12]

The result is no different if we confine our inquiry to the question whether s 4(e) was merely legislation aimed ***654** at the elimination of an invidious discrimination in establishing voter qualifications. We are told that New York's English literacy requirement originated in the desire to provide an incentive for non-English speaking immigrants to learn the English language and in order to assure the

intelligent exercise of the franchise. Yet Congress might well have questioned, in light of the many exemptions provided,[13] and some evidence suggesting that prejudice played a prominent role in the enactment of the requirement,[14] whether these were actually the interests being served. Congress might have also questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise.[15] Finally, Congress **1726 might well have concluded that *655 as a means of furthering the intelligent exercise of the franchise, an ability to read or understand Spanish is as effective as ability to read English for those to whom Spanish-language newspapers and Spanish-language radio and television programs are available to inform them of election issues and governmental affairs.[16] Since Congress undertook to legislate so as to preclude the enforcement of the state law, and did so in the context of a general appraisal of literacy requirements for voting, see State of *656 South Carolina v. Katzenbach, supra, to which it brought a specially informed legislative competence,[17] it was Congress' prerogative to weigh these competing considerations. Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause.

There remains the question whether the congressional remedies adopted in s 4(e) constitute means which are not prohibited by, but are consistent 'with the letter and spirit of the constitution.' The only respect in which appellees contend that s 4(e) fails in this regard is that the section itself works an invidious discrimination in violation of the Fifth Amendment by prohibiting the enforcement of the English literacy requirement only for those educated in American-flag schools (schools located within United States jurisdiction) in which the language of instruction was other than English, and not for those educated in schools **1727 beyond the territorial limits of the United States in which the language of instruction was also other than English. This is not a complaint that Congress, in enacting s 4(e), has unconstitutionally denied or diluted anyone's right to vote but rather that Congress violated the Constitution by not extending the *657 relief effected in s 4(e) to those educated in non-American-flag schools. We need not pause to determine whether appellees have a sufficient personal interest to have s 4(e) invalidated on this ground, see generally United States v. Raines, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524, since the argument, in our view, falls on the merits.

[10] Section 4(e) does not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be denied it by state law. Thus we need not decide whether a state literacy law conditioning the right to vote on achieving a certain level of education in an American-flag school (regardless of the language of instruction) discriminates invidiously against those educated in non-American-flag schools. We need only decide whether the challenged limitation on the relief effected in s 4(e) was permissible. In deciding that question, the principle that calls for the closest scrutiny of distinctions in laws denying fundamental rights, see n. 15, supra, is inapplicable; for the distinction challenged by appellees is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise. Rather, in deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' Roschen v. Ward, 279 U.S. 337, 339, 49 S.Ct. 336, 73 L.Ed. 722, that a legislature need not 'strike at all evils at the same time.' Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 610, 55 S.Ct. 570, 571, 79 L.Ed. 1086 and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' Williamson v. Lee Optical Co., 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563.

[11] Guided by these principles, we are satisfied that appellees' challenge to this limitation in s 4(e) is without merit. In the context of the case before us, the congressional choice to limit the relief effected in s 4(e) may, *658 for example, reflect Congress' greater familiarity with the quality of instruction in American-flag schools,[18] a recognition of the unique historic relationship between the Congress and the Commonwealth of Puerto Rico,[19] an awareness of the Federal Government's acceptance of the desirability of the use of Spanish as the language of instruction in Commonwealth schools,[20] and the fact that Congress has fostered policies encouraging migration from the Commonwealth to the States.[21] We have no occasion to determine in this case whether such factors would justify a similar distinction embodied in a voting-qualification law that denied the franchise to persons educated in non-American-flag schools.

We hold only that the limitation on relief effected in s 4(e) does not constitute a forbidden discrimination since these factors might ****1728** well have been the basis for the decision of Congress to go 'no farther than it did.'

[12] We therefore conclude that s 4(e), in the application challenged in this case, is appropriate legislation to enforce the Equal Protection Clause and that the judgment of the District Court must be and hereby is reversed.

Reversed.

Mr. Justice DOUGLAS joins the Court's opinion except for the discussion, at pp. 1726—1728, of the question whether the congressional remedies adopted in s 4(e) constitute means which are not prohibited by, but are consistent with 'the letter and spirit of the constitution.' On that ***659** question, he reserves judgment until such time as it is presented by a member of the class against which that particular discrimination is directed.

All Citations

384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828

Footnotes

1 The full text of s 4(e) is as follows:

'(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

'(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.' 79 Stat. 439, 42 U.S.C. s 1973b(e) (1964 ed., Supp. I).

2 Article II, s 1, of the New York Constitution provides, in pertinent part:

'Notwithstanding the foregoing provisions, after January first, one thousand nine hundred twenty-two, no person shall become entitled to vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English.'

Section 150 of the New York Election Law, McKinney's Consol.Laws, c. 17, provides, in pertinent part:

'* * * In the case of a person who became entitled to vote in this state by attaining majority, by naturalization or otherwise after January first, nineteen hundred twenty-two, such person must, in addition to the foregoing provisions, be able, except for physical disability, to read and write English. A 'new voter,' within the meaning of this article, is a person who, if he is entitled to vote in this state, shall have become so entitled on or after January first, nineteen hundred twenty-two, and who has not already voted at a general election in the state of New York after making proof of ability to read and write English, in the manner provided in section one hundred sixty-eight.'

Section 168 of the New York Election Law provides, in pertinent part:

'1. The board of regents of the state of New York shall make provisions for the giving of literacy tests.

'2. * * * But a new voter may present as evidence of literacy a certificate or diploma showing that he has completed the work up to and including the sixth grade of an approved elementary school or of an approved higher school in which English is the language of instruction or a certificate or diploma showing that he has completed the work up to and

including the sixth grade in a public school or a private school accredited by the Commonwealth of Puerto Rico in which school instruction is carried on predominantly in the English language or a matriculation card issued by a college or university to a student then at such institution or a certificate or a letter signed by an official of the university or college certifying to such attendance.'

Section 168 of the Election Law as it now reads was enacted while s 4(e) was under consideration in Congress. See 111 Cong.Rec. 19376—19377. The prior law required the successful completion of the eighth rather than the sixth grade in a school in which the language of instruction was English.

3 This limitation on appellees' challenge to s 4(e), and thus on the scope of our inquiry, does not distort the primary intent of s 4(e). The measure as sponsored in the Senate by Senators Javits and Kennedy and in the House by Representatives Gilbert and Ryan, all of New York, for the explicit purpose of dealing with the disenfranchisement of large segments of the Puerto Rican population in New York. Throughout the congressional debate it was repeatedly acknowledged that s 4(e) had particular reference to the Puerto Rican population in New York. That situation was the almost exclusive subject of discussion. See 111 Cong.Rec. 11028, 11060—11074, 15666, 16235—16245, 16282—16283, 19192—19201, 19375—19378; see also Voting Rights, Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 6400, 89th Cong., 1st Sess., 100—101, 420—421, 508—517 (1965). The Solicitor General informs us in his brief to this Court, that in all probability the practical effect of s 4(e) will be limited to enfranchising those educated in Puerto Rican schools. He advises us that, aside from the schools in the Commonwealth of Puerto Rico, there are no public or parochial schools in the territorial limits of the United States in which the predominant language of instruction is other than English and which would have generally been attended by persons who are otherwise qualified to vote save for their lack of literacy in English.

4 Section 14(b) provides, in pertinent part:

'No court other than the District Court for the District of Columbia * * * shall have jurisdiction to issue * * * any restraining order or temporary or permanent injunction against the * * * enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto.' 79 Stat. 445, 42 U.S.C. s 1973*l*(b) (1964 ed., Supp. I).

The Attorney General of the United States was initially named as the sole defendant. The New York City Board of Elections was joined as a defendant after it publicly announced its intention to comply with s 4(e); it has taken the position in these proceedings that s 4(e) is a proper exercise of congressional power. The Attorney General of the State of New York has participated as amicus curiae in the proceedings below and in this Court, urging s 4(e) be declared unconstitutional. The United States was granted leave to intervene as a defendant, 28 U.S.C. s 2403 (1964 ed.); Fed.Rule Civ.Proc. 24(a).

5 'Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.'

It is therefore unnecessary for us to consider whether s 4(e) could be sustained as an exercise of power under the Territorial Clause, Art. IV, s 3; see dissenting opinion of Judge McGowan below, 247 F.Supp., at 204; or as a measure to discharge certain treaty obligations of the United States, see Treaty of Paris of 1898, 30 Stat. 1754, 1759; United Nations Charter, Articles 55 and 56, 59 Stat. 1033; Art. I, s 8, cl. 18. Nor need we consider whether s 4(e) could be sustained insofar as it relates to the election of federal officers as an exercise of congressional power under Art. I, s 4, see Minor v. Happersett, 21 Wall. 162, 171, 22 L.Ed. 627;United States v. Classic, 313 U.S. 299, 315, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368; Literacy Tests and Voter Requirements in Federal and State Elections, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on S. 480, S. 2750, and S. 2979, 87th Cong., 2d Sess., 302, 306—311 (1962) (brief of the Attorney General); nor whether s 4(e) could be sustained, insofar as it relates to the election of state officers, as an exercise of congressional power to enforce the clause guaranteeing to each State a republican form of government, Art. IV, s 4; Art. I, s 8, cl. 18.

6 Harper v. Virginia Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169;Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675. See also United States v. Mississippi, 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed.2d 717;Louisiana v. United States, 380 U.S. 145, 151, 85 S.Ct. 817, 821, 13 L.Ed.2d 709;Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072;Pope v. Williams, 193 U.S. 621, 632—634, 24 S.Ct. 573, 575—576, 48 L.Ed.

817;Minor v. Happersett, 21 Wall. 162, 22 L.Ed. 627; cf. Burns v. Richardson, 384 U.S. 73, at 92, 86 S.Ct. 1286, at 1296, 16 L.Ed.2d 376;Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506.

7 For the historical evidence suggesting that the sponsors and supporters of the Amendment were primarily interested in augmenting the power of Congress, rather than the judiciary, see generally Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 73 Yale L.J. 1353, 1356—1357; Harris, The Quest for Equality, 33—56 (1960); tenBroek, The Antislavery Origins of the Fourteenth Amendment 187—217 (1951).

8 Senator Howard, in introducing the proposed Amendment to the Senate, described s 5 as 'a direct affirmative delegation of power to Congress,' and added:

'It casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no State infringes the rights of persons or property. I look upon this clause as indispensable for the reason that it thus imposes upon Congress this power and this duty. It enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment.' Cong. Globe, 39th Cong., 1st Sess., 2766, 2768 (1866).

This statement of s 5's purpose was not questioned by anyone in the course of the debate. Flack, The Adoption of the Fourteenth Amendment 138 (1908).

9 In fact, earlier drafts of the proposed Amendment employed the 'necessary and proper' terminology to describe the scope of congressional power under the Amendment. See tenBroek, The Antislavery Origins of the Fourteenth Amendment 187—190 (1951). The substitution of the 'appropriate legislation' formula was never thought to have the effect of diminishing the scope of this congressional power. See, e.g., Cong.Globe, 42d Cong., 1st Sess., App. 83 (Representative Bingham, a principal draftsman of the Amendment and the earlier proposals).

10 Contrary to the suggestion of the dissent, infra, 384 U.S. p. 668, 86 S.Ct. p. 1736, 16 L.Ed.2d p. 845, s 5 does not grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' We emphasize that Congress' power under s 5 is limited to adopting measures to enforce the guarantees of the Amendment; s 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by s 5—a measure 'to enforce' the Equal Protection Clause since that clause of its own force prohibits such state laws.

11 Cf. James Everard's Breweries v. Day, supra, which held that, under the Enforcement Clause of the Eighteenth Amendment, Congress could prohibit the prescription of intoxicating malt liquor for medicinal purposes even though the Amendment itself only prohibited the manufacture and sale of intoxicating liquors for beverage purposes. Cf. also the settled principle applied in the Shreveport Case (Houston, E. & W.T.R. Co. v. United States, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341), and expressed in United States v. Darby, 312 U.S. 100, 118, 61 S.Ct. 451, 459, 85 L.Ed. 609, that the power of Congress to regulate interstate commerce 'extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end * * *.' Accord, Heart of Atlanta Motel v. United States, 379 U.S. 241, 258, 85 S.Ct. 348, 358, 13 L.Ed.2d 258.

12 See, e.g., 111 Cong.Rec. 11061—11062, 11065—11066, 16240; Literacy Tests and Voter Requirements in Federal and State Elections, Senate Hearings, n. 5, supra, 507—508.

13 The principal exemption complained of is that for persons who had been eligible to vote before January 1, 1922. See n. 2, supra.

14 This evidence consists in part of statements made in the Constitutional Convention first considering the English literacy requirement, such as the following made by the sponsor of the measure: 'More precious even than the forms of government are the mental qualities of our race. While those stand unimpaired, all is safe. They are exposed to a single single danger, and that is that by constantly changing our voting citizenship through the wholesale, but valuable and

necessary infusion of Southern and Eastern European races * * *. The danger has begun. * * * We should check it.' III New York State Constitutional Convention 3012 (Rev. Record 1916).

See also id., at 3015—3017, 3021—3055. This evidence was reinforced by an understanding of the cultural milieu at the time of proposal and enactment, spanning a period from 1915 to 1921—not one of the enlightened eras of our history. See generally Chafee, Free Speech in the United States 102, 237, 269—282 (1954 ed.). Congress was aware of this evidence. See, e.g., Literacy Tests and Voter Requirements in Federal and State Elections, Senate Hearings, n. 5, supra, 507—513; Voting Rights, House Hearings, n. 3, supra, 508—513.

15 Other States have found ways of assuring an intelligent exercise of the franchise short of total disenfranchisement of persons not literate in English. For example, in Hawaii, where literacy in either English or Hawaiian suffices, candidates' names may be printed in both languages, Hawaii Rev.Laws s 11—38 (1963 Supp.); New York itself already provides assistance for those exempt from the literacy requirement and are literate in no language, N.Y. Election Law, s 169; and, of course, the problem of assuring the intelligent exercise of the franchise has been met by those States, more than 30 in number, that have no literacy requirement at all, see e.g., Fla.Stat.Ann. ss 97.061, 101.061 (1960) (form of personal assistance); New Mexico Stat.Ann. ss 3—2—11, 3—3—13 (personal assistance for those literate in no language), ss 3—3—7, 3—3—12, 3—2—41 (1953) (ballots and instructions authorized to be printed in English or Spanish). Section 4(e) does not preclude resort to these alternative methods of assuring the intelligent exercise of the franchise. True, the statute precludes, for a certain class, disenfranchisement and thus limits the States' choice of means of satisfying a purported state interest. But our cases have held that the States can be required to tailor carefully the means of satisfying a legitimate state interest when fundamental liberties and rights are threatened, see, e.g., Carrington v. Rash, 380 U.S. 89, 96, 85 S.Ct. 775, 780, 13 L.Ed.2d 675;Harper v. Virginia Board of Elections, 383 U.S. 663, 670, 86 S.Ct. 1079, 1083, 16 L.Ed.2d 169;Thomas v. Collins, 323 U.S. 516, 529—530, 65 S.Ct. 315, 322—323, 89 L.Ed. 430;Thornhill v. State of Alabama, 310 U.S. 88, 95—96, 60 S.Ct. 736, 740—741, 84 L.Ed. 1093;United States v. Carolene Products Co., 304 U.S. 144, 152—153, n. 4, 58 S.Ct. 778, 783—784, 82 L.Ed. 1234;Meyer v. State of Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042; and Congress is free to apply the same principle in the exercise of its powers.

16 See, e.g., 111 Cong.Rec. 11060—11061, 15666, 16235. The record in this case includes affidavits describing the nature of New York's two major Spanish-language newspapers, one daily and one weekly, and its three full-time Spanish-language radio stations and affidavits from those who have campaigned in Spanish-speaking areas.

17 See, e.g., 111 Cong.Rec. 11061 (Senator Long of Louisiana and Senator Young), 11064 (Senator Holland), drawing on their experience with voters literate in a language other than English. See also an affidavit from Representative Willis of Louisiana expressing the view that on the basis of his thirty years' personal experience in politics he has 'formed a definite opinion that French-speaking voters who are illiterate in English generally have as clear a grasp of the issues and an understanding of the candidates, as do people who read and write the English language.'

18 See, e.g., 111 Cong.Rec. 11060—11061.

19 See Magruder, The Commonwealth Status of Puerto Rico, 15 U.Pitt.L.Rev. 1 (1953).

20 See, e.g., 111 Cong.Rec. 11060—11061, 11066, 11073, 16235. See Osuna, A History of Education in Puerto Rico (1949).

21 See, e.g., 111 Cong.Rec. 16235; Voting Rights, House Hearings, n. 3, supra, 362. See also Jones Act of 1917, 39 Stat. 953, conferring United States citizenship on all citizens of Puerto Rico.

End of Document

84 N.Y.2d 83, 638 N.E.2d 511, 614 N.Y.S.2d 972

Xavier Leon et. al., Respondents,

v.

Wilfredo Martinez, Defendant, and Pearlman, Apat & Futterman et al., Appellants.

Court of Appeals of New York
103
Argued May 3, 1994;

Decided July 7, 1994

CITE TITLE AS: Leon v Martinez

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of that Court, entered May 24, 1993, which (1) reversed, on the law, an order of the Supreme Court (Joseph J. Dowd, J.), entered in Kings County, insofar as it granted a motion by defendants Pearlman, Apat & Futterman and Ira A. Futterman to dismiss the complaint insofar as it is asserted against them, and (2) denied the motion. The following question was certified by the Appellate Division: "Was the decision and order of this court dated May 24, 1993, properly made?"

Leon v Martinez, 193 AD2d 788, affirmed.

HEADNOTES

Pleading
Sufficiency of Pleading
Cause of Action Predicated on Assignment

(1) In an action against the individual defendant and his attorneys to enforce plaintiffs' claim of entitlement to a portion of the proceeds of the settlement of the individual defendant's personal injury action against a third party pursuant to an agreement drafted by the defendant attorney and executed by the individual defendant which stated "I give [a stated percentage] of any recovery that I may get" to each plaintiff, the complaint and supporting affidavit adequately alleged for pleading survival purposes (CPLR 3211 [a] [7]) that the instrument was intended by all parties to effectuate a present assignment to plaintiffs of interests in the future settlement. No particular words are necessary to effect an assignment; it is only required that there be a perfected transaction between the assignor and assignee, intended by those parties to vest in the assignee a present right to the things assigned. Thus, although there are other inconsistent phrases in the instrument executed by the individual defendant, the words "I give" in the instrument are sufficient to withstand a pleadings challenge as to whether the parties intended to effect a present transfer of the specified percentages of the personal injury recovery to plaintiffs. Assuming that an enforceable assignment of the funds is proven, the attorney unquestionably had notice of the agreement he drafted and of the parties' objectives in entering into that agreement and, therefore, the allegation that the attorney paid the entirety of the funds to the individual defendant in disregard of the agreement is sufficient to state a cause of action.

Attorney and Client
Fiduciary Responsibility--Compliance with Assignment of Portion of Proceeds of Client's Personal Injury Settlement

(2) In an action against the individual defendant and his attorneys to enforce plaintiffs' claim of entitlement under an alleged assignment by the ***84** individual defendant of a portion of the proceeds of the settlement of his personal injury action against a third party, wherein plaintiffs alleged that the entire net proceeds were wrongly paid to the individual defendant, compliance with the alleged assignment would not have required the attorneys to violate their ethical duties to their client, the individual defendant, under Code of Professional Responsibility DR 9-102. DR 9-102 mandates only that an attorney pay to the client those funds in the possession of the attorney "which the client ... is entitled to receive" (Code of Professional Responsibility DR 9-102 [C] [4]), which is not the case to the extent that the client has conveyed a right to those funds by an enforceable assignment. Further, DR 9-102 explicitly creates ethical duties running to third parties as to funds in the possession of the attorney to which those third parties are entitled *(see,* DR 9-102 [C] [1], [2]). Assuming an enforceable assignment is proven, upon execution of that assignment, the individual defendant's interest in that portion of the recovery vested in the plaintiffs

as assignees, and the attorneys were then ethically obligated not only to notify the plaintiffs upon receipt of the funds (DR 9-102 [C] [1]) but also to pay the funds to plaintiffs as the persons then entitled to receive them (DR 9-102 [C] [4]).

Pleading
Sufficiency of Pleading
Attorney-Client Relationship

(3) In an action against the individual defendant and his attorneys to enforce plaintiffs' claim of entitlement under an alleged assignment by the individual defendant to a portion of the proceeds of the settlement of his personal injury action against a third party, wherein plaintiffs alleged that the entire net proceeds were wrongly paid to the individual defendant, the averments of the complaint and its supporting affidavit are sufficient, if believed, to support an inference of an attorney-client relationship between plaintiffs and the law firm defendants in the drafting of the agreement, and that those defendants committed either legal malpractice or breached fiduciary obligations in drafting the instrument or by remitting the entire settlement proceeds to the individual defendant. The complaint alleges that one attorney was requested by both the individual defendant and plaintiffs to prepare the instrument. The affidavit of one plaintiff avers that the firm had previously represented the plaintiffs in unrelated matters, that the attorney draftsman "advised [plaintiffs] to obtain an affidavit in writing" from the individual defendant and discussed the matter with both the individual defendant and plaintiffs before consenting to draft the agreement, that the firm continued to represent plaintiffs subsequent to the individual defendant's execution of the agreement, and that "[the attorneys] were [the individual defendant's] attorneys and they were our attorneys". Thus, these allegations are sufficient to withstand a motion to dismiss.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Assignments, § 82; Attorneys at Law, §§ 258, 306; Pleading, § 32.

Carmody-Wait 2d, Officers of Court § 3:177.

CPLR 3211 (a) (7); Judiciary Law, Appendix, Code of Professional Responsibility DR 9-102. ***85**

NY Jur 2d, Assignments, §§18, 74; Attorneys at Law, §§78, 121, 207; Pleading, § 44.

ANNOTATION REFERENCES

Validity, construction, and effect of contract providing for contingent fee to defendant's attorney. 9 ALR4th 191.

POINTS OF COUNSEL

Rivkin, Radler & Kremer, Uniondale *(Evan H. Krinick* and *John M. Denby* of counsel), for appellants.

I. The complaint fails to state a cause of action based on the existence of an assignment. *(Miller v Wells Fargo Bank Intl. Corp.,* 406 F Supp 452, 540 F2d 548; *WFB Telecommunications v NYNEX Corp.,* 188 AD2d 257; *Donovan v Middlebrook,* 95 App Div 365; *Matter of Link,* 173 Misc 217; *Coastal Commercial Corp. v Kosoff & Sons,* 10 AD2d 372; *Farmer's Loan & Trust Co. v Winthrop,* 207 App Div 356, 238 NY 477; *McAvoy v Schramme,* 219 App Div 604, 245 NY 575; *James v Alderton Dock Yards,* 256 NY 298, 681; *Datlof v Turetsky,* 111 AD2d 364.)

II. Defendants cannot be liable to plaintiffs for paying over the purported assignment. *(People v Keeffe,* 50 NY2d 149; *Matter of Kelly v Greason,* 23 NY2d 368; *Judson v Gray,* 11 NY 408; *Muscara v Lamberti,* 133 AD2d 362; *Aetna Cas. & Sur. Co. v Hambly Constr. Co.,* 65 AD2d 612; *Perma Pave Contr. Corp. v Paerdegat Boat & Racquet Club,* 156 AD2d 550; *Crabtree v Tristar Automotive Group,* 776 F Supp 155; *Brinkman v Moskowitz,* 34 Misc 2d 141, 38 Misc 2d 950; *Rafiy v Davis,* 104 Misc 2d 93; *Aiello v Levine,* 44 Misc 2d 1067.)

III. Defendants are not liable to plaintiffs for Mr. Martinez's alleged breach of contract. *(Datlof v Turetsky,* 111 AD2d 364; *James v Alderton Dock Yards,* 256 NY 298; *Thorne Real Estate v Nezelek,* 100 AD2d 651; *Matter of City of New York [Triborough Bridge],* 257 App Div 267; *Macina v Macina,* 94 AD2d 791, 60 NY2d 691; *Bennett v John,* 151 AD2d 711; *Aetna Cas. & Sur. Co. v Hambly Constr. Co.,* 65 AD2d 612; *People v Keeffe,* 50 NY2d 149; *Perma Pave Contr. Corp. v Paerdegat Boat & Racquet Club,* 156 AD2d 550; *Krasne v Gedell,* 147 AD2d 616.)

Razis & Ross, P. C., Long Island City *(George J. Razis* and *Avery Friedman* of counsel), for respondents.

I. A motion to dismiss a complaint must be denied if a reading of the complaint, together with the affidavits submitted on the motion, ***86** reveals that plaintiff has a cause of action, even if the complaint is inartfully pleaded. *(Guggenheimer v Ginzburg,* 43 NY2d 268; *Barrows v Rozansky,* 111 AD2d

105; *Kaufman v International Bus. Machs. Corp.,* 97 AD2d 925; *Scarlett Letters v Compugraphic Corp.,* 61 AD2d 930; *Hatlee v Owego-Apalachin School Dist.,* 100 Misc 2d 1103; *Prudential Ins. Co. v Dewey, Ballantine, Bushby, Palmer & Wood,* 80 NY2d 377.)

II. Both the firm and Futterman represented plaintiffs in connection with the May 12, 1983 agreement. As such, the firm and Futterman owed both a duty of loyalty and care to plaintiffs. *(Howard v Murray,* 43 NY2d 417; *Guggenheimer v Ginzburg,* 43 NY2d 268; *Aiello v Levine,* 44 Misc 2d 1067.)

III. Attorneys who pay the proceeds of a personal injury settlement to their client, with knowledge that the client has assigned a portion of the fund, are liable to the assignee. *(Matter of Neilson Realty Corp. v Motor Vehicle Acc. Indem. Corp.,* 47 Misc 2d 260; *Williams v Ingersoll,* 89 NY 508; *Grossman v Schlosser,* 19 AD2d 893; *Healy v Brotman,* 96 Misc 2d 386; *Aiello v Levine,* 44 Misc 2d 1067; *Brinkman v Moskowitz,* 34 Misc 2d 141, 38 Misc 2d 950; *Continental Purch. Co. v Van Raalte Co.,* 251 App Div 151; *Miller v Wells Fargo Bank Intl. Corp.,* 406 F Supp 452; *Coastal Commercial Corp. v Kosoff & Sons,* 10 AD2d 372.)

OPINION OF THE COURT

Levine, J.

Plaintiffs brought this action against defendant Wilfredo Martinez and his attorneys to enforce plaintiffs' claim of entitlement to a portion of the proceeds of the settlement of a personal injury action by Martinez against the Hertz Corporation. The complaint alleges that, before the settlement of *Martinez v Hertz Corp.,* at the request of plaintiffs and in consideration for plaintiffs' care of Martinez following his accident, defendant attorney Ira Futterman drafted an agreement between plaintiffs and Martinez which Martinez executed. The agreement, annexed to the complaint, provided as follows:

"(1) I give to Gina Leon 5% of any recovery that I may get after deducting all disbursements, expensesand attorney's fees from the case of WILFREDO MARTINEZ V. HERTZ CORPORATION. ***87**

"(2) I give to Xavier Leon 5% of any recovery that I may get after deducting all disbursements, expenses and attorney's fees from the case of WILFREDO MARTINEZ V. HERTZ CORPORATION.

"(3) I give to Maria Macia 15% of any recovery that I may get after deducting all disbursements, expenses and attorney's fees from the case of WILFREDO MARTINEZ V. HERTZ CORPORATION."

Plaintiffs alleged that the agreement constituted a "lien" upon the proceeds of the settlement. The complaint further alleged that, contrary to the agreement, when the personal injury action was settled, defendant Futterman disbursed the entire net proceeds to Martinez and in doing so had a conflict of interest and was guilty of professional misconduct.

Defendants Futterman and the law firm Pearlman, Apat & Futterman moved to dismiss the complaint as against them pursuant to CPLR 3211 (a) (1) as barred by documentary evidence (i.e., the agreement between plaintiffs and Martinez) and CPLR 3211 (a) (7) for failure to state a cause of action. Plaintiffs submitted an affidavit in opposition describing in greater detail the services rendered by them to Martinez, the circumstances under which Futterman was requested to prepare the agreement, and their ongoing professional relationship with Futterman and his firm.

Supreme Court granted defendants' motion under CPLR 3211 (a) (1), concluding that Futterman's preparation of the agreement did not create liability on the part of him and his law firm for Martinez's failure to honor it. Plaintiffs appealed and the Appellate Division reversed, with one Justice dissenting (193 AD2d 788). The Court held that where attorneys have notice of an assignment of a portion of their client's recovery, they may be held liable to the assignees for paying out that recovery in disregard of the assignment. The Appellate Division granted the defendants' motion for leave to appeal to this Court and certified the following question: "Was the decision and order of this court dated May 24, 1993, properly made?" We now affirm.

(1) On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction *(see,* CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit ***88** within any cognizable legal theory *(Morone v Morone,* 50 NY2d 481, 484; *Rovello v Orofino Realty Co.,* 40 NY2d 633, 634). Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law *(see, e.g., Heaney v Purdy,* 29 NY2d 157). In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint *(Rovello v Orofino Realty Co., supra,*

at 635) and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" *(Guggenheimer v Ginzburg,* 43 NY2d 268, 275; *Rovello v Orofino Realty Co., supra,* at 636). In light of these principles, we agree with the majority at the Appellate Division that the instant complaint and supporting affidavit, although inartfully drafted, adequately alleged for pleading survival purposes that the instrument prepared by Futterman was intended by all parties to effectuate a present assignment to plaintiffs of interests in the future settlement.

No particular words are necessary to effect an assignment; it is only required that there be a perfected transaction between the assignor and assignee, intended by those parties to vest in the assignee a present right in the things assigned *(see,* 4 Corbin, Contracts § 879, at 528 [1951]; *Hinkle Iron Co. v Kohn,* 229 NY 179, 182-183; *Coastal Commercial Corp. v Kosoff & Sons,* 10 AD2d 372, 376).[1] Thus, Professor Corbin illustrates, in a contingent fee arrangement between attorney and client, there is a difference in legal effect between the words " 'I will pay you a fee equal to one third of the amount collected from the defendant' " and the words " 'I now *give* you a one third interest in the claim as your fee' " or " 'You are *entitled* to one third of any amount that may be collected as your fee' " (4 Corbin, Contracts § 879, at 530 [emphasis supplied]). In the latter cases, Professor Corbin concludes, "the transaction seems to be an assignment and not a mere promise" *(id.,* at 530). In accordance with these principles, in *Speelman v Pascal* (10 NY2d 313, 316, *supra),* we held that a document stating *"I give* you from my shares of profits ... five per cent (5%) in England, and two per cent (2%) of my shares of profits in the United States" constituted a presentassignment ***89** of the specified shares of future royalties to be received by the assignor (emphasis supplied).[2] Thus, although there are other inconsistent phrases in the instrument executed by Martinez, the words "I give" in the instrument are sufficient to withstand a pleadings challenge as to whether the parties intended to effect a present transfer of the specified percentages of the personal injury recovery to plaintiffs.

Assuming that an enforceable assignment of the funds is proven, Futterman unquestionably had notice of the agreement he drafted and of the parties' objectives in entering into that agreement. Accordingly, the allegation that Futterman paid the entirety of the funds to Martinez in disregard of the agreement is sufficient to state a cause of action *(see, Sims v Brown,* 6 Thomp & C 5, *affd* 64 NY 660; *Brinkman v Moskowitz,* 38 Misc 2d 950 [App Term, 2d Dept]; *cf., Matter of Kelly,* 23 NY2d 368, 382; *see also, Tri City Roofers v Northeastern Indus. Park,* 61 NY2d 779, 780-781; *Continental Purch. Co. v Van Raalte Co.,* 251 App Div 151, 152). We of course express no opinion as to whether an enforceable assignment of the funds and its derivative claim against defendants will ultimately be established; we conclude only that there are sufficient allegations in the complaint and supporting affidavit to withstand defendants' motion to dismiss.

(2) We reject the law firm defendants' argument that compliance with the alleged assignment would have required them to violate their ethical duties to their client Martinez under Code of Professional Responsibility DR 9-102. Even if the sole attorney-client relationship that existed here was between defendants and Martinez *(but see, infra,* at 90), we conclude that defendants' argument fails for two reasons. First, the cited Disciplinary Rule mandates only that an attorney pay to the client those funds in the possession of the attorney "which the client ... is *entitled to receive"* (Code of Professional Responsibility DR 9-102 [C] [4] [emphasis supplied]), which is not the case to the extent that the client has conveyed a right to those funds by an enforceable assignment. ***90** Second, DR 9-102 explicitly creates ethical duties running to third parties as to funds in the possession of the attorney to which those third parties are entitled *(see,* DR 9-102 [C] [1], [2]). Assuming an enforceable assignment by Martinez to plaintiffs is proven, upon execution of that assignment, Martinez's interest in that portion of the recovery vested in the plaintiffs as assignees, and Futterman was then ethically obligated not only to notify the plaintiffs upon his receipt of the funds (DR 9-102 [C] [1]) but also to pay the funds to plaintiffs as the persons then entitled to receive them (DR 9-102 [C] [4]). We hold, therefore, that under the circumstances alleged here, DR 9-102 does not preclude this cause of action.

(3) Moreover, we conclude that the averments of the complaint and its supporting affidavit are sufficient, if believed, to support an inference of an attorney-client relationship between plaintiffs and the law firm defendants in the drafting of the agreement *(see, Matter of Priest v Hennessy,* 51 NY2d 62, 68-69), and that those defendants committed either legal malpractice or breached fiduciary obligations in drafting the instrument or by remitting the entire settlement proceeds to Martinez. The complaint alleges that Futterman was requested by both Martinez and plaintiffs to prepare the instrument. The affidavit of plaintiff Xavier Leon avers that the firm had previously represented the plaintiffs in unrelated matters, that Futterman "advised

[plaintiffs] to obtain an affidavit in writing" from Martinez, that Futterman discussed the matter with both Martinez and plaintiffs before consenting to draft the agreement, that the firm continued to represent plaintiffs subsequent to Martinez's execution of the agreement, and that "[Pearlman, Apat & Futterman] were Wilfredo Martinez's attorneys and they were our attorneys". Whether or not such a relationship and the claims derived therefrom are ultimately proven, we conclude that these allegations are also sufficient to withstand a motion to dismiss.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

Chief Judge Kaye and Judges Simons, Titone, Bellacosa, Smith and Ciparick concur.
Order affirmed, etc. ***91**

Footnotes

1 An assignment may properly relate to a future or conditional right which is adequately identified, such as the personal injury action recovery here *(Speelman v Pascal,* 10 NY2d 313, 318-319; *see also,* 4 Corbin, Contracts § 874; Restatement [Second] of Contracts §§ 320, 321).

2 See also *Fairbanks v Sargent* (104 NY 108, 113) where this Court found a present assignment in the words of an instrument providing that a party "is to have one-sixth of whatever amount of money, securities, or property shall be received on account of such claims as shall be settled without suit, and one-third of whatever amount of money, securities or property shall be collected, or in any way be realized or received (whether on settlement or without settlement), on account of such of said claims as shall be put in suit".

New York Official Reports

193 A.D.3d 723, 148 N.Y.S.3d 124, 2021 N.Y. Slip Op. 02150

**1 In the Matter of 144-80 Realty Associates, Respondent,

v

144-80 Sanford Apartment Corp., Appellant.

Supreme Court, Appellate Division, Second Department, New York
1506/17, 2018-07596
April 7, 2021

CITE TITLE AS: Matter of 144-80 Realty Assoc. v 144-80 Sanford Apt. Corp.

HEADNOTES

Appeal
Academic and Moot Questions
Corporation's Refusal to Issue New Stock Certificate and Lease to Proposed Purchasers—Matter Not Rendered Academic by Proposed Purchasers' Termination of Contract of Sale

Condominiums and Cooperatives
Cooperative Apartments
Breach of Bylaws and Proprietary Lease—Corporation's Refusal to Issue New Stock Certificate and Lease to Proposed Purchasers

Injunctions
Permanent Injunction
Corporation's Continual Breach of Bylaws and Proprietary Lease Despite Ongoing Litigation

Kenneth W. Jiang, New York, NY, for appellant.
Levin & Glasser, P.C., New York, NY (Rubin Jay Ginsburg and Steven I. Levine of counsel), for respondent.

In a hybrid action, inter alia, to recover damages for breach of contract and proceeding pursuant to CPLR article 78, the defendant/respondent appeals from an order of the Supreme Court, Queens County (Timothy J. Dufficy, J.), entered April 5, 2018. The order, insofar as appealed from, granted the plaintiff/petitioner's cross motion, in effect, for summary judgment on the issue of liability on the third, fourth, and fifth causes of action and for summary judgment on the sixth cause of action.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiff/petitioner (hereinafter 144-80 Realty) is the holder of unsold shares in the cooperative corporation of the defendant/respondent, 144-80 Sanford Apartment Corp. (hereinafter the corporation). In 2017, by order to show cause and petition, 144-80 Realty commenced this hybrid action and proceeding pursuant to CPLR article 78, alleging that the corporation had breached the by-laws and proprietary lease by refusing to issue a new stock certificate and lease for Unit 4B in the names of the proposed purchasers. In an order entered June 27, 2017, the Supreme Court granted so much of 144-80 Realty's motion which was, in the nature of mandamus, to direct the corporation to issue a new stock certificate and lease for Unit 4B and to transfer the shares appurtenant to that unit to the proposed purchasers. Thereafter, the corporation moved pursuant to CPLR 2221 for leave to reargue its opposition to 144-80 Realty's prior motion, contending that the action/proceeding was academic because the proposed purchasers had terminated the contract of sale. 144-80 Realty opposed the corporation's motion for leave to reargue and cross-moved, in effect, for summary judgment on the issue of liability on the third, fourth, and fifth causes of action and for summary judgment on the sixth cause of action, which sought a permanent injunction. In an order entered April 5, 2018, the court granted the corporation's motion for leave to reargue, and upon reargument, ***724** in effect, vacated so much of the June 22, 2017 order as granted mandamus relief. The court then granted 144-80 Realty's cross motion, in effect, for summary judgment on the issue of liability on the third, fourth, and fifth causes of action and for summary judgment on the sixth cause of action. The corporation appeals.

" 'It is a fundamental principle of our jurisprudence that the power of a court to ****2** declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal' " (*Matter of Alvarez v Annucci*, 186 AD3d 704, 705 [2020], quoting *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713 [1980]). "Courts are generally prohibited from issuing advisory opinions or ruling on hypothetical inquiries.

Thus, an appeal is moot unless an adjudication of the merits will result in immediate and practical consequences to the parties" (*Coleman v Daines*, 19 NY3d 1087, 1090 [2012] [citation omitted]). " 'The mootness doctrine precludes courts from considering questions which, although once active, have become academic by the passage of time or by a change in circumstances' " (*Matter of Alvarez v Annucci*, 186 AD3d at 705, quoting *Matter of Melinda D.*, 31 AD3d 24, 28 [2006]).

Here, contrary to the corporation's contention, the termination of the contract of sale for Unit 4B by the proposed purchasers did not render the entire matter academic. Although the third through sixth causes of action arose from the corporation's breach of the by-laws and proprietary lease by its failure to issue a new stock certificate and lease to the proposed purchasers, the termination of the contract of sale by the proposed purchasers did not reverse, undo, or moot the corporation's breach of the by-laws and proprietary lease in the first instance or the damages, maintenance fees, and attorney's fees that arose therefrom. Thus, a determination of those issues would not be hypothetical or advisory, and a judgment on those causes of action will have immediate and practical consequences to the parties. Furthermore, the termination of the contract of sale had no effect on the sixth cause of action, which sought an injunction permanently enjoining the corporation from refusing to take actions that are required under the by-laws and proprietary lease to facilitate closings concerning the sale of the unsold shares held by 144-80 Realty.

Due to the corporation's breach of the by-laws and proprietary lease, 144-80 Realty established, prima facie, its entitlement to summary judgment on the issue of liability on the third cause of action, which alleged breach of contract, the ***725** fourth cause of action, which sought to recover attorneys' fees, and the fifth cause of action, which sought to recover the maintenance fees 144-80 Realty was forced to pay. In opposition, the corporation failed to raise a triable issue of fact.

" 'A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction' " (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 403, 408 [2009], quoting *Icy Splash Food & Beverage, Inc. v Henckel*, 14 AD3d 595, 596 [2005]). Injunctive relief should be invoked only to protect against future, repeated violations of a party's rights (*see Exchange Bakery & Rest. v Rifkin*, 245 NY 260, 264-265 [1927]). Here, 144-80 Realty established, prima facie, that the corporation was continuing to breach the by-laws and proprietary lease despite the ongoing litigation and that an injunction was necessary to prevent continuing violations of 144-80 Realty's property rights under the by-laws and proprietary lease. In opposition, the corporation failed to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Accordingly, the Supreme Court properly granted 144-80 Realty's cross motion, in effect, for summary judgment on the issue of liability on the third, fourth, and fifth causes of action and for summary judgment on the sixth cause for action.

The corporation's remaining contention is without merit. Dillon, J.P., Hinds-Radix, Brathwaite Nelson and Wooten, JJ., concur.

18 A.D.2d 327, 239 N.Y.S.2d 482

In the Matter of the Arbitration between Brown & Guenther, Appellant, and North Queensview Homes, Inc., Respondent.

Supreme Court, Appellate Division,
First Department, New York
April 18, 1963

CITE TITLE AS: Matter of Brown & Guenther (North Queensview Homes)

HEADNOTES

Arbitration
matters arbitrable
contract provision that disputes should be submitted to arbitration within 15 days after dispute arose, unreasonable and unenforcible-- moreover, application of time limitation to "disputes" ***328** and not to "claims" and "questions" renders provision so vague that time limitation may not be enforced.

(1) Petitioner's application to stay arbitration was properly denied.

(2) Respondent was organized under the Redevelopment Companies Law of this State and planned to erect a co-operative housing project. Petitioner was to receive a basic fee for architectural and engineering services as detailed in the contract which provided that all "disputes, claims, or questions" arising under the contract should be submitted to arbitration and that "The demand for arbitration must be made within fifteen (15) days after the dispute has arisen." The project was substantially completed in August, 1958. Thereafter and commencing in January, 1959 and continuing to April 21, 1961 numerous letters and memoranda passed between the parties and their representatives wherein the performance of the contract by the architect and the amount of its fee were discussed. The provision requiring the giving of the notice within the period of 15 days "after the dispute has arisen", in the light of the facts presented, is unreasonable and unenforcible.

(3) Furthermore, the application of that time limitation to "disputes" but providing that "claims" and "questions" may be the subject of arbitration at any time without reference to the short period renders the entire provision so vague that the time limitation may not be enforced.

SUMMARY

Appeal from an order of the Supreme Court at Special Term (Arthur G. Klein, J.), entered August 15, 1961 in New York County, which denied petitioner's motion to stay arbitration.

APPEARANCES OF COUNSEL

Martin l. Shelton of counsel (*Jesse Climenko* with him on the brief; *Gallop Climenko & Gould*, attorneys), for appellant.
Victor Rabinowitz of counsel (*Shirley Fingerhood* with him on the brief; *Rabinowitz & Boudin*, attorneys), for respondent.

OPINION OF THE COURT

Bastow, J.

In this proceeding petitioner's application to stay arbitration has been denied upon the ground that an issue was presented for determination by the arbitrators and not the court as to whether respondent had made timely demand for arbitration. The conclusion of Special Term that arbitration should not be stayed was correct but not for the reasons stated by it.

The contract under consideration was made in June, 1953 between respondent, as owner, and petitioner, a firm of architects. Respondent was organized under the Redevelopment Companies Law of this State. (L. 1942, ch. 845, as amd.) We learn from the recitals in the contract that respondent planned to erect a co-operative housing project in the Borough of Queens consisting of seven buildings for approximately 364 families. Petitioner was to receive for architectural and engineering services as detailed in the contract a basic fee of $120,600.

Article 14 of the contract was entitled "Disputes" and provided, among other things, that all "disputes, claims, or questions" arising under the contract should be submitted to

arbitration and that "The demand for arbitration must be made within fifteen (15) days after the dispute has arisen." ***329**

The project was substantially completed in August, 1958. Thereafter and commencing in January, 1959 and continuing to April 21, 1961 numerous letters and memoranda passed between the parties and their representatives wherein the performance of the contract by the architect and the amount of its fee were discussed. On the latter date respondent owner demanded arbitration of six specified items. Petitioner architect thereafter commenced this proceeding to stay arbitration on the ground that at least five of the items were not arbitrable because they were disputes that had existed for more than 15 days and were barred by the short period of limitations in the contract.

The general rule is recognized that parties may by contract provide for a time shorter than the statutory period as a limitation of time for required action. (Civ. Prac. Act, § 10; 1 Williston, Contracts [3d ed.], § 183; Restatement, Contracts, § 558, *Comment a*; *Soviero Bros. Contr. Corp. v. City of New York*, 286 App. Div. 435, 441, affd. 2 N Y 2d 924.) But the corollary rule is equally well established that the contractual limitation must not be "so short as to be unreasonable in the light of the provisions of the contract and the circumstances of its performance and enforcement." (1 Corbin, Contracts, § 218, p. 726.) "Thus a shorter limitation by written contract may be examined as to whether it is unreasonably short". (*Planet Constr. Corp. v. Board of Educ. of City of N. Y.*, 7 N Y 2d 381, 385.)

In considering bills of lading it has been held that provisions requiring suit for loss or damage to be brought within periods of six months and one year, respectively, were reasonable and valid. (*Aron & Co. v. Panama R. R. Co.*, 255 N. Y. 513; *Sapinkopf v. Cunard S. S. Co.*, 254 N. Y. 111.) On the other hand a provision requiring notice of claim to be given within 60 days after knowledge of the loss and action to be brought within 60 days thereafter was invalidated as being a flagrant departure from the statutory standard of reasonableness. (*South & Cent. Amer. Commercial Co. v. Panama R. R. Co.*, 237 N. Y. 287.) A similar limitation of any suit to 30 days after presentation of claim was held to be unreasonably short in *The President Polk* (43 F. 2d 695, 698) where the court said that "thirty or forty days appears to us no more than a trap to get rid of inconvenient claims."

Similar periods of limitation have been passed upon as to reasonableness in fire, life, accident and marine policies, indemnity and fidelity bonds and shipping contracts. (See Ann. 121 A. L. R. 758-796.) These decisions enunciate the general principles to be used as guides to determine whether the contractual period may be found to be unreasonably short. Thus, consideration ***330** should be given to all the provisions of the contract, the circumstances of its performance and the relative abilities and bargaining positions of the parties. From all of these a conclusion may be reached as to whether the limited time is unconscionable, unfair, unreasonable and therefore unenforcible.

Closely allied with this issue is the collateral problem as to whether the contract provision is so vague and ambiguous that it is unenforcible. "Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement, may prevent the creation of an enforcible contract. *** A promise that is too uncertain in terms for possible enforcement is an illusory promise; but to determine whether or not it is an 'illusion' one must consider the degree and effect of its uncertainty and indefiniteness." (1 Corbin, Contracts, § 95.)

Here the agreement provided that all "disputes, claims, or questions" arising under the contract should be submitted to arbitration. But only one of these three was subjected to a short period of limitation--demand for arbitration was mandatory within 15 days "after the *dispute* has arisen." The parties for a period of more than two years exchanged writings relating to some of the subject matters now claimed to be arbitrable. It would be an exercise in semantics for either court or arbitrators to analyze these writings and determine whether the parties were discussing "claims", "questions" or "disputes".

The short period of limitation here placed in the contract has a recognizable use in other areas. Thus the standard form of contract between owner and contractor approved by The American Institute of Architects (1A Modern Legal Forms, § 1762) contains provisions (arts. 39 and 40) making the architect in the first instance the arbiter of disputes. If he fails to make a decision within 10 days or within a similar period after decision either party may demand arbitration. In any other case such demand must be made within a reasonable time after the dispute arises. Within the frame of such a provision both parties may ascertain with certainty the date upon which the period of 10 days commences to run. In other words, there is no uncertainty as to the date a dispute is submitted to the architect or the date he makes a decision. Presumably work is in progress and there is a recognizable

need for prompt resolution of disagreements. As to all other disputes, however, the parties are given a reasonable time within which to make the demand.

In the event of a dispute arising under such a contractual short period, an issue of fact as to fulfillment of a condition precedent to arbitration would be presented that might require ***331** remand to Special Term for determination (*Matter of Board of Educ. v. Bernard Associates*, 11 A D 2d 1038). But in the contract provisions before us the issues present questions of law that may be decided by us. (10 N. Y. Jur., Contracts, § 190.)

We conclude that the provision requiring the giving of the notice within the period of 15 days "after the dispute has arisen" in the light of the facts presented is unreasonable and unenforcible. (Cf. *Matter of River Brand Rice Mills v. Latrobe Brewing Co.*, 305 N. Y. 36, 41.) Furthermore, the application of that time limitation to "disputes" but providing that "claims" and "questions" may be the subject of arbitration at any time without reference to the short period renders the entire provision so vague that the time limitation may not be enforced. Neither court nor arbitrators can enforce a contract provision unless it can be determined what it is. "It is not enough that the parties think that they have made a contract; they must have expressed their intentions in a manner that is capable of understanding. It is not enough that they have actually agreed, if their expressions are not such that the court can determine what the terms of that agreement are." (1 Corbin, Contracts, § 95.)

The order should be affirmed, with costs.

Breitel, J. P., Rabin, Stevens and Steuer, JJ., concur.
Order, entered on August 15, 1961, unanimously affirmed, with $20 costs and disbursements to respondent.

End of Document

New York
Official Reports

57 A.D.2d 1062, 395 N.Y.S.2d 850

In the Matter of John D. Plumley et al., Respondents,

v.

County of Oneida et al., Appellants

Supreme Court, Appellate Division,
Fourth Department, New York
May 27, 1977

CITE TITLE AS: Matter of Plumley v County of Oneida

HEADNOTE

COUNTIES
VALIDITY OF MEETING OF COUNTY BOARD OF LEGISLATORS

(1) Dispute involves contract between Oneida County and firm of Cole-Layer-Trumble (CLT) by which CLT was to revalue all properties in county for tax assessment purposes --- County board of legislators voted to transfer $100,000 from one account to another to provide funds for payment on account to CLT for services performed; petitioners challenge methods by which meeting of board of legislators was convened and procedures followed at meeting in transfer of funds --- Special Term declared meeting and legislation adopted thereat void and enjoined any payment to CLT from funds transferred --- Proceeding to review legislative action is action for declaratory judgment, not article 78 proceeding, and normally injunctive relief may not be granted in article 78 proceeding; therefore, proceeding treated as action for declaratory judgment (CPLR 103, subd [c]) --- Meeting, having been called contrary to rules of board and statute, was nullity and legislation passed at meeting was void, and nothing done by those members at meeting could cure defect as to absent members --- Since neither validity of CLT's contract with county nor its right to progress payments were in issue, CLT was not necessary party to proceeding.

Judgment unanimously modified in accordance with Memorandum and as modified, affirmed, without costs.

OPINION OF THE COURT

This article 78 proceeding seeks to void Resolution No. 90 adopted on April 16, 1976 by the Oneida County Board of Legislators and to enjoin respondents from paying out sums of money transferred by the resolution. Petitioners are taxpayers and one of them is a member of the board of legislators. Respondents are various officials of Oneida County. At the core of the dispute is a contract between Oneida County and the firm of Cole-Layer-Trumble (CLT) by which CLT agreed to perform certain services in connection with the revaluation of all properties in Oneida County for tax assessment purposes. The validity of that contract and the fact that money is due CLT under its terms is not in dispute in this proceeding. At a meeting of the board of legislators held April 16, 1976 the board voted to transfer $100,000 from one account to another to provide funds for a payment on account to CLT for services performed. By this proceeding petitioners challenge the method by which a meeting of the Oneida County Board of Legislators was convened April 16, 1976 and also the procedures followed at the board meeting in adopting the legislation to transfer funds. Special Term declared the meeting and the legislation adopted at the meeting void and enjoined any payment to CLT from the funds so transferred. We modify because the proceeding to review legislative action is an action for a declaratory judgment, not an article 78 proceeding (see *Matter of Lakeland Water Dist. v Onondaga County Water Auth.*, 24 NY2d 400, 407; *King Road Materials v Town Bd. of Town of Rotterdam*, 37 AD2d 357) and normally injunctive relief may not be granted in an article 78 proceeding *(Matter of Edelman v Baumgartner*, 12 AD2d 922; *Matter of Daniels v Daniels*, 3 AD2d 749). We, therefore, treat this proceeding as an action for declaratory judgment (CPLR 103, subd [c]). The meeting to transfer funds was a special meeting. The rules of the county legislature provide that such meetings may be called upon 48-hours' notice to each member of the board. The notice may be served either personally or by mail and a board member may waive notice by a writing signed by him. (The applicable board rule, No. 5, is identical to the language of subdivision 2 of section 152 of the County Law). It is conceded that the board members did not, indeed could not because of the time the notice was issued, receive 48-hour notice of the April 16 meeting. Nevertheless, the Sheriff attempted to complete service and 34 of the 37 board members attended the meeting in person. Of the three absent

members, one signed a statement waiving notice after this litigation was commenced but the other two did not sign waivers. In the case of one of these three members, Winkler, the Sheriff's return specifically indicates that he refused to sign a waiver. The meeting, having been called contrary to the rules of the board and the statute, was a nullity and legislation passed at the meeting was void, and nothing done by those members at the meeting could cure the defect as to the absent members. Respondents also allege that Special Term's order was invalid because CLT was a necessary party and that the proceeding may not be maintained because of petitioners' laches. Since neither the validity of CLT's contract with the county nor its right to ***1063** progress payments were in issue, CLT was not a necessary party to the proceeding. Furthermore, the 40-day period between the April 16 meeting and the institution of this litigation does not constitute laches. (Appeal from judgment of Oneida Supreme Court -- art 78.)

Present -- Marsh, P. J., Moule, Cardamone, Simons and Goldman, JJ.

New York Official Reports

213 A.D.2d 778, 623 N.Y.S.2d 370

Thomas J. McGovern et al., Appellants,

v.

Francis M. Tatten et al., Respondents.

In the Matter of Thomas J. McGovern et al., Appellants,

v.

Town of Fulton et al., Respondents.

Supreme Court, Appellate Division,
Third Department, New York
71450A, 71450B
(March 29, 1995)

CITE TITLE AS: McGovern v Tatten

OPINION OF THE COURT

Mikoll, J. P.

SUMMARY

Appeals (1) from an order of the Supreme Court (Hughes, J.), entered July 20, 1993 in Schoharie County, which, *inter alia,* granted defendants' cross motion for summary judgment dismissing the complaint, and (2) from an order of said court, entered February 4, 1994 in Schoharie County, which denied plaintiffs' motion for renewal.

HEADNOTE

HIGHWAYS
ABANDONMENT

(1) At issue is status of portion of road which crosses property owned by appellants and provides egress onto respondents' adjoining property; appellants allege portion of road in dispute has been abandoned by Town and that respondents' use of road is trespass on their property; Supreme Court found disputed portion of road had not been abandoned by Town and remains public highway --- Subsequently, appellants commenced CPLR article 78 proceeding seeking to annul action of Town Board in enacting resolution to resume maintaining portion of road in dispute; Supreme Court held issue of abandonment by Town was litigated in prior action and that Town Board's decision to maintain road was not arbitrary and capricious conduct --- Appellants contend Supreme Court erroneously concluded disputed road across their property has not been abandoned because of court's reliance on invalid meeting of Town Board and, therefore, summary judgment was improperly granted to respondents; Supreme Court clearly indicated its decision was based on appellants' failure to prove that road crossing their property was abandoned based on language of 1937 abandonment resolution, which appellants originally relied upon heavily to prove abandonment; language of 1937 abandonment resolution clearly states abandonment of Town highway began at point south of property of appellants' land --- Supreme Court properly granted judgment in CPLR article 78 proceeding in respondents' favor; Town had not abandoned road running across appellants' property, and there is ample evidence road crossing appellants' property has not been abandoned by nonuse --- Special meeting of Town Board relating to inspection of road at issue violated Town Law § 62 (2) requiring two days' notice in writing to members of Town Board and is thus invalid; only one day's notice of special meeting was given; accordingly, resolution to resume maintenance of disputed road is null and void --- While Town Board's executive sessions violated Open Meetings Law (see, Public Officers Law art 7), appellants have failed to submit proof of existence of good cause to void any Town Board action taken at either of these executive sessions --- Supreme Court properly dismissed portion of petition seeking declaration that road across appellants' land had been abandoned because relitigation of this issue is barred under doctrine of collateral estoppel; appellants had full and fair opportunity to contest identical issue in prior action and may not litigate it again.

Appeals (1) from a judgment of the Supreme Court (Hughes, J.), entered December 16, 1993 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78 to, *inter alia,* determine the abandonment of a section of Old Route 30 in the Town of Fulton and to permanently enjoin the Town from taking any action with respect to the roadway, and (2) from an order of said court, entered March 4, 1994 in Albany County, which denied petitioners' motion for reargument.

At the heart of the two cases consolidated on appeal is the status of a portion of Old Route 30 in the Town of Fulton,

Schoharie County, which crosses property owned by Thomas J. McGovern and Tiia McGovern and provides egress onto the adjoining property owned by Francis M. Tatten and Barbara Tatten. The McGoverns purchased their property on March 27, 1984 from Herman Buschhardt and Patricia Buschhardt. ***779** The Tattens purchased their adjoining property south of the McGoverns' property on December 23, 1986 from John Leith.

The McGoverns allege in their action against the Tattens that the portion of the road in dispute has been abandoned by the Town and that the Tattens' use of the road is a trespass on the their property. The Tattens did not respond to service of process with a formal answer, but replied by letter to the McGoverns. In turn, the McGoverns moved for a default judgment. The Tattens opposed the motion and cross-moved for summary judgment contending, *inter alia,* that the McGoverns failed to prove that the portion of the road in dispute has been abandoned and, thus, it continues as a public road for which an action in trespass may not be maintained. Supreme Court found that the disputed portion of the road had not been abandoned by the Town and remains a public highway. Supreme Court denied the McGoverns' motion for renewal. The McGoverns appeal both orders.

Subsequently, the McGoverns commenced a CPLR article 78 proceeding against the Town, the Town Board and the Tattens seeking, *inter alia,* to annul the action of the Town Board in enacting a resolution to resume maintaining the portion of the road in dispute. The Town and the Tattens opposed the petition. Supreme Court held that the issue of abandonment by the Town was litigated in the prior action brought by the McGoverns against the Tattens and could not be relitigated in this proceeding. The court further held that the Town Board's decision to maintain one of its roads after the issuance of Supreme Court's order finding that the road had not been abandoned was not arbitrary and capricious conduct. A judgment was entered dismissing the McGoverns' petition and the McGoverns' motion for reargument was denied. These appeals by the McGoverns ensued.

The McGoverns, appearing *pro se* on these appeals, argue, *inter alia,* that Supreme Court erred in denying their motion to renew consideration of the Tattens' cross motion for summary judgment in the action based on, *inter alia,* new evidence consisting of the Town Board's violation of Town Law § 62 (2) by holding a special meeting on May 11, 1993 and its violation of Public Officers Law § 105 in holding two executive sessions. We disagree. The McGoverns' motion to renew was correctly denied by Supreme Court. The McGoverns failed to show new facts to support the motion and a justifiable excuse for not placing those facts before Supreme Court, which were known when the motion was pending *(see, Lansing Research Corp. v Sybron Corp.,* 142 AD2d 816, 819; *see also,* CPLR 2221). ***780**

The McGoverns contend that Supreme Court erroneously concluded that the disputed road across their property has not been abandoned because of the court's reliance on the invalid meeting of the Town Board and, therefore, summary judgment was improperly granted to the Tattens. Supreme Court, however, did not rely on the resolution adopted at the special meeting in arriving at its decision granting summary judgment in the action. Supreme Court clearly indicated that its decision granting summary judgment in the action was based on the McGoverns' failure to prove that the road crossing their property was abandoned based on the language of a 1937 abandonment resolution, which the McGoverns originally relied upon heavily to prove abandonment. The language of the 1937 abandonment resolution clearly states that the abandonment of the Town highway began at a point south of the property of Mary Becker's land. As Becker's land and the McGoverns' land is the same property, only the Town highway that runs south thereof was abandoned and not that running across the McGoverns' land.

The Tattens' argument that Supreme Court properly granted judgment in the CPLR article 78 proceeding in their favor is persuasive. As previously indicated, the Town had not abandoned the road running across the McGoverns' property. Additionally, affidavits submitted by the Tattens, including those of Francis Tatten, John Leith and Fred Leith, provide ample evidence that the road crossing the McGoverns' property has not been abandoned by nonuse. The proof furnished by the Tattens was sufficient to meet their burden of proving a prima facie case of nonabandonment *(see, Zuckerman v City of New York,* 49 NY2d 557). Moreover, the McGoverns did not present opposing papers to the Tattens' cross motion for summary judgment and their proof submitted in support of their default judgment was conclusory and, thus, insufficient to raise genuine issues of fact *(see, Friends of Animals v Associated Fur Mfrs.,* 46 NY2d 1065, 1067-1068).

It must be noted that the McGoverns' argument, that the special meeting of the Town Board held on May 11, 1993 relating to inspection of the road at issue in these cases violated Town Law § 62 (2) requiring two days' notice in writing to members of the Town Board and is thus invalid, is

meritorious. Only one day's notice of the special meeting was given. Accordingly, the resolution to resume maintenance of the disputed road is null and void.

The McGoverns' contention that the Town Board's executive sessions held on May 10, 1993 and June 14, 1993 were in ***781** violation of Public Officers Law § 105 is correct insofar as said executive sessions violated the Open Meetings Law *(see,* Public Officers Law art 7) as the minutes of the meetings indicate that the executive sessions were called to discuss the status of a portion of Bielfeldt Road *(see generally, Matter of Glens Falls Newspapers v Solid Waste & Recycling Comm.,* 195 AD2d 898, 899). It is discretionary with a court, however, whether to nullify any action taken by a public body in violation of the Open Meetings Law when good cause is established *(see,* Public Officers Law § 107 [1]; *Matter of New York Univ. v Whalen,* 46 NY2d 734, 735; *Matter of Ireland v Town of Queensbury Zoning Bd. of Appeals,* 169 AD2d 73, 76, *lv dismissed* 79 NY2d 822). The McGoverns have failed to submit proof of the existence of good cause to void any Town Board action taken at either of these executive sessions. Thus, the McGoverns' petition was properly dismissed in this proceeding on this issue.

Supreme Court properly dismissed that portion of the petition seeking a declaration that the road across the McGoverns' land had been abandoned because relitigation of this issue is barred under the doctrine of collateral estoppel. The McGoverns had a full and fair opportunity to contest the identical issue in the prior action and may not litigate it again *(see, Weiss v Manfredi,* 83 NY2d 974; *Ryan v New York Tel. Co.,* 62 NY2d 494, 500).

Finally, the McGoverns' appeal from Supreme Court's order denying their motion to reargue in the proceeding is unappealable and must be dismissed *(see, Lindsay v Funtime, Inc.,* 184 AD2d 1036).

Crew III, White, Yesawich Jr. and Spain, JJ., concur.
Ordered that the orders entered July 20, 1993 and February 4, 1994 are affirmed, without costs. Ordered that the judgment is modified, on the law, without costs, by declaring that the May 11, 1993 special meeting of respondent Town Board of the Town of Fulton and the resolution made thereat are null and void, and, as so modified, affirmed. Ordered that the appeal from order entered March 4, 1994 is dismissed, without costs.

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New York Official Reports

KeyCite Yellow Flag - Negative Treatment
Distinguished by Raci v. Lopez, N.Y.City Ct., August 3, 2022
75 Misc.3d 541, 168 N.Y.S.3d 789, 2022 N.Y. Slip Op. 22109

**1 Immacolata Papandrea-Zavaglia, Petitioner,

v

Jose Arroyave et al., Respondents.

Civil Court of the City of New York, Kings County
303636/21
April 7, 2022

CITE TITLE AS: Papandrea-Zavaglia v Arroyave

HEADNOTE

Landlord and Tenant
Eviction
Emergency Rental Assistance Program—Automatic Stay Vacated

In a holdover proceeding where petitioner landlord sought to recover possession of unregulated premises on the ground that petitioner had terminated the tenancy, the automatic stay imposed by respondent tenant's application for rental assistance through the COVID-19 Emergency Rental Assistance Program of 2021 (ERAP) was vacated because petitioner had demonstrated that payment of rental arrears would not resolve the matter and that the equities strongly favored petitioner. The automatic stay under ERAP triggers when respondent seeks "funds to cover all or part of the arrears claimed by the petitioner." (L 2021, ch 417, § 2, part A, § 4, amending L 2021, ch 56, § 1, part BB, § 1, subpart A, sec 1, § 8.) The ERAP statute is not a measure designed to protect litigants where rent is not the basis for seeking possession. A stay under the ERAP statute is appropriate only when the benefit provided could potentially resolve litigation. Considerations for vacating the stay include the regulatory status of the premises, the nature of the cause of action, the relationship between the applicant and the landlord, whether the applicant meets the basic criterion for assistance as outlined in the statute, and whether the equities favor the landlord. Here, the proceeding was commenced prior to the enactment of the ERAP statute and the petition initially sought use and occupancy. However, petitioner represented that upon the passage of the ERAP statute, petitioner informed respondent that she would no longer be seeking use and occupancy and was only interested in regaining possession of the unregulated apartment so that the building could be sold.

RESEARCH REFERENCES

Am Jur 2d Landlord and Tenant § 825.

Carmody-Wait 2d Summary Proceedings to Recover Possession of Real Property §§ 90:16, 90:213, 90:224.

Dolan, Rasch's New York Landlord and Tenant including Summary Proceedings (5th ed) §§ 30:1, 47:1.

NY Jur 2d Real Property—Possessory and Related Actions §§ 13, 295, 301.

ANNOTATION REFERENCE

See ALR Index under Landlord and Tenant.

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*542 Query: holdover & vacat! /5 stay /s assistance

APPEARANCES OF COUNSEL

Andrea Balsamo for petitioner.
RiseBoro Community Partnership/LEAP (*Dane Marrow* of counsel) for Krystal Hernandez-Arroyave, respondent.

OPINION OF THE COURT

Bruce E. Scheckowitz, J.

In this holdover proceeding, the petitioner, Immacolata Papandrea-Zavaglia (petitioner or landlord), seeks to recover possession of the unregulated premises located at 1316 72nd Street, Apt. 1, Brooklyn, New York 11228 (premises) from Jose Arroyave, Krystal Hernandez-Arroyave, John Doe, and Jane Doe (collectively respondents) on the grounds that petitioner has terminated respondents' tenancy. (*See* notice of petition, petition, 90 day notice of termination, affs of

service for 90 day notice of termination and notice of petition and petition.) This proceeding first appeared on the court's Intake Part calendar on January 3, 2022, and was referred to a Resolution Part. On January 24, 2022, the proceeding was transferred to the newly created Small Property Part and adjourned to February 3, 2022. On the return date, petitioner appeared by counsel, Andrea Balsamo, Esq., and respondent Hernandez-Arroyave appeared by counsel, RiseBoro/LEAP by Dane Marrow, Esq. On the ****2** record, counsel for respondent Hernandez-Arroyave represented that his client had filed an application for emergency rental assistance through the COVID-19 Emergency Rental Assistance Program of 2021 (ERAP) and asserted the instant proceeding should be stayed until a final determination was made on her application by the Office of Temporary and Disability Assistance (OTDA). Petitioner opposed the application for the stay and stated respondent had been provisionally approved for ERAP, but petitioner did not intend to accept any funds from ERAP, so the stay was unnecessary. This court adjourned the proceeding to March 3, 2022, and directed respondent Hernandez-Arroyave to file an answer and for petitioner to move to vacate the stay. Upon letter application to the court, and consent by respondent, the instant proceeding was adjourned to March 10, 2022.

Petitioner now moves to vacate the automatic stay imposed by respondent Hernandez-Arroyave's application for rental assistance through ERAP, for summary judgment pursuant to ***543** CPLR 3212, and for attorney's fees. Related to her prayer for relief to lift the automatic stay, petitioner asserts that she has elected not to participate in the ERAP program and is willing to waive the 180 day period allowed under the program for the submission of necessary documents. She further argues that the stay imposed by ERAP is a violation of petitioner's due process rights similar to that of the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 (hereinafter CEEFPA), as adjudged by the United States Supreme Court. Landlord represents respondent Hernandez-Arroyave was notified that petitioner intended to waive any rights to collect ERAP funds so that holdover may proceed. Further, petitioner asserts she is entitled to summary judgment, as the premises are a two-family house, not subject to the NYC rent control laws or governed by the Rent Stabilization Laws of 1969, 1974, and 2019, and since the tenancy has been terminated, respondents do not have any statutory right to remain in the premises. Respondent opposes and avers it is outside the Housing Court's jurisdiction to consider petitioner's argument, as landlord seeks to challenge the constitutionality of section 8 of the ERAP statute (L 2021, ch 56, § 1, part BB, § 1, subpart A, sec 1, as amended by L 2021, ch 417, § 2, part A, § 4 [ERAP statute]), which stays evictions upon the filing of an ERAP application until OTDA makes a final determination about respondent's eligibility. Respondent posits petitioner, in effect, is seeking a declaratory judgment as to the rights of the parties, and the Housing Court does not have the jurisdiction to render a decision, which petitioner can only seek in Supreme Court. Respondent also represents such a constitutional challenge requires petitioner to serve the New York State Attorney General's Office. Finally, during oral argument respondent asserted the instant proceeding should be dismissed as petitioner failed to exercise the requisite due diligence as required by chapter 417 of the Laws of 2021 (§ 2, part C, § 1, subpart A, § 3) when serving the 90 day notice of termination.

Preliminarily, though petitioner challenges the constitutionality of the automatic stay imposed as a result of an ERAP application on due process grounds, respondent correctly avers that petitioner's failure to serve the New York State Attorney General's Office precludes this court from considering this argument. However, the court is not required to consider the constitutionality of the ERAP statute in order to determine whether that provision of the statute is applicable to the facts ***544** herein. (*2986 Briggs LLC v Evans*, 74 Misc 3d 1224[A], 2022 NY Slip Op 50215[U], *3-5 [Civ Ct, Bronx County 2022, Lutwak, J.].)

Relating to applications for a stay, in general, CPLR 2201 provides that "[e]xcept where otherwise prescribed by law, the court in which an action [or proceeding] is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." This section authorizes ****3** courts of original civil jurisdiction to grant a stay of proceedings. (*See Schwartz v New York City Hous. Auth.*, 219 AD2d 47, 47 [2d Dept 1996].) A determination as to whether to grant a stay of a proceeding is a discretionary one as "courts have the inherent power, and indeed responsibility, so essential to the proper administration of justice, to control their calendars and to supervise the course of litigation before them." (*See Matter of Grisi v Shainswit*, 119 AD2d 418, 421 [1st Dept 1986]; *see also Catalane v Plaza 400 Owners Corp.*, 124 AD2d 478, 480 [1st Dept 1986].)

Since March 2020, the New York State Legislature and the Governor's Office have promulgated legislation and executive orders to protect tenants who have been impacted by the pandemic from being evicted. The initial measures, including the COVID-19 Emergency Eviction and

Foreclosure Prevention Act of 2020 (CEEFPA) and chapter 417 of the Laws of 2021 (§ 2, part C, § 1, subpart A, § 4), were prophylactic rules which blanketly stayed those proceedings which were not objectionable conduct/nuisance holdovers, HP proceedings, and illegal lockout proceedings, for tenants and occupants who faced financial hardship due to COVID-19, or whose health has been or could be negatively affected by an eviction or moving during the pandemic. Unlike previous statutes, the ERAP statute provides a benefit to tenants and landlords in the form of payment of accrued rental arrears and prospective rent and stays an eviction proceeding upon an ERAP application pending an eligibility determination by OTDA.

After the instant motion was made, numerous courts of concurrent jurisdiction have ruled on whether the automatic stay imposed by the filing of an ERAP application can be lifted by the court, and, if so, under what circumstances. The considerations for vacating the stay include the regulatory status of the premises, the nature of the cause of action, the relationship between the applicant and the landlord, does the applicant meet the basic criterion for assistance as outlined in the statute, and whether the equities favor the landlord. (*See* ***545** *e.g. Actie v Gregory*, 74 Misc 3d 1213[A], 2022 NY Slip Op 50117[U] [Civ Ct, Kings County 2022, Slade, J.] [court vacated an ERAP stay in a holdover proceeding where petitioner sought to recover possession of an apartment in a building with less than four units for his own personal use and applicant had already vacated the premises]; *Kelly v Doe*, 75 Misc 3d 197 [Civ Ct, Kings County 2022, Cohen, J.] [court vacated a stay in a post-foreclosure holdover proceeding finding that respondents had no contractual obligation to pay rent to landlord]; *Abuelafiya v Orena*, 73 Misc 3d 576 [Suffolk Dist Ct 2021, Hackeling, J.] [court vacated stay when it was determined that applicants had second home]; *2986 Briggs LLC v Evans*, 74 Misc 3d 1224[A], 2022 NY Slip Op 50215[U] [Civ Ct, Bronx County 2022, Lutwak, J.] [court vacated ERAP stay in a licensee holdover proceeding where there was no contractual obligation for respondent to pay rent or use and occupancy]; *Ben Ami v Ronen*, 75 Misc 3d 335 [Civ Ct, Kings County 2022, Barany, J.] [court vacated ERAP stay in a holdover proceeding where petitioner sought to recover the premises, an unregulated apartment, for his personal use]; *Silverstein v Huebner*, 2022 NY Slip Op 31051[U] [Civ Ct, Kings County 2022, Stoller, J.] [court vacated an ERAP stay in a holdover proceeding where remaining occupant was licensee in an unregulated apartment and petitioner sought to recover the apartment for his personal use]; *see cf. 204 W. 55th Street, LLC v Mackler*, 2021 NY Slip Op 32901[U] [Civ Ct, NY County 2021, Fang, J.] [ERAP stay upheld in a licensee holdover proceeding, where respondents alleged succession to the subject rent regulated premises]; *560-566 Hudson LLC v Hillman*, 2022 NY Slip Op 30718[U] [Civ Ct, NY County 2022, Ferdinand, J.] [upholding the ERAP stay in a licensee proceeding in a rent regulated building].) ****4**

In the instant proceeding, this court finds that petitioner has demonstrated that payment of rental arrears will not resolve the instant matter, and that the equities strongly favor petitioner. In consideration of the arguments made in support of and opposition to the motion, the court finds that petitioner has demonstrated grounds to advance this proceeding by vacating the stay. The automatic stay under ERAP triggers when respondent seeks "funds to cover all or part of the arrears claimed by the petitioner." (L 2021, ch 417, § 2, part A, § 4, amending L 2021, ch 56, § 1, part BB, § 1, subpart A, sec 1, § 8.) The ERAP statute, unlike CEEFPA, is not a measure designed to protect litigants where rent is not the basis for seeking possession. A ***546** stay under the ERAP statute is appropriate only when the benefit provided could potentially resolve litigation. Acceptance of payment of "benefits" from ERAP prior to issue being joined would have the effect of vitiating the predicate notice and constitute grounds for dismissal because the statute requires owner, upon receipt of payment, to ratify the lease term or period of possession for an additional 12 months before owner could commence a new holdover proceeding. (L 2021, ch 56, § 1, part BB, § 1, subpart A, sec 1, § 9 [2] [d] [iv]; *see also Pacheco v Gilkes*, 2022 NY Slip Op 31050[U] [Civ Ct, Kings County 2022, Scheckowitz, J.]; *see cf. 1264 Flatbush LLC v Robinson*, 2022 NY Slip Op 31006[U] [Civ Ct, Kings County 2022, Cohen, J.] [court stayed execution of the warrant of eviction for a period of one year after petitioner accepted ERAP funds].)

The court must avoid an unreasonable or absurd application of a law when interpreting a statute. (*People v Schneider*, 37 NY3d 187, 196 [2021].) The ERAP legislation was not intended to act as a prophylactic statute nor was it designed to create a barrier preventing small property owners from advancing litigation involving residential properties, where the tenancy is not subject to statutory control, and landlord expresses its intent not to seek use and occupancy, and desires to pursue litigation where the tenancy has been properly terminated. Here, the proceeding was commenced prior to the enactment of the ERAP statute and the petition initially sought use and occupancy, which the landlord was permitted to do. However, petitioner represents that upon the passage of the ERAP statute, landlord informed respondent that

she would no longer be seeking use and occupancy and is only interested in regaining possession of this unregulated apartment so that the building may be sold. Requiring landlord to wait 180 days to receive an approval from ERAP is an unnecessary exercise in futility where landlord has no intention of accepting such payment and reinstating the terminated tenancy.

Accordingly, the branch of petitioner's motion seeking to vacate the ERAP stay is granted. The branch of petitioner's motion seeking summary judgment is denied without prejudice. Here, though issue is now joined, an answer was not served prior to petitioner moving for this relief. Therefore, the request for summary judgment is premature. Also, though respondent challenged the sufficiency of service of the predicate notice during oral argument on this motion, CPLR 2214 (a) ***547** limits the jurisdiction of the court to grant relief that is not contained within moving papers. (*McGuire v McGuire*, 29 AD3d 963 [2d Dept 2006].) As respondent did not raise this issue in her cross motion to dismiss, this court will not entertain respondent's application for dismissal.

New York Official Reports

208 A.D.2d 247, 622 N.Y.S.2d 300

The People of the State
of New York, Appellant,
v.
Cypress Hills Cemetery et al., Respondents.

Supreme Court, Appellate Division,
Second Department, New York
94-01366, 94-02120
February 6, 1995

CITE TITLE AS: People
v Cypress Hills Cemetery

SUMMARY

Appeal (1) from so much of an order of the Supreme Court (Richard Huttner, J.), entered January 4, 1994 in Kings County, as failed to unconditionally enjoin defendants from performing burials at grave sites created by using fill consisting of construction and demolition debris, and (2) from an order of said court, entered February 1, 1994, which denied plaintiff's motion for "further preliminary injunctive relief".

HEADNOTES

Cemeteries
Use of Construction and Demolition Debris for Burying Human Remains

(1) Not-For-Profit Corporation Law § 1510 (m), which provides that no cemetery "shall use construction and demolition debris ... for the purpose of burying human remains", is violated when a cemetery permits burials on a site which contains such material but is first covered by 10 to 12 feet of topsoil. The language of the statute does not distinguish between (1) the use of such debris in the actual physical act of covering, e.g., being thrown onto, and/or immediately surrounding the coffin in the grave site, and (2) the mere, even passive, existence of such debris anywhere in the grave site, e.g., 10 to 12 feet below the coffin. The purpose of the statute is to prohibit the burial of human remains in any construction and demolition debris, and the "topsoil exception" fashioned by Supreme Court defeats the statute's intent of protecting the sanctity of human burials. While the court may have created such an exception to make more land available to inner city cemeteries and to help them in alleviating limited space and increased financial problems, the court usurped the power of the Legislature which clearly chose not to include such an exception in the amended statute. Finally, any environmental problems associated with the burial mound created by defendants using construction and demolition debris were not the main impetus for the bill, and the fact that no hazardous or toxic wastes were contained therein in excess of regulatory standards, and thus that no significant public health or environmental hazards presently existed, is not determinative of the issue.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Cemeteries, §§ 3, 6.

N-PCL 1510 (m).

NY Jur 2d, Cemeteries and Dead Bodies, §§5, 41. ***248**

ANNOTATION REFERENCES

See ALR Index under Cemeteries.

APPEARANCES OF COUNSEL

Dennis C. Vacco, Attorney-General, New York City *(Pamela A. Mann, Sean Delany* and *Robert R. Molic* of counsel), for appellant.
Morrison & DeRoos, New York City *(Edward A. Morrison* of counsel), for respondent.

OPINION OF THE COURT

Santucci, J.

This is a case of statutory construction. The question presented is whether Not-For-Profit Corporation Law § 1510 (m) (hereinafter N-PCL), which provides that no cemetery "shall use construction and demolition debris ... for the purpose of burying human remains", is violated when a cemetery permits burials on a site which contains such material but only on condition that the site be first covered by 10 to 12 feet of topsoil. We conclude that this question should be answered in the affirmative.

Cypress Hills Cemetery (hereinafter Cypress Hills) was incorporated in or about 1848 as a nonprofit public cemetery corporation. It presently comprises in excess of 200 acres of land on the Brooklyn-Queens border. As a public cemetery corporation, Cypress Hills is subject to the provisions of N-PCL article 15.

In 1985, Cypress Hills embarked on a project to create additional grave plots within its borders using construction and demolition debris. The project was commenced with a contractor working without a written contract. Rather than receive monetary compensation, the contractor was permitted by Cypress Hills to dispose of construction and demolition debris on the grounds of the cemetery. In actuality, the contractor derived his revenue from fill suppliers, who were major road contractors for the City of New York, by finding a place for them to dispose of a byproduct of their work, to wit, landfill composed of construction and demolition debris. When the project was completed, it resulted in the construction of a 40-foot-high mound to be used for burials, that is now known as Terrace Meadow. ***249**

In 1989 Cypress Hills contracted with the same contractor to create several thousand additional new graves by excavating unused roadways within the cemetery and then filling in those areas with construction and demolition debris.

Following the public dedication of these grave sites and the opening by the cemetery of sales to the public, environmental testing took place at the direction of Cypress Hills' officers. The tests showed that the grave sites did not contain any hazardous or toxic wastes and did not pose any significant public health or environmental hazard.

Effective June 28, 1993, N-PCL 1510 was amended by adding a new subdivision (m), which provides in its entirety as follows: "No cemetery corporation or religious corporation having charge and control of a cemetery which heretofore has been or which hereafter may be used for burials, shall use construction and demolition debris, as that term is defined in 6 NYCRR 360-1.2, for the purpose of burying human remains" (L 1993, ch 169, § 2).

Construction and demolition debris is defined by regulations promulgated by the New York State Department of Environmental Conservation (hereinafter the DEC) as: "uncontaminated solid waste resulting from the construction, remodeling, repair and demolition of utilities, structures and roads; and uncontaminated solid waste resulting from land clearing. Such waste includes, but is not limited to bricks, concrete and other masonry materials, soil, rock, wood (including painted, treated and coated wood and wood products), land clearing debris, wall coverings, plaster, drywall, plumbing fixtures, nonasbestos insulation, roofing shingles and other roof coverings, asphaltic pavement, glass, plastics that are not sealed in a manner that conceals other wastes, empty buckets 10 gallons or less in size and having no more than one inch of residue remaining on the bottom, electrical wiring and components containing no hazardous liquids, and pipe and metals that are incidental to any of the above" (6 NYCRR 360-1.2 [b] [38]).

The legislative sponsors of N-PCL 1510 (m) explained that its purpose was to ensure purchasers of burial plots "their sacred burial by prohibiting the usage of construction and demolition debris for the burial of human remains ", and they pointedly decried the use of such material for burials at Cypress Hills (Introducer's Mem in Support, Bill Jacket, L 1993, ch 169).

On or about October 20, 1993, the Attorney-General commencedthis ***250** action against Cypress Hills and its directors, *inter alia,* for a preliminary and permanent injunction prohibiting them from conducting any unauthorized activities, including continuing to perform burials in violation of N-PCL 1510 (m).

The defendants responded to the Attorney-General's complaint with a verified answer dated November 10, 1993, in which they denied the applicability of N-PCL 1510 (m) to the activities engaged in by Cypress Hills.

By order to show cause dated November 9, 1993, the Attorney-General moved in the Supreme Court, *inter alia,* for a preliminary injunction prohibiting all burials in graves at Cypress Hills that were to be dug in fill consisting of any construction and demolition debris, and from continuing to sell such graves either directly or through selling agents. In an affidavit in opposition dated November 22, 1993, and supporting materials, the defendant Gerald B. Egan, the President and a director of Cypress Hills, claimed that there was no violation of N-PCL 1510 (m) because the construction and demolition debris at the cemetery had been covered with "ten to twelve feet of topsoil".

In a memorandum decision dated November 29, 1993, the Supreme Court explained its conditional grant of the Attorney-General's motion for a preliminary injunction as follows: "[I]nsofar as the State seeks ... [to] prohibi[t]

defendants from performing burials on the Terrace Meadows mound or any other sites consisting of construction and demolition debris ... [they are enjoined from doing so] *unless defendants demonstrate that ten to twelve feet of topsoil covers such construction debris* (and a greater amount where bodies are to be buried 'three-deep'), for all burials to be conducted hence-forward“ (emphasis supplied).

The Attorney-General appeals from that portion of an order dated January 4, 1994, entered upon the foregoing memorandum decision, as excepted graves that were covered with topsoil from the application of N-PCL 1510 (m).

Shortly after the Supreme Court's determination of November 29, 1993, the State discovered that little or no topsoil had actually been placed over the debris-landfill used to create the new gravesites. Nevertheless, in a letter to the Supreme Court dated December 28, 1993, the cemetery asserted that there was no violation of the Supreme Court's directive or of the statute because, as burials were required to be performed in ***251** the future, the defendants planned to remove the construction and demolition debris from each affected grave, place topsoil at the bottom of the grave, and, after the casket was placed in the grave, fill it in with indigenous topsoil.

The Attorney-General subsequently moved by order to show cause dated January 14, 1994, for ”further preliminary injunctive relief“, contending that the defendants' ”plan“ violated the plain meaning of N-PCL 1510 (m), as well as the January 4, 1994 order of the Supreme Court requiring a uniform covering of topsoil. By order dated February 1, 1994, the Supreme Court denied the motion for further preliminary injunctive relief without explanation, and the Attorney-General also appeals from that order.

In the interpretation of statutes, the purpose of the act and the objectives to be accomplished must be considered. It is the legislative intent that is the great and controlling principle, and the primary consideration of the courts in the construction of statutory provisions is to ascertain and give effect to that intent *(see,* McKinney's Cons Laws of NY, Book 1, Statutes § 92 [a]; *Niesig v Team I,* 76 NY2d 363, 369; *Ferres v City of New Rochelle,* 68 NY2d 446, 451; *Matter of Allstate Ins. Co. v Libow,* 106 AD2d 110, 114, *affd* 65 NY2d 807).

In effecting that objective, the courts are first bound to ascertain the legislative intent from a literal reading of the words of the statute (McKinney's Cons Laws of NY, Book 1, Statutes § 92 [b]; § 94; *see, Patrolmen's Benevolent Assn. v City of New York,* 41 NY2d 205, 208; *Matter of Allstate Ins. Co. v Libow, supra,* at 114). Where the legislative intent is clear and unambiguous from the language of the statute, the words used should be construed so as to give effect to their plain meaning *(see, e.g., Matter of State of New York v Ford Motor Co.,* 74 NY2d 495, 500; *Finger Lakes Racing Assn. v New York State Racing & Wagering Bd.,* 45 NY2d 471, 479-480), and resort to extrinsic evidence, such as the legislative history of the statute, is inappropriate *(see,* McKinney's Cons Laws of NY, Book 1, Statutes § 120; *Giblin v Nassau County Med. Ctr.,* 61 NY2d 67, 74; *Rubin & Sons v Clay Equip. Corp.,* 184 AD2d 168, 170). Only where the legislative intent of a statute cannot be ascertained from a literal reading may the courts go outside the statute in an endeavor to find its true meaning (McKinney's Cons Laws of NY, Book 1, Statutes § 92 [b]). Such is the situation in the case at bar.

The pertinent language of the amended statute providing ***252** that ”[n]o cemetery corporation ... shall use construction and demolition debris ... for the purpose of burying human remains“ (N-PCL 1510 [m]) does not distinguish between (1) the use of such debris in the actual physical act of covering, e.g., being thrown onto, and/or immediately surrounding the coffin in the grave site, and (2) the mere, even passive, existence of such debris anywhere in the grave site, e.g., 10 to 12 feet below the coffin. Because the statute does not make this distinction, certain questions arise. For instance, if the construction and demolition debris exists only 10 to 12 feet below the coffin, may it still be said that it is used in the act or procedure of burying the human remains? Is the whole grave site contaminated by the existence of any construction and demolition debris anywhere within it? The answers to such questions are not readily garnered by a literal reading of the amended statute. Thus, there is a measure of ambiguity inherent in the statute which we are now called upon to interpret.

As noted, where there is ambiguity about the meaning and intent of a statute, it is proper to resort to its legislative history for clarification. In doing so, it becomes clear that the purpose of the statute is to prohibit the burial of human remains in any construction and demolition debris, and that the ” topsoil exception“ fashioned by Supreme Court defeats the statute's intent of protecting the sanctity of human burials. For example, the New York State Senate Introducer's Memorandum in Support of Senate Bill 5090 and Assembly Bill 5633 (hereinafter S.5090/A.5633) states specifically as follows: ”This bill would prevent the further exploitation of

consumers of burial plots and insure their sacred burial by prohibiting the usage of construction and demolition debris for the burial of human remains" (Bill Jacket, L 1993, ch 169).

Moreover, in Assembly Sponsor Catherine Nolan's June 21, 1993 letter to Governor Cuomo concerning S.5090/ A.5633 she states, *inter alia,* as follows: " [C]onstruction and demolition debris is not suitable material to bury human remains. This bill to prohibit the burial of human remains in construction and demolition debris is unfortunately necessary to prevent further the desecration of the dead. This bill would prevent the further exploitation of consumers of burial plots and insure their sacred burial". (Bill Jacket, L 1993, ch 169.)

The June 25, 1993, Memorandum from Executive Deputy Secretary of State James N. Baldwin to Honorable Elizabeth D. Moore, Counsel to the Governor, recommending approval of ***253** S.5090 (Bill Jacket, L 1993, ch 169), states in relevant part as follows:

"The bill is a response to the practice of certain cemeteries of using construction and demolition debris as fill in lands given over to the interment of deceased persons. Such debris is not necessarily screened for the presence of toxic materials. Clearly, the loved ones of a deceased person have an interest in the prevention of the use of such materials *on or about* the gravesite.

"This bill ... *flatly prohibits* the use of construction and demolition debris in cemetery land associated with burials" (emphasis supplied).

The above examples from the legislative history of the amendment, and the legislative history taken as a whole, lead to the conclusion that the legislative intent of N-PCL 1510 (m) is to ban the use and/or existence of construction and demolition debris anywhere and everywhere in the grave site, whether on, in, immediately surrounding, or under the coffin, etc. That is so because the very presence of construction and demolition debris in the burial mound, regardless of its exact location, contaminates the whole site and desecrates the dead, thus defeating the statute's principal purpose.

Furthermore, the topsoil exception to the statute is merely an "artificial construction" conceived by Supreme Court. The court may have created such an exception to make more land available to inner city cemeteries such as Cypress Hills and to help them in alleviating limited space and increased financial problems. However, by creating the exception, the court usurped the power of the Legislature which clearly chose not to include such an exception in the amended statute. Thus, where, as here, the law describes a particular act, thing or person to which it shall apply, the inference must be drawn that "what is omitted or not included was intended to be omitted or excluded" (McKinney's Cons Laws of NY, Book 1, Statutes § 240; *see, Matter of Alonzo M. v New York City Dept. of Probation,* 72 NY2d 662, 665; *Patrolman's Benevolent Assn. of New York v City of New York, supra,* at 208-209).

Finally, it should be noted that any environmental problems associated with the burial mound, e.g., subsurface fires, odors, and the venting of gases, are only secondarily alluded to by the sponsors of the bill. These potential dangers were not the main impetus for the bill. Consequently, the fact that certain tests performed at the landfill by environmental agencies ***254** revealed that no hazardous or toxic wastes were contained therein in excess of regulatory standards, and thus that no significant public health or environmental hazards presently existed, is not determinative of the main issue. Rather, since the statute was amended primarily to prevent the desecration of the dead and to insure their sacred burial, the court erred in creating an exception which defeated the legislative intent.

Bracken, J. P., Lawrence and Goldstein, JJ., concur.

Ordered that the order dated January 4, 1994 is reversed insofar as appealed from, on the law, and the words "unless a sufficient amount of topsoil, in no event less than ten to twelve feet of topsoil and a greater amount of topsoil in any grave site that has been or will be sold to accommodate three burials in a single grave plot, uniformly covers the construction and demolition debris in Terrace Meadow and any other area where grave sites were constructed using construction and demolition debris" are deleted; and it is further,

Ordered that the appeal from the order dated February 1, 1994 is dismissed as academic, in light of our determination of the appeal from the order dated January 4, 1994; and it is further,

Ordered that the plaintiff is awarded one bill of costs. ***255**

622 N.Y.S.2d 300

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New York
Official Reports

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The People of the State of
New York, Respondent,
v.
David S. Finnegan, Appellant.

Court of Appeals of New York
30
Argued January 12, 1995;

Decided February 16, 1995

CITE TITLE AS: People v Finnegan

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Ontario County Court (James R. Harvey, J.), dated November 22, 1993, which affirmed a judgment of the Justice Court of the Town of Victor (John Dwyer, J.), rendered upon a verdict convicting defendant of driving while ability impaired and driving while intoxicated.

HEADNOTES

Motor Vehicles
Chemical Tests
No Affirmative Duty of Police to Assist in Obtaining Independent Chemical Test

(1) Vehicle and Traffic Law § 1194 (4) (b), which promulgates the defendant's right to an independent chemical test, does not also impose an affirmative duty on the police to assist an arrested individual in obtaining an independent chemical test. The simple, straightforward declaration of Vehicle and Traffic Law § 1194 (4) (b) is that defendants are entitled to their own additional chemical test. The statute is starkly silent as to any implementary duties imposed on the law enforcement personnel as to notice or to direct assistance in obtaining an independent chemical test. Therefore, law enforcement personnel are not required to arrange for an independent test or to transport defendant to a place or person where the test may be performed. The police should not impede arrested individuals from exerting or accomplishing their statutory prerogative, and should even assist persons in custody with appropriate advice and communication means, but the police have no affirmative duty to gather or help gather evidence for an accused. Moreover, assistance for the independent test need not be speedily undertaken so that it is administered within two hours of the arrest as Vehicle and Traffic Law § 1194 (2) (a) (1) mandates for the official breathalyzer test. That prerequisite is not referenced to the accused's independent test option nor is it controlling with respect to the private, personal test.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Automobiles and Highway Traffic, §§ 305-307.

Vehicle and Traffic Law §§ 1194 (2) (a) (1); (4) (b).

NY Jur 2d, Automobiles and Other Vehicles, §§ 510, 512.

ANNOTATION REFERENCES

Drunk driving: motorist's right to private sobriety test. 45 ALR4th 11. ***54**

POINTS OF COUNSEL

Kunstler & Kuby, New York City *(William M. Kunstler* of counsel), for appellant.

I. The trial court erred in denying appellant's request for a suppression of the People's breathalyzer results after appellant had been denied his statutory right to an independent blood test. *(People v Cegelski,* 142 Misc 2d 1023; *People v Batista,* 128 Misc 2d 1054.)

II. Appellant's driving while intoxicated conviction under Vehicle and Traffic Law § 1192 (2) rendered his driving while ability impaired conviction under Vehicle and Traffic Law § 1192 (1) a violation of the Double Jeopardy Clauses of the Federal and State Constitutions. *(People v Prescott,* 66 NY2d 216; *North Carolina v Pearce,* 395 US 711; *Harris v Oklahoma,* 433 US 682; *People v Meikrantz,* 77 Misc 2d 892; *People v Fielder,* 75 Misc 2d 446; *People v Weber,* 82 Misc 2d 593; *People v Green,* 56 NY2d 427; *People v Glover,* 57 NY2d 61; *People v Hoag,* 51 NY2d 632; *People v Brown,* 73 AD2d 112.)

III. The traffic information and supporting deposition were facially insufficient to support a charge of driving while intoxicated. *(People v Key,* 45 NY2d 111.)

IV. There was no reasonable cause to stop and subsequently arrest appellant. *(People v Hoffman,* 53 Misc 2d 1017; *Matter*

of Prudhomme v Hults, 27 AD2d 234; *People v Marriott,* 37 AD2d 868; *People v Cantor,* 36 NY2d 106; *Terry v Ohio,* 392 US 1; *People v De Bour,* 40 NY2d 210.)

V. The evidence adduced at trial was legally insufficient to establish the commission of the charged offense. *(People v Hoffman,* 53 Misc 2d 1017; *Matter of Prudhomme v Hults,* 27 AD2d 234; *People v Marriott,* 37 AD2d 868; *People v Hamlin,* 53 AD2d 1001; *People v Hughes,* 41 AD2d 333; *People v Barnes,* 58 AD2d 608; *People v Grimaldi,* 44 AD2d 722; *People v Lagana,* 43 AD2d 834; *People v Crimmins,* 36 NY2d 230; *People v Mackell,* 40 NY2d 59.)

R. Michael Tantillo, District Attorney of Ontario County, Canandaigua *(John G. Herriman* of counsel), for respondent.

I. The Court below did not err in affirming the trial court's denial of appellant's request for a pretrial suppression hearing on the breathalyzer results from an alleged refusal to allow an independent chemical test. *(People v Miller,* 199 AD2d 692, 82 NY2d 928; *People v Sauve,* 129 Misc 2d 666; *People v Hoats,* 102 Misc 2d 386; *People v Cegelski,* 142 Misc 2d 1023, 74 NY2d 846; *People v Alvarez,* 70 NY2d 375; *California v Trombetta,* 467 US 479; *People v Kirkland,* 157 Misc 2d 38; *People v McGrath,* 135 AD2d 60, 73 NY2d 826; ***55** *People v Morse,* 127 Misc 2d 468.)

II. Appellant's conviction under Vehicle and Traffic Law § 1192 (2) did not render his conviction under section 1192 (1) a violation of the Double Jeopardy Clauses of the Federal and State Constitutions. *(People v Carvalho,* 174 AD2d 687; *People v Hoag,* 51 NY2d 632; *People v Rudd,* 41 AD2d 875.)

III. The traffic ticket and supporting deposition were facially sufficient to support a charge of driving while intoxicated. *(People v Booden,* 69 NY2d 185; *People v Daniels,* 37 NY2d 624; *People v Murray,* 40 NY2d 327; *People v Cuozzo,* 292 NY 85; *People v Jaehne,* 103 NY 182; *People v Jennings,* 40 AD2d 357, 33 NY2d 880; *People v Sims,* 37 NY2d 906; *People v Groff,* 71 NY2d 101; *People v Lipsky,* 57 NY2d 560; *People v Reade,* 13 NY2d 42.)

IV. There was a reasonable basis to stop and probable cause to arrest appellant. *(People v De Bour,* 40 NY2d 210; *People v Bennett,* 70 NY2d 891; *People v Heston,* 152 AD2d 999; *People v McCarthy,* 135 AD2d 1113; *People v Farrell,* 89 AD2d 987.)

V. The evidence adduced at trial was legally sufficient to establish the commission of the charged offense. *(People v Gruttola,* 43 NY2d 116; *People v Sanchez,* 61 NY2d 1022; *People v David W.,* 83 AD2d 690; *People v Pena,* 50 NY2d 400, 449 US 1087; *People v Kennedy,* 47 NY2d 196; *People v Barnes,* 50 NY2d 375.)

OPINION OF THE COURT

Bellacosa, J.

Prior to his jury trial in the Town Court of Victor, defendant moved to suppress the otherwise valid results of a consensual breathalyzer test, claiming that his statutory right to an additional, independent test was violated. Defendant had been arrested for driving while intoxicated. After being transported to the police station, he consented to a breathalyzer test being administered and requested an additional blood test upon being advised of his statutory right.

The issue on this appeal is whether Vehicle and Traffic Law § 1194 (4) (b), which promulgates the defendant's right to an independent chemical test, also imposes an affirmative duty on the police to assist an arrested individual in obtaining an independent chemical test. We conclude that defendant's statutory right to the opportunity to obtain an independent test was not violated. Thus, we affirm the County Court order upholding defendant's conviction in the Town Court.

At approximately 2:30 A.M. on July 4, 1991, an Ontario County Deputy Sheriff, responding to a call of criminal mischief, ***56** observed a vehicle on Willis Hill Road in the Town of Victor. The officer testified that the car's headlights were not on and its right-hand tires "were just off the curb onto the stone." When the officer stopped to check out the situation, he noticed defendant walking toward the vehicle. Defendant told the officer that he had driven the car and parked it at that spot in order "to put something in his friend's mailbox." When the officer placed his hand near the radiator of defendant's parked car, that part of the car felt "hot." The officer concluded that the car had recently been driven. Defendant was questioned and admitted to drinking a beer and driving the car.

Because the officer smelled alcohol on defendant's breath and noticed that his eyes were bloodshot, the officer asked defendant to perform a series of field sobriety exercises. Defendant failed four basic skills. After making further observations of defendant's demeanor and appearance, the officer concluded that defendant was intoxicated and placed him under arrest for driving while intoxicated. Defendant was handcuffed and taken in a police vehicle to the police station. After being read his *Miranda* rights, defendant next agreed to provide a breathalyzer sample. Before administering that test, the officer informed defendant of his right also to "have an independent blood test at his own expense." The official breathalyzer test was performed by a certified operator and reflected a .15% alcohol level in defendant's blood. The test

was conducted at 3:42 A.M., within the two-hour time period required by statute *(see,* Vehicle and Traffic Law § 1194 [2] [a] [1]; *People v McGrath,* 135 AD2d 60, 61, 63, *affd* 73 NY2d 826). Because defendant repeatedly stated to the police that he intended to leave the jurisdiction, he was immediately arraigned and bail was set at $500 cash or $1,000 bond. Defendant was unable to post bond until the afternoon of July 4.

Two weeks prior to trial, defendant submitted an affidavit to the Town of Victor Court in which he stated that: "After I submitted to the breathalyzer test I requested that the police permit me to obtain an independent blood test from a physician of my choosing. ... The police did not assist me in arranging for an independent blood test, and I was unable to obtain such a test within a reasonable and relevant period of time." The trial court denied defendant's request for a pretrial hearing with respect to his motion to suppress the consensual, official breathalyzer test results. Defendant was tried and convicted by a jury of driving while ability impaired (***57** Vehicle and Traffic Law § 1192 [1]) and driving while intoxicated (Vehicle and Traffic Law § 1192 [2]). Ontario County Court, as the intermediate appellate court, affirmed the conviction and held that the police had no affirmative duty to arrange for or implement defendant's request for an independent chemical test or to transport the defendant to a person or place where an independent test could be performed. A Judge of this Court granted leave to appeal.

Defendant claims that the otherwise unchallenged official breathalyzer test results should have been suppressed because he was denied his statutory right to secure an independent blood test. Specifically, defendant asserts that the police have affirmative duties, which are concomitant with defendant's statutory right to seek an independent test *(see,* Vehicle and Traffic Law § 1194 [4] [b]). He would add an official obligation to assist defendant in obtaining an independent blood test. He charges that the enlarged duty was breached in this case (citing *People v Batista,* 128 Misc 2d 1054). We note that there appears to be no dispute that defendant was advised of the statutory right and, thus, find it unnecessary to decide whether the advisory prong should be added by judicial interpretative mandate. We proceed also on the assumption (though there is some factual, evidentiary dispute) that defendant asked generally to secure the independent test and for police assistance.

The whole of Vehicle and Traffic Law § 1194 (4) (b) is: "Right to additional test. The person tested shall be permitted to choose a physician to administer a chemical test in addition to the one administered at the direction of the police officer." Defendant asks that the Court interpretatively add to these words requirements for the police to assist defendant in obtaining an independent test, if one is requested. Defendant specifies at least three additional obligations not expressly prescribed in the statute: (1) the police must give notice of the right to the independent test; (2) the police must transport defendant to the doctor or hospital where the additional test would be performed or presumably arrange for an independent physician or technician to make a precinct call; and (3) the police must obtain the independent test within two hours of defendant's arrest. Failure to comply with these interpretive add-ons, defendant argues further, should result in suppression of the unchallenged, consensual, valid and untainted breathalyzer test results. ***58**

The governing rule of statutory construction is that courts are obliged to interpret a statute to effectuate the intent of the Legislature, and when the statutory "language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of [the] words" used *(People ex rel. Harris v Sullivan,* 74 NY2d 305, 309, citing *Doctors Council v New York City Employees' Retirement Sys.,* 71 NY2d 669, 675; *Patrolmen's Benevolent Assn. v City of New York,* 41 NY2d 205, 208). Equally settled is the principle that courts are not to legislate under the guise of interpretation *(see, People v Heine,* 9 NY2d 925, 929; *see also, Bright Homes v Wright,* 8 NY2d 157, 162).

The simple, straightforward declaration of Vehicle and Traffic Law § 1194 (4) (b) is that defendants are entitled to their own additional chemical test. The statute is starkly silent as to any implementary duties imposed on the law enforcement personnel as to notice or to direct assistance in obtaining an independent chemical test.

We have firmly held that the failure of the Legislature to include a substantive, significant prescription in a statute is a strong indication that its exclusion was intended *(People v Tychanski,* 78 NY2d 909, 911; *Matter of Alonzo M. v New York City Dept. of Probation,* 72 NY2d 662, 665-666; *see also, Pajak v Pajak,* 56 NY2d 394, 397; McKinney's Cons Laws of NY, Book 1, Statutes § 74). Indeed, the omission of the substantive elements defendant would have us add to this fully integrated and comprehensive driving while intoxicated protocol compellingly suggests that the Legislature intended

no such additional obligations. The statutory right is the defendant's and so is the responsibility to take advantage of it.

We hold, therefore, that law enforcement personnel are not required to arrange for an independent test or to transport defendant to a place or person where the test may be performed *(see, People v Miller,* 199 AD2d 692, 694- 695, *lv denied* 82 NY2d 928; *People v Cegelski,* 142 Misc 2d 1023, 1024-1025, *lv denied* 74 NY2d 846; *People v Sauve,* 129 Misc 2d 666, 668). Of course, the police should not impede arrested individuals from exerting or accomplishing their statutory prerogative. The authorities should even assist persons in custody with appropriate advice and communication means, e.g., a telephone call opportunity. On the other hand, we have settled the general question that the police have no affirmative duty to gather or help gather evidence for an accused *(see, People v Alvarez,* 70 NY2d 375). ***59**

Moreover, we disagree with defendant's assertion that assistance for the independent test must be speedily undertaken so that it, too, is administered within two hours of the arrest. Vehicle and Traffic Law § 1194 (2) (a) (1), which mandates that the breathalyzer test be performed within a two-hour time period following arrest, applies only to the official test. That prerequisite is not referenced to the accused's independent test option nor is it controlling with respect to the private, personal test *(see, People v McGrath,* 135 AD2d 60, *affd* 73 NY2d 826, *supra).* Nothing in the unambiguous language of Vehicle and Traffic Law § 1194 (4) (b) indicates that the Legislature intended to cross-reference or incorporate the official test time limitation into obtaining the independent test.

This is a case involving a purely statutory right and statutory construction only. We conclude that under the circumstances presented here, there was no violation and the request for and right to the independent chemical test have no bearing on the reliability of the official breathalyzer test evidence, consensually acquired for eventual trial. Indeed, Vehicle and Traffic Law § 1195, which deals with the admissibility of chemical test results, provides only that such results shall be admissible in evidence if the test was administered in accordance with Vehicle and Traffic Law § 1194 *(see,* Vehicle and Traffic Law § 1195). The official test complied with the statutory prescriptions in all respects, and the defendant's right to an independent one was not transgressed. Defendant's other contentions lack merit and require no further explication.

Accordingly, the order of the County Court should be affirmed.

Chief Judge Kaye and Judges Simons, Titone, Smith, Levine and Ciparick concur.
Order affirmed. ***60**

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New York
Official Reports

48 N.Y.2d 408, 399 N.E.2d 59, 423 N.Y.S.2d 470

The People of the State of
New York, Respondent,
v.
Joseph Illardo, Appellant.

Court of Appeals of New York
Argued October 10, 1979;

decided November 27, 1979

CITE TITLE AS: People v Illardo

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Erie County Court (Joseph P. McCarthy, J.), entered November 22, 1978, which reversed, on the law, an order of the Buffalo City Court (Samuel L. Green, J.), dismissing an information charging defendant with obscenity in the second degree.

Defendant was charged in an information with the knowing promotion of obscene material. He moved to dismiss the information, contending that the affirmative defense provisions of subdivisions 1 and 2 of section 235.15 of the Penal Law are constitutionally infirm and that, because these provisions could not be severed from the remainder of the statute, the defect renders section 235.05 of the Penal Law, the statute under which he was charged, invalid as well. Subdivision 1 of section 235.15 provides that it is an affirmative defense to an obscenity prosecution if the allegedly obscene material was disseminated to persons or institutions having scientific, educational, governmental, or other similar justification for possessing or viewing the same, which language appellant claims is so imprecise as to render this section void for vagueness. With respect to subdivision 2, which affords another affirmative defense to certain nonmanagerial employees of motion picture theatres, appellant argues the exclusion of bookstore employees like himself violates equal protection. The motion to dismiss was granted by the City Court, which declared both subdivisions unconstitutional. On the People's appeal, the Erie County Court reversed that order.

The Court of Appeals affirmed, holding, in an opinion by Judge Fuchsberg, that subdivision 1 of section 235.15 of the Penal Law is not so imprecise as to render it void for vagueness, that subdivision 2 of that section is not fatally underinclusive in violation of equal protection for failure to include bookstore owners while bringing movie theatre employees within its protection, since such a classification by the Legislature is not without a rational basis, that defendant has standing to raise such a challenge to the affirmative defenses although he has not yet proceeded to trial, and that obscene ***409** material falls outside the scope of the First Amendment to the United States Constitution.

People v Illardo, 97 Misc 2d 294, affirmed.

HEADNOTES

Crimes
Obscenity
Validity of Affirmative Defense

(1) The constitutional requisite that a statute be informative on its face does not preclude the Legislature from using ordinary terms to express ideas that find adequate interpretation in everyday usage and understanding; it is enough that the language used conveys sufficiently definite warnings as to proscribed conduct when measured by common understanding and practices. Accordingly, and considering the presumption of constitutionality overlaying duly enacted statutes, subdivision 1 of section 235.15 of the Penal Law, which provides that it is an affirmative defense in any obscenity prosecution that the allegedly obscene material was disseminated to persons or institutions having scientific, educational, governmental or other similar justification for possessing such material, is not so imprecise as to render it void for vagueness; the words "scientific", "educational" and "governmental" are within the compass of the ordinary citizen and the final phrase, "other similar justification", though susceptible of a wide interpretation, is designed to save the Legislature from spelling out in advance every contingency in which the statute could apply, employing the principal of *ejusdem generis* in relying on the courts to give content to the phrase where foreseeable circumstances are too numerous or varied for particular enumeration, and is, under that canon of statutory construction, limited in its effect by the specific terms that precede it; although there may be imaginable instances in which some difficulty may

be encountered in determining on which side of the line a particular fact situation falls, this alone does not render a statute's language impermissibly vague, and this reasoning is certainly no less applicable when the language defines not a criminal offense, but an affirmative defense.

Crimes
Obscenity
Validity of Affirmative Defense

(2) The equal protection clause of the Fourteenth Amendment to the United States Constitution is not violated by statutory distinctions so long as the legislative classification is not arbitrary and can be said to bear a fair and substantial relation to some manifest evil reasonably perceived by the Legislature; if the classification has some reasonable basis, it does not offend the Constitution simply because it lacks mathematical nicety or because in practice it results in some inequality. Accordingly, subdivision 2 of section 235.15 of the Penal Law, which provides an affirmative defense in a prosecution for obscenity for certain nonmanagerial employees of motion picture theatres, is not fatally underinclusive in violation of the equal protection clause for failure to include bookstore employees, since the statute might be seen as addressing itself to the phase of the problem which seems most acute to the legislative mind; on this basis, and bearing in mind the heavy burden that an appellant must shoulder to demonstrate a statute's invalidity, it cannot be said, without more, that the classification is unconstitutional, since, so long as it has a rational basis, it is not for the courts, but for those who enacted the statute, to choose the particular course taken to accomplish an end. ***410**

Constitutional Law
Standing
Validity of Affirmative Defenses

(3) The fact that a defendant has not yet proceeded to trial on a criminal charge does not divest him of standing to raise the constitutionality of the statutory defenses to such charge. Accordingly, defendant, who is charged with promotion of obscene material (Penal Law, § 235.05, subd 1), may raise the constitutionality of section 235.15 of the Penal Law, which provides affirmative defenses to such a charge, since, the moment the prosecution against him was mounted, defendant gained the right to rely on any legitimate defense, including those incorporated in section 235.15.

Constitutional Law
Freedom of Speech
Obscene Material

(4) Where First Amendment rights are involved, to forestall the possibility of inhibiting the exercise of free speech, a statute's imprecision may not be lightly overlooked, but, since obscene matter falls outside the scope of the First Amendment to the United States Constitution, the amendment plays, at best, a peripheral role in the scrutiny of a statute prohibiting the promotion of such material; moreover, where the statute deals not with a proscription itself, but, instead, with affirmative defenses, statutory provisions which become relevant only after an arrest is made and charges are filed, any uncertainty in its terms is far less likely to be an inducement to irresponsible law enforcement, which the constitutional requisite that a statute be informative on its face, in addition to ensuring that citizens can conform their conduct to the dictates of law, serves to avoid.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Penal Law §§235.05 subd 1, 235.15 subds 1, 2

16 Am Jur 2d, Constitutional Law §§ 349, 498, 499, 552; 50 Am Jur 2d, Lewdness, Indecency, and Obscenity §§ 5, 10, 11

18 Am Jur Proof of Facts 465, Obscenity--Motion Pictures

10 Am Jur Trials 1, Obscenity Litigation

ANNOTATION REFERENCES

Comment Note.--Validity of procedures designed to protect the public against obscenity. 5 ALR3d 1214.

Supreme Court's development, since Roth v United States, of standards and principles determining concept of obscenity in context of right of free speech and press. 41 L Ed 2d 1257.

POINTS OF COUNSEL

Paul J. Cambria, Jr., and *Herald Price Fahringer* for appellant.

I. Appellant has standing, as a matter of law and fact, to challenge the constitutionality of article 235 under traditional doctrines, and particularly where, as here, special rules of ***411** standing apply. *(Calderon v City of Buffalo,* 61 AD2d 323; *N. A. A. C. P. v Button,* 371 US 415; *Gooding v Wilson,* 405 US 518; *Coates v City of Cincinnati,* 402 US 611; *Plummer v City of Columbus,* 414 US 2; *Baggett v Bullitt,* 377 US 360; *United States v Raines,* 362 US 17; *N. A. A. C. P. v Alabama,* 357 US 449; *Grayned v City of Rockford,* 408 US 104; *Speiser v Randall,* 357 US 513. II. Section 235.05 and subdivisions 1 and 2 of section 235.15 of the Penal Law suffer from the vice of vagueness, violate equal protection, and suffer from unconstitutional overbreadth. *(People v Heller,* 33 NY2d 314; *Miller v California,* 413 US 15; *Stanley v Georgia,* 394 US 557; *Smith v Goguen,* 415 US 566; *Papachristou v City of Jacksonville,* 405 US 156; *United States v Harriss,* 347 US 612; *Musser v Utah,* 333 US 95; *United States v Brewer,* 139 US 278; *Winters v New York,* 333 US 507; *Grayned v City of Rockford,* 408 US 104.) III. Since section 235.15 is unconstitutional on its face and as applied herein, section 235.05 must as well be declared unconstitutional because in the absence of the former provision, the intent of the Legislature would be frustrated, and the general obscenity proscription would be overly broad. *(Martin v City of Struthers,* 319 US 141; *Griswold v Connecticut,* 381 US 479; *Lamont v Postmaster Gen.,* 381 US 301; *Winters v New York,* 333 US 507; *People v Abrahams,* 40 NY2d 277; *People v Berck,* 32 NY2d 567; *People v Tannenbaum,* 13 NY2d 268; *Bookcase, Inc. v Broderick,* 18 NY2d 71; *People v Bookcase, Inc.,* 14 NY2d 409; *People v Diaz,* 4 NY2d 469.)

Edward C. Cosgrove, District Attorney (John De Frank and *Judith Blake Manzella* of counsel), for respondent.

I. The language of subdivision 1 of section 235.15 is sufficiently clear as to be constitutional. *(United States v Harriss,* 347 US 612; *Colten v Kentucky,* 407; *People v Berck,* 32 NY2d 567; *Matter of Shattuck,* 193 NY 446; *Merritt-Chapman & Scott Corp. v Public Utility Dist. No. 2,* 319 F2d 94; *Republic of Finland v Town of Pelham,* 26 AD2d 35; *New York City Tr. Auth. v Loos,* 2 Misc 2d 733, 3 AD2d 740; *Brush v Commissioner,* 300 US 352; *Miller v California,* 413 US 15.) II. Subdivision 2 of section 235.15 does not violate the principle of equal protection of the law. *(Lindsley v Natural Carbonic Gas Co.,* 220 US 61; *Reed v Reed,* 404 US 71; *Guano Co. v Virginia,* 253 US 412.) III. Subdivisions 1 and/or 2 of section 235.15, if vague or discriminatory, are severable from section 235.05. *(Matter of Ahern v South Buffalo Ry. Co.,* 303 NY 545, 344 US 367; *People v Heller,* 33 NY2d 314; ***412** *Astro Cinema Corp. v Mackell,* 422 F2d 293; *Mishkin v New York,* 383 US 502; *Milky Way Prods. v Leary,* 305 F Supp 288, affd *sub nom. New York Feed Co. v Leary,* 397 US 98; *Matter of McGlone,* 258 App Div 596; *People v Mancuso,* 255 NY 463; *People ex rel. Alpha Portland Cement Co. v Knapp,* 230 NY 48; *People v Abrahams,* 40 NY2d 277.)

Robert Abrams, Attorney-General (Shirley Adelson Siegel and *John J. Warner, Jr.,* of counsel), in his statutory capacity under section 71 of the Executive Law.

Section 235.15 of the Penal Law is neither so vague in its language nor so invidiously discriminatory in its classification scheme as to render it constitutionally void. *(Nettleton Co. v Diamond,* 27 NY2d 182; *Fenster v Leary,* 20 NY2d 309; *Matter of Van Berkel v Power,* 16 NY2d 37; *I. L. F. Y. Co. v Rent Comm.,* 10 NY2d 263, 369 US 795; *Lehnhausen v Lake Shore Auto Parts Co.,* 410 US 356; *People v Kupprat,* 6 NY2d 88; *Lindsley v Natural Carbonic Gas Co.,* 220 US 61; *People v Byron,* 17 NY2d 64; *Whitfield v Simpson,* 312 F Supp 889; *United States v Petrillo,* 332 US 1.)

OPINION OF THE COURT

Fuchsberg, J.

(1, 2)We uphold in this case the affirmative defense provisions of the New York obscenity statute (Penal Law, § 235.15, subds 1, 2) against a constitutional attack brought on the grounds of due process and equal protection.

(3)Appellant Joseph Illardo was charged in an information with the knowing promotion of obscene material for selling a magazine entitled *Puritan* to a plainclothes police officer (Penal Law, § 235.05, subd 1).[1] As a result of preliminary judicial screening, it was determin ed that the magazine in fact was obscene within the meaning of section 235.00, a finding appellant does not contest for the purpose of his assault on the accusatory instrument. Instead, in moving to dismiss the information he relies on the contention that the affirmative defense provisions of section 235.15 are constitutionally infirm and that, because these provisions could not be severed from the remainder of the statute, the defect renders the proscription ***413** in section 235.05 invalid as well.[2] In passing we also note that, at least at this stage, defendant has mounted no such attack against the rest of the statute and we therefore have no occasion to deal with it here.

(1, 2)The motion to dismiss was granted by the Buffalo City Court, which declared both subsections unconstitutional. On the People's appeal to the Erie County Court, the order was reversed on the law. This appeal, in turn, is now here by

reason of a grant of leave by a Judge of this court pursuant to CPL 460.20. For the reasons which follow, we believe the information should be upheld.

Turning at once to the challenged statute itself, subdivision 1 of section 235.15 provides that it is an affirmative defense if the "allegedly obscene material was disseminated *** [to] persons or institutions having scientific, educational, governmental or other similar justification for possessing or viewing the same." Appellant's claim is that each of the adjectives, "scientific", "educational" and "governmental", and, especially, the phrase "other similar justification" are so imprecise as to render this section void for vagueness. With respect to subdivision 2 of section 235.15 of the Penal Law, which affords another affirmative defense to certain nonmanagerial employees of motion picture theatres, appellant argues the exclusion of bookstore employees like himself violates equal protection.

(1, 4)Mindful of the presumption of constitutionality overlaying duly enacted statutes *(People v Pagnotta,* 25 NY2d 333, 337), we first address the contention that subdivision 1 violates due process by " 'fail[ing] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden' " *(Papachristou v City of Jacksonville,* 405 US 156, 162, citing *United States v Harriss,* 347 US 612, 617). Indeed, the constitutional requisite that a statute be "informative on its face" *(People v Firth,* 3 NY2d 472, 474) serves not only to assure that citizens can conform their conduct to the dictates of law but, equally important, to guide those who must administer the law (see *People v Berck,* 32 NY2d 567, 569-570; *Smith v Goguen,* 415 US 566, 572-575; *Interstate Circuit v Dallas,* 390 US 676, 689). As common sense and experience ***414** both tell us, unless by its terms a law is clear and positive, it leaves virtually unfettered discretion in the hands of law enforcement officials and thereby may encourage arbitrary and discriminatory administration.

(1)However, the quest for definiteness does not preclude the Legislature from using ordinary terms to express ideas that find adequate interpretation in everyday usage and understanding *(People v Byron,* 17 NY2d 64, 67; see *People v Cruz,* 48 NY2d 419). For, "Condemned to the use of words, we can never expect mathematical certainty from our language" *(Grayned v City of Rockford,* 408 US 104, 110 [Marshall, J.]). Recognizing reality, the Constitution therefore does not require impossible standards; it is enough that the language used " 'conveys sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices' " *(Miller v California,* 413 US 15, 27-28, n 10, quoting *Roth v United States,* 354 US 476, 491-492; see *Trio Distr. Corp. v City of Albany,* 2 NY2d 690, 696).

(4)Saying so, we nevertheless appreciate that, where First Amendment rights are involved, to forestall the possibility of inhibiting the exercise of free speech, a statute's imprecision may not be lightly overlooked *(Grayned v City of Rockford, supra,* at p 109). But, it is now established doctrine that obscene matter falls outside the scope of the First Amendment *(Roth v United States, supra),* and thus the amendment plays at best a peripheral role in the scrutiny of the statute, prohibiting as it does the promotion of the material it describes. And, where the statute deals not with a proscription itself but, instead, with affirmative defenses, statutory provisions which become relevant only after an arrest is made and charges are filed, any uncertainty in its terms is far less likely to be an inducement to irresponsible law enforcement.

(1)Against this background, we proceed to examine subdivision 1 of section 235.15 in detail. The language of the section, we note, is taken almost verbatim from the Model Penal Code (§ 251.4, subd 3), the drafting of which was neither hasty nor unskilled. As far as the words "scientific", "educational" and "governmental" are concerned, surely these are within the compass of the ordinary citizen. While their exact definition may vary with the lexicon consulted, through daily usage the words have acquired a definite import. In this respect, these may be expressions of which it can be said that their explication proves far more troublesome than each of the words ***415** standing alone; to the "man in the street" they may evoke a reliable, if visceral, response (see *Jacobellis v Ohio,* 378 US 184, 197 ["I know it when I see it", Stewart, J.]). So, avoiding a mere stringing of synonyms, we prefer to await the results of judicial construction of these words after exploration in plenary proceedings (see, e.g., *Matter of Swedenborg Foundation v Lewisohn,* 40 NY2d 87, 94 [interpreting "educational" within the Real Property Tax Law (§ 421, subd 1) to refer to "the development of faculties and powers and the expansion of knowledge by teaching, instruction or schooling"]).

For our purposes here it suffices to examine these words in juxtaposition with some analogous terms that appear in the definition of obscenity itself. As formulated in *Miller v California* (413 US 15, supra.;) and subsequently by our

Legislature in section 235.00 (subd 1, par [c]) of the Penal Law, obscene material, *inter alia,* must be said to lack "serious literary, artistic, political or scientific value".[3] Patently, the term "scientific", therefore, cannot be said to be so vague in meaning as to deny due process. Nor are the terms "literary", "artistic" and "political" any more or less precise than the words "governmental" and "educational" in subdivision 1 of section 235.15. Rather, if anything, the wording of the obscenity test would seem on its face to introduce yet another subjective element by prefacing the terms with the qualifier "serious". Nevertheless, though there may be imaginable instances in which some difficulty in determining on which side of the line a particular fact situation falls, this alone does not render the statute's language impermissibly vague (see *Miller v California,* 413 US, at pp 27-28, supra.;; *People v Heller,* 33 NY2d 314, 329); the reasoning is certainly no less applicable when the language defines not a criminal offense but an affirmative defense.

However, as indicated, the statute does not stop after reciting the possibilities that the purchaser of obscene material ***416** may have a "scientific, educational [or] governmental" justification. It goes on to permit the affirmative defense in circumstances presenting "other similar justification", a phrase which appellant labels "irredeemably vague". But, in our view the phrase obviously represents no more than a common drafting technique designed to save the Legislature from spelling out in advance every contingency in which the statute could apply (see *People v Klose,* 18 NY2d 141, 145). For, when foreseeable circumstances are too numerous or varied for particular enumeration, the Legislature, employing the familiar principles of *"ejusdem generis"* may permissibly rely on the courts to give content to the phrase.

Under that canon of statutory construction, the phrase "other similar justification", though susceptible of a wide interpretation, becomes one limited in its effect by the specific words which precede it; in the vernacular, it is known by the company it keeps (McKinney's Cons Laws of NY, Book 1, Statutes, § 239). Relying on this principle, courts have had no problem construing similar phrases as encompassing or excluding situations that do not fall within the specifically described terms of a statute.

Likewise, in the case before us, the final clause in subdivision 1 of section 235.15 does not expand the scope of the section beyond the three specifically listed terms. Rather, the phrase "other similar justification" should be viewed as "graying the edges" of each of the enumerated justifications so that, in circumstances which reasonably can be thought to be within its embrace, the defense may nonetheless be available. Also, one can readily conceive of a seller raising a defense that the purchaser was serving some legitimate therapeutic or diagnostic purpose related to problems of human sexuality or, again purely by way of illustration, that the purchaser was engaged in a research project relating to perceptions of male/female sex roles; each might be considered a circumstance which, strictly speaking, would not fit within conventional concepts of what is "scientific", "governmental" or "educational". Our function today, however, is not to pass on the validity of section 235.15 in hypothetical situations, but rather to decide whether the phrase "other similar justification" complies with the dictates of due process. As indicated, we find that it does.

Accordingly, we next focus, albeit more briefly, on subdivision 2 of section 235.15, which appellant would have us ***417** declare violative of equal protection. In pertinent part, this section makes it an affirmative defense to an obscenity prosecution that the person charged was employed as "a motion picture projectionist, stage employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter or in any other non- managerial or non-supervisory capacity in a motion picture theatre; provided he has no financial interest, other than his employment, which employment does not encompass compensation based upon any promotion of the gross receipts, in the promotion of obscene material for sale, rental or exhibition or in the promotion, presentation or direction of any obscene performance, or is in any way responsible for acquiring obscene material for sale, rental or exhibition".

The purpose of this section, a provision common in substance to the obscenity statutes of several other States, is to afford a defense to those who function merely as employees, while withholding penal sanctions for those whose financial stake in the enterprise dictates that they bear the brunt of criminal responsibility (see Obscenity Law Project, 52 NYU L Rev 810, 896- 897). Appellant's challenge boils down to a claim that the statutory classification, embracing the class of non-managerial motion picture theatre employees but not similarly situated employees of adult bookstores is underinclusive to a fatal degree.

(2)The equal protection clause of the Fourteenth Amendment, however, is not violated so long as the legislative classification is not arbitrary and can be said to bear a fair and substantial relation to some manifest evil reasonably

perceived by the Legislature (see *Town of Huntington v Park Shore Country Day Camp,* 47 NY2d 61, 66; *Williamson v Lee Opt. Co.,* 348 US 483, 489). That means that "If the classification has some 'reasonable basis', it does not offend the Constitution simply because [it lacks] '*** mathematical nicety or because in practice it results in some inequality' " *(Dandridge v Williams,* 397 US 471, 485, quoting *Lindsley v Natural Carbonic Gas. Co.,* 220 US 61, 78; see *Matter of Levy,* 38 NY2d 653, 658-661; *Matter of Figueroa v Bronstein,* 38 NY2d 533, 535-536).

In applying these standards of rationality, one need not contest the fact that an employee of a bookstore may lack financial responsibility and control over business operations to the same extent as does an employee of a motion picture theatre in order to find a reasonable basis for the distinction. ***418** Unlike a theatre, in which patrons view the film in enclosed surroundings, and do not take possession of the film for circulation elsewhere, a bookstore, once it sells obscene matter, frees it for subsequent distribution by the original purchasers. The Legislature, therefore, conceivably could have viewed this risk of further dissemination as indicative of aggravated culpability, thereby justifying a greater deterrent in the form of denial of the affirmative defense to bookstore employees (see *Wheeler v State,* 281 Md 593, 611-612 [Murphy, Ch. J., dissenting]). Or, as an alternative basis for the difference in its treatment of these classes of defendants, the Legislature, rightly or wrongly, may have thought it more probable that the typical motion picture theatre would employ a larger percentage of nonmanagerial or nonsupervisory personnel than would the typical adult bookstore, and so have drawn the boundaries of the affirmative defense accordingly. The statute might thus permissibly be seen as "addressing itself to the phase of the problem which seems most acute to the legislative mind" *(Williamson v Lee Opt. Co.,* 348 US 483, 389, supra.;).

One reason or the other, it is not our function to decide whether the line of demarcation the Legislature selected was unwise, or that its purpose could better have been achieved in another way, or even that it would be ineffective to accomplish its end. So long as it has a rational basis, it is not for us, but was for those who enacted the statute to choose the particular course that was taken. On this basis, bearing in mind the heavy burden appellant must shoulder to demonstrate the statute's invalidity, we cannot say that the classification, without more, must fall to appellant's constitutional challenge.

Consequently, the order of the County Court should be affirmed.

Chief Judge Cooke and Judges Jasen, Gabrielli, Jones, Wachtler and Meyer concur.
Order affirmed. ***419**

Footnotes

1 The text of the statute reads:

"A person is guilty of obscenity in the second degree when, knowing its content and character, he:

"1. Promotes, or possesses with intent to promote, any obscene material".

2 (3)The fact that appellant has not yet proceeded to trial does not divest him of standing to raise the statutory affirmative defenses. The moment the prosecution against him was mounted, appellant gained the right to rely on any legitimate defense, including those incorporated in section 235.15.

3 Amended in 1974 to reflect *Miller's* standards, the statute reads: "Any material or performance is 'obscene' if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience."

399 N.E.2d 59, 423 N.Y.S.2d 470

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**1 The People of the State of New York, Respondent,

v

Joseph Schneider, Appellant.

Court of Appeals of New York
41
Argued May 5, 2021

Decided June 3, 2021

CITE TITLE AS: People v Schneider

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered October 16, 2019. The Appellate Division affirmed a judgment of the Supreme Court, Kings County (Danny K. Chun, J.), which had convicted defendant, upon a plea of guilty, of enterprise corruption, promoting gambling in the first degree, possession of gambling records in the first degree, and conspiracy in the fifth degree. The appeal to the Appellate Division brought up for review the denial, without a hearing, of that branch of defendant's omnibus motion which was to suppress evidence obtained pursuant to eavesdropping warrants.

People v Schneider, 176 AD3d 979, affirmed.

HEADNOTE

Crimes
Eavesdropping Warrants
Jurisdiction

Eavesdropping warrants are executed in the geographical jurisdiction where the communications are intentionally intercepted by authorized law enforcement officers within the meaning of CPL article 700. Accordingly, a Kings County Supreme Court Justice had jurisdiction to issue eavesdropping warrants for defendant's cell phones, which were not physically present in New York, for the purpose of gathering evidence in an investigation of enterprise corruption and gambling offenses committed in Kings County. CPL 700.05 (4) provides that "any justice of the supreme court of the judicial district in which the eavesdropping warrant is to be executed" is authorized to issue an eavesdropping warrant. When that section is read as an integrated whole and in a commonsense manner along with other sections of the CPL and correlative Penal Law definitions, the statute makes plain that a warrant is "executed" at the time when and at the location where a law enforcement officer intentionally records or overhears telephonic communications and accesses electronic communications targeted by the warrant. Execution of a warrant depends on the action of authorized law enforcement officers vis-à-vis the communications and does not depend on the location of a target, the target's communication devices, or the participants engaged in the call.

RESEARCH REFERENCES

Am Jur 2d Searches and Seizures §§ 391, 395, 413.

**188 Carmody-Wait 2d Search and Seizure §§ 173:195, 173:196, 173:200, 173:205, 173:213.

LaFave, et al., Criminal Procedure (4th ed) § 4.3.

McKinney's, CPL 700.05 (4); 700.30 (9).

NY Jur 2d Criminal Law: Procedure §§ 372, 379, 381, 390.

ANNOTATION REFERENCE

See ALR Index under Eavesdropping and Wiretapping; Warrants.

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POINTS OF COUNSEL

Stephen N. Preziosi P.C., New York City (*Stephen N. Preziosi* of counsel), for appellant.

I. The lower court erred and acted beyond the scope of its authority when it authorized eavesdropping warrants for a California resident who never set foot in New York and never made calls to or received calls from New York and committed no crimes in New York. (*People v Shapiro*, 50 NY2d 747; *United States v Rodriguez*, 968 F2d 130; *People v Delacruz*, 156 Misc 2d 284; *People v Perez*, 18 Misc 3d 582; *People v Capolongo*, 85 NY2d 151; *Stegemann v Rensselaer County Sheriff's Off.*, 155 AD3d 1455.) II. The lower court violated the Due Process Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause of the US Constitution, and the separate sovereign doctrine when it authorized an eavesdropping warrant on a cell phone in a state that does not permit electronic eavesdropping for gambling related offenses and does not permit eavesdropping from another state absent a joint state investigation. (*People v LaFontaine*, 92 NY2d 470; *Padula v Lilarn Props. Corp.*, 84 NY2d 519; *Global Reins. Corp.-U.S. Branch v Equitas Ltd.*, 18 NY3d 722; *Miller v Miller*, 22 NY2d 12; *Carroll v Lanza*, 349 US 408; *Matter of Luna v Dobson*, 97 NY2d 178; *Heath v Alabama*, 474 US 82; *Nielsen v Oregon*, 212 US 315; *Sandberg v McDonald*, 248 US 185; *Katz v United States*, 389 US 347.)

Eric Gonzalez, District Attorney, Brooklyn (*Morgan J. Dennehy* and *Leonard Joblove* of counsel), for respondent.

I. Supreme Court, Kings County, had jurisdiction to issue the ***189** eavesdropping warrants that authorized the monitoring of defendant's cell phone, because the warrants were executed in Kings County. (*Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653; *People v Andujar*, 30 NY3d 160; *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577; *People v Roberts*, 31 NY3d 406; *Matter of Avella v City of New York*, 29 NY3d 425; *People v Perez*, 18 Misc 3d 582; *People v Delacruz*, 156 Misc 2d 284; *Stegemann v Rensselaer County Sheriff's Off.*, 155 AD3d 1455; *United States v Rodriguez*, 968 F2d 130; *United States v Henley*, 766 F3d 893.) II. The issuance of the eavesdropping warrants by a New York court did not violate defendant's constitutional rights. (*People v Hlatky*, 153 AD3d 1538; *Matter of Doe v O'Donnell*, 86 AD3d 238; *Matter of Gordon*, 48 NY2d 266; *Hicklin v Orbeck*, 437 US 518; *Matter of Luna v Dobson*, 97 NY2d 178; *Matter of Whitney*, 57 AD3d 1142; *Nielsen v Oregon*, 212 US 315.)

Sandra Doorley, District Attorneys Association of the State of New York (*Susan Axelrod* and *Alan Gadline* of counsel), for District Attorneys Association of the State of New York, amicus curiae.

New York's Penal Law and Criminal Procedure Law permit courts to issue eavesdropping warrants even when certain intercepted conversations will be between cell phone users who are not in New York State, so long as the issuing court has jurisdiction over the investigation and the listening post is within that jurisdiction. (*United States v Rodriguez*, 968 F2d 130; *United States v Jackson*, 849 F3d 540; *United States v Vega*, 826 F3d 514; *United States v Cano-Flores*, 796 F3d 83; *United States v Henley*, 766 F3d 893; *United States v Luong*, 471 F3d 1107; *United States v Denman*, 100 F3d 399; *Riley v California*, 573 US 373; *People v Capolongo*, 85 NY2d 151; *People v Perez*, 18 Misc 3d 582.)

OPINION OF THE COURT

Chief Judge DiFiore.

The issue raised on defendant's appeal is whether a Kings County Supreme Court Justice had jurisdiction to issue eavesdropping warrants for defendant's cell phones, which were not physically present in New York, for the purpose of gathering evidence in an investigation of enterprise corruption and gambling offenses committed in Kings County. To resolve defendant's jurisdictional challenge, we must decide whether the eavesdropping warrants were "executed" in Kings County within the meaning of Criminal Procedure Law § 700.05 (4). ***190** We hold that eavesdropping warrants are executed in the geographical jurisdiction where the communications are intentionally intercepted by authorized law enforcement officers within the meaning of CPL article 700. Accordingly, the order of the Appellate Division should be affirmed.

I.

Law enforcement officers in Kings County conducted a two-year investigation into an illegal gambling enterprise. In the early stages of the investigation, an undercover agent met with defendant's accomplice, PD, and placed bets at a location in Kings County. A variety of investigative tools were used to identify coconspirators and gather evidence, including physical surveillance and the installation of a bugging device and video surveillance at the Kings County location. Investigators obtained eavesdropping warrants on the cell phones of multiple targets, ****2** including targets physically present in New York. Defendant's participation in the illegal gambling enterprise was uncovered when his telephonic communications were intercepted pursuant to a warrant authorizing eavesdropping on the cell phone of PD, who regularly came to Kings County in furtherance of the gambling enterprise. In the intercepted calls, defendant and PD were overheard discussing password-protected Internet accounts on sports gambling websites, through which

defendant controlled the usernames, passwords, betting limits, gambling lines and spreads for all his gambling clients.

The Kings County District Attorney applied for 11 successive eavesdropping warrants to intercept communications on three cell phones linked to defendant, at least two of which did not have subscriber information but were connected to defendant by voice identification. A Kings County Supreme Court Justice issued the warrants after finding probable cause to believe that defendant was engaging in designated gambling offenses in Kings County, mainly through his website "thewagerspot.com," and that "normal investigative procedures . . . reasonably appear[ed] to be unlikely to succeed" (CPL 700.15 [4]), justifying the use of eavesdropping. The warrants, as provided by statute, directed the particular communications service providers that controlled and operated the telephone wires and other digital and computer systems that transferred the telephonic and electronic communications to "provide all information, facilities, and technical assistance" to law enforcement to execute the warrants in Kings County.

***191** Defendant was subsequently indicted in Kings County, along with seven others, for enterprise corruption, promoting gambling and related crimes. Among other acts attributed to defendant, the indictment alleged that on 17 specific dates between September 13, 2015, and January 3, 2016, in Kings County, defendant and his accomplices received or accepted five or more illegal sports wagers on each date through defendant's gambling website, totaling more than five thousand dollars on each occasion. Defendant moved to suppress the evidence obtained pursuant to the warrants.[1] He did not assert that the government interception of his communications violated his constitutional privacy interests. Nor did he dispute that the charges were properly brought in Kings County based on the commission of designated crimes in that location. Instead, as relevant here, defendant claimed that the Kings County Supreme Court Justice lacked the authority to issue the eavesdropping warrants because defendant and his cell phones were not located in New York and his intercepted communications involved call participants who were not physically present in New York and therefore execution of the warrants did not occur in Kings County. He also claimed that the People violated his due process rights, the separate sovereign doctrine and other constitutional limitations because California law does not include gambling offenses as designated crimes for eavesdropping.

The suppression court denied the motion, concluding that there was probable cause to believe that defendant committed the designated gambling crimes (CPL 700.05 [8]) in Kings County, that the warrant was executed at a facility in Kings County where the communications were overheard and accessed by authorized law enforcement, and the warrants were properly issued by a justice in Kings County. The court further rejected defendant's claim that, under this approach, a judicial warrant allows law enforcement to "re-route phone calls being made anywhere in the country to Kings County and thereby have nation-wide jurisdiction." The court concluded that since the crimes were allegedly committed in Kings County, there was jurisdiction to prosecute the crimes and a sufficient nexus for the issuance of the eavesdropping warrants in that county.

Defendant entered a guilty plea to all counts of the indictment against him. The Appellate Division affirmed the judgment, ***192** holding that the suppression court properly denied defendant's motion to suppress the eavesdropping evidence because CPL article 700 authorized the Supreme Court Justice in Kings County to issue warrants that would be "executed" in that court's judicial district, meaning where the communications would be "intentionally overheard or recorded" (176 AD3d 979, 980 [2d Dept 2019], quoting CPL 700.05 [3] [a]). The Court also rejected defendant's claim that the warrants represented an unconstitutional extraterritorial application of New York State law. A Judge of this Court granted defendant leave to appeal (34 NY3d 1132 [2020]).

II.

There is no dispute here that law enforcement agents must obtain a judicial warrant to intercept real-time cell phone communications. Historically, the Fourth Amendment guarantee against unreasonable searches and seizures (US Const Amend IV) focused on whether the government obtained information by physical intrusions on constitutionally protected areas (*see Carpenter v United States*, 585 US —, —, 138 S Ct 2206, 2213 [2018]; ****3** *Olmstead v United States*, 277 US 438 [1928]). However, over 50 years ago, it was established that " 'the Fourth Amendment protects people, not places,' [which] expanded [the] conception of the Amendment to protect certain expectations of privacy" (*Carpenter*, 585 US at —, 138 S Ct at 2213, quoting *Katz v United States*, 389 US 347, 351 [1967]). Given the more modern appreciation "that property rights are not the sole measure of Fourth Amendment violations," a person's right to privacy has become the paramount concern in assessing the reasonableness of government intrusions,

especially as "innovations in surveillance tools . . . ha[ve] enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes," and courts must continue to "secure the privacies of life against arbitrary power" (*Carpenter*, 585 US at —, 138 S Ct at 2213-2214 [internal quotation marks omitted]; *see also Katz*, 389 US at 351-352; *Riley v California*, 573 US 373, 381-382 [2014]).

In New York, article I, § 12 of the New York State Constitution authorizes the issuance of eavesdropping warrants as a law enforcement investigative tool to overhear and intercept telephonic communications, provided that certain safeguards against unreasonable privacy invasions are met. "[I]n addition to tracking the language of the Fourth Amendment" (***193** *People v Weaver*, 12 NY3d 433, 438-439 [2009]), article I, § 12, adopted in 1938, provides in relevant part that

> "[t]he right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

New York State's express constitutional privacy protections for telephonic communications predated the United States Supreme Court's recognition of the Fourth Amendment protection against eavesdropping (*see Katz*, 389 US at 351-353; *see also People v Capolongo*, 85 NY2d 151, 158 [1995]). Yet, our early statutory procedure for obtaining evidence by wiretap order was struck down as unconstitutional under the Fourth Amendment due to the absence of additional protections, given the gravity of the privacy invasion in overhearing the content of the communications (*see Berger v New York*, 388 US 41 [1967]).[2]

In response to United States Supreme Court decisions in *Katz* and *Berger*, which invalidated government eavesdropping operations based on their failure to employ adequate privacy protections (*see Capolongo*, 85 NY2d at 159), Congress enacted title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Pub L 90-351, tit III, 82 US Stat 211, codified at 18 USC § 2510 *et seq*.), "imposing upon the States minimum standards for electronic surveillance" (*Capolongo*, 85 NY2d at 159; *see also* L 1969, ch 1147). States were permitted to adopt procedures and standards that were more restrictive than those imposed by federal law or to prohibit wiretapping completely (*see id.*; *see also* 18 USC § 2516).

Soon after title III was enacted, our state legislature enacted CPL article 700, which sets forth the procedural mechanism ***194** for securing a court-ordered eavesdropping warrant (*see Capolongo*, 85 NY2d at 159). In enacting article 700, the state legislature sought to "afford law enforcement 'greater flexibility in the employment of eavesdropping as an effective weapon against crime' and, in particular, organized crime, 'where the obtaining of evidence for successful prosecutions is often extremely difficult' " (*People v Rabb*, 16 NY3d 145, 151 [2011], quoting Governor's Approval Mem, Bill Jacket, L 1969, ch 1147, 1969 NY Legis Ann at 586). Complying with federal law, New York also gave effect to our "strong public policy of protecting citizens against the insidiousness of electronic surveillance" by requiring strict compliance with CPL article 700 (*see Capolongo*, 85 NY2d at 159-160). Issuance of the eavesdropping warrants based on demonstrated probable cause, which is not challenged here, satisfied the overarching constitutional privacy protections.

Before discussing the relevant statutory language as to what constitutes the point of execution of the warrant for the purpose of jurisdiction under CPL 700.05, some context with regard to the geographical predicates to conduct ****4** eavesdropping investigations and issue eavesdropping warrants is instructive. As a first principle, the court's jurisdiction to issue eavesdropping warrants is not boundless, but is limited by the rules of geographical jurisdiction set forth in our State Constitution and CPL article 20. Under our State Constitution, a defendant generally has a right to be tried in the county where the crime was committed (*see People v Greenberg*, 89 NY2d 553, 555 [1997]; NY Const, art I, § 2). A person may be prosecuted in a particular county where conduct occurred establishing an element of an offense or an attempt or a conspiracy to commit such offense (*see* CPL 20.40 [1]). Even where no conduct was committed within the county, a person may be prosecuted there under certain circumstances, such as where the result of an offense "occurred in such county" (CPL 20.40 [2] [a], [b]; *see also* CPL 20.60 [3] [causing the use of a computer service in one jurisdiction from another jurisdiction is deemed a use in both jurisdictions]).

Once the jurisdictional predicate to prosecute the crime in a particular county is established, as it was here, then, under CPL 700.10 (1), "a justice may issue an eavesdropping warrant . . . upon ex parte application of an applicant who

is authorized by law to investigate, prosecute or participate in the prosecution of the particular designated offense which is the ***195** subject of the application." Because this was a county-based prosecution (*see* CPL 20.40), the prosecutor authorized to prosecute the designated crimes in that jurisdiction—the Kings County District Attorney—was the proper warrant applicant (*see* CPL 700.05 [5]).

Turning next to the operative statutory language governing the "manner and time of execution," CPL 700.35 (1) provides that "[a]n eavesdropping . . . warrant must be executed according to its terms by a law enforcement officer who is a member of the law enforcement agency authorized in the warrant to intercept the communications . . . ." The law enforcement officers here were competent to execute the warrants because they were authorized to investigate and arrest defendant in the jurisdiction where the interception occurred (*see* CPL 700.05 [6]). Notwithstanding the dissent's suggestion that defendant had no connection to New York (dissenting op at 208), the investigation and prosecution of defendant and his accomplices based on their participation in the gambling enterprise that operated in Kings County are not challenged and were jurisdictionally sound (*see People v Di Pasquale*, 47 NY2d 764, 765 [1979]; CPL 20.40; *see also People v Carvajal*, 6 NY3d 305, 312 [2005]).

Despite the satisfaction of the jurisdictional and probable cause predicates in this case as mandated by our Constitution and CPL articles 20 and 700, defendant challenges the jurisdiction of a Supreme Court Justice presiding in Kings County to issue the eavesdropping warrants on the theory that the court acted extraterritorially. Specifically, defendant claims that the warrants were not "executed" in Kings County as required by CPL 700.05 (4) because his cell phones were not physically located in New York and his communications occurred outside of New York.[3] Resolution of this discrete challenge depends on the statutory interpretation of the word "executed" as used in CPL 700.05 (4), a term that is not defined in CPL article 700. CPL article 700, which sets forth the procedural mechanism of securing a court-ordered eavesdropping warrant, and Penal Law § 250.00, which contains definitions used in article 700, provide the framework to determine where ***196** the warrants targeting defendant's communications were executed.

When resolving a question of statutory interpretation, the primary consideration is to ascertain and give effect to the legislature's intent (*see Matter of Marian T. [Lauren R.]*, 36 NY3d 44, 49 [2020]). The starting point in determining legislative intent is to give effect to the plain language of the statute itself—" 'the clearest indicator of legislative intent' " (*id.*, quoting *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]). Additionally, when the language at issue is a component part of a larger statutory scheme, the language must be analyzed in context and the related provisions must be harmonized and rendered compatible (*see id.* at 49). We are also "governed by the principle that we must interpret a statute so as to avoid an unreasonable or absurd application of the law" (*People v Garson*, 6 NY3d 604, 614 [2006] [internal quotation marks and citations omitted]).

To begin, under CPL 700.05 (4), "any justice of the supreme court of the judicial district *in which the eavesdropping warrant is to be executed*" (emphasis added) is authorized to issue an eavesdropping warrant. When section 700.05 (4) is read as an integrated whole and in a commonsense manner along with other sections of the CPL and correlative Penal Law definitions, the statute makes plain that a warrant is "executed" at the time when and at the location where a law enforcement officer intentionally records or overhears telephonic communications and accesses electronic communications targeted by the warrant. Contrary to defendant's theory, a plain reading of CPL article ****5** 700 demonstrates that "execution" of a warrant depends on the action of authorized law enforcement officers vis-à-vis the communications and does not depend on the location of a target, the target's communication devices or the participants engaged in the call. Indeed, wiretapping occurs upon "the intentional overhearing or recording of . . . telephonic . . . communication [s]" and that statutory definition expressly excludes the actions of telecommunications providers in their normal operations (Penal Law § 250.00 [1]).

"Eavesdropping" contemplates the performance of specific acts by government actors in three ways—wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication (*see* CPL 700.05 [1]). The judicial warrants here authorized interception of both telephonic and electronic communications. Telephonic communications, ***197** when "intentionally overheard or recorded . . . by means of any instrument, device or equipment," are "[i]ntercepted communication[s]"—as are electronic communications that are "intentionally intercepted or accessed" (CPL 700.05 [3]; Penal Law § 250.00 [6]). Given the inclusion of telephonic communications in the definition of "intercepted communication," the dissent's view that the legislature inexplicably failed to authorize interception and

"wiretapping" of telephonic communications occurring on cellular phones is meritless (*see* dissenting op at 209-210). Notably, under the dissent's rather absurd hypothesis, the government apparently could not eavesdrop on cellular communications even where a cell phone or call participant is located within New York's borders.

Mirroring the federal definition of a wire communication, this state defines telephonic communication as "*any aural transfer* made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable *or other like connection between the point of origin and the point of reception* (*including the use of such connection in a switching station*)" (Penal Law § 250.00 [3] [emphasis added]; *see also* 18 USC § 2510 [1]). An "aural transfer" means "a transfer containing the human voice at any point between and including the point of origin and the point of reception" (Penal Law § 250.00 [4]; *see also* 18 USC § 2510 [18]). In contrast, "electronic communication" includes the transfer of various signals and data transmitted by wire (Penal Law § 250.00 [5]). Based on these definitions, execution of the warrants occurs at the point where authorized law enforcement intentionally overhears or records the human voice contained in telephonic communications and intentionally accesses the transferred signals or data in the electronic communications.

The legislative history accompanying substantive amendments made to CPL article 700 and Penal Law § 250.00 in 1988 demonstrates that the revisions were designed to keep pace with emerging technologies "as well as to bring New York law into conformity with the then-existing federal law [18 U.S.C.A. § 2510 et seq.]" (William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, Penal Law § 250.05; *see also* Senate Introducer's Mem in Support, Bill Jacket, L 1988, ch 744 at 8-9). Through the 1988 amendments, the legislature clearly intended to continue the availability of wiretapping to be accomplished by the overhearing of "cellular and cordless telephonic communications" (William C. Donnino, ***198** Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, Penal Law § 250.05), and to add the ability to capture communications involving "various new forms of electronic communications" (Governor's Approval Mem, Bill Jacket, L 1988, ch 744 at 6, 1988 NY Legis Ann at 299). The statutory definitions of "eavesdropping and wiretapping" were revised at that time "to distinguish . . . the tapping of telephone and telegraph communications, the mechanical overhearing of conversations or discussion, and the interception of data transmission" based on emerging electronic technologies (Senate Introducer's Mem in Support, Bill Jacket, L 1988, ch 744 at 8). These amendments were enacted well after the Federal Communications Commission approved the use of cellular telephone services in 1981 (*see* Rep of Senate Judiciary Commn at 9, S Rep 99-541, 99th Cong, 2d Sess, reprinted in 1986 US Code Cong & Admin News at 3555). Acknowledging that law enforcement would require technical assistance in executing warrants involving modern modalities for both telephonic and electronic communication, the legislature's 1988 amendments "authorize[d] courts to direct that providers *of wire or electronic communication* services furnish the applicant with necessary assistance to accomplish unobtrusi[ve] interception," which was codified in CPL 700.30 (9) (Mem of Div of Crim Justice Servs, Dec. 23, 1988, Bill Jacket, L 1988, ch 744 at 12 [emphasis added]).[4]

****6** To be sure, the rerouting of cell phone communications by third-party service providers to the point of execution by authorized law enforcement officers enables "interception" as authorized by the warrant to occur, but is not itself the court- ***199** ordered interception. Federal and state statutes expressly recognize that telephonic communications are aural transfers, in part, and are controlled by service providers between two points (*see e.g.* Penal Law § 250.00 [3]). Anticipating the use of emerging technologies in the commission of crime, both federal and state statutes have recognized for decades the necessity of third-party communications carriers to facilitate court-ordered interception through switching technology that enables the rerouting of calls. To that end, in 1994, Congress enacted the Communications Assistance for Law Enforcement Act (CALEA) to preserve the government's ability, pursuant to court order, to intercept communications involving technologies such as digital and wireless transmission modes (*see United States Telecom Assn. v Federal Communications Commn.*, 227 F3d 450, 454 [2000]). Most significantly, the act "d[id] not alter the existing legal framework for obtaining wiretap . . . authorization," as CALEA was intended to "preserve the status quo" (*id.* at 455). Similarly, in New York, pursuant to CPL 700.30 (9), an eavesdropping order may direct communications service providers to "furnish the applicant information, facilities, or technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference" to the service customer. Contrary to the dissent's conclusion, private communication carriers do not "execute" the warrant (dissenting op at 214). Indeed, our state statute mandates that the court "*shall not*

direct the service providers to perform the intercept or use the premises of the service provider for such activity" (CPL 700.30 [9] [emphasis added]). Plainly, under CALEA and CPL 700.30 (9), an order directing the telecommunications carrier, which alone controls the transfer of communications, to provide technical assistance to investigators is not the equivalent of an interception; rather, these statutes anticipate the rerouting of digital communications by third parties employing their up-to-date technology as a preparatory step to effectuate the execution of eavesdropping warrants by government agents.

When read in the context of this legislative history, the statutory scheme supports our holding: the Kings County Supreme Court Justice presiding in the jurisdiction where defendant's communications were overheard and accessed and therefore intercepted by authorized law enforcement agents had the authority to issue the warrants. No language in the statutory scheme equates the place of interception with the variable points where cell phones or call participants are located.

***200** Defendant nonetheless claims that a Kings County Supreme Court Justice's authority to grant eavesdropping warrants is, at best, limited to "anywhere in the state," citing CPL 700.05 (4)'s definition of a "justice" who may issue a warrant "to authorize the interception of oral communications occurring in a vehicle or wire communications occurring over a telephone located in a vehicle." However, that part of CPL 700.05 (4) has no application to this case. CPL 700.05 (4) mandates that when interception of communications in a vehicle or over a telephone located in a vehicle is to be made through a listening device that is "installed or connected" in the vehicle, the eavesdropping "warrant may be executed and such . . . communications may be intercepted anywhere in the state." Under this section, it is only when communications occurring in a vehicle are intercepted by an eavesdropping "device" that physically moves out of New York along with the vehicle that the justice is without authority to order extraterritorial interception (*see* Peter Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 700.05). That portion of section 700.05 (4) does not relate to the place of execution of a warrant involving the rerouting of communications of a cell phone to a fixed wire room, nor does it conflict with our conclusion that jurisdiction in this case is tied to the place of authorized call interception. No devices were physically connected or implanted in a phone or vehicle in this case and no physical listening device employed by the law enforcement officers traveled outside Kings County. Thus, the vehicle-related language of CPL 700.05 (4) is inapposite to the resolution of this appeal.

III. **7

Because "[t]he New York eavesdropping statute was intended to conform 'State standards for court authorized eavesdropping warrants with federal standards' " (*People v McGrath*, 46 NY2d 12, 26 [1978], quoting Governor's Mem approving L 1969, ch 1147, 1969 NY Legis Ann at 586), federal court decisions interpreting the federal eavesdropping statute are useful as an aid in interpreting provisions of the New York statute that are patterned after the federal counterpart. However, as we explained in *People v Gallina* (66 NY2d 52, 56 [1985]), when the language of our state statute differs from the federal statute, the distinction is considered "purposeful" and the plain language of CPL article 700 controls.

The jurisdiction of federal courts to issue eavesdropping warrants is defined in 18 USC § 2518. The federal statute—like ***201** our state statute—authorizes federal judges of "competent jurisdiction" to issue such an order "authorizing or approving *interception* of wire, oral, or electronic communications *within the territorial jurisdiction of the court in which the judge is sitting*" (18 USC § 2518 [1], [3] [emphasis added]). Beginning with *United States v Rodriguez* (968 F2d 130 [2d Cir 1992]), every federal circuit court interpreting the language of section 2518 (3) has endorsed a "listening post" rule, which focuses on the point of "interception" in analyzing a court's jurisdiction to issue such warrants (*see United States v Jackson*, 849 F3d 540, 551-552 [3d Cir 2017] [collecting federal circuit court cases]). In *Rodriguez*, the Second Circuit concluded that "interception" occurred at both the site of the target phone in New Jersey *and* at the "place where the redirected contents [were] first heard" in the Southern District of New York (968 F2d at 136). The *Rodriguez* court thus employed "the listening post rule" in holding that a warrant for such interception was properly issued by a judge of the Southern District of New York because the communications were overheard at a location "within the territorial jurisdiction" of that court. The Second Circuit concluded that the listening post rule served the key goal of the eavesdropping statute, which was to protect constitutional privacy interests from law enforcement abuse while providing technological tools to advance designated criminal investigations when normal investigative procedures are insufficient (*id.* at 136).[5] Other high courts have also followed the federal "listening post rule," concluding that,

under their respective state statutes modeled upon title III, the location of cell phones ***202** or call recipients does not drive the analysis, and execution of a warrant occurs at the place of interception—even where both parties to the calls or communications are not within the state (*see e.g. State v Ates*, 217 NJ 253, 273, 86 A3d 710, 722 [2014]; *see also Davis v State*, 426 Md 211, 226-227, 43 A3d 1044, 1052-1053 [2012] [collecting cases]).[6] Because both the federal and state statutes link a court's jurisdiction to issue warrants to the point of ****8** interception, the decisions of federal and state courts interpreting their similar statutory provisions support our conclusion here.

Given the ubiquity of cell phones and widespread use of the Internet, this interpretation of our statutory scheme, one in line with the federal "listening post rule," reaffirms that eavesdropping warrants are a critical tool in investigating large-scale crime syndicates operating in our state. Defendant's "multiple plant" theory, pursuant to which a court's authority to issue a warrant is dependent upon the location of targeted cell phones or call participants, is not workable. Nor does defendant's proposal for interagency "cooperation" provide a solution. Linking jurisdiction to the undetectable locations of cell phones and creating dependence on outside law enforcement agencies to investigate and prosecute very serious crimes committed in this state is unreasonable. It would result in a logistical scheme that leaves jurisdiction in flux, creates multistate wire rooms with diffuse oversight responsibility and in many cases would eliminate eavesdropping as an investigative tool. More importantly, centralized oversight by a single issuing court of competent jurisdiction over the eavesdropping investigation of designated New York crimes is critical to protect against abuses in the invasion of an individual's privacy in the communications—the paramount constitutional concern—and to ensure that any interception is necessary, properly minimized, and promptly terminated in accordance with constitutional ***203** safeguards (*see People v Rodriguez y Paz*, 58 NY2d 327, 335-336 [1983]). That crucial oversight is impossible under defendant's proposed construct, which was certainly not the legislature's intent in carefully designing this State's eavesdropping statutes.

Defendant's remaining claims that the warrants at issue violated his constitutional rights as a California resident, the separate sovereignty doctrine and other constitutional rights of the State of California are without merit.

Accordingly, the order of the Appellate Division should be affirmed.

Wilson, J. (dissenting). I agree with the majority that the issue is "discrete": does Criminal Procedure Law § 700.05 authorize a New York court to issue a warrant commanding the diversion into New York of a cellular telephone call between a California resident who has never been to New York and persons not resident or present in New York, so that New York officers may listen to it in New York? I conclude that the statute does not.[1]

****9 I.**

Joseph Schneider is a lifelong resident of California who—prior to his arrest and extradition in June 2016—had never set foot in New York. At one time, Mr. Schneider operated his own gambling website. But beginning in April 2015 he began using facilities provided by a competitor (and fellow Southern California resident) Gordon Mitchnick, for which Mr. Schneider paid Mr. Mitchnick $30,000 per month. Mr. Mitchnick managed a network of "Master Agents" and "Agents" across the country and supported the websites those agents used to place bets on professional and collegiate sporting events. A team in San Jose, Costa Rica provided technical support. The operation required that Mr. Mitchnick and his associates employ a range ***204** of strategies to conceal payments made by customers and launder their profits.

The principal evidence against Mr. Schneider consisted of conversations recorded over the course of a six-month wiretap investigation beginning in December 2015. But in the initial warrant application, the People did not allege that Mr. Schneider had any contact with the State of New York or that he had any customers located in New York. Instead, they summarized four conversations between Mr. Schneider and a New Jersey-based bookmaker, Patrick Deluise, as evidence that Mr. Schneider operated a gambling website used by Mr. Deluise. During one of the calls, Mr. Deluise informed Mr. Schneider that he was in Florida: he did not mention his location in the remaining three, and the warrant application did not assert that Mr. Deluise was in New York when any of those calls took place. The application went on to describe Mr. Schneider's business as "national in scope," noting that he had placed calls to numbers in California, Arkansas, Colorado, Florida, Michigan, Hawaii and Nevada and pointing to three incoming calls from Costa Rica, where online gambling is legal. New York was not among the states

listed, and the warrant application contained no suggestion that Mr. Schneider had communicated by phone with anyone located in New York. Nevertheless, Supreme Court issued the warrant and the wiretap commenced.

Over the course of six months, investigators extensively documented Mr. Schneider's conversations with agents and customers in California, Nevada, Michigan and Costa Rica. But they failed to turn up any evidence that Mr. Schneider made or received calls to or from anyone located in Kings County. Indeed, during that period Mr. Schneider made no calls to anyone in New York, and received just one, from a number registered to an address in Kingston.[2] The People do not assert that any other evidence uncovered during their lengthy investigation demonstrated that Mr. Schneider had contacts with persons located in New York.

II.

Although Mr. Schneider advances no argument under article I, § 12 of the New York Constitution, its explicit protections ***205** against unreasonable interception of telephone communication—absent from the Fourth Amendment—are important in interpreting article 700 of the Criminal Procedure Law. The majority apparently agrees, by acknowledging that New York's constitutional protections for the privacy of electronic communications exceed what the Fourth Amendment provides, but draws from that acknowledgement the odd conclusion that New York's Constitution was amended in 1938 to "authorize[ ]" eavesdropping as an investigative tool (majority op at 192-193). That claim mischaracterizes the explicit language of article I, § 12 and misinterprets the intention of the delegates who authored it.

In 1928, the constitutionality of wiretapping was presented to the U.S. Supreme Court, which held that the Fourth Amendment did not prohibit or constrain wiretapping so long as the wiretapping was performed outside of the target's home (*Olmstead v United States*, 277 US 438, 465 [1928]). Thus, with no reason to suspect anyone of a crime, the police could climb a telephone pole, install a wiretap, listen, and use the evidence in criminal prosecutions. Or, if allowed by the telephone company, they could sit in a chair at the company's offices and do the same. *Olmstead* was met with swift public condemnation (*see e.g.* Forrest Revere Black, *An Ill-Starred Prohibition Case*, 18 Geo LJ 120 [1930]; Osmond K. Fraenkel, *Recent Developments in the Law of Search and Seizure*, 13 Minn L Rev 1 [1928]; Editorial, *Government Lawbreaking*, NY Times, June 6, 1928 at 24 ["Prohibition, having bred crimes innumerable, ****10** has succeeded in making the Government the instigator, abettor and accomplice of crime. It has now made universal snooping possible"]).[3]

***206** At the New York Constitutional Convention of 1938, the delegates added article I, § 12 to the Constitution. Its first paragraph copies the US Constitution's Fourth Amendment verbatim, but the amendment added a second paragraph not found in the Federal Constitution:

> "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

This second paragraph was a direct response to *Olmstead*. In a message to the convention, Governor Lehman emphasized the need to protect scrupulously against wiretapping, citing to Justice Brandeis' dissent in *Olmstead* for the proposition that "writs of assistance and general warrants are but puny instruments of tyranny oppression when compared with wire tapping" (Message of Governor Lehman, 1 Rev Rec, 1938 NY Constitutional Convention at 339, quoting 277 US at 476 [Brandeis, J., dissenting]; *see also* Speech of Delegate Thomas B. Dyett, 1 Rev Rec, 1938 NY Constitutional Convention at 505, quoting 277 US at 474-475; Speech of Delegate Philip Halpern, 1 Rev Rec, 1938 NY Constitutional Convention at 550). Article I, § 12 of the New York Constitution does not "authorize" wiretapping: rather, it expresses our State's fundamental distrust of the use of wiretapping and intention strictly to limit its availability.

The scope of article 700 must be understood with that background in mind. In 1967, the Supreme Court overruled *Olmstead* (*see Katz v United States*, 389 US 347, 353 [1967]), and held that New York's eavesdropping statute failed to require that warrants "particularly [describe] the place to be searched, and the persons or things to be seized" as required by the Fourth Amendment (*Berger v New York*, 388 US 41, 55 [1967]). In response, Congress passed title III of the Omnibus Crime Control and Safe Streets Act of 1968 (OCCSSA), which established minimum federal statutory requirements for applications for eavesdropping warrants and the orders themselves (*see* 18 USC § 2518). Title III requires states to

provide ***207** at least the protections it specifies but does permit states to adopt more restrictive measures. As Chief Judge Kaye explained:

> "Beyond the question of authority, however, stands our strong public policy of protecting citizens against the insidiousness of electronic surveillance by both governmental agents and private individuals.
>
> "New York State has, therefore, responded to the problems raised by electronic surveillance with greater protection than is conferred under Federal law, and continues to assert this strong public policy, through evolving legislation, as technology advances" (*People v Capolongo*, 85 NY2d 151, 160 [1995] [citations omitted]).

Given the protections enshrined in the Constitution and enacted by statute, our "strong public policy" requires that we interpret our eavesdropping statutes narrowly especially where—as here—the statute is silent on the question before us (*id*. at 162-163 [applying notice provisions of article 700 to introduction of foreign wiretap evidence where statutory scheme is silent on the rules governing the admission of such evidence]). Likewise, nothing in article 700's legislative history suggests any contemplation of the narrow issue presented here: whether a New York court can issue a warrant requiring a telephone company to divert a signal into New York when neither party to the call is ****11** located in New York or resides in New York. Contrary to the majority's assertion (majority op at 198 n 4), I completely agree that CPL article 700 authorizes a New York court to issue an eavesdropping warrant when the warrant application shows that a cellular telephone line is being used to communicate to or from New York; I am puzzled by what portion of my "rather absurd hypothesis" (majority op at 197) would have caused the majority to think otherwise.

III.

The easiest way to expose the majority's error is to remove the verbiage and line up the opinion's substantive points: (1) New York has long-standing constitutional protections specifically for telephone communications absent in the Federal Constitution (majority op at 192-193); (2) because of New York's "strong public policy" in protecting privacy, "strict compliance ***208** with CPL article 700" is required (*id*. at 193-194); (3) resolution of Mr. Schneider's claim turns on the word "executed," "a term that is not defined" (*id*. at 195); and (4) "the court's jurisdiction to issue eavesdropping warrants is not boundless, but is limited by the rules of geographical jurisdiction set forth in our State Constitution and CPL article 20" (*id*. at 194). Stripped bare, the majority claims that because New York has a long history of protecting privacy rights in telephone communications and the legislature did not say what it meant by "executed," the legislature meant to grant New York courts the ability to issue warrants to listen in on any cell phone calls between anyone in the United States, or perhaps in the world, so long as a U.S. telephone carrier can divert the call to New York. To the contrary, the obvious conclusion from those points is that we should not interpret an undefined term to permit New York courts to authorize the issuance of warrants requiring the diversion into New York of telephone calls between people with no connection to New York and which calls neither originated nor terminated in New York.

The history of New York's protections of privacy, both constitutional and statutory, establishes the desire to afford electronic communication at least as much protection as is provided for searches and seizures of tangible objects. Instead, the majority grants law enforcement an unlimited geographic reach not available for searches and seizures of physical property. For example, police officers must execute warrants in "the county of issuance or an adjoining county" or in another county within the state "if (a) his geographical area of employment embraces the entire county of issuance or (b) he is a member of the police department or force of a city located in such county of issuance" (CPL 690.25 [2]). Similarly, police officers may not make arrests outside their geographic jurisdiction unless assisted by officers in the jurisdiction where the arrest is made (CPL 120.60; *see also People v Johnson*, 303 AD2d 903, 905-906 [3d Dept 2003]). Nor does our law permit law enforcement agents from another state to conduct a search under either a federal or out-of-state warrant (*see People v LaFontaine*, 92 NY2d 470 [1998]). Those rules reflect the fundamental importance of territoriality in the authorization of searches and seizures. If New York officers have probable cause to believe that the home of a Californian contains evidence relevant to the prosecution of New York crimes, they must—and do—obtain a warrant from a California court. How can we ***209** infer such a dramatic change from a word the legislature did not define?

IV.

Even were we to ignore New York's long-standing commitment to the privacy of electronic communications and look at the statute in a vacuum (which is not what the majority advocates [*see* majority op at 192-193]),

I could not arrive at the majority's conclusion. I start, as does the majority, with the fact that the statute is silent on the meaning of "executed" (*id*. at 195). CPL 700.05 (4) authorizes the issuance of an "eavesdropping warrant" by supreme court justices "of the judicial district in which the eavesdropping warrant is to be executed." An " '[e]avesdropping warrant' means an order of a justice authorizing or approving eavesdropping" (CPL 700.05 [2]), and " '[e]avesdropping' means 'wiretapping', 'mechanical overhearing of conversation,' or the 'intercepting or accessing of an electronic communication', as those terms are defined in section 250.00 of the penal law" (CPL 700.05 [1]). Thus, CPL 700.05 permits the issuance of an eavesdropping warrant for three different types of surveillance.

Penal Law § 250.00 carefully differentiates between "wiretapping" and "intercepting or accessing of an electronic communication" in a way that is crucial to understanding what "execution" of a warrant means.[4] ****12** Telephonic communications are "wiretapped," defined as the "intentional overhearing or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any instrument, device or equipment" (Penal Law § 250.00 [1]). In contrast, electronic communications are "intercepted" or "accessed" ***210** through the "intentional acquiring, receiving, collecting, overhearing, or recording . . . by means of any instrument, device or equipment" (Penal Law § 250.00 [6]). Thus, the legislature authorized eavesdropping warrants that "intercepted or accessed" electronic communications but did not use those words when authorizing eavesdropping warrants of telephonic communications.[5] Telephonic communications are explicitly excluded from the definition of electronic communication (Penal Law § 250.00 [5] [a]), further evidencing the legislature's determination to treat those two forms of communication differently. The bill jacket for the 1988 amendments to CPL article 700 confirms the legislature's explicit differentiation between wiretaps of telephonic communication and the surveillance of other types of communications (Senate Introducer's Mem in Support, Bill Jacket, L 1988, ch 744 at 8).

***211** Those distinctions reflect the manner in which wiretaps were carried out prior to the advent of cell phones. Historically, telephonic communication—and hence wiretapping—traveled point-to-point through vast networks of wires or cables. Law enforcement could simply splice the wire servicing the phone to be monitored with a wire terminating at the law enforcement agency (Micah Sherr et al., *Signaling Vulnerabilities in Wiretapping Systems*, 3 IEEE Security & Privacy 13, 14 [2005]). The wires could be joined either between the telephone and the first junction box or at a local telephone exchange (James G. Carr et al., Law of Electronic Surveillance § 1.2 [Oct. 2020 Update]). Thus, wiretaps were carried out in close geographic proximity to the intended target. The definition of telephonic ****13** communication provided in Penal Law § 250.00 (3), which emphasizes the transmission of communication over wires, cables or other similar connections, indicates that the legislature expected that overhearing or recording telephone calls would require accessing wires, regardless of the device used. It follows that the legislature would have assumed that wiretaps—the physical accessing of the signal—would be carried out within the jurisdiction of the law enforcement agency executing the warrant, because a New York officer could not obtain a warrant from a New York court to travel to California and splice a wire there.

However, intercepting a call placed from a cell phone requires very different technology. Cell phones do not operate solely through the use of wires. Although wires and cables carry the cellular signal through some points of its travel, substantial portions of the transmission—including the initial transmission by the caller and the final receipt by the recipient—are wireless. A cell phone converts the voice of the caller into an encoded electrical signal and transmits it to a local cell phone tower via the electromagnetic spectrum (Rich Mazzola, *How Do Cell Phones Work? A Story of Physics, Towers, and the Government*, Medium, Oct. 7, 2015, https://medium.com/swlh/richmazzola-how-do-cellphones-work-a-story-of-physics-towers-and-the-government-8369aa7226b1). The tower then directs the signal to its intended destination, where the receiving cell phone decodes the signal, allowing the receiver to hear the sender's voice (*id*.). Wiretaps of cellular phone calls are now carried out by telephone companies rather than law enforcement: the company decodes the signaling information and separates out the call audio to a new channel, which is then ***212** transmitted to the law enforcement agency (Sherr et al. at 15). That process does not require a physical connection to the tapped line (*id*.). Therefore, as a

technological matter, a wiretap of a call made to or from a cell phone need not occur in territorial proximity to the intended target.

The majority claims that the legislature's 1988 amendments to article 700 anticipated the rise of new technology (majority op at 197-198). That is correct. The legislature made an explicit definitional choice, by which all "telephonic communications"—both conventional and cellular—were expressly excluded from the definition of "electronic communication." Because even calls placed to and from a cellular telephone contain aural transfers "made in whole or part through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection" and "[e]lectronic communication . . . does not include" "any telephonic or telegraphic communication" (Penal Law § 250.00 [3], [5] [a] [internal quotation marks omitted]), the majority's reliance on citations to the legislative history and commentators relating to the 1988 amendments is not illuminating. Indisputably, the legislature added a definition of "electronic communication" distinct from telephonic communication—for example, to capture "various new forms of electronic communications" (Governor's Approval Mem, Bill Jacket, L 1988, ch 744 at 6, 1988 NY Legis Ann at 299) (e.g., emails, FTP transfers, short message service messages) that are not "aural"—but its intention to permit eavesdropping of those "electronic communications" does not bear on the territorial limitations for the execution of wiretapping warrants.[6]

***213** The only new *telephone* technology expressly addressed by the 1988 amendments was car phones, not the handheld mobile phones ubiquitous today.[7] The legislature's treatment of car phones in the 1988 amendments ****14** cannot be reconciled with the majority's position. According to the majority, the 1988 amendments permit any court in New York State to authorize the wiretap of a telephone call, diverted from anywhere in the country, so long as the police listen to the call somewhere within the court's judicial district. If that were so, the legislature would have had no need to provide that, for "wire communications occurring over a telephone located in a vehicle . . . such warrant may be executed and such oral or wire communications may be intercepted anywhere in the state" (CPL 700.05 [4]). The legislature's specific statewide expansion of the interception of telephone calls made over car phones only is nonsensical under the majority's interpretation, because under the majority's reading of the statute, calls from car phones could be diverted to anywhere in the state even without the car phone provision. Thus, the majority's interpretation of the statute should be rejected under our settled rules of construction (*see Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 587 [1998]; *Matter of OnBank & Trust Co.*, 90 NY2d 725, 731 [1997]; *Matter of Roosevelt Raceway v Monaghan*, 9 NY2d 293, 305-306 [1961]).[8]

Furthermore, simply as a matter of common sense, when a signal is diverted to bring it into New York, it is done so by command of a warrant. If the warrant is never executed, the signal will not be diverted; if the signal is diverted, it is ***214** diverted solely by execution of the warrant. The fact that the telephone company, rather than the police, conduct the physical diversion is of no legal importance. Private actors working at the behest of law enforcement are treated as law enforcement (*see People v Esposito*, 37 NY2d 156, 160 [1975]). Where a telephone company acting pursuant to a warrant diverts an out-of-jurisdiction telephone call, it has executed the warrant at a point outside the judicial district in which the issuing court sits, which article 700 does not allow. The fact that it is later listened to within the judicial district of the issuing court does not erase the warrant's initial out-of-jurisdiction execution (*cf. United States v Rodriguez*, 968 F2d 130, 144 [2d Cir 1992, Meskill, J., concurring] ["The contents of the Imperio Cafe communications were *acquired* by law enforcement officials when they were diverted in New Jersey. In Manhattan the *previously acquired* contents were transformed into sound, but, because they were already within the control of the law enforcement agents, they were not newly 'acquired.' I do not believe that the contents of a communication become acquired anew each time they are transformed into a different medium"]).

In sum, the meaning of the term "execute" in CPL 700.05 (4) must be understood in the relevant historical context. At the time of the statute's enactment, wiretaps on telephonic communications would have been carried out by law enforcement physically tapping lines in close geographical proximity to the targeted subject. The legislature could not have imagined that a warrant could be "executed" simply by instructing a nationwide cellular phone company to redirect into New York an out-of-state electronic signal that never would have entered New York, containing conversation between two people not located in New York. The majority can point to nothing in the legislative history that suggests the legislature intended to grant New York courts the ability to divert purely out-of-state voice calls into New York State by issuance of a warrant.

The scattershot of arguments offered by the majority for its expansive interpretation of "execute" do not bear on the proper interpretation of the term. The various citations to the legislative history of the 1988 amendments and commentators' views thereof stand for the unremarkable proposition that, by defining "electronic communication" and subjecting such communications to eavesdropping, the legislature took steps "designed to keep pace with emerging technologies" (majority ***215** op at 197-198). That is precisely the point: the legislature understood that new technologies, such as email or FTP transfers, could be subjected to warranted surveillance. It permitted those defined "electronic communications" to be "intercepted or accessed," but purposefully excluded "telephonic communications" from that provision. The statute does not authorize courts to issue warrants that "intercept" or "access" telephone calls. Instead, it used a word with a settled territorial component—"execution": of a warrant—to limit a court's authority to seize telephone calls. ****15**

V.

Neither the federal nor foreign state case law relied on by the majority supports its position. I discuss each in turn.

A.

The majority's reliance on the federal "listening post" rule says nothing about how to interpret the CPL. There is no suggestion that the CPL's definition of wiretapping or rules relating to wiretapping are derived from federal law, or that the choice of the word "execute"—which the majority contends is the key to New York's statute—was derived in any way from a federal statute or case law. Indeed, the federal statutory scheme is quite different. The federal statute, 18 USC § 2518 (3), does not use the word "execute" at all. Instead, it provides that a "judge may enter an ex parte order . . . authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting." Interception is defined as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device" (18 USC § 2510 [4]). Thus, the federal statute lumps together, without distinction, voice and all other electronic communication regardless of the type of means used to transmit the signal, and authorizes the "interception" of all such information through the use of any type of device, whereas New York differentiates between voice communications that use wire or cable for any part of the transmission (which includes cellular phone calls) from the transmission of other types of electronic communication, with different rules applying to each, as explained (*supra* at 209-210).

Moreover, when it comes to the ability of a court to issue a warrant to divert an out-of-jurisdiction call into a jurisdiction, ***216** federal and state courts are quite different. Because use of wires (or radio frequencies allocated by the federal government) necessarily implicates interstate commerce, federal courts have nationwide jurisdiction. It is perfectly understandable that federal statutes, and federal courts' interpretation of those statutes, may have fewer concerns about the ability of a federal court to issue an order diverting a call using facilities of interstate commerce to a listening post anywhere in the United States. Not so with state courts: query whether New Yorkers would be content if a Mississippi court authorized the wiretapping of calls purely between New York residents who have never set foot in Mississippi.[9]

Furthermore, there is no view of the OCCSSA under which state courts may authorize more expansive eavesdropping than federal courts. Whether a federal district court could authorize the wiretapping of a cellular phone conversation that neither originated nor terminated within the judicial district in which the issuing federal court sits is unsettled, as I explain below. For that reason alone, we should be hesitant to grant New York courts the authority to grant wiretapping warrants for telephone conversations that neither originate nor terminate in New York.

The majority's reliance on *United States v Rodriguez* (968 F2d 130 [2d Cir 1992]) is misplaced, because it did not involve the wiretapping of purely extraterritorial phone calls nor the wiretapping of cellular phone calls. In *Rodriguez*, law enforcement in the Southern District of New York obtained the wiretap warrant in question in connection with an investigation of a crack organization based in the Hunts Point section of the Bronx (*id*. at 133). The organization's operations extended to a restaurant in New Jersey (*id*. at 133-134). In connection with the investigation, wiretaps were placed on four telephones at the New Jersey restaurant and the apartment of one of the conspirators in the Bronx (*id*. at 134). The calls were monitored at the Drug Enforcement Administration headquarters in the Southern District (*id*. at 135). The warrant application thus facially

established that calls made from the New Jersey phone ***217** numbers were being made to a telephone in New York, and a telephone in New York was being used in furtherance of the crack operation. Those calls were between conventional landlines, carried by wire or cable, which necessarily physically traversed New York. Here, in contrast, the warrant application did not establish probable cause (or, indeed, any reason to believe) that Mr. Schneider's phone was making or receiving calls to or from New York, and the calls would not have entered New York but for their seizure pursuant to the warrant.[10] ****16** It is also important to note that in *Rodriguez*, Judge Meskill separately concurred. He emphasized his disagreement "with the majority's treatment of the wiretap issue, which effectively repeals 18 U.S.C. § 2518(3)'s requirement that a judge may only enter an order authorizing the interception of communications 'within the territorial jurisdiction of the court in which the judge is sitting' " (*id.* at 143-144). As he explained:

> "I cannot join the majority in holding that the unilateral decision of law enforcement agents as to where to set up their listening post can grant authority to a judge in any jurisdiction to authorize a phone tap in any other jurisdiction. . . .
>
> "The heart of the definition of 'intercept' in 18 U.S.C. § 2510(4) is the 'acquisition of the contents' of a communication. The contents of the Imperio Cate communications were *acquired* by law enforcement officials when they were diverted in New Jersey" (*id.* at 144).

In *United States v Ramirez* (112 F3d 849 [7th Cir 1997]), the Seventh Circuit considered whether a federal district court could issue an eavesdropping warrant for a cellular phone call where the communication neither originated nor terminated within the judicial district of the issuing court. It concluded that the 1986 Electronics Communications Privacy Act (ECPA), which authorized federal—but not state—courts to intercept ***218** "wire, oral, or electronic communications . . . outside [the district court's] jurisdiction but within the United States in the case of a mobile interception device" (18 USC § 2518 [3]) allowed a federal district court to intercept cellular telephone signals anywhere in the United States (*id.* at 852). It interpreted the phrase "mobile communication device" to mean "a device for intercepting mobile communications," not "the irrelevant mobility or stationarity of the device" (*id.*). By relying on the "mobile communication device" provision, which applies only to federal courts, the Seventh Circuit implicitly decided that without that provision, a federal court could not issue eavesdropping warrants for communications occurring solely outside its judicial district. Indeed, the "mobile communication device" amendment expanding jurisdiction beyond the federal court's judicial district would be meaningless if courts could issue extra-jurisdictional warrants without it. Because that "mobile communication device" expansion was provided for federal courts only, both *Ramirez* and the ECPA suggest that state courts do not have the ability to issue eavesdropping warrants for wholly out-of-state communications.

More recently, the Fifth Circuit, in *United States v North* (728 F3d 429 [5th Cir 2013]) issued a decision holding that federal district courts may not divert cellular telephone calls into their jurisdictions and establish listening posts there, but then withdrew the decision and substituted it with a decision suppressing the wiretap on the ground of lack of minimization (735 F3d 212, 216 [5th Cir 2013]). However, the concurring opinion of Judge DeMoss sets out the rationale of the withdrawn opinion, which rejects the Seventh Circuit's construction of "mobile communication device," concluding that it refers to interception devices that themselves are mobile —not the interception of mobile phone communications (*id.* at 217-218).

Subsequently, in *United States v Glover* (736 F3d 509 [DC Cir 2013]), the court rejected the Seventh Circuit's interpretation of "mobile communication device," noting that "[a]ccording to a Senate Judiciary Committee report, the objective of the language was to ensure that warrants remain effective in the event a target vehicle is moved out of the issuing judge's jurisdiction *after* a warrant is issued, but before a surveillance device can be placed in the vehicle" (*id.* at 514). Most recently, in *United States v Dahda* (853 F3d 1101 [10th Cir 2017], *affd on other grounds* 584 US —, 138 S Ct 1491 [2018]), the Tenth Circuit likewise concluded that "mobile communication device" ***219** meant a device that itself was mobile (*id.* at 1114, 1113 n 4 ["For example, some scholars point to small mobile devices such as 'IMSI catchers,' which are capable of intercepting the content from cell phone calls"]).

My point is not that the law is settled as to whether a federal court could issue an eavesdropping warrant to divert a purely out-of-state conversation into the judicial district in which the court sits, where the warrant fails to establish that the warrant's target had ever made calls to that district or set foot in that district. To the contrary, my ****17** point is that the federal law is unsettled and, however great the federal jurisdiction might be, the jurisdiction of a state to authorize

eavesdropping of purely out-of-state phone conversations can be no greater, and is likely lesser.

B.

Additionally, the majority points to the adoption of the listening post rule by two other states' high courts. Those states, however, have markedly different statutory provisions from New York's and different state constitutional backdrops against which both legislative and judicial decisions should be framed. The majority cites to the New Jersey high court's decision in *State v Ates* (217 NJ 253, 271, 86 A3d 710, 721 [2014]) and that of Maryland in *Davis v State* (426 Md 211, 218, 43 A3d 1044, 1048 [2012]). The New Jersey wiretapping statute provides "[a]n order authorizing the interception of a wire, electronic or oral communication may be executed at any point of interception within the jurisdiction of an investigative or law enforcement officer executing the order," and defines the "point of interception" as "the site at which the investigative or law enforcement officer is located at the time the interception is made" (NJ Stat Ann §§ 2A:156A-12, 2A:156A-2 [v]). New York uses "execution" of the warrant instead of "interception" of the signal and lacks New Jersey's statutory direction that the point of interception is where the listening officer is located.

Maryland's wiretapping law supports my position, not the majority's. Until Maryland's legislature amended its wiretapping law in 1991, eavesdropping warrants were limited to calls occurring "within the jurisdiction of a particular circuit court"; the 1991 amendment "obviated the need for law enforcement agents to obtain multiple ex parte orders for each jurisdiction where a mobile phone might be located and allowed them to apply for one ex parte order in the jurisdiction where the 'base ***220** station' was located" (*Davis*, 426 Md at 222, 43 A3d at 1050). Even so, in *Perry v State* (357 Md 37, 741 A2d 1162 [1999]) and *Mustafa v State* (323 Md 65, 591 A2d 481 [1991]), Maryland's Court of Appeals held that communications intercepted in another state are inadmissible at trial if they would violate the Maryland wiretap statute had they been intercepted in Maryland. In response, the legislature amended its law once again to authorize "certain out-of-state interceptions" (426 Md at 222, 43 A3d at 1050, citing 2001 Md Laws 370). Then, in 2002, the legislature again amended Maryland's wiretapping statute to broaden its reach. Only in view of the repeated legislative efforts to expand the reach of its courts, and Maryland's use of the word "interception" which copied the federal statutory authorization, did the Maryland Court of Appeals conclude that its statute should be read to reach extraterritorially. In contrast, New York's statutory scheme is different and evidences neither the words nor the legislative history that would render comparison to New Jersey or Maryland apposite.

VI.

Last, in a pronouncement having nothing to do with the statutory language or legislative intent, the majority proposes a fusillade of policy justifications in support of its position. It is worth quoting them just to have them in mind:

- It is "not workable" if "a court's authority to issue a warrant is dependent upon the location of targeted cell phones or call participants" (majority op at 202);
- "Linking jurisdiction to the undetectable locations of cell phones and creating dependence on outside law enforcement agencies to investigate and prosecute very serious crimes committed in this state is unreasonable" and "would result in a logistical scheme that leaves jurisdiction in flux, creates multi-state wire rooms with diffuse oversight responsibility and in many cases would eliminate eavesdropping as an investigative tool" (*id*.);
- "More importantly, centralized oversight by a single issuing court of competent jurisdiction over the eavesdropping investigation of designated New York crimes is critical to protect against abuses in the invasion of an individual's privacy in the communications—the paramount constitutional ***221** concern—and to ensure that any interception is necessary, properly minimized, and promptly terminated in accordance with constitutional safeguards" (*id*. at 202-203);
- "That crucial oversight is impossible under defendant's proposed construct, which was certainly not the legislature's intent in carefully designing this State's eavesdropping statutes" (*id*. at 203). ****18**

The astonishing feature of the majority's policy arguments is that they are pure conjecture. These policy arguments are based on nothing—not facts found below, not facts in the record, not even facts found by the majority from extra-record sources.

Here, instead, are some facts that render the majority's policy arguments untenable. First, both state and federal courts are required to report to the Administrative Office of the United States Courts all wiretaps sought, granted and denied (*see* 18 USC § 2519). For the 11 years

from 2009-2019, state and federal courts together received 36,127 wiretap applications (United States Courts, *Wiretap Report 2019—Wiretap Table Wire 7: Authorized Intercepts Granted* [Dec. 31, 2019], https://www.uscourts.gov/statistics/table/wire-7/wiretap/2019/12/31). Thirty-six thousand, one-hundred eighteen applications were granted: only nine were denied (*id.*). Not a single state or federal wiretap request was denied in 2017, 2018 or 2019 (*id.*). So the idea that crucial, strict oversight of wiretaps would be eroded if, for example, an officer from New York had to go to a California court to seek authorization for this very wiretap, is wholly fictional: there is no oversight to erode, because 99.975% of wiretap applications are granted.

Likewise, the idea that law enforcement would be drastically impaired if officers from one jurisdiction had to cooperate with those in another—for example, if the officers here had to seek a warrant from the federal district court or a California state court instead of a New York state court—has no support in fact. Federal law enforcement agents frequently seek warrants in state courts. As an example, by 2014, the DEA was sending more than 60% of its wiretap applications to state courts, including a DEA operation with California state prosecutors that "built a wiretapping program that secretly intercepted millions of calls and text messages based on the approval of a single state-court judge" (Brad Heath, *DEA Changes Wiretap Procedure after Questionable Eavesdropping Cases*, USA Today, ***222** July 7, 2016, https://www.usatoday.com/story/news/2016/07/07/dea-changes-wiretap-procedure-after-questionable-eavesdropping-cases/86802508/).

As Mr. Schneider points out, the People readily sought and obtained warrants in California state court for his arrest and a search of his home. Perhaps doing so was not quite as rapid as it would have been if a New York court could have issued the warrant for his arrest, but no facts support the majority's doomsday pronouncements, which should be viewed with great skepticism, as the U.S. Supreme Court has admonished:

> "[W]e have found no empirical statistics on the use of electronic devices (bugging) in the fight against organized crime. Indeed, there are even figures available in the wiretap category which indicate to the contrary. . . .
>
> "Some may claim that without the use of such devices crime detection in certain areas may suffer some delays since eavesdropping is quicker, easier, and more certain. However, techniques and practices may well be developed that will operate just as speedily and certainly and—what is more important—without attending illegality" (*Berger*, 388 US at 60-63).

The proposition that the majority's holding will better ensure that "the invasion of an individual's privacy . . . —the paramount constitutional concern" is "properly minimized" runs headlong into a different set of facts (majority op at 202). New York accounts for a little less than 6% of the total United States population, yet in 2019, New York State courts accounted for 28% of all wiretap applications granted by all state courts (United States Courts, *Wiretap Report 2019* [Dec. 31, 2019], https://www.uscourts.gov/statistics-reports/wiretap-report-2019, cached at http://www.nycourts.gov/reporter/webdocs/USCourtsWiretapReport2019.pdf). In contrast, the United States District Court for the Southern District of New York, which granted the greatest number of federal wiretap applications of any federal district court, accounted for just 5% of the federal total (*see* United States Courts, *Wiretap Table 2—Intercept Orders Issued by Judges During Calendar Year 2019* [Dec. 31, 2019], https://www.uscourts.gov/statistics/table/wire-2/wiretap/2019/12/31). Adding in the other New York federal district courts brings the New York federal court total ***223** to just 6% of all federally-issued warrants nationwide (*see* United States Courts, *Wiretap Report 2019—Appendix Table A1: Intercepts of Wire, Oral, or Electronic Communications Authorized by U.S. District Courts and Terminated* [Dec. 31, 2019], https://www.uscourts.gov/statistics/table/wire-a1/wiretap/2019/12/31). Thus, compared either to the rest of the nation or the federal courts in New York, New York's prosecutors, aided by the New York State courts, are wiretap-happy—hardly fulfilling the Constitution's paramount concern to protect the privacy of New Yorkers touted by the majority. One should not expect the majority's grant of nationwide wiretapping authority to New York courts to provide enhanced protection of the right to privacy given the above data.

Yet one bit of truth in the majority's policy pronouncements is borne out by the facts: requiring New York law enforcement officials who desire to wiretap conversations not originating or terminating in New York, and not from or to a New York resident, to obtain authorization from either a federal court or the court of some other appropriate state may occasionally "eliminate eavesdropping as an investigative tool" (majority op at 202). In dissent in *Olmstead*, Justice Brandeis rejected the worth of that complaint in words of unequalled elegance:

**19 "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face" (277 US at 485).

Wiretapping is a crime under our Penal Law. Neither the text nor the legislative history of CPL article 700 suggests that the legislature authorized our courts to issue warrants commanding the diversion of purely out-of-state telephone calls between nonresidents so that they could be listened to by New York law enforcement agents. Firmly convinced thereof, I respectfully dissent.

*224 Judges Stein, Fahey and Garcia concur; Judge Wilson dissents in an opinion, in which Judge Rivera concurs.

Order affirmed.

Footnotes

1 Defendant's suppression motion addressed only one of the three intercepted phone numbers attributed to him.

2 The federal exclusionary rule recognized in *Weeks v United States* (232 US 383 [1914]), prohibiting the use in federal court of any evidence seized in violation of the Fourth Amendment, was extended to illegally seized wiretap evidence (*see Nardone v United States*, 302 US 379 [1937]). New York followed suit in 1962, enacting CPLR 4506, which barred admission of any eavesdropping evidence that was unlawfully obtained (*see Capolongo*, 85 NY2d at 158, citing L 1962, ch 308).

3 Although defendant claims that his calls were not made to parties in New York, the suppression court specifically found in denying defendant's suppression motion that "defendants were calling people in New York state from California and as such, a clear connection is established with New York state and Kings County."

4 As previously stated, the notion raised by the dissent that the statute, as written, does not authorize eavesdropping on cellular communications is meritless. Defendant never identified any distinctions in the types of technology used in wiretapping or in rerouting or redirecting communications as a basis for his jurisdictional challenges. Nor did defendant make any claim that he had a reasonable expectation of privacy in the telecommunications providers' use of their own technology in transferring the communications point to point. The dissent's extended discussion of these unpreserved issues comparing early landline phones and digital and wireless methods of transfers of telephonic communications and the resulting analysis based on those distinctions (*see* dissenting op at 209-212) is flawed. The definition of telephonic communications under both state and federal law has remained the same because the transfer of the human voice still remains the communication to be intercepted. While both federal and state statutes account for the evolving technology used by the providers to transfer the communications, that evolving technology does not alter the essence of an aural communication, which is clearly subject to interception by eavesdropping.

5 18 USC § 2518 (3) permits a federal judge to issue an eavesdropping warrant for interception "outside" the territorial jurisdiction of the court "but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction." Defendant claims here that this section provides federal judges, not state judges, with "express authority to issue eavesdropping orders outside of their geographic jurisdiction," and concludes that this means that a state judge can administer eavesdropping orders only "within its borders." Determinatively, defendant failed to preserve any issue of law for our review as to whether the eavesdropping orders issued here involved installation of a "mobile interception device" as defined in section 2518 (3). Thus, while there is an apparent split in the federal circuit courts as to the meaning of a "mobile interception device" (*compare United States v Ramirez*, 112 F3d 849, 853 [7th Cir 1997] ["mobile interception device" means "a device for intercepting mobile communications"], *with United States v Dahda*, 853 F3d 1101, 1112-1113 [10th Cir 2017] ["mobile interception device" means "(a) listening device that is mobile"], *affd on other grounds* 584 US —, 138 S Ct 1491 [2018]), we do not consider whether the cell phone fits the definition of a mobile interception device.

6 In *Ates*, the New Jersey Supreme Court rejected the defendant's arguments that New Jersey law enforcement officers exceeded their jurisdiction in intercepting communications in cell phone calls among participants that were out of state, "creat[ing] an 'artificial connection' to New Jersey" and that only a judge from the defendant's state of residence could authorize a wiretap. The court explained that those arguments disregarded the fact that the New Jersey Wiretap Act requires an actual nexus to the state before an eavesdropping order can be issued, which is met by a predicate finding of probable cause to believe that a designated offense under New Jersey law is being committed and that communications about criminal offenses occurring in that state may be obtained through eavesdropping (217 NJ at 268, 86 A3d at 719).

1 As the majority notes, Mr. Schneider advanced no claim under the Fourth Amendment of the US Constitution or article I, § 12 of the New York Constitution. Further, I agree with the majority that Mr. Schneider failed to challenge the jurisdiction of the Kings County court to prosecute him, though we must be careful not to confuse the question of the court's jurisdiction to prosecute Mr. Schneider based on evidence turned up through the wiretaps with the court's statutory authority to issue the wiretapping warrants in the first place. Finally, I would also reject Mr. Schneider's claims framed under the Full Faith and Credit Clause and his explication of California's public policy, at least in the manner in which he has presented those arguments.

2 Although the majority highlights the suppression court's finding that *other* defendants made calls to New York from California (majority op at 195 n 3), the prosecution's warrant applications failed to demonstrate that Mr. Schneider was communicating with individuals in New York.

3 In an about-face, the U.S. Supreme Court thereafter held that the Communication Act of 1934, which provided that "no person" may divulge an intercepted telephone communication to "any person," prohibited the use of wiretapped information in both federal (*Nardone v United States*, 302 US 379 [1937]) and state (*Weiss v United States*, 308 US 321 [1939]) prosecutions. The managers of the bill that became the 1934 Communications Act "repeatedly declared that it was designed solely to transfer jurisdiction over radio, telegraph, and telephone to a new agency, the Federal Communications Commission, and that 'the bill as a whole does not change existing law' " (Alan F. Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 Colum L Rev 165, 174 [1952]). Thus, "the *Nardone* decision was generally regarded as a bit of judicial legislation, a policy decision by the Court that the increased need to curb a dangerously prevalent practice justified a somewhat liberal remolding of a statutory section" (*id*. at 175).

4 "Wiretapping" is "the intentional overhearing or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof . . . by means of any instrument, device or equipment" (Penal Law § 250.00 [1]). A "telephonic communication" means "any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station)" (Penal Law § 250.00 [3]). "Aural transfer" is in turn defined as "a transfer containing the human voice at any point between and including the point of origin and the point of reception" (Penal Law § 250.00 [4]). "Electronic communication" is defined as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photo-optical system" (Penal Law § 250.00 [5]).

5 The majority contends that this argument is "meritless," pointing to CPL 700.05 (3)'s definition of "intercepted communication," which includes (a) telephonic or telegraphic communications, (b) conversations or discussions intentionally overheard and recorded, and (c) "an electronic communication which was intentionally intercepted or accessed." However, "intercepted communication" does not bear on the meaning of "executed" in CPL 700.05 (4). Rather, it is an omnibus term used throughout article 700 to refer to all three types of communications that may be the targets of eavesdropping warrants (*see* CPL 700.35 [4] ["In the event an *intercepted communication* is in a code or foreign language, and the services of an expert in that foreign language or code cannot reasonably be obtained during the interception period, where the warrant so authorizes and in a manner specified therein, the minimization required by subdivision seven of section 700.30 of this article may be accomplished as soon as practicable after such interception" (emphasis added)]; CPL 700.50 [3] ["Within a reasonable time . . . written notice of the fact and date of the issuance of the eavesdropping or video surveillance warrant . . . must be served upon the person named in the warrant and such other parties to the *intercepted communications* or subjects of the video surveillance as the justice may determine in his discretion is in the interest of justice. . . . The justice . . . may in his discretion make available to such person or his counsel for inspection such portions of the *intercepted communications* or video surveillance" (emphasis added)]; CPL 700.65 [1]

["Any law enforcement officer who, by any means authorized by this article, has obtained knowledge of the contents of any *intercepted communication* or video surveillance, or evidence derived therefrom, may disclose such contents to another law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure" (emphasis added)]; CPL 700.70 ["The contents of any *intercepted communication*, or evidence derived therefrom, may not be received in evidence or otherwise disclosed upon a trial of a defendant unless the people, within fifteen days after arraignment and before the commencement of the trial, furnish the defendant with a copy of the eavesdropping warrant" (emphasis added)]).

6 The majority cites McKinney's Practice Commentaries for Penal Law § 250.05 to support its view that "the legislature clearly intended to continue the availability of wiretapping to be accomplished by the overhearing of 'cellular and cordless communications' " (majority op at 197-198). However, the quoted language refers to the fact that under New York law "people are entitled to privacy in their telephonic communications, even if a portion of the conversation is transmitted by radio" (William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, Penal Law § 250.05). McKinney's, in turn, cites to *People v Fata*, a 1990 case in which the Second Department concluded that the warrantless surveillance of cordless telephone conversations was illegal (159 AD2d 180, 185 [2d Dept 1990]). *Fata* references the 1988 amendments to distinguish between federal law (which explicitly excludes cordless telephones from its definition of wire communications that may not be intentionally intercepted without a warrant) and state law (which does not) (*id.*). From that fact—and the broader protections afforded New York State citizens under our Constitution—*Fata* concluded that "the Legislature intended to provide greater protection for the privacy of telephone communications than that available under the Federal eavesdropping statute" (*id.*).

7 The legislature's focus on car phones is understandable. In the late 1980s, handheld mobile phones were a high-end luxury good used by less than one percent of Americans (*see* Michael deCourcy Hinds, Consumer's World, *Mobile Phones, as Prices Drop, Aren't Just for Work Anymore*, NY Times, June 10, 1989 at 33, available at https://www.nytimes.com/1989/06/10/style/consumer-s-world-mobile-phones-as-prices-drop-aren-t-just-for-work-anymore.html). In contrast, car phones were an increasingly common consumer good (*id.*).

8 Although I place little or no weight on failed legislative attempts, I note that in the 2001-2002 legislative term, NY Senate Bill S5793 was introduced; it would have authorized "roving interceptions" of telephone communications by eliminating the "specification of the facilities from which, or the place where, the communication is to be intercepted" in cases where the People could show that those limitations were "not practical." Had that bill's sponsor shared the majority's view, the bill would never have been introduced.

9 The majority's reliance on the Communications Assistance for Law Enforcement Act (CALEA) and CPL 700.30 (9) is misplaced (majority op at 198-199). Both CALEA and CPL 700.30 (9) require telecommunications carriers to assist in the seizure of telephonic and electronic communications authorized by a proper warrant, but neither statute expands or contracts the territorial jurisdiction of courts, whether state or federal, to issue warrants.

10 The Second Circuit interpreted the federal definition of "interception" to mean both the location where "the contents of a wire communication are captured or redirected" and "where the redirected contents are first heard" (968 F2d at 135-136). Thus, it read the federal statute to authorize the diversion of the signal "through the use of any electronic, mechanical or other device" as explicit statutory authority to order the out-of-state wiretaps on the New Jersey phones. New York law contains no analogous provision for telephone wiretapping and, indeed, uses "interception" when authorizing eavesdropping of electronic communications only, not telephonic communications.

New York Official Reports

19 N.Y.3d 100, 968 N.E.2d 983, 945 N.Y.S.2d 629, 2012 N.Y. Slip Op. 03232

**1 The People of the State of New York, Respondent

v

Leroy Williams, Appellant.

Court of Appeals of New York
Argued March 22, 2012

Decided April 26, 2012

CITE TITLE AS: People v Williams

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered May 31, 2011. The Appellate Division affirmed a resentence of the Supreme Court, Bronx County (John W. Carter, J.), which had imposed a term of 13 years, with three years' postrelease supervision and an order of protection.

People v Williams, 84 AD3d 684, affirmed.

HEADNOTE

Crimes
Order of Protection
Duration of Order

A mandatory period of postrelease supervision (PRS) is included in calculating the maximum expiration date of a determinate sentence of imprisonment for purposes of calculating the duration of an order of protection issued at sentencing under former CPL 530.13 (4). Although that statute, which provided that an order of protection issued at sentencing on a felony conviction shall not exceed "three years from the date of the expiration of the maximum term of . . . a determinate sentence of imprisonment actually imposed" (CPL 530.13 [4] [ii]), was enacted before PRS became a mandatory component of a determinate sentence, a determinate sentence of imprisonment necessarily includes PRS under the clear and unambiguous language of former Penal Law § 70.45 (1) and § 70.00 (6). If the Legislature intended PRS to be wholly distinct from a defendant's determinate sentence, it would not have specified in former Penal Law § 70.45 that a "determinate sentence" encompassed PRS "as a part thereof." Nor would it have described a "determinate sentence of imprisonment" to "include, as a part thereof, a period of [PRS]" in former Penal Law § 70.00 (6). In addition, in order to calculate the maximum expiration date of a defendant's determinate sentence of imprisonment at the time of sentencing, a court should include PRS to account for the possibility that a defendant's term of incarceration may be "held in abeyance" (Penal Law § 70.45 [5] [a]) during the period in which he or she is conditionally released due to "good behavior" (*see* Penal Law § 70.30 [4] [a]; § 70.40 [1] [b]; Correction Law § 803 [1] [c]).

RESEARCH REFERENCES

Am Jur 2d, Criminal Law §§ 845, 846.

McKinney's, CPL 530.13 (4); Penal Law § 70.00 (6); § 70.45 (1).

*101 NY Jur 2d, Criminal Law: Procedure §§ 3178, 3183.

ANNOTATION REFERENCE

See ALR Index under Parole, Probation, and Pardon.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: order /3 protection /s duration & post-release /2 supervision

POINTS OF COUNSEL

Center for Appellate Litigation, New York City (*Katharine Skolnick* and *Robert S. Dean* of counsel), for appellant.
Because the plain language of CPL 530.13 (4) specifically refers to the prison term's expiration date as the relevant one in setting the order of protection's end-date, the court erred in refusing to modify the order of protection to accord with the statute's express terms. (*Doctors Council v New York City Employees' Retirement Sys.*, 71 NY2d 669; *Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205; *Majewski v Broadalbin-Perth Cent. School Dist.*, 91

NY2d 577; *Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86; *People v Paulin*, 17 NY3d 238; *Tompkins v Hunter*, 149 NY 117; *Cahen v Boyland*, 1 NY2d 8; *Finger Lakes Racing Assn. v New York State Racing & Wagering Bd.*, 45 NY2d 471; *People v Smith*, 79 NY2d 309; *Sega v State of New York*, 60 NY2d 183.)

Robert T. Johnson, District Attorney, Bronx (*Justin J. Braun*, *Joseph N. Ferdenzi* and *Karen Swiger* of counsel), for respondent.

Given that defendant's "determinate sentence also includes, as a part thereof, an additional period of post-release supervision" (Penal Law former § 70.45 [1]), the Appellate Division correctly held that the running of the final order of protection begins after defendant's postrelease supervision has expired. (*People v Crowley*, 34 AD3d 866, 7 NY3d 924; *People v Goodband*, 291 AD2d 584; *People v Andrickson*, 7 AD3d 725; *People v Lamagna*, 30 AD3d 1052, 7 NY3d 814; *People v Victor*, 20 AD3d 927, 5 NY3d 833; *People v Grice*, 300 AD2d 1005, 99 NY2d 654; *People v Harris*, 285 AD2d 980; *People v Catu*, 4 NY3d 242; *Matter of Garner v New York State Dept. of Correctional Servs.*, 10 NY3d 358; *Ruffins v Department of Correctional Servs.*, 701 F Supp 2d 385.)

OPINION OF THE COURT

Ciparick, J.

In this appeal, we consider whether "a determinate sentence of imprisonment actually imposed" (former CPL 530.13 [4]) ***102** includes the mandatory period of postrelease supervision (PRS) for purposes of calculating the duration of an order of protection issued at sentencing. We hold that it does. ****2**

On August 29, 2003, a Bronx County grand jury charged defendant with one count of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), one count of assault in the first degree (Penal Law § 120.10 [1]) and one count of assault in the second degree (Penal Law § 120.05 [1]) for allegedly stabbing his fiancée in the back and the neck. On May 3, 2006, in full satisfaction of the indictment, defendant pleaded guilty to one count of first-degree assault, a violent felony offense. At the initial sentencing proceeding, Supreme Court imposed a 13-year term of imprisonment. As part of the sentence, the court also ordered that "there will be a full Order of Protection in effect, which will run for three years from the date that [defendant is] released—from the date of the maximum time of incarceration." The order of protection reflects an expiration date of May 22, 2022.

Supreme Court did not mention PRS during sentencing, although the court's commitment sheet indicated a three-year PRS term. On direct appeal, the Appellate Division modified the judgment of conviction and sentence by vacating the three-year term of PRS since it was not part of the "oral pronouncement of sentence" and remanding the case for the proper imposition of PRS, and, as so modified, affirmed (*People v Williams*, 44 AD3d 335, 335 [1st Dept 2007]).

Defendant appeared in court for resentencing on May 28, 2008. At that time, Supreme Court orally sentenced defendant to a three-year term of PRS. Prior to this proceeding, however, defendant had moved to amend the order of protection issued at the original sentencing. Defendant argued that the order's May 22, 2022 expiration date did not take into account the approximately three years of jail time credit that he had accrued prior to his original sentence. Defendant reasoned that since the Department of Correctional Services had calculated the maximum expiration date of his determinate term of imprisonment as August 23, 2016, the order of protection should expire three years later on August 23, 2019. In opposing defendant's application, the People did not quarrel with defendant's calculations for jail time credit, but countered that the three-year period of PRS Supreme Court had intended to impose at the original sentencing extended the duration of the order of protection ***103** into 2022. Supreme Court agreed with the People and denied defendant's motion. The Appellate Division unanimously affirmed the judgment of resentencing (*see People v Williams*, 84 AD3d 684, 685 [1st Dept 2011]). A Judge of this Court granted defendant leave to appeal (17 NY3d 810 [2011]) and we now affirm.

The parties agree that former CPL 530.13 (4), in effect at the time defendant pleaded guilty, is controlling here. That statute, as relevant to this appeal, provided that the duration of an order of protection issued at sentencing "in the case of a felony conviction, shall not exceed the greater of: (i) five years from the date of such conviction, or (ii) three years from the date of the expiration of the maximum term of . . . a *determinate sentence of imprisonment* ****3** *actually imposed*" (emphasis added).[1] Defendant does not dispute that extending the order of protection for three years following the maximum expiration date of his determinate sentence of imprisonment yields the greater of the two duration periods listed in the statute. He simply maintains that the term of PRS should be excluded from this calculation because it is not part of the "determinate sentence of imprisonment actually imposed." We disagree.

Of course, "[t]he governing rule of statutory construction is that courts are obliged to interpret a statute to effectuate the intent of the Legislature, and when the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used" (*People v Finnegan*, 85 NY2d 53, 58 [1995] [internal quotation marks and brackets omitted]; *see also Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208 [1976]). Applying this rule here, we begin by observing that when the Legislature enacted CPL 530.13 (4), PRS was not yet a component of a determinate sentence. This changed, however, when the Legislature amended the Penal Law and introduced PRS to the statutory scheme in 1998 (*see* L 1998, ch 1, as amended). Specifically, the Legislature enacted Penal Law § 70.45 (1), which then provided that "[e]ach determinate sentence also includes, as a part thereof, an ***104** additional period of [PRS]."[2] Moreover, then Penal Law § 70.00 (6) defined "determinate sentence of imprisonment" to "include, as a part thereof, a period of [PRS] in accordance with section 70.45."

Despite these revisions to the Penal Law, defendant emphasizes that there was no corresponding amendment to former CPL 530.13 (4) referencing PRS. Defendant interprets the Legislature's inaction in this regard to mean that the Legislature did not intend for PRS to be part of a defendant's "determinate sentence of imprisonment." Although defendant's reading of former CPL 530.13 (4) by itself is not unreasonable, we prefer to harmonize the statutes (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 98). The language of former Penal Law § 70.45 (1) and § 70.00 (6) is clear and unambiguous: a "determinate sentence of imprisonment" necessarily includes PRS (*see People v Catu*, 4 NY3d 242, 244 [2005]). If the Legislature intended PRS to be wholly distinct from a defendant's determinate sentence, it would not have ****4** specified in former section 70.45 of the Penal Law that a "determinate sentence" encompassed PRS "as a part thereof." Nor would the Legislature have described a "determinate sentence of imprisonment" to "include, as a part thereof, a period of [PRS]" in former section 70.00 (6).

Furthermore, inclusion of PRS in calculating the maximum expiration date of a determinate sentence of imprisonment is appropriate for another reason. A defendant sentenced to a determinate sentence of imprisonment may be conditionally released for "good behavior" after serving at least six-sevenths of the underlying term of incarceration (*see* Penal Law § 70.30 [4] [a]; § 70.40 [1] [b]; Correction Law § 803 [1] [c]). Such a defendant who is conditionally released immediately commences serving the imposed term of PRS and the remaining term of incarceration is "held in abeyance" during this period (Penal Law § 70.45 [5] [a]). A defendant who violates the conditions of PRS may be subject to additional confinement in prison. If this occurs, this period of reincarceration is credited toward the defendant's remaining unserved term of imprisonment (*id.*; Penal Law § 70.45 [5] [d]). Thus, in order to calculate a defendant's *maximum* expiration date of his determinate sentence of ***105** imprisonment at the time of sentencing, a court should include the mandatory period of PRS to account for the possibility that a defendant's term of incarceration may be "held in abeyance" (*see People v Goodband*, 291 AD2d 584, 586 [3d Dept 2002]).

Accordingly, the order of the Appellate Division should be affirmed.

Chief Judge Lippman and Judges Graffeo, Read, Smith, Pigott and Jones concur.

Order affirmed.

FOOTNOTES

Footnotes

1 The current version of CPL 530.13 (4) affords even greater protection to victims. It provides that the duration of an order of protection "in the case of a felony conviction, shall not exceed the greater of: (i) eight years from the date of such sentencing, or (ii) eight years from the date of the expiration of the maximum term . . . of a determinate sentence of imprisonment actually imposed."

2 The Legislature has since amended the language of Penal Law § 70.45 (1). It presently provides that, "[w]hen a court imposes a determinate sentence it shall in each case state not only the term of imprisonment, but also an additional period of [PRS]."

End of Document

New York Official Reports

Unreported Disposition
18 Misc.3d 1127(A), 856 N.Y.S.2d 502 (Table), 2007 WL 4884524 (N.Y.Sup.), 2007 N.Y. Slip Op. 52533(U)

***1** Robert Phillips, David Rose, Neil Czerniak, Douglas Becker, Angela Carpenter, Patricia Chapman, Bonnie Watson, Charilla Sandstrom Conner, Karen Arthmann, and Beverly Fisher, Plaintiffs/, Petitioners,

v.

County of Monroe, Monroe County Legislature of the County of Monroe, Wayne E. Zyra, as President of the Monroe County Legislature, David J. Barry, Jr., as the Clerk of the Monroe County Legislature and Maggie Brooks, in her capacity as the County Executive of the County of Monroe, Defendants/, Respondents.

2007/14206
Supreme Court, Monroe County
Decided on December 10, 2007

CITE TITLE AS: Phillips v County of Monroe

ABSTRACT

Public Officers
Open Meetings Law

Phillips v County of Monroe, 2007 NY Slip Op 52533(U). Public Officers—Open Meetings Law. (Sup Ct, Monroe County, Dec. 10, 2007, Fisher, J.)

OPINION OF THE COURT

Kenneth R. Fisher, J.

In this combined Article 78 proceeding and action for a declaratory judgment, defendants/respondents move to dismiss the Amended petition/complaint. The State of New York appeared by letter dated December 5, 2007, indicating that it would not be submitting papers. By stipulation of the parties, and contrary to the prior OTSC pertaining to the same, the parties ask the court to convert the motion to dismiss into a motion for summary judgment "pursuant to CPLR 3211(c) on due notice to all parties." Stipulation and Order, dated November 28-29, 2007, and endorsed as an order of the court on December 3, 2007. That request is granted.

STANDING ***2**

The County defendants/respondents contend that plaintiff/petitioners lack standing to bring the proceeding. To the extent the challenge is to the constitutionality of the intercept program, as implemented by the County Legislature resolution, it appears that plaintiffs/petitioners indeed do lack standing. *Havranek v. Mathews*, 160 AD2d 1207, 1208 (3d Dept. 1990); *Forward v. Webster Cent. School Dist.*, 136 AD2d 277, 280 (4th Dept. 1988). Even if standing was present, however, plaintiffs/petitioners cannot succeed on the merits of their claims.

CLAIMED VIOLATION OF COUNTY LAW 150-a(2) and 152(2)

Relying on *Plumley v. County of Oneida*, 57 A.D. 1062 (4th Dept. 1977) and *McGovern v. Tatten*, 213 AD2d 778 (3d Dept. 1995), plaintiffs/petitioners contend that the special meeting should be declared a nullity by virtue of the failure to comply with the two day notice requirement of County Law 150-a(2) and 152(2). The County defendants/respondents contend that the County Charter provisions relating to notice trump the County Law in this regard by virtue of County Law 2, and that a declaration of nullity is inappropriate given the attendance of all members of the legislature and their active participation in the meeting.

In *Plumley*, not all members attended the meeting, and the court held that the remaining members at the meeting could not cure the defect. Here all members attended, and so that case is distinguishable. "Moreover, if all members of a town board are present at a special meeting and participate therein, business may properly be transacted even though the two days' notice in writing was not given to all members." 25 NY Jur.2d *Counties, Towns and Municipal Corporations* 141, at 252-53 (2001). The Attorney General has consistently opined

that, if all members are present and participate in the meeting, the defect is waived. 1980 Op. (Inf.) Att'y Gen. 129 (April 14, 1980); 1977 Op. Att'y Gen. 226; 1950 Op. Att'y Gen. 117. The Comptroller has opined to the same effect. 18 Op. St. Compt. 442, 443 (#

62-977 Decemberv 5, 1962)("presence of all members of a town board at a special meeting and their participation therein would satisfy that requirement"). *See also*, *Brechner v. Village of Lake Success*, 25 Misc 2d 920 (Sup. Ct. Nassau Co. 1960)(Meyer, J.)("Since all of the Board members were present and voted, the ordinance may not be invalidated simply because oral rather than written notice of the meeting was given. 4 McQuillen, *Municipal Corporations* (3d Ed.) 13.37; 62 C.J.S. *Municipal Corporations* 297d, p. 756."), *aff'd*, 14 AD2d 567 (2d Dept. 1961), cited with approval, *Alscot Investing Corp. v. Laibach*, 65 NY2d 1042, 1044 (1985). Accordingly, the County Law two day notice claim is without merit and a declaratory judgment to that effect may be submitted for signature.

OPEN MEETINGS LAW CHALLENGE

Plaintiffs/petitioners contend that the special session of the legislature was called to order in violation of Public Officers Law 104. The county defendants/respondents respond that they made extraordinary efforts to alert the public, through the news media and via internet and other channels, of the meeting and to ensure widespread public access. Moreover, it is undisputed that the public attended the meeting and plaintiff/petitioners acknowledged that at least two members of the public made comment during the meeting. There was also a motion to adjourn which was defeated by a majority vote. The court finds that the procedure used, while truncated, was designed to ensure that the goals of the open meetings law would be met by throughly public deliberation and vote, and thus was reasonable within the meaning of the statute. Even if there was a violation of the statute effected exclusively by the truncated nature of the public notice ***3** (and I find that there was not, *see* below), invalidation is not an appropriate sanction. Only if good cause is established, is it discretionary with a court to nullify an action taken by a public body in violation of the Open Meetings Law. Public Officers Law 107; *Matter of New York Univ. v. Whalen*, 46 NY2d 734; *McGovern v. Tatten*, 213 AD2d 778. It is the challenger's burden to show good cause warranting voiding the public action. *Gernatt Asphalt v. Sardinia*, 87 NY2d 668, 686 (1996).

The purpose of the Open Meetings Law is to prevent municipal governments from debating and deciding in private what they are required to debate and decide in public (*see*, *Matter of Gordon v. Village of Monticello*, 87 NY2d 124, 126-127; *Matter of Sciolino v. Ryan*, 81 AD2d 475, 440 NYS2d 795). Courts are empowered, "in their discretion and upon good cause shown, to declare void any action taken by a public body in violation of the mandate of this legislation" (*Matter of New York Univ. v. Whalen*, 46 NY2d 734, 735 [emphasis in original]; *see*, Public Officers Law 107 [1]). It is the challenger's burden to show good cause warranting judicial relief (*Matter of New York Univ. v. Whalen*, 46 NY2d, at 735*, supra*).

Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 NY2d 668, 686 (1996). As in *Mobil Oil Corp. v. City of Syracuse Indus. Development Agency*, 224 AD2d 15 (4th Dept. 1996), "Petitioners have not met their burden of establishing that the . . . [County Legislature] carried out public business in private." *Id*., 224 AD2d at 29-30. The resolution was adopted at a special session "open to the public," and by all accounts well attended. *Griswald v. Village of Penn Yan*, 244 AD2d 950, 951 (4th Dept. 1997). *See also*, *Schweichler v. Village of Caledonia*

AD3d , 2007 WL 3318068 (4th Dept. November 29, 2007); *Carrier v. Town of Palmyra Zoning Bd. of Appeals*, 30 AD3d 1036, 1038 (4th Dept. 2006), and esp. *Monroe-Livingston Sanitary Landfill, Inc. v. Bickford*, 107 AD2d 1062 (4th Dept. 1985)(involving same day *public* notice of special session deemed reasonable under Public Officers Law 104 [2]).Accordingly, the Open Meetings Law challenge to the resolution is without merit, and a declaratory judgment to that effect may be submitted for signature.

INFRINGEMENT OF STATE'S CONSTITUTIONAL DUTY TO PROVIDE MINIMAL EDUCATION

Plaintiffs/petitioners have wholly failed to meet their heavy burden to show that the County Legislature resolution which adopted the sales tax intercept option would be a "causal link between the present funding system and a proven failure to provide a sound basic education to . . . children." *Campaign for Fiscal Equity, Inc. v. State of New York*, 8 NY3d 14, 15 (2006). Defendants/respondents establish as a matter of law on this record that, with the affected suburban and adjoining school districts, that establishing such a causal link is, at best, premature. We do not know yet how the affected districts will respond to the shortfall, either by cutting services or by raising

property taxes, or otherwise, nor is their any record of "proven failure to provide a sound basic education to . . . children" in these districts which might be used as a predicate for the speculative and indirect claims made here.

The remaining contentions of the plaintiffs/petitioners in the various and separately stated causes of action, which are largely derivative of the claims treated above, do not warrant separate comment, and are without merit. Accordingly, the Article 78 proceeding is dismissed, and a declaratory judgment may be submitted for signature consistent with the above. ***4**

SO ORDERED.

_____

Kenneth R. Fisher

Justice Supreme Court

DATED:December 10, 2007

Rochester, New York

1 Wash.3d 629
Supreme Court of Washington,
En Banc.

Gabriel PORTUGAL, Brandon Paul Morales, Jose Trinidad Corral, and League of United Latin American Citizens, Respondents,

v.

FRANKLIN COUNTY, a Washington municipal entity, Clint Didier, Rodney J. Mullen, Lowell B. Peck, in their official capacities as members of the Franklin County Board of Commissioners, Defendants,

James Gimenez, Appellant.

No. 100999-2
|
Argued May 11, 2023
|
Filed June 15, 2023

Synopsis

Background: Latino voters brought action against county and county board of commissioners, alleging that county's system for electing board members diluted votes of Latino/a voters by cracking the population into different districts in violation of Washington Voting Rights Act (WVRA). After intervenor's motion to intervene was granted and intervenor's motion to dismiss was denied, the Superior Court, Franklin County, Alexander Ekstrom, J., entered a final order approving parties' settlement agreement. Intervenor appealed, and plaintiffs requested attorney fees and costs on appeal against intervenor.

Holdings: The Supreme Court, Yu, J., held that:

[1] voters had standing;

[2] as a matter of first impression, legislature had not implicitly repealed WVRA;

[3] facial equal protection claim triggered rational basis review, not strict scrutiny;

[4] WVRA survived rational basis review on facial equal protection challenge;

[5] plaintiffs were entitled to nongovernmental, prevailing party trial and appellate attorney fees and costs under WVRA; and

[6] Supreme Court would decline to assess nongovernmental prevailing party attorney fees against county commissioner.

Affirmed, request for attorney fees granted, and remanded.

West Headnotes (40)

[1] Election Law Discriminatory practices proscribed in general

An abridgement of the right to vote, within meaning of the federal Voting Rights Act (VRA), refers to an electoral system or practice that impairs voting rights on the basis of race, color, or language minority group, regardless of whether there was outright denial of the right to vote. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[2] Election Law Vote Dilution

Dilution of voting rights under § 2 of the Voting Rights Act (VRA) is a specific type of abridgment, which arises from the features of legislative districting plans. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[3] Election Law Vote Dilution

Under § 2 of the Voting Rights Act (VRA), vote dilution can be caused by the use of multimember districts and at-large voting schemes, as opposed to single-member districts and district-based elections. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[4] Election Law Vote Dilution

Under § 2 of the Voting Rights Act, at-large elections, in which voters of the entire jurisdiction elect the members to the governing body, may minimize or cancel out the voting strength of racial minorities because the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a); Wash. Rev. Code Ann. § 29A.92.010(1)(a).

[5] **Election Law** Vote Dilution

Under § 2 of the Voting Rights Act (VRA), vote dilution can occur in district-based elections through the manipulation of district lines. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(a).

[6] **Election Law** Dispersal or concentration of minority voters

"Cracking" occurs when a group of voters is split up among multiple districts so that they fall short of a majority in each one.

1 Case that cites this headnote

[7] **Election Law** Dispersal or concentration of minority voters

"Packing" occurs when a group of voters is concentrated in a few districts that they win by overwhelming margins, thus preventing the group from electing its preferred candidates in other districts.

[8] **Election Law** Majority-minority districts

Under § 2 of the Voting Rights Act (VRA), in majority-minority voting districts, a minority group composes a numerical, working majority of the voting-age population, thereby creating an opportunity for the minority group to elect its candidate of choice in that district. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

1 Case that cites this headnote

[9] **Election Law** Relief in General

Federal courts may order the creation of majority-minority voting districts if necessary to remedy a violation of federal law.

[10] **Election Law** Relief in General

Section 2 of the Voting Rights Act (VRA) does not require remedies such as so-called influence districts in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected, or crossover districts in which the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate; instead, courts adjudicating § 2 claims are generally limited to ordering single-member districts and, in some cases, majority-minority districts. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

1 Case that cites this headnote

[11] **Election Law** Vote Dilution

A plaintiff asserting a § 2 vote dilution claim under the Voting Rights Act (VRA) must prove three threshold conditions: (1) that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) that the minority group is politically cohesive; and (3) that the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

1 Case that cites this headnote

[12] **Election Law** Dilution of voting power in general

Gingles factors are necessary in § 2 vote dilution cases under the Voting Rights Act (VRA) to ensure that the plaintiff has stated a redressable injury. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[13] **Election Law** Majority-minority districts

Election Law Vote Dilution

The *Gingles* factors require the plaintiff bringing a vote-dilution case under the Voting Rights Act (VRA) to show that the plaintiff's concerns could, at least potentially, be addressed by implementing single-member districts, majority-minority districts, or both. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[14] **Election Law** Compactness and cohesiveness of minority group

Election Law Compactness and cohesiveness of minority group

The showings of geographically compact majority and minority political cohesion for a vote-dilution case under § 2 of the Voting Rights Act (VRA) are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district, and the minority political cohesion and majority bloc voting showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger voting population. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[15] **Election Law** Dilution of voting power in general

Only when a party has established the *Gingles* requirements for a vote-dilution case under the Voting Rights Act (VRA) does a court proceed to analyze whether a violation of Section 2 has occurred based on the totality of the circumstances. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[16] **Election Law** Dilution of voting power in general

States Dilution of voting power in general

States are free to implement remedies for vote dilution that are not required pursuant to § 2 of the Voting Rights Act (VRA), so long as those remedies are not otherwise prohibited. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301.

[17] **Election Law** Majority-minority districts

Election Law Compactness and cohesiveness of minority group

If the plaintiff in a case under the Washington Voting Rights Act (WVRA) seeks the creation of a so-called majority-minority district, the plaintiff may be required at the remedy stage to show that the minority group is sufficiently geographically compact to constitute a majority in the proposed district, just as a plaintiff bringing a claim under § 2 of the federal Voting Rights Act (VRA) would need to do at the threshold stage; by contrast, if the plaintiff in a WVRA case seeks only the implementation of a ranked choice voting system for at-large elections, a showing of geographical compactness would be both irrelevant and unnecessary at any stage. Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301(b); Wash. Rev. Code Ann. § 29A.92.010(3).

[18] **Appeal and Error** Statutory or legislative law

Statutory interpretation is a matter of law, so Supreme Court review is de novo.

[19] **Election Law** Scope of review

Constitutional challenges to the Washington Voting Rights Act (WVRA) are subject to de novo review. Wash. Rev. Code Ann. § 29A.92.020.

[20] **Constitutional Law** Presumptions and Construction as to Constitutionality

Constitutional Law Burden of Proof

Courts presume statutes are constitutional, and the party challenging constitutionality bears the burden of proving otherwise.

[21] **Constitutional Law** Facial invalidity

Facial challenges must be rejected unless there is no set of circumstances in which the statute can constitutionally be applied.

[22] **Constitutional Law** Electoral districts and gerrymandering

Strict scrutiny could certainly be triggered in an as-applied equal protection challenge to districting maps that sort voters on the basis of race or to some other race-based sorting of voters. U.S. Const. Amend. 14.

[23] **Election Law** Racial and language minorities in general

Under its plain language, Washington Voting Rights Act (WVRA) prohibiting voting discrimination against members of a protected class or classes of voters who are members of a race, color, or language minority group applies to all Washington voters; last antecedent rule shows that "minority group" modifies only "language," not "race" or "color," if legislature had intended otherwise, then WVRA would refer to "racial" groups, not "race" groups, WVRA allows for a challenge by any voter who resides in a political subdivision where a violation is alleged, it would improperly frustrate WVRA's purpose to hold that WVRA's protections are inapplicable to many Washington voters, and it would be both absurd and contrary to precedent to hold that statement of legislative findings negates plain language of WVRA's operative provisions. Wash. Rev. Code Ann. §§ 29A.92.010(5), 29A.92.020, 29A.92.090(1).

[24] **Statutes** Relative and qualifying terms and provisions, and their relation to antecedents

When evaluating the language of a statute, courts apply the last antecedent rule absent evidence of a contrary legislative intent.

[25] **Statutes** Construction based on multiple factors

Statutory language must be interpreted in the context of the statute, related provisions, and the statutory scheme as a whole.

1 Case that cites this headnote

[26] **Statutes** Purpose

In resolving a question of statutory construction, the Supreme Court will ultimately adopt the interpretation which best advances the legislative purpose.

[27] **Statutes** Other Jurisdictions

Absent contrary legislative intent, when a state statute is taken substantially verbatim from another jurisdiction, it carries the same construction.

[28] **Constitutional Law** Judicial rewriting or revision

Courts may not rewrite unambiguous statutory language under the guise of interpretation.

1 Case that cites this headnote

[29] **Statutes** Statements of purpose, intent, or policy in general

Declarations of legislative intent are not controlling; instead, they serve only as an important guide in determining the intended effect of the operative sections.

[30] **Election Law** Racial and language minorities in general

Under the Washington Voting Rights Act (WVRA), abridgment of the right to vote can occur regardless of which racial group is in the majority. Wash. Rev. Code Ann. § 29A.92.020.

[31] **Counties** Nature and constitution in general

Latino voters had standing to bring action against county and county board of commissioners, alleging that county's system for electing board members diluted votes of Latino/a voters by cracking the population into different districts in violation of Washington Voting Rights Act (WVRA) which protects all Washington voters from discrimination on the basis of race, color, or language minority group. Wash. Rev. Code Ann. § 29A.92.020.

[32] **Counties** Constitutional and statutory provisions

Election Law In general; power to prohibit discrimination

On its face, Washington Voting Rights Act (WVRA) requires equality, not race-based favoritism, in electoral systems, such that WVRA did not irreconcilably conflict with section providing that when a county engages in periodic redistricting after a census, population data may not be used for purposes of favoring or disfavoring any racial group or political party, and therefore legislature had not implicitly repealed WVRA; WVRA's protections applied to all Washington voters, all Washington voters had standing to bring a WVRA challenge, and a political subdivision could not be compelled to do anything pursuant to WVRA based on the single factor of racially polarized voting, meaning the fact that voters of different races tend to vote for different candidates. Wash. Rev. Code Ann. §§ 29A.76.010(4)(d), 29A.92.020.

[33] **Constitutional Law** In General; State Constitutional Provisions

For a violation of privileges and immunities clause of the state constitution to occur, the law must confer a privilege to a class of citizens. Wash. Const. art. 1, § 12.

[34] **Constitutional Law** Elections

Election Law In general; power to prohibit discrimination

Washington Voting Rights Act (WVRA), which protects the equal opportunity of voters of all races, colors, and language minority groups to elect candidates of their choice, does not confer any privilege to any class of citizens, and thus WVRA does not facially violate privileges and immunities clause of the state constitution; all Washington voters have equal rights to challenge their local governments for alleged WVRA violations. Wash. Const. art. 1, § 12; Wash. Rev. Code Ann. § 29A.92.020.

[35] **Constitutional Law** Elections, Voting, and Political Rights

Washington Voting Rights Act (WVRA) on its face did not classify voters on the basis of race, nor does it deprive anyone of the fundamental right to vote, but instead mandated equal voting opportunities for members of every race, color, and language minority group, and therefore, facial equal protection claim triggered rational basis review, not strict scrutiny. U.S. Const. Amend. 14; Wash. Rev. Code Ann. § 29A.92.020.

[36] **Constitutional Law** Statutes and other written regulations and rules

In an equal protection case, rational basis review is satisfied if there is a rational relationship between the challenged statute and any legitimate governmental interests. U.S. Const. Amend. 14.

[37] **Constitutional Law** Equality of Voting Power (One Person, One Vote)

Election Law In general; power to prohibit discrimination

Washington Voting Rights Act's (WVRA) mandate for equal voting opportunities was clearly rationally related to the state's legitimate interest in protecting Washington voters from discrimination, and thus WVRA survived rational basis review on facial equal protection

challenge in vote-dilution case. U.S. Const. Amend. 14; Wash. Rev. Code Ann. § 29A.92.020.

[38] **Constitutional Law** Statutes and other written regulations and rules

A law directing state actors to provide equal protection is facially neutral, and cannot violate the Constitution. U.S. Const. Amend. 14.

[39] **Counties** Costs

Latino voters, as nongovernmental prevailing parties, were entitled to trial and appellate attorney fees and costs under Washington Voting Rights Act (WVRA) attributable to their litigation against intervenor in vote-dilution action against county; intervenor's appeal forced Latino voters to spend an entire year litigating case after county had settled their WVRA claim. Wash. Rev. Code Ann. §§ 4.84.010, 29A.92.020, 29A.92.130(1).

[40] **Counties** Costs

Supreme Court would decline to assess nongovernmental prevailing party attorney fees against county commissioner in Latino voters' vote-dilution action against county and members of county board of commissioners under Washington Voting Rights Act (WVRA), notwithstanding evidence that commissioner was involved in intervenor's intervention or appeal of settlement between county, board members, and Latino voters; commissioner had not filed anything on appeal. Wash. Rev. Code Ann. §§ 29A.92.020, 29A.92.130(1).

**998 Appeal from Franklin County Superior Court, Docket No: 21-2-50210-4, Honorable Alexander C. Ekstrom, Judge

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Opinion

YU, J.

***632** ¶1 This case presents matters of first impression concerning the interpretation and facial validity of the Washington voting rights act of 2018 (WVRA), ch. 29A.92 RCW.[1] As detailed below, the WVRA protects the rights of Washington voters in local elections. In this case, three Latino[2] voters from ****999** Franklin County alleged that the county's system for electing its board of commissioners violated the WVRA by "dilut[ing] the votes of Latino/a voters." Clerk's Papers (CP) at 1. The plaintiffs (respondents on appeal) ultimately settled with defendants Franklin County and the Franklin County Board of Commissioners. The defendants are not participants on appeal. We are not asked to ***633** review the merits of the plaintiffs' claim or the parties' settlement agreement.

¶2 The issues on appeal were raised by James Gimenez, a Franklin County voter who was allowed to intervene by the trial court. Immediately after his motion to intervene was granted, Gimenez moved to dismiss the plaintiffs' claim, arguing that the plaintiffs do not have standing and that the WVRA is facially invalid. The trial court denied Gimenez's motion to dismiss, and he was not an active participant in the case thereafter. After the trial court entered a final order approving the parties' settlement, Gimenez appealed directly to this court.

¶3 Gimenez's arguments are all based on his view that the WVRA protects some Washington voters but excludes others. The WVRA's protections apply to "a class of voters who are members of a race, color, or language minority group."[3] RCW 29A.92.010(5). Gimenez interprets this language to mean that the WVRA protects only members of " 'race minority groups,' 'color minority groups,' or 'language minority group[s].' " Br. of Appellant at 2 (underlining added) (alteration in original). Based on this interpretation, Gimenez argues that the plaintiffs do not have standing because the WVRA does not protect Latinx voters from Franklin County as a matter of law. Gimenez also argues that the WVRA has been repealed by implication and is facially unconstitutional because it requires local governments to implement electoral systems that favor protected voters and disfavor others on the basis of race.

¶4 Gimenez's arguments cannot succeed because his reading of the statute is incorrect. The WVRA protects *all* Washington voters from discrimination on the basis of race, color, and language minority group. On its face, the WVRA ***634** does not require race-based favoritism in local electoral systems, nor does it trigger strict scrutiny by granting special privileges, abridging voting rights, or otherwise classifying voters on the basis of race. Therefore, we hold that the plaintiffs have standing and that the WVRA is valid and constitutional on its face.[4] We affirm the trial court, grant the plaintiffs' request for attorney fees and costs on appeal against Gimenez, and remand for a determination of fees and costs incurred at the trial court.

OVERVIEW OF THE WVRA

¶5 No Washington appellate court has previously considered the WVRA. To provide context for this case, it is important to begin with an overview of the relevant law and terminology.

A. General provisions

¶6 The WVRA recognizes "that electoral systems that deny race, color, or language minority groups an equal opportunity to elect candidates of their choice are inconsistent with the right to free and equal elections." RCW 29A.92.005 (citing Wash. Const. art. I, § 19, art. VI, § 1; U.S. Const. amends. XIV, XV). However, prior to the WVRA's enactment, Washington law "often prohibited" local governments from making changes to their electoral systems, even in response to changing demographics. *Id.* The legislature found that "in some cases, this has resulted in an improper dilution of voting power," particularly as applied to "minority groups." *Id.*

¶7 To protect the rights of Washington voters in local elections, the legislature ****1000** passed the WVRA in 2018. The WVRA provides that

> no method of electing the governing body of a political subdivision may be imposed or applied in a manner that impairs the ***635** ability of members of a protected class or classes to have an equal opportunity to elect candidates of their choice as a result of the dilution or abridgment of the rights of voters who are members of a protected class or classes.

RCW 29A.92.020. A " '[p]rotected class' means a class of voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal voting rights act [of 1965 (FVRA)], 52 U.S.C. 10301 et seq." RCW 29A.92.010(5). A " '[p]olitical subdivision' " includes "any county, city, town, school district, fire protection district, port district, or public utility district, but does not include the state." RCW 29A.92.010(4). Small cities, towns, and school

districts are exempt from most of the WVRA's provisions. RCW 29A.92.700.

¶8 Two elements must be shown before a political subdivision may be found in violation of the WVRA:

> (a) Elections in the political subdivision exhibit polarized voting[5]; and
>
> (b) Members of a protected class or classes do not have an equal opportunity to elect candidates of their choice as a result of the dilution or abridgment of the rights of members of that protected class or classes.

RCW 29A.92.030(1). There are definitions and guidelines for applying these elements in individual cases. *See* RCW 29A.92.010, .030(2)-(6).

B. Types of prohibited voting discrimination

¶9 The WVRA expressly protects against two types of voting discrimination: "abridgment" and "dilution." RCW 29A.92.020, .030(1)(b). These terms are not statutorily defined, and their meaning is not necessarily obvious. However, "courts may rely on relevant federal case law for guidance" in interpreting the WVRA. RCW 29A.92.010.

***636** ¶10 Federal cases use "abridgment" as a relatively general term. Practices that "abridge" the right to vote on the basis of race or color have been expressly prohibited by the Fifteenth Amendment since 1870 and by section 2 of the FVRA (Section 2) since 1965. U.S. Const. amend. XV, § 1; *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. ——, 141 S. Ct. 2321, 2331, 210 L. Ed. 2d 753 (2021) (citing 79 Stat. 437). In its current form, Section 2 prohibits electoral systems and practices "which result[ ] in a denial or abridgement" of voting rights based on "race," "color," or membership in a "language minority group." 52 U.S.C. §§ 10301(a), 10303(f)(2).

[1] ¶11 A Section 2 violation may be found if "the totality of circumstances" show

> that the political processes leading to nomination or election in the [jurisdiction] are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301(b). Thus, "an 'abridgement' of the right to vote" refers to an electoral system or practice that impairs voting rights on the basis of race, color, or language minority group, regardless of whether there was "outright denial of the right" to vote. *Brnovich*, 141 S. Ct. at 2341.

¶12 For example, abridgment may be caused "by the requirement of the payment of a poll tax as a precondition to voting" or by "the discriminatory use of literacy tests." 52 U.S.C. § 10306(a); *Oregon v. Mitchell*, 400 U.S. 112, 132, 91 S. Ct. 260, 27 L. Ed. 2d 272 (1970) (plurality opinion). For many years, Washington State abridged voting rights by imposing an English-language literacy requirement for voter registration, while at the same time "vesting unlimited discretion in state registration officers" to decide whether ****1001** to administer a literacy test before registering any particular individual to vote. 1967 Op. Att'y Gen. No. 21, at ***637** 5; *see* Laws of 1901, ch. 135, § 4; Laws of 1965, ch. 9, § 29.07.070(13).

[2] ¶13 In contrast to "abridgment," federal courts use "dilution" as a technical term of art. Dilution is a specific type of abridgment, which arises from the "features of legislative districting plans." *Brnovich*, 141 S. Ct. at 2331. In a dilution claim, the plaintiff alleges that their jurisdiction's districting plan "dilute[s] the ability of particular voters to affect the outcome of elections." *Id.* Federal cases recognize two primary forms of vote dilution.

[3] **[4]** ¶14 First, vote dilution can be caused by the use of "multimember districts and at-large voting schemes,"[6] as opposed to single-member districts and district-based elections.[7] *Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986). At-large elections may " 'minimize or cancel out the voting strength of racial [minorities]' " because "the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters." *Id.* at 47-48, 106 S. Ct. 2752 (alteration in original) (internal quotation marks omitted) (quoting *Burns v. Richardson*, 384 U.S. 73, 88, 86 S. Ct. 1286, 16 L. Ed. 2d 376 (1966)).

[5] **[6]** **[7]** ¶15 Second, vote dilution can occur in district-based elections through "the manipulation of district lines." *Voinovich v. Quilter*, 507 U.S. 146, 153, 113 S. Ct. 1149, 122 L. Ed. 2d 500 (1993). This often involves so-called " 'cracking' and 'packing.' " *Gill v. Whitford*, 585 U.S. ——, 138 S. Ct. 1916, 1923, 201 L. Ed. 2d 313 (2018) (quoting record). "Cracking" occurs when a group of voters is split up " 'among multiple districts so that they fall short of a majority in each one.' " *Id.* at 1924 (quoting record). "Packing" occurs

when a group of voters is concentrated " 'in a few districts that they win by overwhelming margins,' " thus preventing the group from ***638** electing its preferred candidates in other districts. *Id.* (quoting record).

¶16 Both the WVRA and Section 2 of the FVRA prohibit vote dilution. RCW 29A.92.020; *Brnovich*, 141 S. Ct. at 2333. However, there are significant differences between the two, which affect both the range of available remedies and the elements required for a successful claim.

C. The WVRA recognizes a broader range of redressable claims for vote dilution than those recognized by Section 2 of the FVRA

[8] **[9]** **[10]** ¶17 Section 2 recognizes only a few potential remedies for vote dilution. Federal courts "have strongly preferred single-member districts" as the remedy of choice. *Growe v. Emison*, 507 U.S. 25, 40, 113 S. Ct. 1075, 122 L. Ed. 2d 388 (1993). In addition, federal courts may order "the creation of majority-minority[8] districts [if] necessary to remedy a violation of federal law." *Quilter*, 507 U.S. at 156, 113 S.Ct. 1149. However, Section 2 does not require other remedies, such as so-called "influence districts"[9] or "crossover district[s]."[10] *Bartlett v. Strickland*, 556 U.S. 1, 13, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009) (plurality opinion). Instead, courts adjudicating Section 2 claims are generally limited to ordering single-member districts and, in some cases, majority-minority districts.

****1002** **[11]** ¶18 Due to these limits on available remedies, a plaintiff asserting a Section 2 vote dilution claim

> must prove three threshold conditions: first, "that [the minority group] is sufficiently large and geographically compact to constitute ***639** a majority in a single-member district"; second, "that [the minority group] is politically cohesive"; and third, "that the ... majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate."

Emison, 507 U.S. at 40, 113 S.Ct. 1075 (some alterations in original) (quoting *Gingles*, 478 U.S. at 50-51, 106 S.Ct. 2752). These threshold conditions are generally referred to as the "*Gingles* factors" or "*Gingles* requirements."

[12] **[13]** **[14]** **[15]** ¶19 As the United States Supreme Court has explained, the *Gingles* factors are necessary in Section 2 vote dilution cases to ensure that the plaintiff has stated a redressable injury. In other words, the *Gingles* factors require the plaintiff to show that their concerns could, at least potentially, be addressed by implementing single-member districts, majority-minority districts, or both:

> The "geographically compact majority" and "minority political cohesion" showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district, [a]nd the "minority political cohesion" and "majority bloc voting" showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger ... voting population.

Id. (citing *Gingles*, 478 U.S. at 50 n.17, 51, 106 S.Ct. 2752). "[O]nly when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation [of Section 2] has occurred based on the totality of the circumstances." *Strickland*, 556 U.S. at 11-12, 129 S.Ct. 1231.

¶20 By contrast, the WVRA contemplates a much broader range of available remedies. Similar to Section 2, the WVRA permits courts to order a political subdivision to implement "a district-based election system" and "to draw or redraw district boundaries." RCW 29A.92.110(1). However, unlike Section 2, courts adjudicating WVRA claims are "not limited to" these examples, and any remedy must be "tailor[ed]" to the political subdivision at issue. RCW 29A.92.110(1)-(2).

***640** ¶21 For example, in direct contrast to the FVRA, the WVRA explicitly allows for the creation of a crossover or "coalition"[11] district "that provides the protected class the opportunity to join in a coalition of two or more protected classes to elect candidates of their choice if there is demonstrated political cohesion among the protected classes." RCW 29A.92.110(2). Other potential remedies include, but are not necessarily limited to,

- limited voting, where a voter receives fewer votes than there are candidates to elect;
- cumulative voting, where a voter receives as many votes as there are candidates to elect, but may cast multiple votes for a single candidate; and
- single transferrable or ranked choice voting, where a voter ranks candidates in order of preference, and votes are transferred to lower-ranked candidates who are not elected on first-place votes if a majority is not reached.

Final B. Rep. on Engrossed Substitute S.B. 6002, at 2, 65th Leg., Reg. Sess. (Wash. 2018).

[16] ¶22 Thus, on its face, the WVRA permits remedies that Section 2 does not. This does not create a conflict between state and federal law because the states are free to implement remedies that are not *required* pursuant to Section 2, so long as those remedies are not otherwise *prohibited*. *See Strickland*, 556 U.S. at 23, 129 S.Ct. 1231 ("Our holding that [Section] 2 does not require crossover districts does not consider the permissibility of such districts as a matter of legislative choice or discretion."); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 430, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006) (*LULAC*) ("To be sure, [Section] 2 ****1003** does not forbid the creation of a noncompact majority-minority district.").

¶23 Because the WVRA contemplates a broader range of remedies than Section 2, a WVRA plaintiff can state a redressable injury under a broader range of circumstances ***641** than a Section 2 plaintiff. This is reflected in the elements required to prove a WVRA claim.

¶24 Similar to Section 2, the WVRA requires the plaintiff to show that "[e]lections in the political subdivision exhibit polarized voting." RCW 29A.92.030(1)(a). This requirement corresponds to the second and third *Gingles* factors, discussed above: "the minority group must be able to show that it is politically cohesive" and that the "majority [group] votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51, 106 S.Ct. 2752; *see* RCW 29A.92.010(3). The WVRA is also similar to Section 2 in placing the ultimate burden on the plaintiff to prove that "[m]embers of a protected class or classes do not have an equal opportunity to elect candidates of their choice as a result of the dilution or abridgment of the rights of members of that protected class or classes." RCW 29A.92.030(1)(b); *cf.* 52 U.S.C. § 10301(b).

¶25 However, unlike Section 2, the WVRA specifically rejects the first *Gingles* factor as a *threshold* requirement: "The fact that members of a protected class are not geographically compact or concentrated to constitute a majority in a proposed or existing district-based election district shall not preclude a finding of a violation under this chapter." RCW 29A.92.030(2). *Contra Gingles*, 478 U.S. at 50, 106 S.Ct. 2752. Instead, the WVRA provides that geographical compactness "may be a factor in determining a *remedy*." RCW 29A.92.030(2) (emphasis added).

[17] ¶26 Thus, if the plaintiff in a WVRA case seeks the creation of a so-called "majority-minority" district, they may be required at the remedy stage to show that the minority group is sufficiently geographically compact to constitute a majority in the proposed district—just as a Section 2 plaintiff would need to do at the threshold stage. *Cf. Gingles*, 478 U.S. at 50 & n.17, 106 S.Ct. 2752. By contrast, if the plaintiff in a WVRA case seeks only the implementation of a ranked choice voting system for at-large elections, a showing of geographical compactness would be both irrelevant and unnecessary at any stage.

***642** D. Enforcement of the WVRA

¶27 The WVRA includes two mechanisms to promote compliance: voluntary changes by political subdivisions and challenges by local voters.

¶28 A political subdivision may voluntarily "change its electoral system ... to remedy a potential violation" of the WVRA. RCW 29A.92.040(1). If the political subdivision wishes to draw or redraw its election districts, then it must comply with specific criteria. RCW 29A.92.050(3). In addition, before implementing any voluntary changes, "the political subdivision must provide public notice" and "hold at least one public hearing." RCW 29A.92.050(1)(a)-(b).

¶29 Local voters may also "challenge a political subdivision's electoral system" for alleged WVRA violations. RCW 29A.92.060(1). The voter must "first notify the political subdivision," which must work with the voter "in good faith." *Id.*; RCW 29A.92.070(1). If the political subdivision wishes to implement a remedy at this stage, it must "seek a court order acknowledging that the ... remedy complies with RCW 29A.92.020 and was prompted by a plausible violation." RCW 29A.92.070(2). There is "a rebuttable presumption that the court will decline to approve the political subdivision's proposed remedy." *Id.*

¶30 If a political subdivision receives notice of an alleged WVRA violation but fails to implement a court-approved remedy within a specified time frame, then "any voter who resides in [the] political subdivision ... may file an action" in superior court. RCW 29A.92.090(1). Such an action is subject to the WVRA's provisions on venue, time for trial, statute of limitations, and similar issues. *See* RCW 29A.92.090-.100. If the trial court finds that the political subdivision has violated the WVRA, then it "may order appropriate remedies," as discussed above. RCW 29A.92.110(1). Once the political subdivision ****1004** implements a court-approved remedy, it is largely shielded from WVRA challenges for the next four years. *See* RCW 29A.92.070(3), .080(3), .120(1).

***643** ¶31 Since the WVRA was enacted in 2018, several political subdivisions have made changes to their electoral systems. However, this will be the first time that any Washington appellate court addresses the WVRA.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

¶32 This case arises from a voter-initiated challenge to Franklin County's system for electing its three-member board of commissioners. Franklin County is located in southeastern Washington, with its county seat in the city of Pasco. *Find Us*, Franklin County, https://www.franklincountywa.gov/508/Find-Us (last visited June 5, 2023). About 54 percent of the county's total population is "Hispanic or Latino."[12] *QuickFacts, Franklin County, Washington*, U.S. Census Bureau, https://www.census.gov/quickfacts/franklincountywashington (last visited June 5, 2023). "Latino citizens make up over one third, or 34.4%, of Franklin County's citizen voting age population." CP at 5.

A. The plaintiffs notify Franklin County of an alleged WVRA violation and ultimately file suit

¶33 Prior to this case, Franklin County used "a 'hybrid' election system," which combined district-based primaries with at-large general elections:

> [P]otential candidates [ran] in their respective districts and the top two candidates proceed[ed] to the general election. The general election [was] then conducted as an at-large election, in which all voters in the County cast votes to seat a county commissioner in each seat the year that position is up for election.

***644** *Id.* at 1010. In October 2020, counsel for the plaintiffs[13] sent Franklin County a notice alleging that its electoral system violated the WVRA.

¶34 According to the plaintiffs' notice, the county's "at-large general elections for commissioners prevent Latinos from electing a candidate of choice" and "Franklin County has diluted the Latino community's votes by cracking the population into different districts." *Id.* at 116-17. The notice further alleged that "as a result of the County's discriminatory electoral scheme, there are no Latino preferred candidates currently serving on the Franklin County Board of Commissioners, nor has there ever been one elected to serve on the commission." *Id.* at 116.

¶35 Franklin County did not take remedial action within the then applicable six-month time frame. *See* RCW 29A.92.080(1). The plaintiffs subsequently filed a WVRA claim in Franklin County Superior Court against Franklin County and each member of the Franklin County Board of Commissioners (Clint Didier, Rodney J. Mullen, and Lowell B. Peck) in their official capacities.

B. James Gimenez intervenes to defend Franklin County's electoral system

¶36 The procedural history of this litigation is fairly complicated, but many of the details are irrelevant to our review. To briefly summarize, the plaintiffs moved for partial summary judgment on the issue of whether Franklin County's electoral system violated the WVRA. The defendants conceded the WVRA violation because they could not make a contrary argument "in good faith." CP at 170. The trial court granted partial summary judgment and ordered the parties to "work cooperatively together on the development ***645** of the district map." *Id.* at 259. However, this ****1005** order was vacated shortly after it was entered.

¶37 Three days after the trial court granted partial summary judgment, Gimenez moved to intervene to defend Franklin County's existing electoral system, alleging that the plaintiffs lack standing and that the WVRA is facially unconstitutional. One week later, the Franklin County Board of Commissioners adopted a resolution directing the county prosecutor to "seek reconsideration of the order granting Summary Judgement [sic]." *Id.* at 275. As directed, the prosecutor moved to vacate the summary judgment order, asserting that the "Board of Commissioners never authorized or gave direction in an open public meeting to the Franklin County Prosecutor to stipulate to an order granting summary judgment in favor of the Plaintiffs." *Id.* at 318.

¶38 Over the plaintiffs' objections, the trial court granted the defendants' motion to vacate and Gimenez's motion to intervene.

C. The trial court denies Gimenez's motion to dismiss and approves the parties' CR 2A settlement agreement

¶39 After his motion to intervene was granted, Gimenez immediately moved for dismissal pursuant to CR 12(c), arguing that the plaintiffs lack standing and that the WVRA

is facially invalid. The trial court denied Gimenez's CR 12(c) motion on its merits.

¶40 The plaintiffs subsequently filed a second motion for partial summary judgment. As they had done in their first motion, the plaintiffs sought a ruling that Franklin County's electoral system violated the WVRA, leaving only "the question of an appropriate remedial map" for trial. *Id.* at 682. The defendants initially opposed summary judgment, but the parties ultimately entered into a CR 2A settlement agreement, "which was ratified by Defendant Commissioners in a Franklin County commissioner meeting." *Id.* at 1288.

***646** ¶41 The settlement agreement allowed Franklin County to use a district map that its board of commissioners had already "approved and adopted" following the 2020 U.S. Census. *Id.* at 1292. However, "[b]eginning with the 2024 election cycle, all future elections for the office of Franklin County Commissioner will be conducted under a single-member district election system for both primary and general elections." *Id.* The plaintiffs also agreed to accept a reduced award of attorney fees and costs from the defendants. Over Gimenez's objection, the trial court approved the parties' CR 2A settlement and dismissed the plaintiffs' claims with prejudice.

¶42 Gimenez appealed directly to this court. The plaintiffs opposed Gimenez's arguments on the merits, but they agreed that direct review was appropriate. We retained the case for a decision on the merits and accepted six amici briefs for filing.[14] We have not received any appellate filings from Franklin County or any member of the Franklin County Board of Commissioners.

ISSUES

¶43 A. Do the plaintiffs have standing to bring a WVRA claim?

¶44 B. Did the legislature repeal the WVRA by implication?

¶45 C. Does the WVRA facially violate the privileges and immunities clause of article I, section 12 of the Washington Constitution?

¶46 D. Does the WVRA facially violate the equal protection clause of the Fourteenth Amendment to the United States Constitution?

***647** ¶47 E. Should we reach the additional issues raised by plaintiffs and amici?

¶48 F. Should we grant the plaintiffs' request for attorney fees and costs?

****1006** ANALYSIS

¶49 Each of Gimenez's arguments is based on his interpretation of the WVRA's definition of a "protected class." He believes that this definition protects some racial groups, while excluding others. As a result, Gimenez believes that the WVRA requires local governments to implement electoral systems that favor some racial groups, while disfavoring others.

[18] ¶50 Statutory interpretation is a matter of law, so our review is de novo. *Woods v. Seattle's Union Gospel Mission*, 197 Wn.2d 231, 238, 481 P.3d 1060 (2021), *cert. denied*, —— U.S. ——, 142 S. Ct. 1094, 212 L.Ed.2d 318 (2022). We reject Gimenez's interpretation of the WVRA. The plain language of the statute and basic principles of statutory interpretation show that the WVRA protects *all* Washington voters from discrimination on the basis of race, color, and language minority group. Therefore, the plaintiffs in this case have standing and the WVRA has not been repealed by implication.

[19] **[20]** **[21]** ¶51 Gimenez's constitutional challenges to the WVRA are also subject to de novo review. *Id.* "We presume statutes are constitutional, and the party challenging constitutionality bears the burden of proving otherwise." *Id.* at 239, 481 P.3d 1060. Because Gimenez makes facial challenges, his arguments "must be rejected unless there is '*no set of circumstances* in which the statute ... can constitutionally be applied.' " *Id.* at 240, 481 P.3d 1060 (quoting *In re Det. of Turay*, 139 Wn.2d 379, 417 n.27, 986 P.2d 790 (1999)). The WVRA can clearly be applied in a manner that does not violate article I, section 12 because, on its face, the WVRA does not grant any privilege or immunity to any class of citizens.

***648** **[22]** ¶52 Finally, contrary to Gimenez's view, his federal equal protection claim does not trigger strict scrutiny because the WVRA, on its face, does not "create racial classifications." *Contra* Br. of Appellant at 17. Strict scrutiny could certainly be triggered in an *as-applied* challenge to "districting maps that sort voters on the basis of race" or to

some other "race-based sorting of voters." *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. ——, 142 S. Ct. 1245, 1248, 212 L. Ed. 2d 251 (2022) (per curiam). However, on its face, the WVRA requires "equal opportunit[ies]" for voters of all races, colors, and language minority groups, not race-based sorting of voters. RCW 29A.92.020.

¶53 Gimenez appears to argue that the WVRA makes "racial classifications" by recognizing the existence of race, color, and language minority groups and prohibiting discrimination on that basis. Br. of Appellant at 17. He also appears to argue that the WVRA *must* favor some racial groups and disfavor others because "[e]lections are quintessentially zero-sum." *Id.* at 53. We cannot agree. If Gimenez's position were correct, then every statute prohibiting racial discrimination or mandating equal voting rights would be subject to facial equal protection challenges triggering strict scrutiny. No authority supports that position. Therefore, we hold that Gimenez's equal protection claim triggers only rational basis review, which the WVRA easily satisfies on its face.

¶54 We grant the plaintiffs' request for attorney fees in part. We award fees and costs incurred at trial and on appeal against Gimenez, and we remand to the trial court for a calculation of the fees and costs incurred at the trial court. However, we decline the plaintiffs' request to assess fees against Commissioner Didier.

A. The plaintiffs have standing

¶55 According to Gimenez, the WVRA's protections simply do not apply to members of a race, color, or language minority group that comprises a numerical majority of the ***649** total population in their local jurisdiction. Slightly over 50 percent of Franklin County's total population is Latinx. Therefore, according to Gimenez, it is impossible for *any* Latinx voter in Franklin County to have standing to bring a WRVA claim, unless they happen to be a member of some other protected class. The trial court rejected Gimenez's interpretation and ruled that the plaintiffs have standing. We affirm.

****1007** 1. The plain statutory language and principles of statutory interpretation show that the WVRA's protections apply to all Washington voters

[23] ¶56 The plain meaning of the WVRA applies to all Washington voters. As discussed above, the WVRA prohibits voting discrimination against "members of a protected class or classes." RCW 29A.92.020. A "protected class" is "a class of voters who are members of a race, color, or language minority group." RCW 29A.92.010(5). Everyone can be a member of a race or races, everyone has a color, and "language minority group" includes ethnic groups that might otherwise be wrongfully excluded—"persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage."[15] 52 U.S.C. § 10310(3)(c). As a result, every Washington voter is a member of at least one protected class, so every Washington voter is protected by the WVRA.

***650** **[24]** ¶57 The statute's plain meaning is confirmed by "traditional rules of grammar." *PeaceHealth St. Joseph Med. Ctr. v. Dep't of Revenue*, 196 Wn.2d 1, 8, 468 P.3d 1056 (2020). For instance, "[w]hen evaluating the language of a statute, we apply the last antecedent rule" absent evidence of a contrary legislative intent. *City of Spokane v. Spokane County*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006). The last antecedent rule shows that "minority group" modifies only "language," not "race" or "color." *See id.*; RCW 29A.92.010(5). If the legislature had intended otherwise, then the WVRA would refer to "racial" groups, not "race" groups.

[25] ¶58 Principles of statutory interpretation further confirm that the WVRA " 'says what it means and means what it says.' " *City of Seattle v. Long*, 198 Wn.2d 136, 149, 493 P.3d 94 (2021) (quoting *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004)). Statutory language must be interpreted in "the context of the statute, related provisions, and the statutory scheme as a whole." *Id.* at 148, 493 P.3d 94. The WVRA recognizes that voters must have an "*equal* opportunity to elect candidates of their choice." RCW 29A.92.020, .030(1)(b) (emphasis added). Equality would not be possible if the WVRA protected the members of some racial groups and excluded others. Moreover, the WVRA does not say that a political subdivision's electoral system may be challenged by "minorities," "minority voters," "minority groups," or anything similar. Instead, the WVRA allows for a challenge by "*any* voter who resides in a political subdivision where a violation of RCW 29A.92.020 is alleged."[16] RCW 29A.92.090(1) (emphasis added).

[26] ¶59 In addition, as the trial court correctly ruled, Gimenez's narrow statutory interpretation is inconsistent with the WVRA's remedial purpose. "Ultimately, in resolving a question of statutory construction, this court will adopt the interpretation which best advances the legislative purpose." *Bennett v. Hardy*, 113 Wn.2d 912, 928, 784 P.2d 1258 (1990). ***651** The stated legislative purpose of the WVRA is to prohibit "electoral systems that deny race, color, or language minority groups an equal opportunity to elect candidates

of their choice." RCW 29A.92.005. It would improperly frustrate this purpose to hold that the WVRA's protections are inapplicable to many Washington voters, as Gimenez claims.

**1008 ¶60 Finally, we consider persuasive authority from California and federal courts. The WVRA's definition of a protected class is identical to the definition of a protected class in California's voting rights act. *Compare* RCW 29A.92.010(5), *with* Cal. Elec. Code § 14026(d). In 2006, the California Court of Appeals recognized that this definition "simply gives a cause of action to members of *any* racial or ethnic group that can establish that its members' votes are diluted." *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 666, 51 Cal. Rptr. 3d 821 (2006). The WVRA adopted the same definition 12 years later.

[27] ¶61 If our legislature intended to enact a different definition of a protected class, it had ample time to change the language. Instead, our legislature adopted California's definition verbatim. Absent "contrary legislative intent, when a state statute is 'taken substantially verbatim' " from another jurisdiction, " 'it carries the same construction.' " *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 868, 281 P.3d 289 (2012) (internal quotation marks omitted) (quoting *State v. Bobic*, 140 Wn.2d 250, 264, 996 P.2d 610 (2000)). Thus, California's broad interpretation of the definition of a protected class is highly persuasive when interpreting the same language in the WVRA.

¶62 In addition, "courts may rely on relevant federal case law for guidance" when interpreting the WVRA. RCW 29A.92.010. As the California Court of Appeals explained, "In a variety of contexts, the [United States] Supreme Court has held that the term 'race' is expansive and covers all ethnic and racial groups." *Sanchez*, 145 Cal. App. 4th at 684, 51 Cal.Rptr.3d 821. Notably, the Supreme Court has held that the Fifteenth *652 Amendment's prohibition on "deny[ing] or abridg[ing] the right to vote on account of race ... grants protection to *all* persons, not just members of a particular race." *Rice v. Cayetano*, 528 U.S. 495, 512, 120 S. Ct. 1044, 145 L. Ed. 2d 1007 (2000) (emphasis added).

¶63 Like the United States Supreme Court, this court has previously refused to apply narrow definitions when deciding whether a person is protected from discrimination on the basis of "race." *See State v. Zamora*, 199 Wn.2d 698, 704 n.6, 512 P.3d 512 (2022) (quoting *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 214, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017)). We decline to change our approach now. Instead, we apply the plain statutory language and hold that the WVRA's protections apply to all Washington voters.

2. We decline Gimenez's invitation to rewrite the statute

[28] ¶64 Gimenez acknowledges that it is both "plausible" and "grammatically permissible" to interpret the WVRA as protecting all Washington voters. Br. of Appellant at 13-14. Nevertheless, he argues that we must restructure and rewrite the statute as follows:

> " 'Protected class' means
>
> (a) a class of voters who are members of a race minority group; or
>
> (b) a class of voters who are members of a color minority group; or
>
> (c) a class of voters who are members of a language minority group, as this class is referenced and defined in the federal voting rights act, 52 U.S.C. 10301 *et seq*."

Id. at 10 (underlining added). "Courts may not 'rewrite unambiguous statutory language under the guise of interpretation.' " *State v. Hawkins*, 200 Wn.2d 477, 492, 519 P.3d 182 (2022) (quoting *Jespersen v. Clark County*, 199 Wn. App. 568, 578, 399 P.3d 1209 (2017)). However, Gimenez argues that this court must judicially rewrite the WVRA. He is incorrect.

*653 ¶65 First, Gimenez points to the WVRA's statement of legislative findings and intent, which appears to use "minority groups" as a shorthand for "race, color, or language minority groups." RCW 29A.92.005. However, there is no indication that this was intended to exclude certain racial groups from the WVRA's protections. Indeed, the stand-alone phrase "minority groups" is not defined (or even used) anywhere else in the WVRA.

[29] ¶66 It would be both absurd and contrary to precedent to hold that the statement of legislative findings negates the plain language of the WVRA's operative provisions. "Declarations of intent are not controlling; **1009 instead, they serve 'only as an important guide in determining the intended effect of the operative sections.' " *State v. Reis*, 183 Wn.2d 197, 212, 351 P.3d 127 (2015) (quoting *Kilian v. Atkinson*, 147 Wn.2d 16, 23, 50 P.3d 638 (2002)). The legislature may have found that minority groups would benefit from the WVRA, but that does not mean the legislature intended to exclude everyone else.

¶67 Next, Gimenez appears to argue that the WVRA cannot be intended to protect all racial groups because it is "impossible" for a majority group to experience voting discrimination. Br. of Appellant at 26. According to Gimenez, "if the 'protected class' constitutes a majority of the political subdivision ... it would not lack an equal opportunity to elect candidates of choice due to vote dilution within that subdivision." *Id.* at 25-26 (emphasis omitted).

[30] ¶68 In this argument, Gimenez appears to assume that the WVRA recognizes only vote *dilution* claims. To the contrary, as discussed above, the WVRA prohibits both "dilution" and "abridgment" of voting rights on the basis of race, color, or language minority group. RCW 29A.92.020. Abridgment of the right to vote can occur regardless of which racial group is in the majority.

¶69 For instance, abridgment would likely be found if voting registration officials "administered literacy tests to Mexican-American members of the plaintiffs' class more ***654** frequently, more carefully, and more stringently than they have administered them to other persons, including Anglo-Americans whose ability to read and speak English is imperfect or limited." *Mexican-Am. Fed'n-Wash. State v. Naff*, 299 F. Supp. 587, 593 (E.D. Wash. 1969), *judgment vacated sub nom. Jimenez v. Naff*, 400 U.S. 986, 91 S.Ct. 448, 27 L.Ed.2d 434 (1971); *see also* 1967 Op. Att'y Gen. No. 21. "Indeed, the most egregious examples of Jim Crow era voter suppression—such as poll taxes and literacy tests—were specifically designed to prevent Black majorities from participating in elections." Amicus Br. of State of Wash. at 11-12 (citing Brad Epperly et al., *Rule by Violence, Rule by Law: Lynching, Jim Crow, and the Continuing Evolution of Voter Suppression in the U.S.*, 18 Persps. on Pol. 756, 761-64 (2020)).

¶70 Moreover, it is entirely possible to dilute the voting power of majority groups through the manipulation of district lines. The United States Supreme Court has already explained how:

> Assume a hypothetical jurisdiction of 1,000 voters divided into 10 districts of 100 each, where members of a minority group make up 40 percent of the voting population and voting is totally polarized along racial lines. With the right geographic dispersion to satisfy the compactness requirement, and with careful manipulation of district lines, the minority voters might be placed in control of as many as 7 of the 10 districts.

Johnson v. De Grandy, 512 U.S. 997, 1016, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994). Thus, to the extent that Gimenez believes that the WVRA does not protect majority groups because they do not need the WVRA's protection, he is simply incorrect.

[31] ¶71 In sum, the WVRA means exactly what it says. All Washington voters are protected from discrimination on the basis of race, color, or language minority group. That includes the plaintiffs. Therefore, the trial court correctly ruled that the plaintiffs have standing to bring their WVRA claim.

***655** B. The WVRA has not been repealed by implication

¶72 Next, Gimenez argues that the WVRA gives minority groups the exclusive "right to sue to compel redistricting, and require[s] the county to favor the racial group which sued in drawing new district lines." Br. of Appellant at 17-18. He contends that this irreconcilably conflicts with RCW 29A.76.010(4)(d), which provides that when a county engages in periodic redistricting after a census, "[p]opulation data may not be used for purposes of favoring or disfavoring any racial group or political party." Due to this alleged conflict, Gimenez believes that every time RCW 29A.76.010 was amended, the WVRA was implicitly repealed, at least as applied to counties. He is incorrect. The WVRA neither requires nor allows the kind ****1010** of race-based favoritism that RCW 29A.76.010(4)(d) prohibits.

¶73 First, as discussed above, the WVRA's protections apply to all Washington voters, and all Washington voters have standing to bring a WVRA challenge. The WVRA does not compel race-based favoritism; it explicitly requires "an equal opportunity" in local elections for voters of all races, colors, and language minority groups. RCW 29A.92.020.

¶74 Second, contrary to Gimenez's interpretation, a political subdivision cannot be compelled to do *anything* pursuant to the WVRA based on the "single factor" of "racially polarized voting, *i.e.*, the fact that voters of different races tend to vote for different candidates." *Contra* Br. of Appellant at 45. In fact, the plain language of the WVRA provides that a plaintiff must prove *both* that "[e]lections in the political subdivision exhibit polarized voting" *and* that "[m]embers of a protected class or classes do not have an equal opportunity to elect candidates of their choice as a result of the dilution or abridgment of the rights of members of that protected class or classes." RCW 29A.92.030(1)(b). Thus, the WVRA does not require local governments to favor "race minority 'haves' " at the expense of "race majority 'have-nots.' " *Contra* Reply Br. of Appellant at ***656** 18. The WVRA does not compel local governments to do anything based on *race*. Instead,

the WVRA may compel local governments to change their electoral systems to remedy proven *racial discrimination*.

¶75 Gimenez appears to believe that actions to remedy proven racial discrimination are indistinguishable from actions based on race alone. He also argues that the WVRA actually "*forbids* consideration of ... past discrimination" because the WVRA does not require "[p]roof of intent on the part of the voters or elected officials to discriminate against a protected class." Br. of Appellant at 4 (emphasis added); RCW 29A.92.030(5). We disagree. On its face, the WVRA simply codifies the following, indisputable propositions:

¶76 (1) Voters can be "members of a race, color, or language minority group." RCW 29A.92.010(5). Recognizing the existence of race, color, and language minority groups does not, in itself, "create racial classifications." *Contra* Br. of Appellant at 17. *See* U.S. Const. amend. XV; 52 U.S.C. §§ 10301(a), 10303(f)(2).

¶77 (2) "Polarized voting" is possible. RCW 29A.92.010(3). Recognizing the possibility of racially polarized voting is neither novel nor unique to the WVRA. *See generally Gingles*, 478 U.S. 30, 106 S.Ct. 2752. Moreover, even where polarized voting is proved to exist, that is not sufficient, by itself, to prove a WVRA violation. RCW 29A.92.030(1).

¶78 (3) A combination of polarized voting and "dilution or abridgment" of voting rights can deprive members of a race, color, or language minority group of an "equal opportunity to elect candidates of their choice" in local elections. RCW 29A.92.030(1)(b); *cf.* U.S. Const. amend. XV; 52 U.S.C. §§ 10301, 10303(f)(2).

¶79 (4) Where a class of voters has been deprived of equal electoral opportunities on the basis of race, color, or language minority group, the law can provide a remedy based on "discriminatory effect alone," even in the absence of discriminatory intent. *Gingles*, 478 U.S. at 35, 106 S.Ct. 2752; *see* U.S. Const. amend. XV, § 2; 52 U.S.C. §§ 10301, 10303(f)(2).

***657** **[32]** ¶80 We hold that the WVRA does not irreconcilably conflict with RCW 29A.76.010(4)(d) because on its face, the WVRA requires equality, not race-based favoritism, in electoral systems. Thus, the legislature has not implicitly repealed the WVRA.

C. The WVRA does not facially violate article I, section 12

¶81 Next, Gimenez argues that the WVRA violates article I, section 12 on its face because "it grants to a specific identified class the right and privilege to have county commissioner boundaries drawn so that members of that identified class—but not the public at large, or members of other definable classes—can elect a 'candidate of choice.' " Br. of Appellant at 52. As detailed above, Gimenez fundamentally misinterprets what ****1011** the WVRA says and does. We therefore reject his article I, section 12 argument.

[33] **[34]** ¶82 " 'For a violation of article I, section 12 to occur, the law ... must confer a privilege to a class of citizens.' " *Madison v. State*, 161 Wn.2d 85, 95, 163 P.3d 757 (2007) (quoting *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 812, 83 P.3d 419 (2004)). The WVRA does not confer any privilege to any class of citizens. Instead, the WVRA protects the "*equal* opportunity" of voters of *all* races, colors, and language minority groups "to elect candidates of their choice." RCW 29A.92.020, .030(1)(b) (emphasis added). Therefore, all Washington voters have equal rights to challenge their local governments for alleged WVRA violations. If, in some future case, the WVRA is applied or interpreted in way that grants privileges to some racial groups while excluding others, then the WVRA will be subject to an as-applied challenge. But on its face, the WVRA simply does not implicate article I, section 12.

D. The WVRA does not facially violate the equal protection clause

[35] **[36]** ¶83 Finally, Gimenez argues that the WVRA facially violates the equal protection clause of the Fourteenth ***658** Amendment because the WVRA cannot survive strict scrutiny. However, as explained above, the WVRA on its face does not classify voters on the basis of race, nor does it deprive anyone of the fundamental right to vote. Instead, the WVRA mandates *equal* voting opportunities for members of every race, color, and language minority group. Therefore, Gimenez's facial equal protection claim triggers rational basis review, not strict scrutiny. *Cf. Madison*, 161 Wn.2d at 103, 163 P.3d 757. Rational basis review is satisfied if "there is a rational relationship between" the WVRA "and any legitimate governmental interests." *Id.* at 106, 163 P.3d 757.

[37] **[38]** ¶84 To the extent that Gimenez's equal protection argument is based on his misinterpretation of the WVRA, we reject it. The WVRA's mandate for equal voting opportunities is clearly rationally related to the State's legitimate interest in protecting Washington voters from discrimination. "[A] law

directing state actors to provide equal protection is (to say the least) facially neutral, and cannot violate the Constitution." *Schuette v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 318, 134 S. Ct. 1623, 188 L. Ed. 2d 613 (2014) (Scalia, J., concurring in the judgment).

¶85 Gimenez further points out, correctly, that Section 2 of the FVRA has a threshold requirement for vote dilution claims that the WVRA does not have. As discussed above, before a federal court will reach the merits of a Section 2 vote dilution claim, a "group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50, 106 S.Ct. 2752. By contrast, the WVRA provides that "[t]he fact that members of a protected class are not geographically compact or concentrated to constitute a majority in a proposed or existing district-based election district shall not preclude a finding of a violation under this chapter, but may be a factor in determining a remedy." RCW 29A.92.030(2).

¶86 Gimenez argues that the WVRA is unconstitutional on its face because "[w]ithout the compactness precondition, the [United States] Supreme Court has made clear, ***659** Section 2 could never" satisfy the equal protection clause. Br. of Appellant at 40-41. However, he does not cite a single case—from any court—that actually says what he claims. Instead, Gimenez relies on cases addressing as-applied challenges to specific redistricting plans based on allegations of racial gerrymandering. *See id.* at 37-50.[17] These ****1012** cases consistently hold that *Section 2* requires a threshold showing of compactness in a vote dilution claim. *E.g.*, *Strickland*, 556 U.S. at 10-16, 20-21, 129 S.Ct. 1231; *Emison*, 507 U.S. at 40-41, 113 S.Ct. 1075. However, Gimenez cites no case holding that the *equal protection clause* imposes the same requirement in every voting discrimination claim.

¶87 Without a doubt, the WVRA could be applied in an unconstitutional manner, and it is subject to as-applied challenges. However, Gimenez did not bring an as-applied challenge. He brought a facial challenge. As detailed above, the WVRA, on its face, does not require unconstitutional actions.

¶88 Moreover, as amici point out, "entire pages of Gimenez's argument on this point are word-for-word identical" to the briefing from a recent challenge to California's voting rights act. Br. of Law Sch. Clinics Focused on C.R. as Amici Curiae at 14 n.1. *Compare* Br. of Appellant at 37-43, *with* Appellant's Opening Br. at 3-7, 32, *Higginson v. Becerra*, No. 19-55275 (9th Cir. June 17, 2019), *and* Pet. for Writ of Cert. at 4-6, *Higginson v. Becerra*, No. 19-1199 (U.S. Apr. 2, 2020). The Ninth Circuit Court of Appeals rejected the arguments Gimenez makes here and the United States ***660** Supreme Court denied certiorari. *Higginson v. Becerra*, 786 F. App'x 705 (9th Cir. 2019), *cert. denied*, —— U.S. ——, 140 S. Ct. 2807, 207 L.Ed.2d 144 (2020). Gimenez does not explain why we should reach a different conclusion based on the same arguments.

¶89 Finally, even under federal law, the threshold compactness requirement applies only in the specific context of a vote *dilution* claim. It does not apply to all voting rights cases. As the United States Supreme Court has explained:

> The reason that a minority group making such a [vote dilution] challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.

Gingles, 478 U.S. at 50 n.17, 106 S.Ct. 2752.

¶90 The WVRA protects voters from all forms of abridgment, not just dilution. Gimenez does not explain why a group must demonstrate compactness to prove that their voting rights have been abridged by, for instance, the discriminatory administration of literacy tests. *See Mexican-Am. Fed'n*, 299 F. Supp. 587. Thus, even if the equal protection clause does require a threshold compactness inquiry for a vote dilution claim, that would not make the WVRA facially unconstitutional. At most, the WVRA would be unconstitutional as applied in the context of vote dilution claims. Gimenez did not bring an as-applied challenge.

¶91 Gimenez argues that he cannot be required to prove that the WVRA is unconstitutional in all of its potential applications "because it is impossible to explore and describe every possible circumstance" that might arise. Reply Br. of Appellant at 9. However, that is the standard that applies to a facial constitutional challenge in accordance with this court's controlling precedent. *Woods*, 197 Wn.2d at 240, 481 P.3d 1060. Gimenez does not show that our precedent is " 'incorrect and harmful' " or that its " 'legal underpinnings' " have ***661** changed. *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016) (quoting *In re Rts. to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970); *W.G. Clark*

Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014)).

¶92 Therefore, because it is impossible for Gimenez to show that the WVRA is unconstitutional in all of its potential applications, his facial equal protection challenge to the WVRA must be rejected.

E. We decline to reach the additional issues raised by the plaintiffs and amici

¶93 As detailed above, each of Gimenez's arguments fails on its merits. We affirm the trial court on that basis alone. We therefore decline to reach the alternative arguments ****1013** raised by the plaintiffs and amici concerning RCW 7.24.110 and Gimenez's standing to appeal.[18]

F. We award the plaintiffs' request for attorney fees and costs against Gimenez and remand for a calculation of fees incurred at the trial court

¶94 Finally, the plaintiffs request attorney fees and costs based on the WVRA, as well as the statutes and court rules governing frivolous claims. We need not decide whether Gimenez's claims are frivolous. Instead, we award the plaintiffs' request for fees against Gimenez pursuant to the WVRA.

***662** **[39]** ¶95 The WVRA allows, but does not require, an award of "reasonable attorneys' fees, all nonattorney fee costs as defined by RCW 4.84.010, and all reasonable expert witness fees" to "the prevailing plaintiff or plaintiffs, other than the state or political subdivision thereof." RCW 29A.92.130(1). Here, the plaintiffs are the prevailing parties, they are not the state or a political subdivision, and Gimenez's appeal forced the plaintiffs to spend an entire year litigating this case *after* Franklin County settled their WVRA claim. We therefore exercise our discretion to award the plaintiffs' request for fees and costs attributable to their litigation against Gimenez.[19]

¶96 The plaintiffs request their appellate attorney fees, as well as "a fee award at trial" for the "time and expense incurred litigating with Gimenez." Br. of Resp'ts at 52 & n.16. The WVRA's fee provision is explicitly discretionary, providing that "the court *may* allow" fees to a prevailing, nongovernmental plaintiff. RCW 29A.92.130(1) (emphasis added). Thus, we grant both trial and appellate fees, but we remand the calculation of trial court fees to the trial court's discretion.

1. The WVRA's fee provision is constitutional

¶97 Gimenez argues that we cannot assess fees against him because "it is unconstitutional to permit a group of lawyers who are funded by another state's government[20] to collect fees from an individual Washington Hispanic citizen because of his exercise of his fundamental right to access the state courts and petition the government." Reply Br. of Appellant at 26. However, he misrepresents the authorities he cites to support this argument.

¶98 Gimenez relies primarily on ***663** *Miller v. Bonta*, No. 22cv1446-BEN, 646 F.Supp.3d 1218, 2022 WL 17811114 (S.D. Cal. 2022) (court order). According to Gimenez, *Miller* considered "a California punitive fee-shifting provision such as this one that Plaintiffs seek to exercise" in this case, and "the California attorney general refused to even defend such a statute." Reply Br. of Appellant at 26. In fact, the statute in *Miller* was nothing like the fee provision in the WVRA.

¶99 The fee-shifting statute in *Miller* "applie[d] only to cases challenging firearm restrictions." 2022 WL 17811114, at *1. The statute "insulate[d] laws from judicial review by permitting fee awards in favor of the government, tilting the table in the government's favor, and making a plaintiff's attorney jointly and severally liable for fee awards." *Id.* The statute also provided that "[a]s a matter of law, a California plaintiff ****1014** cannot be a prevailing party." *Id.* The WVRA, by contrast, allows prevailing plaintiffs to recover fees, but only if they are *not* the government. RCW 29A.92.130(1). Moreover, the WVRA does not "tilt the table" in favor of any government entity, and it does not automatically make any party's attorney jointly and severally liable for fees. *Miller* simply does not apply here.

¶100 Gimenez also suggests that applying the WVRA's fee provision in this case would violate *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). *Boddie* struck down "state procedures for the commencement of litigation, including requirements for payment of court fees and costs for service of process, that restrict[ed the appellants'] access to the courts in their effort to bring an action for divorce." *Id.* at 372, 91 S. Ct. 780. The WVRA's prevailing party fee provision applies at the conclusion of an action, not its commencement. *Boddie* does not apply.

***664** 2. We decline to assess fees against Commissioner Didier

[40] ¶101 Finally, the plaintiffs argue that "Commissioner Didier, who is a named party in the suit in their official capacity, should also be held responsible for any fee award where he was in cahoots with Gimenez's action designed to torpedo the WVRA settlement." Br. of Resp'ts at 54-55. We decline to assess fees against Commissioner Didier.

¶102 To be sure, there is significant evidence in the record supporting the plaintiffs' factual allegations. Initially, Commissioner Didier planned to intervene in his personal capacity to challenge the validity of the WVRA. However, after the plaintiffs questioned how a named defendant could also be an intervenor, Gimenez intervened instead. Gimenez has at all times been represented by the same attorney who had originally intended to represent Commissioner Didier in his personal capacity.

¶103 Thus, the plaintiffs may be correct that "Commissioner Didier's involvement in Gimenez's intervention was transparent to all those involved in the matter." *Id.* at 55. Indeed, the trial court's order denying Gimenez's CR 12(c) motion begins by stating, "This matter came before the court for hearing on December 13, 2021 on Intervenor, *Clint Didier's*, Motion for Judgment on the Pleadings." CP at 678 (emphasis added). However, that appears to be a typo, not a finding of fact. The plaintiffs do not cite any trial court findings that Commissioner Didier is the real party behind Gimenez's intervention or appeal.

¶104 This court is not a fact-finding court. Moreover, the plaintiffs settled their claims with the defendants, including Commissioner Didier, and Commissioner Didier has not filed anything on appeal. We therefore decline to assess fees against Commissioner Didier based on the plaintiffs' allegations. We express no opinion as to whether Gimenez may have viable claims against Commissioner Didier or anyone else arising from this litigation.

***665** CONCLUSION

¶105 All of Gimenez's arguments are based on his interpretation of the WVRA's definition of a protected class. His interpretation is incorrect. We therefore affirm the trial court, award attorney fees and costs to the plaintiffs against Gimenez, and remand for a calculation of fees incurred at the trial court.

WE CONCUR:

González, C.J.

Johnson, J.

Madsen, J.

Owens, J.

Stephens, J.

Gordon McCloud, J.

Montoya-Lewis, J.

Judge, J.P.T.

All Citations

1 Wash.3d 629, 530 P.3d 994

Footnotes

1 The legislature amended the WVRA while this appeal was pending, effective January 1, 2024. *See* Laws of 2023, ch. 56, § 14. This opinion does not address those amendments.

2 When referring to the race or ethnicity of specific individuals, this opinion uses the terminology used by that individual. When quoting from another source, this opinion uses the terminology from the source material. Otherwise, this opinion uses gender-neutral terminology.

3 "Language minority group" is a term that is "referenced and defined in the federal voting rights act [of 1965 (FVRA)], 52 U.S.C. 10301 et seq." RCW 29A.92.010(5). The FVRA, in turn, defines "language minority group" as "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." 52 U.S.C. § 10310(c)(3).

4 We decline to reach the plaintiffs' argument that Gimenez failed to comply with RCW 7.24.110 and amici's argument that Gimenez lacks standing to appeal as a matter of right.

5 As discussed further below, "polarized voting" is "a difference ... in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate." RCW 29A.92.010(3).

6 In an "at-large" election system, "voters of the entire jurisdiction elect the members to the governing body." RCW 29A.92.010(1)(a).

7 In a "district-based" election system, "the candidate must reside within an election district that is a divisible part of the political subdivision and is elected only by voters residing within that election district." RCW 29A.92.010(2).

8 "In majority-minority districts, a minority group composes a numerical, working majority of the voting-age population," thereby creating an opportunity for the minority group to elect its candidate of choice in that district. *Bartlett v. Strickland*, 556 U.S. 1, 13, 129 S. Ct. 1231, 173 L. Ed. 2d 173 (2009) (plurality opinion).

9 In an "influence district[ ] ... a minority group can influence the outcome of an election even if its preferred candidate cannot be elected." *Id.*

10 "[I]n a crossover district, the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Id.*

11 In a coalition district, "two minority groups form a coalition to elect the candidate of the coalition's choice." *Id.*

12 "The [United States] Office of Management and Budget (OMB) requires federal agencies to use a minimum of two ethnicities in collecting and reporting data: Hispanic or Latino and Not Hispanic or Latino. OMB defines 'Hispanic or Latino' as a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race." CP at 558.

13 The individual plaintiffs are Gabriel Portugal, Brandon Paul Morales, and Jose Trinidad Corral, "Latino registered voters who reside in Franklin County." *Id.* at 2. League of United Latin American Citizens (LULAC) is also a named plaintiff. *Id.* at 3. None of the parties or amici distinguish between the individual plaintiffs and LULAC.

14 An amicus brief supporting Gimenez was filed by the American Civil Rights Project (ACRP). Amici briefs supporting the plaintiffs were filed by (1) the Civil Rights and Justice Clinic at the University of Washington School of Law and the Election Law Clinic at Harvard Law School, (2) OneAmerica and the Campaign Legal Center, (3) the Fred T. Korematsu Center for Law and Equality and the American Civil Liberties Union of Washington, (4) the Brennan Center for Justice, and (5) the State of Washington.

15 Gimenez and amicus ACRP argue that "Spanish heritage" does not refer to ethnicity but to "those who speak Spanish." Br. of Appellant at 36; *see generally* Br. of ACRP as Amicus Curiae in Supp. of Intervenor Def.-Appellant (Amicus Br. of ACRP). They acknowledge that no case law supports this interpretation. To the contrary, United States Supreme Court precedent has applied the FVRA's protections to Latinx voters. *E.g.*, *LULAC*, 548 U.S. 399, 126 S.Ct. 2594 (partial plurality opinion). Nevertheless, Gimenez argues that if "Spanish heritage" refers to ethnicity, then it is "superfluous" because ethnicity is "already captured by the preceding categories" of race and color. Br. of Appellant at 36. However, elsewhere in his briefing, Gimenez questions whether " 'Hispanics' are a race," and amicus argues that they are not. Reply Br. of Appellant at 1 n.1; *see also* Amicus Br. of ACRP at 13-14 n.30. Including Latinx ethnicities within "language minority groups," as other courts have consistently done based on the statute's plain language, forecloses the need for such arguments and, therefore, is not superfluous.

16 It is undisputed that the voter bringing the challenge must be a member of the race, color, or language minority group whose rights they seek to vindicate.

17 Citing *Shaw v. Reno*, 509 U.S. 630, 642-43, 647, 651, 657, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993); *Miller v. Johnson*, 515 U.S. 900, 926-28, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995); *Georgia v. Ashcroft*, 539 U.S. 461, 491, 123 S. Ct.

2498, 156 L. Ed. 2d 428 (2003) (Kennedy, J., concurring); *Strickland*, 556 U.S. at 10-13, 15-16, 20-21, 129 S.Ct. 1231; *Shaw v. Hunt*, 517 U.S. 899, 906-08, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996); *Emison*, 507 U.S. at 40-41, 113 S.Ct. 1075; *De Grandy*, 512 U.S. at 1016, 114 S.Ct. 2647 (majority), 1028-29 (Kennedy, J., concurring in part and concurring in the judgment); *Cooper v. Harris*, 581 U.S. 285, 292, 137 S. Ct. 1455, 197 L. Ed. 2d 837 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189-90, 137 S. Ct. 788, 197 L. Ed. 2d 85 (2017); *LULAC*, 548 U.S. at 446, 126 S.Ct. 2594 (plurality portion); *Abrams v. Johnson*, 521 U.S. 74, 85-86, 117 S. Ct. 1925, 138 L. Ed. 2d 285 (1997); *United States v. Hays*, 515 U.S. 737, 744-45, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995).

18 The plaintiffs and amici argue that Gimenez's constitutional claims should not be considered on their merits because Gimenez did not serve his pleading on the attorney general pursuant to RCW 7.24.110. It is undisputed that Gimenez did not serve the attorney general before filing his CR 12(c) motion for judgment on the pleadings. Yet, arguably, Gimenez did not file any pleading seeking declaratory judgment that would be subject to RCW 7.24.110. Gimenez attached a *proposed* pleading to his motion to intervene, which included counterclaims for declaratory judgment. However, the trial court's order granting the motion to intervene did not address the proposed pleading, and Gimenez did not subsequently file his proposed pleading as a separate document. Instead, he chose to file a CR 12(c) motion for judgment on the *existing* pleadings—the plaintiffs' amended complaint and the defendants' answer. We decline to interpret RCW 7.24.110 as applied to these specific facts.

19 The plaintiffs were already awarded fees attributable to their litigation with Franklin County and its board of commissioners in the parties' settlement agreement.

20 Some, but not all, of the plaintiffs' attorneys are affiliated with the UCLA (University of California, Los Angeles) Voting Rights Project.

End of Document

95 N.Y.2d 455, 742 N.E.2d 98, 719
N.Y.S.2d 623, 2000 N.Y. Slip Op. 10304

Betty A. Riley et al., Appellants,

v.

County of Broome et al., Respondents.

John P. Wilson, Appellant,

v.

State of New York, Respondent.

Court of Appeals of New York
131, 132
Argued October 17, 2000;

Decided November 21, 2000

CITE TITLE AS: Riley v County of Broome

SUMMARY

Appeal, in the first above-entitled action, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered January 6, 2000, which affirmed a judgment of the Supreme Court (Patrick D. Monserrate, J.), entered in Broome County, upon a verdict rendered in favor of defendants.

Appeal, in the second above-entitled action, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered February 16, 2000, which affirmed a judgment of the Court of Claims (Thomas J. McNamara, J.), dismissing the claim.

Riley v County of Broome, 263 AD2d 267, affirmed.

Wilson v State of New York, 269 AD2d 854, affirmed.

HEADNOTES

Negligence
Violation of Statutory Duty
Rules of Road--Exemption for Hazard Vehicles Engaged in Highway Work-- Recklessness Standard of Care

(1) Vehicle and Traffic Law § 1103 (b) exempts statutorily defined "hazard vehicles" engaged in highway work from the "rules of the road" and limits the liability of their owners and operators to reckless disregard for the safety of others. The language of section 1103 and related statutes pertaining to emergency vehicles is clear: all vehicles "actually engaged in work on a highway," just as all emergency vehicles engaged in emergency situations, are exempt from the rules of the road. Accordingly, plaintiffs in personal injury actions that arose from collisions with a street sweeper cleaning a street and a snowplow clearing snow, may not recover absent a showing that those vehicles were being operated in a reckless manner. The exemption for hazard vehicles is not limited to the stopping, standing and parking regulations of Vehicle and Traffic Law § 1202 (a), since the plain language of section 1103 (b) excuses all vehicles "actually engaged in work on a highway" from the rules of the road, regardless of their classification.

Statutes
Construction
Legislative History--Rules of Road--Exemption for Hazard Vehicles

(2) It is appropriate to examine the legislative history of a statute even though the language of a statute is clear. While the words of a statute arethe ***456** best evidence of the Legislature's intent, and as a general rule, unambiguous language of a statute is alone determinative, the legislative history of an enactment may also be relevant and is not to be ignored, even if words be clear. Varying concerns may bear on the weight to be given legislative history, but they do not justify abandoning the long tradition of using all available interpretive tools to ascertain the meaning of a statute. The history of Vehicle and Traffic Law § 1103 (b) explicates the legislative intention to create a broad exemption from the rules of the road for all vehicles engaged in highway construction, maintenance or repair, regardless of their classification. The exemption turns on the nature of the work being performed-- not on the nature of the vehicle performing the work.

Negligence
Violation of Statutory Duty
Rules of Road--Exemption for Hazard Vehicles Engaged in Highway Work-- Recklessness Standard of Care

(3) Vehicle and Traffic Law § 1103 (b) exempts statutorily defined "hazard vehicles" engaged in highway work from the "rules of the road" and limits the liability of their owners and operators to reckless disregard for the safety of others. An amendment to the statute removed the unqualified exemption such vehicles enjoyed and imposed the recklessness standard. Inasmuch as identical language in Vehicle and Traffic Law § 1104 (e) has been held to impose a standard of recklessness, general principles of statutory construction militate against imposing a different standard. Nor is there anything in the context or history of the statutes indicating that different meanings were intended. Although section 1103 (b) uses the phrase "due regard" as well as "reckless disregard" to describe the standard, the Legislature's specific reference to reckless disregard would be unnecessary and, in fact, inexplicable if the conventional criterion for negligence--reasonable care under the circumstances--were the intended standard. Thus, the only way to apply the statute is to read its general admonition to exercise "due care" in light of its more specific reference to "recklessness."

Negligence
Violation of Statutory Duty
Rules of Road--Exemption for Hazard Vehicles Engaged in Highway Work-- Work Area

(4) Vehicle and Traffic Law § 1103 (b) exempts statutorily defined "hazard vehicles" engaged in highway work from the "rules of the road" and limits the liability of their owners and operators to reckless disregard for the safety of others. The protections of section 1103 (b) do not apply solely to vehicles operating in a designated "work area" as defined in Vehicle and Traffic Law § 160. Section 1103 (b) states that a vehicle "actually engaged in work on a highway" is exempt from the rules of the road. The statute does not require that a vehicle be located in a designated "work area" in order to receive the protection. Significantly, section 160 was not enacted until 1984--long after section 1103 (b) was adopted. Thus, there is no credible argument that the Legislature only had designated "work areas" in mind when it adopted section 1103 (b).

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Automobiles and Highway Traffic, §§ 278, 1033, 1034.

McKinney's, Vehicle and Traffic Law §§ 160, 1103 (b); § 1104 (e); § 1202 (a). ***457**

NY Jur 2d, Automobiles and Other Vehicles, §§ 639, 641, 704, 748, 957.

ANNOTATION REFERENCES

See ALR Index under Automobiles and Highway Traffic.

POINTS OF COUNSEL

Thomas F. Cannavino, Endicott, for appellants in the first above-entitled action.
I. This Court should not extend the qualified privilege for emergency vehicles to hazard vehicles. (*McDonald v State of New York,* 176 Misc 2d 130; *Saarinen v Kerr,* 84 NY2d 494; *Somersall v New York Tel. Co.,* 74 AD2d 302, 52 NY2d 157; *Cottingham v State of New York,* 182 Misc 2d 928; *Szczerbiak v Pilat,* 90 NY2d 553; *Bliss v State of New York,* 179 Misc 2d 549; *Abood v Hospital Ambulance Serv.,* 30 NY2d 295; *LaMotta v City of New York,* 130 AD2d 627; *Mattera v Avis Rent A Car Sys.,* 245 AD2d 274; *Kerwin v County of Broome,* 134 AD2d 812.) II. The 1974 amendments to Vehicle and Traffic Law § 1103 (b) did not expand the qualified privilege provided for emergency vehicles under Vehicle and Traffic Law § 1104 to hazard vehicles. (*Stanton v State of New York,* 26 NY2d 990; *Saarinen v Kerr,* 84 NY2d 494; *Strobel v State of New York,* 36 AD2d 485, 30 NY2d 629; *Thain v City of New York,* 35 AD2d 545, 30 NY2d 524; *Dunn v State of New York,* 34 AD2d 267.) III. The statutory language of Vehicle and Traffic Law § 1103 (b) specifically limits the qualified privilege for hazard vehicles to parking restrictions provided for in subdivision (a) of section 1202 of the Vehicle and Traffic Law. IV. Even assuming that a qualified privilege exists for hazard vehicles under Vehicle and Traffic Law § 1103 (b), it would only apply to "rules of the road" violations. (*McDonald v State of New York,* 176 Misc 2d 130; *Bliss v State of New York,* 179 Misc 2d 549; *Gonzalez v Iocovello,* 93 NY2d 539; *Szczerbiak v Pilat,* 90 NY2d 553; *Sorensen v Nazarian,* 175 AD2d 417; *Kelley v State of New York,* 24 AD2d 831, 21 NY2d 901; *Gurecki v State of New York,* 18 Misc 2d 527; *Malanify v Pauls*

Trucking Co., 27 AD2d 622, 19 NY2d 804; *Gaynor v State of New York, Dept. of Pub. Works,* 61 AD2d 1086; *Beardsley v State of New York,* 57 AD2d 1061.) V. Respondents were required by State regulations to display appropriate traffic control devices. (*Zecca v State of New York,* 247 AD2d 776; *Bliss v State of New York,* 179 Misc 2d 549; *McDonald v State of New York,* 176 Misc 2d 130.) ***458**

William L. Gibson, Jr., County Attorney of Broome County, Binghamton (*Robert G. Behnke* of counsel), for respondents in the first above-entitled action.

I. The trial court correctly charged the jury that the reckless disregard standard of Vehicle and Traffic Law § 1103 applied in this case. (*McDonald v State of New York,* 176 Misc 2d 130; *Cottingham v State of New York,* 182 Misc 2d 928; *Saarinen v Kerr,* 84 NY2d 494; *Szczerbiak v Pilat,* 90 NY2d 553; *Somersall v New York Tel. Co.,* 52 NY2d 157.) II. The reckless disregard standard applies to all facets of defendants' street sweeping activity. (*Martin v Miller,* 255 AD2d 816; *Szczerbiak v Pilat,* 90 NY2d 553.) III. The court below properly charged that the reckless disregard standard applied to alleged violations of uniform manual of traffic control devices. (*Bliss v State of New York,* 179 Misc 2d 549.)

Lockwood & Golden, Utica (*Lawrence W. Golden* and *B. Brooks Benson* of counsel), for appellant in the second above-entitled action.

I. The court below erred in holding that the operator of the State snowplow engaged in customary plowing along a highway was liable only for "reckless disregard" under Vehicle and Traffic Law § 1103 (b), contrary both to legislative intent and public policy. (*Cottingham v State of New York,* 182 Misc 2d 928; *Saarinen v Kerr,* 84 NY2d 494; *Campbell v City of Elmira,* 84 NY2d 505; *Rust v Reyer,* 91 NY2d 355; *Sherman v Robinson,* 80 NY2d 483; *D'Amico v Christie,* 71 NY2d 76; *Hechter v New York Life Ins. Co.,* 46 NY2d 34; *Matter of Sullivan Co.,* 289 NY 110; *Jones v City of Albany,* 151 NY 223; *Majewski v Broadalbin-Perth Cent. School Dist.,* 91 NY2d 577.) II. The court below erred in holding that the standard of "reckless disregard" in Vehicle and Traffic Law § 1103 (b) need not be pleaded as an affirmative defense. (*Culhane v State of New York,* 180 Misc 2d 61; *McDonald v State of New York,* 176 Misc 2d 130; *Dinerman v Poehlman,* 237 AD2d 483; *Liu v New York City Police Dept.,* 216 AD2d 67; *Dwyer v Mott,* 87 Misc 2d 965; *Bragg v Genesee County Agric. Socy.,* 84 NY2d 544; *Ferres v City of New Rochelle,* 68 NY2d 446; *Saarinen v Kerr,* 84 NY2d 494; *Pellegrino v New York City Tr. Auth.,* 177 AD2d 554; *Somersall v New York Tel. Co.,* 74 AD2d 302, 52 NY2d 157; *Stewart v Volkswagen of Am.,* 181 AD2d 4.)

Eliot Spitzer, Attorney General, Albany (*Robert M. Goldfarb, Preeta D. Bansal, Daniel Smirlock* and *Peter G. Crary* of counsel), for respondent in the second above-entitled action.

I. A snowplow engaged in plowing snow from a highway is a vehicle ***459** "actually engaged in work on a highway" subject to the reckless disregard standard of care in Vehicle and Traffic Law § 1103 (b). (*Majewski v Broadalbin-Perth Cent. School Dist.,* 91 NY2d 577; *Saarinen v Kerr,* 84 NY2d 494; *McDonald v State of New York,* 176 Misc 2d 130; *Cottingham v State of New York,* 182 Misc 2d 928; *People v Foster,* 73 NY2d 596; *People v Finnegan,* 85 NY2d 53, 516 US 919.) II. The statutory burden of proof set forth in Vehicle and Traffic Law § 1103 (b) is not an affirmative defense which must be pleaded under CPLR 3018 (b). (*Ferres v City of New Rochelle,* 68 NY2d 446; *Gill v Montgomery Ward & Co.,* 284 App Div 36; *Mayers v D'Agostino,* 58 NY2d 696; *Dinerman v Poehlman,* 237 AD2d 483, 90 NY2d 838, 808; *Liu v New York City Police Dept.,* 216 AD2d 67, 87 NY2d 802, 517 US 1167; *McDonald v State of New York,* 176 Misc 2d 130; *Culhane v State of New York,* 180 Misc 2d 61; *Sims v Town of Ramapo,* 177 Misc 2d 302; *Rogoff v San Juan Racing Assn.,* 77 AD2d 831, 54 NY2d 883.)

OPINION OF THE COURT

Chief Judge Kaye.

(1) These appeals call upon us to do what increasingly is asked of courts in this age of statutes: interpret the words of a legislative enactment which the contesting parties construe differently. In particular, we are asked whether Vehicle and Traffic Law § 1103 (b) exempts statutorily defined "hazard vehicles" engaged in highway work from the "rules of the road," and whether it limits the liability of their owners and operators to reckless disregard for the safety of others. We conclude that defendants correctly read the statute, and we hold--as did the courts before us--that the vehicles here were exempt from the rules of the road and their liability limited to reckless conduct.

Riley v County of Broome

Defendant Garwood A. Young, an employee of the Broome County Highway Division, was operating a street sweeper on West Colesville Road in the Town of Kirkwood. Young was driving two or three miles per hour, with the sweeper straddling the shoulder and the road. Plaintiff Betty Riley was also driving on West Colesville Road, in the same direction as the street sweeper. As Riley reached the top of a hill, she

saw a "huge patch of fog"--actually a cloud of dirt and dust created by the sweeper--and collided with the sweeper.

Riley and her husband brought this action against Young and the County, alleging that the sweeper caused the accident. ***460** At trial, the court held--over Riley's objection--that, under Vehicle and Traffic Law § 1103 (b), the applicable standard of care was whether defendants conducted themselves "in such a way so as not to recklessly disregard the safety of others." The court then charged the jury on that standard. The jury returned a verdict in favor of defendants, finding no recklessness in the operation of the sweeper. In a comprehensive opinion by Justice Anthony J. Carpinello, the Appellate Division affirmed, holding that under Vehicle and Traffic Law § 1103 (b), all vehicles engaged in "highway maintenance" are exempt from the rules of the road and subject only to a recklessness standard (263 AD2d 267, 273).

Wilson v State of New York

Claimant John Wilson was driving west from Canajoharie to Utica on Route 5, traveling at 30 to 35 miles per hour. Moderate to heavy snow was falling, rendering visibility poor. Two snowplows owned by the State were operating near the intersection of Route 5 and Route 167, one behind the other in the eastbound passing lane on Route 5. As Wilson approached the intersection, the first snowplow stopped to make a wide turn, and the second snowplow--driven by William Hunt--made a left turn inside the first plow in an attempt to enter Route 167 North. Although Hunt looked, he did not see Wilson's car approaching, and his snowplow collided with Wilson's car.

Wilson then brought the present action against the State of New York. The case proceeded to trial before the Court of Claims. At the close of the evidence, the State moved to dismiss, arguing that Wilson had failed to establish that the accident was the result of recklessness. The court granted the motion, holding that a recklessness standard applied because the snowplow was involved in work on a highway within the meaning of Vehicle and Traffic Law § 1103 (b), and that the evidence was insufficient to meet that standard. The Appellate Division affirmed, holding that since the snowplow qualified as a vehicle "actually engaged in work on a highway" under section 1103 (b), the recklessness standard applied, and the evidence failed to establish that Hunt had acted recklessly (269 AD2d 854).

The "Hazard Vehicle" Exemption

On appeal to this Court, Riley and Wilson (claimants) contend that Vehicle and Traffic Law § 1103 (b) does not ***461** exempt "hazard vehicles"--like snowplows and street sweepers--from the rules of the road.[1] Rather, they assert that section 1103 (b) exempts such vehicles only from the stopping, standing and parking regulations of Vehicle and Traffic Law § 1202 (a). We agree with the trial courts and the Appellate Division that section 1103 (b) exempts all vehicles "actually engaged in work on a highway"--including the vehicles here--from the rules of the road.

Some degree of risk, of course, is inherent in travel on public highways. Certain classes of vehicles--like snowplows and street sweepers--are intended to minimize the risk by keeping the roadways clean and safe for everyone. While serving an important public function, however, those vehicles may themselves cause risks to ordinary motorists with whom they share the road. Over the years, courts and legislatures have struggled to define the rules under which these vehicles may operate and the standard of care they owe to others.

At common law, all vehicles, including emergency vehicles, were held to an ordinary negligence standard (*see, e.g., Farley v Mayor of City of N. Y.,* 152 NY 222, 227-228 [1897]; *Garrett v City of Schenectady,* 268 NY 219, 223-224 [1935]; *Ottmann v Village of Rockville Centre,* 275 NY 270, 273 [1937]).[2] But the common law also recognized that the level of care owed by emergency and road work vehicles must be tempered by the nature of their work. Fire trucks, for instance, were permitted to drive at the "greatest practicable speed," since the "safety of property and the protection of life may ... depend upon celerity of movement" (*Farley v Mayor of City of N. Y., supra,* at 227). In addition, many emergency vehicles were, by statute, given the right of way (*see, id.*). Nevertheless, the common law required that such vehicles exercise their right of way ***462** "with care and caution ... measured by the purpose and necessity of the right" (*Hashey v Board of Fire Commrs. of Roosevelt Fire Dist.,* 192 NYS2d 767, 769-770 [Sup Ct, Nassau County]).

In 1957, the Legislature enacted what is now title VII of the Vehicle and Traffic Law (§ 1100 *et seq.*), creating a uniform set of traffic regulations, or the "rules of the road" (*see,* L 1957, ch 698). That legislation was intended to update and replace the former traffic regulations, and bring them into conformance with the Uniform Vehicle Code adopted in other

states (*see,* Mem in Support, Bill Jacket, L 1957, ch 698, at 35-37).

The Vehicle and Traffic Law states that the rules of the road apply to all vehicles unless otherwise provided by law (*see,* Vehicle and Traffic Law §§ 1101, 1103 [a]). Except for the provisions regarding driving under the influence of drugs or alcohol, however, the rules of the road explicitly do *not* apply to "persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway" (Vehicle and Traffic Law § 1103 [b]).[3] Section 1103 (b) adds that Vehicle and Traffic Law § 1202 (a), which regulates stopping, standing and parking, does not apply to "hazard vehicles while actually engaged in hazardous operation on or adjacent to a highway but shall apply to such persons and vehicles when traveling to or from such hazardous operation." Similarly, Vehicle and Traffic Law § 1104 exempts "emergency vehicles," such as ambulances, police vehicles and fire vehicles (*see,* Vehicle and Traffic Law § 101), engaged in emergency operations from the rules of the road, subject to specified conditions.

The language of these statutes seems clear: all vehicles "actually engaged in work on a highway"--just as all emergency vehicles engaged in emergency operations--are exempt from ***463** the rules of the road. In the cases at hand, the street sweeper and the snowplow were engaged in "work on a highway." The street sweeper was cleaning the street, the snowplow was clearing the road during a snowstorm. Thus, the Appellate Division correctly held that section 1103 (b) exempts both vehicles from the rules of the road.

We reject claimants' contention that designated "hazard vehicles" are exempt *only* from the stopping, standing and parking regulations of section 1202 (a), even when they are engaged in work on a highway. Section 1103 (b) says no such thing. Rather, by its plain language, section 1103 (b) excuses all vehicles "actually engaged in work on a highway" from the rules of the road, regardless of their classification. To be sure, the statute also gives protection to designated "hazard vehicles" engaged in "hazardous operation" (as defined by sections 117-a and 117-b), excusing them from the stopping, standing and parking rules of section 1202 (a). But the statute nowhere states that "hazard vehicles" are a distinct class from "work vehicles," nor does it deny "hazard vehicles" the special protection given to all vehicles actually engaged in road work.[4]

The legislative history of section 1103 (b) confirms this plain language reading.

(2) We note at the outset that it is appropriate to examine the legislative history even though the language of section 1103 (b) is clear. The primary consideration of courts in interpreting a statute is to "ascertain and give effect to the intention of the Legislature" (McKinney's Cons Laws of NY, Book 1, Statutes § 92 [a], at 177). Of course, the words of the statute are the best evidence of the Legislature's intent. As a general rule, unambiguous language of a statute is alone determinative (*see, Matter of Washington Post Co. v New York State Ins. Dept.,* 61 NY2d 557, 565). Nevertheless, the legislative history of an enactment may also be relevant and "is not to be ignored, even if words be clear" (McKinney's Cons Laws of NY, Book 1, Statutes § 124, at 252). " 'When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law " which forbids its use, however clear the words may appear on "superficial examination" ' " ***464** (*New York State Bankers Assn. v Albright,* 38 NY2d 430, 437). Pertinent also are "the history of the times, the circumstances surrounding the statute's passage, and ... attempted amendments" (McKinney's Cons Laws of NY, Book 1, Statutes § 124, at 253). Varying concerns may bear on the weight to be given legislative history (*see generally,* Abner J. Mikva and Eric Lane, An Introduction to Statutory Interpretation and the Legislative Process, at 27-41 [1997]), but they do not justify abandoning this Court's long tradition of using all available interpretive tools to ascertain the meaning of a statute.

Here, the history of section 1103 (b) explicates the legislative intention to create a broad exemption from the rules of the road for all vehicles engaged in highway construction, maintenance or repair, regardless of their classification. In 1954, the Committee that proposed the original version of the statute stated that the law was intended to exempt from the rules of the road all teams and vehicles that "build highways, repair or maintain them, paint the pavement markings, remove the snow, sand the pavement and do similar work" (*see,* 1954 NY Legis Doc No. 36, at 35). Thus, the exemption turns on the nature of the work being performed (construction, repair, maintenance or similar work)--not on the nature of the vehicle performing the work.

Further, the legislative history shows that the reference to "hazard vehicles" in section 1103 (b) is wholly unrelated to the provision excusing vehicles engaged in road work from the rules of the road. Notably, the original version of section 1103 (b), enacted in 1957, exempted vehicles

"engaged in work on a highway" from the rules of the road, and did *not* contain any separate provisions concerning hazard vehicles (*see,* L 1957, ch 698, § 4).[5] In 1970, the Legislature amended the Vehicle and Traffic Law to create the "hazard class" of vehicles, enacting section 117-a defining hazard vehicles, and amending section 1103 (b) to exempt hazard vehicles from the standing, stopping ***465** and parking regulations (*see,* L 1970, ch 197). The Memorandum in Support of that amendment explained that it was intended to clear up confusion as to the meaning of different "flashing colored lights," and thus four distinct classes of vehicles were created (emergency vehicles, hazard vehicles, privately owned vehicles of volunteer firemen and privately owned vehicles of volunteer ambulance drivers), each of which is identified by a different colored flashing light (*see,* Bill Jacket, L 1970, ch 197, at 4). The amendment was not intended to curtail the exemption for any vehicles-- including "hazard vehicles"--engaged in work on a highway (*see,* Dugan Letter, Bill Jacket, L 1970, ch 197, at 16 [noting the exemption of hazard vehicles and emergency vehicles from the rules of the road]).

Thus, we conclude that section 1103 (b) exempts from the rules of the road all vehicles actually engaged in work on a highway, including the "hazard vehicles" in the cases before us.

The Standard of Care

We next turn to the standard of care owed to other drivers by vehicles "actually engaged in work on a highway." Originally, section 1103 (b) provided such vehicles with an unqualified exemption from the rules of the road (*see,* L 1957, ch 698, § 4). In a 1974 amendment, the Legislature added the following sentence to that section:

"The foregoing provisions of this subdivision shall not relieve any person, or team or any operator of a motor vehicle or other equipment while actually engaged in work on a highway from the duty to proceed at all times during all phases of such work with *due regard for the safety of all persons* nor shall the foregoing provisions protect such persons or teams or such operators of motor vehicles or other equipment from the consequences of their *reckless disregard for the safety of others*" (L 1974, ch 223, § 1) (emphasis added).

(3) The legislative history explains that this amendment was designed to soften the outright exemption of vehicles engaged in road work from the rules of the road, allowing them to drive at any speed or in any manner "which suits their fancy, without any prohibition from the Vehicle and Traffic Law" (*see,* Mem of Senator Frank Padavan, Bill Jacket, L 1974, ch 223, at 4). For ***466** example, under the original version of the statute, "a snow plow could be operated well above the speed limit and through red lights ... without regard for the safety of other persons" (Mem of Dept of Motor Vehicles, Bill Jacket, L 1974, ch 223, at 7). The Legislature therefore amended section 1103 (b) to impose "a minimum standard of care" on operators of such vehicles (Padavan Mem, *op. cit.,* at 4).

In *Saarinen v Kerr* (84 NY2d 494), we held that Vehicle and Traffic Law § 1104 (e)--which contains identical language requiring emergency vehicles to act with "due regard for the safety of all persons" and holding drivers responsible for "the consequences of [their] reckless disregard for the safety of others"-- imposes a standard of recklessness. Specifically, this Court held that, under section 1104 (e), a plaintiff seeking to recover for injuries caused by an emergency vehicle must show that " 'the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow' and has done so with conscious indifference to the outcome" (*id.,* at 501 [quoting Prosser and Keeton, Torts § 34, at 213 [5th ed]).

Section 1103 (b) imposes the same recklessness standard on vehicles actually engaged in work on a highway. The language here is the same language that we held in *Saarinen* to impose a recklessness standard. To be sure, as claimants point out, the statute uses the phrase "due regard" as well as "reckless disregard" to describe the standard. But as we stated in *Saarinen,* "the Legislature's specific reference to ... *reckless disregard* ... would be unnecessary and, in fact, inexplicable if the conventional criterion for negligence--reasonable care under the circumstances--were the intended standard" (*Saarinen v Kerr, supra,* at 501) (emphasis in original). Thus, "the only way to apply the statute is to read its general admonition to exercise 'due care' in light of its more specific reference to 'recklessness' " (*id.,* at 501-502; *see also, Bliss v State of New York,* 95 NY2d ___ [decided today]).

We decline claimants' invitation to read the "due regard" and "reckless disregard" language in section 1103 (b) differently from our reading of those very words in section 1104 (e). As a general principle of statutory construction, "whenever a word is used in a statute in one sense and with one meaning, and subsequently the same word is used in a statute on the same

subject matter, it is understood as having been used in the same sense" (McKinney's Cons Laws of NY, Book 1, Statutes § 236, at 402). ***467**

Nor is there anything in the context or history of the statutes indicating that different meanings were intended. In fact, the history of section 1103 (b) confirms that the Legislature intended to subject vehicles engaged in road work to the same standard of care as emergency vehicles. The Attorney General's memorandum in support of the 1974 amendment states that the bill "extends the standard of care presently applicable to drivers of authorized emergency vehicles under § 1104 ... to persons engaged in maintenance and hazardous operations" (Lefkowitz Mem, Bill Jacket, L 1974, ch 223, at 2). In addition, Senator Padavan's supporting memorandum states that the amendment imposes a standard "similar to that imposed on operators of authorized emergency vehicles" (Padavan Mem, *op. cit.,* Bill Jacket, at 4). Many other memoranda in the bill jacket confirm this understanding (*see,* Department of Transportation Mem, Bill Jacket, L 1974, ch 223, at 5; Department of Motor Vehicles Mem, Bill Jacket, L 1974, ch 223, at 6; New York State Police Mem, Bill Jacket, L 1974, ch 223, at 8; Association of Towns Mem, Bill Jacket, L 1974, ch 223, at 10). Undeniably then, the 1974 amendment was intended to subject vehicles engaged in road work to the same recklessness standard applicable to emergency vehicles under section 1104 (e) (*see, McDonald v State of New York,* 176 Misc 2d 130, 139 [Ct Cl]).

Claimants urge that, as a matter of logic and fairness, vehicles engaged in road work should not enjoy the same level of protection as emergency vehicles, like police cars, fire trucks and ambulances. As we stated in *Saarinen,* the protection given to emergency vehicles under section 1104 (e) "represents a recognition that the duties of police officers and other emergency personnel often bring them into conflict with the rules and laws that are intended to regulate citizens' daily conduct," and that emergency personnel require a "qualified privilege to disregard those laws where necessary to carry out their important responsibilities" (*Saarinen v Kerr, supra,* at 502). The Court recognized, however, that giving emergency personnel this qualified privilege "will inevitably increase the risk of harm to innocent motorists and pedestrians," and "will necessarily escalate the over-all risk to the public at large"--an increased risk justified by the necessity of accomplishing an "immediate, specific law enforcement or public safety goal" (*id.,* at 502).

As claimants point out, it is unclear that the increased risk to the public is similarly justified for all vehicles engaged in road work. Indeed, criticizing protections given to non-emergency ***468** vehicles under pre-1957 law, the Joint Legislative Committee that was convened to revise the Vehicle and Traffic Law also observed that the "reason for extending emergency privileges to non-emergency vehicles ... is not apparent. ... The danger to highway users and true emergency vehicles is greatly increased by the special status which is unnecessarily given to non-emergency vehicles" (1954 NY Legis Doc No. 36, at 35). The trial court in *Gawelko v State of New York* (184 Misc 2d 581 [Ct Cl]) echoed that concern, questioning the present law:

"Why, for example, should rural letter carriers or tow truck drivers be permitted, in the course of their work, to speed, drive on the wrong side of the road, ignore pedestrian rights and vehicular rights-of-way, and disregard traffic signs and signals--all without sirens or lights being employed--while the driver of an ambulance or civil defense vehicle must employ both lights and bells or sirens in order to be exempt from any rules of the road?" (*Id.,* at 584; *see also, Cottingham v State of New York,* 182 Misc 2d 928, 942 [Ct Cl].)

Apt as those concerns may be, the Legislature has spoken clearly, giving vehicles engaged in road work the benefit of the same lesser standard of care as emergency vehicles. Any change in that standard, therefore, must come from the Legislature, not the courts.

Work Area

(4) Finally, there is no merit to claimants' argument that the protections of section 1103 (b) apply solely to vehicles operating in a designated "work area" as defined in Vehicle and Traffic Law § 160. Section 1103 (b) states that a vehicle "actually engaged in work on a highway" is exempt from the rules of the road. The statute does not require that a vehicle be located in a designated "work area" in order to receive the protection. Significantly, section 160 was not enacted until 1984--long after section 1103 (b) was adopted. Thus, there is no credible argument that the Legislature only had designated "work areas" in mind when it adopted section 1103 (b).

Claimants' remaining arguments are without merit.

Accordingly, in each case the order of the Appellate Division should be affirmed, with costs. ***469**

Judges Smith, Levine, Ciparick, Wesley and Rosenblatt concur.

In each case: Order affirmed, with costs. ***470**

Footnotes

1 Vehicle and Traffic Law § 117-a defines "hazard vehicle" as follows: "Every vehicle owned and operated or leased by a utility, whether public or private, used in the construction, maintenance and repair of its facilities, every vehicle specially equipped or designed for the towing or pushing of disabled vehicles, every vehicle engaged in highway maintenance, or in ice and snow removal where such operation involves the use of a public highway and vehicles driven by rural letter carriers while in the performance of their official duties." "Hazardous operation" is defined as the "operation, or parking, of a vehicle on or immediately adjacent to a public highway while such vehicle is actually engaged in an operation which would restrict, impede or interfere with the normal flow of traffic" (Vehicle and Traffic Law § 117-b).

2 This accorded with the common-law rule in other jurisdictions (*see,* Annotation, *Liability for Injury or Damage Caused by Snowplowing or Snow Removal Operations and Equipment,* 83 ALR4th 5).

3 Section 1103 (b) states in its entirety: "Unless specifically made applicable, the provisions of this title, except the provisions of sections eleven hundred ninety-two through eleven hundred ninety-six of this chapter, shall not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway nor shall the provisions of subsection (a) of section twelve hundred two apply to hazard vehicles while actually engaged in hazardous operation on or adjacent to a highway but shall apply to such persons and vehicles when traveling to or from such hazardous operation. The foregoing provisions of this subdivision shall not relieve any person, or team or any operator of a motor vehicle or other equipment while actually engaged in work on a highway from the duty to proceed at all times during all phases of such work with due regard for the safety of all persons nor shall the foregoing provisions protect such persons or teams or such operators of motor vehicles or other equipment from the consequences of their reckless disregard for the safety of others."

4 To the extent that *Somersall v New York Tel. Co.* (74 AD2d 302, 307-309, *revd on other grounds* 52 NY2d 157) holds otherwise, that decision is not to be followed.

5 The original version of section 1103 (b) stated in its entirety: "Unless specifically made applicable, the provisions of this title shall not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway nor shall the provisions of subsection (a) of section twelve hundred two apply to vehicles operated by public service corporations while actually engaged in work on the installation or maintenance of public service facilities on or adjacent to a highway but shall apply to such persons and vehicles when traveling to or from such work."

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145 Cal.App.4th 660
Court of Appeal, Fifth District, California.

Enrique SANCHEZ et al.,
Plaintiffs and Appellants,
v.
CITY OF MODESTO et al.,
Defendants and Respondents.

No. F048277.
|
Dec. 6, 2006.
|
Review Denied March 21, 2007.
|
Certiorari Denied Oct. 15, 2007.
|
See 128 S.Ct. 438.

Synopsis
Background: Latino voters filed action against city under the California Voting Rights Act (CVRA), alleging that because of racially polarized voting in the city, they are precluded from electing any candidates in the city's at-large city council elections. The Superior Court of Stanislaus County, No. 347903, Roger M. Beauchesne, J., granted city's motion for judgment on the pleadings after ruling that the CVRA was facially invalid under the equal protection clauses of the state and federal Constitutions. Voters appealed.

Holdings: The Court of Appeal, Wiseman, J., held that:

[1] CVRA is race-neutral;

[2] city had third-party standing to maintain equal protection challenge to CVRA;

[3] city failed to show that CVRA was facially invalid;

[4] all persons have standing under CVRA to sue for race-based vote dilution; and

[5] CVRA is not subject to strict scrutiny under equal protection.

Reversed and remanded.

West Headnotes (30)

[1] Election Law Judicial Review or Intervention

California Voting Rights Act (CVRA) is race-neutral; it does not favor any race over others or allocate burdens or benefits to any groups on the basis of race, but simply gives a cause of action to members of any racial or ethnic group that can establish that its members' votes are diluted though the combination of racially polarized voting and an at-large election system. West's Ann.Cal.Elec.Code §§ 14025–14032.

See 7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 233.

2 Cases that cite this headnote

[2] Evidence Population; census data

In voting rights case, the Court of Appeal would take judicial notice of the fact, which was revealed by the 2000 census, reporting non-Hispanic Whites as 46.7 percent of state population.

5 Cases that cite this headnote

[3] Appeal and Error Judgment on the pleadings

Appeal and Error Objections and exceptions; demurrer

Appeal and Error Judgment on the pleadings

The standard of review for an order granting judgment on the pleadings is the same as that for an order sustaining a general demurrer; Court of Appeal treats as admitted all material facts properly pleaded, give the complaint's factual allegations a liberal construction, and determines

de novo whether the complaint states a cause of action under any legal theory.

5 Cases that cite this headnote

[4] **Appeal and Error** Theory and Grounds of Decision Below and on Review

Court of Appeal may rely on any applicable legal theory in affirming or reversing a case because it reviews the trial court's disposition of the matter, not its reasons for the disposition.

3 Cases that cite this headnote

[5] **Constitutional Law** Presumptions and Construction as to Constitutionality

Where reasonably possible, courts are obliged to adopt an interpretation of a statute that renders it constitutional in preference to an interpretation that renders it unconstitutional.

[6] **Statutes** Judicial authority and duty

Judicial reformation of a statute is preferable to invalidation where reformation would better serve the intent of the Legislature.

1 Case that cites this headnote

[7] **Constitutional Law** Necessity of Determination

Constitutional Law Resolution of non-constitutional questions before constitutional questions

Principles of judicial self-restraint require courts to avoid deciding a case on constitutional grounds unless absolutely necessary; nonconstitutional grounds must be relied on if they are available.

9 Cases that cite this headnote

[8] **Action** Persons entitled to sue

The issue of standing may be raised at any time.

2 Cases that cite this headnote

[9] **Constitutional Law** Equal Protection

Rule barring cities from mounting equal protection challenges to state statutes is subject to an exception for situations in which the claim of a city or county is best understood as a practical means of asserting the individual rights of its citizens. U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

[10] **Constitutional Law** Equal Protection

Although a local government has no equal protection rights of its own to assert against the state, there is no reason why it cannot act as a mouthpiece for its citizens, who unquestionably have those rights, where the third-party-standing doctrine would allow it. U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

[11] **Constitutional Law** Elections

Constitutional Law Elections, Voting, and Political Rights

The constitutional interest at stake in an equal-protection challenge to race-related changes in a voting system arises from the fact that changes of that kind may reinforce racial stereotypes and threaten to undermine the system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole, and individual voters are entitled to assert this interest through litigation testing state laws. U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

[12] **Constitutional Law** Elections

City had third-party standing to maintain equal protection challenge on behalf of its citizens to state law giving a cause of action to members of any racial or ethnic group that can establish that its members' votes are diluted though the combination of racially polarized voting and an at-large election system; the relationship between the city and individual citizens or

voters was of the appropriate kind, city voters had rejected district-based elections by a large margin in a recent referendum, there were genuine obstacles to citizens asserting their own rights, and a showing of impossibility was not required. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[13] **Constitutional Law** Differing levels set forth or compared

A state's use of a classification is subject to strict scrutiny under the equal protection clause of the Fourteenth Amendment if it is a suspect classification or if it burdens a fundamental right; otherwise, the classification is subject only to rational-basis review. U.S.C.A. Const.Amend. 14.

[14] **Constitutional Law** Race, national origin, or ethnicity

Race is a suspect classification subject to strict scrutiny under the equal protection clause. U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

[15] **Constitutional Law** Voting and political rights

The right to vote is a fundamental right under the equal protection clause. U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

[16] **Constitutional Law** Differing levels set forth or compared

A law subject to strict scrutiny under equal protection is upheld only if it is narrowly tailored to promote a compelling governmental interest, while under rational-basis review, a law need only bear a rational relationship to a legitimate governmental interest. U.S.C.A. Const.Amend. 14.

[17] **Constitutional Law** Facial invalidity

A facial constitutional challenge to a legislative act is the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the act would be valid.

5 Cases that cite this headnote

[18] **Constitutional Law** Electoral districts and gerrymandering

Election Law In general; power to prohibit discrimination

City failed to show that the California Voting Rights Act (CVRA), permitting voters to challenge racially polarized voting in the city if they were precluded from electing any candidates in the city's at-large city council elections, was facially invalid under equal protection, where they failed to show that the CVRA could be validly applied under no circumstances. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Elec.Code §§ 14025–14032.

1 Case that cites this headnote

[19] **Constitutional Law** Elections, Voting, and Political Rights

Election Law Dilution of voting power in general

California Voting Rights Act (CVRA) vote-dilution cause of action differs from the Federal Voting Rights Act (FVRA) version in that the need to prove the possibility of creating a geographically compact majority-minority district is eliminated; differences do not introduce a racial classification or a burden on the right to vote, however, and the facial terms of the statute thus are not subject to strict scrutiny under equal protection, only rational-basis review applies, and the CVRA readily passes it. West's Ann.Cal.Elec.Code §§ 14025–14032; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973; U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[20] **Constitutional Law** Race, national origin, or ethnicity

A law classifying individuals by race and then imposing some kind of burden or benefit on the basis of the classification is subject to strict scrutiny under equal protection even if persons of all races bear the burden or receive the benefit equally. U.S.C.A. Const.Amend. 14.

[21] **Constitutional Law** Race, national origin, or ethnicity

A statute is not automatically subject to strict scrutiny because it involves race consciousness if it does not discriminate among individuals by race and does not impose any burden or confer any benefit on any particular racial group or groups. U.S.C.A. Const.Amend. 14.

[22] **Election Law** Racial and language minorities in general

The classification "language minority group" in the Federal Voting Rights Act (FVRA) does not define any group in terms of language, but simply identifies four specific racial or ethnic groups, American Indians, Asian Americans, Alaskan Natives, and Hispanics, as belonging to a protected class; definition refers to these as racial or ethnic groups, not in terms of their language, and the category "language minority group" was added to the FVRA for the purpose of ensuring that courts would not mistakenly exclude American Indians, Asian Americans, Alaskan Natives, and Hispanics from coverage under the statute, even though each group was already included in the category "race." Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.

1 Case that cites this headnote

[23] **Election Law** Parties; standing

All persons have standing under the California Voting Rights Act CVRA to sue for race-based vote dilution because all persons are members of a race. West's Ann.Cal.Elec.Code §§ 14025–14032.

1 Case that cites this headnote

[24] **Election Law** In general; power to prohibit discrimination

California Voting Rights Act (CVRA) is not an affirmative action statute because, unlike affirmative action laws, it does not identify any races for conferral of preferences. West's Ann.Cal.Elec.Code §§ 14025–14032.

1 Case that cites this headnote

[25] **Constitutional Law** Equality of Voting Power (One Person, One Vote)

The California Voting Rights Act (CVRA) is not subject to strict scrutiny under equal protection because it imposes liability on the basis of voting; while the CVRA requires a showing of racially polarized voting as an element of liability, that does not mean any person or group of people is held liable for voting or for how they voted, as the liability is that of the government entity that maintains the at-large voting system, and it is imposed because of dilution of a groups' votes. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Elec.Code §§ 14025–14032.

2 Cases that cite this headnote

[26] **Election Law** Dilution of voting power in general

California Voting Rights Act (CVRA) does not burden anyone's right to engage in racially polarized voting, but only makes racially polarized voting part of the predicate for a government entity's liability for racial vote dilution; effect of racially polarized voting, the election of monoracial city councils and the like, may be and is intended to be reduced by the application of the CVRA, but no voter has a right to a voting system that chronically and systematically brings about that effect. West's Ann.Cal.Elec.Code §§ 14025–14032.

4 Cases that cite this headnote

[27] **Constitutional Law** Race, national origin, or ethnicity

A facially neutral law is subject to strict scrutiny under equal protection if it was adopted for a racially discriminatory purpose. U.S.C.A. Const.Amend. 14.

[28] **Constitutional Law** Affirmative action in general

A legislature's intent to remedy a race-related harm constitutes a racially discriminatory purpose under equal protection no more than its use of the word "race" in an antidiscrimination statute renders the statute racially discriminatory, although an intent to remedy a race-related harm may well be combined with an improper use of race, as in an affirmative action program that uses race in an improper way. U.S.C.A. Const.Amend. 14.

[29] **Constitutional Law** Necessity of Determination

A court should not decide constitutional questions unless required to do so.

[30] **Constitutional Law** Facial invalidity

A court's ability to think of a single hypothetical in which the application of a statute would violate a constitutional provision is not grounds for facial invalidation, which is justified only where the statute could be validly applied under no circumstances.

5 Cases that cite this headnote

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***665 OPINION**

WISEMAN, J.

The trial court granted the defense's motion for judgment on the pleadings after ruling that the California Voting Rights Act of 2001 was facially invalid under the equal protection clauses of the state and federal Constitutions. It entered judgment against plaintiff Latino voters, who allege that, because of racially polarized voting in Modesto, they are precluded from electing any candidates in the city's at-large city council elections. No evidence has been presented in support of or in opposition to this claim. Rather, at a preliminary stage of the litigation, the trial court struck down the CVRA, ruling that any possible application would necessarily involve unconstitutional racial discrimination. As we will explain, Modesto's arguments do not support disposing of the Legislature's act in this summary manner.

Courts make two kinds of decisions about the constitutionality of laws: decisions about whether a law is

invalid on its face and in all of its conceivable applications (called "facial" invalidity), and about whether a particular application of a law is invalid (called "as-applied" invalidity). In this case, the City of Modesto attempted to show that the CVRA is unconstitutional because it is facially invalid. Modesto's arguments cannot establish facial invalidity. The city may, however, use similar arguments to attempt to show *as-applied* ****826** invalidity later if liability is proven and a specific application or remedy is considered that warrants the attempt. For example, if the court entertains a remedy that uses race, such as a district-based election system in which race is a factor in establishing district boundaries, defendants may again assert the meaty constitutional issues they have raised here. In doing so, at that time they can ask the court to decide whether the particular application or remedy is discriminatory.

[1] ***666** Why do Modesto's arguments fail to show that the CVRA is facially unconstitutional? Modesto takes the position that the CVRA is unconstitutional because it uses "race" to identify the polarized voting that causes vote dilution and prevents groups from electing candidates. Modesto claims that this use of race constitutes reverse racial discrimination and is a form of unconstitutional affirmative action benefiting only certain racial groups. However, this is not an accurate characterization of what the CVRA requires. The CVRA is raceneutral. It does not favor any race over others or allocate burdens or benefits to any groups on the basis of race. It simply gives a cause of action to members of *any* racial or ethnic group that can establish that its members' votes are diluted though the combination of racially polarized voting and an at-large election system—like the election system used in Modesto. In this respect, it is similar to other long-standing statutes that create causes of action for racial discrimination, such as the federal Civil Rights Act or California's Fair Employment and Housing Act.

[2] The reality in California is that no racial group forms a majority.[1] As a result, *any* racial group can experience the kind of vote dilution the CVRA was designed to combat, including Whites. Just as non-Whites in majority-White cities may have a cause of action under the CVRA, so may Whites in majority-non-White cities. Both demographic situations exist in California, even within our own San Joaquin Valley, and the CVRA applies to each in exactly the same way.

The trial court also found facially unconstitutional the portion of the CVRA that allows attorney fees to be awarded to prevailing plaintiffs. The trial court reached this issue even though it was moot—plaintiffs never had an opportunity to seek attorney fees, since they lost—and the city only briefed the issue after the trial court asked it to do so. Further, in reaching its decision, the court focused on an improbable set of hypothetical facts. The asserted invalidity of a single hypothetical application is not a proper basis for finding the fee clause invalid on its face.

The judgment is reversed and the case is remanded to the trial court.

FACTUAL AND PROCEDURAL HISTORIES

Plaintiffs are Latino voters who reside in Modesto. They filed a complaint in Superior Court on June 3, 2004, alleging that, because of racially polarized voting, the city's at-large method of electing city council members diluted ***667** their votes. The complaint named as defendants the City of Modesto, the city clerk, the mayor, and each member of the city council.

According to the complaint, in Modesto's at-large election system, candidates for city council run for individual seats to ****827** which numbers are arbitrarily assigned and for each of which all the city's voters may vote. To win, a candidate must receive a majority of the votes cast for the seat for which he or she has chosen to run. A runoff between the top two vote-getters for a seat occurs if no candidate receives a majority. The complaint alleges that this system, combined with a pattern of racially polarized voting, regularly prevented Latino voters from electing any candidates of their choice or influencing city government. Although Latinos were 25.6 percent of the city's population of 200,000, only one Latino had been elected to the city council since 1911.

The complaint alleged one cause of action, a violation of the CVRA (Elec.Code, §§ 14025–14032),[2] and prayed for the imposition of a district-based system as a remedy. The CVRA provides a private right of action to members of a protected class where, because of "dilution or the abridgement of the rights of voters," an at-large election system "impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election...." (§§ 14027, 14032.) To prove a violation, plaintiffs must show racially polarized voting. They do not need to show that members of a protected class live in a geographically compact area or demonstrate an intent to discriminate on the part of voters or officials. (§ 14028.)

Some background on federal voting rights law is helpful to provide context for the CVRA. Like the CVRA, section 2 of the Federal Voting Rights Act (FVRA) (42 U.S.C. § 1973) creates liability for vote dilution. A violation of the FVRA is established if "the political processes leading to nomination or election in [a] State or political subdivision [of a state] are not equally open to participation by members of a [protected] class ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." (42 U.S.C. § 1973(b).) Amendments to the FVRA passed by Congress in 1982 made it clear that intentional discrimination by officials is not required to show a violation. (*Shaw v. Reno* (1993) 509 U.S. 630, 641, 113 S.Ct. 2816, 125 L.Ed.2d 511(*Shaw*);*Thornburg v. Gingles* (1986) 478 U.S. 30, 35, 106 S.Ct. 2752, 92 L.Ed.2d 25(*Gingles*).) Later, after noting that it has "long recognized" that at-large elections and multi-member districts can " ' "minimize or cancel out the voting strength" ' " of minorities (*Gingles, supra,* at p. 47, 106 S.Ct. 2752), the Supreme Court delineated the elements of a vote-dilution ***668** violation under the FVRA:

> "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.... Second, the minority group must be able to show that it is politically cohesive.... Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." (*Gingles, supra,* 478 U.S. at pp. 50–51, 106 S.Ct. 2752 (fn. omitted).)

Section 2 of the FVRA does not allow states to use race however they want to in remedying vote dilution. In fact, the Supreme Court has recognized constitutional limitations on race-based districting plans adopted by state and local governments attempting to avoid section 2 liability. For example, in *Shaw, supra,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511, the court considered a new district map for the State of North Carolina, created by the ****828** state legislature after the results of the 1990 census gave the state a right to an additional member of the House of Representatives. The new districting plan included two majority-Black districts. The plaintiffs claimed the plan constituted an unconstitutional racial gerrymander. (*Id.* at pp. 633–634, 641, 113 S.Ct. 2816.) Among the justifications the state offered for the plan was that the two majority-Black districts were needed to avoid liability for vote dilution under section 2 of the FVRA. (*Shaw, supra,* at p. 655, 113 S.Ct. 2816.) Reversing the trial court's order dismissing the case, the Supreme Court held that the plaintiffs had stated a valid claim for relief under the equal protection clause of the Fourteenth Amendment. (*Shaw, supra,* at pp. 637–639, 642, 113 S.Ct. 2816.) It stated that, because the majority-Black districts' shapes were so bizarre, they could not "rationally ... be understood as anything other than an effort to separate voters into different districts on the basis of race," and the redistricting plan should be subjected by the trial court to strict scrutiny, just like "other state laws that classify citizens by race." (*Id.* at pp. 644, 649, 113 S.Ct. 2816.)

Later cases explained that a finding that race was the "predominant" factor in creating a district—to which other factors were "subordinated"—is what triggers strict scrutiny. (*Bush v. Vera* (1996) 517 U.S. 952, 958–959, 116 S.Ct. 1941, 135 L.Ed.2d 248 (plur. opn. of O'Connor, J.) (*Vera*).) *Shaw* and its progeny therefore stand for the following proposition: While state and local governments are commanded not to permit racial vote dilution that violates section 2 of the FVRA, they are also forbidden to use race as the predominant factor in a redistricting scheme designed to avoid a violation unless that use of race passes strict scrutiny. The court has assumed without deciding that race-conscious measures undertaken to avoid section 2 liability pass strict scrutiny if those measures use race no more than is reasonably necessary to achieve section 2 compliance. (*Vera, supra,* 517 U.S. at pp. 976–979, 116 S.Ct. 1941.)

***669** The legislative history of the CVRA indicates that the California Legislature wanted to provide a broader cause of action for vote dilution than was provided for by federal law. Specifically, the Legislature wanted to eliminate the *Gingles* requirement that, to establish *liability* for dilution under section 2 of the FVRA, plaintiffs must show that a compact majority-minority district is possible. That said, the bill that ultimately became the CVRA did intend to allow geographical compactness to be a consideration at the *remedy* stage. A bill analysis prepared by staff for the Assembly Committee on Judiciary reflects this fact:

> "This bill would allow a showing of dilution or abridgement of minority voting rights by showing the first two *Thornburg* [*v. Gingles, supra,* 478 U.S. 30, 106 S.Ct. 2752] requirements without an additional showing of geographical compactness.... This bill recognizes that geographical concentration is an appropriate question at the *remedy* stage. However, geographical compactness would not appear to be an important factor in assessing whether the voting rights of a minority group have been diluted or abridged by an at-large election system. Thus, this bill

puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown).” (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, p. 3 (italics added).)

**829 Another point emphasized in the legislative history is California's lack of a racial majority group. The Assembly Judiciary Committee analysis says “[t]he author states that [the bill] ‘addresses the problem of racial block voting,’ which is particularly harmful to a state like California due to its diversity.... In California, we face a unique situation where we are all minorities. We need statutes to ensure that our electoral system is fair and open. This measure gives us a tool to move us in that direction....” (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, p. 2.)

The bill ultimately became sections 14025 to 14032 of the Elections Code. Here is a synopsis of those provisions:

- Section 14027 sets forth the prohibited government conduct:

  “An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgement of the rights of voters who are members of a protected class, as defined pursuant to Section 14026.”

- A protected class is a class of voters “who are members of a race, color or language minority group, as this class is referenced and defined in the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.).” (§ 14026, subd. (d).)

*670 - Section 14032 gives a right of action to voters in protected classes.

- Section 14028 lists facts relevant to proving a violation: The dilution or abridgement described in section 14027 is established by showing racially polarized voting. (§ 14028, subd. (a).) Circumstances to be considered in determining whether there is racially polarized voting are described. (§ 14028, subd. (b).) Lack of geographical concentration of protected class members and lack of discriminatory intent by the government are not factors in determining liability. (§ 14028, subds. (c), (d).) Certain other probative factors are included. (§ 14028, subd. (e).)

- The court shall “implement appropriate remedies, including the imposition of district-based elections,” if it finds liability. (§ 14029.)

- Prevailing plaintiffs shall be awarded attorney fees. Prevailing defendants can recover only costs, and then only if the action was frivolous. (§ 14030.)

According to plaintiffs, the CVRA enlarges the potential for relief beyond that available under the FVRA in a number of ways, of which the elimination of the geographically compact majority-minority district requirement as an element of liability is only the beginning. First, freed of that requirement, a court could craft a remedy involving a crossover or coalition district. A crossover district is one in which, although members of the plaintiffs' group do not constitute a majority, that group can elect candidates of its choice by joining forces with dissident members of the racial majority who also live in the district. A coalition district is similar, except that members of the plaintiffs' group join forces with members of another racial minority group.

Second, a court could impose a remedy not involving districts at all, relying instead on one of several alternative at-large voting systems. In one of these, called cumulative voting, each voter has as many votes as there are open seats and may distribute them among several candidates or give them all to one candidate. In a cumulative voting system, a politically cohesive but geographically dispersed minority **830 group can elect a single candidate by giving all its votes to that candidate, although it would be unable to elect any candidates in a conventional winner-take-all at-large system and could not form a majority in any feasible district in a district system.

Defendants in this case filed a motion for judgment on the pleadings, arguing that the CVRA was facially invalid under the equal protection clause of the Fourteenth Amendment and article I, section 7 (i.e., the equal protection provision) of the California Constitution. In response to a request by the trial court, defendants filed a supplemental brief arguing that the *671 CVRA's attorney-fee provision also violated article XVI, section 6, of the California Constitution, which prohibits gifts of public funds. The trial court agreed with defendants on both points. It granted the motion and entered a judgment of dismissal.

DISCUSSION

[3] **[4]** The standard of review for an order granting judgment on the pleadings is the same as that for an order sustaining a general demurrer: We treat as admitted all material facts properly pleaded, give the complaint's factual allegations a liberal construction, and determine de novo whether the complaint states a cause of action under any legal theory. (*DiPirro v. American Isuzu Motors, Inc.* (2004) 119 Cal.App.4th 966, 972, 14 Cal.Rptr.3d 787.) We may rely on any applicable legal theory in affirming or reversing because we " 'review the trial court's disposition of the matter, not its reasons for the disposition.' " (*Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1065, 20 Cal.Rptr.3d 562.)

[5] **[6]** **[7]** Where reasonably possible, we are obliged to adopt an interpretation of a statute that renders it constitutional in preference to an interpretation that renders it unconstitutional. (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 60, 195 P.2d 1;*Martin v. Santa Clara Unified School Dist.* (2002) 102 Cal.App.4th 241, 254, 125 Cal.Rptr.2d 337.) Even judicial reformation of a statute is preferable to invalidation where reformation would better serve the intent of the Legislature.(*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 660–661, 47 Cal.Rptr.2d 108, 905 P.2d 1248.) Principles of judicial self-restraint similarly require us to avoid deciding a case on constitutional grounds unless absolutely necessary; nonconstitutional grounds must be relied on if they are available. (*People v. Pantoja* (2004) 122 Cal.App.4th 1, 10, 18 Cal.Rptr.3d 492.)

I. City's standing to challenge statute

As a threshold issue, plaintiffs contend that defendants are not entitled to bring their constitutional challenge to the CVRA. We disagree. Plaintiffs rely on a settled line of cases barring cities from mounting equal protection challenges to state statutes, but a second line of cases establishes an exception, into which this case falls. In light of our conclusion that defendants' equal protection challenge fails on its merits, we could decide this appeal without reaching the standing issue. We choose to address it, however, because the equal protection issue will likely arise on remand if the case reaches the remedy stage, and the standing question will surface again.

[8] Defendants moved to strike the footnote in plaintiffs' reply brief in which standing was first raised and argued that we should not address it. We ***672** disagree because standing can be raised at any time. (*Payne v. Anaheim Memorial Medical Center, Inc.* (2005) 130 Cal.App.4th 729, 745, 30 Cal.Rptr.3d 230; ****831** *Marshall v. Pasadena Unified School Dist.* (2004) 119 Cal.App.4th 1241, 1251, 15 Cal.Rptr.3d 344;*People v. Leung* (1992) 5 Cal.App.4th 482, 490, fn. 2, 7 Cal.Rptr.2d 290.) The issue of standing here does not come up in the traditional context, as we shall explain; however, it is sufficiently similar to warrant application of the rule that it may be raised at any time.

Further, defendants have had two opportunities to brief the issue. They did so first in their motion to strike the footnote, where they requested leave to submit additional briefing, and included a supplemental brief as a section of their motion. This request is granted and the supplemental discussion in the motion is deemed filed. Defendants also submitted a supplemental brief on the issue in response to our briefing letter dated June 30, 2006. For these reasons, defendants cannot legitimately claim to be prejudiced by any lack of opportunity to inform the court of their position. We hold that addressing the issue is appropriate and deny the motion to strike.[3] We now turn to the merits.

Plaintiffs invoke the "well-established rule that subordinate political entities, as 'creatures' of the state, may not challenge state action as violating the entities' rights under the due process or equal protection clauses of the Fourteenth Amendment or under the contract clause of the federal Constitution." (*Star–Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 6, 227 Cal.Rptr. 391, 719 P.2d 987(*Star–Kist*).) The concept of standing at issue here is not the usual one limiting the rights of plaintiffs, but a special one pertaining to cities and counties attempting, as plaintiffs or defendants, to challenge state laws:

> "The term 'standing' in this context refers not to traditional notions of a plaintiff's entitlement to seek judicial resolution of a dispute, but to a narrower, more specific inquiry focused upon the internal political organization of the state: whether counties and municipalities may invoke the federal Constitution to challenge a state law which they are otherwise duty-bound to enforce." (*Star–Kist, supra,* 42 Cal.3d at pp. 5–6, 227 Cal.Rptr. 391, 719 P.2d 987, fn. omitted.)

The rule against city and county standing in cases of this kind derives from the United States Supreme Court's holdings in *Williams v. Mayor* (1933) 289 U.S. 36, 40, 53 S.Ct. 431,

77 L.Ed. 1015(*Williams*) and a number of earlier cases. In *Williams,* the Maryland Legislature exempted a railroad from local taxes. (*Id.* at pp. 37–38, 53 S.Ct. 431.) The railroad was in the hands of a receiver ***673** appointed by a federal district court. Two cities filed claims in the receivership proceedings in the district court seeking taxes due. They challenged the tax-exemption statute under the equal protection clause of the Fourteenth Amendment. (*Williams, supra,* 289 U.S. at pp. 39–40, 53 S.Ct. 431.) The Supreme Court reversed a lower court decision invalidating the statute. Its explanation of this holding is simply: "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." (*Id.* at p. 40, 53 S.Ct. 431.) The court cited several of its own earlier cases, none of which explained the rule in any greater detail. (See, e.g., *Newark v. New Jersey* (1923) 262 U.S. 192, 196, 43 S.Ct. 539, 67 L.Ed. 943 [city not entitled to raise 14th Amend. equal protection challenge to ****832** state's imposition of water use fee]; *Trenton v. New Jersey* (1923) 262 U.S. 182, 185–188, 192, 43 S.Ct. 534, 67 L.Ed. 937 [city not entitled to challenge same fee under due process clause of 14th Amend. or under contract clause of art. I, § 10, of the U.S. Const.].)

California courts have applied the rule in a variety of contexts. (*Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 209, 282 P.2d 481 [city cannot rely on contract clause to obtain invalidation of state statute allegedly impairing preexisting contract between city and state]; *City of Burbank v. Burbank–Glendale–Pasadena Airport Authority* (1999) 72 Cal.App.4th 366, 380, 85 Cal.Rptr.2d 28 [airport authority, as political subdivision of state, had no standing to challenge under due process clause of 14th Amend. state statute allowing city to review authority's development plans]; *Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 296–297, 268 Cal.Rptr. 219(*McMahon*) [county had no power to challenge under due process clause of 14th Amend. a state law requiring it to contribute county funds for welfare payments]; *City of Los Angeles v. City of Artesia* (1977) 73 Cal.App.3d 450, 457, 140 Cal.Rptr. 684 [City and County of Los Angeles could not seek invalidation under due process clause of 14th Amend. or contract clause of retroactive application of state law limiting amount counties could charge Lakewood Plan cities for police protection].) The Ninth Circuit in California has applied the rule as well. (*City of South Lake Tahoe v. California Tahoe* (9th Cir.1980) 625 F.2d 231, 233–234 [city lacked standing to challenge under 14th Amend. a planning agency's land use rules promulgated pursuant to state statute].)

The California Supreme Court has held that the no-standing rule does not apply to a political subdivision's claim that a state statute encroaches on the power of Congress to regulate interstate commerce under the commerce clause of the United States Constitution. (*Star–Kist, supra,* 42 Cal.3d at pp. 4, 8–9, 227 Cal.Rptr. 391, 719 P.2d 987.) It relied in part on federal cases holding that the no-standing rule also does not apply to challenges based on the supremacy clause of the United States Constitution.(*Id.* at p. 8, 227 Cal.Rptr. 391, 719 P.2d 987.) The court did not, however, disturb the ***674** doctrine with respect to the equal protection and due process clauses of the Fourteenth Amendment and the contract clause, the areas in which it traditionally has been applied. (*Id.* at pp. 5–6, 227 Cal.Rptr. 391, 719 P.2d 987.)

[9] A second line of cases establishes an exception to the no-standing rule for situations in which the claim of a city or county is best understood as a practical means of asserting the individual rights of its citizens. The first of these cases, *Drum v. Fresno County Dept. of Public Works* (1983) 144 Cal.App.3d 777, 192 Cal.Rptr. 782(*Drum*), involved a county's due-process challenge to its own inadequate notice to a building project's neighbors of a zoning-variance hearing. The county approved a request for a variance to enable a homeowner to build a garage. The notices of the variance hearing received by the neighbors described the garage. Later, the owner decided to add a second story with living quarters to the garage and requested a permit for the new design. The county issued the permit. When construction began, neighbors complained that they had not been informed about the second story. The county reversed its decision to issue the permit and issued a stop-work order. In the ensuing litigation between the owner and county, the county argued that the permit it issued for a two-story garage was invalid because it was not within the scope of the variance ****833** of which the neighbors had received notice; the neighbors' due process rights had therefore been violated. (*Id.* at pp. 779–781, 782, 192 Cal.Rptr. 782.) We agreed with this position, rejecting the owner's argument that the county was not entitled to assert individual citizens' due process rights:

> "It would serve no legitimate interest to hold that appellant may not invoke lack of notice to its citizens in order to enjoin construction of respondents' building. Surely it should be able to invoke its own requirements of notice in order to preserve the public interest in preserving community patterns established by zoning laws." (*Drum, supra,* 144 Cal.App.3d at pp. 784–785, 192 Cal.Rptr. 782.)

Admittedly, *Drum* did not involve a local government's challenge to a state law and dealt with statutory rather than constitutional due process rights. (*Drum, supra,* 144 Cal.App.3d at p. 783, 192 Cal.Rptr. 782.) It did not discuss or cite any of the no-standing cases we mention above. But the next case in the line, *Selinger v. City Council* (1989) 216 Cal.App.3d 259, 264 Cal.Rptr. 499(*Selinger*), relied on *Drum,* among other authorities, in expressly asserting an exception to the no-standing rule.

In *Selinger,* a subdivision developer obtained a writ of mandate from the superior court requiring a city to acknowledge that his subdivision map was deemed approved by operation of law—because one year had elapsed without city action on his application—under the Permit Streamlining Act, a state statute. (*Selinger, supra,* 216 Cal.App.3d at p. 263, 264 Cal.Rptr. 499.) Among other things, the city argued that the Permit Streamlining Act violated ***675** adjacent landowners' right to due process of law by allowing a development plan to be automatically approved without notice and a hearing. (*Id.* at p. 270, 264 Cal.Rptr. 499.) The Court of Appeal agreed, rejecting the developer's argument that the city lacked standing to contest the validity of the statute. The court noted the no-standing rule as stated in *Star–Kist, supra,* 42 Cal.3d at page 6, 227 Cal.Rptr. 391, 719 P.2d 987, but it cited *Drum, supra,* 144 Cal.App.3d 777, 192 Cal.Rptr. 782 in support of making an exception. (*Selinger, supra,* 216 Cal.App.3d at pp. 270, 271, 264 Cal.Rptr. 499.)

More powerfully, the court relied on the Supreme Court's doctrine of third-party standing as set forth in *Singleton v. Wulff* (1976) 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826. In that case, the Supreme Court explained that constitutional rights usually must be asserted by the person to whom they belong, but that a litigant may assert them on behalf of a third party under exceptional circumstances. (*Id.* at p. 114, 96 S.Ct. 2868.) In addition to the requirement that the litigant must sustain an injury of its own, two factual elements are relevant in determining whether the litigant should be allowed to assert a third party's rights. One tests whether the litigant and third party are related closely enough to ensure that the litigant's interest in asserting the right is genuine and its advocacy will be effective:

> "The first [element] is the relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." (*Singleton v.* ****834** *Wulff, supra,* 428 U.S. at pp. 114–115, 96 S.Ct. 2868.)

The second element concerns the reasons why the third party is not asserting or cannot assert the right in question for itself:

> "The other factual element to which the Court has looked is the ability of the third party to assert his own right. Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent." (*Singleton v. Wulff, supra,* 428 U.S. at pp. 115–116, 96 S.Ct. 2868.)

In *Selinger,* the Court of Appeal thought the two elements supported the city's standing. Local citizens' right to notice and a hearing was "inextricably bound up" with the city's interest in reviewing and conditioning subdivision applications on its own timetable based on local needs. (*Selinger, supra,* 216 Cal.App.3d at p. 271, 264 Cal.Rptr. 499.) Also, there was a high obstacle to local citizens' ***676** ability to litigate their rights: Without notice, adjacent landowners would be likely to miss the 90–day statutory deadline for legal challenges to the approval of subdivision maps. (*Ibid.*)

The Court of Appeal applied the exception to the no-standing rule again in *Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 Cal.App.4th 621, 21 Cal.Rptr.2d 453(*Central Delta Water*). Two local water agencies sued the State Water Resources Control Board, mounting an equal-protection challenge to discharge fees imposed on them under a state statute and regulations. (*Id.* at pp. 627–629, 630, 21 Cal.Rptr.2d 453.) The Court of Appeal rejected the defendant's claim that, as political subdivisions, the agencies lacked standing to challenge the statute and regulations. It stated that the equal protection rights of the agencies' constituent water users were inextricably bound up with the agencies' duty to supply water. (*Id.* at pp. 630–631, 21 Cal.Rptr.2d 453.) The court did not explain what obstacles prevented the constituents from suing on their own behalf.

[10] We believe these courts have reasoned correctly in establishing an exception to the no-standing rule for

those situations in which the usual standards for third-party standing are satisfied. As previously mentioned, we acknowledge that there was no challenge to a state statute in *Drum,* and therefore the principle that a political subdivision cannot challenge the will of its creator was not implicated. Consequently, the citation of *Drum* by the *Selinger* court was a stretch. But the reasoning stated in *Selinger* and applied in *Central Delta Water* is sound. Although a local government has no equal protection rights of its own to assert against the state, there is no reason why it cannot act as a mouthpiece for its citizens, who unquestionably have those rights, where the third-party-standing doctrine would allow it.

We recognize that the third-party-standing doctrine is the key to the exception; that the doctrine is addressed to the standing of plaintiffs to sue in federal court; and that we deal here neither with the standing of plaintiffs nor with federal court. The doctrine is a sound basis for the exception in spite of these omissions. The point of the no-standing rule is to prevent local governments, whether as plaintiffs or defendants, from using certain provisions of the federal Constitution to obtain invalidation of laws passed by their ****835** creator, the state. This notion has no application where the truly interested parties—citizens or constituents of the local government entity—undisputedly do have standing and the entity merely asserts rights on their behalf.

[11] This case falls into the exception to the no-standing rule established in these cases. As the Supreme Court explained in *Shaw, supra,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511, the constitutional interest at stake in an equal-protection challenge to race-related changes in a voting system arises from the fact that changes of that ***677** kind may "reinforce ... racial stereotypes and threaten ... to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." (*Id.* at p. 650, 113 S.Ct. 2816.) Individual voters are entitled to assert this interest through litigation testing state laws, as they did in *Shaw.* The city's assertion of equal protection rights in this case is best understood as a means of asserting those rights on behalf of its citizens.

[12] The requirements of third-party standing are satisfied here. First, the relationship between the city and individual citizens or voters is of the appropriate kind. The city's vigorous litigation up to this point has shown its zealousness in asserting the claimed right. Plaintiffs' complaint has informed us that city voters rejected district-based elections by a large margin in a referendum in 2001, so the city likely is acting with substantial constituent support for its position. A cross-complaint filed by the individual defendants, seeking a judgment declaring the CVRA unconstitutional, shows that at least those individuals want to have the city pursue the matter on their behalf. Finally, the claimed equal-protection interest of individual citizens is "inextricably bound up" (*Singleton v. Wulff, supra,* 428 U.S. at p. 114, 96 S.Ct. 2868) with the city's interest in continuing its present election system.

Second, there are genuine obstacles to citizens asserting their own rights. It is not clear how a lawsuit could be structured to enable citizens to mount the facial challenge made by the city. Prior to any change in the city's voting system, whom would these citizens sue, and for what? Making citizens wait until after some remedy is ordered or adopted would involve other obstacles, including the possibility that elections could be held under the remedy before the litigation is concluded. Even after adoption of a change in the system, an individual voter's stake in the matter would be small in relation to the economic burdens of litigation, and this could be a substantial deterrent. (See *Powers v. Ohio* (1991) 499 U.S. 400, 415, 111 S.Ct. 1364, 113 L.Ed.2d 411 [venire person dismissed in criminal case for racially discriminatory reason has little incentive to pursue costly litigation to vindicate his or her equal protection rights, so criminal defendant must be permitted to assert those rights].) While these obstacles would not make it impossible for individual voters to sue the city if some alteration in its voting system is adopted, a showing of impossibility is not required. (See *Singleton v. Wulff, supra,* 428 U.S. at p. 116, fn. 6, 96 S.Ct. 2868 [dis. opn. argued that third parties must face insuperable obstacles; maj. replied that "our cases do not go that far"].)

For these reasons, we reject plaintiffs' contention that defendants are not entitled to assert an equal protection challenge to the CVRA. The city is entitled to do so on behalf of its citizens.

***678** *II. Equal protection*

A. Principles

We begin our examination of defendants' equal-protection claim with a brief review ****836** of the basic constitutional principles at issue. Federal and California equal-protection standards are not the same for all purposes. (See *Warden v. State Bar* (1999) 21 Cal.4th 628, 652–653, 88 Cal.Rptr.2d 283, 982 P.2d 154 (dis. opn. of Kennard, J.); *Butt v. State of California* (1992) 4 Cal.4th 668, 683, 685, 15 Cal.Rptr.2d

480, 842 P.2d 1240.) Here, however, the parties' briefs rely on federal case law and do not claim that any different standards apply to these facts under the state Constitution. We will, therefore, focus on principles developed in federal cases.

1. Suspect classifications, fundamental rights, strict scrutiny, and rational-basis review

[13] [14] [15] A state's use of a classification is subject to strict scrutiny under the equal protection clause of the Fourteenth Amendment if it is a suspect classification or if it burdens a fundamental right. (*Plyler v. Doe* (1982) 457 U.S. 202, 216–218 & fns. 14 & 15, 102 S.Ct. 2382, 72 L.Ed.2d 786.) Otherwise, the classification is subject only to rational-basis review. (*Vacco v. Quill* (1997) 521 U.S. 793, 799, 117 S.Ct. 2293, 138 L.Ed.2d 834.) Race is a suspect classification (*Johnson v. California* (2005) 543 U.S. 499, 505, 125 S.Ct. 1141, 160 L.Ed.2d 949(*Johnson*)), and the right to vote is a fundamental right (*Kramer v. Union School District* (1969) 395 U.S. 621, 626–628, 89 S.Ct. 1886, 23 L.Ed.2d 583) for equal protection purposes.

[16] A law subject to strict scrutiny is upheld only if it is *narrowly tailored* to promote a *compelling* governmental interest. (*Johnson, supra,* 543 U.S. at p. 505, 125 S.Ct. 1141.) Under rational-basis review, by contrast, a law need only bear a *rational relationship* to a *legitimate* governmental interest. (*Vacco v. Quill, supra,* 521 U.S. at p. 799, 117 S.Ct. 2293.) (The third level of review—intermediate scrutiny, which applies to sex discrimination—is not at issue in this case.)

2. Facial invalidity standard

[17] Defendants' challenge claims that the statute is facially invalid. In *United States v. Salerno* (1987) 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697(*Salerno*), the Supreme Court stated that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." The court explained that the fact the federal Bail Reform Act, subject in that case to a substantive due-process ***679** challenge, "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." (*Ibid.*)

Defendants assert that the *Salerno* standard does not apply here because *Salerno* was not cited in certain cases involving affirmative action laws (see, e.g., *Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 [municipal ordinance establishing affirmative action program for city contracting]); laws creating specific election districts (see, e.g., *Shaw, supra,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 [bizarrely shaped congressional district boundaries designed to create majority-Black districts]); and laws involving explicit use of racial segregation (see, e.g., *Johnson, supra,* 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949 [racial segregation of prisoners during initial evaluation]). Various justices of the Supreme Court, not amounting in any instance to a majority, have taken differing positions on the scope and applicability of the *Salerno* doctrine. ****837** (*Chicago v. Morales* (1999) 527 U.S. 41, 55, fn. 22, 119 S.Ct. 1849, 144 L.Ed.2d 67 (conc. opn. of Stevens, J., joined by Souter, J. and Ginsburg, J.) [*Salerno* formulation is dictum and need not be followed, especially by state courts]; *id.* at pp. 77–80 & fns. 1–3, 119 S.Ct. 1849 (dis. opn. of Scalia, J.) [*Salerno* states the correct standard for all cases but First Amendment overbreadth challenges].)

[18] The only cases of which we are aware where it has been definitively stated that a facial challenge could succeed on a showing falling short of the *Salerno* standard, however, are those where the overbreadth of a law violated the First Amendment by chilling protected speech (*Salerno, supra,* 481 U.S. at p. 745, 107 S.Ct. 2095) and where a law imposed an undue burden on the right to have an abortion (*Planned Parenthood of Southern Arizona v. Lawall* (9th Cir.1999) 180 F.3d 1022, 1026 [asserting that in *Planned Parenthood of Southeastern Pa. v. Casey* (1992) 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674, U.S. Supreme Court overruled *Salerno* in context of facial challenges to abortion restrictions]). Outside these areas, California courts apply a *Salerno*-type approach to facial constitutional challenges in general. (See, e.g., *East Bay Asian Local Development Corp. v. State of California* (2000) 24 Cal.4th 693, 709, 102 Cal.Rptr.2d 280, 13 P.3d 1122;*California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 338, 84 Cal.Rptr.2d 425, 975 P.2d 622;*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084, 40 Cal.Rptr.2d 402, 892 P.2d 1145.) We agree there is no warrant for refusing to apply *Salerno* outside the First Amendment overbreadth and abortion areas until a majority of the Supreme Court gives clear direction to do so. (*Hotel & Motel Ass'n of Oakland v. City of Oakland* (9th Cir.2003) 344 F.3d 959, 972.) Consequently, we hold that the *Salerno* standard for facial invalidation applies here, and defendants can succeed in their facial challenge only

by showing that the CVRA can be validly applied under no circumstances.

*680 ***B. Analysis***

With this background, the two basic reasons for rejecting defendants' challenge to the CVRA are easy to state. First, because the statute is nondiscriminatory, it is subject only to rational-basis review, not strict scrutiny; and it passes rational-basis review. Second, although the *Shaw–Vera* line of cases reveals the potential for unconstitutional applications of the statute, that potential does not show there can be no valid applications and therefore cannot establish that the statute is facially invalid. We consider these two reasons in turn.

1. The CVRA is nondiscriminatory, not subject to strict scrutiny, and passes rational basis review

Like the FVRA, the CVRA involves race and voting, but, also like the FVRA, it does not allocate benefits or burdens on the basis of race or any other suspect classification and does not burden anyone's right to vote. Like the FVRA, the CVRA confers on voters of any race a right to sue for an appropriate alteration in voting conditions when racial vote dilution exists.

[19] The CVRA vote-dilution cause of action differs from the FVRA version in important ways, specifically, that the need to prove the possibility of creating a geographically compact majority-minority district is eliminated. The differences do not introduce a racial classification or a burden on the right to vote, however. Therefore, the facial terms of the statute are not subject to strict scrutiny. Only rational-basis review applies, and the CVRA readily passes it. Curing vote dilution is a legitimate government interest and creation ****838** of a private right of action like that in the CVRA is rationally related to it. Major portions of defendants' briefs are devoted to showing that the CVRA fails strict scrutiny. We need not address these points because strict scrutiny does not apply.

a. The CVRA is not a law that imposes a racial classification on individuals and then uses it to confer a burden or benefit on all

Defendants argue that strict scrutiny applies here because it applies to any statute that refers to race or calls for any sort of race-conscious remedy or other action, even if it does not affect different races in different ways. They rely on cases like *Loving v. Virginia* (1967) 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010(*Loving*) and *Johnson, supra,* 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949, which applied strict scrutiny to state laws that employed racial classifications but burdened persons of different races equally. In *Loving,* the Supreme Court invalidated a state law forbidding persons of different races to marry one another. The law ***681** was subject to strict scrutiny even though its burden was generally distributed. (*Loving, supra,* 388 U.S. at p. 8, 87 S.Ct. 1817.) In *Johnson,* a policy of segregating state prison inmates by race during an initial evaluation period was held to be subject to strict scrutiny even though all prisoners were equally affected by it. (*Johnson, supra,* 543 U.S. at p. 506, 125 S.Ct. 1141.)

[20] What those cases hold is that a law classifying individuals by race and then imposing some kind of burden or benefit on the basis of the classification is subject to strict scrutiny even if persons of all races bear the burden or receive the benefit equally. In *Johnson,* for instance, the court rejected the state's argument that "strict scrutiny should not apply because all prisoners are 'equally' segregated." (*Johnson, supra,* 543 U.S. at p. 506, 125 S.Ct. 1141.) It stated that this argument "ignores our repeated command that 'racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.' " (*Ibid.*)

[21] What the cases do not hold is that a statute is automatically subject to strict scrutiny because it involves race consciousness even though it does not discriminate among individuals by race and does not impose any burden or confer any benefit on any particular racial group or groups. The CVRA confers on members of any racial group a cause of action to seek redress for a race-based harm, vote dilution. The creation of that kind of liability does not constitute the imposition of a burden or conferral of a benefit on the basis of a racial classification. If the CVRA were subject to strict scrutiny because of its reference to race, so would every law be that creates liability for race-based harm, including the FVRA, the federal Civil Rights Act, and California's Fair Employment and Housing Act.

Defendants argue that these antidiscrimination laws are, in fact, subject to strict scrutiny, but cite no cases subjecting them to it. Lacking that authority, they instead cite lower court cases subjecting federal antidiscrimination laws to analysis under the congruence and proportionality test of *City of Boerne v. Flores* (1997) 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624(*Boerne*), which they describe as "obviously very similar to strict scrutiny." For example, the court of appeals subjected a provision of Title VII of the federal

Civil Rights Act to a *Boerne* analysis in *In re Employment Discrimination Litigation* (11th Cir.1999) 198 F.3d 1305, 1319–1324.

This argument does not work. The *Boerne* test has nothing to do with strict ****839** scrutiny. It has nothing in particular to do with the equal protection clause. It is about the source of constitutional power for Congress' enactment of certain types of statutes, not the constitutional right of individuals to be free from discrimination.

***682** Briefly, the question presented in *Boerne* was whether Congress had authority under section 5 of the Fourteenth Amendment (the amendment's enforcement clause) to enact by statute a standard for protecting the free exercise of religion that was far more stringent than the standard the Supreme Court established under the free exercise clause of the First Amendment in an earlier case. Congress claimed the action was within its power under section 5 of the Fourteenth Amendment to enforce the due process clause of the Fourteenth Amendment, which in turn incorporated the First Amendment and its free exercise clause. (*Boerne, supra,* 521 U.S. at pp. 512–517, 117 S.Ct. 2157.) The court held that Congress lacked this authority because the standard Congress adopted was not congruent and proportional to the scope of the First Amendment right as the court itself had earlier defined it. (*Id.* at pp. 519–520, 532, 117 S.Ct. 2157.)

From this summary, it can be seen that the fact that an antidiscrimination law like Title VII has been subjected by some courts to a *Boerne* analysis does not even remotely imply that laws of that kind violate individuals' rights against discrimination unless they pass strict scrutiny. Defendants go so far as to imply that the only reason strict scrutiny has never been applied to federal antidiscrimination laws is that the *Boerne* test applies to those laws instead; strict scrutiny is the test appropriate for state legislation while *Boerne* applies in federal law. This cannot be true. Strict scrutiny applies to all racially discriminatory laws. It does not apply to antidiscrimination laws because, like CVRA, they are not racially discriminatory.

Defendants argue that the "sky will not fall" if strict scrutiny is applied to antidiscrimination laws. It will not fall because those laws, unlike the CVRA, generally impose liability only upon a showing of intentional discrimination, and for that reason the laws would likely be upheld under strict scrutiny. This argument collapses as soon as it is applied to the FVRA. As noted above, section 2 of the FVRA does not require a showing of intentional discrimination. No court has ever suggested, to our knowledge, that strict scrutiny applies to section 2 of the FVRA and that it would fail for this reason.

Also unhelpful to defendants is the argument that *Shaw* and *Vera* stand for the proposition that strict scrutiny can be triggered by an anti-vote-dilution law even though it does not burden the rights of the White plaintiffs. Responding to Justice Souter's dissenting view in *Shaw* that race-based districting should not trigger strict scrutiny unless another race's voting strength is harmed, the *Shaw* majority explained that "reapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters in other ways. It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular ***683** racial group rather than their constituency as a whole." (*Shaw, supra,* 509 U.S. at p. 650, 113 S.Ct. 2816.) Similarly, in *Vera,* the plurality responded to a dissenting comment by Justice Souter—that race-based, dilution-combating districts do not harm any class of voters—by referring to "harmful and divisive stereotypes" that the use of race may foster even if it does not involve any voting-related ****840** harm to the plaintiffs. (*Vera, supra,* 517 U.S. at pp. 983–984, 116 S.Ct. 1941.)

Contrary to defendants' view, these statements do not mean the CVRA is subject to strict scrutiny even though it does not confer benefits or impose burdens on any particular racial group and does not burden anyone's right to vote. They only mean that districting plans that use race as the predominant line-drawing factor—and therefore amount to segregation of voters by race—are subject to strict scrutiny. A court might wish to impose that kind of districting plan as a CVRA remedy. Even so, as we will explain, applications of the statute not involving that type of remedy are readily conceivable, so this potential problem is not a basis for a *facial* challenge.

b. The CVRA does not deny anyone standing on the basis of membership in any group

So far we have only addressed the main thrust of defendants' argument in support of applying strict scrutiny: that the statute's reference to race is itself a racial classification. We turn next to a series of related minor arguments. The first of these is based on the trial court's view that the statute is racially discriminatory on its face because its definition of "protected class" excludes some racial or ethnic groups. The CVRA defines a protected class as persons "who are members of a race, color or language minority group, as this class is

referenced and defined in the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.)." (§ 14026, subd. (d).)

The trial court took issue with the inclusion of "language minority group" in this definition. Its objection is based on an error made in reviewing the federal standard that the CVRA incorporates. Its order quoted Title 42 United States Code section 1973b(f)(1), a provision stating congressional findings on the deleterious effects of English-only elections. The provision states that "voting discrimination against citizens of language minorities is pervasive" and that "[s]uch minority citizens are from environments in which the dominant language is other than English." The trial court believed this was the federal statutory definition of "language minority group" to which the CVRA refers. On that basis, it concluded that the CVRA denies standing to English speakers. Then the trial court quoted 28 Code of Federal Regulations part 51.2 (2003), which states that "language minority group" means "persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage." The court believed this further restricted the meaning of the term, ***684** so as to exclude, for example, speakers of Polish or Portuguese. These restrictions, the court ruled, denied standing to ethnic groups that speak the purportedly excluded languages. That, in turn, triggered strict scrutiny, which the statute failed.

In reality, the regulation the court referred to merely restated the *actual* federal statutory definition of "language minority group," which is found at Title 42 United States Code section 1973*l*(c)(3): "The term 'language minorities' or 'language minority group' means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." This provision uses and defines the precise phrase ("language minority group") contained in the CVRA. The only logical conclusion is that this is the definition the Legislature intended to incorporate. There is no reason to think it also meant to include the language from Title 42 United States Code section 1973b(f)(1) about "environments in which the dominant language is other than English," which does not use the phrase "language ****841** minority group" and which states a congressional finding, not a definition.

[22] Consequently, despite its name, the classification "language minority group" does not define any group in terms of language, and the trial court relied on a mistaken understanding of the statute. The term simply identifies four specific racial or ethnic groups as belonging to a protected class. The definition refers to these as racial or ethnic groups ("persons who are American Indian," etc.), not in terms of their language. As plaintiffs explain, the category "language minority group" was added to the FVRA in 1975 for the purpose of ensuring that courts would not mistakenly exclude American Indians, Asian Americans, Alaskan Natives, and Hispanics from coverage under the statute, even though each group was already included in the category "race." (See Sen.Rep. No. 94–925, 1st Sess. (1975), reprinted in 1975 U.S.Code Cong. & Admin. News, pp. 774, 814 ["The Department of Justice and the United States Commission on Civil Rights have both expressed the position that all persons defined in this title as 'language minorities' are members of a 'race or color' group...."].)

The four language minority groups are, therefore, on the same footing as Whites, persons of Polish or Portuguese ancestry, or any other racial or ethnic group. In a variety of contexts, the Supreme Court has held that the term "race" is expansive and covers all ethnic and racial groups.(*Rice v. Cayetano* (2000) 528 U.S. 495, 512, 120 S.Ct. 1044, 145 L.Ed.2d 1007 [15th Amendment's prohibition on abridgment of right to vote on account of race "grants protection to all persons, not just members of a particular race"]; *Saint Francis College v. Al–Khazraji* (1987) 481 U.S. 604, 610, 613, 107 S.Ct. 2022, 95 L.Ed.2d 582 [prohibition of racial discrimination in 42 U.S.C. § 1981 protects all persons from discrimination based on their ***685** "ancestry or ethnic characteristics"; court is "quite sure" White people are protected]; *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 280, 96 S.Ct. 2574, 49 L.Ed.2d 493 [prohibition on discrimination because of race in Title VII applies to Whites and non-Whites alike].) The inclusion of "language minority groups," as defined by the statute, only reinforces the proposition that American Indians, Asian Americans, Alaskan Natives, and Hispanics are among the racial or ethnic groups that can constitute a protected class. It does not deny standing to anyone.

The trial court cited *Polish American Congress v. City of Chicago* (N.D.Ill.2002) 211 F.Supp.2d 1098 for the proposition that "the federal courts have interpreted the definition of protected class under 42 U.S.C. [section] 1973 so as to exclude Polish speakers from those having standing to sue," but that is not what that case held. The court simply stated that Polish–Americans were not one of the four groups included in the statutory definition of "language minority group." (*Polish American Congress v. City of Chicago, supra,* at p. 1107.) The court did not consider whether Polish–Americans had standing under the FVRA as a "race" and the plaintiffs apparently did not argue that they did. A case is

not authority for a proposition it did not consider. (*City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1318, 92 Cal.Rptr.2d 418.)

[23] The trial court's view would likely justify strict scrutiny and facial invalidation if it represented a correct reading of the statute, but it does not. Even if it were a *plausible* reading of the statute, it would be both possible and necessary under the constitutional avoidance doctrine to construe it as we have: All persons have standing under the CVRA to sue for race- ****842** based vote dilution because all persons are members of a race.

c. The CVRA is not an affirmative action law

[24] Defendants characterize the CVRA as an affirmative action statute and rely on affirmative action cases to argue that it is subject to strict scrutiny. The CVRA is not an affirmative action statute because, unlike affirmative action laws the Supreme Court has struck down, it does not identify any races for conferral of preferences. In *Gratz v. Bollinger* (2003) 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257, for instance, the Supreme Court applied strict scrutiny and struck down a university's affirmative action admission program. The program conferred 20 points, on a scale of 1 to 150, on applicants belonging to a specified set of racial groups. This advantage could increase a low waitlist score to an automatic admit score. (*Id.* at pp. 251, 255, 123 S.Ct. 2411). In *Richmond v. J.A. Croson Co., supra,* 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854, the court applied strict scrutiny and struck down a city's program of affirmative action in government contracting. The program commanded that 30 percent of the ***686** money spent on city building contracts be paid to subcontracting firms owned by members of a specified set of racial groups.(*Id.* at pp. 477–478, 511, 109 S.Ct. 706.) The CVRA does nothing similar. We cannot subject the CVRA to strict scrutiny on the ground that affirmative action programs are subject to strict scrutiny.

d. The CVRA does not burden the fundamental right to vote

[25] As we have said, strict scrutiny under the equal protection clause can be triggered by a classification used to burden a fundamental right, and voting is treated as a fundamental right in this context. Separately from their racial discrimination argument, defendants contend that the CVRA is subject to strict scrutiny because it "impos[es] liability on the basis of voting...." This is not correct. It is true that the CVRA requires a showing of racially polarized voting as an element of liability, but that does not mean any person or group of people is held liable for voting or for how they voted. The liability is that of the government entity that maintains the voting system, and it is imposed because of dilution of the plaintiffs' votes.

A prime example of a violation of the equal protection clause through a burden on the right to vote is malapportioned districts, i.e., those that violate the one-person, one-vote rule by having unequal populations. (*Reynolds v. Sims* (1964) 377 U.S. 533, 568, 84 S.Ct. 1362, 12 L.Ed.2d 506.) The CVRA involves nothing similar. Cases reviewing districts created predominantly on the basis of race presumably are another example, even though the opinions in those cases focus on the suspect racial classification rather than on the fundamental right to vote. However, the possibility of some court imposing an unconstitutional remedy under the CVRA in some cases is not, as we have said, a basis for *facial* invalidation.

e. The CVRA does not burden any First Amendment right

Defendants also argue that the CVRA is subject to strict scrutiny because it burdens fundamental rights protected by the First Amendment:

> "Voter preferences that underlie racially polarized voting, moreover, are political views protected against infringement by the First Amendment. The votes themselves are expressions of political preferences about candidates and ballot measures. Bloc voting, then, represents a coalition of political interests ****843** that lie close to the core of the freedom of political association."

[26] Defendants may be correct in arguing that racially polarized voting constitutes political expression protected by the First Amendment. But the CVRA does not burden anyone's right to engage in racially polarized voting. It only makes racially polarized voting part of the predicate for a government ***687** entity's liability for racial vote dilution. In doing so, it is comparable to the FVRA. The *effect* of racially polarized voting—election of monoracial city councils and the like—may be and is intended to be reduced by the application of the CVRA. But no voter has a right to a voting system that chronically and systematically brings about that effect. We do not understand defendants to argue the contrary.

f. The fact that the CVRA addresses a racial issue does not show that the Legislature acted with an invidious purpose

[27] A facially neutral law is subject to strict scrutiny if it was adopted for a racially discriminatory purpose. (*Miller v. Johnson* (1995) 515 U.S. 900, 913, 115 S.Ct. 2475, 132 L.Ed.2d 762.) Defendants argue that, even if the CVRA is facially neutral, it is subject to strict scrutiny because it was "enacted *solely* for racial purposes, i.e., to remedy racial bloc voting in at-large" voting systems. Defendants contend that plaintiffs admit this by "assert[ing] that the [CVRA] is an antidiscrimination statute intended to remedy" racially polarized voting.

[28] This is incorrect for essentially the same reason that defendants are mistaken in claiming that the statute is subject to strict scrutiny because it contains a facial reference to race. A legislature's intent to remedy a race-related harm constitutes a racially discriminatory purpose no more than its use of the word "race" in an antidiscrimination statute renders the statute racially discriminatory. An intent to remedy a race-related harm may well be combined with an improper use of race, as in an affirmative action program that uses race in an improper way. The CVRA does not, however, have the latter component. Upon a finding of liability, it calls only for "appropriate remedies" (§ 14029), not for any particular, let alone any improper, use of race.

g. Differences between the CVRA and the FVRA do not automatically render the CVRA unconstitutional

Defendants devote almost half of the argument portion of their brief to attempting to show that the CVRA contains "dramatic departures from the FVRA" which amount to an "extraordinary expansion of federal law." To the extent that this may be intended as an independent argument that the CVRA is unconstitutional, it is without merit. There is no rule that a state legislature can never extend civil rights beyond what Congress has provided. State law may, of course, be preempted by federal law if inconsistent with it, but defendants have not made a preemption argument. To the extent that this discussion may be intended to make the narrower point that the CVRA is not ***688** narrowly tailored to effectuate a compelling government interest—i.e., that it fails strict scrutiny—we will disregard it, since we hold that strict scrutiny does not apply.

2. Potential unconstitutional applications cannot show facial invalidity

Defendants' arguments are partially based on Supreme Court cases that struck down specific redistricting plans drawn up partly to avoid racial vote dilution that ****844** might violate section 2 of the FVRA. Because those cases only address specific actions taken by states to cure racial vote dilution (i.e., the creation of particular districts), their impact here relates only to the validity of specific applications of the CVRA—applications that at this point are hypothetical. Under the facial-invalidity standard set forth in *Salerno, supra,* 481 U.S. at page 745, 107 S.Ct. 2095, therefore, the cases cannot establish that the CVRA is facially invalid. (To be sure, defendants contend that none of their arguments are addressed to mere remedies issues and that all are instead addressed to the criteria for liability under the CVRA and prove that those criteria are subject to strict scrutiny. As explained earlier, they are not subject to strict scrutiny.)

Shaw, supra, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511, was the first in this line of cases. It held, as mentioned earlier, that a redistricting plan was subject to strict scrutiny because it could not rationally be understood as anything but an effort to separate voters on the basis of race. The plurality opinion in *Vera* made a similar point. There is no doubt that any district-based remedy the trial court might impose using race as a factor in drawing district lines would be subject to analysis under the *Shaw–Vera* line of cases. In reviewing a district-based remedy, it would be necessary to determine whether race was the predominant factor used in drawing the district lines. If it was, the plan would be subject to strict scrutiny.

It is equally apparent that this does not mean the CVRA must pass strict scrutiny in order to withstand a facial challenge. Whether one potential remedy under a statute would be subject to strict scrutiny if imposed is not the test for facial invalidity of the statute. Defendants' argument, to be successful, would have to be not only that unconstitutional remedies are consistent with the CVRA, but that they are mandated by it. They are not.

III. Gift of public funds

Although no fee motion was ever made, the trial court found the CVRA's attorney-fee provision to be invalid. That provision states as follows:

> "In any action to enforce Section 14027 and Section 14028, the court shall allow the prevailing plaintiff party, other than the state or political subdivision thereof, ***689** a reasonable attorney's fee consistent with the standards established in *Serrano v. Priest* (1977) 20 Cal.3d 25, 48–49[, 141 Cal.Rptr. 315, 569 P.2d 1303], and litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs. Prevailing defendant

> parties shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation." (§ 14030.)

Relying on *Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 450–451, 123 Cal.Rptr.2d 122(*Jordan*), the trial court ruled that this section violated article XVI, section 6, of the California Constitution, which forbids the Legislature to "make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation...." The court interpreted *Jordan* to mean that "[a] lawsuit against a public entity which results in no change whatever in the status quo ante serves no public purpose, and does not constitute a valid claim against the public for attorney fee and cost purposes."

The court then applied this purported rule to a hypothetical:

> "If a California city has at large city council election plus one (1) voter of Alaskan native ancestry who repeatedly runs for the council and always gets just ****845** one vote (his own) and files suit under the California Voting Rights Act, he would be a prevailing party under the Act though no remedy is possible, and so be entitled to attorney fees and expenses. Defendants contend, and Plaintiffs do not dispute, that a local government cannot be required to carve an electoral district for an impossibly small number of voters (such as this hypothetical's one Alaskan native). [Citations.] While it is doubtful this hypothetical city could be sued every day under the Act in this situation, it could probably be sued every election cycle, and have to pay attorney fees over and over for a situation it cannot remedy or avoid."

[29] The court violated two rules of constitutional decisionmaking in invalidating the section. First, a court should not decide constitutional questions unless required to do so. (*People v. Pantoja, supra,* 122 Cal.App.4th at p. 10, 18 Cal.Rptr.3d 492.) Here, no party moved for attorney fees, so the validity of the fee statute was not at issue. The court should not have addressed or answered the question.

[30] Second, the court's ability to think of a single hypothetical in which the application of a statute would violate a constitutional provision is not grounds for facial invalidation. Facial invalidation is justified only where the statute could be validly applied under *no* circumstances.(*East Bay Asian Local Development Corp. v. State of California, supra,* 24 Cal.4th at p. 709, 102 Cal.Rptr.2d 280, 13 P.3d 1122.) Circumstances in which the objection the court raises would not be present are easy to imagine. If, on remand, the court finds liability *in this case* but is unable to formulate a permissible remedy *in this case,* then the court will ***690** have an opportunity to decide whether the application of section 14030 would be unconstitutional *in this case.* It has not had that opportunity yet. We express no opinion here on whether a fee award would be barred under those circumstances since doing so is premature.

IV. Issues on remand

The parties have raised several issues in this appeal that the trial court never decided and that we need not decide now. We repeat them here for convenience:

- What elements must be proved to establish liability under the CVRA?
- Is the court precluded from employing crossover or coalition districts (i.e., districts in which the plaintiffs' protected class does not comprise a majority of voters) as a remedy?
- Is the court precluded from employing any alternative at-large voting system as a remedy?
- Does the particular remedy under contemplation by the court, if any, conform to the Supreme Court's vote-dilution-remedy cases?

The court's answers to these questions will determine the scope of relief, if any, available to plaintiffs. The logical limit in one direction would be a conclusion that plaintiffs can obtain under the CVRA only the same relief that they could have obtained under the FVRA. The logical limit in the other direction would be the conclusion that, upon proof of racially polarized voting, plaintiffs will be entitled to the most appropriate remedy, among the remedies we have discussed, that does not result in unconstitutionally drawn districts under the Supreme Court's rulings.

DISPOSITION

The judgment is reversed and the case remanded to the trial court for further proceedings. Plaintiffs shall recover their costs on appeal.

****846** Defendants' motion to strike, filed February 10, 2006, is denied. The request for leave to submit supplemental

briefing included in the motion to strike is granted and the supplemental brief incorporated in the motion is deemed filed.

***691** The following requests are granted: Motion of Appellants Requesting Judicial Notice (filed September 15, 2005); Supplemental Motion of Appellants Requesting Judicial Notice (filed January 31, 2006); Second Motion of Respondents Requesting Judicial Notice (filed February 6, 2006); Request for Judicial Notice contained in defendants' Answer to Brief of Amici Curiae Common Cause and FairVote (filed March 22, 2006); Third Motion of Respondents Requesting Judicial Notice (filed July 20, 2006).

HARRIS, Acting P.J., and CORNELL, J., concur.

All Citations

145 Cal.App.4th 660, 51 Cal.Rptr.3d 821, 06 Cal. Daily Op. Serv. 11,187

Footnotes

1 We take judicial notice of this fact, which was revealed by the 2000 census. (See < http://factfinder.census.gov/servlet/QTTable?_bm =y&-qr_ name=DEC_2000_SF1_U_DP1&-geo_id=04000US06&-ds_name=DEC_2000_SF1_U&-_ lang =en&-_sse=on> [census table reporting non-Hispanic Whites as 46.7 percent of state population].)

2 Subsequent statutory references are to the Elections Code unless otherwise noted.

3 In addition to the motion to strike and request for leave to submit supplemental briefing, a number of requests for judicial notice are pending. These requests, which we list in the Disposition, are granted.

End of Document

New York Official Reports

45 N.Y.2d 482, 382 N.E.2d 1139, 410 N.Y.S.2d 276

Town of Massena, Respondent,

v.

Niagara Mohawk Power Corporation, Appellant.

Court of Appeals of New York
Argued September 20, 1978;

decided October 31, 1978

CITE TITLE AS: Town of Massena v Niagara Mohawk Power Corp.

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the Third Judicial Department, from an order of that court entered January 12, 1978, and amended by order entered June 27, 1978, which (1) reversed, on the law, a judgment of the St. Lawrence County Court (Michael W. Duskas, J.), dismissing plaintiff's petition for condemnation after a nonjury trial, and (2) remitted the matter to the County Court. The following question was certified by the Appellate Division: "Did this Court err as a matter of law in reversing the judgment of the County Court of St. Lawrence County with directions to grant the petition for condemnation and enter the appropriate judgment thereon together with the right of temporary possession in accordance with the Condemnation Law?"

The plaintiff town instituted a condemnation proceeding with respect to certain property in the town owned by defendant, a privately owned public utility, in order that the town could own and operate its own electric distribution system and supply electricity to the inhabitants of the town. The County Court dismissed the petition and denied the plaintiff temporary possession because it had materially departed from both the authorized plan of acquisition (i.e., construction) and its formerly proposed method of furnishing service to customers of the municipal utility. The Appellate Division held that plaintiff had substantially complied with section 360 of the General Municipal Law, and remitted the matter with directions to grant (1) the petition for condemnation and (2) the right of temporary possession.

The Court of Appeals affirmed the order of the Appellate Division, and answered the certified question in the negative, holding, in an opinion by Judge Cooke, that plaintiff's proposal to construct a substation and transmission line, which was abandoned in favor of using existing facilities, did not vitiate the entire project; that plaintiff's listing of the "maximum estimated costs" of the project complied with the statutory requirement (General Municipal Law, § 360) that "the maximum and the estimated costs" be provided; that the Court of Appeals could not review any of defendant's factual ***483** contentions inasmuch as the reversal of the Appellate Division was on the law alone; that there was no requirement that plaintiff arrange for its power supply prior to acquiring title by condemnation, and that the grant of temporary possession to plaintiff was not an abuse of discretion.

Town of Massena v Niagara Mohawk Power Corp., 60 AD2d 139, and 63 AD2d 1080, affirmed.

HEADNOTES

Appeal
Review of Points Rejected at Trial Level

(1) Where the defendant, who prevailed at the trial level in securing the relief sought, namely, dismissal of the petition, raised several grounds for dismissal, two of which were specifically rejected by the trial court, defendant was not aggrieved by the trial court's judgment and could not cross-appeal to the Appellate Division; however, since defendant was entitled to raise those two points in the Appellate Division as alternative grounds for sustaining the judgment of the trial court, they were properly before the Appellate Division and may also be considered by the Court of Appeals.

Eminent Domain
Municipality's Establishment of Public Utility Service

(2) Section 360 of the General Municipal Law, which confers powers upon municipal corporations to establish, own and operate certain public utility services, compliance with which is required before public utility service may be acquired by

condemnation, requires that the proposed method of acquiring and constructing the plant and facilities for such service and the method of furnishing such service be fixed by resolution, but, where a resolution of a town board proposed to construct a substation and transmission line, and the proposal was later abandoned in favor of using existing facilities, the entire project is not vitiated, inasmuch as there is a time gap between the drafting of the initial outline and actual completion of the project, during which interval contingencies may suggest or necessitate a change of direction; flexibility in implementation of a section 360 project is necessary.

Eminent Domain
Municipality's Establishment of Public Utility Service

(3) Although section 360 of the General Municipal Law, which confers powers upon municipal corporations to establish, own and operate certain public utility services, compliance with which is required before public utility service may be acquired by condemnation, requires that "the maximum and the estimated costs" of acquiring and constructing the plant and facilities for such service be fixed by resolution, a resolution of a town board which includes the "maximum estimated cost" meets the statutory requirement.

Municipal Corporations
Resolution of Town Board--Presumption of Validity and Construction

(4) A resolution of a town board is clothed with a presumption of validity and words employed in the resolution will be construed according to their ordinary and plain meaning in the absence of a clear intent to the contrary expressed in the enactment; a court should make an effort to interpret the ***484** language so as to give effect to the resolution rather than destroy it. Accordingly, where a statute requires that a resolution include "both the maximum and the estimated costs" of a project, a resolution that includes the words "maximum estimated cost" followed by a single monetary figure meets the statutory requirement, inasmuch as it is the spirit rather than the letter of the resolution which determines its construction.

Appeal
Court of Appeals
Review of Factual Issue

(5) Where a reversal effected by order of the Appellate Division is expressly on the law alone, with no issue of fact considered, new findings of fact were not made by that court; accordingly, a factual issue may not be determined or even advanced before the Court of Appeals.

Eminent Domain
Municipality's Establishment of Public Utility Service

(6) In a condemnation proceeding in which a municipality seeks to acquire title to parts of a public utility's system, there is no requirement that the municipality arrange for its power supply before it can acquire title.

Eminent Domain
Temporary Possession

(7) A grant to the plaintiff of temporary possession of real property which is to be condemned is not an abuse of discretion where buttressed by obvious and substantial justifications inasmuch as section 24 of the Condemnation Law provides that a court may direct that a plaintiff may enter upon the real property to be taken when the public interests will be prejudiced by delay.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

19 NY Jur, Electricity, Gas and Steam §§ 58-60; 40 NY Jur, Municipal Corporations § 908

17 Carm-Wait 2d, § 108:39

General Municipal Law §360; Condemnation Law §24

26 Am Jur 2d, Electricity, Gas and Steam §§ 32-38; 56 Am Jur 2d, Municipal Corporations, Counties and Other Political Subdivisions §§ 565- 568

15 Am Jur Legal Forms 2d, Public Utilities § 215:16

ANNOTATION REFERENCES

Power of municipality to sell, lease, or mortgage public utility plant or interest therein. 61 ALR2d 595.

POINTS OF COUNSEL

Milton S. Gould, Bryan J. Hughes and *Lauman Martin* for appellant.

I. The condemnation proceeding should have been dismissed by reason of the change in the method of furnishing public utility service as fixed in the bond resolution. *(Matter* ***485** *of Smathers,* 309 NY 487; *O'Flynn v Village of East Rochester,* 292 NY 156; *Matter of Village of Le Roy,* 35 App Div 177; *County of Jefferson v Horbiger,* 229 App Div 381.) II. The condemnation proceeding should have been dismissed by reason of failure of the bond resolution to set forth "both the maximum and the estimated costs" of the project. III. The condemnation proceeding should have been dismissed by reason of respondent's failure to negotiate in good faith to purchase the property sought to be condemned. *(City of Long Beach v Long Beach Water Co.,* 209 App Div 902; *Matter of Lockport & Buffalo R. R. Co.,* 77 NY 557; *Matter of County of Erie v Lancaster Dev. Co.,* 232 App Div 331; *New York State Elec. & Gas Corp. v Morrison,* 44 Misc 2d 145; *New York Tel. Co. v Wood,* 145 Misc 481; *Matter of Bronx Parkway Comm.,* 176 App Div 717.) IV. The condemnation proceeding should have been dismissed by reason of respondent's failure to obtain contracts for power supply and transmission as was required by the bond resolution. *(People v Fisher,* 189 App Div 148, 233 NY 663; *Matter of Citizens' Water-Works Co. v Parry,* 59 Hun 202, 128 NY 669.) V. The right to an order of temporary possession should not have been granted. *(City of Glen Cove v Utilities & Inds. Corp.,* 24 AD2d 766, 17 NY2d 205; *Central New England Ry. Co. v Whittley,* 159 App Div 468; *City of Utica v Damiano,* 22 Misc 2d 804; *Matter of Board of Educ. v Gorga,* 13 Misc 2d 5; *Home Gas Co. v Kuruc,* 206 Misc 130; *Matter of County of Nassau [William Cullen Bryant Park & Preserve],* 87 Misc 2d 1004; *Village of Spring Val. Urban Renewal Agency v K. G. R. Realty Co.,* 82 Misc 2d 1082; *Matter of Town of Hempstead,* 78 Misc 2d 1090; *Long Is. Light. Co. v Lambert,* 77 Misc 2d 511; *Matter of City of New York [Spuyten Duyvil Shorefront Park],* 71 Misc 2d 1019.)

Frederick D. Palmer, Wallace L. Duncan and *James D. Pembroke,* of the Washington, D. C. Bar, admitted on motion *pro hac vice,* and *Eugene L. Nicandri* for respondent.

I. This court lacks jurisdiction to hear and decide the issues purportedly raised by Niagara Mohawk. *(Matter of Westerfield,* 163 NY 209; *Mrachek v Sunshine Biscuit,* 308 NY 116; *Donohue v First Trust Co. of Albany,* 286 App Div 918; *Hutter v Levitt & Sons,* 36 AD2d 758; *Matter of Burk,* 298 NY 450; *Matter of Davis,* 91 Hun 53, 149 NY 539; *Matter of Fahey v Whalen,* 54 AD2d 1097; *Costikyan v Keeffe,* 54 AD2d 573; *Antonetti v City of Syracuse,* 52 AD2d 742.) II. The holding by the court below that Massena has complied with section 360 is correct both on ***486** the facts and the law. *(O'Flynn v Village of East Rochester,* 292 NY 156; *Data Processing Serv. v Camp,* 397 US 150; *Barlow v Collins,* 397 US 159; *Blomquist v County of Orange,* 69 Misc 2d 1077; *Richardson v Bohemia Fire Dist.,* 75 Misc 2d 837.) III. Purported failure of bond resolution to set forth the maximum and estimated cost of the project. IV. Massena's purported failure to negotiate in good faith. *(City of Long Beach v Long Beach Water Co.,* 209 App Div 902; *Otter Tail Power Co. v Federal Power Comm.,* 401 US 947; *Matter of Mayor, Aldermen & Commonalty of City of N. Y.,* 135 NY 253; *Dormitory Auth. of State of N. Y. v 59th St. & 10th Ave. Realty Corp.,* 62 Misc 2d 174; *Matter of City of Syracuse [Eastman],* 137 Misc 632.) V. The Power Authority of the State of New York power and transmission services. *(People v Fisher,* 189 App Div 148, 233 NY 663; *Matter of Citizens' Water-Works Co. v Parry,* 59 Hun 202; *County of Jefferson v Horbiger,* 229 App Div 381.) VI. The right to an order of temporary possession was required by virtue of the reversal by the court below of the County Court. VII. The April 19, 1977 referendum provides Massena with additional authority to proceed with the project. *(Bradford v County of Suffolk,* 283 NY 503; *Swanker v City of Amsterdam,* 5 Misc 2d 932; *Colorado Cent. Power Co. v Municipal Power Dev. Co.,* 1 F Supp 961; *Mitchell v Town of Shelter Is.,* 3 Misc 2d 127.)

OPINION OF THE COURT

Cooke, J.

This case is another episode in the controversy over the supply of public utility services as between a municipal corporation and a privately owned public utility. We voice no policy preference but determine the rights of these parties under article 14-A of the General Municipal Law.

The scenario is laid in the northern reaches of our State. The combatants are the Town of Massena in St. Lawrence County (Massena), a municipal corporation, and Niagara Mohawk Power Corporation (Niagara Mohawk), a stock corporation presently supplying electrical energy to the region. The encounter, officially initiated by the passage of certain town board resolutions in 1974, intensified in 1975 when Massena instituted this condemnation proceeding in the County Court

of St. Lawrence County in respect to certain Niagara Mohawk property in the Town of Massena. The asserted purpose for the acquisition was to allow Massena to "own and operate its ***487** own electric distribution system and to supply electricity to the inhabitants" of the town. In opposition to this proceeding, Niagara Mohawk has unleashed a fusillade of legal objections.

After Massena filed its petition for condemnation on March 14, 1975 and an amended petition and motion for temporary possession on January 15, 1976, Niagara Mohawk moved for dismissal. County Court entered an order denying dismissal, directing Niagara Mohawk to serve and file its answer and denying temporary possession to Massena, without prejudice to renewal after service of an answer (see 87 Misc 2d 79). After service of an answer to the petition and amended petition on June 11, 1976, denying most of the allegations of the pleadings to which it responded and setting forth 10 affirmative defenses, and subsequent to Massena's renewal of its motion for temporary possession on July 19, 1976, a nonjury trial was held spanning a period of over two weeks in County Court. That court delineated the issues into six categories and decided all favorably to plaintiff Massena except it concluded that "plaintiff has materially departed from both the authorized plan of acquisition (i.e. construction) *and* its formerly proposed method of furnishing service to customers of the municipal utility." Because of this ascribed digression, it was deemed that dismissal of the petition must ensue and, consequently, temporary possession was denied.

In turn, a four-Justice majority in the Appellate Division viewed the determination that there had been a material deviation as being without support in the record and held that there had been substantial compliance by Massena with section 360 of the General Municipal Law (60 AD2d 139). By virtue of an order and amended order, the judgment of County Court was reversed on the law alone and the matter remitted with directions to grant the petition for condemnation by entry of an appropriate judgment together with the right of temporary possession. A single dissenter agreed that there had not been a material departure from the plan approved by referendum, but voted for affirmance on the base of noncompliance with subdivision 3 of section 360 which required that "the resolution submitted to the townspeople set forth 'both the maximum and the estimated costs' of the proposed enterprise" (60 AD2d, at p 147).

In this court, Niagara Mohawk's array of reasons for dismissal can be distilled into four categories: first, that Massena's method for furnishing public utility service varies from ***488** that described in the resolution of the town board and in the referendum submitted to the electors; second, that the resolution did not set forth "both the maximum and the estimated costs" of the project; third, that Massena failed to negotiate in good faith for the purchase of the property, a condition precedent to condemnation; and fourth, that Massena failed to obtain contracts for power supply and transmission, another such condition. Additionally, it is contended that the right of temporary possession should not have been granted. Massena counters with plethoric argumentation.

(1)First off, note must be taken of certain jurisdictional contentions raised by Massena. It is urged that Niagara Mohawk's third and fourth hypotheses, the asserted failure to negotiate in good faith and to obtain contracts for power supply and transmission, may not be considered by this court. Massena's reasoning is that Niagara Mohawk raised these points before County Court which specifically rejected them, and that Niagara Mohawk failed to cross-appeal to the Appellate Division from these findings; ergo, Niagara Mohawk, as appellant, has not preserved these objections. We reject this position. At trial level, Niagara Mohawk was the prevailing party and it secured the relief it sought, the dismissal of the petition. Although County Court rejected these arguments, the adjudicative provisions of the judgment made no mention of them and instead merely rendered a determination in favor of Niagara Mohawk. Thus, Niagara Mohawk was not aggrieved by the judgment and could not cross-appeal to the Appellate Division (CPLR 5511; see Cohen and Karger, Powers of the New York Court of Appeals, p 395). However, since Niagara Mohawk was entitled to raise these two points in the Appellate Division as alternative grounds for sustaining the County Court judgment, they were properly before the Appellate Division and are now before this court on the question certified (see *Logan v Guggenheim,* 230 NY 19, 21-22; 10 Carmody-Wait 2d, NY Prac, §70:423, pp 693-695). Secondly, Massena's assertion that all points raised by its adversary involve questions of fact, upon analysis, is only partially correct.

The resolution adopted by the town board on April 16, 1974, as subsequently approved by the qualified electors of the Town of Massena at the mandatory referendum held on May 30, 1974, provided in part: "Section 3. The *proposed method* of providing such public utility service system is by the acquisition thereof from the Niagara Mohawk Power Corporation ***489** pursuant to

condemnation proceedings to be instituted in conformance with law and the *proposed method* of constructing additions to such system, once it has been acquired, *consists of the construction of a sub- station and transmission line,* together with other related facilities incidental thereto, pursuant to contracts to be let in conformance with provisions of the General Municipal Law" (emphasis added). Unmistakably, the resolution "proposed" the "construction of a substation and transmission line", but just as definitely, as appears from a filing by Massena with the Federal Power Commission (now the Federal Energy Regulatory Commission), it appears that Massena has abandoned this construction for the present and has decided to use existing Niagara Mohawk transmission and subtransmission facilities for the wheeling of power. Hence, we are obliged to analyze this "change" to ascertain whether it is such as to vitiate the entire project--a novel question under the statute of our State.

Section 360 of the General Municipal Law, which confers powers upon municipal corporations to establish, own and operate certain public utility services, is the point from which our inquiry starts. Since subdivision 6 grants to such corporations the power to "acquire the public utility service of any public utility company *** by condemnation in the manner provided by law for condemnation by such municipal corporation of private property for a public use", it follows that compliance with 360 is a condition precedent to the right to condemn. The section does not expressly proscribe such a change in plan; neither does it manifest permission. In any event, the town board was required to "fix" by resolution "[t]he proposed method of constructing, leasing, purchasing, acquiring, the plant and facilities for such service together with both the maximum and the estimated costs thereof, and the method of furnishing such service" (subd 3).

(2)Although Niagara Mohawk's contention that the section must be construed literally, thus requiring that the method as ultimately executed be identical with that detailed in the resolution, is perhaps tenable, very sound reasons dictate otherwise. In any instance when a municipal corporation endeavors to enter into the public utility field, necessarily a time gap occurs between drafting the initial outline and actual completion of the project. During this interval, usually not of short duration, several contingencies may suggest or ***490** even necessitate a change of direction: e.g., spiraling costs may render the undertaking economically unfeasible; technical developments may make the plans obsolete; and demographic shifts may require a revamping of the system. In view of these and other pragmatic considerations, flexibility in implementation of a section 360 project is obviously necessary. To adopt a narrow interpretation, therefore, might well destroy for practical purposes the very statutory scheme which the Legislature has seen fit to enact. Furthermore, since a project once implemented may be altered freely without referendum submission (see 2 Opns St Comp, 1946, p 582; 2 Opns St Comp, 1946, p 556; *Illinois Power Co. v City of Jacksonville,* 18 Ill 2d 618), it would be absurd to insist on such strict adherence to the approved method.

(3, 4)Niagara Mohawk now, but never previously, poses the proposition that the town board resolution, authorizing acquisition and construction "at a maximum estimated cost of $4,500,000", was defective in not complying with the section 360 directive that "both the maximum and the estimated costs thereof" be fixed (subd 3). The statute prescribes that the town's power be exercised by resolution (see *Meredith v Connally,* 68 Misc 2d 956, 961 [Casey, J.], affd 38 AD2d 385; see, also, *Matter of Jewett v Luau-Nyack Corp.,* 31 NY2d 298, 303, 305-306). Such a resolution is clothed with a presumption of validity (cf. *Lighthouse Shores v Town of Islip,* 41 NY2d 7, 11-12; *Matter of Magnotta v Gerlach,* 301 NY 143, 149; *O'Connor v Greene,* 174 Misc 597, 598- 599). Words employed in the resolution will be construed according to their ordinary and plain meaning in the absence of a clear intent to the contrary expressed in the enactment (cf. *Fifth Ave. Coach Co. v City of New York,* 194 NY 19, 26-27, affd 221 US 467; 62 CJS, Municipal Corporations, § 442, pp 843, 846), and we should make an effort to interpret the language so as to give effect to the resolution rather than destroy it (see *Greenwood Volunteer Fire Co. v Dearden,* 64 RI 368). The plain and ordinary significance of the words "maximum estimated cost" followed by a single monetary figure is that the maximum and estimated costs are the same. The noun "cost" is modified by two adjectives, which separately qualify the subject which in turn relates to the object, a single sum. Neither modifier conflicts; in fact they coincide. It is the spirit rather than the letter of the resolution which determines its construction (cf. *Effell Realty Corp. v City of New York,* 165 Misc 176, 179, affd ***491** 256 App Div 972, affd 282 NY 541) and we should not exalt form over substance by holding that the town board was obliged to employ two separate sentences, one in respect to maximum costs and the other specifying the estimated, particularly when they can be united in a single statement with complete signification.

(5)The claim that Massena did not negotiate in good faith to purchase the property sought to be condemned, in substance a condition precedent to condemnation by virtue of subdivision

5 of section 4 of the Condemnation Law, was resolved against Niagara Mohawk by the County Court and the Appellate Division. The issue was essentially one of fact, involving Massena's statements, conduct and intentions considered in the context of the property owner's reactions. The Court of Appeals is the State's highest tribunal to settle the law; it sits in an appellate capacity primarily to review every question of law properly before it (Siegel, New York Practice [1978], p 13; Cohen and Karger, Powers of the New York Court of Appeals, pp 7, 29). "In civil cases, the court is empowered to review the facts only when (1) the Appellate Division has reversed or modified (2) a final or interlocutory determination and (3) made new findings of fact and (4) a final determination 'pursuant thereto' has been entered" (7 Weinstein- Korn-Miller, NY Civ Prac, par 5501.14; see NY Const, art VI, §3, subd a; CPLR 5501, subd [b]). Since the reversal effected by the amended order of the Appellate Division was expressly "on the law alone", with "no issue of fact *** considered" by said court, it is obvious that new findings of fact were not made and it follows as a definite legal consequence that the basically factual question as to Massena's inability to agree with the property owner for purchase may not be determined by or even advanced before this body.

(6)The contention, put forward without actual authority, that Massena has not satisfied a further condition precedent, in that it has not compacted for power supply, is without merit. In effect, it is maintained that Massena must arrange for its power supply before it can acquire title to the specified parts of Niagara Mohawk's utility system. For this proposition, section 4 of the Condemnation Law is cited. However, the only possibly relevant portion of that section is subdivision 7 which provides that the petition set forth "[a] statement that it is the intention of the plaintiff, in good faith, to complete the work or improvement *** and that all the preliminary ***492** steps required by law have been taken". In this instance section 360 of the General Municipal Law traces "the preliminary steps required by law" and nowhere therein can be gleaned a requirement that Massena adduce evidence of commitments for power supply or any other such item. As County Court held, the proof that the Power Authority of the State of New York will provide very substantial amounts of power is sufficient to negate dismissal of the petition in this respect.

(7)Section 24 of the Condemnation Law recites that a court "may direct" that a plaintiff be permitted to enter upon the real property to be taken "[w]hen it appears to the satisfaction of the court *** that the public interests will be prejudiced by delay". By reason of its dismissal of the petition after trial, County Court denied such possession. Previously it had declared on motion that Massena had shown that the public interest will be served best by a grant. It was noted that prolongation might necessitate submission of another bond proposition due to inflationary factors and added value resulting from improvements made by Niagara Mohawk, to the extent "that any substantial delay may ultimately result in a loss of that which the plaintiff seeks--a municipally owned electric utility." On appeal, the Appellate Division observed that the record revealed no basis for refusing possession. The direction that temporary possession be granted here was an "exercise of discretion", obviously without abuse since it was buttressed by obvious and substantial justifications (Condemnation Law, § 24; *City of Glen Cove v Utilities & Inds. Corp.*, 17 NY2d 205, 208). As such, the directive grant by the Appellate Division should not be disturbed.

The order of the Appellate Division should be affirmed, with costs, and the question certified answered in the negative.

Chief Judge Breitel and Judges Jasen, Gabrielli, Jones, Wachtler and Fuchsberg concur.
Order affirmed, etc. ***493**

End of Document

New York Official Reports

35 A.D.3d 455, 826 N.Y.S.2d 152, 2006 N.Y. Slip Op. 09230

**1 Gary F. Warrington, Respondent

v

Ryder Truck Rental, Inc., Appellant.

Supreme Court, Appellate Division, Second Department, New York
2006-02892, 4809/04
December 5, 2006

CITE TITLE AS: Warrington v Ryder Truck Rental, Inc.

HEADNOTE

Judgments
Summary Judgment

In action by truck driver, who was injured while standing on and operating lift gate attached to rear of truck owned and maintained by defendant, defendant was not entitled to summary judgment—evidence presented by defendant that it did not have notice of alleged defect consisted merely of attorney's hearsay affirmation that there were no open repair orders and that no complaints had been made to defendant regarding lift gates prior to occurrence; deposition testimony did not address those issues, and thus failed to put forth sufficient evidentiary proof to support attorney's affirmation —attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance, and accordingly, defendant failed to establish its prima facie entitlement to summary judgment.

In an action to recover damages for personal injuries, the defendant Ryder Truck Rental, Inc., appeals from an order of the Supreme Court, Nassau County (Davis, J.), dated February 16, 2006, which denied its motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed, with costs.

The plaintiff, a truck driver, allegedly injured his foot and ankle while standing on and operating a lift gate attached to the rear of a truck owned and maintained by the defendant Ryder Truck Rental, Inc. The defendant leased the truck to the *456 plaintiff's employer and, under the terms of the lease, was obligated to maintain and repair the vehicle. Under the terms of the agreement, the plaintiff's employer was required to return the vehicle to the defendant for ordinary maintenance and service for at least eight hours per week.

The defendant sought summary judgment on the ground that it did not create the defect with the lift gate and did not have actual or constructive notice thereof. Specifically, the defendant argued that it inspected the truck at issue on a weekly basis pursuant to the rental agreement with the plaintiff's employer; that no repair work to the lift gate had been necessary since eight months before the plaintiff's accident; that no one had notified the defendant of any defect with the lift gate leading up to the plaintiff's accident; and that there were no open repair orders for the **2 lift gate at the time of the accident. The Supreme Court denied the defendant's motion for summary judgment finding, in effect, that the plaintiff had raised questions of fact requiring trial, based upon the maintenance history of the lift gate and the affidavit of a shop steward that another employee had experienced difficulties with the lift gate four weeks before the accident. We affirm, but for reasons other than those relied upon by the Supreme Court.

The evidence presented by the defendant on its motion for summary judgment that it did not have notice of the alleged defect consisted merely of an attorney's hearsay affirmation that there were no open repair orders and that no complaints had been made to the defendant regarding the lift gates prior to the occurrence. The deposition testimony annexed to the motion papers did not address those issues, and thus failed to put forth sufficient evidentiary proof to support the attorney's affirmation (*cf. Olan v Farrell Lines*, 64 NY2d 1092, 1093 [1985]). An attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance (*see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384-385 [2005]; *Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; *Palo v Principio*, 303 AD2d 478, 479 [2003]; *Hirsch v Morgan Stanley & Co.*, 239 AD2d 466, 467 [1997]), and accordingly, the defendant failed to establish its prima facie entitlement to summary judgment. As the burden never shifted to the plaintiff, the defendant's motion should have been denied without regard to the sufficiency of the plaintiff's opposition papers (*see JMD Holding Corp.*

v Congress Fin. Corp., supra at 384; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Hughes v Cai*, 31 AD3d 385 [2006]). Prudenti, P.J., Schmidt, Dillon and Covello, JJ., concur. ***457**

6 S.Ct. 1064
Supreme Court of the United States

YICK WO

v.

HOPKINS, Sheriff, etc.[1] (In Error to the Supreme Court of the State of California.)

WO LEE

v.

SAME. (Appeal from the Circuit Court of the United States for the District of California.)

Filed May 10, 1886.

West Headnotes (1)

[1] **Constitutional Law** Other particular occupations and businesses

Municipal Corporations Validity of building regulations

The ordinances of the city of San Francisco give the board of supervisors authority, at their discretion, to refuse permission to carry on laundries, except where located in buildings of brick or stone. The appellants applied for and were refused permission, and thereafter they were convicted of a violation of the above ordinances, and sentenced to imprisonment. Held, that the ordinances were unconstitutional and invalid; it being a breach of the fourteenth amendment to the constitution to empower any man, or body of men, at his or their absolute and unrestrained discretion, to give or withhold permission to carry on a lawful business in any place.

2391 Cases that cite this headnote

Syllabus

****1065** These two cases were argued as one, and depend upon precisely the same state of facts; the first coming here upon a writ of error to the supreme court of the state of California, the second on appeal from the circuit court of the United States for that district.

The plaintiff in error, Yick Wo, on August 24, 1885, petitioned the supreme court of California for the writ of *habeas corpus*, alleging that he was illegally deprived of his personal liberty by the defendant as sheriff of the city and county of San Francisco. The sheriff made return to the writ that he held the petitioner in custody by virtue of a sentence of the police judge's court No. 2 of the city and county of San Francisco, whereby he was found guilty of a violation of certain ordinances of the board of supervisors of that county, and adjudged to pay a fine of $10, and, in default of payment, be imprisoned in the county jail at the rate of one day for each dollar of fine until said fine should be satisfied; and a commitment in consequence of non-payment of said fine.

The ordinances for the violation of which he had been found guilty are set out as follows:

Order No. 1,569, passed May 26, 1880, prescribing the kind of buildings in which laundries may be located.

'The people of the city and county of San Francisco do ordain as follows:

'Section 1. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry, within the corporate limits of the city and county of San Francisco, without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone.

'Sec. 2. It shall be unlawful for any person to erect, build, or maintain, or cause to be erected, built, or maintained, over or upon the roof of any building now erected, or which may hereafter be erected, within the limits of said city and county, any scaffolding, without first obtaining the written permission of the board of supervisors, which permit shall state fully for what purpose said scaffolding is to be erected and used, and such scaffolding shall not be used for any other purpose than that designated in such permit.

'Sec. 3. Any person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment.'

Order No. 1,587, passed July 28, 1880, the following section:

'Sec. 68. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone'

The following facts are also admitted on the record: That petitioner is a native of China, and came to California in 1861, and is still a subject of the emperor of China; that he has been engaged in the laundry business in the same premises and building for 22 years last past; that he had a license from the board of fire-wardens, dated March 3, 1884, from which it appeared 'that the above-described premises have been inspected by the board of fire-wardens, and upon such inspection said board found all proper arrangements for carrying on the business; that the stoves, washing and drying apparatus, and the appliances for heating smoothing-irons, are in good condition, and that **1066 their use is not dangerous to the surrounding property from fire, and that all proper precautions have been taken to comply with the provisions of order No. 1,617, defining 'the fire limits of the city and county of San Francisco, and making regulations concerning the erection and use of buildings in said city and county,' and of order No. 1,670, 'prohibiting the kindling, maintenance, and use of open fires in houses;' that he had a certificate from the health officer that the same premises had been inspected by him, and that he found that they were properly and sufficiently drained, and that all proper arrangements for carrying on the business of a laundry, without injury to the sanitary condition of the neighborhood, had been complied with; that the city license of the petitioner was in force, and expired October 1, 1885; and that the petitioner applied to the board of supervisors, June 1, 1885, for consent of said board to maintain and carry on his laundry, but that said board, on July 1, 1885, refused said consent.' It is also admitted to be true, as alleged in the petition, that on February 24, 1880, 'there were about 320 laundries in the city and county of San Francisco, of which about 240 were owned and conducted by subjects of China, and of the whole number, viz., 320, about 310 were constructed of wood, the same material that constitutes ninetenths of the houses in the city of San Francisco. The capital thus invested by the subjects of China was not less than two hundred thousand dollars, and they paid annually for rent, license, taxes, gas, and water about one hundred and eighty thousand dollars.' It is alleged in the petition that 'your petitioner, and more than one hundred and fifty of his countrymen, have been arrested upon the charge of carrying on business without having such special consent, while those who are not subjects of China, and who ar conducting eighty odd laundries under similar conditions, are left unmolested, and free to enjoy the enhanced trade and profits arising from this hurtful and unfair discrimination. The business of your petitioners, and of those of his countrymen similarly situated, is greatly impaired, and in many cases practically ruined, by this system of oppression to one kind of men, and favoritism to all others.'

The statement therein contained as to the arrest, etc., is admitted to be true, with the qualification only that the 80-odd laundries referred to are in wooden buildings without scaffolds on the roofs. It is also admitted 'that petitioner and 200 of his countrymen similarly situated petitioned the board of supervisors for permission to continue their business in the various houses which they had been occupying and using for laundries for more than twenty years, and such petitions were denied, and all the petitions of those who were not Chinese, with one exception of Mrs. Mary Meagles, were granted.'

By section 11 of article 11 of the constitution of California it is provided that 'any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.' By section 74 of the act of April 19, 1856, usually known as the 'Consolidation Act,' the board of supervisors is empowered, among other things, 'to provide by regulation for the prevention and summary removal of nuisances to public health, the prevention of contagious diseases; * * * to prohibit the erection of wooden buildings within any fixed limits where the streets shall have been established and graded; * * * to regulate the sale, storage, and use of gunpowder, or other explosive or combustible materials and substances, and make all needful regulations for protection against fire; to make such regulations concerning the erection and use of buildings as may be necessary for the safety of the inhabitants.'

The supreme court of California, in the opinion pronouncing the judgment in this case, said: 'The board of supervisors, under the several statutes conferring authority upon them, has

the power to prohibit or regulate all occupations which are against good morals, contrary to public order and decency, or dangerous to the public safety. Clothes-washing is certainly not opposed **1067 to good morals, or subversive of public order or decency, but when conducted in given localities it may be highly dangerous to the public safety. Of this fact the supervisors are made the judges, and, having taken action in the premises, we do not find that they have prohibited the establishment of laundries, but they have, as they well might do, regulated the places at which they should be established, the character of the buildings in which they are to be maintained, etc. The process of washing is not prohibited by thus regulating the places at which and the surroundings by which it must be exercised. The order No. 1,569 and section 68 of order No. 1,587 are not in contravention of common right, or unjust, unequal, partial, or oppressive, in such sense as authorizes us in this proceeding to pronounce them invalid.' After answering the position taken in behalf of the petitioner, that the ordinances in question had been repealed, the court adds: 'We have not deemed it necessary to discuss the question in the light of supposed infringement of petitioner's rights under the constitution of the United States, for the reason that we think the principles upon which contention on that head can be based have in effect been set at rest by the cases of *Barbier* v. *Connolly*, 113 U. S. 27, S. C. 5 Sup. Ct. Rep. 357, and *Soon Hing* v. *Crowley*, 113 U. S. 703, S. C. 5 Sup. Ct. Rep. 730.' The writ was accordingly discharged, and the prisoner remanded.

In the other case, the appellant, Wo Lee, petitioned for his discharge from an alleged illegal imprisonment, upon a state of facts, shown upon the record, precisely similar to that in the *Case of Yick Wo.* In disposing of the application, the learned Circuit Judge SAWYER, in his opinion, (26 Fed. Rep. 471,) after quoting the ordinance in question, proceeded at length as follows:

'Thus, in a territory some ten miles wide by fifteen or more miles long, much of it still occupied as mere farming and pasturage lands, and much of it unoccupied sand banks, in many places without a building within a quarter or half a mile of each other, including the isolated and almost wholly unoccupied Goat island, the right to carry on this, when properly guarded, harmless and necessary occupation, in a wooden building, is not made to depend upon any prescribed conditions giving a right to anybody complying with them, but upon the consent or arbitrary will of the board of supervisors. In three-fourths of the territory covered by the ordinance there is no more need of prohibiting or regulating laundries than if they were located in any portion of the farming regions of the state. Hitherto the regulation of laundries has been limited to the thickly-settled portions of the city. Why this unnecessary extension of the limits affected, if not designed to prevent the establishment of laundries, after a compulsory removal from their present locations, within practicable reach of the customers or their proprietors? And the uncontradicted petition shows that all Chinese applications are, in fact, denied, and those of Caucasians granted; thus, in fact, making the discriminations in the administration of the ordinance which its terms permit. The fact that the right to give consent is reserved in the ordinance shows that carrying on the laundry business in wooden buildings is not deemed of itself necessarily dangerous. It must be apparent to every well-informed mind that a fire, properly guarded, for laundry purposes, in a wooden building, is just as necessary, and no more dangerous, than a fire for cooking purposes or for warming a house. If the ordinance under consideration is valid, then the board of supervisors can pass a valid ordinance preventing the maintenance, in a wooden building, of a cooking-stove, heating apparatus, or a restaurant, within the boundaries of the city and county of San Francisco, without the consent of that body, arbitrarily given or withheld, as their prejudices or other motives may dictate. If it is competent for the board of supervisors to pass a valid ordinance prohibiting the inhabitants of San Francisco from following any ordinary, proper, and necessary calling within the limits of the city and county, except at its arbitrary and unregulated discretion and special **1068 consent,—and it can do so if this ordinance is valid,—then it seems to us that there has been a wide departure from the principles that have heretofore been supposed to guard and protect the rights, property, and liberties of the American people. And if, by an ordinance general in its terms and form, like the one in question, by reserving an arbitrary discretion in the enacting body to grant or deny permission to engage in a proper and necessary calling, a discrimination against any class can be made in its execution, thereby evading and in effect nullifying the provisions of the national constitution, then the insertion of provisions to guard the rights of every class and person in that instrument was a vain and futile act.

'The effect of the execution of this ordinance in the manner indicated in the record would seem to be necessarily to close up the many Chinese laundries now existing, or compel their owners to pull down their present buildings and reconstruct of brick or stone, or to drive them outside the city and county of San Francisco, to the adjoining counties, beyond the convenient reach of customers, either of which results would

be little short of absolute confiscation of the large amount of property shown to be now, and to have been for a long time, invested in these occupations. If this would not be depriving such parties of their property without due process of law, it would be difficult to say what would effect that prohibited result. The necessary tendency, if not the specific purpose, of this ordinance, and of enforcing it in the manner indicated in the record, is to drive out of business all the numerous small laundries, especially those owned by Chinese, and give a monopoly of the business to the large institutions established and carried on by means of large associated Caucasian capital. If the facts appearing on the face of the ordinance, on the petition and return, and admitted in the case, and shown by the notorious public and municipal history of the times, indicate a purpose to drive out the Chinese laundrymen, and not merely to regulate the business for the public safety, does it not disclose a case of violation of the provisions of the fourteenth amendment to the national constitution, and of the treaty between the United States and China, in more than one particular? * * * If this means prohibition of the occupation, and a destruction of the business and property, of the Chinese laundrymen in San Francisco,—as it seems to us this must be the effect of executing the ordinance,—and not merely the proper regulation of the business, then there is discrimination, and a violation of other highly important rights secured by the fourteenth amendment and the treaty. That it does mean prohibition, as to the Chinese, it seems to us must be apparent to every citizen of San Francisco who has been here long enough to be familiar with the course of an active and aggressive branch of public opinion and of public notorious events. Can a court be blind to what must be necessarily known to every intelligent person in the state? See *Ah Kow* v. *Nunan*, 5 Sawy. 560; *Sparrow* v. *Strong*, 3 Wall. 104; *Brown* v. *Piper*, 91 U. S. 42.'

But, in deference to the decision of the supreme court of California in the *Case of Yick Wo*, and contrary to his own opinion as thus expressed, the circuit judge discharged the writ and remanded the prisoner.

Attorneys and Law Firms

***363** *D. L. Smoot* and *Hall McAllister*, for plaintiff in error and appellant.

H. G. Sieberst, for Hopkins, Sheriff, etc.

Opinion

***365** MATTHEWS, J.

In the case of the petitioner, brought here by writ of error to the supreme court of California, our jurisdiction is limited to the question whether the plaintiff in error has been denied a right in violation of the constitution, laws, or treaties of the United States. The question whether his imprisonment is illegal, under the constitution and laws of the state, is not open to us. And although that question might have been considered ***366** in the circuit court in the application made to it, and by this court on appeal from its order, yet judicial propriety is best consulted by accepting the judgment ****1069** of the state court upon the points involved in that inquiry. That, however, does not preclude this court from putting upon the ordinances of the supervisors of the county and city of San Francisco an independent construction; for the determination of the question whether the proceedings under these ordinances, and in enforcement of them, are in conflict with the constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge.

We are consequently constrained, at the outset, to differ from the supreme court of California upon the real meaning of the ordinances in question. That court considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually to confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons; so that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of *mandamus* to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not

confided to their discretion in the legal sense of that term, but is granted ***367** to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.

This erroneous view of the ordinances in question led the supreme court of California into the further error of holding that they were justified by the decisions of this court in the cases of *Barbier* v. *Connelly*, 113 U. S. 27, S. C. 5 Sup. Ct. Rep. 357, and *Soon Hing* v. *Crowley*, 113 U. S. 703, S. C. 5 Sup. Ct. Rep. 730. In both of these cases the ordinance involved was simply a prohibition to carry on the washing and ironing of clothes in public laundries and wash houses, within certain prescribed limits of the city and county of San Francisco, from 10 o'clock at night until 6 o'clock in the morning of the following day. This provision was held to be purely a police regulation, within the competency of any municipality possessed of the ordinary powers belonging to such bodies,—a necessary measure of precaution in a city composed largely of wooden buildings, like San Francisco, in the application of which there was no invidious discrimination against any one within the prescribed limits; all persons engaged in the same business being treated alike, and subject to the same restrictions, and entitled to the same privileges, under similar conditions. For these reasons that ordinance was adjudged not to be within the prohibitions of the fourteenth amendment to the constitution of the United States, which, it was said in the first case cited, 'undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same ****1070** pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that, in the administration of criminal justice, no different or higher punishment should be imposed upon ***368** one than such as is prescribed to all for like offenses. * * * Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if, within the sphere of its operation, it affects alike all persons similarly situated, is not within the amendment.'

The ordinance drawn in question in the present case is of a very different character. It does not prescribe a rule and conditions, for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows, without restriction, the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this: that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature.

The rights of the petitioners, as affected by the proceedings of which they complain, are not less because they are aliens and subjects of the emperor of China. By the third article of the treaty between this government and that of China, concluded November 17, 1880, (22 St. 827), it is stipulated: 'If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, ***369** the government of the United States will exert all its powers to devise measures for their protection, and to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty.' The fourteenth amendment to the constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by section 1977 of the

Revised Statutes that 'all persons within the jurisdiction of the United States shall have the same right, in every state and territory, to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.' The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.

It is contended on the part of the petitioners that the ordinances for violations of which they are severally sentenced to imprisonment are void on **1071 their face, as being within the prohibitions of the fourteenth amendment, and, in the alternative, if not so, that they are void by reason of their administration, operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances,—an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances, is made possible by them.

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed *370 to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion, or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts bill of rights, the government of the commonwealth 'may be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

There are many illustrations that might be given of this truth, which would make manifest that it was self-evident in the light of our system of jurisprudence. The case of the political franchise of voting is one. Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights. In reference to that right, it was declared by the supreme judicial court of Massachusetts, in *Capen* v. *Foster*, 12 Pick. 485, 488, in the words of Chief Justice SHAW, 'that in all *371 cases where the constitution has conferred a political right or privilege, and where the constitution has not particularly designated the manner in which that right is to be exercised, it is clearly within the just and constitutional limits of the legislative power to adopt any reasonable and uniform regulations, in regard to the time and mode of exercising that right, which are designed to secure and facilitate the exercise of such right in a prompt, orderly, and convenient manner;' nevertheless, 'such a construction would afford no warrant for such an exercise of legislative power as, under the pretense and color of regulating, should subvert or injuriously restrain, the right itself.' It has accordingly been held generally in the states that whether the particular provisions of an act of legislation establishing means for ascertaining the qualifications of those entitled to vote, and making previous registration in lists of such, a condition precedent to the exercise of the right, were or were not reasonable regulations, and accordingly valid or void, was always open to inquiry, as a judicial question. See *Daggett* v. *Hudson*, 3 N. E. Rep. 538, decided by the supreme court of Ohio, where many of the cases are collected; *Monroe* v. *Collins*, 17 Ohio St. 666.

The same principle has been more freely extended to the *quasi* legislative acts of inferior municipal bodies, in respect to which it is an ancient jurisdiction of judicial tribunals to pronounce upon the reasonableness and consequent **1072 validity of their by-laws. In respect to these it was the doctrine that every by-law must be reasonable, not inconsistent with the charter of the corporation, nor with any statute of parliament, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject, or the rights of private property. Dill. Mun. Corp. (3d Ed.) § 319, and cases cited in notes. Accordingly, in the case of *State* v. *Cincinnati Gas-light & Coke Co.*, 18 Ohio St. 262, 300, an ordinance of the city council purporting

to fix the price to be charged for gas, under an authority of law giving discretionary power to do so, was held to be bad, if passed in bad faith, fixing an unreasonable price, for the fraudulent purpose of compelling ***372** the gas company to submit to an unfair appraisement of their works. And a similar question, very pertinent to the one in the present cases, was decided by the court of appeals of Maryland in the case of *City of Baltimore* v. *Radecke*, 49 Md. 217. In that case the defendant had erected and used a steam-engine, in the prosecution of his business as a carpenter and box-maker in the city of Baltimore, under a permit from the mayor and city council, which contained a condition that the engine was 'to be removed after six months' notice to that effect from the mayor.' After such notice, and refusal to conform to it, a suit was instituted to recover the penalty provided by the ordinance, to restrain the prosecution of which a bill in equity was filed. The court holding the opinion that 'there may be a case in which an ordinance, passed under grants of power like those we have cited, is so clearly unreasonable, so arbitrary, oppressive, or partial, as to raise the presumption that the legislature never intended to confer the power to pass it, and to justify the courts in interfering and setting it aside as a plain abuse of authority,' it proceeds to speak, with regard to the ordinance in question, in relation to the use of steam-engines, as follows: 'It does not profess to prescribe regulations for their construction, location, or use; nor require such precautions and safeguards to be provided by those who own and use them as are best calculated to render them less dangerous to life and property; nor does it restrain their use in box factories and other similar establishments within certain defined limits; not in any other way attempt to promote their safety and security without destroying their usefulness. But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam-engine in the prosecution of any business in the city of Baltimore to cease to do so, and, by providing compulsory fines for every day's disobedience of such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action. It lays down no ***373** rules by which its impartial execution can be secured, or partiality and oppression prevented. It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they are directed, while others, from whom they are withheld, may be actually benefited by what is thus done to their neighbors; and, when we remember that this action of non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment, and difficult to be detected and exposed, it becomes unnecessary to suggest or comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void.' This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary pendency and ultimate actual operation.

In the present cases, we are not obliged to reason from the probable to the ****1073** actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration; for the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the constitution of the United States. Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal ***374** hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. This principle of interpretation has been sanctioned by this court in *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Chy Luny* v. *Freeman*, 92 U. S. 275; *Ex parte Virginia*, 100 U. S. 339; *Neal* v. *Delaware*, 103 U.S. 370; and *Soon Hing* v. *Crowley*, 113 U. S. 703; S. C. 5 Sup. Ct. Rep. 730.

The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite deemed by the law, or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why

they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood; and while this consent of the supervisors is withheld from them, and from 200 others who have also petitioned, all of whom happen to be Chinese subjects, 80 others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the constitution. The imprisonment of the petitioners is therefore illegal, and they must be discharged. To this end the judgment of the supreme court of California in the *Case of Yick Wo*, and that of the circuit court of the United States for the district of California in the *Case of Wo Lee*, are severally reversed, and the cases remanded, each to the proper court, with directions to discharge the petitioners from custody and imprisonment.

All Citations

118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220

Footnotes

1 S. C. 9 Pac. Rep. 139.

End of Document

New York Official Reports

30 N.Y.3d 719, 94 N.E.3d 471, 70 N.Y.S.3d 909, 2018 N.Y. Slip Op. 01148

**1 Barbara Connolly et al., Respondents,

v

Long Island Power Authority et al., Appellants, et al., Defendant.

William Baumann et al., Respondents,

v

Long Island Power Authority et al., Appellants, et al., Defendant.

William Heeran, Individually and on Behalf of Harbor Light Enterprises Corp. and Another, et al., Respondents,

v

Long Island Power Authority (LIPA) et al., Appellants, et al., Defendants.

Court of Appeals of New York
11, 12, 13
Argued January 9, 2018

Decided February 20, 2018

CITE TITLE AS: Connolly v Long Is. Power Auth.

SUMMARY

Appeal, in the first above-entitled action, by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of that Court, entered July 13, 2016. The Appellate Division affirmed an order of the Supreme Court, Queens County (Bernice D. Siegal, J.), which had denied the joint motion by defendants Long Island Power Authority, Long Island Lighting Company and National Grid Electric Services, LLC pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint insofar as asserted against them. The following question was certified by the Appellate Division: "Was the decision and order of this Court dated July 13, 2016, properly made?"

Appeal, in the second above-entitled action, by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of that Court, entered July 13, 2016. The Appellate Division affirmed an order of the Supreme Court, Queens County (Bernice D. Siegal, J.; op 45 Misc 3d 257 [2014]), which had denied the joint motion by defendants Long Island Power Authority, Long Island Lighting Company and National Grid Electric Services, LLC pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint insofar as asserted against them. The following question was certified by the Appellate Division: "Was the decision and order of this Court dated July 13, 2016, properly made?"

Appeal, in the third above-entitled action, by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of that Court, entered July 13, 2016. The Appellate Division affirmed an order of the Supreme Court, Queens County (Bernice D. Siegal, J.; op *720 2014 NY Slip Op 32205[U] [2014]), which had denied the joint motion by defendants Long Island Power Authority and National Grid Electric Services, LLC, incorrectly sued herein as Keyspan Electric Services, Inc., pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint insofar as asserted against them. The following question was certified by the Appellate Division: "Was the decision and order of this Court dated July 13, 2016, properly made?"

Connolly v Long Is. Power Auth., 141 AD3d 555, affirmed.

Baumann v Long Is. Power Auth., 141 AD3d 554, affirmed.

Heeran v Long Is. Power Auth. (LIPA), 141 AD3d 561, affirmed.

HEADNOTE

Public Authorities
Long Island Power Authority
Governmental Function Immunity

Defendants, the Long Island Power Authority (LIPA), a wholly-owned subsidiary of LIPA and an electrical energy provider that contracted with LIPA, were not entitled to dismissal of plaintiffs' complaints on the ground that LIPA was immune from liability based on the doctrine of governmental function immunity, where defendants failed to establish that LIPA's decision not to shut down power

to plaintiffs' service area before or during Hurricane Sandy, which allegedly caused the fires that ultimately destroyed plaintiffs' property, was a governmental function. A government entity performs a purely proprietary role when its activities essentially substitute for or supplement traditionally private enterprises. In contrast, a government entity will be deemed to have been engaged in a governmental function when its acts are undertaken for the protection and safety of the public pursuant to the general police powers. Plaintiffs' allegations concerned the provision of electrical power by defendants, a service that traditionally had been provided by private entities in the State of New York. Moreover, the magnitude of the disaster, without any reference to the circumstances and nature of the specific act or omission alleged, did not render the challenged conduct governmental as a matter of law.

RESEARCH REFERENCES

Am Jur 2d Municipal, County, School, and State Tort Liability §§ 38, 40, 52.

NY Jur 2d Government Tort Liability §§ 15, 135; NY Jur 2d Public Authorities § 11.

ANNOTATION REFERENCE

See ALR Index under Governmental Immunity or Privilege.

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***721** Query: government! /2 function /3 immun! & power /2 authority

POINTS OF COUNSEL

Lazer, Aptheker, Rosella & Yedid, P.C., Melville (*David Lazer* and *Zachary Murdock* of counsel), and *Hammill, O'Brien, Croutier, Dempsey, Pender & Koehler, P.C.*, Syossett (*William J. Croutier, Jr.* and *Erin N. Mackin* of counsel), for appellants in the first, second and third above-entitled actions.

I. Long Island Power Authority exercised a governmental function when it decided not to preemptively de-energize the Rockaway Peninsula in anticipation of Superstorm Sandy. (*Haddock v City of New York*, 75 NY2d 478; *Valdez v City of New York*, 18 NY3d 69; *Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d 428; *Cuffy v City of New York*, 69 NY2d 255; *Moch Co. v Rensselaer Water Co.*, 247 NY 160; *Lauer v City of New York*, 95 NY2d 95; *Applewhite v Accuhealth, Inc.*, 21 NY3d 420; *Riss v City of New York*, 22 NY2d 579; *Miller v State of New York*, 62 NY2d 506; *Laratro v City of New York*, 8 NY3d 79.) II. The amended complaint fails to allege facts that, if proved, would establish an exception to the governmental function immunity doctrine. (*McLean v City of New York*, 12 NY3d 194; *Tango v Tulevech*, 61 NY2d 34; *Lauer v City of New York*, 95 NY2d 95.) III. National Grid Electric Services, LLC, as an entity in contract with Long Island Power Authority, performed a governmental function in preparing for and responding to Superstorm Sandy. (*Altro v Conrail*, 130 AD2d 612; *Weiner v Metropolitan Transp. Auth.*, 55 NY2d 175; *Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d 428; *Matter of Crown Communication N.Y., Inc. v Department of Transp. of State of N.Y.*, 4 NY3d 159; *Howard v Finnegans Warehouse Corp.*, 33 AD2d 1090; *Berger v 34th St. Garage*, 3 NY2d 701; *Mohammed v D.H. Farney Contrs.*, 881 F Supp 110; *Isbrandtsen Co. v Lenaghan*, 128 F Supp 662; *Bates v Holbrook*, 171 NY 460; *Ramme v Long Is. R.R. Co.*, 226 NY 327.)

Sullivan Papain Block McGrath & Cannavo P.C., New York City (*Brian J. Shoot* and *Eric K. Schwarz* of counsel), for respondents in the first and second above-entitled actions.

I. Liability is imposed under ordinary tort standards where the conduct that caused the alleged injuries was "proprietary" in nature. (*Sebastian v State of New York*, 93 NY2d 790; *Miller v State of New York*, 62 NY2d 506; *Riss v City of New York*, 22 NY2d 579; *Valdez v City of New York*, 18 NY3d 69; ***722** *Turturro v City of New York*, 28 NY3d 469; *Price v New York City Hous. Auth.*, 92 NY2d 553; *Wittorf v City of New York*, 23 NY3d 473; *Schrempf v State of New York*, 66 NY2d 289; *Weiss v Fote*, 7 NY2d 579; *Alexander v Eldred*, 63 NY2d 460.) II. The conduct in issue was plainly "proprietary" and thus governed by the same tort standards as would apply to any other utility. (*Haddock v City of New York*, 75 NY2d 478; *Turturro v City of New York*, 28 NY3d 469; *Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d 428; *Miller v State of New York*, 62 NY2d 506; *Wittorf v City of New York*, 23 NY3d 473; *Sebastian v State of New York*, 93 NY2d 790; *Applewhite v Accuhealth, Inc.*, 21 NY3d 420; *Kovit v Estate of Hallums*, 4 NY3d 499; *Balsam v Delma Eng'g Corp.*, 90 NY2d 966; *Friedman v State of New York*, 67 NY2d 271.) III. Appellants' argument that the conduct in issue was akin to a "governmental" failure to protect the public from "criminals," "third persons," or "natural disasters" is fundamentally flawed inasmuch as the "outside force" from

which plaintiffs herein required protection was the appellants' own electrical lines. (*Garricks v City of New York*, 1 NY3d 22; *Cockburn v City of New York*, 129 AD3d 895; *Estate of Gail Radvin v City of New York*, 119 AD3d 730; *Freeman v City of New York*, 111 AD3d 780; *In re Signal Intl., LLC*, 579 F3d 478.) IV. Long Island Power Authority's argument for immunity is also inconsistent with the Public Service Law, the State-approved tariff that directly governs its tort liability, and the Long Island Power Authority Act itself. (*Newman v Consolidated Edison Co.*, 79 Misc 2d 153; *Bowen v Niagara Mohawk Power Corp.*, 183 AD2d 293; *Zoller v Niagara Mohawk Power Corp.*, 137 AD2d 947; *Flex-O-Vit USA v Niagara Mohawk Power Corp.*, 292 AD2d 764; *Matter of Jewish Home & Infirmary of Rochester v Commissioner of N.Y. State Dept. of Health*, 84 NY2d 252; *City of New York v Long Is. Power Auth.*, 14 AD3d 642.) V. Long Island Power Authority's claim that its theorized governmental immunity should extend to its investor-owned contractor fails for the additional reason that New York has consistently rejected any form of government contractor tort immunity. (*Bates v Holbrook*, 171 NY 460; *Turner v Degnon-McLean Contr. Co.*, 99 App Div 135; *Royal Ins. Co. of Am. v RU-VAL Elec. Corp.*, 918 F Supp 647; *Steinberg v New York City Tr. Auth.*, 88 AD3d 582; *Clark v City of New York*, 130 AD3d 964; *Howard v Finnegans Warehouse Corp.*, 33 AD2d 1090; *Berger v 34th St. Garage*, 3 NY2d 701; *Sue/Perior Concrete & Paving, Inc. v Lewiston Golf Course Corp.*, 24 NY3d 538; ***723** *Matter of Crown Communication N.Y., Inc. v Department of Transp. of State of N.Y.*, 4 NY3d 159; *Filarsky v Delia*, 566 US 377.) VI. Appellants' appeals to "public policy" turn on demonstrably false assertions. (*Trawally v City of New York*, 137 AD3d 492; *Arriola v City of New York*, 128 AD3d 747; *Brunero v City of N.Y. Dept. of Parks & Recreation*, 121 AD3d 624; *Lee v Consolidated Edison Co. of N.Y.*, 98 Misc 2d 304; *Weld v Postal Telegraph-Cable Co.*, 199 NY 88.)

Pollack, Pollack, Isaac & DeCicco, LLP, New York City (*Brian J. Isaac* of counsel), and *Godosky & Gentile, P.C.* (*Anthony P. Gentile* of counsel), for respondents in the third above-entitled action.

I. Long Island Power Authority (LIPA) is not entitled to immunity because the provision of electricity was traditionally a proprietary function; there is no evidence of any actual decision or discretion, as LIPA delegated the running of its power grid to National Grid; statutes and regulations impose a duty of reasonable care upon LIPA, as does its own tariff, which provides that it will be liable for ordinary negligence; accordingly, the denial of the motion to dismiss was appropriate. (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342; *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633; *Leon v Martinez*, 84 NY2d 83; *Wittorf v City of New York*, 23 NY3d 473; *Miller v State of New York*, 62 NY2d 506; *Weiner v Metropolitan Transp. Auth.*, 55 NY2d 175; *Bass v City of New York*, 32 NY2d 894; *DiLauro v Consolidated Edison Co. of N.Y.*, 200 AD2d 485; *Miner v Long Is. Light. Co.*, 40 NY2d 372.) II. De-energization of an electrical power line is standard utility practice performed on a regular basis by utilities throughout the country; it does not involve extraordinary discretionary action as described by defense counsel in its brief. (*Tallarico v Long Is. Light Co.*, 45 AD2d 845; *Austro v Niagara Mohawk Power Corp.*, 103 AD2d 903; *Ward v Atlantic & Pac. Tel. Co.*, 71 NY 81; *Braun v Buffalo Gen. Elec. Co.*, 200 NY 484; *Huscher v New York & Queens Elec. Light & Power Co.*, 223 NY 615; *Russell v New York State Elec. & Gas Corp.*, 276 App Div 44.) III. National Grid may not "borrow" Long Island Power Authority's alleged immunity. (*Bates v Holbrook*, 171 NY 460; *Mairs v Manhattan Real Estate Assn.*, 89 NY 498; *Clark v City of New York*, 130 AD3d 964; *Steinberg v New York City Tr. Auth.*, 88 AD3d 582; *Berger v 34th St. Garage*, 3 NY2d 701; *Sue/Perior Concrete & Paving, Inc. v Lewiston Golf Course Corp.*, 24 NY3d 538; *Matter of Crown Communication N.Y., Inc. v Department of Transp. of State of N.Y.*, 4 NY3d 159; *Filarsky v Delia*, 566 US 377; *Altro v Conrail*, 130 AD2d 612; *Matter of County of Monroe [City of Rochester]*, 72 NY2d 338.) IV. The arguments ***724** and citations in defendants' brief do not support the recognition of immunity sufficient to grant their motion to dismiss. (*Ernest v Red Creek Cent. School Dist.*, 93 NY2d 664; *Alexander v Eldred*, 63 NY2d 460; *Havas v Victory Paper Stock Co., Inc.*, 49 NY2d 381; *Palsgraf v Long Is. R.R. Co.*, 248 NY 339; *Kovit v Estate of Hallums*, 4 NY3d 499; *Friedman v State of New York*, 67 NY2d 271; *Cockburn v City of New York*, 129 AD3d 895; *Estate of Gail Radvin v City of New York*, 119 AD3d 730; *Freeman v City of New York*, 111 AD3d 780; *Garricks v City of New York*, 1 NY3d 22.)

OPINION OF THE COURT

Stein, J.

The narrow issue before us on these appeals is whether defendants Long Island Power Authority (LIPA), Long Island Lighting Company (LILCO), and National Grid Electric Services, LLC (National Grid, and collectively with LIPA and LILCO, defendants) are entitled to dismissal of plaintiffs' amended complaints on the rationale that the actions challenged were governmental and discretionary as a matter of law, and, even assuming the actions were not discretionary, that plaintiffs' failure to allege a special duty is a

fatal defect. Because defendants have not met their threshold burden of demonstrating that the action was governmental in the context of these pre-answer, pre-discovery CPLR 3211 (a) (7) motions, we cannot say that the complaints fail to state causes of action as a matter of law. We therefore affirm.

I.

LIPA is a public authority that was created by the legislature in 1986 to provide a "safer, more efficient, reliable and economical supply of electric energy" in the service area of LILCO, which includes the Rockaway Peninsula in Queens County (*see* Public Authorities Law § 1020-a). Due to rising costs of electricity and a lack of confidence in the ability of LILCO—an "investor owned utility" at the time—the legislature determined that "[s]uch matters of state concern best can be dealt with by replacing [LILCO] with a publicly owned power authority" (*id.*). To effectuate these purposes, the legislature created LIPA as a "corporate municipal instrumentality of the state . . . which shall be a body corporate and politic and a political subdivision of the state, exercising essential governmental and public powers," and authorized it to operate in LILCO's service area (Public Authorities Law § 1020-c [1], [2]).

***725** At the direction of the legislature, LIPA acquired LILCO including, among other things, its electric transmission and distribution facilities (T&D System) (*see* Public Authorities Law § 1020-h [1] [b]; *Matter of Suffolk County v Long Is. Power Auth.*, 258 AD2d 226, 228 [2d Dept 1999], *lv denied* 94 NY2d 759 [2000]). The T&D System consists of the equipment necessary to bring power onto Long Island from high-load power lines, towers, and substations, and to deliver power to individual customers. As a result of the acquisition, LILCO became a wholly-owned subsidiary of LIPA, entitled by statute to "all the privileges [and] immunities . . . of [LIPA]" (Public Authorities Law § 1020-i [2]). Meanwhile, in preparation for the acquisition, LIPA entered into a Management Services Agreement (MSA) with LILCO, which was eventually assigned to the entity now known as National Grid. The MSA governed all aspects of the relationship between LIPA and National Grid at the relevant time, including National Grid's main function of operating and maintaining the T&D System. ****2**

In each of the actions presently before us, plaintiffs allege that their real and personal property was destroyed by fire as a result of defendants' negligent failure to preemptively de-energize the Rockaway Peninsula prior to or after Hurricane Sandy made landfall in October 2012.[1] As alleged in plaintiffs' complaints, the Governor declared a state of emergency in all counties across New York State in preparation for the potential impact of the storm, and the National Hurricane Center warned of a "life-threatening storm surge" that could cause "repeated and extended periods of coastal and bayside flooding." Further, the Mayor of the City of New York issued Executive Order [Bloomberg] No. 163 ordering the evacuation of Zone A, which included the Rockaway Peninsula. Nevertheless, LIPA did not shut down power to the area, even though Consolidated Edison —the utility supplying most of the electricity to the five boroughs of New York City—preemptively did so in its service area in order to avoid salt water from the surge coming into contact with its electrical systems. According to plaintiffs, when the Rockaway Peninsula flooded due to storm surges from Hurricane Sandy, flood water came into contact with components of the T&D System, causing short circuits, fires and, ultimately, the destruction of plaintiffs' property. ***726** Plaintiffs also alleged in their amended complaints that LIPA persisted in failing to shut down power despite having received actual notice of downed, live power lines.

Defendants moved to dismiss the amended complaints pursuant to CPLR 3211 (a) (7) insofar as asserted against them on the ground that LIPA was immune from liability based on the doctrine of governmental function immunity, and that LILCO and National Grid were entitled to the same defense. Specifically, LIPA argued, among other things, that the actions challenged were taken in the exercise of its governmental capacity and were discretionary, and, even if they were not discretionary, plaintiffs' failure to allege a special duty in the complaints amounted to a failure to state viable claims. Plaintiffs opposed the motions on the ground that defendants' actions were proprietary, not governmental, and that special duty rules did not apply. Supreme Court denied the motions to dismiss in three substantially similar orders.

On defendants' appeals, the Appellate Division, Second Department, with one Justice dissenting, affirmed each order denying defendants' motions to dismiss (141 AD3d 555 [2d Dept 2016]; 141 AD3d 554 [2d Dept 2016]; 141 AD3d 561 [2d Dept 2016]). The Court held that LIPA was not entitled to governmental immunity because the provision of electricity is properly categorized as a proprietary function and, in the Court's view, the functions of both providing electricity in the ordinary course and in responding to a hurricane are part of the proprietary core functions of electric utilities.

The Court also rejected National Grid's claim of immunity on the basis that it presupposed that LIPA was entitled to governmental immunity. The dissenting Justice agreed that defendants were engaged in a generally proprietary activity as providers of electricity, but would have held that the specific acts or omissions alleged in the complaints were related, not to defendants' general operations but, instead, to the governmental function of preparing for, and responding to, a natural disaster (141 AD3d at 571-573 [Miller, J., dissenting]).

The Appellate Division granted defendants leave to appeal to this Court, in each case, certifying the question of whether its order was properly made.

II.

It is well settled that, "[d]espite the sovereign's own statutory surrender of common-law tort immunity for the misfeasance ***727** of its employees, governmental entities somewhat incongruously claim—and unquestionably continue to enjoy—a significant measure of immunity fashioned for their protection by the courts" (*Haddock v City of New York*, 75 NY2d 478, 484 [1990]). The doctrine of governmental function immunity "reflects separation of powers principles and is intended to ensure that public servants are free to exercise their decision-making authority without interference from the courts" (*Valdez v City of New York*, 18 NY3d 69, 76 [2011]). Additionally,

> "this immunity reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury" ****3** (*Haddock*, 75 NY2d at 484).

Because the issue in this CPLR 3211 (a) (7) motion is whether plaintiffs' complaints have stated a viable claim, the first issue that we must consider "is whether the . . . entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose" (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 [2013]). This is so because, if the action challenged in the litigation is governmental, the existence of a special duty is an element of the plaintiff's negligence cause of action (*see Lauer v City of New York*, 95 NY2d 95 [2000]). As this Court recently explained:

> "A government entity performs a purely proprietary role when its activities essentially substitute for or supplement traditionally private enterprises. In contrast, a [government entity] will be deemed to have been engaged in a governmental function when its acts are undertaken for the protection and safety of the public pursuant to the general police powers" (*Turturro v City of New York*, 28 NY3d 469, 477-478 [2016] [internal quotation marks and citations omitted]; *see Sebastian v State of New York*, 93 NY2d 790, 793 [1999]).

This Court has observed that "[a] governmental entity's conduct may fall along a continuum of responsibility to individuals and society deriving from its governmental and proprietary functions" (*Miller v State of New York*, ***728** 62 NY2d 506, 511-512 [1984]), and that "the determination . . . may present a close question for the courts to decide" (*Applewhite*, 21 NY3d at 425). Consequently, "[w]hen the liability of a governmental entity is at issue, it is the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred which governs liability" (*Miller*, 62 NY2d at 513 [internal quotation marks, brackets and citation omitted]). Put differently, "the determination of the primary capacity under which a governmental agency was acting turns solely on the acts or omissions claimed to have caused the injury" (*Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d 428, 447 [2011], *cert denied sub nom. Ruiz v Port Auth. of N.Y. & N.J.*, 568 US 817 [2012]).

Assuming the government entity was acting in a governmental capacity, the plaintiff may nevertheless state a viable claim by alleging the existence of a special duty to the plaintiff (*see Turturro*, 28 NY3d at 478). If the plaintiff establishes the elements of the cause of action, including special duty, the government entity can avoid liability under the governmental function immunity defense by proving the challenged actions were discretionary in nature and that discretion was, in fact, exercised (*see id.*; *Valdez*, 18 NY3d at 75-76). However, because the governmental immunity defense protects government entities from liability only for discretionary actions taken during the performance of governmental functions, "[t]he . . . defense has no applicability where the [entity] has acted in a proprietary capacity, even if the acts of the [entity] may be characterized as discretionary" (*Turturro*, 28 NY3d at 479; *see Matter of World Trade Ctr.*, 17 NY3d at 432).

III.

In assessing defendants' motions to dismiss under CPLR 3211 (a) (7), we must accept plaintiffs' allegations as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether plaintiffs have a cause of action

(*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). At the same time, defendants bear the burden of establishing that the complaint fails to state a viable cause of action. Thus, the threshold inquiry distills to whether defendants have established that the challenged action, or failure to act, was governmental, as a matter of law, based solely on plaintiffs' amplified pleadings (*see id.* at 88).

As noted above, plaintiffs averred that defendants were negligent in failing to preemptively de-energize or otherwise ***729** suspend the provision of electricity to the Rockaway Peninsula. Specifically, plaintiffs alleged that defendants failed to take action despite repeated warnings that Hurricane Sandy would create a massive surge, inundating the locality with salt water that was likely to come into contact with components of defendants' T&D System, which defendants knew created a risk of fire and which, in fact, caused such fires. Plaintiffs further alleged that, notwithstanding defendants' actual knowledge of downed live electrical lines, they persisted in their failure to de-energize the area.

Viewing these allegations in the light most favorable to plaintiffs, as we must given the procedural posture, plaintiffs' allegations concern the provision of electrical power by defendants, a service that traditionally has been provided by private entities in the State of New York. In fact, LIPA itself was created to replace LILCO which, at the time, was an "investor owned utility" (Public Authorities Law § 1020-a). This takeover was anomalous and, when the legislation creating LIPA was enacted, the New York State Public Service Commission—the agency ****4** charged with ensuring safe and reliable utility service throughout the State—observed that, "[i]n New York State we have generally adopted a system of private ownership subject to close regulation" (NY St Dept of Pub Serv Mem at 1, Bill Jacket, L 1986, ch 517 at 21). In that vein, during a debate concerning the bill, the Senate acknowledged that passage of the bill marked an "extraordinary event in the history of New York State" (NY Senate Debate on L 1986, ch 517 at 7060-7061). Moreover, the record demonstrates that LILCO itself observed that "[t]he draft bill breaks new . . . ground on several scores[;] . . . there is no precedent whatsoever for a utility takeover of this magnitude by any means anywhere in this country" (LILCO Mem, July 2, 1986 at 3).

Indeed, LIPA does not dispute that the provision of electricity traditionally has been a private enterprise which, in the normal course of operations, would be a proprietary function. However, LIPA argues that its alleged decision to refrain from shutting down electrical power to, or failure to de-energize, the Rockaway Peninsula—the specific act or omission alleged in the amended complaints—was a governmental function under the circumstances here because it related more broadly to the protection of the public from a natural disaster.

Given the procedural posture, we cannot say, as a matter of law based only on the allegations in the amended complaints, ***730** as amplified, that LIPA was acting in a governmental, rather than a proprietary, capacity when engaged in the conduct claimed to have caused plaintiffs' injuries. We reject defendants' claim that the magnitude of the disaster, without any reference to the circumstances and nature of the specific act or omission alleged—i.e., the failure to de-energize—renders LIPA's conduct governmental as a matter of law.[2] Inasmuch as defendants have failed to meet their burden to establish that plaintiffs' amended complaints failed to state viable claims, we hold that the courts below properly denied LIPA's motions to dismiss.[3]

Accordingly, in each appeal, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

Rivera, J. (concurring). Defendants are electrical power suppliers for customers in Suffolk and Nassau Counties and parts of Queens County, New York. Defendant Long Island Power Authority (LIPA) is a publicly-owned power authority created in 1986 to replace the existing investor-owned utility, defendant Long Island Lighting Company (LILCO), for the purpose of "assuring the provision of an adequate supply of electricity in a reliable, efficient and economic manner" to LILCO's customers (*see* Public Authorities Law § 1020-a). As the majority acknowledges ***731** "[t]his takeover was anomalous," both in scope and concept, as historically, New York's electrical needs have been met by the private sector through a market-driven proprietary model of services (majority op at 729; *see Braun v Buffalo Gen. Elec. Co.*, 200 NY 484 [1911]; *Miner v Long Is. Light. Co.*, 40 NY2d 372 [1976]). Plaintiffs sued defendants for property damage allegedly caused by defendants' failure to de-energize part of its customer service area during Superstorm Sandy. Defendants moved to dismiss on the ground that LIPA, and as a consequence the codefendants, are immune from suit for acting in LIPA's governmental, as opposed to proprietary, capacity.

I agree with the majority that defendants failed to carry their burden on the motion because the amended complaints state cognizable claims for relief based on defendants' alleged negligence (majority op at 728-730). However, I disagree with the majority's suggestion that defendants may be able to establish an affirmative defense of immunity at some later stage in this litigation (majority op at 730 n 2). The majority essentially invites the parties to engage in further motion practice on defendants' purported entitlement to immunity. In doing so, it encourages the parties to incur unwarranted litigation costs and needlessly expend judicial resources on an argument that has no possibility of success. A governmental entity that replaced a private entity to supply a service that historically has been provided by private entities, in a manner indistinguishable from those private entities, simply cannot be said to be acting in a governmental capacity. LIPA's decision not to de-energize is decidedly proprietary because its "activities essentially substitute for or supplement 'traditionally private enterprises' " (*Sebastian v State of New York*, 93 NY2d 790, 793 [1999], citing *Riss v City of New York*, 22 NY2d 579, 581 [1968, Breitel, J.]). Regardless of how LIPA characterizes its actions, they were not undertaken "pursuant to the general police powers" and did not involve a governmental function (*Balsam v Delma Eng'g Corp.*, 90 NY2d 966, 968 [1997]). Therefore, as a matter of law, ****5** defendants are not entitled to an affirmative defense of immunity from suit under the theory that they acted in a governmental capacity.

New York's doctrine of governmental immunity furthers important societal interests.

> "This limitation on liability reflects separation of powers principles and is intended to ensure that public servants are free to exercise their decision- ***732** making authority without interference from the courts. It further reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury" (*Valdez v City of New York*, 18 NY3d 69, 76 [2011] [internal quotation marks omitted]).

Our law is well-settled that a governmental entity may be subject to liability under ordinary principles of tort law for "activities which have displaced or supplemented traditionally private enterprises . . . [and] activities of government which provide services and facilities for the use of the public" because these actions are performed in the entity's proprietary capacity (*Riss*, 22 NY2d at 581). In contrast, absent a special duty to the injured party, a governmental entity may assert a defense of immunity to a negligence suit for actions taken in performance of its governmental function (*Sebastian v State of New York*, 93 NY2d 790, 793 [1999]).

The application of the doctrine requires careful review to determine whether the entity's actions have proprietary characteristics.

> "This Court has recognized that a 'governmental entity's conduct may fall along a continuum of responsibility to individuals and society deriving from its governmental and proprietary functions.' At one end of the continuum lie purely governmental functions 'undertaken for the protection and safety of the public pursuant to the general police powers.' . . .
>
> "On the opposite periphery lie proprietary functions in which governmental activities essentially substitute for or supplement 'traditionally private enterprises' " (*id.* at 793 [citations omitted]).

To determine whether a function is proprietary or governmental, the courts must examine

> "the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred . . . , not whether ***733** the agency involved is engaged generally in proprietary activity or is in control of the location in which the injury occurred" (*Miller v State of New York*, 62 NY2d 506, 513 [1984]).

The critical factor in determining whether the governmental entity is acting pursuant to a governmental function is determining if it exercised its police powers for the protection and safety of the public in carrying out the action challenged by a plaintiff (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 [2013]). If not, the entity is understood to be acting as its private sector counterpart, without the need for immunity to ensure the proper deployment of limited governmental resources. Examples of governmental functions attributed to the general police powers include police and fire protections, oversight of juvenile delinquents, issuance of building permits or certificates of occupancy, certifying compliance with fire safety codes, teacher supervision of a public school playground, boat inspections, garbage collection, and traffic regulations (*see id.* at 425-426). Each of these examples manifest policy choices based on social norms and political considerations that at their core require balancing society's

interests in protecting the public welfare, health, and safety against the interests of the individual.

LIPA's challenged action here does not involve the exercise of the police power. Its decision not to de-energize is no different than those historically made by private actors. In fact, its private sector counterpart, Con Edison, faced this very same decision in the days and hours before the storm. We need only compare this decision with a true exercise of the police power under the circumstances of a storm emergency to understand why LIPA's actions were proprietary. As the storm approached, the deployment of law enforcement personnel, fire fighters, ****6** emergency medical providers, and other first responders, was a clear governmental act (*id.* at 425, 428 ["Police and fire protection are examples of long-recognized, quintessential governmental functions," and EMT and other first responders fulfill a government function]). Similarly, the decision to evacuate parts of New York City could only be accomplished by means of the government exercising its police powers in the course of an emergency. In contrast, LIPA's actions did not involve decisions about these limited governmental resources, which are at the core of those governmental actions.

I agree with the majority that the fact that LIPA was responding to a severe storm does not itself mean that its ***734** behavior constituted governmental action (majority op at 730). Nor would the fact that LIPA took into consideration the choices of other governmental actors, such as various entities' decisions about evacuating particular areas and deploying first responders, make its decision "governmental." Con Edison did the same. Additionally, to the extent that LIPA's actions were taken at the behest of some governmental command, this may bear upon LIPA's eventual liability under traditional negligence principles, not whether LIPA acted in a governmental capacity. Again, a private utility would respond to governmental directives in the same way.

It is not disputed that the provision of electricity has traditionally been a proprietary enterprise undertaken by private entities (*see* Prosser & Keeton, Torts § 131 at 1053 [5th ed 1984] ["(I)f the city operates a local electric or water company for which fees are charged, this looks very much like private enterprise and is usually considered proprietary"]).[1] LIPA replaced a private entity—LILCO—and as such its "activities essentially substitute for or supplement traditionally private enterprises" (*Sebastian*, 93 NY2d at 793 [internal quotation marks omitted]). Our courts have frequently held private utility companies subject to liability under ordinary rules of negligence, including LILCO (*see e.g. Miner*, 40 NY2d at 375). Indeed, defendants concede that LIPA's "core function—the routine operation and maintenance of its electric utility equipment on a 'blue sky day'—is proprietary."

This case is distinguishable from *Matter of World Trade Ctr. Bombing Litig.*, in which the Court found that the Port Authority had security concerns of a drastically different quantitative and qualitative register than most landowners and that the administration and deployment of security at the World Trade Center (WTC) involved discretionary decision-making about allocating security and police resources (17 NY3d 428, 449 [2011]). First, nothing suggests that LIPA faces different public safety concerns than the private companies in the region, including those providing power to customers directly across ***735** Jamaica Bay, as well as different parts of New York City (*see Heeran*, 141 AD3d at 565-566). While, as the Moreland Commission on Utility Storm Preparation and Response observed, the purpose of the de-energization process, broadly speaking, "is to protect the public from fire and electrical hazards posed by wiring and circuits that may have come into contact with flood water," LIPA was required to protect its customers from the commodity it supplies, in the same way, and with the same considerations, as a private utility company.[2]

Second, there is nothing to suggest that the decision not to de-energize implicated the general police powers of the state. In *Matter of World Trade Ctr.*, the Port Authority was tasked with administering security measures to ****7** counter criminal and terrorist activity for its tenants and everyone who used the WTC facility, which required determining how best to allocate its finite resources (17 NY3d at 449). As the Court noted there, "[p]olice protection . . . is a quintessential example of a governmental function as it involves 'the provision of a governmental service to protect the public generally from external hazards and particularly to control the activities of criminal wrongdoers' " (*id.* at 448, quoting *Riss*, 22 NY2d at 581). What distinguishes police protection from other decisions made by governmental entities is that it is "limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed" (*Matter of World Trade Ctr.*, 17 NY3d at 448, quoting *Riss*, 22 NY2d at 581-582). Indeed, crime prevention is "a classic example of a governmental function" and that this function "has traditionally been assumed by police rather than by private actors is a tell-tale sign that the conduct is not proprietary

in nature" (*Balsam*, 90 NY2d at 968). While we have acknowledged that government entities' conduct may fall on a continuum between purely proprietary and purely governmental functions, and that a governmental entity may have a "dual role" in performing both (*see Miller*, 62 NY2d at 511), unlike WTC, nothing moves LIPA's actions off the proprietary end of the continuum. Its sole role is proprietary in nature: the efficient delivery of electrical services to its customers.

***736** LIPA and codefendant National Grid were aware that a major storm capable of flooding the Rockaway Peninsula was about to hit the region, and that this could create a fire hazard if certain areas vulnerable to flooding were not de-energized. They were also aware that de-energizing could potentially bring its own risks, as it could affect those unable to evacuate and those responding to the storm. Had LIPA never taken over from LILCO, however, a private utility company would have been faced with this precise dilemma, as were other private utility providers in the region on that day. The magnitude of the storm did not in any way generate a situation in which defendants' activities did more than substitute for or supplement a traditional private enterprise. Utility companies provide power not only when the sky is blue, but also during intense blizzards, thunderstorms, hurricanes, and other treacherous weather events. Superstorm Sandy may have been one of the more severe storms to hit New York, but preparing for it and reacting to it was a proprietary function.

The fact that electrical services have traditionally been delivered through private enterprises and that the legislature supplanted privately-owned LILCO with publicly-owned LIPA for the sole purpose of ensuring the efficient delivery of electricity to LILCO's customer base leads to the conclusion that LIPA's decision not to withhold delivery of that commodity was unquestionably a proprietary act. The majority's suggestion that some as-yet-unknown fact may come to light at some future point in this litigation that might illuminate defendants' conduct, and transform LIPA's decision not to de-energize into a governmental action, has no grounding in law or the reality of public utility services. LIPA's decision to keep the lights on was not an exercise of the police power.

In *Connolly v Long Is. Power Auth.*, *Baumann v Long Is. Power Auth.* and *Heeran v Long Is. Power Auth. (LIPA)*: Order affirmed, with costs, and certified question answered in the affirmative.

Opinion by Judge Stein. Chief Judge DiFiore and Judges Wilson and Feinman concur. Judge Rivera concurs in result in an opinion, in which Judge Fahey concurs. Judge Garcia taking no part.

FOOTNOTES

Footnotes

1 LILCO was not named as a defendant in one of the actions (*see Heeran v Long Is. Power Auth. [LIPA]*, 141 AD3d 561 [2d Dept 2016]).

2 Indeed, in cases in which it is difficult to determine whether the municipal entity has acted in a proprietary or governmental capacity, that inquiry has not been resolved at the threshold stage of the litigation based on the plaintiffs' allegations alone. Rather, such determinations have been made after discovery on summary judgment or after trial (*see e.g. Matter of World Trade Ctr.*, 17 NY3d at 448 [reasoning that the acts or omissions for which plaintiffs sought to hold the defendant liable involved the "strategic allocation of police resources" and reflected a "considered legislative-executive decision as to how those resources may be deployed"]). Nevertheless, while we conclude that, in this particular case, the procedural posture in which it is presented to us does not enable us to determine the nature of LIPA's acts, we note that we have recognized circumstances in which that determination could be made in the context of a CPLR 3211 (a) (7) motion (*see e.g. Lauer v City of New York*, 95 NY2d 95, 102-103 [2000]). We do not foreclose the possibility that this threshold issue concerning the governmental function immunity defense may be capable of resolution at the pre-answer, motion to dismiss stage in other appropriate cases.

3 LILCO, as LIPA's subsidiary, likewise was not entitled to dismissal of the amended complaints. Further, inasmuch as defendants' assertion that National Grid should be afforded governmental immunity by virtue of its contractual obligation

to operate LIPA's T&D System presupposes that LIPA, itself, is entitled to immunity, defendants have not shown that plaintiffs' amended complaints should be dismissed insofar as asserted against National Grid.

1 LIPA stresses that the legislature specified that LIPA would be performing an "essential governmental function" (Public Authorities Law § 1020-p [1]), but as the Appellate Division majority points out, similar language is in the laws creating other public authorities that definitely carry out proprietary activities, such as the White Plains Parking Authority or the Upper Mohawk Valley Memorial Auditorium Authority (*see* *Heeran v Long Is. Power Auth. [LIPA]*, 141 AD3d 561, 566 [2016], citing Public Authorities Law §§ 1427 [2]; 1942 [5]).

2 The Moreland Commission was established by Governor Andrew M. Cuomo in November 2012 to investigate the response, preparation, and management of the state's power utility companies with respect to major storms afflicting the state (The Moreland Commission on Utility Storm Preparation and Response, https://utilitystormmanagement.moreland.ny.gov/ [last accessed Jan. 20, 2018]).

McKinney's Consolidated Laws of New York Annotated
Election Law (Refs & Annos)
Chapter Seventeen. Of the Consolidated Laws (Refs & Annos)
Article 17. Protecting the Elective Franchise (Refs & Annos)
Title 2. John R. Lewis Voting Rights Act of New York (Refs & Annos)

McKinney's Election Law § 17-200

§ 17-200. Legislative purpose and statement of public policy

Effective: July 1, 2023
Currentness

In recognition of the protections for the right to vote provided by the constitution of the state of New York, which substantially exceed the protections for the right to vote provided by the constitution of the United States, and in conjunction with the constitutional guarantees of equal protection, freedom of expression, and freedom of association under the law and against the denial or abridgement of the voting rights of members of a race, color, or language-minority group, it is the public policy of the state of New York to:

1. Encourage participation in the elective franchise by all eligible voters to the maximum extent; and

2. Ensure that eligible voters who are members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political processes of the state of New York, and especially to exercise the elective franchise.

Credits
(Added L.2022, c. 226, § 4, eff. July 1, 2023.)

McKinney's Election Law § 17-200, NY ELEC § 17-200
Current through L.2024, chapters 1 to 212. Some statute sections may be more current, see credits for details.

McKinney's Election Law § 17-202

§ 17-202. Interpretation of laws related to the elective franchise

Effective: July 1, 2023
Currentness

In further recognition of the protections for the right to vote provided by the constitution of the state of New York, all statutes, rules and regulations, and local laws or ordinances related to the elective franchise shall be construed liberally in favor of (a) protecting the right of voters to have their ballot cast and counted; (b) ensuring that eligible voters are not impaired in registering to vote, and (c) ensuring voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process in registering to vote and voting. The authority to prescribe or maintain voting or elections policies and practices cannot be so exercised as to unnecessarily deny or abridge the right to vote. Policies and practices that burden the right to vote must be narrowly tailored to promote a compelling policy justification that must be supported by substantial evidence.

Credits
(Added L.2022, c. 226, § 4, eff. July 1, 2023.)

McKinney's Election Law § 17-202, NY ELEC § 17-202
Current through L.2024, chapters 1 to 212. Some statute sections may be more current, see credits for details.

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Election Law (Refs & Annos)
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Article 17. Protecting the Elective Franchise (Refs & Annos)
Title 2. John R. Lewis Voting Rights Act of New York (Refs & Annos)

McKinney's Election Law § 17-204

§ 17-204. Definitions

Effective: July 1, 2023
Currentness

For the purposes of this title:

1. “At-large” method of election means a method of electing members to the governing body of a political subdivision: (a) in which all of the voters of the entire political subdivision elect each of the members to the governing body; (b) in which the candidates are required to reside within given areas of the political subdivision and all of the voters of the entire political subdivision elect each of the members to the governing body; or (c) that combines at-large elections with district-based elections, unless the only member of the governing body of a political subdivision elected at-large holds exclusively executive responsibilities. For the purposes of this title, at-large method of election does not include ranked-choice voting, cumulative voting, and limited voting.

2. “District-based” method of election means a method of electing members to the governing body of a political subdivision using a districting or redistricting plan in which each member of the governing body resides within a district or ward that is a divisible part of the political subdivision and is elected only by voters residing within that district or ward, except for a member of the governing body that holds exclusively executive responsibilities.

3. “Alternative” method of election means a method of electing members to the governing body of a political subdivision using a method other than at-large or district-based, including, but not limited to, ranked-choice voting, cumulative voting, and limited voting.

4. “Political subdivision” means a geographic area of representation created for the provision of government services, including, but not limited to, a county, city, town, village, school district, or any other district organized pursuant to state or local law.

5. “Protected class” means a class of eligible voters who are members of a race, color, or language-minority group.

5-a. “Language minorities” or “language-minority group” means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.

6. “Racially polarized voting” means voting in which there is a divergence in the candidate, political preferences, or electoral choice of members in a protected class from the candidates, or electoral choice of the rest of the electorate.

7. “Federal voting rights act” means the federal Voting Rights Act of 1965, 52 U.S.C. § 10301 et seq., as amended.

8. The “civil rights bureau” means the civil rights bureau of the office of the attorney general.

9. “Government enforcement action” means a denial of administrative or judicial preclearance by the state or federal government, pending litigation filed by a federal or state entity, a final judgment or adjudication, a consent decree, or similar formal action.

10. “Deceptive or fraudulent device, contrivance, or communication” means one that contains false information pertaining to: (a) the time, place, and manner of any election; (b) the qualifications or restrictions on voter eligibility for such election; or (c) a statement of endorsement by any specifically named person, political party, or organization.

Credits
(Added L.2022, c. 226, § 4, eff. July 1, 2023.)

McKinney's Election Law § 17-204, NY ELEC § 17-204
Current through L.2024, chapters 1 to 212. Some statute sections may be more current, see credits for details.

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McKinney's Election Law § 17-206

§ 17-206. Prohibitions on voter disenfranchisement

Effective: July 1, 2023
Currentness

1. Prohibition against voter suppression. (a) No voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy shall be enacted or implemented by any board of elections or political subdivision in a manner that results in a denial or abridgement of the right of members of a protected class to vote.

(b) A violation of paragraph (a) of this subdivision shall be established upon a showing that, based on the totality of the circumstances, members of a protected class have less opportunity than the rest of the electorate to elect candidates of their choice or influence the outcome of elections.

2. Prohibition against vote dilution. (a) No board of elections or political subdivision shall use any method of election, having the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections, as a result of vote dilution.

(b) A violation of paragraph (a) of this subdivision shall be established upon a showing that a political subdivision:

(i) used an at-large method of election and either: (A) voting patterns of members of the protected class within the political subdivision are racially polarized; or (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired; or

(ii) used a district-based or alternative method of election and that candidates or electoral choices preferred by members of the protected class would usually be defeated, and either: (A) voting patterns of members of the protected class within the political subdivision are racially polarized; or (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired; or

(c) For the purposes of demonstrating that a violation of paragraph (a) of this subdivision has occurred, evidence shall be weighed and considered as follows: (i) elections conducted prior to the filing of an action pursuant to this subdivision are more probative than elections conducted after the filing of the action; (ii) evidence concerning elections for members of the governing body of the political subdivision are more probative than evidence concerning other elections; (iii) statistical evidence is more probative

than non-statistical evidence; (iv) where there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision, members of each of those protected classes may be combined; (v) evidence concerning the intent on the part of the voters, elected officials, or the political subdivision to discriminate against a protected class is not required; (vi) evidence that voting patterns and election outcomes could be explained by factors other than racially polarized voting, including but not limited to partisanship, shall not be considered; (vii) evidence that sub-groups within a protected class have different voting patterns shall not be considered; (viii) evidence concerning whether members of a protected class are geographically compact or concentrated shall not be considered, but may be a factor in determining an appropriate remedy; and (ix) evidence concerning projected changes in population or demographics shall not be considered, but may be a factor, in determining an appropriate remedy.

3. In determining whether, under the totality of the circumstances, a violation of subdivision one or two of this section has occurred, factors that may be considered shall include, but not be limited to: (a) the history of discrimination in or affecting the political subdivision; (b) the extent to which members of the protected class have been elected to office in the political subdivision; (c) the use of any voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy that may enhance the dilutive effects of the election scheme; (d) denying eligible voters or candidates who are members of the protected class to processes determining which groups of candidates receive access to the ballot, financial support, or other support in a given election; (e) the extent to which members of the protected class contribute to political campaigns at lower rates; (f) the extent to which members of a protected class in the state or political subdivision vote at lower rates than other members of the electorate; (g) the extent to which members of the protected class are disadvantaged in areas including but not limited to education, employment, health, criminal justice, housing, land use, or environmental protection; (h) the extent to which members of the protected class are disadvantaged in other areas which may hinder their ability to participate effectively in the political process; (i) the use of overt or subtle racial appeals in political campaigns; (j) a significant lack of responsiveness on the part of elected officials to the particularized needs of members of the protected class; and (k) whether the political subdivision has a compelling policy justification that is substantiated and supported by evidence for adopting or maintaining the method of election or the voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy. Nothing in this subdivision shall preclude any additional factors from being considered, nor shall any specified number of factors be required in establishing that such a violation has occurred.

4. Standing. Any aggrieved person, organization whose membership includes aggrieved persons or members of a protected class, organization whose mission, in whole or in part, is to ensure voting access and such mission would be hindered by a violation of this section, or the attorney general may file an action against a political subdivision pursuant to this section in the supreme court of the county in which the political subdivision is located.

5. Remedies. (a) Upon a finding of a violation of any provision of this section, the court shall implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process, which may include, but shall not be limited to:

(i) a district-based method of election;

(ii) an alternative method of election;

(iii) new or revised districting or redistricting plans;

(iv) elimination of staggered elections so that all members of the governing body are elected on the same date;

(v) reasonably increasing the size of the governing body;

(vi) moving the dates of regular elections to be concurrent with the primary or general election dates for state, county, or city office as established in section eight of article three or section eight of article thirteen of the constitution, unless the budget in such political subdivision is subject to direct voter approval pursuant to part two of article five or article forty-one of the education law;

(vii) transferring authority for conducting the political subdivision's elections to the board of elections for the county in which the political subdivision is located;

(viii) additional voting hours or days;

(ix) additional polling locations;

(x) additional means of voting such as voting by mail;

(xi) ordering of special elections;

(xii) requiring expanded opportunities for voter registration;

(xiii) requiring additional voter education;

(xiv) modifying the election calendar;

(xv) the restoration or addition of persons to registration lists; or

(xvi) retaining jurisdiction for such period of time on a given matter as the court may deem appropriate, during which no redistricting plan shall be enforced unless and until the court finds that such plan does not have the purpose of diluting the right to vote on the basis of protected class membership, or in contravention of the voting guarantees set forth in this title, except that the court's finding shall not bar a subsequent action to enjoin enforcement of such redistricting plan.

(b) The court shall consider proposed remedies by any parties and interested non-parties, but shall not provide deference or priority to a proposed remedy offered by the political subdivision. The court shall have the power to require a political subdivision to implement remedies that are inconsistent with any other provision of law where such inconsistent provision of law would preclude the court from ordering an otherwise appropriate remedy in such matter.

6. Procedures for implementing new or revised districting or redistricting plans. The governing body of a political subdivision with the authority under this title and all applicable state and local laws to enact and implement a new method of election that

would replace the political subdivision's at-large method of election with a district-based or alternative method of election, or enact and implement a new districting or redistricting plan, shall undertake each of the steps enumerated in this subdivision, if proposed subsequent to receipt of a NYVRA notification letter, as defined in subdivision seven of this section, or the filing of a claim pursuant to this title or the federal voting rights act.

(a) Before drawing a draft districting or redistricting plan or plans of the proposed boundaries of the districts, the political subdivision shall hold at least two public hearings over a period of no more than thirty days, at which the public is invited to provide input regarding the composition of the districts. Before these hearings, the political subdivision may conduct outreach to the public, including to non-English-speaking communities, to explain the districting or redistricting process and to encourage public participation.

(b) After all draft districting or redistricting plans are drawn, the political subdivision shall publish and make available for release at least one draft districting or redistricting plan and, if members of the governing body of the political subdivision would be elected in their districts at different times to provide for staggered terms of office, the potential sequence of such elections. The political subdivision shall also hold at least two additional hearings over a period of no more than forty-five days, at which the public shall be invited to provide input regarding the content of the draft districting or redistricting plan or plans and the proposed sequence of elections, if applicable. The draft districting or redistricting plan or plans shall be published at least seven days before consideration at a hearing. If the draft districting or redistricting plan or plans are revised at or following a hearing, the revised versions shall be published and made available to the public for at least seven days before being adopted.

(c) In determining the final sequence of the district elections conducted in a political subdivision in which members of the governing body will be elected at different times to provide for staggered terms of office, the governing body shall give special consideration to the purposes of this title, and it shall take into account the preferences expressed by members of the districts.

7. Notification requirement and safe harbor for judicial actions. Before commencing a judicial action against a political subdivision under this section, a prospective plaintiff shall send by certified mail a written notice to the clerk of the political subdivision, or, if the political subdivision does not have a clerk, the governing body of the political subdivision, against which the action would be brought, asserting that the political subdivision may be in violation of this title. This written notice shall be referred to as a "NYVRA notification letter" in this title. For actions against a school district or any other political subdivision that holds elections governed by the education law, the prospective plaintiff shall also send by certified mail a copy of the NYVRA notification letter to the commissioner of education.

(a) A prospective plaintiff shall not commence a judicial action against a political subdivision under this section within fifty days of sending to the political subdivision a NYVRA notification letter.

(b) Before receiving a NYVRA notification letter, or within fifty days of mailing of a NYVRA notification letter, the governing body of a political subdivision may pass a resolution affirming: (i) the political subdivision's intention to enact and implement a remedy for a potential violation of this title; (ii) specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy; and (iii) a schedule for enacting and implementing such a remedy. Such a resolution shall be referred to as a "NYVRA resolution" in this title. If a political subdivision passes a NYVRA resolution, such political subdivision shall have ninety days after such passage to enact and implement such remedy, during which a prospective plaintiff shall not commence an action to enforce this section against the political subdivision. For actions against a school district, the commissioner of education may order the enactment of a NYVRA resolution pursuant to the commissioner's authority under section three hundred five of the education law.

(c) If the governing body of a political subdivision lacks the authority under this title or applicable state law or local laws to enact or implement a remedy identified in a NYVRA resolution, or fails to enact or implement a remedy identified in a NYVRA resolution, within ninety days after the passage of the NYVRA resolution, or if the political subdivision is a covered entity as defined under section 17-210 of this title, the governing body of the political subdivision shall undertake the steps enumerated in the following provisions:

(i) The governing body of the political subdivision may approve a proposed remedy that complies with this title and submit such a proposed remedy to the civil rights bureau. Such a submission shall be referred to as a "NYVRA proposal" in this title.

(ii) Prior to passing a NYVRA proposal, the political subdivision shall hold at least one public hearing, at which the public shall be invited to provide input regarding the NYVRA proposal. Before this hearing, the political subdivision may conduct outreach to the public, including to non-English-speaking communities, to encourage public participation.

(iii) Within forty-five days of receipt of a NYVRA proposal, the civil rights bureau shall grant or deny approval of the NYVRA proposal.

(iv) The civil rights bureau shall only grant approval to the NYVRA proposal if it concludes that: (A) the political subdivision may be in violation of this title; (B) the NYVRA proposal would remedy any potential violation of this title; (C) the NYVRA proposal is unlikely to violate the constitution or any federal law; (D) the NYVRA proposal would not diminish the ability of protected class members to participate in the political process and to elect their preferred candidates to office; and (E) implementation of the NYVRA proposal is feasible.

(v) If the civil rights bureau grants approval, the NYVRA proposal shall be enacted and implemented immediately, notwithstanding any other provision of law, including any other state or local law.

(vi) If the political subdivision is a covered entity as defined under section 17-210 of this title, the political subdivision shall not be required to obtain preclearance for the NYVRA proposal pursuant to such section upon approval of the NYVRA proposal by the civil rights bureau.

(vii) If the civil rights bureau denies approval, the NYVRA proposal shall not be enacted or implemented. The civil rights bureau shall explain the basis for such denial and may, in its discretion, make recommendations for an alternative remedy for which it would grant approval.

(viii) If the civil rights bureau does not respond, the NYVRA proposal shall not be enacted or implemented.

(d) A political subdivision that has passed a NYVRA resolution may enter into an agreement with the prospective plaintiff providing that such prospective plaintiff shall not commence an action pursuant to this section against the political subdivision for an additional ninety days. Such agreement shall include a requirement that either the political subdivision shall enact and implement a remedy that complies with this title or the political subdivision shall pass a NYVRA proposal and submit it to the civil rights bureau.

(e) If, pursuant to a process commenced by a NYVRA notification letter, a political subdivision enacts or implements a remedy or the civil rights bureau grants approval to a NYVRA proposal, a prospective plaintiff who sent the NYVRA notification letter may, within thirty days of the enactment or implementation of the remedy or approval of the NYVRA proposal, demand reimbursement for the cost of the work product generated to support the NYVRA notification letter. A prospective plaintiff shall make the demand in writing and shall substantiate the demand with financial documentation, such as a detailed invoice for demography services or for the analysis of voting patterns in the political subdivision. A political subdivision may request additional documentation if the provided documentation is insufficient to corroborate the claimed costs. A political subdivision shall reimburse a prospective plaintiff for reasonable costs claimed, or in an amount to which the parties mutually agree. The cumulative amount of reimbursements to all prospective plaintiffs, except for actions brought by the attorney general, shall not exceed forty-three thousand dollars, as adjusted annually to the consumer price index for all urban consumers, United States city average, as published by the United States department of labor. To the extent a prospective plaintiff who sent the NYVRA notification letter and a political subdivision are unable to come to a mutual agreement, either party may file a declaratory judgment action to obtain a clarification of rights.

(f) Notwithstanding the provisions of this subdivision, in the event that the first day for designating petitions for a political subdivision's next regular election to select members of its governing board has begun or is scheduled to begin within thirty days, or in the event that a political subdivision is scheduled to conduct any election within one hundred twenty days, a plaintiff alleging any violation of this title may commence a judicial action against a political subdivision under this section, provided that the relief sought by such a plaintiff includes preliminary relief for that election. Prior to or concurrent with commencing such a judicial action, any such plaintiff shall also submit a NYVRA notification letter to the political subdivision. In the event that a judicial action commenced under this provision is withdrawn or dismissed for mootness because the political subdivision has enacted or implemented a remedy or the civil rights bureau has granted approval of a NYVRA proposal pursuant to a process commenced by a NYVRA notification letter, any such plaintiff may only demand reimbursement pursuant to this subdivision.

8. Coalition claims permitted. Members of different protected classes may file an action jointly pursuant to this title in the event that they demonstrate that the combined voting preferences of the multiple protected classes are polarized against the rest of the electorate.

Credits

(Added L.2022, c. 226, § 4, eff. July 1, 2023.)

McKinney's Election Law § 17-206, NY ELEC § 17-206

Current through L.2024, chapters 1 to 212. Some statute sections may be more current, see credits for details.

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McKinney's Election Law § 17-216

§ 17-216. Expedited judicial proceedings and preliminary relief

Effective: July 1, 2023
Currentness

Because of the frequency of elections, the severe consequences and irreparable harm of holding elections under unlawful conditions, and the expenditure to defend potentially unlawful conditions that benefit incumbent officials, actions brought pursuant to this title shall be subject to expedited pretrial and trial proceedings and receive an automatic calendar preference. In any action alleging a violation of this section in which a plaintiff party seeks preliminary relief with respect to an upcoming election, the court shall grant relief if it determines that: (a) plaintiffs are more likely than not to succeed on the merits; and (b) it is possible to implement an appropriate remedy that would resolve the alleged violation in the upcoming election.

Credits
(Added L.2022, c. 226, § 4, eff. July 1, 2023.)

McKinney's Election Law § 17-216, NY ELEC § 17-216
Current through L.2024, chapters 1 to 212. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated
Town Law
Chapter 62. Of the Consolidated Laws

McKinney's Town Law Ch. 62, Misc Table

Currentness

Editors' Notes

DISTRIBUTION TABLE

Showing where sections of the Town Law of 1909 were distributed in whole or in part in the Town Law of 1932.

1909 Law	1932 Law
1	1
2	2
10	64(6)
11	65
12	Omitted
13	25
14	Omitted
15	Omitted
16	64(8)
17	133
30	75
31	76
32	77
33	78
34	79
40	80, 81
41	Omitted
42	82
43	81

44 ..... 64(5)

45 ..... 81(1)

45-a ..... Omitted

46 ..... 80, 81

46-a 81

47 ..... 80, 82

48 82

49 83

50 83

51 82

52 ..... Omitted

53 84

54 84

55 84

56 ..... Omitted

57 82

58 80

59 84

60 ..... Omitted

61 83

62 83

63 83

64 83

65 80

66 ..... Omitted

67 ..... 80, 83

68 ..... 80, 83

69 84

80 20

82 24

83 25

84 26

85 27

85-a ..... Omitted

86 27

87 27

87-a ..... 29(7)

88 28

89 ..... Omitted

90 107

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92 30

92-a, L.1912, ch. 136 25

92-a, L.1917, ch. 582 ..... 30(3)

93 ..... 30(10)

94 ..... 30(3, 4)

95 ..... 30(8)

96 ..... 102(1)

97 ..... 30(6)

98 29

99 ..... 29(9)

100 25

101 ..... 29(6)

102 ..... Omitted

103 341

104 ..... Omitted

105 ..... Omitted

105-a 20

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127 20

129 ..... Omitted

129-a 20

130 ..... 64(5)

131 ..... 60, 62, 105

131-a ..... Omitted

132 ..... 62, 105

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134 ..... 64(9)

134-a ..... 64(2)

135 ..... 64(2), 81(1), 220(3)

135-a ..... 20(2)

135-b ..... 20(2)

136 ..... 64(12)

136-a ..... 64(12)

136-c ..... 81(1), 220(2)

136-d ..... Omitted

137 ..... 64(13)

137-a ..... 64(14)

138-a ..... Omitted

138-b ..... 64(15)

138-c ..... 64(16)

138-d ..... 64(16)

138-e, L.1928, ch. 58 ..... 64(9)

138-e, L.1928, ch. 796 ..... Omitted

140 ..... 64(17)

141-a, L.1920, ch. 146 ..... 64(18)

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174 102

175 103

176 102

177 ..... Omitted

178 ..... Omitted

179 ..... Omitted

190 29

191 29

192 ..... 29(5)

193 ..... Omitted

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196 108

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212 135

213 ..... 135, 136

214 ..... Omitted

215 136

216 ..... 130, 136

217 135

218 ..... Omitted

219 ..... Omitted

220 ..... 130, 136

221 136

222 136

230-249-a ..... Omitted

Superseded by Articles 12, 13 and 15.

250-256-b ..... Omitted

Superseded by Articles 12, 13 and 15.

257-257-l.....Omitted

Superseded by Articles 12, 13, and 15.

260-266.....Omitted

Superseded by Articles 12, 13 and 15.

270-309.....Omitted

Superseded by Articles 12, 13 and 15.

310-318-b.....Omitted

Superseded by Article 11.

319-319-f.....Omitted

Superseded by Article 10.

319-k.....150

319-l.....151

319-m.....152

319-n.....153

319-o.....154

319-p.....155

319-q.....156

319-r.....157

320-322.....Omitted

Superseded by Articles 12, 13 and 15.

322-a-323-x.....Omitted

Superseded by Articles 12, 13 and 15.

330.....Omitted

331.....290

332.....291

332-a.....292

332-b.....64(8)

333.....293

334.....Omitted

335.....Omitted

336.....294

337.....295

340-341-a.....Omitted

Superseded by Articles 14 and 15.

342-348.....Omitted

Superseded by Articles 14 and 15.

349-349-o.....Omitted

Superseded by Articles 12, 13 and 15.

349-o, L.1926, ch. 714.....261

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Superseded by Articles 14 and 15.

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430-444.....Omitted

Superseded by Articles 12, 13 and 15.

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451.....41(2)

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460-512-b.....Omitted

513.....20(1)

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515.....Omitted

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520-589-b.....Omitted

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590-603.....Omitted

See Article 8.

604-616.....Omitted

Superseded by Articles 12, 13 and 15.

McKinney's Town Law Ch. 62, Misc Table, NY TOWN Ch. 62, Misc Table
Current through L.2024, chapters 1 to 212. Some statute sections may be more current, see credits for details.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 32. Accelerated Judgment (Refs & Annos)

McKinney's CPLR Rule 3211

Rule 3211. Motion to dismiss

Effective: May 7, 2022
Currentness

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence; or

2. the court has not jurisdiction of the subject matter of the cause of action; or

3. the party asserting the cause of action has not legal capacity to sue; or

4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires; or

5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or

6. with respect to a counterclaim, it may not properly be interposed in the action; or

7. the pleading fails to state a cause of action; or

8. the court has not jurisdiction of the person of the defendant; or

9. the court has not jurisdiction in an action where service was made under section 314 or 315; or

10. the court should not proceed in the absence of a person who should be a party.

11. the party is immune from liability pursuant to section seven hundred twenty-a of the not-for-profit corporation law. Presumptive evidence of the status of the corporation, association, organization or trust under section 501(c)(3) of the internal revenue code may consist of production of a letter from the United States internal revenue service reciting such determination on a preliminary or final basis or production of an official publication of the internal revenue service listing the corporation, association, organization or trust as an organization described in such section, and presumptive evidence of uncompensated status of the defendant may consist of an affidavit of the chief financial officer of the corporation, association, organization or trust. On a motion by a defendant based upon this paragraph the court shall determine whether such defendant is entitled to the benefit of section seven hundred twenty-a of the not-for-profit corporation law or subdivision six of section 20.09 of the arts and cultural affairs law and, if it so finds, whether there is a reasonable probability that the specific conduct of such defendant alleged constitutes gross negligence or was intended to cause the resulting harm. If the court finds that the defendant is entitled to the benefits of that section and does not find reasonable probability of gross negligence or intentional harm, it shall dismiss the cause of action as to such defendant.

(b) Motion to dismiss defense. A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.

(c) Evidence permitted; immediate trial; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.

(d) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

(e) Number, time and waiver of objections; motion to plead over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a) of this rule, and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) of this rule is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) of this rule may be made at any subsequent time or in a later pleading, if one is permitted; an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship. The foregoing sentence shall not apply in any proceeding to collect a debt arising out of a consumer credit transaction where a consumer is a defendant or under subdivision one or two of section seven hundred eleven of the real property actions and proceedings law. The papers in opposition to a motion based on improper service shall contain a copy of the proof of service, whether or not previously filed. An objection based upon a ground specified in paragraph eight or nine of subdivision (a) of this rule is waived if a party moves on any of the grounds set forth in subdivision (a) of this rule without raising such objection or if, having made no objection under subdivision (a) of this rule, he or she does not raise such objection in the responsive pleading which, in any action to collect a debt arising out of a consumer credit transaction where a consumer is a defendant, includes any amended responsive pleading.

(f) Extension of time to plead. Service of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order.

(g) Stay of proceedings and standards for motions to dismiss in certain cases involving public petition and participation. 1. A motion to dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

2. In making its determination on a motion to dismiss made pursuant to paragraph one of this subdivision, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the action or defense is based. No determination made by the court on a motion to dismiss brought under this section, nor the fact of that determination, shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

3. All discovery, pending hearings, and motions in the action shall be stayed upon the filing of a motion made pursuant to this section. The stay shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and upon a showing by the nonmoving party, by affidavit or declaration under penalty of perjury that, for specified reasons, it cannot present facts essential to justify its opposition, may order that specified discovery be conducted notwithstanding this subdivision. Such discovery, if granted, shall be limited to the issues raised in the motion to dismiss.

4. For purposes of this section, "complaint" includes "cross-complaint" and "petition", "plaintiff" includes "cross-complainant" and "petitioner", and "defendant" includes "cross-defendant" and "respondent."

(h) Standards for motions to dismiss in certain cases involving licensed architects, engineers, land surveyors or landscape architects. A motion to dismiss based on paragraph seven of subdivision (a) of this rule, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action in which a notice of claim must be served on a licensed architect, engineer, land surveyor or landscape architect pursuant to the provisions of subdivision one of section two hundred fourteen of this chapter, shall be granted unless the party responding to the motion demonstrates that a substantial basis in law exists to believe that the performance, conduct or omission complained of such licensed architect, engineer, land surveyor or landscape architect or such firm as set forth in the notice of claim was negligent and that such performance, conduct or omission was a proximate cause of personal injury, wrongful death or property damage complained of by the claimant or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant a preference in the hearing of such motion.

Credits

(L.1962, c. 308. Amended Jud.Conf.1964 Proposal No. 6; Jud.Conf.1965 Proposal Nos. 5, 6; L.1965, c. 773, § 9; Jud.Conf.1973 Proposal No. 4; L.1986, c. 220, § 12; L.1990, c. 904, § 26; L.1991, c. 656, § 4; L.1992, c. 767, § 4; L.1996, c. 501, § 1; L.1996, c. 682, § 2; L.1997, c. 518, § 2, eff. Sept. 3, 1997; L.2005, c. 616, § 1, eff. Jan. 1, 2006; L.2020, c. 250, § 3, eff. Nov. 10, 2020; L.2021, c. 593, § 8, eff. May 7, 2022.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Hon. Mark C. Dillon

2023
C3211:1 The Motion to Dismiss, Generally

Practitioners, beware of using Artificial Intelligence (AI) such as ChatGPT when preparing motion affidavits and memoranda of law. ChatGPT is a form of AI which became available to the public on November 30, 2022. “Chat” refers to its chat box functionality. The “GPT” stands for Generative Pre-Trained Transformer. The program has many functions, one of which is to compose letters and essays on topics selected by the user. Essays produced by ChatGPT are not based on dedicated search engines such as Westlaw, but are instead based on generally-available information which leaves room for error in the sophisticated and detail-orientated field of law.

This is just the opinion of your humble Practice Commentator, take it for whatever it is worth: Do not use ChatGPT for writing legal papers that will be served upon parties and filed with a court. Two attorneys learned that lesson the hard way in the case of *Roberto Mata v Avianca, Inc.* The plaintiff, Mata, commenced an action in the Supreme Court, New York County, seeking damages for personal injuries allegedly sustained as a result of having been struck by a metal serving cart during a 2019 airline flight bound for New York's JFK Airport. The action was removed to the federal District Court for the Southern District of New York, under Docket No. 22 CV 1461 (Castel, J.). The defendant, Avianca, Inc., later moved to dismiss the action under F.R.C.P 12(b)(6) (https://storage.courtlistener.com/recap/gov.uscourts.nysd.575368/gov.uscourts.nysd.575368.16.0.pdf), which was opposed by counsel representing the plaintiff. The opposition papers were composed by plaintiff's counsel using ChatGPT. Because of shortcomings with the ChatGPT program, the papers submitted in opposition to dismissal cited to several judicial decisions which did not, in fact, exist (https://www.documentcloud.org/documents/23826751-mata-v-avianca-airlines-affidavit-in-opposition-to-motion). The non-existent cases were accompanied by non-existent quotes from them and contained internal citations which also did not exist. Quick on the uptake, District Judge P. Kevin Castel directed that the plaintiff's attorneys show cause on June 8, 2023 as to why they should not be sanctioned for the submission (Order to Show Cause dated May 4, 2023, *available at* https://ecf.nysd.uscourts.gov/doc1/127133304220. *See also* Weiser, Benjamin, Here's What Happens When Your Lawyer Used ChatGPT, *New York Times*, May 27, 2023, *available at* https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html).

Lawyering is never one-size-fits all. No computer program such as ChatGPT can incorporate the years of experience that an attorney brings to a matter such as in the drafting of legal papers for filing. No computer program can substitute for human judgment, strategy, nuance, emphasis, and persuasiveness. No computer program can know, like a lawyer, what type of argument may best resonate with the particular judge assigned to the matter. And if composition programs such as ChatGPT do not directly focus upon proven legal research platforms like Westlaw, legal research and analysis is rightly suspect.

Some might argue that the problem which came to light in *Mata* was not one of burgeoning technology, but the failure by counsel to double-check ChatGPT's draft to assure that the final product submitted to the court was accurate and complete (Wilkins, Stephanie, “The Problem With the ‘Bogus' ChatGPT Legal Brief? It's Not the Tech,” *NYLJ*, June 2, 2023, *available at* https://www.law.com/legaltechnews/2023/06/02/the-problem-with-the-bogus-chatgpt-legal-brief-its-not-the-tech/). But that begs the question. If the technology produces flawed material,

should any attorney use it in the first place rather than drafting the papers from scratch using our traditional schooled methods? Do not clients deserve the traditional effort?

On June 22, 2023, Judge Castel financially sanctioned the two attorneys and their law firm who had submitted the misleading opposition papers the sum of $5,000 (Opinion and Order dated June 22, 2023, p. 34, *available at* https://ecf.nysd.uscourts.gov/doc1/127133572604). The court noted that the attorneys failed in their gatekeeping function to assure the accuracy of their filings. Further, in a separate order, the District Court dismissed plaintiff Mata's personal injury action as untimely commenced (Opinion and Order dated June 22, 2023, *available at* https://ecf.nysd.uscourts.gov/doc1/127133572662).

Aside from the shortfalls of ChatGPT, ethics rules may be implicated as well. How is counsel to bill a client for the research and drafting of legal papers actually researched and drafted by an Artificial Intelligence, which a non-lawyer could obtain by using the same computer program? How can counsel sign an attorney certification that filed papers are not frivolous, as required by 22 NYCRR 130-1.1a(b) and Federal Rule 11(b), if counsel relies upon ChatGPT research and fails to carefully review the papers to assure that there are not inaccuracies and non-existent citations? May there be disciplinary concerns under the Rules 1.1(a) or 5.1(d) of the Rules of Professional Conduct (22 NYCRR 1200.1.1(a), 1200.5.1[d]), and under other potentially-applicable Rules? The answer to all of these questions may be problematic for any attorney caught in a ChatGPT snare. As General Colin Powell once said of the Pottery Barn rule in a different context, "You break it, you own it."

We do not have a crystal ball as whether and to what extent AI might become more accurate and reliable in the future. A law office is not a drive-thru business. For now, nothing beats legal writing the old fashioned way--knowing the facts, accumulating evidence, performing legal research, drafting papers discussing the facts and law, attaching relevant exhibits, being persuasive in submissions, and filing the papers in an appropriate manner that permits you to sleep well at night.

C3211:8 *Sua Sponte* Dismissals

These Supplemental Practice Commentaries take the annual pulse of the number of plaintiffs' complaints that are erroneously dismissed by trial courts *sua sponte*. Such dismissals are to occur sparingly and only when extraordinary circumstances exist to warrant such drastic relief. The bar is set high because *sua sponte* dismissals deprive aggrieved parties of due process notice and any opportunity to be heard on the question of whether the dismissal is appropriate.

This year's crop of appellate court reversals of *sua sponte* dismissals, from the absence of extraordinary circumstances for doing so, include *Newrez, LLC v City of Middletown*, 216 A.D.3d 657, 188 N.Y.S.3d 606 (2nd Dep't. 2023); *U.S. Bank National Association v Bhagwandeen*, 216 A.D.3d 700, 187 N.Y.S.3d 115 (Mem.) (2nd Dep't. 2023); *U.S. Bank National Association v Turner,* 215 A.D.3d 889, 188 N.Y.S.3d 536 (2nd Dep't. 2023); *Deutsche Bank Trust Company Americas v Martinez*, 214 A.D.3d 704, 185 N.Y.S.3d 232 (2nd Dep't. 2023); *CRC Insurance Services, Inc. v Kullman*, 211 A.D.3d 903, 180 N.Y.S.3d 589 (2nd Dep't. 2022); *Melikov v 66 Overlook Terrace Corp*., 211 A.D.3d 537, 181 N.Y.S.3d 35 (1st Dep't. 2022); *Citimortgage, Inc. v Dedalto*, 210 A.D.3d 628, 178 N.Y.S.3d 102 (2nd Dep't. 2022); *U.S. Bank National Association v Stuart*, 208 A.D.3d 824, 172 N.Y.S.3d 625 (2nd Dep't. 2022); *Wells Fargo Bank, N.A. v Cascarano*, 208 A.D.3d 729, 174 N.Y.S.3d 394 (2nd Dep't. 2022).

Conversely, there is another side of the coin on this pesky topic. If a court dismisses an action *sua sponte*, it may, upon motion, likewise vacate its dismissal to cure its previous error of doing so (*Bank of New York Mellon v Stewart*, 216 A.D.3d 720, 190 N.Y.S.3d 80 [2nd Dep't. May 14, 2023]). In appropriate circumstances, a trial court will be reversed for failing to vacate an earlier *sua sponte* dismissal (*Wohnberger v Lucani*, 214 A.D.3d 615, 186 N.Y.S.3d

618 [1st Dep't. 2023]; *Cooper v Broems*, 214 A.D.3d 497, 186 N.Y.S.3d 159 [1st Dep't. 2023]; *Bankunited v Kaur*, 208 A.D.3d 622, 173 N.Y.S.3d 55 (2nd Dep't. 2022]).

C3211:10 Defense Based on "Documentary Evidence"

Decisional authority continues to develop on the extent to which letters, e-mails, and affidavits may qualify as documentary evidence for purposes of a CPLR 3211(a)(1) motion. Affidavits prepared for the motion never qualify (*J.D. v Archdiocese of New York*, 214 A.D.3d 561, 183 N.Y.S.3d 851 [1st Dep't. 2023]; *Davis v Henry*, 212 A.D.3d 597, 181 N.Y.S.3d 606 [2nd Dep't. 2023]). For letters and electronically-generated information such as e-mails, the general rule is that such material does not qualify as documentary evidence for purposes of CPLR 3211(a)(1) (*Xu v Van Zwienen*, 212 A.D.3d 872, 183 N.Y.S.3d 475 [2nd Dep't. 2023] [letter inadmissible]; *Bath & Twenty, LLC v Federal Savings Bank*, 198 A.D.3d 855, 156 N.Y.S.3d 316 [2nd Dep't. 2021]). The reason for the general rule is that these forms of material are too easily manipulatable by a party to be allowed to affect a dismissal motion's outcome. Case law tends to view CPLR 3211(a)(1) documentary evidence as material that is more unassailable such as judicial records, as well as documents reflecting out-of-court transactions including mortgages, deeds, contracts, and other papers the contents of which are essentially undeniable (*Xu v Van Zwienen*, 212 A.D.3d at 874). For e-mails to have any chance of being admissible for a CPLR 3211(a)(1) motion, they must fall into the category of material that is essentially undeniable. E-mails, for admissibility, must at least meet the high test of being unambiguous, authentic, and undeniable. How particular e-mails fare under that test will vary depending on the unique facts of each action. The parties' agreement in their papers that e-mails are authentic goes a long way toward meeting that test. Recently, in *Matter of Estate of Eckert v Connelly*, 217 A.D.3d 1151, 191 N.Y.S.3d 510 (3rd Dep't. June 15, 2023), the court addressed the question of whether the language of parties' e-mails constituted a binding stipulation of settlement. In *Eckert*, there was no issue between the parties as to the authenticity of their e e-mail exchanges, and as a result, the court determined the merits of the enforceability of the purported stipulation (finding in the end by a 3-2 majority that essential terms for the settlement and assent were lacking). Thus, even when authenticity is not an issue, the e-mail, once admitted, must be conclusive to the subject matter of the motion to be determinative of an outcome (*e.g. Cohen v Getzel*, 205 A.D.3d 532, 166 N.Y.S.3d 527 [1st Dep't. 2022]).

Nothing beats the decision of a Canadian court about whether a thumbs-up emoji qualifies as a binding signature for an electronic contract, finding that under section 18(1)(b) of its controlling Electronic Information and Documents Act, an emoji *is* the equivalent of a signature because it is an "icon" permissible under the language of the Act (*South West Terminal v Achter Land & Cattle*, 2023 SKKB 116 [Swift Current, Canada 2023]). Thanks goes to David Paul Horowitz and Katryna L. Kristoferson for bringing that interesting Canadian case to the attention of the bar in a published article (Horowitz, David Paul and Kristoferson, Katryna L. " 'It Is Hereby ...' Can Emails Create a Binding Stipulation?" *NYLJ* July 17, 2023, *available at* https://www.law.com/newyorklawjournal/2023/07/17/it-is-hereby-can-emails-create-a-binding-stipulation/). New York practitioners should of course not rely on that Canadian case as legal authority, as we are subject to the terms and expectations of the General Obligations Law, and specifically GOL 5-701, for determining whether a document qualifies as an enforceable signed writing. A New York court held that a "thumbs-up" emoji was insufficient to convey a party's intent to be bound, where only minutes beforehand the same party had categorically asserted that he would never sign any document (*Lightstone Re LLC v Zinntex LLC*, 2022 WL 3757585 (Sup. Ct. N.Y. Co. 2022). In a general sense, might a "thumbs-up" reflect a party's happiness with an offer without going so far as to reflect an intent to be bound by it? Attorneys should advise clients against using the thumbs-up emoji when executing legal contracts and stipulations, and while at it, advise clients against using the happy face, the hand clap, the fireworks, the celebratory balloons, the check mark, the A-OK sign, and the red heart! Parties agreeing to the terms of a contract are better off simply placing an electronic signature at the designated signature location of the e-document. Doing so avoids ambiguities, problems, misunderstandings, and perhaps litigation. For deeper analysis, an entire law review article has been written about whether emojis should may qualify as signed writings under New York's statute of frauds, GOL 5-701 (Berliner,

Moshe. "When a Picture s Not Worth a Thousand Words: Why Emojis Should Not Satisfy the Statute of Frauds' Writing Requirement," 41 *Cardozo L. Rev*. 2161 (June 2020).

E-mails may sometimes be used to establish claims or defenses in actions involving the statute of frauds (CPLR 3211[a][5]). There is further discussion of this topic specific to the statute of frauds within this year's Supplemental Practice Commentary C3211:18.

C3211:11 Lack of Subject Matter Jurisdiction

The state constitution was amended by public referendum on November 2, 2021, raising the jurisdiction of the Civil Court within the City of New York from $25,000 to $50,000. The previous amendment, which raised the Civil Court's monetary jurisdiction from $10,000 to $25,000, occurred in 1983. The primary purpose of the constitutional amendment was to adjust the Civil Court's jurisdiction for almost four decades of price inflation. The new $50,000 limit applies not only to actions for money damages, but to actions for replevin, the foreclosure of mechanics' liens, partitions, contract rescissions, and real property foreclosures, so long as the value of the subject matter fits within the new $50,000 cap. The subject matter jurisdiction of the Supreme Court is not affected by the constitutional amendment in any way, and Supreme Court therefore remains the go-to court for disputes which exceed $50,000 in value.

The increase in the Civil Court's jurisdiction presents pros and cons. The benefit of the increase is its stated purpose, of adjusting the court's subject matter jurisdiction to account for inflation. A burden of the increase is that it may add to the size of the Civil Court dockets in counties within the City of New York which are already overworked and backlogged. For disputes that are less than $50,000 in value, nothing prevents plaintiffs from commencing their actions in the Supreme Court, but doing so risks the court's discretionary removal of those actions to Civil Court under CPLR 325(d) and 22 NYCRR 202.13(a), even *sua sponte* (*Leighton v Lowenberg*, 215 A.D.3d 474, 185 N.Y.S.3d 683 [1st Dep't. 2023] [post-amendment removal from Supreme Court to Civil Court]). If an action is removed to a court of more limited jurisdiction without the parties' consent, which "higher" courts have the authority to order, the verdict or judgment is not limited to the monetary jurisdiction of the lower court and may instead be of an amount within the jurisdiction of the court where the action was originally filed (CPLR 325[d]; *Delaine v Finger Lakes Fire & Cas. Co*, 23 A.D.3d 1143, 806 N.Y.S.2d 320 [4th Dep't. 2005]). It is only when an action's removal to a court of more limited jurisdiction is on the parties' consent that the parties become bound to the monetary jurisdictional limit of the lower court (CPLR 325[c] [subject to a counterclaim-related exception]; *Hoboken Wood Flooring Corp. v Fischoff*, 10 Misc.3d 1065[A], 814 N.Y.S.2d 561 [Sup. Ct. Nassau Co. 2005]).

Pivoting to another topic, there must be a valid marriage for the Supreme Court to have the subject matter jurisdiction for granting a divorce. While that concept seems straight-forward, an interesting twist occurred in *Bernstein v Benchemoun*, 216 A.D.3d 893, 188 N.Y.S.3d 669 (2nd Dep't. May 23, 2023). The parties in *Bernstein* were New York residents. The plaintiff "wife" sought a divorce based upon a Florida marriage. The defendant "husband" moved for *inter alia* the dismissal of the action for lack of subject matter jurisdiction, claiming that the marriage in Florida was not valid absent there being a valid marriage license issued from there permitting it to be solemnized. Indeed, Florida law does not recognize the validity marriages without a license, whereas in New York marriages are valid without a license so long as they are solemnized. The defendant's dismissal motion was referred to a court attorney referee (Szochet, Ct. Att. Ref.) to determine the matter. After a fact-finding hearing, the referee determined that the Florida marriage was not valid under Florida law as it was performed without a license from that state. The plaintiff's alternative argument, that the parties' marriage was validly solemnized by a rabbi in New York under a procedure in the Jewish faith known as a ketubah, was likewise found by the referee to be invalid as the rabbi who purportedly executed the ketubah denied actually solemnizing the marriage. Absent a valid marriage for the court's subject matter jurisdiction, the plaintiff's divorce action was dismissed, and the dismissal was affirmed on appeal.

Matrimonial actions are not the only subject area where there has been recent activity in the case law on subject matter jurisdiction. In 2019, New York changed its statute of limitations for cases that may be brought by victims of various forms of sexual abuse. CPLR 208 was amended to provide, in new subparagraph (b), that for minors victimized by certain sex offenses defined by the Penal Law, actions may be commenced for damages from physical, psychological, or other injuries or conditions during a defined two and one half revival period, for victim plaintiffs that have not reached the age of 55 (CPLR 214-g). Naturally, actions have been commenced against various defendants for damages arising from alleged sexual abuse incidents dating back many years, even many decades. In actions brought against state agencies in the Court of Claims, where Court of Claims Act 11(b) requires the claimant to allege particular details as a condition to the waiver of sovereign immunity including, *inter alia,* "the time when" the claim arose (*Kolnacki v State*, 8 N.Y.3d 277, 832 N.Y.S.2d 481, 864 N.E.2d 611 [2007]), claimants are not necessarily in a position so many years after the fact to accurately specify exact dates when the alleged sexual abuse occurred. The Crime Victims Act (CVA), of which CPLR 208 is a part, creates a tension between the inability of some claimants to specify abuse dates *versus* the subject matter jurisdictional requirement that specificity be provided. As a general matter, a claimant's failure in the Court of Claims to particularize a claim, as to prevent the state from investigating it and ascertaining the existence and extent of liability, may result in the dismissal of the action (*D.G. v State of New York*, 214 A.D.3d 713, 185 N.Y.S.3d 245 [2nd Dep't. 2023]). However, courts have recognized under the new CVA some flexibility reflecting the reality that certain claimants may be unable to specify dates of abuse, and whose actions should not necessarily be dismissed as a result. Courts have held that as to the dates of alleged abuse under the CVA, absolute exactitude is not required so long as the particulars of the claim are sufficiently detailed to enable the state to conduct an investigation of the claim (*e.g. Wagner v State of New York*, 214 A.D.3d 930, 187 N.Y.S.3d 61 [2nd Dep't. 2023]; *Meyer v State of New York*, 213 A.D.3d 753, 183 N.Y.S.3d 521 [2nd Dep't. 2023]). The theory of these cases, which is sound, is that if the claimant provides a general time frame, a place, perhaps name of a perpetrator, the overall quantum of detail is sufficient to permit the investigation contemplated by Court of Claims Act 11(b), and such actions should not be dismissed for the absence of subject matter jurisdiction.

C3211:14 "Other Action Pending"

CPLR 3211(a)(4), which permits the dismissal of an action because there is a prior action pending between the same parties for the same dispute, received some exercise in *Quinones v Z & B Trucking Inc.*, __ A.D.3d __, 196 N.Y.S.3d 162 (Mem.) (2nd Dep't. 2023). The two related actions at issue were for personal injuries sustained by the plaintiff as a result of a two-vehicle automobile accident. Action #1 was commenced by the filing of initiatory papers in 2019 but process was never served upon the defendants who owned and operated one of the vehicles. Action #2 was e-filed by the same plaintiff against the same defendants in 2021 for the same underlying occurrence, but on this occasion process was effected upon the defendants. The two actions were assigned to different justices in Queens County. The defendants moved to dismiss the second action under CPLR 3211(a)(4) arguing that there was a prior action from 2019 that was pending. At the same general time, the defendants served a motion to dismiss the first of the two actions on the ground that service of process had not been accomplished within the 120-day timeframe required by CPLR 306-b. The practicing bar might view these facts as potentially inequitable if both actions were to be dismissed and the plaintiff left without any pending case. Yet, because the two actions were assigned to two different judges, the dismissal of both actions is what happened--the first action was dismissed on September 14, 2021 for the failure to serve process, and the second action was dismissed three days later on the ground of prior action pending. Of course, RJI forms are supposed to identify the relatedness of actions so these types of inconsistencies can be avoided. One day before the dismissal of the second action, the plaintiff provided the court with a copy of the order dismissing the first action, which the court acknowledged receiving, but which was not later listed in the order of dismissal as among the papers considered. The plaintiff's motion to renew and reargue the dismissal of the second action was denied, and the denial of reargument is of course not appealable (though the denial of renewal is subject to appeal). Appeals were taken *inter alia* from both the order dismissing

the second action for prior action pending, and the order denying its renewal on the ground that the earlier dismissal of the first action negated the existence of any prior action *pending.* The Second Department held that it was error for the court in the second action to find that there was a prior action pending, as the absence of any service of process in that matter meant that no prior action was actually "pending." That determination rendered academic any error that arguably existed by the court's denial of renewal. Had renewal been reached on appeal, it is likely and predictable that the Appellate Division would have reversed, as the first action had clearly been dismissed by court order prior to the dismissal of the second action for prior action pending, so that on that additional basis, there was no longer any pending prior action.

C3211:18 Affirmative Defenses Available on Subdivision (a)(5) Motion

Statute of Limitations

Governor Andrew Cuomo issued a series of Executive Orders that affected court deadlines as a means of dealing with the covid-19 virus and the disruptions and shutdowns related to it. The governor's authority to do so derived from Executive Law 29-a(1) and (2) in dealing with disaster emergencies. Executive Law 29-a(1) permits a governor by executive order to temporarily suspend specific provisions of statutes, local laws, or ordinances, or the rules or regulations of state agencies, during disaster emergencies. Executive Law 29-a(2)(d) permits the governor in such instances to alter or modify the requirements of statutes, local laws, ordinances, rules or regulations. Under that authority, the governor issued on March 20, 2020 Executive Order ("EO") 202.8 (9 NYCRR 8.202.8) directing that any time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, be tolled until April 19, 2020. Nine additional Executive Orders were issued extending the deadline extensions ultimately to November 3, 2020, a total of 228 days (EO Nos. 202.14, 202.28, 202.38, 202.48, 202.55, 202.55.1, 202.60, 202.67, 202.72, found at 9 NYCRR 8.202.14, 9 NYCRR 8.202.28, 9 NYCRR 8.202.38, 9 NYCRR 8.202.48, 9 NYCRR 8.202.55, 9 NYCRR 8.202.55.1, 9 NYCRR 8.202.60, 9 NYCRR 8.202.67, and 9 NYCRR 8.202.72). Without doubt, the Executive Orders extended, among other things, statutes of limitations.

A question naturally arose as to whether these covid-related time extensions represented a "suspension" or a "toll" of the statute of limitations. There is a difference in the nomenclature that could have a practical effect upon the timeliness of actions. A "suspension" of a statute of limitations merely extends the limitations period to the end-date of the suspension, so that limitations periods expiring in the interim do not expire during that defined time. With a suspension, a statute of limitations expiring on a date after the suspension is lifted is unaffected, meaning that the plaintiff must commence an anticipated action or proceeding within the standard limitations period. By contrast, a "toll" stops the statute of limitations clock from ticking for so long as the toll is in effect. When the toll period ceases, the amount of the tolled time is added to the end of the standard limitations period, thereby expanding the time for timely commencing an action or proceeding to a date beyond the original end-date of the statute of limitations. Tolls may therefore more helpful and generous to plaintiffs than suspensions. Executive Law 29-a(1) clearly provides the governor with authority to temporarily "suspend" statutory provisions. Yet, the Executive Orders issued by Governor Cuomo expressly used the language of a "toll."

The Appellate Division in the Second Department squarely addressed the question of whether the covid-related Executive Orders at issue operated as suspensions or tolls to the statutes of limitations. It held in *Brash v Richards*, 195 A.D.3d 582, 149 N.Y.S.3d 560 (2nd Dep't. 2021) that the Executive Orders were tolls. The court acknowledged that the governor only has authority to toll statutory deadlines where the underlying authority of the Executive Law permits it. It found the tolling authority to exist by virtue of the language of Executive Law 29-a(2)(d), which confers upon the governor the authority to "provide for the *alteration or modification* of the requirements of such statute, local law, ordinance, order, rule or regulation suspended, and may include other terms and conditions (emphasis added)." The operative words for the Appellate Division were "alteration" and "modification," broad enough to envision the tolling of limitations periods (*Brash v Richards*, 195 A.D.3d at 585). The same reasoning has since

been adopted by other judicial departments (*Murphy v Harris*, 210 A.D.3d 410, 411, 177 N.Y.S.3d 559 [1st Dep't. 2022]; *Roach v Cornell University*, 207 A.D.3d 931, 933, 172 N.Y.S.3d 215 [3rd Dep't. 2022]).

The covid tolls will be mathematically applied just like any lawful toll such as those for a defendant's absence from the state (CPLR 207), infancy (CPLR 208), insanity (CPLR 208), war (CPLR 209), the death of a party (CPLR 210), military service (Military Law 308), and bankruptcy (11 U.S.C. 362[a]). By logical extension, arguably, all causes of action that accrued in New York prior to Governor Cuomo's initial Executive Order on March 20, 2020 may be filed months or years into the future, enjoying a 228-day toll to their limitations deadlines depending on the applicable math.

The courts are beginning to see the effects of the covid tolls in litigations where the toll has enabled facially untimely actions to be timely, and thereby enable plaintiffs to survive CPLR 3211(a)(5) dismissal motions. But the arithmetic must actually work for the plaintiff to avoid such dismissals. *In Lastella v St. Joseph's Hospital*, 219 A.D.3d 1421, 196 N.Y.S.3d 162 [2nd Dep't. 2023], an administrator's action for medical malpractice and wrongful death was dismissed based on the last date the decedent was a patient at the defendant hospital as to the medical malpractice, and the date that the decedent died as to the wrongful death. The respective statutes of limitations had expired as to both causes of action by the time of the action's commencement-two and a half years for the alleged medical malpractice (CPLR 214-a) and two years for the alleged wrongful death (EPTL 5-4.1). The plaintiff argued that Governor Cuomo's 228-day covid tolls were excludable from the computations. However, even excluding those days, both causes of action were still untimely in the relation to the date the action was commenced, requiring that the entire action be dismissed for untimeliness (*Lastella v St. Joseph's Hospital*, 219 A.D.3d at 1421).

The Statute of Limitations and Standing

The plaintiff's lack of standing is a basis for the dismissal of a complaint under CPLR 3211(a)(5). The Foreclosure Abuse Prevention Act (L.2022 ch. 821) known in shorthand as FAPA, which was signed into law by Governor Hochul on December 30, 2022, affects limitations-related and standing-related dismissal motions under CPLR 3211(a)(5).

The FAPA legislation contains a number of inter-related homeowner-friendly provisions. Prior to the enactment of FAPA, if a residential mortgage foreclosure action was commenced with an acceleration of the balance due on the unpaid note, the action could be discontinued under CPLR 3217 and, according to the Court of Appeals, the discontinuance had the automatic effect of rescinding the debt acceleration. The lender could then commence a second action at a later date within the six-year statute of limitations measured from the discontinuance of the earlier action (CPLR 213[4]), and with a new acceleration of the outstanding debt on the note (*Freedom Mortgage Corporation v Engel*, 37 N.Y.3d 1, 146 N.Y.S.3d 542, 169 N.E.2d 912 [2021]; *Bank of New York Mellon v Shurko*, 209 A.D.3d 951, 177 N.Y.S.3d 593 [2nd Dep't. 2022]). Further, a later action could be commenced *after* six years from the discontinuance of the earlier one, along with a debt acceleration, so long as the plaintiff in that earlier action lacked standing to commence it and accelerate the debt (*Hawthorne v New Century Mortgage Corp.*, 207 A.D.3d 528, 169 N.Y.S.3d 814 [2nd Dep't. 2022] [action under RPAPL 1504(1)]; *Wells Fargo Bank, N.A. v Rutty*, 206 A.D.3d 862, 171 N.Y.S.3d 117 [2nd Dep't. 2022]). In those second actions, the lender argued the seemingly-counterintuitive position that the plaintiff-lender in the earlier action lacked standing which, if proven, rendered the debt acceleration in that earlier action null and void. The only limitation upon the lender in the later action was that missed payments toward the note could only be sought for the six-year limitations period preceding the commencement of the later action, plus the accelerated note balance. The accelerated note balance is usually the prayer for relief that represents the big money of these actions, and is typically more important than the value of missed monthly payments. But FAPA changed the dynamic.

FAPA amended CPLR 213 to add two new subdivisions denominated in the statute as subdivisions (4)(a) and (4)(b), which changes much of the foregoing. Under CPLR 213(4)(a), as amended, the lender in a second action is estopped from claiming that the plaintiff-lender in an earlier action against the mortgagor lacked standing to commence the action and accelerate the loan (*MTGLQ Investors, L.P. v Singh*, 216 A.D.3d 1087, 190 N.Y.S.3d 415 [2nd Dep't. 2023]). As a result, even if the plaintiff in the first action can be shown to have lacked standing, it does not matter as the plaintiff-lender in the second action, with standing, is statutorily barred from claiming that there had been an unenforceable earlier acceleration. CPLR 213(4)(a) contains one important exception: If the earlier mortgage foreclosure action was *dismissed by the court* for the lack of standing, then the plaintiff-lender in the second action may argue the invalidity of the initial acceleration, as to allow the acceleration in the later action. The court's dismissal of an earlier action for the lack of standing could be by an order granting dismissal under CPLR 3211(a)(5) or by summary judgment under CPLR 3212. But absent a judicial dismissal for lack of standing in the earlier action, the estoppel imposed against the lender by CPLR 213(4)(a) controls (*SYCP, LLC v Evans*, 217 A.D.3d 707, 191 N.Y.S.3d 433 [2nd Dep't. 2023]; *Bank of N.Y. Mellon v Stewart,* 216 A.D.3d 720, 190 N.Y.S.3d 80 [2nd Dep't. 2023]; *GMAT Legal Title Trust 2014-1 v Kator*, 213 A.D.3d 915, 184 N.Y.S.3d 805 [2nd Dep't. 2023]).

Under CPLR 213(4)(b), as amended, the same concept, described above, is applied to actions under RPAPL 1504(1) seeking to cancel and discharge mortgages.

What we are left with, insofar as standing is concerned, is the greater ability for homeowner defendants in the later of multiple actions to move to dismiss those actions for untimeliness under CPLR 3211(a)(5).

The provision of FAPA that restricts parties' rights to challenge standing in a prior related action, in order to seek recovery on a re-accelerated debt in a later action, is limited to residential mortgage foreclosure actions subject to CPLR 213(4). Other actions to collect upon defaulted notes are unaffected by the FAPA legislation, and as to those, the Court of Appeals decision in *Freedom Mortgage Corporation v Engel*, discussed above, remains good law.

The reader is referred to this year's Supplemental Practice Commentary C3217:5, which discusses the FAPA amendment to CPLR 3217 and its effect on discontinuances and the statute of limitations in residential mortgage foreclosure actions.

Statute of Limitations and CPLR 214-a

The state legislature enacted "Lavern's Law," which amended CPLR 214-a effective on January 18, 2018 (L.2018 ch. 1 sec. 6). The amendment added a discovery toll to the statute of limitations for medical malpractice claims arising out of a defendant's failure to diagnose cancer or a malignant tumor. The statute of limitations remained the same--two and a half years-but it did not begin to run until when the plaintiff knew or should have known that the defendant's alleged act or omission caused injury, subject to a seven-year cap measured from the alleged negligent act or omission. However, the revival period of the statutory amendment also was limited by its terms to medical malpractice claims that arose within two and a half years prior to its January 18, 2018 effective date, and not before. In *Ford v Lee,* 203 A.D.3d 456, 164 N.Y.S.3d 592 (1st Dep't. 2022), the defendant moved to dismiss the plaintiff's complaint for an alleged failure to diagnose cancer as the cause of action had accrued on May 16, 2014, earlier in time than the revival period defined by the statute. The First Department agreed, and the plaintiff's dismissal motion, which had been denied by the Supreme Court, was granted on appeal.

Statute of Limitations and the Crime Victims Act

The Crime Victims Act (CVA) embodied by CPLR 214-g, originally effective February 14, 2019, revived otherwise time-barred claims by plaintiffs who were victimized as minors by certain defined acts of sexual offenses committed by defendants. It must be read in conjunction with the CVA-related tolling provisions for infancy as set forth in

CPLR 208(b), as also amended in 2019. The CVA is primarily a civil remedy, not a criminal one. It allows for the filing of formerly time-barred actions by individuals who were under the age of 18 at the time of certain sex offenses, for a two and a half revival period measured from the effective date of the statute, so long as the plaintiff is not 55 years old or older at the time of commencement. CPLR 208(b) otherwise extends the civil statute of limitations for actions arising from underage sex offenses to victims' 55th birthdays. CPLR 214-g was further amended effective August 30, 2020. The CVA was challenged on due process grounds. The statute was found to not violate due process, and on that basis, the denial of the defendant's motion to dismiss for a violation of the statute of limitations was affirmed on appeal (*Schearer v Fitzgerald*, 217 A.D.3d 980, 192 N.Y.S.3d 207 [2nd Dep't. June 28, 2023]). Case not dismissed.

The CVA has also been challenged on constitutional grounds, both on its face and as applied to particular defendants. The Third Department rejected the dismissal of an action on those constitutional challenges in *Matarazzo v Charlee Family Care, Inc*., 218 A.D.3d 941, 192 N.Y.S.3d 755 (3rd Dep't. 2023).

Statute of Limitations and Bankruptcy

A bankruptcy proceeding stays the running of the statute of limitations on an accrued claim that may potentially be asserted against the bankrupt party. In *Deutsche Bank National Trust Company v Lubonty*, 208 A.D.3d 142, 171 N.Y.S.3d 556 (2nd Dep't. 2022), the defendant moved for a CPLR 3211 dismissal of the second of two residential mortgage foreclosure actions on the ground of untimeliness. The defendant argued that the second action was commenced more than six years from the discontinuance by the plaintiff of the first action and was therefore untimely under CPLR 213(4). While the defendant was correct on that math, he was not correct on the law. The defendant had been under the protection of a bankruptcy court for part of the time between the two cases, which operated as a toll of the statute of limitations under 11 U.S.C. 362(a) and CPLR 204(a). The toll stayed and extended the time for commencing the plaintiff's second action long enough that the action, though commenced more than six calendar years from the discontinuance of the first action, was nevertheless timely (*Deutsche Bank National Trust Company v Lubonty*, 208 A.D.3d at 150). Case not dismissed.

Infancy

Plaintiffs in a two-vehicle automobile accident commenced an action for damages. One plaintiff was an infant who sued in her own name rather than through a parent or guardian, and the second plaintiff was the infant's mother. The defendants moved to dismiss the action of the daughter based on the infancy defense of CPLR 3211(a)(5). The plaintiffs cross-moved under CPLR 3025(b) for leave to amend their complaint to name the infant's mother as the plaintiff on behalf of her daughter. The Supreme Court, Bronx County, granted the dismissal motion and denied the cross-motion. The First Department reversed, finding that the court should have exercised its discretion to deny dismissal in favor of granting the plaintiff-mother's cross-motion to correct the problem (*Veloz v Jiddou*, 212 A.D.3d 549, 182 N.Y.S.3d 85 [1st Dep't. 2023]). The case could have alternatively been viewed as one involving the infant's lack of capacity to act as the plaintiff in the action under CPLR 3211(a)(3), though that was apparently not a defense raised by the parties or discussed in the reported decision. In any event, the failure of the initial complaint to name a proper party plaintiff was rectified. Case not dismissed.

Release

Sjogren v Board of Trustees of Dutchess Community Coll., 216 A.D.3d 836, 189 N.Y.S.3d 237 (2nd Dep't. 2023) involved a student at a college that mandated certain gym activities. The plaintiff had some physical limitations, but she signed a release discharging the defendant college "from all liability for any claim of injury" to the student's person, whether harm was "caused by the negligence of the releasees or otherwise." The release further provided that it was "intended to be broad and inclusive in keeping with state laws." The plaintiff claimed that she was injured

during one of her mandated gym activities and commenced an action against the defendant college for damages. The defendant of course moved to dismiss the action under CPLR 3211(a)(5) based on the language of the release. The Second Department noted that a release constitutes a complete bar to an action on a claim which is the subject of the release. Releases are interpreted under the principles of contract law. The Second Department held that the sweeping language of the release at issue here evinced an intention of the parties that it be all-encompassing. The release included language that the plaintiff was aware of and agreed to any risks associated with her gym activities (*Sjogren v Board of Trustees of Dutchess Community Coll.*, 216 A.D.3d at 239). Case dismissed.

A similar result was reached in the Fourth Department involving the operator of a snowmobile who was involved in an accident. The plaintiff had signed a broad general release, clearly and unambiguously releasing the defendant from any claims for bodily injury of any kind. The Fourth Department found it enforceable, and on that basis, dismissed the plaintiff's complaint on appeal (*Putnam v Kibler*, 210 A.D.3d 1458, 178 N.Y.S.3d 851 [4th Dep't. 2022]).

Statute of Frauds

These Practice Commentaries have monitored developing case law addressing when and whether e-mail and other material obtained from social media may qualify as "documentary evidence" for the dismissal of an action under CPLR 3211(a)(1) (CPLR Practice Commentaries and Supplemental Practice Commentaries C3211:10). Distilled to its essence, e-mails may qualify as documentary evidence under CPLR 3211 when they are essentially unambiguous, undeniable and authentic, and for a dismissal motion to be granted upon them, conclusive.

Similar issues have arisen in the context of dismissal motions arguing non-compliance with the statute of frauds under CPLR 3211(a)(5). E-mails were found to be insufficient to establish a party's compliance with the statute of frauds where they were not subscribed in an electronic signature block by the party to be charged as to form a binding contract (*Preston v Nichols*, 216 A.D.3d 1398, 189 N.Y.S.3d 837 [4th Dep't. May 5, 2023] [texts and e-mails]).

Practitioners are referred to an analytical decision and order of Supreme Court Justice Aaron D. Maslow, which surveys appellate cases that address when e-mail has been, and has not been, admissible in determining motions under CPLR 3211(a)(1) (*590 Myrtle LLC v Silverman-Shaw Inc.*, 78 Misc.3d 1218[A], 185 N.Y.S.3d 655 [Sup. Ct. Kings Co. 2023] [portions of the motions were converted to summary judgment per CPLR 3211[c]). In *590 Myrtle Avenue*, e-mail exchanges between counsel during negotiation of a $9.5 million real estate transaction were found to be admissible on the ground that they were unambiguous, authentic, and undeniable (*590 Myrtle LLC v Silverman-Shaw Inc.*, 78 Misc.3d at 1218[A] *8). Indeed, the authenticity of the e-mails were not in question by the parties to the CPLR 3211(a)(1) motion which, it seems, makes it much easier for a court to find that prong of admissibility to be met. In the end, the court determined that the merits of the proffered e-mails established *inter alia* a lack of a meeting of the minds for there to be an enforceable contract between the parties.

C3211:21 Failure to State a Cause a Cause of Action, Generally

CPLR 3211(a)(7) allows for the dismissal of complaints that fail to state a cause of action on which the relief sought can be granted. The term "cause of action" has no discrete definition in the general definitional section of CPLR 105. It is readily understood as relating to allegations of fact and the invocation of law providing grounds for some form of monetary or equitable relief from another party. Causes of action do not lie for procedural devices that are merely collateral to them such as joinder, consolidation, and severance, and should not be styled as such. Relief collateral to causes of action may instead be pursued by means of a separate application to the court, brought under its own enabling statute.

The same concept is true of claims for punitive damages. Punitive damages are not a cognizable free-standing cause of action in New York and should not be pleaded as such (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 N.Y.603, 616, 612 N.Y.S.2d 339, 634 N.E.2d 940 [1997]). Punitive damages are instead a prayer for relief to be set forth in an *ad damnum* clause, which relate back to the stated causes of action from which damage awards are derived (*Trigo v Miller*, 60 Misc.3d 456, 75 N.Y.S.3d 847 [Sup. Ct. Nassau Co. 2018]).

C3211:28 Lack of Personal Jurisdiction

Service of Process

CPLR 308(2) and (4) require the filing of affidavits of service. Affidavits of service are likewise important in helping establish the proper service of process when other forms of service are used as well. Attorneys should be diligent in overseeing the work of process servers not just in connection with the timing and methods of service, but also, the accuracy of the affidavits of service prepared after the fact. The failure of a party to produce accurate affidavits of service can be fatal to the service itself, particularly when the timing or method is challenged by the defendant. An example is seen in *HSBC Bank, National Association v Rini*, 202 A.D.3d 945, 162 N.Y.S.3d 471 (2nd Dep't. 2023). In *Rini*, the defendant moved to dismiss the plaintiff's complaint for the alleged improper "suitable age and discretion" process under CPLR 308(2). The defendant produced in support of the motion the process server's affidavit which reflected an execution of the affidavit one day *prior* to the necessary mailing of a copy of the summons and complaint. In response to the motion, the plaintiff filed two amended affidavits of service, the first confirming the mailing date of the summons and complaint, and the second changing that date to three days earlier. The Supreme Court deemed the second amended affidavit as correcting the confusion on dates and denied the defendant's motion to dismiss. The Second Department reversed on the ground that the process server's inconsistent and competing affidavits raised credibility issues which required a *Traverse* hearing to determine the validity of the service of process. The court noted that while affidavits of service may be corrected under CPLR 305(c) in the exercise of judicial discretion where a substantial right of a party is not prejudiced, the alleged erroneous mailing date reflected by the first and second affidavits of service affected a substantial right of the defendant to proper CPLR notice of the action. Of course, the problem faced by the plaintiff could have been avoided if counsel had more carefully checked the content of the original affidavit of service against the calendar incongruity apparent on its face.

General Jurisdiction

Courts continue to address issues of general jurisdiction in light of the U.S. Supreme Court's groundbreaking opinion in *Daimler AG v Bauman*, 571 U.S. 117, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014) Opinion by Ginsburg, J.). As readers of these Practice Commentaries know, the U.S. Supreme Court clarified in *Daimler* that for general jurisdiction to attach against a corporate party, the entity must be "at home" in the state, meaning that it 1) be incorporated within the state, or 2) maintain its principle office within the state, or 3) qualify as a "truly exceptional case" where the entity's operations are so substantial and of such nature as to render the corporation at home within the state. In New York, general jurisdiction is recognized by CPLR 301.

The first two prongs for general jurisdiction defined by *Daimler* are objective and straight-forward, easily determined by reference to public documentation. Every corporation will have a publicly-filed document identifying its state of incorporation and principal office address. The third potential prong for general jurisdiction is more amorphous as it depends upon arguable factors that will vary from case to case, such as operations being "so substantial" within a state or being of "such nature." A number of recent reported cases have found the circumstances to *not* qualify as "truly exceptional" under *Daimler*. These include, as examples, *Machado v Hershey Entertainment and Resorts Company*, 2023 WL 1967531 (E.D.N.Y. 2023) (not exceptional where defendant engages in *inter alia* extensive television and internet advertising in New York and solicitation of business) and

Starostenko v UBS AG (A Swiss Bank), 2023 WL 34947 (S.D.N.Y. 2023) (not exceptional where defendant is one of the largest broker-dealers in the world with subsidiaries in New York).

The *Machado* and *Starostenko* cases, and other reported jurisdiction-related cases that may be found on Westlaw across the country, discuss one case from 1952 which is held out an example of where exceptional circumstances may exist for the assertion of general jurisdiction--*Perkins v Benquet Consol. Min. Co*., 342 U.S. 437, 72, S.Ct. 413, 96 L.Ed. 485 (1952). *Perkins* involved a defendant corporation that shut down the entirety of its mining operations in the Philippines because of World War II and relocated its operations to Ohio. The U.S. Supreme Court held in *Perkins* that the defendant was amenable to the general jurisdiction of Ohio because Ohio had become its principal, albeit perhaps temporary, place of business. The definition of a "truly exceptional case" for general jurisdiction is nosebleed high.

Of note from our state court where truly exceptional circumstances were analyzed for the possible assertion of general jurisdiction is *Jiang v Z & D Tour, Inc*., 75 Misc.3d 583, 169 N.Y.S.3d 460 (Sup. Ct. Richmond Co. 2022). The plaintiff was injured on a passenger bus operated by the defendant during a roll-over accident while the bus was travelling in Pennsylvania. The defendant, J & D Tour, Inc. (Z & D), was a New Jersey corporation whose buses traveled to many locations throughout the country. Although Z & D was not incorporated in New York and did not maintain its principal office here, it maintained a brick-and-mortar office in New York for the sale of tickets, its buses stopped in front of its office to take on and discharge passengers, the defendant's name appeared on a bus stop sign posted in New York, and the defendant had applied to the New York City Department of Transportation and lobbied the local community board for permission to post its signage. The Court held that those circumstances failed to qualify as truly exceptional under *Daimler.* The Supreme Court's analysis in *Jiang* appears to be correct, as the factors that the plaintiff relied upon for arguing in favor of general jurisdiction were simply run-of-the-mill endeavors by an out-of-state entity to transact business in New York, and were limited in and of themselves. The Supreme Court held in *Jiang* that the defendant was amendable to the specific longarm jurisdiction of New York under CPLR 302(a)(1), from its transaction of business in New York and the relatedness of its transaction to the plaintiff's claim (*Jiang v Z & D Tours, Inc*., 75 Misc.3d at 590). *Jiang* underscores that even where general jurisdiction is lacking against a defendant under CPLR 301, that same defendant may be amenable to longarm jurisdiction under at least one of the statutory bases set forth in CPLR 302(a).

On June 27, 2023, the U.S. Supreme Court released its 5-4 decision in the case of *Mallory v Norfolk Southern Railway Co*., 600 U.S. 122, 143 S.Ct. 2028, 216 L.Ed.2d 815 (2023). The majority opinion was written by Justice Gorsuch and the dissent by Justice Barrett. It is yet another significant development in the evolving law on the assertion of general jurisdiction. It is the latest of four major developments on the subject of general jurisdiction.

The first of four major developments was the U.S. Supreme Court's 2014 decision in *Daimler AG v Bauman*, *supra*. As already noted, in *Daimler*, the Supreme Court clarified that states may assert general jurisdiction (as distinguished from specific jurisdiction) over an out-of-state corporation only when the entity is "at home" in the forum state. The court identified three circumstances when a corporation is "at home" in a state--the first being the corporation's state of incorporation, the second being the state where the corporation maintains its principal office, and the third being the "truly exceptional case" where the entity's operations are so substantial and of such nature as to render the corporation at home in the state. *Daimler* was a restrictive interpretation of federal due process in this area.

The second major development on general jurisdiction, at least in New York State, was the question of whether a corporation's registration to do business within the state confers general jurisdiction over the entity. The issue worked its way through the state courts and came to a head in a 5-2 opinion of the Court of Appeals in *Aybar v Aybar*, 37 N.Y.3d 274, 156 N.Y.S.3d 104, 177 N.E.3d 1257 (2021). *Aybar* held that a corporation's registration to do business in New York did *not* confer the state's general jurisdiction over the out-of-state entity, as it instead merely

provided for the corporation's consent to service of process within the state. Service of process upon the corporation, by whatever means, still requires an underlying basis for New York's jurisdiction, and corporate registration in New York did not, in and of itself, establish general jurisdiction. Notably, *Aybar* was decided based upon New York's due process precedents and was not reliant upon *Daimler*. Plaintiffs seeking to commence actions against foreign corporations, without the availability of general jurisdiction, need under *Aybar* to look to a specific jurisdictional basis under New York's longarm statute (CPLR 302), which in some instances is trickier.

A third recent development has been the New York legislature's response to *Aybar*. The legislature did not like the holding, not one bit. Both houses of the state legislature passed a bill to legislatively nullify *Aybar* (A7769, S7253) by creating proposed CPLR 301-a and amending BCL 1301(e). The amendments provide that a foreign corporation's registration to do business in New York will constitute the corporation's consent the general jurisdiction of New York's courts, absent a withdrawal by the corporation of its registration. That legislation, however, was vetoed by Governor Hochul on December 31, 2021 on the ground that in her view, the proposed legislation would deter foreign corporations from coming to New York to do business. The state legislature was not deterred by the veto. In 2023, both houses of the legislature passed a bill once again to enact a new statute denominated as CPLR 301-a and by amending BCL 1301(e) (A7351, S7476), to provide that a foreign corporation's registration to do business in New York confers New York's general jurisdiction over the entity. Like its proposed legislative predecessor, the corporation could avoid general jurisdiction by withdrawing its New York registration. As of this writing in the summer of 2023, the amendatory bill has not yet been submitted to Governor Hochul for signature. The fate of the bill should be known by the time this Supplemental Practice Commentary is distributed in hard copy at approximately the New Year.

The fourth major development on general jurisdiction is the U.S. Supreme Court's decision in *Mallory v Norfolk Southern Railway Co., supra*. The plaintiff in *Mallory* brought a cancer-related personal injury action against the defendant, Norfolk Southern Railway Co. (Norfolk Southern) in the commonwealth of Pennsylvania under the Federal Employers' Liability Act. The plaintiff resided in Virginia at the time the action was commenced. His exposure to carcinogens while in the former employ of Norfolk Southern was in both Virginia and Ohio. Norfolk Southern's state of incorporation and principal office were in Virginia. The corporation's only jural connection to Pennsylvania was its registration there to do business. And business it did--maintaining within the commonwealth 5,000 Pennsylvanian employees, 2,400 miles of Pennsylvania rail, eleven rail yards there, the largest locomotive shop in North America, and other Pennsylvanian activities (*Mallory v Norfolk Southern Railway Co.*, at *10). Pennsylvania is a "compulsory consent" state, meaning that any entity wishing to do business in the state is *required* to register there and *required* by that registration to consent to the general jurisdiction of the state (15 Pa. Cons. Stat. Ann. 411[a], 5301[a][2][i]). Naturally, considerations of due process are implicated.

In *Mallory*, the five-justice majority at the U.S. Supreme Court (Gorsuch, J.) upheld the assertion of general jurisdiction on the basis of the railway's consent to it, whether compulsory or otherwise. In doing so, the majority relied primarily on precedent which the court found to be squarely on point both factually and legally, the case of *Pennsylvania Fire Ins. Co. of Philadelphia v Gold Issue Min. & Mill. Co*., 243 U.S. 93, 37 S.Ct. 344, 61 L.Ed. 610 (1917) (Holmes, J.). The Gorsuch majority was unwilling to ignore the court's own century-old precedent. The four-justice dissent (Barrett, J.) disagreed, concluding that the *Pennsylvania Fire Ins. Co.* case from 1917 was implicitly overruled by the Supreme Court's due process analysis in *International Shoe Co. v State of Wash., Office of Unemployment Compensation and Placement,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and by *Daimler's* more recent pronouncement in 2014 that general jurisdiction may only be asserted when a corporation is "at home" in the state by its incorporation there, its principal office there, or in the "truly exceptional case" (*Mallory v Norfolk Southern Railway Co.*, at *26). The dissent concluded that since Norfolk Southern did not meet the *Daimler* tests for the assertion of general jurisdiction by Pennsylvania, general jurisdiction was lacking. Both the majority and the dissent made creditable points.

In his concurrence with the majority in *Mallory*, Justice Alito made an observation that is potentially significant. He questioned whether the assertion of general jurisdiction through a compulsory consent statute is constitutional under the commerce clause. He stated there was a "good prospect" that Pennsylvania's compulsory consent statute places an undue burden on interstate commerce by requiring corporations to defend themselves in the commonwealth in potentially all of its transactions, whether those transactions are related to Pennsylvania or not. He expressed a concern that businesses might elect to avoid entering new markets as a means of insulating themselves from remote litigations. Justice Alito also noted that the commerce clause, though raised in the parties' papers in the state court proceedings, was not addressed by the Pennsylvania Supreme Court and was therefore not before the U.S. Supreme Court to consider on the merits. But he invited Norfolk Southern to raise the issue upon *Mallory's* remand to the Pennsylvania court (*Mallory v Norfolk Southern Railway Co.*, at *14).

Some observations flow from *Mallory* that impacts us in New York:

Justice Gorsuch was not on the U.S. Supreme Court in 2014 when the *Daimler* case was decided, so he had a free hand to write the majority opinion in *Mallory* without particular constraint. *Mallory's* finding of general jurisdiction based on compulsory consent provides an end-run around *Daimler* for any state that has, or enacts, a sufficient compulsory consent statute. The *Daimler*r Bastille has been partially stormed. However, of equal importance is *what* the compulsory consent statute must actually say to qualify under *Mallory* for general jurisdiction.

Justice Alito's concurrence in *Mallory* that compulsory consent statutes may violate the commerce clause of the constitution is a red flare fired into the sky that will affect the focus of our still-evolving re-definition of general jurisdiction. The legal battlefield will now shift to the commerce clause. The true constitutional limitations to general jurisdiction shall continue to be litigation fodder for a handful of additional years.

The Pennsylvania statute at issue in *Mallory* requires certain paperwork guarantees, and the corporate entity must continuously maintain a registration office as a condition of its certificate to do business and for accepting the benefits and burdens of its presence in that commonwealth. The recent proposed amendments to enact in New York CPLR 301-a and amend BCL 1301(e) (A7351, S7476) which have been passed by the state legislature but as of this writing not yet sent to Governor Hochul, do not mimic the level of compulsory conditions as seen in the Pennsylvania statute. Therefore, arguably, an open question will still fester as to whether the amendatory language, if signed into law, is "enough" under *Mallory* to assert general jurisdiction absent additional language to bring it more in line with Pennsylvania's statute. That may of course be an argument of the out-of-state corporations going forward, commerce clause aside. If, *arguendo*, the proposed legislative amendments to CPLR 301-a and BCL 1301(e) are signed into law by the governor, they will be subject to the same commerce clause challenge identified by Justice Alito in his *Mallory* concurrence. We in New York may still be debating and watching developments on general jurisdiction in year 2028 as *Mallory* does not quite settle the full array of issues, which is unsatisfying. Justice Barrett may be correct in her assessment that the states may now enact broad compulsory consent statutes full of language and conditions, which will have the effect over time of gutting the restrictiveness of *Daimler*. But if she is correct on that, so be it. Chips fall where they may. But it will all be subject to future courts' interpretations of whether it passes muster under the commerce clause.

Where does *Mallory* leave *Aybar*? *Aybar* was decided as a matter of state due process law and analysis, and it should therefore be unaffected by *Mallory.* The prediction here is that if *Aybar* ever goes away, if at all, it will be by means of New York State legislative nullification.

Mallory deserves one final observation. As already noted, *Daimler* recognized three separate bases for general jurisdiction for an entity to be "at home"--the state of incorporation, the state of the principal office, and the "truly exceptional case" where an entity's operations within a state are so substantial and of such nature as to render the corporation at home there. That third prong is deserving of further federal appellate definition and refinement, going

forward. If Norfolk Southern's contacts with Pennsylvania in *Mallory* were so very extensive as described by Justice Gorsuch in his majority opinion (5,000 Pennsylvanian employees, 2,400 miles of Pennsylvanian rail, eleven rail yards, and the largest locomotive shop there in North America), then *Mallory* might have been a case for considering the third prong of *Daimler* had it been argued and addressed. But instead *Mallory*'s sole focus was the different question of whether a compulsory consent statute permits the assertion of general jurisdiction. The majority and dissent seemed to talk past one another--Justice Barrett's dissent (along with three colleagues) hinged on *Daimler, Daimler, Daimler*, whereas Justice Gorsuch's reasoning focused almost exclusively on the *Pennsylvania Fire* case and only mentioned *Daimler* incidentally a couple of times during a discussion of *International Shoe*. The division behind their closed doors was probably palpable. The third prong of *Daimler* might have potentially brought the members of the court together for one side of the case or the other had that issue been part of the briefing, but the true and separate issue was compulsory consent where the divide occurred.

There is a bottom line that we can draw from *Mallory*: Beyond the three prongs of *Daimler* for general jurisdiction, there now appears to be a fourth, under *Mallory*, based on compulsory consent. *Daimler* + *Mallory* = All current available general jurisdiction grounds. General jurisdiction should be determined, under federal analyses, under what might now be called the *Daimler-Mallory* tests. If more states enact compulsory consent statutes for general jurisdiction, *Mallory* may overpower *Daimler* in the bigger future scheme. But again, word to the wise, it will all be subject to potential future developments involving the commerce clause.

C3211:42 Converting CPLR 3211 Motion Into One for Summary Judgment

A court may not properly advise the parties that it will treat a CPLR 3211 motion as one for summary judgment, and then do so, if summary judgment would itself be premature (*Russo v Crisona*, 219 A.D.3d 920, 195 N.Y.S.3d 729 [2nd Dep't. 2023] [summary judgment premature where discovery was required]).

C3211:69 Easier Standard for Dismissing "SLAPP" Suit

The SLAPP statute has generated some new activity in the courts, particularly as a consequence of the state legislature's amendment of CPLR 3211(g) which became effective on November 10, 2020. The CPLR amendment was made in conjunction with related amendments to Civil Rights Law 70-a and 76-a. CRL 70-a(1)(a), as amended, provides, *inter alia*, that costs and attorneys' fees "shall" be awarded to defendants who successfully obtain CPLR 3211(g) dismissals of SLAPP actions. CRL 70-a(1)(b) and (c) further provide for the discretionary award of compensatory and punitive damages upon plaintiffs who are shown to have commenced SLAPP actions for the purpose of harassing, intimidating, punishing, or maliciously inhibiting the free exercise of free speech, petition, or association rights. The amendments to CPLR 3211(g) directed that the court's determination of a defendant's dismissal motion under CPLR 3211 does not affect the burden of proof in the continuing action or in a subsequent action; that the making of a CPLR 3211 dismissal motion automatically stays discovery, hearings, or other motions absent the court specifically permitting limited discovery on targeted issues; and that the SLAPP provisions of CPLR 3211(g) apply to all forms of parties and pleadings (CPLR 3211[g][2], [3], [4]).

What of the 2020 amendments' retroactivity? Case law on the subject was split and evolving, ultimately leading to a decision by the state Court of Appeals that should put the issue to rest.

The Appellate Divisions in the First and Fourth Departments addressed the issue in both *Gottwald v Sebert*, 203 A.D.3d 488, 165 N.Y.S.3d 38 (1st Dep't. 2022) and *Trinh v Nguyen*, 211 A.D.3d 1623, 180 N.Y.S.3d 735 [4th Dep't. 2022]). In *Gottwald*, the First Department noted that the original SLAPP statute had been enacted almost thirty years before the amendments, and that the amendments were enacted to address shortfalls perceived in the statute's original language. The court noted the absence of any actual retroactivity language in the SLAPP amendments and therefore applied the well-worn presumption that the amendments were prospective only as measured from their

effective date (*Gottwald v Sebert*, 203 A.D.3d at 488). *Gottwald* was followed by the First Department, though without much discussion, in *Cisneros v Cook*, 209 A.D.3d 519, 175 N.Y.S.3d 214 (Mem.) [1st Dep't. 2022) and *Robbins v 315 West 103 Enterprises LLC*, 204 A.D.3d 551, 164 N.Y.S.3d 823 [1st Dep't. 2022]).

Trinh, from the Fourth Department, was a case of alleged defamation and defamation *per se* that fell within the provisions of the SLAPP statute, and which was commenced prior to the 2020 amendments of the law. The interesting twist to *Trinh* was that the 2020 amendment to the cost and attorney fee provisions of CRL 70-a(1)(a) had become effective by the time the defendant's CPLR 3211(g) dismissal motion was made. The Supreme Court, Erie County, applied the cost and attorney fee provisions retroactively in favor of the successful moving defendant. But the Fourth Department held otherwise, noting that the 2020 statutory amendments contained no provision that its language was to be applied retroactively; that statutes are presumed to be prospective; and that as directly relevant here, a retroactive application of the amendments would impair the rights of the plaintiff in the form that existed when the action was initially filed, increase his liability for past conduct, and impose new duties with respect to transactions already completed (*Trinh v Nguyen*, 211 A.D.3d at 1624-25).

Readers of these Supplemental Practice Commentaries are warned that contrary decisions have been rendered from two federal district courts. Those courts determined that the 2020 SLAPP enactments were "remedial" based on certain material contained in the Bill Jacket for the amendments to CRL 70-a, and became effective immediately. Hence, said those courts, retroactive application best implemented the intent of the state legislature (*Coleman v Grand*, 523 F.Supp.3d 244, 258-59 [E.D.N.Y. 2021]; *Palin v New York Times Company*, 510 F.Supp.3d 21 [S.D.N.Y. 2020]). As of this writing, an appeal of *Coleman* is pending at the Second Circuit under Case Number 21-800, so the fate of Coleman's reasoning, at least in the federal context, is uncertain, though it should be affected by further analysis discussed below involving the state Court of Appeals. Respectfully, the Fourth Department was correct to note, contrary to the analyses of the judges in the Eastern and Southern Districts of New York, that the "remedial" nature of a statutory amendment, which is generally at play with many amendments, is not a basis, in and of itself, for ignoring the long-standing legal presumption that new enactments be prospective particularly where there is no expressed provision that a new law be given retroactive effect. All statutory amendments are, at some level, remedial. Had the state legislature intended for its amendments to CRL 70-a and related law to be retroactive to the pre-commencement date of an action's commencement, it could have said so without any need for the federal courts to read its mind.

Of course, guidance from the New York State Court of Appeals would be most welcome on the issue, particularly given the split of reasoning between the federal district courts on the one hand and the state appellate divisions on the other. But like manna from Heaven, the *Gottwald* case of the First Department, discussed above, was granted leave to the state Court of Appeals, and the Court of Appeals determined the issue of retroactivity in a decision rendered June 13, 2023 (*Gottwald v Sebert*, __ N.Y.3d __, 186 N.Y.S.3d 611, 207 N.E.3d 577 [2023]).

Much of the Court of Appeals' analysis in *Gottwald* involves whether the plaintiff was a public figure and whether the defendant enjoyed a privilege defense under the defamation law, which is not particularly relevant here. As to retroactivity, the majority opinion written by Judge Garcia concluded that the SLAPP amendments were prospective only. The specific amendment regarding costs and attorney's fees was made applicable to actions "*commenced or continued* without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law," citing to CRL 70-a(1)(a), which is prospective language (*Gottwald v Sebert*, 2023 WL 3959051 *6 [emphasis added]). Therefore, there is no retroactivity to the cost and attorney's fees language for the period of time between an action's commencement and the effective date of the SLAPP amendments. *But*, said the court, the statutory amendment regarding costs and attorney's fees was also expressly made applicable to actions commenced "*or continued"* without a substantial basis fact or law. As a consequence, costs and attorney's fees shall be assessed in favor of successful counterclaiming defendants in SLAPP actions as computed from the effective date of the SLAPP amendments, forward. The bottom line, therefore, is that

the issue of costs and attorney's fees straddle the November 10, 2020 effective date of the SLAPP amendments, as not being awardable in actions existing prior to that date but awardable for specific costs and attorney's fees incurred in any actions "continuing" *from* that effective date. Thus, according to the Court of Appeals, the First Department's view of retroactivity under *Gottwald* (and by extension the Fourth Department's view under *Trinh*) was partially correct and partially incorrect, based on the need to straddle the effective date of the SLAPP amendments.

Practitioners should draw two lessons from *Gottwald v Sebert.* The first is that plaintiffs seeking to "continue" actions beyond November 10, 2020 should soberly assess the merits of their claims and the strength, if at all, of the defendants' SLAPP counterclaims. An award of costs and attorney's fees on the counterclaim may be a consequence of any erroneous assessment of those merits, covering the post-amendment timeframe. The same is of course true for plaintiffs who may "commence" an action after SLAPP's 2020 amendments, where all costs and attorney's fees are fair game. Second, there should now be a turnaround in the federal courts on how they view the issue of retroactivity. The Court of Appeals decision in *Gottwald v Sebert* is a matter of substantive law which federal courts must apply. The expectation here is that the Eastern and Southern District holdings in *Coleman v Grand* and *Palin v New York Times Company*, respectively, which retroactively computed SLAPP costs and attorney's fees from their date of pre-amendment commencements, will not be followed by the federal district or circuit courts in the future.

Of further recent interest for readers on the subject of SLAPP is the case of *Trump v Trump*, 79 Misc.3d 866, 189 N.Y.S.3d 430 (Sup. Ct. N.Y. Co. 2023). The action involved a claim by former President Donald J. Trump against his niece, Mary Trump, the *New York Times*, and certain named reporters of the *New York Times*, arising from the newspaper's publication in 2018 of information obtained from Mary Trump about her uncle's taxes. The information at issue was subject to a 2001 settlement and confidentiality agreement between*, inter alia*, Donald J. Trump and Mary Trump, as reached in connection with an earlier family Surrogate's Court proceeding. Mary Trump allegedly provided tax information to a reporter at the *New York Times* in violation of her confidentiality agreement which the *Times* then published to its readers. Plaintiff Trump alleged causes of action against the *New York Times* for tortious interference with contract by inducing Mary Trump to violate the terms of the confidentiality agreement, aiding and abetting the tortious interference with contract, unjust enrichment, and negligent supervision. Notably, plaintiff Trump did not take issue with the contents of the *Times*' 2018 article, nor was there a cause of action asserted for defamation. The *New York Times* defendants moved to dismiss the action under CPLR 3211(g), arguing that the action against those defendants was in the nature of a "public petition and participation" SLAPP action under the expanded, amended version of the law. In opposition, plaintiff Trump argued that SLAPP actions were limited to claims of defamation and that no such cause of action was part of the case. The Supreme Court disagreed with plaintiff Trump, applied SLAPP to the various alleged causes of action, dismissed the case under CPLR 3211(g), and invoked the provisions of CRL 76-a(1)(a) in awarding costs and attorney's fees to the *New York Times* defendants. Noteworthy here is that *Trump v Trump* was commenced on September 21, 2021, *after* the 2020 amendments to both CPLR 3211(g) and CRL 70-a. Therefore, the retroactivity of cost and attorney fee provisions was not a relevant issue for the court to analyze and address, as costs and attorney's fees were required to be given.

A final case of note is the uniquely-named matter of *Balliet v with prejudice of the other Kottamasu*, 76 Misc.3d 906, 175 N.Y.S.3d 678 (Civ. Ct. Kings Co. 2022). The plaintiff and defendant were roommates. The plaintiff commenced an action for defamation against the defendant, for statements allegedly made by the defendant that the plaintiff had been sexually flirtatious with the defendant's significant other. The plaintiff moved to discontinue the action, and the defendant sought in response an award of attorney's fees and costs as required under the SLAPP statute (CRL 70-a[1][a]). The issue before the Civil Court was whether an action of this type fell within the scope of SLAPP. The court held that it did not. The court, while noting that the amendatory language of CRL 70-a, CRL 76-a, and CPLR 3211(g) and (h) broadened the matters that are to be of public interest or concern, the communication in *Balliet* was nevertheless of a private nature outside the intendment of SLAPP. Attorney's fees and costs, otherwise awardable under SLAPP, were therefore denied to the defendant, and appropriately so.

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C3211:6 Specifying the Ground of the Motion

While the language of CPLR 3211(a) is silent about the need for a moving party to specify the ground for a dismissal motion, CPLR 2214(a) fills the gap by requiring that the ground be specified. The specific ground for a CPLR 3211 motion should be set forth in the notice of motion in a way that is plain for the trial court, the opposing parties, and perhaps the appellate court, to see. If a party makes a motion to dismiss on one or more of the eleven specified grounds available under CPLR 3211(a), the moving party should just plainly say so.

The foregoing brings us to the case of *Grocery Leasing Corp. v P & C Merrick Realty Co*., 197 A.D.3d 628, 153 N.Y.S.3d 82 (2nd Dep't. 2021). In that matter, the defendant made a motion that was unclear about whether it was styled as one for CPLR 3211 dismissal or for CPLR 3212 summary judgment. The notice of motion appeared to be for a CPLR 3211 dismissal, but the supporting papers spoke in terms of CPLR 3212 summary judgment. The deficiency was raised by the plaintiff in opposition. In reply papers, the defendant clarified that the motion was in the nature of a CPLR 3211(a)(7) motion to dismiss for the plaintiff's failure to state a cause of action on which the relief sought could be granted. The Supreme Court granted the motion to dismiss but the dismissal was reversed by the Second Department. The reason for the appellate reversal was that since the nature and evidentiary standard for the defendant's motion was not truly revealed until the defendant's reply papers, and there was no sur-reply, the plaintiff was deprived of an opportunity to oppose the actual grounds on which the defendant's motion was made and granted. All of the foregoing confusion could have been avoided had the defendant's initial motion papers been properly drafted to make clear in both the notice of motion and in the supporting papers that the basis for the motion was an alleged failure to state a cause of action. If the complaint actually failed to state a viable cause of action, its dismissal would have been indicated, and the ultimate result would have been a different and happier one for the defendant. Lawyering matters.

C3211:8 *Sua Sponte* Dismissals

As part of an annual observational exercise, trial courts continue to sometimes dismiss residential mortgage foreclosure complaints *sua sponte,* when the defendant is in default, only to see the orders reversed or modified on appeal (*U.S. Bank National Association v Green*, 205 A.D.3d 755, 165 N.Y.S.3d 712 [2nd Dep't. 2022]; *Deutsche Bank National Trust Company v Dicerbo*, 204 A.D.3d 884, 164 N.Y.S.3d 829 [2nd Dep't. 2022]; *Bayview Loan Servicing, LLC v Taddeo*, 199 A.D.3d 749, 157 N.Y.S.3d 82 [2nd Dep't. 2021]; *U.S. Bank National Association v Salgado*, 192 A.D.3d 1181, 141 N.Y.S.3d 337 [2nd Dep't. 2021]. *See also Binder v Tolou Realty Associates, Inc*., 205 A.D.3d 870, 166 N.Y.S.3d 551 [2nd Dep't. 2022] [alleged breach of lease]). The issue continues to be one that plagues only the Second Department. A court's authority to dismiss a plaintiff's complaint *sua sponte* must be exercised sparingly and only under extraordinary circumstances. Errors in the exercise of that limited authority continue to be made by trial courts.

C3211:10 Defense Based on "Documentary Evidence"

Case law continues to develop the circumstances under which electronically-generated information may or may not qualify as "documentary evidence" within the purview of CPLR 3211(a)(1).

Evidence, including e-mails, must be essentially undeniable and authentic to qualify as "documentary evidence" under CPLR 3211(a)(1) (*Shah v Mitra*, 171 A.D.3d 971, 98 N.Y.S.3d 197 [2nd Dep't. 2019]). Letters, e-mails, and affidavits are not "documentary evidence" (*Bath & Twenty, LLC v Federal Savings Bank*, 198 A.D.3d 855, 156 N.Y.S.3d 316 [2nd Dep't. 2021]), at least as a general rule. If letters or e-mails are found to be essentially undeniable and authentic, then their contents may be examined to determine whether they utterly refute a plaintiff's claim.

E-mails continue to be reflected in cases on an ever-increasing basis, as more and more business is conducted using that form of communication. In *Cohen v Getzel*, 205 A.D.3d 532, 166 N.Y.S.3d 527 (1st Dep't. 2022), the plaintiff taxpayer sought damages against the defendant accountant for certain IRS tax penalties and interest, imposed as a result of errors on a 2016 tax return. Apparently, the net amount of the plaintiff's recoverable damages were credited to the plaintiff against fees that were otherwise owed to the defendant, as evidenced by an uncontested e-mail from the defendant to the plaintiff. The court accepted the e-mail as evidence in support of the defendant's motion to dismiss, on the ground that the plaintiff incurred no recoverable damages, finding it a "proper case" for evidentially allowing the uncontested e-mail. Presumably, the e-mail at issue was deemed to be authentic and disposed of the plaintiff's claim. Similarly, in *Ostojic v Life Medical Technologies, Inc.*, 201 A.D.3d 522, 162 N.Y.S.3d 27 [1st Dep't. 2022]), where the issue was whether the parties had reached a meeting of the minds on a federal case settlement and whether there was a breach of that contract, the state court relied upon e-mails and letters sent by the parties to the federal court in concluding that the material terms of a settlement had been reached there. Observationally, the authenticity of the e-mails and letters was aided by the fact that they were generated in real-time and addressed to a court, were directly related to the subject matter, and were uncontested.

An e-mail, while authentic, was found to be inconclusive in *Vergara v Mission Capital Advisors, LLC*, 200 A.D.3d 484, 155 N.Y.S.3d 68 (1st Dep't. 2021). In *Vergara*, the parties disputed the amount of commissions that were owed by the defendant to the plaintiff. The defendant moved to dismiss the plaintiff's complaint, arguing in part that a prior e-mailed spreadsheet by the plaintiff conclusively established that no additional commissions were owed. The court was unpersuaded, as there was no evidence that the plaintiff's calculations in the particular e-mail and spreadsheet were accurate, or more accurate than the plaintiff's later calculations showing that higher commissions were owed. The same was true in *Whitestone Construction Corp. v F.J. Sciame Construction Co. Inc.*, 194 A.D.3d 532, 149 N.Y.S.3d 21 (1st Dep't. 2021), where the contents of certain chain logs and e-mails did not reflect facts that were undeniable. In other words, while the e-mail was authentic, its content did not utterly refute the plaintiff's claim for damages.

C3211:11 Lack of Subject Matter Jurisdiction

Two of the various conditions for the state's waiver of sovereign immunity is that actions be commenced against the state only in the Court of Claims, and that a notice of claim be filed and served upon the attorney general's office within 90 days of certain claims' accrual (CCA 10). Under CCA 10(2), if a claim is sought to be made by a decedent's executor or administrator, the 90-day notice period runs from the date of the executor's or administrator's appointment. If no timely notice is filed as directed by the statute, the Court of Claims has no subject matter jurisdiction to entertain the action in the first instance (*Kolnacki v State of New York*, 8 N.Y.3d 277, 832 N.Y.S.3d 481, 864 N.E.2d 611 [2007]). The statutory requirements conditioning claims are strictly construed and applied (*Lichtenstein v State*, 93 N.Y.2d 911, 690 N.Y.S.2d 851, 712 N.E.2d 1218 [1999]; *Dreger v New York State Thruway Authority*, 81 N.Y.2d 721, 593 N.Y.S.2d 758, 609 N.E.2d 111 [1992]).

Philip v State of New York, 75 Misc.3d 1205(A), 166 N.Y.S.3d 838 (Ct. Cl. 2022) is among the many recent cases that addressed the effect of covid upon time-sensitive deadlines. The claimant, as an administrator, missed the 90-day notice deadline of CCA 10(2) measured from his appointment, but relied upon governor Andrew Cuomo's pandemic-related executive orders which collectively tolled time limitations by 228 days (Executive Order Nos. 202.8, 202.14, 202.28, 202.38, 202.48, 202.55, 202.55.1, 202.60, 202.67, 202.72, 202.79). The Court of Claims applied the toll in concluding that the notice required by CCA 10(2) was filed and served upon the state timely. The strict construction and application of CCA 10, and its importance to subject matter jurisdiction, yields to law that recognizes tolling.

C3211:14 "Other Action Pending"

When an action is subject to dismissal on the ground that there is a prior action pending between the parties (CPLR 3211[a][4]), the result of the dismissal motion in the second of the two actions is not necessarily just a binary choice between granting it or denying it.

Illustrating the foregoing point is the recent decision in *Zanani v Sutton Apartments Corporation*, 193 A.D.3d 536, 146 N.Y.S.3d 257 [1st Dep't. 2021]). The plaintiff owned shares and occupied space at a cooperative apartment. The defendant cooperative commenced a holdover proceeding in Housing Court, which was the first of the two actions involving the parties. The defendant obtained a judgment of possession in the Housing Court, which the plaintiff appealed to the Appellate Term. While the appeal was pending, the plaintiff commenced the second of the parties' two actions, this one in Supreme Court, New York County, for a declaratory judgment resolving how much money was owed to the defendant. On motion, the Supreme Court dismissed the declaratory judgment action on the ground that there was a prior action pending. However, after the pre-answer dismissal of the second action, the Appellate Term reversed the judgment of possession that had been awarded to the defendant by the Housing Court. On the separate appeal of the dismissal of the second action, the First Department held that since an appeal was pending at the Appellate Term when the CPLR 3211(a)(4) dismissal motion was made, the Supreme Court might have been better advised to stay the second action pending a determination of the appeal before the Appellate Term, and then depending on the appellate result, decide the prior action pending motion accordingly. In the appeal of the second matter, the First Department exercised its discretion in noting that that the Housing Court action was no longer pending at any level, and in the exercise of its discretion, reversed the Supreme Court's order of dismissal and denied the motion to dismiss the declaratory judgment action.

Actions are still "pending" even when on appeal. How the court handling the second of two actions, when the first is on appeal, allows for some flexibility in terms of how to best handle the procedural posture of the cases. Indeed, the *Zanani* case illustrates the importance of the language in CPLR 3211(a)(4) that "the court need not dismiss on this ground but may make such order as justice requires," which provides for results other than merely granting or denying the motions.

C3211:18 Affirmative Defenses Available on Subdivision (a) Motion

One of the frequently-seen defenses underlying CPLR 3211 dismissal motions in litigation is that of collateral estoppel and *res judicata*. Collateral estoppel has a preclusive effect on the re-litigation of a singular, identical issue, decided in a prior proceeding. *Res judicata* precludes the re-litigation of the entirety of an identical claim, which is broader. The party asserting the collateral estoppel or *res judicata* defense has the burden of establishing the duplicative identity of the already-decided issue/claim. When that burden is met, the opposing party may avoid collateral estoppel or *res judicata* by meeting its own burden, that the party lacked a full and fair opportunity to be heard at the prior proceeding (*Matter of Dunn*, 24 N.Y.3d 699, 3 N.Y.S.3d 751, 27 N.E.3d 465 [2015]).

The related doctrines of collateral estoppel and *res judicata* are usually seen in connection with matters that may have been determined at prior state or federal court proceedings. But what of administrative determinations? Do these doctrines apply to administrative law determinations rendered after evidentiary proceedings, such as those seen from the worker's compensation board, state or county agencies, and administrative review panels, but without the imprimatur of courts of law? The answer, as is heard often enough in the legal profession, is that it depends.

Instructive is the recent case of *Lennon v 56th and Park (NY) Owner Corp., LLC*, 199 A.D.3d 64, 153 N.Y.S.3d 535 [2nd Dep't. 2021] [signed opinion by Dillon, J.]). The plaintiff in *Lennon* claimed that he sustained personal injuries at a worksite during the course of employment, when a hoist elevator on which he was riding with other workers allegedly made multiple sudden rises and drops. The plaintiff filed a worker's compensation claim for knee injuries, which resulted in the conduct of an evidentiary hearing before an administrative law judge ("ALJ"). At the hearing, the plaintiff could not recall the names of any other workers on the elevator at the time of the occurrence.

The general superintendent of the scaffold contractor at the site testified that safety devices which were in place would have prevented the incident from occurring in the mechanical manner described by the plaintiff, and that any such incident would have prompted a shutdown and evaluation of the equipment which did not occur. A medical administrator investigated the date in question and concluded that nothing out of the ordinary had occurred. The plaintiff was represented at the worker's compensation hearing by counsel who cross-examined witnesses and made closing arguments. The ALJ concluded that the hoist elevator did not malfunction in the manner described by the plaintiff, and described the plaintiff's "claim to be, at best, an afterthought." The worker's compensation board reviewed and affirmed the ALJ's findings and conclusions, and the payment of worker's compensation benefits were denied.

The plaintiff in *Lennon* nevertheless commenced a personal injury action against various entities alleging common law negligence and violations of Labor Law sections 200, 240(1), and 241(6). One of the issues addressed by the Second Department was whether the findings and conclusions of the ALJ, as affirmed by the worker's compensation board, operated as collateral estoppel against the plaintiff's personal injury and Labor Law claims, and particularly, whether the underlying accident had happened at all. The court examined a range of collateral estoppel cases and determined that factors unique to each action determine whether the result of a prior administrative proceeding qualifies for *collateral estoppel*. In some instances, a mere overlap of the subject matter of two proceedings does not mean that one collaterally estops the other, if the nature of the litigated conduct or their chronology differ between them (*e.g. Auqui v Seven Thirty One Ltd. Partnership*, 22 N.Y.3d 246, 980 N.Y.S.3d 345, 3 N.E.3d 682 [2013]; *Melendez v McCrowell*, 139 A.D.3d 1018, 32 N.Y.S.3d 604 [2nd Dep't. 2016]). After all, negligence actions may sometimes involve subject matter that is broader than that addressed at an administrative proceeding, and collateral estoppel should not apply in such instances. Yet, there are other actions where a prior factual finding or legal conclusion is so central, elemental, or pivotal to the core viability of the later action in court, that collateral estoppel should be applied (*Roserie v Alexander's Kings Plaza, LLC,* 171 A.D.3d 822, 97 N.Y.S.3d 174 [2nd Dep't. 2019]; *Emanuel v MMI Mech., Inc*., 131 A.D.3d 1002, 16 N.Y.S.3d 285 [2nd Dep't. 2015]). In *Lennon*, the finding of the ALJ that the plaintiff's accident did not occur, or did not occur as described, was fatal to the plaintiff's ability to establish the common law negligence and Labor Law claims which were asserted. In other words, without an injury-producing occurrence, the court need not reach the remaining issues of the case, warranting its dismissal.

Collateral estoppel and *res judicata* are affirmative defenses set forth in CPLR 3211(a)(5). Defenses in that subdivision are waived unless raised in a pre-answer motion to dismiss or as an affirmative defense in the defendant's answer (CPLR 3211[e]). Here, *Lennon* is further instructive regarding its discussion of leave to amend pleadings under CPLR 3025(b), which was successfully accomplished by the defendants, and which allowed the collateral estoppel defense to then be presented via summary judgment.

C3211:28 Lack of Personal Jurisdiction

Developments continue to unfold in New York and elsewhere as fallout from the U.S. Supreme Court's decision in *Daimler AG v Bauman*, 571 U.S. 117, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014). In *Daimler,* the Supreme Court re-examined the topic of general jurisdiction in relation to corporate entities, as distinguished from specific jurisdiction seen in state longarm statutes, and narrowed the concept of general jurisdiction to only where the entity is "at home" within the state. The U.S. Supreme Court identified three circumstances where a corporation may be at home within a state. The first is the corporation's state of incorporation. The second is the state where the corporation maintains its principal office. The third, which is more amorphous than the first two, is the "truly exceptional case," where the entity's operations are so substantial and of such nature as to render the corporation at home in the state. The absence of personal jurisdiction over a corporate party, either by general jurisdiction or longarm jurisdiction, provides a basis for the dismissal of such actions under CPLR 3211(a)(8).

New York's general jurisdiction is set forth in CPLR 301. Longarm jurisdiction is as defined in CPLR 302 and its various subdivisions. CPLR 301 reads very simply, that "[a] court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." The *Daimler* case affects CPLR 301 only, as it leaves untouched the various bases for longarm jurisdiction under CPLR 302(a). As predicted in prior Practice Commentaries and elsewhere, the significant effect of *Daimler* would generate a new wave of case law in state and federal courts around the nation, applying, interpreting, and developing its broader impact and meaning.

Among the questions created by *Daimler's* wake is whether a corporation's registration with a state Department of State for authority to do business, and the related designation of an agent for the receipt of service of process within the state, is a sufficient predicate for the assertion of general jurisdiction. The issue, in other words, is whether the registration and designation operates as a consent to the general jurisdiction of the state.

The hot case to watch in New York on this particular issue was *Aybar v Aybar*, 37 N.Y.3d 274, 156 N.Y.S.3d 504, 177 N.E.2d 1257 (2021), which was discussed at length in 2021 Supplemental Practice Commentary C3211:28. The Court of Appeals held by a 5-2 margin that a corporation's registration to do business in New York does not confer the state's general jurisdiction over the entity, and instead is a consent for the service of process only. The result of *Aybar* is that in New York, plaintiff attorneys have a more difficult time obtaining jurisdiction over out-of-state entities. The easy path of satisfying CPLR 301, by an entity's mere registration and designation of an agent for receiving service of process, is no longer available. Instead, plaintiffs must have another independent basis for the assertion of general jurisdiction under CPLR 301, or jump through the more complicated, costly, and uncertain hoops of longarm jurisdiction under CPLR 302(a).

Of course, law is not a two-dimensional concept consisting of courts only. Law is a three-dimensional concept that involves the whole of state government, meaning the legislature, the executive, and the courts. Attorneys disappointed by *Aybar* spoke with state legislators and found sympathetic ears in Albany. Both the New York State Assembly and Senate passed bills in 2021 to enact a new CPLR 301-a and BCL 1301(e), with concomitant amendments to related statutes (A7769, S7253). The proposed enactments provided that a foreign corporation's registration to do business within New York operated as a consent to the general jurisdiction of New York courts. The proposed legislation extended the consent-to-jurisdiction to foreign associations, foreign limited partnerships, and foreign limited liability partnerships as well. The proposed statute included a proviso that if the foreign entity were to withdraw its registration to do business in New York, the entity's consent to New York jurisdiction would likewise cease upon that event. Under the proposed enactments, foreign corporations registered to do business in New York would automatically be subject to the general jurisdiction of New York courts, thereby nullifying the contrary holding of the Court of Appeals in *Aybar.* The bill went to governor Kathy Hochul for signature. On December 31, 2021, governor Hochul vetoed the enactment of the proposed legislation, explaining in her veto message that in her opinion, the proposed legislation would discourage out-of-state corporations from coming to New York to do business here, because they would be more easily amenable to suits. *Aybar* therefore remains good law and the issue *might* now be quieted, at least for the time being.

In any event, these Practice Commentaries have been annually monitoring decisional developments on general jurisdiction in light of *Daimler*, and now also, *Aybar*. The law is developing on whether and under what circumstances general jurisdiction may be obtained when there is (or might be) an "alter ego" relationship between a corporate parent and a subsidiary, so as to reach a non-New York target defendant. In New York State procedure, CPLR 3102(c) permits a party to engage is pre-action discovery, by court order, if necessary to frame a complaint or, as relevant here, determine a jurisdictional basis for commencing an action against a defendant. There is no corresponding provision in the federal Rules of Civil Procedure. In *Lensky v Yollari*, 2021 WL 4311319 (S.D.N.Y. 2021), *app. pend. Lensky v Turkish Airlines* (2nd Cir. Case No. 21-2567), the plaintiffs commenced an action against defendants Turk Hava Yallari AO (THY) and Turkish Airlines (TA). THY is a state-sponsored Turkish airline and TA is its subsidiary with offices in New York City. THY filed a motion to dismiss the plaintiffs' amended

complaint pursuant to Federal Rule 12(b)(2) on the ground that it was not subject to New York's general or specific jurisdiction. The plaintiffs sought to defeat the motion by alleging that TA, which was subject to jurisdiction, was merely an alter ego of THY, and sought to engage in jurisdictional discovery on that issue. However, the plaintiffs, who noted the fact-intensive nature of an alter ego inquiry, failed to define what evidence they would seek in order to establish jurisdiction, and on that basis, the amended complaint was dismissed as to THY. The lesson for practitioners, whether in pre-action discovery under CPLR 3102(c), or in framed-issue discovery in state litigations, or in jurisdictional discovery in federal courts, is to be as specific as possible in defining the nature and scope of discovery materials relevant to jurisdictional considerations during the earliest stage of litigation.

While much of the focus from *Daimler* has been on whether entities are subject to the general jurisdiction of a state, *Daimler* has impacted the discussion of general jurisdiction as to individuals as well. Prior to *Daimler*, individuals were subject to New York's general jurisdiction by being a domiciliary or mere resident of the state upon being served with process here. The First Department went so far as to apply CPLR 301 general jurisdiction to out-of-state individuals doing business in New York and extending that jurisdiction to other causes arising outside of New York (*ABKCO Industries, Inc. v Lennon*, 52 A.D.2d 435, 384 N.Y.S.2d 781 [1st Dep't. 1976]). Daimler has changed that. Whereas *Daimler* defined corporations "at home" in a state by being incorporated or maintaining a principal office within the state, the concept for individuals most akin to that is the individual's domicile, rather than mere residency or other non-domicile contacts (*IMAX Corp. v The Essel Group*, 154 A.D.3d 464, 62 N.Y.S.3d 107 [1st Dep't. 2017]; *Magdalena v Lins*, 123 A.D.3d 600, 999 N.Y.S.2d 44 [1st Dep't. 2014]). An individual may only have one domicile. Absent being domiciled in New York, an individual's mere ownership of residential property in New York is insufficient for the establishment of general jurisdiction under CPLR 301 (*Chen v Guo Lu*, 144 A.D.3d 735, 41 N.Y.S.3d 517 [2nd Dep't. 2016]). In other words, for individuals, the test for being "at home" in New York is domicile rather than some other form of "presence." Moreover, for general jurisdiction over an individual in the course of business, it must be shown that the person's activities within New York were undertaken on an individualized basis rather than on behalf of a corporate entity (*IMAC Corp. v The Essel Group, supra*).

If a non-domiciliary is passing through New York and personally served with process under CPLR 308, as if "tagged" in the state, may CPLR 301 general jurisdiction be recognized? No, says the Supreme Court, Kings County, in *Ford v Bhatoe*, 58 Misc.3d 1201(A), 92 N.Y.S.3d 703 [Sup. Ct. Kings County 2017]).

Switching gears to a different jurisdictional issue, there is an appellate decision that reflects the interplay between CPLR 3211(a)(8) and General Business Law (GBL) 13. The latter statute provides that service of process may not be effected upon any individual on a Saturday, where the process server knows that the defendant observes that day of the week as a holy time. Our Jewish brothers and sisters are the primary beneficiaries of GBL 13, when postured as defendants in actions. In *Wells Fargo Bank, N.A. v Gross*, 202 A.D.3d 882, 162 N.Y.S.3d 444 (2nd Dep't. 2022), nail and mail service (CPLR 308[4]) was effected at the Orthodox Jewish defendants' residence on a Saturday, and the impropriety of service was raised as a defense in their answer. However, the motion to dismiss the action for improper service was not made until after the 60-day timeframe for contesting service measured from the answer and affirmative defense, as dictated by CPLR 3211(e). The defendants did not assert any undue hardship that prevented them from making a timely dismissal motion. The Second Department held that the failure of a timely motion, without an excusable hardship, required the denial of dismissal, on the ground of a waiver occasioned by the untimeliness of the motion. The defendants may have had a viable ground for dismissing the complaint on the ground of improper service, but failed to make their motion within the required timeframe. The CPLR can lead a horse to water, but can't make it drink. Practitioners must take the 60-day deadline for contesting service of process under CPLR 3211(a)(8) and CPLR 3211(e) seriously, absent the ability to argue and demonstrate an undue hardship in doing so.

C3211:37 Motion to Dismiss Defense May Lead to "Searching the Record"

CPLR 3211 dismissal motions are unlike motions for summary judgment under CPLR 3212. There are several differences between the two statutes, one of which is that on summary judgment a court may search the record, assess the sufficiency of the parties' evidence, and on that basis grant judgment in favor of one party or another. In contrast, the CPLR 3211 motion to dismiss merely examines the adequacy of the pleadings which are assumed true (CPLR 3212[b]; *Spearance v Snyder*, 73 Misc.3d 769, 156 N.Y.S.3d 809 [Sup. Ct. Onondaga County 2021], *citing Davis v Boeheim,* 24 N.Y.3d 262, 998 N.Y.S.2d 131, 22 N.E.3d 999 [2014]).

There is only one means by which a court may appropriately search the record upon a CPLR 3211 motion to dismiss. That is if a dismissal motion is converted into one for a summary judgment under the procedures set forth in CPLR 3211(c) (*Sitt v Sitt*, 200 A.D.3d 440, 154 N.Y.S.3d 768 [1st Dep't. 2021]). Once converted, searching the record in an appropriate instance becomes fair game. The circumstances and procedures for converting dismissal motions into summary judgment motions are discussed in Practice Commentary C3211:42 and its corresponding Supplemental Practice Commentaries.

C3211:42 Converting CPLR 3211 Motion Into One for Summary Judgment

CPLR 3212(a) spells out a general rule that a party may move for summary judgment in any action, but not until after issue has been joined. The provision of CPLR 3211(c) that courts may, upon adequate notice to the parties, treat a pre-answer dismissal motion as one for summary judgment, is therefore an exception to the general rule. Summary judgment determinations are not front-loaded in litigation except 1) when sought in lieu of a complaint under CPLR 3213, or 2) when a CPLR 3211 dismissal motion is treated upon notice as a motion for summary judgment.

There are three ways that a CPLR 3211 dismissal motion can properly be treated and decided as a motion for summary judgment. The first is when the parties jointly request that the motion be treated as one for summary judgment. The second is when the parties, through their conduct in prosecuting or defending the motion, lay bare their respective proofs as to deliberately chart a summary judgment course. The third is when the court gives adequate notice to the parties of its intention to treat the dismissal motion as a summary judgment motion, as authorized by CPLR 3211(c) (*Hendrickson v Philbor Motors, Inc*., 102 A.D.3d 251, 955 N.Y.S.2d 384 [2nd Dep't. 2012] [signed opinion by Dillon, J.]). In all such instances, the court has the final say as to whether the motion warrants summary judgment treatment. Absent one of those three described circumstances, the rule against premature summary judgment motions is adhered to strictly (*City of Rochester v Chiarella*, 65 N.Y.2d 92, 490 N.Y.S.2d 174, 479 N.E.2d 810 [1985]).

When a court chooses at its own initiative to treat a dismissal motion as one for summary judgment, the notice that courts are required to give to the parties presupposes that the motion papers have been read prior to or after the return date, with the parties offered an opportunity to thereafter make submissions or supplemental submissions addressing summary judgment standards and evidence. The transition of a motion from dismissal to summary judgment should not be handled by the court in a way that catches any party flat-footed. Due process and an opportunity for parties to be heard matters.

Whether a CPLR 3211 dismissal motion should be treated as a summary judgment motion is a determination that cannot be unilaterally forced upon a court and an adversary party by means of a premature summary judgment motion prior to the joinder of issue (*SHG Resources, LLC v SYTR Real Estate Holdings LLC*, 201 A.D.3d 610, 162 N.Y.S.3d 325 [1st Dep't. 2022]). If a summary judgment motion is made prior to the joinder of issue, without the parties stipulating to its treatment as summary judgment, and without the dismissal motion otherwise qualifying for summary judgment under CPLR 3211(c), it will be denied (*Id*.). The same is true if a defendant makes a pre-answer CPLR 3211 motion to dismiss and the defendant responds with a cross-motion for summary judgment. The cross-motion will be denied absent one of the exceptions qualifying it for summary judgment treatment (*New York*

Bus Operators Compensation Trust v American Home Assurance Co., 71 Misc.3d 630, 144 N.Y.S.3d 820 (Sup. Ct. Suffolk County 2021).

C3211:43 Notice of the Conversion

While CPLR 3211(c) statutorily requires that courts provide the parties with notice if it intends to treat a dismissal motion as one for summary judgment, formal notice is excused by decisional authority if the dispositive issue is strictly a matter of law that is argued by the parties (*Mihlovan v Grozavu*, 72 N.Y.2d 506, 534 N.Y.S.2d 656, 531 N.E.2d 288 [1985]). Due process concerns are satisfied if the issue of law has already been addressed by the parties. That said, if there is no notice to the parties of the motion's conversion to summary judgment, and if the action does not involve purely legal issues that have been briefed, a conversion by the trial court is improper (*Balay v Manhattan 140 LLC*, 204 A.D.3d 491, 167 N.Y.S.3d 62 [1st Dep't. 2022]; *Davis v Augoustopoulos*, 198 A.D.3d 528, 156 N.Y.S.3d 168 [1st Dep't. 2021]).

C3211:51 Single-Motion Rule

If a defendant moves to dismiss a plaintiff's complaint, and the plaintiff thereafter amends the complaint to assert new factual allegations, is a motion to dismiss barred as to the amended complaint under the single motion rule? No. So says the Supreme Court, New York County, in *People v National Rifle Association*, 74 Misc.3d 998, 165 N.Y.S.3d 234 [Sup. Ct. New York County 2022]). There, the People of the State of New York, by its Attorney General, brought a suit against the NRA and various individual defendants, and certain of the named defendants including the NRA made motions to dismiss the causes of action on various grounds. The action was stayed by a bankruptcy filing of the NRA, which was ultimately dismissed by the federal bankruptcy court. Thereafter, the People amended the complaint to add 90 additional factual allegations detailing the defendants' wrongdoing that allegedly occurred during the 12 months since the commencement of the action, and certain defendants including the NRA then moved to dismiss causes of action reflected by the amended complaint. The Supreme Court mentioned, though in a footnote, that the single motion rule did not prohibit the defendants from filing a CPLR 3211 motion to dismiss as against the amended complaint, citing as authority *Barbarito v Zahavi*, 107 A.D.3d 416, 968 N.Y.S.2d 422 (1st Dep't. 2013). The result makes sense. If the single motion rule were to be interpreted as prohibiting defendants from seeking the dismissal of amended complaints, the defendants would be unable to ever challenge under CPLR 3211 new non-corresponding allegations of an amended complaint compared with the original complaint.

C3211:67 Motion Automatically Extends Responding Time

In the event a motion to dismiss is denied, the defendant's time to answer the plaintiff's surviving complaint is extended by 10 days after service of the court's order with notice of entry (CPLR 3211[f]). Therefore, no answer is due from the defendant while the motion is pending, plus the 10 days from the order's entry. The same is of course true in reverse, if a plaintiff makes a CPLR 3211 motion to dismiss the defendant's counterclaim and the motion is denied. Under that circumstance, the time for a Reply to the counterclaim is extended for 10 days, as set forth by CPLR 3211(f).

The Second Department addressed an unusual but significant issue in *DLJ Mtge. Capital, Inc. v Christie*, 202 A.D.3d 913, 162 N.Y.S.3d 464 [2nd Dep't. 2022]), involving the interplay between CPLR 3211(f) and CPLR 306-b. In *Christie*, the plaintiff sought summary judgment and an order of reference in a mortgage foreclosure action, on default. The defendants cross-moved under CPLR 3211(a)(8) for *inter alia* the dismissal of the plaintiff's complaint based on the failure of proper service of process. The court directed a *Traverse* hearing and, at its conclusion, granted the cross-motion by finding that process was not properly served, and therefore denied the plaintiff's motion for an order of reference. Within approximately a month, the plaintiff “re-served” process upon the defendants,

and thereafter moved for leave to deem the re-service effective *nunc pro tunc*. The defendants not only opposed the motion, but cross-moved to dismiss the complaint pursuant to CPLR 3211(a)(5) and (a)(8) for untimeliness under the statute of limitations and lack of proper service of process. The court granted the CPLR 306-b motion and denied the defendants' cross-motion. Several months elapsed before the defendants served an answer, which the plaintiff treated as untimely. The court's order recognizing the re-service *nunc pro tunc* did not address the time within which the defendants were to serve an answer. However, CPLR 3211(f) says that upon denial of a CPLR 3211 dismissal motion, the defendants have 10 days within which to answer the complaint. Thus, the *nunc pro tunc* treatment of re-service did not place the defendants into an "automatic default," as CPLR 3211(f) provides such defendants with 10 days to serve an answer measured from the order's notice of entry. Observationally, because the defendants made a cross-motion to dismiss under CPLR 3211, they subjected themselves to the provision of CPLR 3211(f) that if their motion was denied, they would have 10 days in which to answer the plaintiff's complaint. The appeal was ultimately decided on other procedural issues unrelated to CPLR 3211(f), but the other issues do not detract from the court's analysis of the 10-day rule of CPLR 3211(f).

C3211:69 Easier Standard for Dismissing "SLAPP" Suit

Law regarding the Strategic Lawsuit Against Public Participation ("SLAPP") was fairly quiet from 1992 when it was enacted into CPLR 3211(g) (L.1992, ch. 767, sec. 4) until 2020, when it was amended (L.2020, ch. 250, sec. 3). SLAPP suits, as the reader knows, involve litigation commenced by property owners, real estate developers, and others seeking public approvals for projects. The suits are brought against members of the public who, through public participation, oppose the project. Causes of action are asserted under various theories such as defamation, prima facie tort, and tortious interference with contractual relations. The concern behind the law is that the suits are motivated to intimate the public from speaking out against proposed projects. CPLR 3211(g), and parallel provisions of CPLR 3212(h), were enacted to provide protections to members of the public from such suits. The 1992 law enabled defendants to move for the dismissal of the plaintiff's complaint, as well as cross-claims and counterclaims, by merely establishing that the claim qualifies as a SLAPP suit. The 1992 law provided that the dismissal "shall be granted" unless the party opposing the motion establishes that the cause(s) of action has (or have) a substantial basis in law, or is/are supported by a substantial argument for an extension, modification, or reversal of existing law. A primary significance of CPLR 3211(g) is that the statute, in effect, flips the burden of proof from the moving party to demonstrate a dispositive legal defense to an action, to the opposing party to demonstrate that the action has merit. The law accomplished it purpose of making it more difficult for plaintiffs to prosecute SLAPP suits beyond the pleading stage.

As noted in the Supplemental Practice Commentaries for 2021, the recent amendment to CPLR 3211(g), which became effective on November 10, 2020, divided SLAPP analysis into four subdivisions. The first subdivision retained the language from the earlier statute about the working and burdens of motions to dismiss, as described above (CPLR 3211[g][1]). The second requires that the pleadings be attached to the moving papers for examination by the court, along with supporting and opposing affidavits. What is "new" about this requirement is its direction that any factual determination by the court is not admissible later in the action or in a subsequent action, and has no effect upon the burden of proof required in the continuing or subsequent action. The third change of the 2020 amendment is the direction in CPLR 3211(g)(3) that while the dismissal motion is pending, all discovery, hearings, or other motions are stayed, pending a determination of the dismissal motion. If the court, upon reviewing the papers, determines that limited discovery is needed for properly deciding the dismissal motion, it may order specified discovery. The mechanism is akin to that which exists in CPLR 3212(d), where the court may order a continuance of a summary judgment motion pending targeted discovery for facts essential to justify opposition to the motion. Finally, the 2020 amendment added CPLR 3211(g)(4), which explains that the overall provisions of the statute apply to all forms of pleadings and all potential posturing of parties.

The 2020 amendments were accompanied by a parallel amendment to Civil Rights Law (CRL) 76-a, which defines SLAPP actions and the meaning of "public petition and participation." The amendment to CRL 76-a (L.2020, ch. 250, sec. 1) added language to include claims based upon "any communication in a place open to the public or a public forum in connection with an issue of public interest" (CRL 76-a[1][a][1]). That amendment has been described as "broaden[ing] the scope of the law and afford[ing] greater protections to citizens facing litigation arising from their public petition and participation" (*Marble Assets, LLC v Rachmanov*, 192 A.D.3d 998, 146 N.Y.S.3d 147 [2nd Dep't. 2021]). The amendatory language applying SLAPP to "any communication ... in a public forum" extends the statute beyond just property owners and developers, to a far wider range of law suits intended to intimidate or punish public comments.

These amendments have had an additional year to bake into the CPLR and for cases to address the amendatory language. A continuing issue is what conduct by the public constitutes matters of "public petition and participation" (CPLR 3211[g]; Civil Rights law 76-a). Clearly, the statute has been easily applied to suits commenced against members of the public by property owners and developers seeking municipal approvals for projects. But what about public commentary about more private matters? Some late breaking guidance on that question is provided by *Aristocrat Plastic Surgery, P.C. v Silva*, 206 A.D.3d 26, 169 N.Y.S.3d 272 (1st Dep't. 2022). There, the defendant underwent a procedure from a plastic surgeon who practiced medicine through the plaintiff, a professional corporation. The defendant was dissatisfied with her results, and posted a negative review on two websites which provide public commentaries about various businesses. The plaintiff, believing it had been defamed, commenced an action against the defendant for defamation, intentional interference with prospective contractual relations, intentional infliction of emotional distress, and prima facie tort. The defendant moved to dismiss the action as a SLAPP suit, and also sought an award of damages under CRL 76-a and attorney's fees. The First Department was called upon to interpret the recent amendment to CRL 76-a, whereby SLAPP protections were extended to claims based upon "any communication in a place open to the public or a public forum in connection with an issue of public interest" (Civil Rights law 76-a[1][a][1]). The court held that the defendant's posts concerning the plastic surgery performed upon her qualified as an exercise of her constitutional right of free speech and a comment on a matter of legitimate public concern and public interest--that is, medical treatment rendered by a physician's professional corporation and the physician performing surgery under its auspices. In other words, even though the plastic surgery was performed as a private matter, the defendant's right to express her opinion about the plastic surgeon's quality was of sufficient public interest as to fall within the expanded language of SLAPP.

It remains to be seen how wide the barn door has been thrown open to law suits that may not arguably qualify for SLAPP protections. Predictably, this issue will receive attention in future supplemental practice commentaries.

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C3211:5 Grounds for Dismissal

A party moving for a CPLR 3211 dismissal may argue more than one ground in the papers, directed at the same cause or causes of action. Perhaps best illustrating the point is *Monaco v Van Meerendonk*, 190 A.D.3d 968, 136 N.Y.S.3d 790 (2nd Dep't. 2021). In *Monaco*, the plaintiff's cause of action for fraud was dismissed by the court because it was not adequately pleaded, *and* was time-barred under the applicable statute of limitations, *and* was precluded by the *res judicata* doctrine, *and* was barred by a prior settlement and release. In other words, the meat was turned over on the grill multiple times to assure that the result was well done. Different grounds also may be argued as to different causes of action.

C3211:8 *Sua Sponte* Dismissals

Our decisional law continues to be plagued with reported appellate cases where trial judges are reversed for dismissing complaints *sua sponte*, on grounds not raised by the defendant in the underlying CPLR 3211 moving

papers. It is an ongoing, annual problem as the trial judges doing so are either refusing to get the precedential message, or are not listening to it. The problem continues to be centered in the Second Department and almost exclusively in the field of residential mortgage foreclosure actions. The Appellate Division has consistently and repeatedly held that the court's power to dismiss a complaint *sua sponte* is to be used sparingly, and only when extraordinary circumstances exist to warrant dismissal (*e.g. Deutsche Bank Natl. Trust Co. v Winslow*, 180 A.D.3d 1000, 120 N.Y.S.3d 81 [2nd Dep't. 2020]; *JP Morgan Chase Bank, N.A. v Laszlo*, 169 A.D.3d 885, 94 N.Y.S.3d 343 [2nd Dep't. 2019]; *OneWest Bank, FSB v Fernandez*, 112 A.D.3d 681, 976 N.Y.S.2d 405 [2nd Dep't. 2013]; *HSBC Bank USA, N.A. v Taher*, 104 A.D.3d 815, 962 N.Y.S.2d 301 [2nd Dep't. 2013]; *U.S. Bank, N.A. v Emmanuel*, 83 A.D.3d 1047, 921 N.Y.S.3d 320 [2nd Dep't. 2011]). There has been no equivocation of that rule on the part of the Appellate Division. Nor does the rule engender ambiguity. The reason that *sua sponte* dismissals should occur sparingly, and only where there are extraordinary circumstances for doing so, is that a *sua sponte* dismissal of a complaint deprives the plaintiff of basic due process to which that party is entitled-notice, and an opportunity to be heard. Courts should be the last forum where due process rights are violated, yet, for reasons unique to residential mortgage foreclosure actions, the violations repeat, then repeat some more, and repeat again. The discussion of the subject in this section of the Practice Commentaries has become an annual event.

Examples of this practice during the year prior to this writing include as follows:

U.S. Bank N.A. v Salgado, 192 A.D.3d 1181, 141 N.Y.S.3d 337 (2nd Dep't. 2021) (*sua sponte* dismissal of compliant by Supreme Court, Queens County [Latin, J.] for plaintiff's violation of a status conference order, reversed on appeal).

Bank of N.Y. v Ramirez, 186 A.D.3d 1472, 131 N.Y.S.3d 104 (2nd Dep't. 2020) (*sua sponte* dismissal of a complaint by Supreme Court, Queens County [Grays, J.], and an order of the same court denying its vacatur [Velasquez, J.] relative to an order of reference, reversed in the absence of any extraordinary circumstances).

Lehman Bros. Bank v Hickson, 186 A.D.3d 1348, 129 N.Y.S.3d 2 (2nd Dep't. 2020) (order of the Supreme Court, Kings County [Baynes, J.] modified on appeal to delete therefrom the branch that *sua sponte* dismissed the plaintiff's complaint on a personal jurisdiction ground not raised by any party).

The established track record suggests that these *sua sponte* dismissals almost never survive appeal.

C3211:10 Defense Based on "Documentary Evidence"

Motions to dismiss on the basis of documentary evidence raise, by definition, two primary considerations for attorneys and courts. One consideration is what type of documents qualify under the statute. The second consideration is the legal standard that must be applied for determining whether qualifying documentary evidence warrants, or fails to warrant, the dismissal of all or part of a plaintiff's complaint. The same discussion applies to motions that may be interposed to dismiss counterclaims, third party complaints, cross-claims (CPLR 3211[a]), and affirmative defenses set forth in parties' answers (CPLR 3211[b]). For ease of reference, this discussion presumes that dismissal is sought of a plaintiff's complaint on the basis of documentary evidence.

The legal standard that courts must apply in determining motions under CPLR 3211(a)(1) is the easier of the two considerations, because the standard is straight-forward. For dismissal, the proffered documents must "utterly refute" the allegations in the plaintiff's complaint, "conclusively establishing a defense as a matter of law" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 34 N.Y.3d 908, 115 N.Y.S.3d 782, 139 N.E.3d 406 [2021]; *Shephard v Friedlander*, 195 A.D.3d 1191, 151 N.Y.S.3d 184 [3rd Dep't. 2021]; *Hart 230, Inc. v PennyMac Corp.*, 194 A.D.3d 789, 149 N.Y.S.3d 134 [2nd Dep't. 2021]). Note the extremism of the burden of proof-that the documentary evidence not only refute the allegations of the plaintiff's

complaint, but "utterly" do so, and that defense not only be established as a matter of law, but that it "conclusively" do so. There is no room for daylight. Wiggle room is not countenanced. Close calls are not enough. Gray areas have no place within the ambit of CPLR 3211(a)(1). The document that is proffered must clearly say what it says and mean what it means. Courts will not grant motions brought under CPLR 3211(a)(1) on account of documentary evidence, and dismiss a plaintiff's complaint in lieu of an answer, unless the basis for doing so is clear, unambiguous, and absolute.

Which brings the discussion to the *type* of documents that may qualify under the statute. Many documents do not qualify for CPLR 3211(a)(1) consideration. Others, of course, do.

E-mails continue to be an evolving area of law where some qualify as CPLR 3211(a)(1) documentary evidence, and some do not. As a general rule, letters, e-mails, and affidavits prepared for the CPLR 3211 motion are not documentary evidence contemplated by the statute (*Shah v Mitra*, 171 A.D.3d 971, 98 N.Y.S.3d 197 [2nd Dep't. 2019]). Those forms of material are too easily manipulated for the purpose that the moving party seeks to achieve. The standard that appears to be evolving is that for e-mails to be treated as documentary evidence under CPLR 3211(a)(1), their content must be "essentially undeniable" and quintessentially authentic at the time of their creation. (*Id.*) If the content does not undeniably refute the plaintiff's contentions, it will not suffice for the dismissal of the plaintiff's complaint (*Whitestone Constr. Corp. v F.J. Sciame Constr. Co., Inc.*, 194 A.D.3d 532, 149 N.Y.S.3d 21 [1st Dep't. 2021]).

Facebook postings are even more problematic for defendants moving for CPLR 3211(a)(1) dismissals. Unlike e-mails, which are business-like, Facebook postings are almost-exclusively social. In *W & G Wines LLC v Golden Chariot Holdings LLC*, 46 Misc.3d 1202(A), 7 N.Y.S.3d 245 (Sup. Ct. Kings County 2014), the court held that printouts of the plaintiff's Facebook postings were subject to interpretations, and their reliability had not been established.

C3211:11 Lack of Subject Matter Jurisdiction

Motions to dismiss for a court's lack of subject matter jurisdiction is recognized in CPLR 3211(a)(2).

Subject matter jurisdiction has been described as the power of the court to adjudge a general question involved in a matter, and is not dependent on the facts that may appear in a particular case arising, or claimed to have arisen, under the general question (*Thrasher v United States Liab. Ins. Co.*, 19 N.Y.2d 159, 278 N.Y.S.2d 793, 225 N.E.2d 503 [1967]; *21st Century Pharmacy v American Intl. Group*, 195 A.D.3d 776, 145 N.Y.S. 3d 810 [2nd Dep't. 2021]). Even for courts of general jurisdiction, such as the state Supreme Court, there are forms of disputes that cannot be heard where subject matter jurisdiction is lacking. An example of matters that the Supreme Court cannot hear are those where the State of New York is sued and which may only be heard in the Court of Claims. Another example are matters that are within the exclusive province of the federal courts, such as bankruptcy, suits against the United States, and federal tax matters. Also, state courts lack subject matter jurisdiction over issues that have been legislatively preempted by federal law (*Klingsberg v Council of School Supervisors and Administrators--Local 1*, 181 A.D.3d 949, 122 N.Y.S.3d 335 [2nd Dep't. 2020] [preemption of the parties' dispute by the Federal Labor Management Relations Act]). The "lower courts" in New York State at the village, town, city, county, and district level have no subject matter jurisdiction to hear matters that exceed the authorized monetary limits of those respective courts. Specialized courts, such as Family Courts and Surrogate Courts, also lack subject jurisdiction to hear matters outside of their defined ambits.

Subject matter jurisdiction must inherently exist with a court for it to hear and resolve a matter on the merits. Parties may not confer subject matter jurisdiction upon a court that otherwise lacks it, not by consent or otherwise (*Matter of Metropolitan Transp. Auth.*, 32 A.D.3d 943, 823 N.Y.S.3d 88 [2nd Dep't. 2006]). Relatedly, the absence of a

court's subject matter jurisdiction is a defense that is not waived by a party's failure to raise it at any particular time in a litigation, as it may instead be raised at any time (*Financial Indus. Regulatory Auth., Inc. v Fiero*, 10 N.Y.3d 12, 853 N.Y.S.2d 267, 882 N.E.2d 879 [2008]). Indeed, the issue is one area that may be raised by the court at its own initiative, *sua sponte* (*Id.*), since it is so fundamental. The lack of subject matter jurisdiction is understandably not listed as among the various defenses of CPLR 3211(e) that are waived if not raised as an affirmative defense or in a pre-answer motion to dismiss. If a court determines that it does not have the jurisdiction to hear the subject matter of an action, the action must be dismissed. Period, end of story. If a court renders a judgment in a matter where subject matter jurisdiction was lacking, the judgment is void as a matter of law (*Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 N.Y.3d 200, 969 N.Y.S.2d 424, 991 N.E.2d 198 [2013]; *Caffrey v North Arrow Abstract & Settlement Servs., Inc.*, 160 A.D.3d 121, 73 N.Y.S.3d 70 [2nd Dep't. 2018]).

In actions against the State of New York, a claimant must file a claim within 90 days from the accrual of a cause of action (CCA 10, 11), akin to notices of claims that must be served upon other municipal entities under General Municipal Law 50-e and 50-i. The failure of a claimant to satisfy that aspect of the Court of Claims Act divests the Court of Claims of subject matter jurisdiction to hear the action (*Criscuola v State of New York*, 188 A.D.3d 645, 134 N.Y.S.3d 67 [2nd Dep't. 2020]). Likewise, Court of Claims Act 11(b) requires that claims against the state be verified in the same manner as a complaint in the Supreme Court. The absence of a proper verification on claims against the state is a jurisdictional defect that divests the Court of Claims of subject matter jurisdiction over the matter (*Flowers v State of New York*, 175 A.D.3d 1724, 109 N.Y.S.3d 508 [3rd Dep't. 2019]).

Religious disputes sometimes spill into the state court system. Some are justiciable, some are not. Courts lack subject matter jurisdiction over issues that involve the interpretation of religious doctrine or which involve particular doctrinal beliefs (*Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana*, 9 N.Y.3d 282, 849 N.Y.S.3d 463, 879 N.E.2d 1282 [2007]; *Russian Orthodox Convent Novo-Diveevo, Inc. v Sukharevskaya*, 166 A.D.3d 1036, 91 N.Y.S.3d 101 [2nd Dep't. 2018]). The reason is that the state courts must avoid becoming entangled in essentially religious controversies or intervening on behalf of groups espousing particular doctrines or beliefs. Conversely, courts possess subject matter jurisdiction over parties who happen to be involved in religious organizations or controversies, where the dispute is capable of resolution by the application of neutral principles of law without reference to religious principles (*Id. See also Jones v Wolf*, 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775 [1979]). When the issue is raised, courts must part the Red Sea, so to speak, between deciding issues that can be resolved by application of neutral civil law, versus those that are so intertwined with religious doctrines or principles that subject matter jurisdiction is lacking.

In *Laguerre v Maurice*, 192 A.D.3d 44, 138 N.Y.S.3d 123 (2nd Dep't. 2020), the plaintiff sued the defendant for defamation, and the defendant moved to dismiss the action under CPLR 3211(a)(2) for lack of subject matter jurisdiction. The defendant argued that the alleged statement--that the plaintiff was a homosexual who viewed gay pornography from a church computer, was intertwined with religious doctrine, and therefore, not justiciable in a civil court. The Supreme Court and the Second Department disagreed, finding that the statement's defamatory content, if any, could be resolved without reference to religious principles, doctrines, or practices. Thus, disputes that happen to involve religious persons or organizations, such as not only defamation, but the interpretation of by-laws or the enforcement of contracts, are within the subject matter of the courts. Disputes that are inextricably intertwined with religious doctrine, or which go to the judgment and discretion of church elders, are not.

Attorneys commencing litigations should therefore be careful of subject matter jurisdiction, as it must be a difficult conversation to later explain to a client why the action was brought in the wrong court.

C3211:14 "Other Action Pending," Generally

While CPLR 3211(a)(4) vests the court with authority to dismiss an action if there is already another action pending between the same parties for the same cause of action, a dismissal of the second action is never mandatory. The statute qualifies the authority of the court, that it "need not dismiss upon this ground but may make such order as justice requires." In other words, the trial court has discretion to fashion a remedy that best suits the circumstances of the parties and the case.

An example of the statute's flexibility was recently seen in *U.S. Bank N.A. v Karnaby*, 190 A.D.3d 1005, 136 N.Y.S.3d 886 (2nd Dep't. 2021). The plaintiff commenced two actions against the same defendant, the first in 2010 and the second at a later time. The defendant moved to dismiss the second of the two actions. The 2010 action was in the process of being discontinued, and was in fact discontinued while the motion to dismiss was pending in the second action. The Supreme Court's denial of the dismissal motion was affirmed on appeal. Yes, the two actions overlapped in terms of the parties, the subject matter of the litigation, and time. But as a practical matter, there was no need for the court to dismiss the second action under CPLR 3211(a)(4) if the first action was in the process of being discontinued while the dismissal motion was pending and was in fact discontinued by the time the motion was decided.

The circumstances addressed by CPLR 3211(a)(4) may be a little more compelling in the context of two duplicitous residential mortgage foreclosure litigations. The reason is that under RPAPL 1301(3), an action to recover upon a mortgaged debt prohibits the commencement of a second such action. The purpose of the statute is to protect the mortgagor of the expense and annoyance of two separate actions at the same time with reference to the same debt (*Central Trust Co. v Dann*, 85 N.Y.2d 767, 628 N.Y.S.2d 259, 651 N.E.2d 1278 [1995]; *U.S. Bank v Stern*, 189 A.D.3d 1313, 134 N.Y.S.3d 272 [2nd Dep't. 2020]). The statute allows an exception, that a second action may be commenced if permission is obtained from the court where the first action is already pending. In *21st Mtge. Corp. v Ahmed*, 173 A.D.3d 951, 105 N.Y.S.3d 467 (2nd Dep't. 2019), the plaintiff commenced two actions against the same defendant homeowner over the same debt, one in 2007 and one in 2015. Leave of court was not sought prior to the commencement of the second action. A stipulation discontinuing the 2007 action had been executed but had not been filed prior to the commencement of the 2015 action. The stipulation of discontinuance was filed after the commencement of the 2015 action but before the defendant in that action moved to dismiss it on the ground of prior action pending. The court denied dismissal of the 2015 action, noting that while under the circumstances leave of court should have been sought and obtained before the commencement of the second action, there was no prejudice to the defendant and no substantive violation of RPAPL 1301(3).

Indeed, dismissal of the second action need not be ordered even where the first action has not been discontinued or been in the process of a discontinuance. In *Bank of N.Y. Mellon v Porfert*, 187 A.D.3d 1110, 134 N.Y.S.3d 57 (2nd Dep't. 2020), two duplicative foreclosure actions were commenced against the same defendant in 2006 and 2014, respectively. There was no activity in the 2006 action since its commencement. The Second Department, in affirming the Supreme Court, held that judicial discretion permitted the denial of the defendant's motion to dismiss the second action under CPLR 3211(a)(4), presumably because of the moribund nature of the earlier of the two actions.

By contrast, where the prior action is not discontinued or in the process of discontinuing, and is not otherwise moribund as in *Porfert*, the dismissal of the second action is warranted (*HSBC Bank USA, N.A. v Pena*, 187 A.D.3d 724, 130 N.Y.S.3d 354 [2nd Dep't. 2020]).

In comparing two actions under CPLR 3211(a)(4), it is not necessary that the precise legal theories presented in the first action also be presented in the second, as long as the *relief* is the same or substantially the same (*Board of Mgrs. of the 1835 E. 14th St. Condominium v Singer*, 186 A.D.3d 1477, 132 N.Y.S.3d 25 [2nd Dep't. 2020]).

C3211:18 Affirmative Defenses Available on Subdivision (a) Motion

CPLR 3211(a)(5) is a grab bag of different forms of affirmative defenses that have been batched together in a single subdivision of the statute. Each has its own elements which, when established by a moving defendant, may result in the dismissal of the plaintiffs' complaints.

CPLR 3211 may be used against not only complaints, but also cross-claims, counterclaims, and third party complaints. Relatedly, CPLR 3211(b) permits a plaintiff to move for the dismissal of one or more defenses, on the ground that the stated defense has no merit. Therefore, while CPLR 3211 is typically seen in the context of dismissal motions made against plaintiffs' complaints, the applicability of the statute is actually broader. A recent example of a motion by a defendant to dismiss the cross-claims of a co-defendant is *Jaber v Elayyan*, 191 A.D.3d 964, 142 N.Y.S.3d 601 (2nd Dep't. 2021).

Arbitration and Award

The CPLR 3211(a)(5) defense of arbitration and award is easily applied when the same dispute between the parties has already been *resolved* by an earlier arbitration, and where the arbitration has been or is subject to confirmation by the courts under CPLR Article 75. However, if an action is commenced before an agreed-upon arbitration has begun or concluded, the circumstances are more murky. A signed opinion by Justice Linda Christopher, *Wilson v PBM, LLC*, 193 A.D.3d 22, 140 N.Y.S.3d 276 (2nd Dep't. 2021), addressed the issue. She and the Second Department noted that a mere *agreement to arbitrate* a dispute is not a CPLR 3211(a)(5) defense to an action and may therefore not provide a basis for a motion to dismiss (*citing Allied Bldg. Inspectors Intl. Union of Operating Engrs., Local Union No. 211, AFL-CIO v Office of Labor Relations of City of N.Y.*, 45 N.Y.2d 735, 408 N.Y.S.2d 476, 380 N.E.2d 303 [1978]). In *Wilson*, the Supreme Court had granted a motion to compel arbitration, and under those circumstances, the Second Department held that rather than dismiss the plaintiff's complaint, the action should instead have been stayed pending the arbitration. *See also Matter of County of Nassau v Detectives Assn., Inc. of Police Dept. of Nassau County*, 188 A.D.3d 1049, 137 N.Y.S.3d 77 (2nd Dep't. 2021).

Collateral Estoppel

Prior Practice Commentaries have focused largely on the circumstances where summary judgment determinations either do or do not have *collateral estoppel* effect on later actions. The same is true for the related topic of *res judicata*, which is also ground for the dismissal of actions under CPLR 3211(a)(5).

A recent decision, *Matter of BZ Chiropractic, P.C. v Allstate Ins. Co.*, 197 A.D.3d 144, 154 N.Y.S.3d 46 [2nd Dep't. 2021]) [signed opinion by Dillon, J.]), addressed whether a court's advisory opinion--which is very rare and to be typically avoided by the courts--is subject to either doctrine. In *BZ Chiropractic*, the Appellate Term for the 2nd, 11th and 13th Judicial Districts addressed an issue of whether certain interest should have been tolled on an insurance-related judgment, and if so, whether a satisfaction should have been entered on the judgment. The Appellate Term determined that no toll of interest was indicated, but then gratuitously stated that the non-tolled interest be computed at the 9% rate of CPLR 5004 rather than at the more specific 2% per month compounded rate of Insurance Law 5106(a). In determining a later motion brought to clarify its holding, the Appellate Term described its language about the *rate* of interest as “advisory” only and not on the merits. An aggrieved party commenced a hybrid turnover proceeding/declaratory judgment action related to the same dispute for various forms of relief, including a declaration that it was entitled to the higher rate of interest on the judgment as authorized by Insurance Law 5106(a). At issue in the Supreme Court, and on appeal, was whether the Appellate Term's advisory language that the parties' judgment was subject to 9% interest under CPLR 5004 collaterally estopped the plaintiff/petitioner from arguing the same issue anew at the Supreme Court on the merits. The Second Department held that the Appellate Term's advisory opinion, and for that matter dicta from the courts, are by nature not determinations of contested issues rendered on the merits after a full and fair opportunity to be heard. Therefore, when an advisory

opinion is rendered, however rare, the doctrine of collateral estoppel does not bar consideration of the same issue on the merits in a later court proceeding. Further, the Second Department held that since Insurance Law 5106(a) was the more specific interest statute applicable to the dispute, it trumped the general provision of CPLR 5004, and required that the interest be computed at the higher rate of 2% per month, compounded.

C3211:28 Lack of Personal Jurisdiction

The law nationally and in New York continues to mold itself around the U.S. Supreme Court's groundbreaking opinion in *Daimler AG v Bauman*, 571 U.S. 117, 134 S. Ct. 746, 187 L.Ed.2d 624 (2014). In *Daimler*, general jurisdiction over corporate entities has been narrowly defined to entities "at home" in a state, meaning 1) the state of the entity's incorporation, or 2) the state where the entity maintains its principal place of business, or 3) in truly exceptional cases, where the entity's operations are so substantial and of such nature as to render the corporation at home in the state. New York's general jurisdiction statute is CPLR 301. The absence of personal jurisdiction over a party, including a corporate entity not subject to New York's general or longarm jurisdiction, is a basis for the dismissal of an action under CPLR 3211(a)(8).

The First Department adhered to *Daimler* in its holding rendered in *Okoroafor v Emirates Airlines*, 195 A.D.3d 540, 145 N.Y.S.3d 807 (1st Dep't. 2021). There, the defendant, Emirates Airlines, was headquartered and maintained its principal office in Dubai, UAE. It also maintained an office in New York County, but that office was not the airline's "principal" one. On that basis, the First Department held that the defendant was not amenable to the general jurisdiction of New York State and dismissed the plaintiff's complaint.

The Second Department saw its own share of the action on general jurisdiction in *Aybar v Aybar,* 169 A.D.3d 137, 93 N.Y.S.3d 159 (2nd Dep't. 2019) (signed opinion by Braithwaite-Nelson, J.), which has been followed with interest and discussed in the 2019 and 2020 CPLR Practice Commentaries, C3211:28. The Second Department held in *Aybar* that a corporation's mere registration with the Secretary of State designating it as an agent for the service of process, in connection with obtaining authority to do business within the state, does not constitute consent to the general jurisdiction of New York under CPLR 301, as it is instead a mere convenience to be used for service when jurisdiction may already independently exist.

The *Aybar* case has been closely followed because leave to appeal was granted by the Court of Appeals, which then put its own imprint on the issue in a 5-2 determination rendered on October 7, 2021 (*Aybar v Aybar*, ___ N.Y.3d ___, ___ N.Y.S.3d ___, ___ N.E.3d ___, 2021 WL 4596367, 2021 N.Y. Slip Op. 05393) (Singas, J.). The majority of the Court of Appeals affirmed what had been found by the Second Department; namely, that a foreign corporation's compliance with the relevant statutory provisions for registering with the Secretary of State for authority to do business in New York, and the concomitant designation of the Secretary of State as an agent of the corporation for the service of process, is consent to service of process *only*. It does not establish New York's general jurisdiction over the foreign corporation in and of itself. Interestingly, the Court of Appeals specifically based its conclusion on an analysis of New York precedents, without reaching whether any consent to general jurisdiction by registration would comport with federal due process under *Daimler*. Yet, it appears that the conclusion of the Court of Appeals in *Aybar* is consistent with *Daimler's* directive that that general jurisdiction is cognizable only where a corporate entity is "at home" in a state, defined as being incorporated in the state or maintaining its principal place of business there, or there being other truly exceptional and rare circumstances that do not appear applicable here. Thus, for New York, the issue is now put to rest, that a corporation's registration to do business in New York, standing alone, is not enough to trigger general jurisdiction under CPLR 301. Practitioners seeking to commence actions in New York against foreign corporations with principal offices elsewhere must therefore look away from the ease and convenience of CPLR 301, were it applicable, and instead look to the more complicated longarm provisions of CPLR 302 for obtaining jurisdiction over the entity. CPLR 301 will still remain available for the assertion of general jurisdiction for entities incorporated in New York or which maintain their principal place of business in New York.

General jurisdiction based upon *Daimler's* third jurisdictional prong, that a corporate entity's operations be so substantial in a state as to represent an exceptional circumstance basis for recognizing general jurisdiction, was found to be lacking in *Lowy v Chalkable, LLC*, 186 A.D.3d 590, 129 N.Y.S.3d 517 (2nd Dep't. 2020).

Daimler left unanswered the question of whether, under an "alter ego test," a parent corporation may be subject to the general jurisdiction of a state based upon the conduct of its subsidiary entity. Cases still remain elusive on this issue. Cases which have come close to addressing this issue have found that the quantum of proof for finding dominion and control by the principal over the subsidiary was lacking, and that the secondary issue of whether an "alter ego" relationship was sufficient to impute general jurisdiction to the principal, if at all, did not then need to be reached (*e.g. Branson v Alliance Coal, LLC*, No. 4:19-CV-00155-JHM, 2021 WL 1031002 [W.D. Kent. Mar. 17, 2020] [but also permitting some discovery on the issue]; *Zia Agricultural Consulting, LLC v Tyson Foods, Inc.*, No. 1:20-CV-445-KWR-JHR, 2021 WL 245686 [D. N.M. Jan. 25, 2021]; *Rivera v Invitation Homes, Inc.*, No. 18-cv-03158-JSW, 2020 WL 8910882 [N.D. Cal. Oct. 29, 2020]). We should expect that the federal courts, where so many cases are based upon the diversity of the parties' citizenship, will be the forums most likely to encounter and address these still-unresolved issues.

General jurisdiction under CPLR 301 should not be confused with longarm jurisdiction under CPLR 302(a)(1) through (4). A defendant not amenable to the general jurisdiction of New York under CPLR 301 may still be independently subject to New York jurisdiction under the longarm statute of CPLR 302.

C3211:29 Jurisdictional Basis Depending on Complaint

There are varied bases for the assertion of longarm jurisdiction over non-domiciliary defendants under CPLR 302, each dependent upon the nature of the defendant's contacts with New York State, or with the defendant, or with the tort or contract at issue in the plaintiff's complaint, or with real property that is the subject of an action.

Subdivision (a)(1) speaks to defendants who transact business in New York State, or who contract anywhere to supply goods or services to New York. Longarm jurisdiction under this subdivision may exist for cases sounding in either tort or contract, but at a minimum must involve the provision of goods within the state. The "transaction" of business in New York refers to a purposeful activity here, even if irregular, where the defendant avails itself of the privileges and protections of New York law. The CPLR 302(a)(1) jurisdictional inquiry is twofold: under the first prong, the defendant must have conducted sufficient activities to have transacted business in the state, and under the second prong, the claims must arise from the transactions (*Skutnik v Messina*, 178 A.D.3d 744, 113 N.Y.S.3d 195 [2nd Dep't. 2019]). "Purposeful activities" are those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws (*Fischbarg v Doucet*, 9 N.Y.3d 375, 849 N.Y.S.2d 501, 880 N.E.2d 22 [2007]). The requirement of purposeful activities is not met by a single phone call to New York requesting the shipment of goods (*Parke-Bernet Galleries v Franklyn*, 26 N.Y.2d 13, 308 N.Y.S.2d 337, 256 N.E.2d 506 [1970], *citing M. Katz & Son Billiard Prods. Inc. v Correale & Sons*, 20 N.Y.2d 903, 285 N.Y.S.2d 871, 232 N.E.2d 864 [1967]), the transitory presence of a corporate official in New York (*McKee Elec. Co. v Rauland-Borg Corp.*, 20 N.Y.2d 377, 283 N.Y.S.2d 34, 229 N.E.2d 604 [1967]), or communications from an out-of-state physician serving as a consultant to a New York physician (*Etra v. Matta*, 61 N.Y.2d 455, 474 N.Y.S.2d 687, 463 N.E.2d 3 [1984]). The nature and quality of the contacts are what are important for determining whether a defendant's activities are sufficiently purposeful with New York as to amount to the transaction of business within the state. The defendant need not personally ever be in New York, as the inquiry is whether the defendant's *activities* related to New York were purposeful and there is a substantial relationship between the transaction and the cause of action asserted by the plaintiff (*Paterno v Laser Spine Inst.*, 24 N.Y.3d 370, 998 N.Y.S.2d 720, 23 N.E.2d 988 [2014]; *Glazer v Socata, S.A.S.*, 170 A.D.3d 1685,

96 N.Y.S.3d 791 [4th Dep't. 2019]; *Robert M. Schneider, M.D., P.C. v Licciardi*, 65 Misc.3d 254, 108 N.Y.S.3d 720 [Sup. Ct. Greene County 2019]).

Subdivision (a)(2) speaks to defendants who allegedly commit a tort within New York, except for defamation. The tortious conduct may be negligent or intentional. This general longarm basis makes sense. If an out-of-state defendant commits a civil battery at a tavern within New York and, in so doing, injures a New York plaintiff during the altercation, New York has an obvious interest in exercising jurisdiction over the parties and the related cause of action. The same can be said of out-of-state defendants who may engage in other forms of tortious conduct within the state borders of New York. For this longarm subdivision to apply, the defendant must be physically within the state of New York at the time the tort is committed (*Feathers v McLucas*, 15 N.Y.2d 443, 261 N.Y.S.2d 8, 209 N.E.2d 68 [1965]). CPLR 302(a)(2) looks to the non-domiciliary defendant's *conduct* that is physically within the state as its basis for jurisdiction, as distinguished from conduct elsewhere that may merely have a residual *effect* in New York.

Subdivision (a)(3) was added to the statute in 1966, after the original version of the 1962 statute had been enacted, to extend longarm jurisdiction to out-of-state defendants who commit torts outside of the state and where the resultant injury is caused to persons or property within the state, except for defamation. The reason for the addition of this subdivision was to close a perceived loophole in the law. The original 1962 version of the longarm statute did not contain any specific provision applicable to strict products' liability claims where a product is defectively designed, manufactured, or sold from outside of New York, and where the effect of the product defect causes injury within New York. The Court of Appeals held so in *Feathers* that non-residents could not be subjected to New York jurisdiction for tortious conduct committed out-of-state under the then-existing language of CPLR 302. *Feathers* involved a Florida defendant that negligently loaded propane gas for delivery in Vermont, which ignited in New York while en route to the beautiful Green Mountains. The state legislature responded to *Feathers* in 1966 by adding CPLR 302(a)(3) to the statutory scheme, expressly and logically extending the longarm concept to out-of-state defendants whose out-of-state conduct causes harm within New York.

CPLR 302(a)(3) contains qualifiers, however. For longarm to apply, even where the foregoing factual underpinnings are in place, the out-of-state defendant must also regularly do or solicit business in New York, or engage in any other persistent course of conduct in New York, or derive substantial revenue from interstate or international commerce, *or* expects or reasonably should expect its acts to have consequences in New York while also deriving substantial revenue from interstate or international commerce. For persons trained in the law, CPLR 302(a)(3) is a veritable gold mine of debatable legal nomenclature which uniquely impacts the cases from one to the next-the meaning of words like "regularly," "solicits," "persistent," "substantial," and "expects consequences." Each is briefly discussed below:

Does or Solicits Business: While the "transaction" of business under CPLR 302(a)(1) involves a defendant availing itself of the benefits and protections of New York law, regularly "doing business" or "soliciting business" under the language of CPLR 302[a][3][i]) is broader. It connotes a non-domiciliary defendant's presence in New York that is not merely casual or occasional, but which represents a fair measure of permanence and continuity here (*AirTran, N.Y., LLC v Midwest Air Group, Inc.*, 46 A.D.3d 208, 844 N.Y.S.2d 233 [1st Dep't. 2007]). An entity doing business in New York can be sued in the state, whether the subject of the lawsuit relates to a particular aspect of the business or not.

Persistent Course of Conduct: Persistence regards the ongoing nature of the defendant's activities in New York. A long-term lease in New York, or a series of business transactions within the state, may qualify under CPLR 302(a)(1)(i) (*Williams v Beemiller Inc.*, 33 N.Y.3d 523, 106 N.Y.S.3d 237, 130 N.E.3d 833 [2019] [Feinman, J., concurrence]).

Derives Substantial Revenue: The concept of deriving "substantial" revenue from New York is a relative term based upon the uniqueness of each individual defendant. A large national corporation might derive only a small percentage of its sales from New York, but because of the entity's "bigness," even a small percentage of overall revenue amounts to a substantial sum of money. Conversely, a small non-domiciliary company, with limited revenue, may derive a substantial percentage of its revenue from New York and thereby be found to derive substantial revenue from the state (*Id.*). The examination of "substantial revenue" under CPLR 302(a)(3)(ii) is therefore not only *sui generis*, but also, both quantitative and qualitative in nature.

The Expectation of Consequences. The statutory prong of CPLR 302(a)(3)(ii) that the defendant may alternatively be subject to longarm jurisdiction when it expects or should reasonably expect its act to have consequences in New York, speaks to foreseeability. The defendant need not foresee the specific injury-producing event in New York. Instead, the statute speaks to foreseeability in a more general sense, such as that the out-of-state manufacture or sale of a product which turns out to be defective would be used in New York and cause injury there (*Darrow v Hetronic Deutschland*, 119 A.D.3d 1142, 990 N.Y.S.2d 150 [3rd Dep't. 2014]).

CPLR 302(a)(4) is a straight-forward basis for longarm jurisdiction, and not one that generates much decisional law. It establishes longarm jurisdiction against non-domiciliary defendants who own, use, or possess real property situated within the state of New York. The lawsuit, incidentally, must relate to that same property within New York (*Zeidan v Scott's Dev. Co.*, 173 A.D.3d 1639, 103 N.Y.S.3d 707 [4th Dep't. 2019]).

Different longarm prongs may overlap with others. Conceivably, a defendant may be subject to more than one basis of longarm at the same time. The plaintiff need only have one such basis to obtain a jurisdictional predicate against the out-of-state defendant. Put another way, a plaintiff seeking to defeat a CPLR 3211(a)(8) motion to dismiss, based on the lack of personal jurisdiction over the defendant, need only provide *prima facie* evidence tending to establish one of the four statutory longarm bases to succeed in defeating the motion.

A statute related to the longarm is VTL 253. For out-of-state motorists, VTL 253 deems the New York Secretary of State as the agent for service of process upon non-domiciliary defendants whose vehicular operation is the subject of a suit in New York. The statute directs that service be effected upon the office of the Secretary of State personally or by mail, plus service by certified mail, return receipt requested, to the defendant at his or her out-of-state address, and then by regular mail if acceptance of the certified mailing is refused at its destination address (VTL 253[2]). The statute also provides other mechanisms for effecting service upon the out-of-state defendant.

For matrimonial actions, CPLR 302(b) allows for New York jurisdiction over a non-domiciliary if New York was the matrimonial domicile before the parties' estrangement, or if the defendant abandoned the marriage from New York, or if the cause of action accrued under New York law such as by a New York separation agreement or a New York prenuptial agreement (*Levy v Levy*, 185 A.D.2d 15, 592 N.Y.S.2d 480 [3rd Dep't. 1993]; *Klette v Klette*, 167 A.D.2d 197, 561 N.Y.S. 2d 580 [1st Dep't. 1990]).

The plaintiff need not allege a longarm jurisdictional basis in the complaint. The lack of a jurisdictional basis is an affirmative defense to be pleaded in an answer (CPLR 3211[a][8]). However, where the jurisdictional predicate is contested, the ultimate burden of proving a basis of jurisdiction, whether it be general or longarm or otherwise, rests with the plaintiff. In opposing a CPLR 3211(a)(8) motion to dismiss, the plaintiff need only make a *prima facie* showing that jurisdiction exists (*Skutnik v Messina*, 178 A.D.3d 744, 113 N.Y.S.3d 195 [2nd Dep't. 2019]; *Hopstein v Cohen*, 143 A.D.3d 859, 40 N.Y.S.3d 436 [2nd Dep't. 2016]). Parties moving to dismiss actions based upon an alleged lack of longarm jurisdiction, and those defending against such motions, must look closely at the particulars of the relevant subdivisions of CPLR 302(a), and key their arguments into the presence or absence of qualifying facts and criteria.

C3211:32 Absence of a Person Who Should be a Party

CPLR 1001 and 1003 afford the courts with wide latitude in the addition or deletion of parties. The absence of a necessary party may therefore be raised at any stage in the proceedings by any party, or by the court on its own motion (*Migliore v Manzo*, 28 A.D.3d 620, 813 N.Y.S.2d 762 [2nd Dep't. 2006]).

C3211:55 Waiving Objection Contained in Paragraphs 8 or 9 of 3211(a)

A defendant with a basis for seeking the dismissal of the plaintiff's complaint on the ground that personal jurisdiction is lacking (CPLR 3211[a][8]) cannot sit on the right. CPLR 3211(e) requires that the right to seek such a dismissal is waived under either of three procedural circumstances. One is where the defendant unsuccessfully moves to dismiss the complaint under any grounds set forth in CPLR 3211(a) but does not raise the lack of personal jurisdiction as one of those grounds. The second circumstance is where the defendant serves an answer to the complaint which does not contain the lack of personal jurisdiction as an affirmative defense. The third circumstance is where the lack of personal jurisdiction is raised in the answer as an affirmative defense but the defendant does not move to dismiss on that basis within 60 days of the answer's service. In other words, the issue of personal jurisdiction has a fixed shelf life, and must be raised by the defendant early in the course a litigation.

Much of foregoing presumes that the defendant has, in fact, appeared and answered the plaintiff's complaint. The mere filing of a notice of appearance by counsel, without an answer raising a jurisdictional objection and without a motion to dismiss under CPLR 3211(a)(8), has the same effect of waiving the defense (*U.S. Rof III Legal Tit. Trust 2015-1 v John*, 189 A.D.3d 1645, 140 N.Y.S.3d 59 [2nd Dept. 2020]). An interesting twist occurred in the notice of appearance case of *Federal Nat. Mortg. Assoc. v Beckford*, 196 A.D.3d 546, 147 N.Y.S.3d 466 [2nd Dep't. 2021]), where a defendant sought to vacate a default judgment on the ground that *inter alia* she had never been properly served with process. There, the defendant denied that an attorney was ever authorized to appear for her in the action prior to the default, and was supported by an affirmation of the attorney that his name on a document earlier submitted to the court had been the product of an unfortunate scrivener's error. The Supreme Court denied the defendant's vacatur motion on the ground that the proffered jurisdictional defense had been waived. The Second Department disagreed and remitted the matter for a Traverse hearing, finding from the documentation that the attorney's purported appearance was unauthorized and therefore failed to trigger a waiver of the defendant's affirmative defense that personal jurisdiction was never obtained over her.

C3211:69 Easier Standard for Dismissing "SLAPP" Suit

"SLAPP" is an acronym for the "strategic lawsuit against public participation." It involves suits commenced by property owners, real estate developers, or others who seek public approval for proposed projects, such as those needing a permit, a variance, municipal approvals, or licenses. Persons who oppose the project by means of public petition and participation have been known to be sued for doing so, upon a variety of legal theories such as defamation, prima facie tort, and tortious interference with contractual relations, i.e., the SLAPP suit. The public policy concern is that SLAPP suits could potentially be designed and initiated to stifle public opposition to what is proposed, which is contrary to the importance society places upon the right to free-expression. The legislature, seeking to protect the public's right to petition and participation, had enacted in 1992 subdivision (g) to CPLR 3211, which is specific to SLAPP suits (L.1992, ch. 767, sec. 4). By that amendment, defendants may move for the dismissal of the plaintiff's complaint, cross-claim, or counterclaim by merely establishing that the claim qualifies as a SLAPP suit as defined by Civil Rights Law 76-a(1)(a). Such a dismissal motion "shall be granted" unless the opposing party demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification, or reversal of existing law (CPLR 3211[g]). Clearly, the statute is written to make it difficult, though still possible in creditable cases, for plaintiffs to litigate SLAPP suits beyond the pleading

stage. But gone for SLAPP suits is the concept embodied by CPLR 3026, applicable to other actions generally, that pleadings be "liberally construed."

CPLR 3211(g) was amended effective November 10, 2020. The amendments break CPLR 3211(g) into four subdivisions, with the new material contained in CPLR 3211(g)(2) through (4).

CPLR 3211(g)(2) states that the court shall examine the pleadings and the supporting and opposing affidavits of the parties in determining subdivision (g) dismissal motions. While that language might appear at first glance to add little to our jurisprudence, the only other statute that has specifically addressed attaching a copy of the pleadings to the moving papers, until now, was CPLR 3212(b) for summary judgment. CPLR 3211(g)(2) further states that the fact a determination was made on the motion, and the content of the determination itself, is not admissible later in the action, or in any subsequent action. In other words, the CPLR 3211(g) determination is "evidence" of nothing. The legislature also clarifies in subdivision (g)(2), as if to underscore the foregoing point, that the motion determination does not affect the burden of proof in the continuing action or in any subsequent action. That latter directive is well-taken, as CPLR 3211(g) reverses the burden of proof that normally lies with the moving party, to the party opposing dismissal, requiring the proponent of the SLAPP claim to establish its "substantial" legal basis in order to survive the claim's dismissal. As the recent amendment to CPLR 3211(g)(2) makes clear, that altered burden of proof does not carry beyond the dismissal motion itself and its determination.

CPLR 3211(g)(3) directs that once a dismissal motion is made in a SLAPP case, all discovery, hearings, or other motions are stayed, pending determination of the dismissal motion. Typically, since CPLR 3211 dismissal motions are made early in a litigation and in lieu of an answer, actions will not have progressed to discovery, hearings, or motions in any event. The amendment to (g)(3) removes all doubt, and under all relevant circumstances including those where, for whatever reason, a dismissal motion is made later in a litigation. Wisely, the state legislature realized that there may be occasions where the party opposing dismissal needs some measure of discovery in order to present facts essential to justify its opposition. After all, the burden of proof has effectively been flipped to the SLAPP party, and it would be unjust to expect a party with that burden to be simultaneously prohibited from obtaining any discovery that might be reasonably necessary for opposing the dismissal motion. Subdivision (g)(3) therefore provides a Solomonic solution, permitting the court, upon receipt of a motion made on notice, to order specified discovery limited to the issues raised by the motion to dismiss. While the statute does not expressly say so, it impliedly requires that under such circumstances, the court will hold the CPLR 3211(g) dismissal motion in abeyance pending the parties' conduct of the specified discovery. In that regard, the treatment is similar to that expressly permitted for summary judgment motions in CPLR 3212(d), where, *inter alia*, considerations of summary judgment may be subject to a "continuance" to permit discovery of facts essential to justify opposition to the motion.

CPLR 3211(g)(4) has been added to the statute to prevent any ambiguity from arising over what is subject to the overall provisions of subdivision (g); namely, it applies to complaints, cross-complaints, petitions, plaintiffs, cross-complainants, petitioners, defendants, cross-defendants, and respondents.

C3211:70 Greater Scrutiny of Complaint Where Defendant is Design Professional

CPLR 3211(h) is not seen very often, as the number of actions that might implicate it are limited. When an appellate division addresses subdivision (h) of CPLR 3211, it is worth noting.

Subdivision (h) was enacted in 1996 as a special aid to licensed architects, engineers, land surveyors or landscape architects who are sued in the courts of the state. To understand the statute, one must first read CPLR 214-d. CPLR 214-d(1) provides that when a person seeks damages for personal injuries, wrongful death, or injury to property against a licensed architect, engineer, land surveyor or landscape architect or their business entities, based upon the acts or omissions of their professional performance more than 10 years before the claim, such defendant is

entitled to a written notice of claim. The notice of claim is to be served at least 90 days before the commencement of the action, including a description of the performance, the acts or omissions complained of on information and belief, and shall include a request for general and special damages. A copy of the notice of claim and proof of its service is to be filed with the court within 30 days from the commencement of the action to which they apply. Compliance with the procedural requirements of CPLR 214-d is a condition precedent to any lawsuit against the licensed architects, engineers, land surveyors, and landscape architects. In fact, compliance with the condition precedent must be affirmatively pleaded in the complaint and proven when CPLR 214-d is applicable (*Kretschmann v Board of Educ. of Corning Painted Post School Dist.*, 294 A.D.2d 39, 744 N.Y.S.2d 106 [4th Dep't. 2002]; *Dorst v Eggers Partnership*, 265 A.D.2d 294, 696 N.Y.S.2d 478 [2nd Dep't. 2002]).

That all said, CPLR 3211(h) provides that for actions subject to CPLR 214-d(1), the moving defendant's CPLR 3211 motion to dismiss, brought under (a)(7) of the statute, "shall be granted unless the party responding to the motion demonstrates that a substantial basis in law exists to believe that the performance, conduct, or omission was a proximate cause" of the damages claimed "or is supported by a substantial argument for an extension, modification, or reversal of existing law." In essence, CPLR 3211(h) flips the burden of proof, which is normally on the movant, to the party opposing the motion to establish proximate cause between the negligent acts or omissions on the one hand and the personal injury, wrongful death, or property damage claimed on the other, or to articulate early in the litigation a "substantial" argument for the extension, modification, or reversal of existing law. The statute's treatment of the dismissal motion is similar to the changed burden imposed by CPLR 3211(g) for dismissal motions in SLAPP suits. The statute does not affect any statute of limitations. CPLR 3211(h) must be viewed in tandem with CPLR 3211(g), which accomplishes the same inversion of the burden of proof for dismissal motions in SLAPP suits, and CPLR 3212(i), which likewise inverts the burden of proof for qualifying actions involving licensed architects, engineers, land surveyors, and landscape architects in the context of summary judgment.

In addition to the various protections afforded to the qualifying professionals and entities named in CPLR 214-d and CPLR 3211(h), the latter statute confers upon those professionals the additional benefit that their dismissal motions shall be given a preference. These protections, collectively, reflect a public policy goal of the state legislature that for acts or omissions of qualifying professionals from more than 10 years before, only the most credible of those actions be permitted to survive beyond the stage of a motion to dismiss in lieu of an answer.

The operation of CPLR 3211(h) is seen in *Golby v N & P Engrs. & Land Surveyor, PLLC*, 185 A.D.3d 792, 128 N.Y.S.3d 34 (2nd Dep't. 2020). *Golby* is a tragic case. The plaintiff's decedent, who was in a wheelchair, rolled off a pier into the water and died the next day as a result of the occurrence. A defendant had been an engineer involved in the design of pier renovations performed in the mid-1990s. The plaintiff alleged that the pier was defectively designed in the area where boats were not moored, by not placing protective pedestrian railings there. The defendant moved to dismiss the action in lieu of an answer, and the Supreme Court and Second Department applied the heightened standard of CPLR 3211(h). In opposition to the dismissal motion, the plaintiff presented a transcript of the defendant's representative, which was taken as part of pre-action discovery, that railings are used on pedestrian piers to prevent persons from falling into the water. The Second Department, affirming the Supreme Court, found that under the heightened evidentiary standard, the plaintiff raised a material question of fact proximately linking the defendant's failure to recommend use of a pedestrian railing to the decedent's injuries and death.

The official texts of CPLR 3211(h) and 3212(i) each contain a typographical error. The statutes incorporate by reference, in long form, CPLR 214(1). In fact, the legislature intended to incorporate CPLR 214-d(1), which is the only way that CPLR 3211(h) and 3212(i) make any sense. CPLR 214(1) involves the statute of limitations in actions brought against sheriffs, constables, or other officers for the non-payment of money collected upon an execution and has nothing to do with the actual subject matter here.

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C3211:5 Grounds for Dismissal

The dismissal of actions under CPLR 3211 may occur when there is a specified ground for doing so under one of the enumerated grounds of subdivision (a)(1) through (11) of the statute. CPLR 3211 does not include a "catch-all" provision for the dismissal of actions for non-enumerated grounds. While complaints may be stricken or dismissed for other reasons set forth in the CPLR, such as the dismissal of complaints for willful and contumacious discovery non-compliance under CPLR 3126 or summary judgment under CPLR 3212, the grounds for dismissal under CPLR 3211 are exclusive and restricted. The point is illustrated by whether an action may be dismissed by a plaintiff's non-compliance with the Certificate of Merit requirement of CPLR 3012-a applicable to medical, dental, and podiatric malpractice actions.

For actions sounding in medical, dental, or podiatric malpractice, complaints shall be accompanied by a certificate executed by the plaintiff's attorney declaring that the attorney has reviewed the facts of the case and has consulted with at least one licensed physician, dentist, or podiatrist who the attorney believes to be knowledgeable about the relevant issues of the action, and that as a result of such review and consultation, the attorney has concluded that the action has a reasonable basis. The purpose of the requirement is to discourage frivolous litigations that raise the insurance premiums charged to physicians and thereby help control health care costs within the state. While there are certain exceptions to when the certificate of merit be filed such as those based upon time constraints, the unavailability of medical or hospital records, the plaintiff's reliance solely upon a theory of *res ipsa loquitor*, and actions commenced by plaintiffs pro se (CPLR 3012-a[2], [3]), the bulk of medical malpractice actions require the filing of certificate and the bar honors the statutory requirement for it.

What if the plaintiff's attorney in a medical malpractice action erroneously believes that the action does not require a certificate of merit and does not file one? What are the remedies of the statute if there is a failure of compliance? Notably, CPLR 3012-a does not contain any language whatsoever about how courts are to deal with non-compliance.

These issues were extensively discussed in *Rabinovich v. Maimonides Medical Center*, 179 A.D.3d 88, 113 N.Y.S.3d 198 (2d Dep't. 2019) (opinion by Dillon, J.). The first of two primary issues in the case was whether the plaintiff's action raised issues of medical malpractice, which would require a certificate of merit, or ordinary negligence, which would not. The plaintiff claimed damages for personal injuries sustained as a result of the negligent performance of a blood draw at a blood donation center in Brooklyn, resulting in the plaintiff experiencing an adverse reaction, the loss of consciousness, and a fall down. The defendant moved to dismiss the action for non-compliance with CPLR 3012-a. In opposition, the plaintiff argued that the gravamen of the action was ordinary negligence as the plaintiff's blood had not been drawn by a physician, but by a phlebotomist. On that issue, the appellate opinion surveyed decisional authorities that addressed the dividing line between medical malpractice and ordinary negligence, noting that the former exists when the task performed by the professional bears a substantial relationship to the rendition of medical treatment. In *Rabinovich*, the plaintiff's complaint and bill of particulars described the defendant's negligence in detailed medical terms, including failing to screen for health problems, failing to monitor the plaintiff's physical conditions and hemoglobin levels, and failing to keep the plaintiff at the donation site for a proper interval of observation. The court concluded that these allegations involved medical judgments beyond the knowledge of ordinary persons that style the action as one for medical malpractice. Indeed, the court noted that actions have been recognized as involving medical malpractice against non-physicians including phlebotomists, nurses, emergency medical technicians, and x-ray technicians. A CPLR 3012-a certificate of merit was therefore required of plaintiff's counsel given the particular nature of the case.

Remedially, the *Rabinovich* opinion noted that CPLR 3012-a does not contain any language for non-compliance with the statute. There was no reason in *Rabinovich* for the court to believe that the failure to provide a certificate of merit was motivated by anything other than a good faith but erroneous assessment by plaintiff's counsel that none

was required. The Second Department therefore declined to dismiss the action, and instead provided the plaintiff's attorney with a 60-day window to comply with CPLR 3012-a measured from service upon him of a copy of the appellate order.

CPLR 3012-a performs a ministerial function of reducing the commencement of medical malpractice actions that lack sufficient merit. The statute does not regard the ultimate substantive merits of actions, and hence, non-compliance with the statute does not implicate the dismissal provisions of CPLR 3211 or the summary judgment provisions of CPLR 3212. *Rabinovich* should not be read to suggest that courts are without authority to enforce CPLR 3012-a. Non-compliance should be dealt with in the first instance ministerially, or by court order, and failing that, perhaps with monetary sanctions against the recalcitrant attorney under 22 N.Y.C.R.R. 130-1.1.

C3211:8 *Sua Sponte* Dismissals

Trial judges continue, from time to time, dismissing plaintiffs' complaints on *sua sponte* grounds. The occasional practice continues despite the fact that there has been a long and consistent line of cases, developed over many years, routinely reversing trial judges who do so. The reason that a court's *sua sponte* dismissal is problematic is that a dismissal, which is dispositive, is ordered without the plaintiff being given the due process of notice and an opportunity to be heard. *Sua sponte* dismissal, however many or few there are in a given year, typically occur when a defendant moves to dismiss a plaintiff's complaint under CPLR 3211 under stated grounds, which the plaintiff may or may not oppose. The court, unable or unwilling to grant dismissal on a noticed ground, then does so on another ground not raised in the moving papers.

The law governing these circumstances is clear: a court's power to dismiss a complaint *sua sponte* is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal (*Deutsche Bank National Trust Company v Winslow*, 180 A.D.3d 1000, 120 N.Y.S.3d 81 [2d Dep't. 2020]). Extraordinary circumstances virtually never exist. Reversals of *sua sponte* dismissals include where the court's dismissal is for the plaintiff's lack of prosecution despite having made a motion for an order of reference (*Deutsche Bank National Trust Company v Winslow*, 180 A.D.3d at 1002), the plaintiff's failure to comply with foreclosure-related administrative orders (*J.P. Morgan Chase Bank, N.A. v Laszlo*, 169 A.D.3d 885, 94 N.Y.S.3d 343 [2d Dep't. 2019]; *LaSalle Bank National Association v Lopez*, 168 A.D.3d 697, 91 N.Y.S.3d 259 [2d Dep't. 2019]), the alleged failure of the plaintiff to comply with RPAPL 1303 (*HSBC Bank USA, N.A. v Lopez*, 178 A.D.3d 679, 111 N.Y.S.3d 223 [2d Dept. 2019]), and the plaintiff's alleged lack of standing (*Consumer Solutions, LLC v Charles*, 137 A.D.3d 952, 27 N.Y.S.3d 216 [2d Dep't. 2016]). The reader may note that improper *sua sponte* dismissals arise almost exclusively in the Second Department, and within that department almost exclusively in the realm of residential mortgage foreclosure actions, which have in recent years become a significant portion of civil actions filed in certain counties of New York City and its suburbs, and on appeal.

Practitioners may, if they be so advised, move to reargue *sua sponte* dismissals that arise from noticed motions, or appeal them to an appellate court, as the odds of reversing the determination, particularly on appeal, are statistically very, very good.

C3211:10 Defense Based on "Documentary Evidence"

The Practice Commentaries for 2020 noted that while e-mails are not generally material that qualifies as "documentary evidence" for CPLR 3211(a)(1) purposes, decisional authorities were increasingly recognizing circumstances where e-mails can qualify under the statute for potential dismissals. As noted then, e-mails may be properly considered by courts determining CPLR 3211(a)(1) motions when the e-mails themselves are central to a party's cause of action, such as whether statements in an e-mail are a non-defamatory opinion as a matter of law (*International Pub. Concepts, LLC v Locatelli*, 46 Misc.3d 1213[A], 9 N.Y.S.3d 593 [Sup. Ct., New York County

2015]), or where e-mails establish the absence of a gross disregard of the truth in defense of a defamation action (*Stone v Bloomberg, L.P.*, 163 A.D.3d 1028, 83 N.Y.S.3d 78 [2d Dept. 2018]), or when an e-mail chain between parties may or may not establish a meeting of the minds between parties about the material terms of an alleged extended contact (*Kolchins v Evolution Markets, Inc*. 31 N.Y.3d 100, 73 N.Y.S.3d 519, 96 N.E.3d 784 [2018]).

Since publication of the last Practice Commentaries, further decisional authority has been rendered suggestive of a continuing and growing flexibility by courts to consider e-mail as a proper basis for potential CPLR 3211(a)(1) dismissals. In an action involving legal malpractice, the First Department considered the content of e-mails exchanged between the plaintiff/clients and the defendant/attorneys, and other materials, in determining that the clients understood the terms of business transactions they had entered into, as well as alternative options. The e-mails were found by the Supreme Court, New York County, and by the First Department, as conclusively establishing the absence of legal malpractice by the attorneys as a matter of law (*Binn v Muchnick, Golieb & Golieb, P.C.*, 180 A.D.3d 598, 121 N.Y.S.3d 13 [1st Dep't. 2020]).

In *Flink v Smith*, 66 Misc.3d 1229[A], 125 N.Y.S.3d 529 (Sup. Ct., Albany County 2020), the court likewise held that e-mails exchanged between parties in a breach of contract action were properly admissible in deciding a CPLR 3211(a)(1) motion, on the ground that the e-mails were "unambiguous and of uncontested authenticity." Notably, the court's reliance upon an "unambiguous and of uncontested authenticity" standard was derived from the First Department's determination in *Kolchins v Evolution Markets, Inc*., 128 A.D.3d 47, 8 N.Y.S.3d 1 (1st Dep't. 2015) which, as the reader knows, was later affirmed in 2018 by the Court of Appeals. Yet, in *Flink*, the e-mails that were proffered by the moving party, once considered by the court, were found to insufficiently set forth a basis for the dismissal of the plaintiff's complaint under CPLR 3211(a)(1).

The legal standard that e-mails be unambiguous and authentic, to be considered by courts in deciding whether to grant CPLR 3211(a)(1) motions, appears to be a reasonable, responsible, and prudent evidentiary standard. The Second Department employed the same concept, using very similar language in *S & J Service Center, Inc. v Commerce Commercial Group Inc*., 178 A.D.3d 977, 112 N.Y.S.3d 584 (2d Dep't. 2019). In that breach of contract matter, the Second Department determined that e-mails proffered by the defendant in support of a CPLR 3211(a)(1) dismissal did not qualify as documentary evidence, as the e-mails "were not essentially undeniable." The Second Department recognized a general legal standard that qualifying e-mails be "unambiguous, authentic, and undeniable" (*S & J Service Center, Inc. v Commerce Commercial Group Inc*., 178 A.D.3d at 978, *citing Grenada Condominium III Ass'n v Palomino*, 78 A.D.3d 996, 913 N.Y.S.2d 668 [2d Dep't. 2010]. *See also, Seaman v Schulte, Roth & Zabel LLP*, 176 A.D.3d 538, 111 N.Y.S.3d 266 [1st Dep't. 2019]).

What this developing case law should tell practitioners is that counsel preparing dismissal motions should not only provide e-mails that help establish the grounds for the motion, but also address the lack of ambiguity, authenticity, and undeniability of the e-mails themselves, so that they may be considered on their merits. Conversely, for plaintiff attorneys opposing CPLR 3211(a)(1) dismissal motions, the argument should be made, where appropriate, that the proffered e-mails are ambiguous, or arguably inauthentic, or deniable. Less clear, for now, is whether the same legal standards will be applied to alleged communications made on more casual forms of social media such as Twitter and Instagram, but expect case law to develop as to those platforms in the years ahead.

C3211:11 Lack of Subject Matter Jurisdiction

The Supreme Court, which is a court of general and unlimited jurisdiction, is not, in fact, unlimited. Matters that are exclusive to the state Court of Claims, or to the federal courts, are the categories of matters that should not be brought in the Supreme Court.

Recent examples of cases involving the absence of subject matter jurisdiction include those where a cause of action is pre-empted by federal law (*Klingsberg v Council of School Supervisors and Administrators-Local 1*, 181 A.D.3d 949, 122 N.Y.S.3d 335 [2d Dep't. 2020]), non-judiciable internal church disputes based on religious rather than secular principles (*Eltingville Lutheran Church v Rimbo*, 174 A.D.3d 856, 108 N.Y.S.3d 39 [2d Dep't. 2019]), the absence of a timely notice of claim as required for actions in the state Court of Claims (*Jones v State*, 171 A.D.3d 1362, 98 N.Y.S.3d 366 [3d Dep't. 2019]), and the failure by the plaintiff to exhaust administrative remedies (*City of New York Human Resources Administration v Hewitt*, 120 N.Y.S.3d 571 [App. Term, New York 2020]; *IKON Business Group, Inc. v Police Athletic League, Inc.*, 65 Misc.3d 1226[A], 119 N.Y.S.3d 700 [Sup. Ct. New York County 2019]).

C3211:12 Plaintiff's Lack of Capacity

As noted in the 2020 Practice Commentaries and other legal literature, the language of CPLR 3211(a)(3), which authorizes the dismissal of actions for plaintiffs' lack of capacity, has been interpreted as also applying to plaintiffs' lack of standing even though the term "standing" is absent from the statute itself. New York State's legislature enacted a significant amendment to the Real Property Actions and Proceedings Law (RPAPL) regarding the defense of standing, effective December 23, 2019. The amendment at issue here, RPAPL 1302-a (2019 NY Sess. Laws, c. 739, sec. 1), involves only residential mortgage foreclosure actions involving defaulted home loans.

Until December 23, 2019, standing in residential mortgage foreclosure actions was a defense waived by the defendant homeowner if not asserted as a basis for dismissal in either a pre-answer motion to dismiss or as an affirmative defense in the defendant's answer. This principal was concretized in *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 A.D.3d 239, 837 N.Y.S.3d 247 (2d Dept. 2007), and followed by courts in countless foreclosure actions in the years that followed.

However, RPAPL 1302-a has nullified a significant body of case law that had, until now, been recognized throughout the State on New York on the issue of standing. The amendment adds to the RPAPL an entirely new section, 1302-a (2019 NY Sess. Laws, c. 739, sec. 1). The new RPAPL 1302-a provides that in qualifying foreclosure actions, a defendant's failure to raise standing as a defense in a responsive pleading or motion to dismiss does not constitute a waiver.

The purpose of the law is to help assure that standing issues be resolved on their merits, so that only lenders who own a loan by direct lending, purchase, or assignment are permitted to collect upon the mortgaged debt (NY Sponsor's Memorandum, 2019 S.B. 5160 [April 14, 2019]).

The statutory enactment that the standing defense is not waived was placed by the state legislature specifically in the RPAPL, and not in the CPLR that governs all actions generally. RPAPL 1302-a is expressly limited to residential mortgage foreclosure actions. The amendment therefore creates an odd legal dichotomy, that the failure to raise standing as an affirmative defense does constitute a waiver in qualifying residential mortgage foreclosure actions, but the same defense continues to be waived in all other litigations outside the scope of RPAPL 1302-a. The procedural rules of standing will therefore vary from now on, depending on the nature of the litigation at issue.

If a foreclosure defendant files a motion to dismiss on grounds other than standing, and is unsuccessful, a logical construction of the new statute is that the defendant may then include standing as an affirmative defense in the answer that follows. This is true because the language of RPAPL 1302-a is notwithstanding any of the provisions of CPLR 3211(e).

RPAPL 1302-a does not apply to all mortgage foreclosure actions, but only those involving a "home loan" as that term is defined by RPAPL 1304(6). Commercial and other secured loans are outside the scope of the statute's

standing-related protections. The incumbent version of RPAPL 1304(6) was scheduled to sunset on January 14, 2020, and a newer definition of "home loan" was to become effective from January 14, 2020, forward. However, the new definition that was scheduled to take effect was itself repealed (L. 2019, c. 55, part VV), as a result of which the incumbent definition contained within RPAPL 1304(6) remains in effect.

RPAPL 1304(6)(a)(1) and (2) define home loans as those involving natural persons in family dwellings and condominiums within the state, occupied or intended to be occupied by the borrower(s) in whole or in part as a personal residence, inclusive of reverse mortgages. Actions involving any other forms of loans are outside the scope of the new standing-related homeowner protection afforded by RPAPL 1302-a.

RPAPL 1302-a became effective on the date it was signed, which was December 23, 2019. It applies not only to residential foreclosure actions that will be filed in the future, but also to actions already pending in the courts as of its effective date.

Limiting language in the newly-enacted RPAPL 1302-a provides that the standing defense is waived if the action has already resulted in a foreclosure sale, except when the judgment was rendered on the default of the defendant. Defendants who have lost their cases on the merits, after a full and fair opportunity to be heard, may not seek to now litigate standing for the first time, if a judgment of foreclosure and sale has already been rendered. The provision of RPAPL 1302-a allowing for standing to be raised and contested by defaulted homeowners, even after a foreclosure judgment has been rendered and the property has been sold, might prove the law of unintended consequences. The obvious purpose of the provision is to assist homeowners, but as noted by Melissa Clement in the March 2020 issue of the Albany Bar Association's *Bar News*, potential buyers may be less inclined to purchase real property at foreclosure sales if there is uncertainty over whether the sale might be set aside in the future for the bank's lack of previously-unlitigated standing. Such uncertainty may have the effect of depressing foreclosure sale prices, generate fewer funds for homeowners to apply toward deficiency judgments, and dissuade lenders from financing the purchase of distressed properties (Clement, Melissa, "The Good, The Bad, and The Ugly: RPAPL 1302-a and Residential Foreclosure Proceedings" 25, *Bar News* [March 2020]). In other words, the portion of the new statute that allows for a standing defense to be raised after the property has been foreclosed upon may cause unintended harm to the homeowners that the law is intended to protect.

While the issue of a plaintiff's lack of capacity is often presented to courts in the context of whether the individual is subject to a disqualifying disability such as infancy or mental illness, capacity may also be an issue as to the plaintiff's corporate form and legal ability to bring an action in a New York forum. The latter was an issue in *Montvale Surgical Center, LLC v State Farm Mutual Automobile Insurance Co.*, 66 Misc.3d 1215[A], 120 N.Y.S.3d 720 (Dist. Ct. Suffolk County 2020). The plaintiff assignee in *Montvale Surgical Center* was a New Jersey limited liability company that commenced an action to recover No Fault benefits paid for medical and surgical services provided to the assignor. The defendant No Fault insurer sought to dismiss the action on the ground of lack of capacity to sue, as the plaintiff had never registered with the New York Department of State to authorize its conduct of business in New York pursuant to BCL 1312(a). Indeed, there was no question between the parties that the plaintiff was a New Jersey entity with no BCL registration at the Department of State. The District Court denied the defendant's motion to dismiss, finding that under the circumstances of the action, the plaintiff's litigation efforts in New York were incidental to its business, rather than systematic, as a result of which no BCL registration was required of it. In the alternative, the court also noted that the absence of a registration with the Department of State, if required, was not a jurisdictional defect, but a curable one at any time prior to the resolution of the action (*Montvale Surgical Center, LLC v State Farm Mutual Automobile Insurance Co.*, 66 Misc.3d 1215[A], at *3).

Capacity may also involve the legal authorization of an administrator to bring an action on behalf of an estate, as in *Rodriguez v River Valley Care Center, Inc.*, 175 A.D.3d 432, 108 N.Y.S.3d 126 (1st Dep't. 2019). *Rodriguez* involved causes of action for damages arising from alleged medical malpractice, and for wrongful death. The first

of two actions was commenced by the named plaintiff as a "proposed administrator," which was dismissed for lack of capacity since no letters of administration had been issued. Facing a ticking clock on certain statutes of limitations, the same named plaintiff commenced a second action as the estate's "voluntary administrator," again without the benefit of letters of administration at the time of commencement, and the defendants once again moved to dismiss the action for lack of capacity. However, while the dismissal motion was pending in the second action, the Surrogate's Court issued the plaintiff his long-awaited letters of administration, on a date that was within six months from the dismissal of the first action. The First Department, reviewing the matter on appeal, held that while the plaintiff lacked capacity when commencing his actions, the defect was cured by his ultimate receipt of letters of administration and by timely application of the six-month savings provision of CPLR 205(a).

Capacity, and more precisely standing, also arises in the context of cases where a plaintiff has filed for the protection of a bankruptcy court. Upon the filing of a Chapter 7 or 11 bankruptcy petition, all property that the debtor owns, including the civil cause of action, vests in the bankruptcy estate (11 U.S.C. 541[a][1]; *Keegan v Moriarty-Morris*, 153 A.D.3d 683, 59 N.Y.S.3d 779 [2d Dep't. 2017]). The plaintiff's cause of action becomes an asset of the bankruptcy court which is to be disclosed as such on the appropriate bankruptcy schedules. The failure to disclose the cause of action on the bankruptcy schedule of assets deprives the plaintiff of the legal capacity to sue on the claim (*Keegan v Moriarty-Morris*, 153 A.D.3d at 684). Upon filing for bankruptcy and the disclosure of the cause of action as a bankruptcy asset, the party that has standing to prosecute the civil action is not the plaintiff who was allegedly caused damages, but the appointed bankruptcy trustee, and the commencement of an action by the plaintiff-debtor can be dismissed under CPLR 3211 (*Burbacki v Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, & Wolf, LLP*, 172 A.D.3d 1300, 99 N.Y.S.3d 671 [2d Dep't. 2019]).

An action commenced by a plaintiff in bankruptcy will typically be dismissed for the absence of standing, whether the cause of action is disclosed on the bankruptcy schedule of assets or not. Since standing and capacity-related dismissals are not on the merits, the bankruptcy trustee may commence a new civil action for the debtor so long as the statute of limitations has not expired in the meantime. However, plaintiffs and their trustees have the benefit of the six-month grace provision of CPLR 205(a), and the timeliness of a second action will not be a problem so long as the trustee commences it within the six-month window measured from service of the order dismissing the first action (*Goodman v Skanska USA Civil, Inc.*, 169 A.D.3d 1010, 95 N.Y.S.3d 243 [2d Dep't. 2019]) with notice of its entry.

C3211:15 Same Parties, Same Causes of Action

CPLR 3211(a)(4) permits the dismissal of a plaintiff's complaint if there is already another action pending between the same parties for the same cause of action in New York, or another state, or in a federal court. The dismissal of an action is a discretionary determination of the trial court, addressed in connection with the "second" of the two actions or proceedings.

The statute is most frequently applied when the same party is the plaintiff in two separate actions. But there are variations to that general concept. A dismissal for "prior action pending" may be obtained to dismiss a defendant's counterclaim in an action, if the counterclaiming defendant has asserted in an already-pending action a cause of action for the same relief based on the same facts between the same parties (*744 E. 215 LLC v Simmonds*, 65 Misc.3d 1234[A], 119 N.Y.S.3d 828 [Civ. Ct. City of New York 2019]).

C3211:18 Affirmative Defenses Available on Subdivision (a) Motion

CPLR 3211(a)(5) contains a veritable grab bag of grounds on which defendants may move to dismiss complaints.

Infancy of Other Disability of the Moving Party

The infancy or other disability of a defendant is a basis for seeking dismissal of a plaintiff's complaint under CPLR 3211(a)(5), but mere proof of a minor's age or of other disability is not necessarily enough for the defendant to actually win the motion. More is required per the holding in *US Bank National Association for Deutsche Bank, Alt-A Securities Mortgage Loan Trust Series 2007-2 v McGown*, 60 Misc.3d 808, 80 N.Y.S.3d 643 (Sup. Ct. Kings County 2018). In that action, the plaintiff's predecessor in interest had loaned money in 2007 to the defendant, James McGown (McGown) in exchange for an $816,000 promissory note and mortgage upon the property. Later that year, McGown transferred title to the property to his minor child, A.M., pursuant to the Uniform Transfer to Minors Act (UTMA). The deed and recording documents did not reveal the relationship between McGown and A.M., the UTMA, or that A.M. was a minor. Upon the loan's default, the plaintiff commenced an action against McGown and A.M., and process was served upon both at their home by means of suitable age and discretion method of CPLR 308(2). No answer was served and an order of reference was granted. A.M., by her mother and natural guardian, moved to vacate the default and dismiss the action on the ground that A.M. was a minor under the age of 14. Although a birth certificate evidenced A.M.'s age, the Supreme Court denied dismissal of the action. The court held that for the plaintiff to be subject to the special service provisions for minors set forth in CPLR 309, the plaintiff must have actual or constructive notice that the party to be served is, in fact, a minor. The Supreme Court further held that the defendant, as moving party, bore the initial burden of proving actual constructive notice that A.M. was a minor, which was not accomplished where the deed transfer made no mention of A.M.'s age, did not mention the UTMA, and where service was effected upon an adult of suitable age and discretion. The court noted that under the UTMA, McGown was required to identify A.M. as a minor, and that his failure to do so secreted A.M.'s age from the bank.

Release

As a general rule, the existence of a valid release constitutes a complete bar to an action on a claim that is the subject of the release (*Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 N.Y.3d 269, 929 N.Y.S.2d 3, 952 N.E.2d 995 [2011]). A release is a contract and its construction is governed by contract law. When a defendant moving to dismiss an action under CPLR 3211(a)(5) produces a copy of a signed release from the plaintiff's claim, the burden shifts to the plaintiff to show, under well-established contract principles, that the release was a product of fraud, coercion, duress, mutual mistake, or other conduct sufficient to void it (*Cames v Craig*, 181 A.D.3d 851, 119 N.Y.S.3d 888 [2d Dep't. 2020]). A plaintiff's failure to controvert a facially valid and relevant release will result in the dismissal of the cause of action.

Statute of Limitations

The determination of motions to dismiss for alleged untimeliness under CPLR 3211(a)(5) is similar to the procedures used for determining summary judgment motions for alleged untimeliness under CPLR 3212. The party moving for a CPLR 3211(a)(5) dismissal has the initial burden of establishing *prima facie* that the plaintiff's time to sue had expired (*Horowitz v Foster*, 180 A.D.3d 783, 120 N.Y.S.3d 49 [2d Dep't. 2020]). Such proof can be typically established by reference to the date of accrual typically ascertainable from the plaintiff's complaint, the date of commencement ascertainable from the filing date reflected on the summons or in the e-filing system, and a mathematical overlay of the controlling statute of limitations. If the moving defendant fails to meet the *prima facie* burden of proof, the dismissal motion will be denied (*Horowitz v Foster*, 180 A.D.3d at 784), at least as to its statute of limitations grounds. Where a complaint alleges more than one cause of action, the defendant should take care to apply the same exercise to each separate cause of action within the scope of the motion, as different causes of action may have different dates of accrual or be subject to different limitations periods. If the moving defendant meets the *prima facie* burden of proof, the plaintiff then undertakes the burden of raising a question of fact that the action is timely, such as by there being a later date of accrual, the existence of a limitations toll or extension, or a revival of

a limitations period (*e.g.*, *U.S. Bank National Association v Vitolo*, 182 A.D.3d 627, 120 N.Y.S.3d 791 [2d Dep't. 2020]; *Mello v Long Island Vitreo-Retinal Consultant, P.C.*, 172 A.D.3d 849, 99 N.Y.S.3d 414 [2d Dep't. 2019]).

Statute of Frauds

One of the CPLR 3211(a)(5) grounds for dismissal is that the plaintiff's cause of action may not be maintained on account of the statute of frauds. The determination of these motions may sometime depend on which statute of frauds provision in the General Obligations Law is controlling of the action. This parsing of the statute of frauds was recently seen in *Korman v Corbett*, 183 A.D.3d 608, 123 N.Y.S.3d 192 (2d Dep't. 2020). The plaintiff sought specific performance of an alleged oral agreement with a decedent, where the plaintiff cared for the decedent prior to her death in exchange for the plaintiff being given an option to buy the residence from her estate for $1.2 million. The decedent's estate moved to dismiss certain causes of action under CPLR 3211(a)(5) on the ground that the alleged agreement, which was never memorialized in writing, was unenforceable under the statute of frauds. At issue at the trial level, and on appeal, was whether the causes of action were governed by G.O.L. 5-701, which requires agreements involving the purchase of real property be in writing and contains no language authorizing courts to grant specific performance, and G.O.L. 5-703, which more specifically enables courts to award specific performance of real property agreements where there is evidence of partial performance. As between the two statutes, the Appellate Division held that G.O.L. 5-703 was the statute more specific to the plaintiff's factual and legal claims, and on that basis, held that the dismissal of the relevant causes of action was not appropriate.

C3211:28 Lack of Personal Jurisdiction

Last year's Practice Commentary for CPLR 3211(a)(8) reviewed the significant legal developments arising from the U.S. Supreme Court's decision on general jurisdiction in *Daimler AG v Bauman*, 571 U.S. 117, 134 S. Ct. 746 (2014). The Supreme Court clarified the law on general jurisdiction, by requiring that corporations be “at home” in a state to be subject to its general jurisdiction and be sued for any claim there. A corporation is “at home” in a state where 1) it is incorporated, or 2) maintains its principal place of business, or 3) in truly exceptional circumstances, where the corporation's operations are so substantial and of such nature as to render the corporation at home in the state. *Daimler* does not affect the states' exercise of specific jurisdiction, such as longarm jurisdiction recognized in New York under CPLR 302. While *Daimler* does not extend general jurisdiction liability between parent corporations and subsidiaries under an “agency” theory, which the Supreme Court directly addressed, it left unresolved the question of whether general jurisdiction can be extended between a parent corporation and a subsidiary under the parallel “alter ego” theory, which was not addressed. Last year's Practice Commentary predicted that future federal and state cases will be needed to definitively address whether general jurisdiction may be asserted between corporate parents and subsidiaries on an “alter ego” basis, and to flesh out the true meaning of *Daimler's* third basis for the assertion of general jurisdiction regarding truly exceptional cases where a corporation's operations are so substantial and of such nature as to render the entity “at home” in the state.

New York's general jurisdiction statute is CPLR 301. Decisions are slowly trickling in on issues related to that statute post-*Daimler*.

In one reported decision, a complaint was dismissed under CPLR 3211(a)(8) where a corporate president established in an affidavit that the defendant principal office was in New Jersey rather than New York, thereby depriving the plaintiff of general jurisdiction (*Robins v Procure Treatment Centers, Inc.*, 179 A.D.3d 412, 116 N.Y.S.3d 35 [1st Dep't. 2020]).

On the issue of whether an “alter ego” relationship between a corporate parent and subsidiary permits the assertion of general jurisdiction, where a party is not incorporated in the state and does not maintain a principal office here, an early canary in a coal mine may be *RP Business Marketing, Inc. v Timlin Industries, Inc.*, 67 Misc.3d 1205(A),

2020 WL 1856604 (Sup. Ct. New York County 2020) (Barrok, J.). The defendant, Timlin Industries, Inc. (Timlin), was in the telemarketing business and was sued by RP Business Marketing, Inc. (RPB) for allegedly breaching the exclusivity provisions of an agreement and by the improper sharing of proprietary information. Contractually, RPB and Timlin had agreed that any disputes between them would be governed by the law of the state of New York, and that any litigation between them would be venued in a state or federal court within New York. The party that Timlin allegedly worked with in breach of the contractual exclusivity provision was SM Consulting, LLC (SMC), which was also named as a defendant in the action, but which was not incorporated in New York and did not maintain its principal office within the state. SMC moved to dismiss the plaintiff's action against it on the ground that it was not subject to the general jurisdiction of the New York courts. The court focused on evidence about whether SMC was so dominated and controlled by Timlin as to be an alter ego or Timlin. Although the court held that SMC was subject to New York's longarm jurisdiction under CPLR 302, which rendered questions of general jurisdiction academic, it alternatively held that SMC was also subject to the general jurisdiction of New York courts as an alter ego of Timlin. Traditionally, New York has recognized a principal's domination and control over a subsidiary as an "alter ego" basis for the assertion of general jurisdiction. New York has avoided the nomenclature of "alter ego" in favor of what it instead calls the "department test" focused on whether the parent corporation's domination of control of a subsidiary is so extensive that the subsidiary is rendered a mere department of the parent. The court's recognition of an alter ego (department) basis for general jurisdiction addressed an issue that the U.S. Supreme Court did not address in *Daimler*, that an alter ego basis may be properly used for asserting general jurisdiction, but may arguably be called into question by *Daimler*. *RP Business* will not be the last word on the subject, as significant federal and, likely, appellate determinations in New York, should be expected.

The establishment of *Daimler's* third basis for general jurisdiction, based on exceptional circumstances, will not be easy for plaintiffs to meet. One reason is that the U.S. Supreme Court limited this basis to circumstances that are not just exceptional, but "truly exceptional." The Supreme Court further limited the basis to circumstances where the corporate defendant's operations within the state are "so substantial and of such nature" as to render the entity at home in the state. The bar is raised high. It was not met in *Aybar v Goodyear Tire & Rubber Company*, 175 A.D.3d 1373, 106 N.Y.S.3d 361 (2d Dep't. 2019).

Complaints and answers may be properly examined to determine whether the plaintiff has a basis for general jurisdiction in New York. In *Gibson v Air & Liquid Systems Corporation*, 173 A.D.3d 519, 103 N.Y.S.3d 391 (1st Dep't. 2019), the plaintiff's complaint alleged that the defendant was a corporation duly organized in the state of New York, which the defendant did not deny in its answer. The First Department concluded that the allegation of incorporation was admitted and binding upon the defendant, notwithstanding the fact that the answer had been prepared prior to the U.S. Supreme Court's determination in *Daimler*. General jurisdiction therefore existed based on an admission in the pleadings.

On the issue of whether general jurisdiction can be asserted against a parent corporation through the New York presence of a subsidiary, practitioners should be aware of *Sabol v Bayer Healthcare Pharm., Inc*., 439 F.Supp.3d 131 (2020) (Marrero, J.). A metal called gadolinium is used as a contrast agent for persons undergoing MRIs, and is supposed to be eliminated from the body through the kidneys. The plaintiff, who underwent 23 MRIs, alleged that she was caused physical injuries because the contrast agent was retained in her body, and sought damages under theories of negligence and strict products' liability for the defendants' failure to warn. The defendants included General Electric Healthcare (GEHC), which manufactured and distributed some of the gadolinium-based contrast agents. GEHC moved to dismiss the plaintiff's amended complaint on the ground, *inter alia*, that it was neither headquartered nor incorporated in New York. The plaintiff argued that GEHC was amenable to the court's general jurisdiction as it was a wholly-owned subsidiary of co-defendant General Electric Company (GE), a New York corporation. The court noted, as this Practice Commentary did last year, that it is unusual for a party to seek to extend jurisdiction over a subsidiary through its parent, rather than *vice versa*. The Southern District found that general jurisdiction was lacking over GEHC for two reasons. The first was that under *Daimler*, an agency theory between

the parent and subsidiary was expressly rejected by the U.S. Supreme Court for the assertion of general jurisdiction through one entity to another. Second, as to the "alter ego" basis for extending general jurisdiction from one related entity to another, as discussed in *Ranza v Nike, Inc*., 793 F.3d 1059 (9th Cir. 2015), the court stopped short of accepting "alter ego" as a jurisdictional path. Instead, the court said that *if* general jurisdiction could be imputed to a subsidiary under an alter ego analysis, the plaintiff would need to assert more than just the parent-subsidiary relationship between the parties. Indeed, in this instance, there appears from the court's decision to be no evidence from the plaintiff meeting New York's long-standing "department" test for establishing the parent's domination and control over its subsidiary, including the most important element of the parent's 100% stock ownership of the subsidiary.

Thus, for plaintiff practitioners, the message from *Sabel* v *Bayer Healthcare Pharm., Inc*. is that New York courts have not yet adopted *Ranza's* alter ego basis for the imputation of general jurisdiction, and may or may not do so. If the day comes when it does so, the parent-subsidiary relationship, in and of itself, will not be sufficient for the assertion of general jurisdiction, and the plaintiffs should be prepared to meet the four-part "department test" for the assertion of such jurisdiction; namely, 100% stock ownership by the parent of the subsidiary, the financial dependency of the subsidiary upon the parent, the parent's influence on the composition of the subsidiary's board, and the parent's control over the marketing and operational responsibilities of the subsidiary (*Volkswagenwerk Aktiengesellschaft v Beech Aircraft Corp*., 751 F.2d 117 [2nd Cir. 1984]; *Varga v McGraw Hill Financial Inc*., 2015 WL 4627748 [Sup. Ct. New York County 2015]).

In *Homeward Residential, Inc v Thompson Hine, LLP*, 172 A.D.3d 459, 100 N.Y.S.3d 233 (1st Dep't. 2019), the defendant was a limited liability partnership formed in Ohio with a principal office in that state. When the defendant moved to dismiss the action for lack of general jurisdiction, the plaintiff argued that the defendant should be estopped from asserting the defense that general jurisdiction was lacking, as the defendant had allegedly misrepresented that it maintained its principal place of business in New York upon which the plaintiff relied in commencing the action in New York. The Supreme Court, New York County, and the Appellate Division in the First Department, were unimpressed with the plaintiff's argument, as the plaintiff's reliance upon the defendant's alleged representations for venue-selection purposes was found to not be reasonable.

Discovery is of course permissible between parties to help determine whether a defendant is, or is not, subject to New York's general jurisdiction. To be entitled to jurisdictional discovery, the plaintiff must merely make an initial showing that is a "sufficient start," establishing facts that *may* exist for the exercise of personal jurisdiction (*Best v Guthrie Medical Group, P.C*., 175 A.D.3d 1048, 107 N.Y.S.3d 258 [4th Dep't. 2019]). Conversely, the absence of any initial showing, such as would contradict the defendant's readily-available evidence of non-New York incorporation and principal office location, does not provide a basis for fishing-expedition discovery on personal jurisdiction (*Qudsi v Larios*, 173 A.D.3d 920, 103 N.Y.S.3d 920 [2d Dep't. 2019]).

The pre-action discovery procedures of CPLR 3102(c) are generally available for acquiring material that is relevant to the potential assertion of general jurisdiction against a party in New York. Pre-action discovery, when sought, is requested by a petition in a special proceeding. In *Matter of Legal Aid Society of Suffolk County to Compel Production of Documents From Indeed, Inc. Prior to Commencement of Action*, 66 Misc.3d 1212(A), 120 N.Y.S.3d 720 (Sup. Ct. Suffolk County) (St. George, J.), the target entity, Indeed, Inc. (Indeed), was a Delaware corporation with a principal office located in Texas. Under *Daimler*, therefore, there would be no basis for general jurisdiction over Indeed, unless the circumstances were truly exceptional in maintaining operations in New York that were so substantial and of such nature as to render the entity at home in New York. While Indeed had registered to do business in New York, the court correctly noted that registration is not sufficient under *Daimler* to support the assertion of general jurisdiction over an entity, particularly as New York's registration statutes do not require the foreign corporation to consent to the general jurisdiction of the New York courts (BCL 1301, 1304[a]). No basis was stated in the pre-action discovery petition for the assertion of longarm jurisdiction over Indeed. As a consequence,

the Supreme Court, Suffolk County, denied the petition for pre-action discovery from Indeed, as the petitioner failed to provide any basis for jurisdiction. A similar result was reached in *Kline v Facebook, Inc. and Google, Inc.*, 62 Misc.3d 1207(A), 112 N.Y.S.3d 875 (Sup. Ct. New York County) (Freed, J.), where the petitioner seeking pre-action discovery failed to establish that the respondents, who were not incorporated in New York and did not maintain their principal offices here, was nevertheless potentially subject to New York's general jurisdiction.

C3211:32 Absence of a Person Who Should be a Party

Actions may be dismissed under CPLR 3211(a)(10) when the court should not proceed in the absence of a necessary party. The language of CPLR 3211(a)(10) is a little misleading, because the plaintiff's mere failure to name a necessary party does not automatically mean that the action will be dismissed. A party is defined as "necessary" when his or her presence is needed for complete relief to be accorded between persons who are parties to the action or who might be inequitably affected by a judgment in the action (CPLR 1001[a]).

The first issue, therefore, is whether a party is necessary. By nature and definition, the issue arises under CPLR 3211(a)(10) only where a potentially affected party is *not* named in the caption of the action, as the party's presence in the action would obviate consideration of a dismissal on this statutory ground.

The second issue that a court must address in determining CPLR 3211(a)(10) dismissal motions is whether the absent party is amenable to the personal jurisdiction of the court. If so, the court is not to dismiss the action in a kneejerk fashion, but instead, shall order the necessary party "summoned" (CPLR 1001[b]; *Deutsche Bank National Trust Company v Bandalos*, 173 A.D.3d 1136, 105 N.Y.S.3d 489 [2d Dep't. 2019]). If the summoned party enters the case, the problem of the party's absence is resolved, and no continuing legal basis exists for the dismissal of the action.

A third issue arises if the necessary party is not amenable to jurisdiction in response to the second or refuses to voluntarily appear. The court still does not automatically dismiss the action, but must engage in a balancing of five statutory factors set forth in CPLR 1001(b). These factors include the availability of other remedies in the event of a non-joinder, the prejudice that might accrue from non-joinder to the defendant or the party not joined, whether and by whom prejudice might be avoided in the future, the feasibility of a protective provision by order of the court or in the judgment, and whether an effective judgment may be rendered in the absence of the person not joined. No one factor is determinative (*Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Standards and Appeals*, 5 N.Y.3d 452, 805 N.Y.S.2d 525, 839 N.E.2d 878 [2005]), and granting a dismissal of the action will only occur if, upon a balancing of the delineated factors, it is reached as a last resort (*JP Morgan Chase, National Association v Salvage*, 171 A.D.3d 438, 98 N.Y.S.3d 6 [1st Dep't. 2019]). CPLR 3211(a)(10) motions therefore tend to be complicated, and do not lend themselves to easy resolution such as a black-and-white determination of a mathematical statute of limitations dismissal, or dismissals based upon uncontroverted documentary evidence, payment, release, arbitration and award, *res judicata*, and other potential grounds.

There is authority that the absence of a necessary party may be raised for the first time on appeal (*City of New York v Long Island Airports Limousine Service Corp.*, 48 N.Y.2d 469, 423 N.Y.S.2d 651, 399 N.E.2d 538 [1979]). If so, the appellate court has no authority to order that an additional party be added to an action, and by extension cannot dismiss an action on that basis, but must instead remit the question to the trial court for an initial determination of whether the matter should proceed in the absence of the party (*Velez v New York State, Department of Corrections and Community Supervision*, 163 A.D.3d 1210, 80 N.Y.S.3d 719 [3d Dep't. 2018]).

C3211:53 Waiving Objection Contained in Paragraph 1, 3, 4, 5, or 6 of 3211(a)

Last year's Practice Commentary for C3211:53 discussed a significant case from the Second Department regarding the waiver of affirmative defenses, *U.S. Bank National Association v Nelson*, 169 A.D.3d 110, 93 N.Y.S.3d 138 (2d Dept. 2019). *Nelson* is a residential mortgage foreclosure action where the plaintiff included in its complaint an allegation that it had standing to seek a judgment of foreclosure, even though standing is not an element of the cause of action that need to be pleaded. The defendant's answer responded to the allegation by denying knowledge or information sufficient to form a belief ("DKI"), but did not plead the lack of standing as a separate affirmative defense. The issue on appeal was whether a defendant's denial ("D") or DKI could be construed as an implicit and cognizable assertion of the standing defense, which could be raised, and not be waived, at the time of a lager dispositive motion. The Second Department held in a 3-1 decision that the standing defense is waived unless raised as a separate affirmative defense in the defendant's answer. The reasoning is the difference between CPLR 3018, which draws a clear statutory distinction between denials, which places the burden of proof upon plaintiffs, from affirmative defenses, which raise a new defensive matter which the defendant is obligated to prove. Any conflation of the two concepts can cause surprise and confusion at trial, which CPLR 3018 is designed to avoid.

As noted on C3211:12, the state legislature enacted RPAPL 1302-a, effective December 23, 2019, which provides that in residential mortgage foreclosure actions only, standing is not waived by the defendant's failure to raise it as an affirmative defense in the answer. The enactment of RPAPL 1302-a therefore renders academic the portion of *Nelson* that addressed whether a standing defense may be implicitly recognized by a defendant's denial or DKI of related allegations or whether a separate affirmative defense is required to preserve the defense. However, *Nelson's* general holding that defendants must actually plead standing as an affirmative defense in order to preserve it remains relevant and good law as to all actions---tort, contract, or otherwise---that do not involve residential mortgage foreclosures under RPAPL 1302-a. Therefore, per *Nelson*, if a defendant in any action outside of RPAPL 1302-a has a good faith basis to challenge the plaintiff's standing in the answer, the defendant should follow the well-known colloquial maxim: use it or lose it.

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C3211:10. Defense Based on "Documentary Evidence"

CPLR 3211(a)(1) permits dismissal of an action where "a defense is founded upon documentary evidence." While the language seems straight-forward, the operative inquiry is what specific types of documentation qualify as "documentary evidence" under the statute. A motion to dismiss under CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 [2002]).

Sequentially, a proffered document must first be of the type that qualifies under the statute, and if so, the court then determines whether its contents provide a defense warranting the dismissal of the action as a matter of law. Decisional authorities have not examined the issue in terms of a two-step sequence, but that is, in effect, the steps that courts must take. Documents that have traditionally qualified for evidentiary consideration under CPLR 3211(a)(1) are those which are 1) unambiguous, 2) of undeniable authenticity, and 3) reflect content that is essentially undeniable (*Koziatek v SJB Dev. Inc.*, 172 A.D.3d 1486, 99 N.Y.S.3d 480 [3d Dep't. 2019]; *VXI Lux Holdco S.A.R.L. v SIC Holdings, Inc., LLC,* 171 A.D.3d 189, 98 N.Y.S.3d 1 [1st Dep't. 2019]; *Mehrhof v Monroe-Woodbury Central School District*, 168 A.D.3d 713, 91 N.Y.S.3d 503 [2d Dep't. 2019]). Documents that have been found to qualify as documentary evidence have included judicial records, mortgages, deeds, contracts, and other papers the contents of which meet the requirements of being essentially unambiguous, authentic, and undeniable *(Magee-Boyle v Reliastar Life Ins. Co. of New York*, 173 A.D.3d 1157, 105 N.Y.S.3d 90 [2d Dep't. June 26, 2019]). In a recent case, a copy of an insurance policy was found to be documentary evidence permitting the dismissal of the plaintiff's cause of action for breach of contract, where the defendant insurer had denied the plaintiff coverage for a claimed loss under the policy's terms (*Calhoun v Midrox Ins. Co.*, 165 A.D.3d 1450, 86 N.Y.S.3d 769 [3d Dep't. 2018]).

Conversely, documents that tend to be self-serving or prepared for litigation do not qualify as documentary evidence for 3211(a)(1) dismissals, such as letters, affidavits, e-mails (*Magee-Boyle,* 173 A.D.3d 1157, 105 N.Y.S.3d 90; *Phoenix Grantor Tr. v Exclusive Hosp., LLC,* 172 A.D.3d 923, 101 N.Y.S.3d 175 [2d Dep't. 2019]; *First Choice Plumbing Corp. v Miller Law Offices, PLLC*, 164 A.D.3d 756, 84 N.Y.S.3d 171 [2d Dep't. 2018]; *Phillips v Taco Bell Corp*., 152 A.D.3d 806, 60 N.Y.S.3d 67 [2d Dep't. 2017]) and text messages (*Kalaj v 21 Fountain Place, LLC*, 169 A.D.3d 657, 94 N.Y.S.3d 106 [2d Dep't. 2019]).

The use of e-mails has been a source of vigorous argument and continuing controversy on the question of whether they are the type of document that may be considered by courts within the intended scope of CPLR 3211(a)(1). Courts often grapple with legal issues that arise from ever-changing technology, oftentimes one step behind. There are a fair number of cases where e-mails have not found traction as appropriate documentary evidence. E-mails were recently found to not be documentary evidence within the scope of CPLR 3211(a)(1) in *Members of DeKalb Avenue Condominium Association v Klein* (172 A.D.3d 1196, 102 N.Y.S.3d 207 [2d Dep't. 2019]) and in *First Choice Plumbing Corp.* (164 A.D.3d 756, 84 N.Y.S.3d 171 [2d Dep't. 2018]).

Nevertheless, the propriety and use of e-mails as documentary evidence in support of a CPLR 3211(a)(1) dismissal motion has been evolving, and is seen with some increasing flexibility. In *Kolchins v Evolution Markets, Inc.,* 31 N.Y.3d 100, 73 N.Y.S.3d 519 (2018), the Court of Appeals had occasion to consider whether e-mails exchanged between an employer and employee evidenced the existence of an employment contract. The plaintiff employee and defendant employer had entered into two separate three-year employment agreements that ended in 2009 and 2012, respectively. As the end of the second agreement approached, the defendant sent an e-mail to the plaintiff stating *inter alia* that the essential terms of its offer were the same as those of the parties' existing contract; the plaintiff responded by sending e-mail accepting the offer; and the defendant replied by e-mail with congratulations. When the terms of a written contract document could not later be agreed upon, the plaintiff was notified that his employment had ceased at the conclusion of the second contract in 2012. The plaintiff commenced an action for breach of contract, arguing that the e-mail exchanges between the parties evidenced the existence and terms of a third contract which incorporated by reference the terms of the second contract. The defendant moved to dismiss, arguing that the e-mails did not evidence the parties' mutual assent to material contract terms, and that indefiniteness rendered any purported contract invalid as a matter of law. The Court of Appeals ultimately determined that the e-mails failed to conclusively establish the absence of material terms or indefiniteness, as would be required to permit dismissal of the plaintiff's complaint. The Court of Appeals found that the e-mails permitted competing inferences about whether a new and enforceable contract had been reached, rendering a CPLR 3211(a)(1) dismissal inappropriate (*see also Tozzi v Mack*, 169 A.D.3d 547, 92 N.Y.S.3d 648 [1st Dep't. 2019]).

How, then, may *Kolchins* be reconciled with *Members of DeKalb Avenue Condominium Association, First Choice Plumbing Corp*., and many other reported cases that have disavowed the appropriateness of e-mails as documentary evidence for purposes of CPLR 3211(a)(1) dismissals? The answer appears to lie in the fact that in *Kolchins*, the e-mails that were exchanged by the parties bilaterally suggested an offer and an acceptance of a contract, or at least failed to refute that an offer and acceptance had occurred beyond mere preliminary and non-binding communications. The fact that the e-mails were exchanged, and the nature and authenticity of their contents, were not contested by the parties. E-mails in other conceivable actions sent by a party unilaterally, or which fail to authentically establish an offer and acceptance of the material and enforceable contractual terms, would likely fail to qualify as documentary evidence under *Kolchins* for 3211(a)(1) dismissals.

Of course, if the e-mails are themselves central to a cause of action or defense, they should qualify as documentary evidence for CPLR 3211(a)(1) purposes. For instance, in an action of alleged defamation, a news media outlet was able to establish that its reporting did not represent a gross disregard for the truth, by providing *inter alia* an e-mail chain between its reporters and police regarding the investigation that was reported upon (*Stone v Bloomberg, L.P.*, 163 A.D.3d 1028, 83 N.Y.S.3d 78 [2d Dep't. 2018]). Another example is where the e-mails are central to the cause of

action, such as alleged defamation contained in the e-mail itself, and the e-mail is proffered as evidence to establish that the statements constituted non-actionable opinion warranting dismissal of the cause of action under CPLR 3211(a)(7) (*International Pub. Concepts, LLC v Locatelli*, 46 Misc.3d 1213[A], 9 N.Y.S.3d 593 [Sup. Ct., New York County 2015]). The appropriateness of letters, e-mails, or texts as documentary evidence therefore depends in many instances upon the nature and circumstances of the action or its available defenses.

C3211:12. Plaintiff's Lack of Capacity

The concepts of "capacity" and "standing" have been described as difficult to distinguish and as "twins" (David D. Siegel and Patrick M. Connors, N.Y. Practice § 136 at 349 [6th ed.]). Nevertheless, the two concepts are distinct. Both fall within the scope of CPLR 3211(a)(3), permitting the dismissal of actions on either ground by means of a pre-answer motion (David D. Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:13 [2011]). The difference between the concepts is that "capacity" regards the ability of a plaintiff to competently bring an action in a civil court, without being afflicted by a disqualifying disability such as infancy or mental illness (*Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 N.Y.2d 148, 615 N.Y.S.2d 644 [1994]; *HSBC Bank USA Nat. Ass'n v Roumiantseva*, 39 Misc.3d 1239[A], 975 N.Y.S.2d 709 [Sup. Ct., Kings County 2013]). In contrast, "standing" involves whether a plaintiff with capacity to litigate has a sufficiently cognizable stake in the outcome of the action or proceeding as cast the dispute in a form traditionally capable of judicial resolution (*Community Bd. 7 of Borough of Manhattan,* 84 N.Y.2d 148, 615 N.Y.S.2d 644). Defense attorneys wishing to dismiss an action for lack of standing may do so under CPLR 3211(a)(3), even though the word "standing" is missing from the grounds specifically listed in the subdivision.

The defense of lack of capacity under CPLR 3211(a)(3), if asserted as an affirmative defense in a defendant's answer, is not waived by the defendant's participation in the defense of the action (*Gulledge v Jefferson County*, 172 A.D.3d 1666, 101 N.Y.S.3d 493 [3d Dep't. 2019]).

C3211:15. Same Parties, Same Cause of Action

An action may be dismissed under CPLR 3211(a)(4) if there is already another action pending between the same parties for the same cause of action in a court of any state or the United States. The purpose of CPLR 3211(a)(4) is to prevent a party from being harassed or burdened by having to defend against multiple law suits from the same plaintiff (*LaBuda v LaBuda*, 175 A.D.3d 39, 105 N.Y.S.3d 585, [3d Dep't. July 3, 2019]).

Dismissal is always discretionary, as the statute specifically provides that the court "may" dismiss the action, not "shall." In exercising that discretion, courts may examine the circumstances under which the second action is brought. In *LaBuda*, a second action was commenced by a substituted attorney to merely add new claims ahead of an expiring statute of limitations, though with 20/20 hindsight the attorney might have more easily sought leave to amend the original complaint. The Appellate Division, Third Department, was satisfied that the second action was commenced for credible, non-harassment purposes, reasoning that a joinder or consolidation of the two actions could be the more appropriate remedy for fostering judicial economy under the circumstances of that case.

The cases seen under this subdivision of the CPLR tend to involve whether two actions truly involve 1) the same parties, 2) the same causes of action, and 3) the same requested relief. The mere relatedness of causes of action or parties is not sufficient to justify CPLR 3211(a)(4) dismissals. The CPLR contemplates something more.

A complete identity of the parties is not necessary for a dismissal under CPLR 3211(a)(4) so long as there is a "substantial" identity of parties, which generally requires that there be at least one plaintiff and one defendant common to both actions (*Jaber v Elayyan*, 168 A.D.3d 693, 93 N.Y.S.3d 315 [2d Dep't. 2019]).

Similarly, for CPLR 3211(a)(4) remedies to apply, the precise legal theories and prayers for relief presented in both actions need not be precisely identical, so long as they are at least "substantially the same" (*Id*.).

An example of causes of action being related, but not quite similar enough for CPLR 3211(a)(4), is *Spicer v Spicer*, 162 A.D.3d 886, 80 N.Y.S.3d 328 (2d Dep't. 2018). *Spicer* involved a mother and a father who were already divorced. An action was commenced in the Supreme Court, Nassau County, where the parties executed an agreement modifying their custody arrangement, and the agreement was awaiting a So Ordered signature of the assigned justice. As that was pending, the mother commenced a proceeding in the Family Court, Nassau County, seeking to hold the father in contempt for allegedly violating the terms of the modification agreement. While the court attorney referee was found on appeal to have erred in dismissing the Family Court petition for failing to state a cause of action, a related issue on appeal was whether the Family Court should have dismissed its proceeding on the ground that a prior action between the same parties was pending at the Supreme Court. As to that issue, the Second Department held that while the parties were identical in both proceedings, the relief sought by them in each forum was very different--one involved a modification of custody, and the other involved alleged contempt and its related remedies. *Spicer* makes clear that a mere connection between the parties and the relief sought in the two forums is not enough, as CPLR 3211(a)(4) speaks more to avoiding an actual duplication of causes in different courts.

If a prior action is pending, but abandoned, dismissal of the second action is not warranted (*MLB Sub I, LLC v Grimes*, 170 A.D.3d 992, 96 N.Y.S.3d 594 [2d Dep't. 2019]). In *MLB Sub I*, the plaintiff had moved to discontinue its first action against the defendant, commenced the second action three weeks later, and the Supreme Court granted the discontinuance of the first action six weeks after that. The Supreme Court and Appellate Division, Second Department, held that the defendant was not entitled to a dismissal of the second action, as the first action had effectively been abandoned by the time the defendant's CPLR 3211(a)(4) motion to dismiss was made.

RPAPL 1301(3) prohibits the commencement of a mortgage foreclosure action if a prior action for the same relief is active, absent leave of court (*U.S. Bank Tr., N.A. v Humphrey*, 173 A.D.3d 811, 103 N.Y.S.3d 98 [2d Dep't. June 5, 2019]; *Deutsche Bank Nat. Tr. Co. v Fandetta*, 60 Misc.3d 1220[A] [Sup. Ct., Suffolk County 2018]).

Actions should not be dismissed on the ground of prior action pending by courts acting *sua sponte* (*DLJ Mortg. Capital v Mahadeo*, 166 A.D.3d 512, 89 N.Y.S.3d 26 [1st Dep't. 2018]).

C3211:18. Affirmative Defenses Available on Subdivision (a) Motions

Statute of Limitations

One of the staple grounds asserted in support of motions to dismiss is the statute of limitations, which is among the grab bag of grounds set forth in CPLR 3211(a)(5). A signed opinion of Justice Robert Miller of the Appellate Division, Second Department, resolved at the appellate level an issue of first impression that had divided several trial-level courts. In *Bank of New York Mellon v Dieudonne*, 171 A.D.3d 34, 96 N.Y.S.3d 354 (2d Dep't. 2019), a lender commenced a residential mortgage foreclosure action against a homeowner who allegedly defaulted in the payment of the installment loan obligation. The note underlying the mortgage contained language in Paragraph 22 setting forth conditions that needed to be satisfied for the lender to accelerate the full balance due on the note. Separately, Paragraph 19 of the note provided that upon default, the homeowner had the right to reinstate the note and mortgage by paying all monies due up to the time of, *inter alia,* the final judgment. The balance of the *Dieudonne* loan debt was duly accelerated by the lender in June of 2010 but the action was not commenced until October of 2016, beyond the six year statute of limitations of CPLR 213(2). The homeowner moved to dismiss the action pursuant to CPLR 3211(a)(5) and CPLR 213(2). In opposition, the lender argued, with reliance upon certain trial-level decisional authority, that because the homeowner possessed the right to reinstate the loan and mortgage under the conditions defined in Paragraph 19 of the note, the statute of limitations did not begin to run until the

homeowner's reinstatement rights were extinguished. In effect, the lender argued that the statute of limitations had not even begun to run, as the homeowner's contractual right to reinstatement continued until the time of the entry of final judgment which had not yet occurred.

The Second Department held in *Dieudonne* that the lender's action was untimely and dismissed the complaint. It reasoned that Paragraphs 19 and 22 of the note were independent of one another, and that the lender's right to accelerate the outstanding loan debt expressly preceded the exercise or extinguishment of the homeowner's reinstatement rights. The court's holding makes sense. If the lender's legal argument were taken to its logical conclusion, a homeowner's right to reinstatement until the time of the final judgment, or until some other contractually-defined deadline late in the foreclosure process, would essentially nullify any statute of limitations from applying to residential mortgage foreclosure actions, and provide quite a boon to the banks. The lender's legal argument that the statute of limitations had not begun to run despite the acceleration of the full outstanding loan debt, while clever, fell short of earning a congratulatory cigar.

By virtue of *Dieudonne*, the following reported trial-level decisions, which had agreed with the same or similar bank arguments, are no longer good law and should not be followed: *U.S. Bank Nat'l Ass'n v Nail*, 2018 NY Slip Op. 32897(U), 2018 WL 6172080 (Sup. Ct., Westchester County 2018); *Wells Fargo Bank, N.A. v Fetonti*, 2018 NY Slip Op. 30193(U), 2018 WL 823782 (Sup. Ct., Westchester County 2018); *HSBC Bank, USA, NA v Margineanu*, 61 Misc.3d 973, 86 N.Y.S.3d 694 (Sup. Ct., Suffolk County 2018); *U.S. Bank Trust, N.A. v Monsalve*, 2017 NY Slip Op. 32764(U), 2017 WL 6994224 (Sup. Ct., Queens County 2017); and *Nationstar Mortgage, LLC v MacPherson*, 56 Misc.3d 339, 54 N.Y.S.3d 825 (Sup. Ct., Suffolk County 2017).

Res Judicata

The well-worn definition of res judicata is that it prohibits re-litigation of a matter when an earlier action disposed of the same transaction or series of transactions, involving the same parties, and there was a full and fair opportunity for the parties to be heard in the prior forum (*Paramount Pictures Corp. v Allianz Risk Transfer AG,* 31 N.Y.3d 64, 73 N.Y.S.3d 472 [2018]; *Wilson v Dantas,* 29 N.Y.3d 1051, 58 N.Y.S.3d 286 [2017]; *O'Brien v City of Syracuse*, 54 N.Y.2d 353, 445 N.Y.S.2d 687 [1981]).

An instructive case about res judicata and the identity of parties is *Aponte v Estate of Aponte*, 172 A.D.3d 970, 101 N.Y.S.3d 132 (2d Dep't. 2019). In *Aponte*, the plaintiff sought the appointment of an administrator for his son's estate, claiming that he had retained an attorney to commence an action against the estate to recover monies allegedly owed to him as a result of business dealings. The Surrogate's Court, Queens County, appointed the son's wife as the estate's administratrix, who filed a final account with the Surrogate's Court that the plaintiff did not oppose in that forum. Approximately one month after the Surrogate's Court issued a final decree settling the final account for the estate, the plaintiff commenced an action in Supreme Court for various forms of relief against the son's estate, the son's wife, and a corporate entity allegedly owned by the wife, in connection with the business dealings between them. The issue for the Supreme Court, and on appeal, was whether the Supreme Court action was barred by the doctrine of res judicata. The Second Department applied a pragmatic test analyzing how the facts of the two proceedings were related in time, space, origin, and motivation, whether the facts formed "a convenient trial unit," and whether treating the facts as a unit "conform[ed] to the parties' expectations or business understanding" (*Aponte*, 172 A.D.3d at 972, 101 N.Y.S.3d at 133). The Second Department concluded that causes of action for damages and for a constructive trust in connection with the business should have been dismissed on the ground of res judicata under CPLR 3211(a)(5), as those claims could have and should have been asserted against the estate in the Surrogate's Court proceeding. Indeed, the Second Department specifically held that res judicata applies with equal force to judicially-settled accounting decrees. However, the Second Department also held that as to causes of action in the Supreme Court against the son's wife, res judicata did not apply or warrant dismissal, since her appearance in the Surrogate's Court proceeding was in an administratrix capacity whereas her appearance

in the Supreme Court action was in an individual capacity. The corporate entity was not a party to the Surrogate's Court proceeding at all, and therefore was also not entitled to a dismissal of the Supreme Court action against it on account of res judicata. The case demonstrates how courts may parse individual parties, and individual causes of action, in determining which, if any, should be dismissed from an action on the ground of res judicata.

A stipulation of discontinuance with prejudice, without a reservation of right or limitation of the claim disposed by it, is entitled to res judicata effect (*Wells Fargo Bank Nat'l Ass'n v Enbar*, 173 A.D.3d 938, 104 N.Y.S.3d 183, 2019 WL 2439783 [2d Dep't. June 12, 2019]).

The res judicata defense applies to arbitration awards (*Piller v Princeton Realty Assoc., LLC*, 173 A.D.3d 1298, 104 N.Y.S.3d 344, 2019 WL 2375424 [3d Dep't. June 6, 2019] [signed opinion by Mulvey, J.]). If a party fails to comply with a confirmed arbitration award, the remedy is an enforcement or contempt application in the action or proceeding which confirmed the arbitration award (CPLR 7502[a][iii]), as a separate later action is subject to dismissal on the ground of res judicata (*Id.*).

Release

While the existence of a release is a basis for the dismissal of a plaintiff's complaint under CPLR 3211(a)(5), the dismissal motion should be denied where the release is a product of fraud or duress in its procurement (*Paulino v Braun*, 60 Misc.3d 1201[A] [Sup. Ct., Bronx County 2018]). A release is a species of contract, and as such, is governed by the principles of contract law in its execution, interpretation, and enforcement. In *Paulino*, the defendant seeking dismissal met his initial burden of proof by submitting an authenticated copy of a release executed by the plaintiff, a copy of a $6,000 check forwarded to the plaintiff, and an affidavit of the defendant's insurance adjustor that the release and payment pertained to the same automobile accident that became the subject of the plaintiff's complaint. But in opposition, the defendant raised questions of fact about whether the release was signed under circumstances of unfairness and overreaching, which were described. Thus, while the existence of a release is a defense permitting the dismissal of actions, the release itself must be a product of proper attainment.

C3211:21. Failure to State a Cause of Action, Generally

Where the plaintiff is a contractor asserting a cause of action against a consumer, and the contractor is required by state or local law to be licensed, the complaint must allege that the plaintiff was duly licensed at the time that services were provided, and shall identify the license's name, number, and the of governmental agency of its issuance (CPLR 3015[e]). If a complaint fails to reflect such information, the defendant may move for dismissal of the complaint under CPLR 3211(a)(7) for its failure to state a cause of action (CPLR 3015[e]). The policy behind CPLR 3015(e) is to protect consumers. Additionally, if a contract between an unlicensed contractor and a consumer is illegal by virtue of the contractor's failure to obtain a license, the courts cannot provide the contractor with relief for the consumer's non-payment. The contractor's unlicensed status forecloses a recovery for both money damages and in quantum meruit (*Holistic Homes, LLC v Greenfield*, 138 A.D.3d 689, 27 N.Y.S.3d 892 [2d Dep't. 2016]).

Certainly, unlicensed contractors have been caught unaware of this pleading requirement, and have suffered the dismissal of their actions as a result of non-compliance with licensing laws (*Kristeel, Inc. v Seaview Development Corp.,* 165 A.D.3d 1243, 87 N.Y.S.3d 600 [2d Dep't. 2018]). A new twist occurred in *Rusin v Design-Apart USA, Ltd.*, 173 A.D.3d 1231, 104 N.Y.S.3d 675 (2d Dep't. 2019). In *Rusin*, it was the consumer, rather than the unlicensed contractor, who commenced an action for breach of contract, seeking as damages the return of monies previously paid to the contractor. What is good for the goose is good for the gander. The court held on appeal that when a consumer obtains a benefit of services from an unlicensed contractor, as here, a recoupment of monies already paid is not permitted. As stated by the Appellate Division, “The parties, in these circumstances, should be left as

they are" (*Rusin v Design-Apart USA, Ltd.*, 173 A.D.3d at 1231, *citing* *Segrete v Zimmerman*, 67 A.D.2d 999, 413 N.Y.S.3d 732 [2d Dep't. 1979]).

C3211:28. Lack of Personal Jurisdiction

General Jurisdiction Under CPLR 301

The U.S. Supreme Court caused a moderate earthquake in 2014 with the opinion it rendered in *Daimler AG v Bauman*, 571 U.S. 117, 134 S. Ct. 746 (2014) regarding the issue of all-purpose general jurisdiction against corporate defendants. Professor Patrick M. Connors of Albany Law School was one of the earliest observers out of the gate to recognize the procedural significance of *Daimler* to New York practice (Patrick M. Connors, *Impact of Supreme Court Decisions on New York Practice*, NYLJ, June 18, 2014). The shockwaves of *Daimler* are being felt nationwide generally, and in New York specifically, and it is predicted here that a few years of litigation will be required to fine-tune secondary issues that arise from the case.

Daimler involved several Argentinian plaintiffs who sued a corporate defendant, Daimler AG ("Daimler") in federal court in California, seeking damages for the alleged criminal actions committed in Argentina by a Daimler subsidiary. Daimler is a German entity headquartered in Stuttgart, Germany. The plaintiffs sought to assert general jurisdiction over Daimler in California based upon the presence there of yet another Daimler subsidiary that distributed automobiles in California and elsewhere. The difference between "general jurisdiction" and "specific jurisdiction" is that with the former, a forum state may hear any and all claims against the entity, because the entity's affiliations with the state are so continuous and systematic as to render it essentially "at home" there (*Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 131 S.Ct. 2846 [2011]). However, in *Goodyear*, the Supreme Court stopped short of defining how and under what circumstances a corporate entity is considered "at home" in a state, keeping its tradition of not deciding questions beyond what is immediately before it. By contrast, "specific jurisdiction" depends on an identifiable affiliation between the state and the underlying controversy, principally activity or an occurrence that takes place in the forum state, or having effect in the forum state, and is therefore subject to the state's regulation (*Id.*).

The issue of whether Daimler was subject to the general jurisdiction of California courts made its way to the U.S. Supreme Court. The majority opinion, written by Justice Ginsburg, held that even assuming the California subsidiary's activities were jurisdictionally imputable to Daimler, Daimler was still not subject to the general jurisdiction of the California courts. The reason is that the Supreme Court re-defined--or perhaps we should say "clarified"--the definition of general jurisdiction over corporate entities. Previously, such jurisdiction derived in New York and elsewhere from a corporation's permanence and continuity within a state (*Tauza v Susquehanna Coal Co.*, 220 N.Y. 259 [1917]), the so called "doing business" test (*Frummer v. Hilton Hotels Intl.* (19 N.Y.2d 533, 281 N.Y.S.2d 41 [1967]). The Supreme Court in *Daimler* gave a much narrower focus to general jurisdiction, holding, as it did in *Goodyear*, that such jurisdiction applies only when the corporate entity is "at home" in the state. However, for the first time, the Supreme Court defined a corporation as being "at home" only in a state 1) where it is incorporated, or 2) where it maintains its principal place of business, or 3) in truly exceptional cases, where the corporation's operations are so substantial and of such nature as to render the corporation at home in the state. Otherwise, the corporation is not "at home" in a state, and is not subject to that state's general jurisdiction.

The effect of *Daimler* was to obliterate New York's "doing business" test with both barrels, wiping out New York's construct for general jurisdiction that has been utilized for several decades. One of the biggest casualties of New York case law was *Frummer v. Hilton Hotels International*, not to mention its progeny.

The first two definitions of being "at home" in a state, based upon the places of the entity's incorporation and principal office, are clear-cut, objective, and documented. Like pregnancy, it exists or it does not with no ground for

argument in between. The "third" definition of being "at home" is what may require further litigation to clarify, to determine more precisely the meaning and permutations of having operations so substantial and of such nature as to be tantamount to the corporation being at home in a state, even though its incorporation and principal office lies elsewhere. The language of the U.S. Supreme Court that this third basis for general jurisdiction is "exceptional" suggests that the plaintiffs, rather than the defendants, will face the uphill climb in convincing courts that general jurisdiction be applied on a case-by-case basis to out-of-state corporations.

Daimler represented such a jurisdictional departure from what had previously been understood that the U.S. Supreme Court felt the need to reaffirm its holding three years later in *BNSF Ry. Co. v Tyrrell*, __ U.S. __, 137 S. Ct. 1549 (2017).

A plaintiff who is unable to obtain general jurisdiction over a foreign corporation is not necessarily out of luck in maintaining an action in New York, or forced to travel to another jurisdiction where the corporate defendant is at home. General jurisdiction, which is embodied in CPLR 301, is distinctly different from specific jurisdiction which is embodied in CPLR 302. New York's longarm statute, CPLR 302(a), may independently provide a basis for the assertion of specific jurisdiction, especially where the causes of action in the complaint relate to the foreign corporation's New York activities (*Qudsi v Larios*, 173 A.D.3d 920, 103 N.Y.S.3d 492, 2019 NY Slip Op. 04742 [2d Dep't. June 12, 2019]). These may include, for example, breach of contract actions involving the supply of goods or services to New York, or cases involving the foreign defendant's alleged commission of a tortious act within New York, or product liability cases involving acts outside New York which have an effect within New York (CPLR 302[a][1], [2], [3]).

May the liability of a subsidiary at home in a state where the action is pending be jurisdictionally imputed to a corporate parent not at home in the state? Justice Ginsburg's opinion in *Daimler* shuts down the question, holding that the corporate parent must itself be at home in the state to be subject to its general jurisdiction, *if* the basis for extending jurisdiction over the out-of-state parent is merely an "agency" relationship between the corporate parties. Justice Ginsburg's majority opinion in *Daimler* did not address whether jurisdiction over a subsidiary at home in the state may be extended to an out-of-state parent under an "alter ego" relationship between the corporate parties. The difference between corporate "agency" and corporate "alter ego," and the significance of the two theories to the extension of general jurisdiction, is discussed below.

And what of the converse? May an entity incorporated in New York or maintaining a principal office here be held vicariously liable for the acts of its non-New York subsidiary, perhaps through a piercing of the corporate veil? May the contacts of a parent company incorporated or headquartered in New York be extended to a foreign subsidiary for the assertion of general jurisdiction over that subsidiary? There, the questions become more dicey.

So far, there is no reported case in New York that directly addresses the question of whether an "at home" parent corporation may be held liable for the acts of a foreign subsidiary not "at home" in the forum state. One case of potential guidance, from the West Coast, is *Ranza v Nike, Inc*., 793 F.3d 1059 (9th Cir. 2015). *Ranza* involved a plaintiff's claim for age and sex discrimination allegedly committed against her by her employer, Nike European Operations Netherlands, B.V. (NEON) in Hilversum, Netherlands. NEON's parent company is Nike, Inc. (Nike), which is headquartered and "at home" in Oregon. The plaintiff commenced her action in the federal District Court, District of Oregon. The Ninth Circuit determined that NEON was not incorporated or headquartered in Oregon, and that its contacts with Oregon were not so extraordinary, continuous, and systematic as to render it essentially at home in the forum state. NEON's contacts with Oregon might have been sufficient for the assertion of specific jurisdiction if there had been some connection between the conduct complained of and NEON's contacts with Oregon, but there was no such connection and specific jurisdiction was not an issue in the action. The Ninth Circuit then considered whether Nike's contacts with Oregon could be imputed to its subsidiary, NEON. It determined that a mere parent-subsidiary relationship, standing alone, is insufficient to permit the imputation, because corporate

separateness insulates a parent corporation from the liabilities of its subsidiary absent circumstances permitting a piercing of the corporate veil. Prior to *Daimler*, federal courts had allowed the corporate veil to be pierced for jurisdictional purposes under either of two tests, the "agency test" and the "alter ego test". The "agency test" requires the plaintiff to demonstrate that there were tasks so important to the parent corporation that if the subsidiary did not perform them, the parent corporation's own officials would undertake them. The "alter ego test" looks to whether the parent and subsidiary are not truly separate entities, if the parent dominates and controls the subsidiary's internal affairs or daily operations. More specifically, the alter ego test examines whether there is such unity of interest and ownership that the separate personalities of two corporate entities no longer exist, and if so, whether the failure to disregard their separate identities would result in fraud or injustice (*e.g. Williams v Yamaha Motor Co. Ltd*, 851 F.3d 1015 [9th Cir. 2017]). According to the Ninth Circuit, *Daimler* invalidated the agency test but left intact the alter ego test. Under the facts of *Ranza*, the Ninth Circuit determined that the plaintiff failed to provide evidence that Nike and NEON did not observe their separate corporate formalities, and on that basis, general jurisdiction was not permissible under the alter ego test. The holding in *Ranza* assuredly suggests that had the alter ego test been satisfied by the plaintiff, Nike's contacts with Oregon, where it was "at home," would have permitted the extension of general jurisdiction over NEON, its foreign subsidiary.

The reasoning of *Ranza* was followed at the federal District Court level in *Maple Leaf Adventures Corporation v Jet Tern Marine Co. Ltd.*, 15-CV-02504-AJB-BGS, 2016 WL 3063956 (S.D. Cal. 2016). There, the court found that the plaintiff failed to establish that a foreign parent corporation was an alter ego of its California subsidiary, but granted the plaintiff the alternative relief of conducting jurisdictional discovery so the issue could be revisited later.

Notably, the entity at home in California in *Maple Leaf Adventures Corporation* was the subsidiary, while the entity at home in Oregon in *Ranza* was the corporate parent. Should it matter to general jurisdiction, for imputation purposes, whether the "at home" entity is the parent or the subsidiary? That question was addressed by the Ninth Circuit in *Ranza*, acknowledging that it is more typical for the subsidiary to be the "at home" entity, with the plaintiff's efforts to extend general jurisdiction directed at the foreign parent corporation. That said, the Ninth Circuit held that where the alter ego test is satisfied for the imputation of general jurisdiction, it does not matter whether the corporate parent or the subsidiary is the "at home" party or which entity is foreign. Its analysis was supported by a federal District Court case and by a law review article that analyzed why it should not matter which of the related entities was at home and which was not (*In re Chocolate Confectionary Antitrust Litig.*, 674 F.Supp.2d 580, 599 n. 25 [M.D. Pa. 2009]; Lea Brilmayer and Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 Calif. L. Rev. 1, 13-15 [1986]). Notwithstanding the analysis in *Ranza*, it actually seems that if two entities are to be treated as one under an alter ego theory, it makes more sense that the "home" of the dominated entity definitionally be the state where the parent is incorporated or maintains its headquarters, as would have been the case in *Ranza* had alter ego evidence been established. If that were to be the case, then general jurisdiction may be extended by a forum state to a foreign subsidiary.

What should make *Ranza* particularly compelling to New York practitioners is that our state recognizes its own alter ego test, though New York courts refer to it as a "department test" with slightly different definitional nomenclature. New York's "department test," roughly similar to the "alter ego test" recognized in Oregon, California, and elsewhere, examines whether a parent corporation's control over the foreign subsidiary's operations is so complete that the subsidiary is, in fact, merely a "department" of the parent (*Delagi v. Volkswagenwerk A.G. of Wolfsburg, Germany*, 29 N.Y.2d 426, 328 N.Y.S.2d 653 [1972]; *Pub. Adm'r of Cnty. of N.Y. v. Royal Bank of Can.*, 19 N.Y.2d 127, 278 N.Y.S.2d 378 [1967]; *Benefits by Design Corp. v Contractor Management Servs., LLC*, 75 A.D.3d 826, 905 N.Y.S.2d 340 [3d Dep't. 2010] [signed opinion by Garry, J.]; *Varga v McGraw Hill Financial Inc.*, 2015 WL 4627748 [Sup. Ct., New York County 2015]; *Transasia Commodities Ltd. v Newlead JMEG, LLC*, 45 Misc.3d 1217[A] [Sup. Ct., New York County 2014]). New York courts consider four factors when assessing whether a mere "department" relationship exists between a parent and a subsidiary; namely: (1) an identical ownership interest, (2) the financial dependency of the subsidiary upon the parent, (3) the parent's influence on the composition of the board

and operations of the subsidiary, and (4) the parent's control over the marketing and operational responsibilities of the subsidiary (*Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp*., 751 F.2d 117 [2d Cir. 1984]; *Varga,* at 2015 WL 4627748). The first of the four factors is regarded as essential, while the remaining three factors are merely important (*Volkswagenwerk Aktiengesellschaft,* 751 F.2d at 120-22). The first factor, that there be identical ownership between the corporate parent and the subsidiary, requires the parent to own 100% of the subsidiary, or nearly so (*Volkswagenwerk Aktiengesellschaft,* 751 F.2d at 120 [wholly-owned subsidiary established the common ownership factor]; *OneBeacon Am. Ins. Co. v Newmont Mining Corp*., 82 A.D.3d 554, 918 N.Y.S.2d 470 [1st Dep't. 2011] [general jurisdiction inapplicable as corporate parent owned only 51% of its subsidiary]). From that standpoint, New York's "department test" may be somewhat more detailed and sophisticated than the "alter ego test" that focuses primarily upon the corporate parent's domination and control if its subsidiary.

If the alter ego test survives future U.S. Supreme Court review for the assertion of general jurisdiction over a foreign entity, then New York's decisional authorities regarding its department test should probably remain viable as well. If, on the other hand, the U.S. Supreme Court determines in the future that the alter ego test is no longer applicable to the assertion of general jurisdiction over a foreign entity, then a portion of New York's jurisprudence may be overruled. Thus, the true parameters of general jurisdiction, extending or not extending through an "at home" entity to related foreign entities, will not be fully known until the U.S. Supreme Court takes up this issue in a future appeal. Only a reader of tea leaves might predict whether the Supreme Court will decide if, in addition to a vicarious relationship between the two entities, a New York entity and a related foreign entity must each be at home for general jurisdiction to attach to them, or whether proof of an alter ego relationship between them may suffice to extend general jurisdiction over the foreign entity.

As *Ranza* demonstrates, if a general jurisdictional extension is permissible against a foreign subsidiary and/or parent, the plaintiffs will need to provide *evidence* sufficient to satisfy the alter ego test, and general jurisdiction will not be sustained if that test is not satisfied. The same would be true of New York's "department test."

What if a corporation is registered to do business in a state for service of process and has designated the Secretary of State as its agent for service of process (BCL 1301, 1312[a]), but is incorporated in and maintains its principal office elsewhere? Is registration equivalent to an incorporation or principal office for general jurisdictional purposes? A signed opinion of Justice Valerie Brathwaite-Nelson of the Appellate Division, Second Department, holds that a mere corporate registration allowing for service of process upon a designated agent within the state is not a consent to the general jurisdiction of that state, but is instead merely a convenience to be utilized when jurisdiction exists (*Aybar v Aybar*, 169 A.D.3d 137, 93 N.Y.S.3d 159 [2d Dep't. 2019]. *See also Amelius v Grand Imperial LLC*, 57 Misc.3d 835, 64 N.Y.S.3d 855 [Sup. Ct., New York County 2017]). It appears that state and federal courts throughout the nation agree with the same reasoning (*Brown v Lockheed Martin Corp.,* 814 F.3d 619 [2d Cir. 2016]; *Gorton v Air & Liquid Sys. Corp.*, 303 F.Supp.3d 270 [M.D. Pa. 2018]; *Gulf Coast Bank v Designed Conveyor Sys., LLC,* No. 16-412-JJB-RLB, 2017 WL 120645 [M.D. La. 2017]; *Perez v Air and Liquid Sys. Corp.,* No. 3:16-CV-00842-NJR-DGW, 2016 WL 7049153 [S.D. Ill. 2016]; *Genuine Parts Co. v Cepec*, 137 A.3d 123 [Del. 2016]; *DeLeon v BNSF Ry Co.* 426 P.3d 1 [Mont. 2018]; *State ex rel. Norfolk S. Ry. Co. v Dolan*, 512 S.W.3d 41 [Mo. 2017]; *Segregated Account of Ambac Assurance Corp. v Countrywide Home Loans, Inc*., 898 N.W.2d 70 [Wis. 2017]. *But see Bailen v Air & Liquid Sys. Corp*., 2014 NY Slip Op. 32079(U), 2014 WL 3885949 [Sup. Ct., New York County 2014]). The holding in *Aybar* makes sense, as the mere doing of business within a state is not enough under *Daimler* to render a corporation "at home" in the state, unless in a given action the third definition in *Daimler* applies--that it be a truly exceptional case where the corporation's operations are so substantial and of such nature as to render the corporation at home in the state.

A contractual forum selection clause naming New York as the forum for litigation is enforceable notwithstanding *Daimler*, as the forum selection clause represents the formal consent of the defendant to the personal jurisdiction of

New York courts (*Zucker v Waldman,* 46 Misc.3d 1214[A], 9 N.Y.S.3d 596 [Sup. Ct., Kings County 2015]; *Putnam Leasing Co., Inc. v Pappas*, 46 Misc.3d 195 [Dist. Ct., Nassau County 2014]).

Daimler's restriction of general jurisdiction to states where a corporate defendant is at home does not extend to proceedings to recognize or enforce a foreign judgment against a foreign entity. In doing so, the court is merely performing a ministerial function in according recognition to a foreign judgment of unquestioned finality (*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 state that may be most affected by *Daimler* is Delaware, the one state out of 50 where many national corporations tend to incorporate, regardless of their principal office locations. Suits may always be maintained against corporate entities in their state of incorporation, which may increase the volume of suits filed against corporate defendants in Delaware now that *Daimler* has restricted the meaning of general jurisdiction.

The absence of general jurisdiction is an affirmative defense to actions, within the grounds contemplated by CPLR 3211(a)(8) (*Time Equities, Inc. v Naeringsbygg 1 Norge III AS*, 50 Misc.3d 1221[A], 36 N.Y.S.3d 50 [Sup. Ct., New York County 2016]). That basis for dismissal is therefore subject to a strict 60-day deadline for the filing of a dismissal motion, measured from the service of the defendant's answer with its affirmative defense that personal jurisdiction is lacking. Thus, if a defendant is not subject to general or specific jurisdiction of the New York courts, the party should not sit on its right but instead file a motion to dismiss within the limited time constraints of CPLR 3211(e).

The plaintiff bears the ultimate burden of establishing personal jurisdiction over the defendant, via general jurisdiction or otherwise. Since time-sensitive dismissal motions are made early in litigations, a plaintiff, in opposing a jurisdiction-based dismissal motion, may not yet be possessed of complete information for establishing the existence of general jurisdiction over the defendant. This is particularly true if the basis for general jurisdiction is the defendant having operations in the forum state so substantial and of such nature as to be tantamount to the corporation being “at home” there, or if the jurisdictional basis requires evidence of an alter ego (i.e. “department”) relationship between the related domestic and foreign entities. When that is the case, the plaintiff opposing the dismissal motion may, in addition to providing the court with whatever opposition evidence is available, alternatively request discovery on the jurisdictional issue. To successfully oppose a CPLR 3211(a)(8) motion to dismiss on the ground that discovery on the issue of personal jurisdiction is necessary, the plaintiff not need make a *prima facie* showing of jurisdiction, but rather, must only set forth “a sufficient start, and [show its] position not to be frivolous”(*Marist College v. Brady*, 84 A.D.3d 1322, 1323, 924 N.Y.S.2d 529, 531 [2d Dep't. 2011], *quoting Petersen v. Spartan Indus.*, 33 N.Y.2d 463, 467, 354 N.Y.S.2d 905, 908 [1974]. *See Archer-Vail v LHV Precast Inc.*, 168 A.D.3d 1257, 92 N.Y.S.3d 434 [3d Dep't. 2019]).

Indeed, CPLR 3211(d) provides that if facts essential to justify opposition to a motion to dismiss exist, but cannot then be stated, the court may deny the motion so that the defendant may assert the affirmative defense in a responsive pleading if that pleading has not yet been served, with leave to renew the motion upon the completion of discovery (*Qudsi v Larios*, 173 A.D.3d 920, 103 N.Y.S.3d 492 [2d Dep't. June 12, 2019]), or alternatively, hold the dismissal motion in abeyance to permit discovery about the jurisdictional issue (*Fernandez v DaimlerChrysler, A.G.*, 143 A.D.3d 765, 40 N.Y.S.3d 128 [2d Dep't. 2016]). The plaintiff's opposition to dismissal on general jurisdiction grounds cannot be based upon mere speculation, conjecture, surmise, wishful-thinking, fortune telling, or unsupported allegations to justify a denial of the motion with leave to renew, or to justify a continuance of the motion pending discovery. The plaintiff must instead tender at least some tangible evidence or basis which refutes the defendant's argument that general jurisdiction is lacking (*Robins v Procure Treatment Centers, Inc.*, 157 A.D.3d 606, 70 N.Y.S.3d 457 [1st Dep't. 2018]). Plaintiffs have been denied disclosure, and had their actions dismissed, where they failed to make credible non-frivolous showings that facts *may exist* to support the exercise of personal

jurisdiction (*Glazer v Socata, S.A.S.*, 170 A.D.3d 1685, 96 N.Y.S.3d 791 [4th Dep't. 2019]; *Abad v Lorenzo*, 163 A.D.3d 903, 82 N.Y.S.3d 486 [2d Dep't. 2018]).

Prohibited Service on the Religious Sabbath

General Business Law 11 prohibits service of process on Sundays, and relatedly, General Business Law 13 prohibits service on Saturdays as to any persons who observe that day as a holy time. The Sunday prohibition, which was enacted in 1965 (L. 1965, c. 1031, sec. 45), is consistent with local "blue laws" that existed at that time where businesses were closed for rest on the Lord's Day. The Saturday prohibition, which is protective of Jewish defendants, goes so far as to render a violation of the statute by a process server a misdemeanor. In any event, service of process in violation of GBL 11 or 13 renders the service void (*Foster v. Piasecki,* 259 A.D.2d 804, 686 N.Y.S.2d 184 [3d Dep't. 1999] [Sunday service]; *JP Morgan Chase Bank, Nat'l Ass'n. v Lilker*, 153 AD3d 1243, 61 N.Y.S.3d 578 [2d Dep't. 2017] [Saturday service upon an observant]), and subjects the plaintiff to a dismissal of the complaint for failing to obtain personal jurisdiction over the defendant.

For a defendant that observes Saturdays as a holy time, dismissal of the complaint for improper service is only warranted where 1) the defendant is not merely Jewish, but observes Saturday as a no-work holy time, *and* 2) the timing of service is motivated by malice. Malice speaks to the state of mind of the process server, or perhaps by imputation to that of the plaintiff's attorney (*Hirsch v. Ben Zvi*, 184 Misc.2d 946, 712 N.Y.S.2d 238 [Civ. Ct., Kings County 2000]). Dismissals will be denied if the defendant fails to establish that he or she is, in fact, observant (*e.g., Chase Manhattan Bank, N.A. v Powell*, 111 Misc.2d 1011, 445 N.Y.S.2d 928 [Sup. Ct., Nassau County 1981]), or where the necessary element of malice is not shown (*e.g.*, *Matter of Kushner*, 200 AD2d 1; 613 N.Y.S.3d 363 [1st Dept. 1994]). Malice can be demonstrated by the drawing of a reasonable inference from the circumstances, or from actual knowledge that the defendant is religiously observant on Saturdays (*Hirsch v. Ben Zvi*, 184 Misc.2d at 948, 712 N.Y.S.2d at 238).

These issues arose in *Hudson City Savings Bank, FSB v Schoenfeld,* 172 A.D.3d 692, 99 N.Y.S.3d 389 [2d Dep't. 2019]). Few details of the service of process were discussed in the published decision. However, in *Schoenfeld*, a Jewish defendant was served with process on Sukkot, which did not fall that year on a Saturday or Sunday. The defendant moved to dismiss the action on the ground that, *inter alia*, the service of process on Sukkot violated GBL 13. The Appellate Division, Second Department agreed with the Supreme Court that on the record before it, a dismissal of the complaint for improper service was not warranted under CPLR 3211(a)(8) or GBL 13. The Second Department determined that since the contested service did not occur on a Saturday, there was no actual violation of GBL 13, and in any event, the defendant failed to establish that the timing of service was motivated by a malicious intent.

The plain language of GBL 13 does not protect Jewish defendants from being served with process on any holy days, except for when they occur on Saturdays, or in the case of everyone, Sundays under GBL 11. Thus, service on Passover or Yom Kippur is not statutorily prohibited upon a Jewish defendant unless the holy day happens to fall on a Saturday (GBL 13) or a Sunday (GBL 11). Similarly, service of process upon a Christian defendant is permissible on various non-Sunday holy days, but is never allowed on Easter because that holy day always falls by definition on a Sunday (GBL 13).

One may question whether the statutory dichotomy between weekly holy days and annual holy days makes sense, as the public policy for not permitting service of process on Sundays, or on Saturdays for those who are observant then, is no less compelling than for major annual holy days that receive as much or more sincere religious attention. Conversely, were GBL 11 and 13 interpreted to apply to non-weekend holy days, or if the statutes were amended by the legislature to say so, would process be off limits upon observant Jewish defendants during all eight days of Chanukah? Or the entire 30-day month of Ramadan for defendants observant of the Muslim faith? The issue

of extending the prohibition of service to non-Saturday or non-Sunday religious holy days would necessarily raise difficulties for the secular legislature in defining which holy days of each religion is significant *enough* to warrant protections against the service of process on those days, and which secondary holy days would not qualify for that protection. One can imagine the problems inherent in drawing such Christian, Jewish, Muslim, and other religious denominational lines. The current language of GBL 11 and 13 sets forth lines that are bright. The Second Department's holding in *Schoenfeld* therefore appears to be correct to the extent it is based upon the plain and unambiguous language of GBL 13.

That said, there is no excuse for process servers to effect process on Sundays in violation of GBL 11, and in virtually all instances, they know better. The statute applies in favor of all defendants and the prohibition is clear-cut. Service on Saturdays is arguably more dicey, particularly if the plaintiff or process server knows or has reason to know that the defendant is Jewish, but does not know the depth of the defendant's religiosity. If a Jewish defendant is located for service of process at a work place on a Saturday, the service should survive jurisdictional challenge as a defendant engaged in employment should be unable to simultaneously claim the religious observance protection of GBL 13. If a Jewish defendant is found elsewhere, and the extent of religiosity is not known, the process server might be advised to speak to the defendant about the process before effecting it, or alternatively, be even better advised to effect process on another day that avoids the complications and pitfalls of GBL 13.

C3211:53. Waiving Objection Contained in Paragraph 1, 3, 4, 5, or 6 of 3211(a)

Since the time Moses parted the Red Sea, or at least since 1962, CPLR 3211 has identified certain affirmative defenses which, if not raised in the defendant's answer or in a pre-answer motion to dismiss, are waived by the defendant. CPLR 3018(b) also provides that defendants must plead affirmative defenses of matters which, if not pleaded, would likely surprise the plaintiff. If a defendant merely denies an allegation in a complaint which requires the plaintiff to then prove the matter, may a court deem the denial the equivalent of an "affirmative defense," even though no separate affirmative defense is actually pleaded in the answer? There have been conflicting appellate decisions on this issue, but recently, the Second Department rendered an extensive analytical opinion that answers the question with a definitive "No."

This pleading issue came to a head in the context of a residential mortgage foreclosure appeal, though it could have appeared as easily in other types of civil litigations. There have been foreclosure actions where plaintiff lenders asserted allegations in their complaints to establish their standing to commence the foreclosure actions against the defaulted homeowners and their collateralized properties. In certain of those appeals, defendant homeowners had served answers either denying the standing-related allegations outright ("D") or denying information sufficient to form a belief ("DKI"), but without separately interposing an affirmative defense that the lenders lacked standing. If a mere "D" or "DKI" of allegations were to qualify as an implicit and cognizable affirmative defense that standing is lacking, the plaintiff lenders would be required to prove those allegations as part of their *prima facie* burden when moving for summary judgment. Otherwise, not. The adequacy of moving papers hung in the balance at the trial courts and on appeal. The reader can substitute allegations about standing with those about the statute of limitations, or the statute of frauds, or other legal mainstays, and the query raised here is the same.

The significance of the issue, particularly for defendants, is that several defenses are waived under CPLR 3211(e) unless set forth as an affirmative defense in the responsive pleading or as a ground for a pre-answer dismissal motion. These waivable defenses include many of the staples relied upon by defense attorneys including, among others, the plaintiff's lack of capacity to sue, standing, collateral estoppel, res judicata, the statute of limitations, and the statute of frauds.

A 3-1 holding was rendered by the Appellate Division, Second Department in *U.S. Bank National Association v Nelson,* 169 A.D.3d 110, 93 N.Y.S.3d 138 (2d Dep't. 2019) (signed opinion by Mastro, J.), which now definitively

holds that affirmative defenses are *not* cognizable by a defendant's mere denial or "DKI" of allegations contained in the complaint. Instead, for affirmative defenses to be cognizable and preserved, they must specifically be set forth in the answer as such. The reason is found in CPLR 3018, which draws a distinction between denials, which place at issue proofs that the plaintiff must provide at trial, from affirmative defenses, which raise new defensive matter beyond the elements that plaintiffs must affirmatively plead in a complaint and then prove. Without separately pleaded affirmative defenses, plaintiffs could be surprised by defenses raised later, which CPLR 3018(b) expressly seeks to avoid.

Moreover, though not mentioned in the *Nelson* opinion, a clearly-defined separation between complaint allegations on the one hand, and affirmative defense allegations on the other, properly directs the parties' respective burdens of proof to their own allegations. Since standing is not an element that plaintiffs must plead and prove, and is instead purely in the nature of a defense, the denial or "DKI" of allegations that incidentally implicated standing failed in *Nelson* to qualify as an "affirmative defense." One appellate justice dissented, arguing that mere denials, and "DKIs" that are to be treated for pleading purposes as denials under CPLR 3018(a), raise affirmative defenses by putting plaintiffs to their burden of proving the matters actually asserted in the complaint.

To argue that a mere "D" in response to an allegation qualifies as an affirmative defense is problematic, and if adopted would wreak havoc upon practitioners and courts. While CPLR 3014 provides that pleadings shall consist of plain and concise statements containing as far as practicable a single allegation, it is not unusual for practitioners to craft pleadings that contain multiple fragmented allegations within a single paragraph. The defendant answering the complaint may provide a fragmented response in the answer, or may deny the entirety of a complaint paragraph even if only one specific allegation within the paragraph is deniable. Where a multi-allegation paragraph is answered with a blanket "D," the plaintiff does not necessarily know which one or more fragments of the complaint paragraph prompted the denial of the entire paragraph. In some of those circumstances, it would be impossible for the plaintiff or the court to know what, if any, affirmative defense is supposedly and implicitly invoked by the defendant's responsive denial of the paragraph in the complaint. Complicating matters further are answers consisting of a "general denial," where the defendant denies in a single sentence all of the allegations in a plaintiff's complaint. While general denials tend to be seen in response to shorter, simpler complaints, the omnibus denial makes it likely difficult or impossible for the plaintiff's attorney or the court to discern what affirmative defense(s) the general denial is intended to convey by implication. Thus, the best practice for lawyers, litigants, and courts, is to follow the well-reasoned logic of *Nelson* by requiring defendants who are vested of defenses to plead them as affirmative defenses in their answers, especially where the failure to do so results in a waiver of those defenses (CPLR 3211[e]).

Even more problematic is the argument that a mere "DKI" is sufficient to implicitly raise an affirmative defense against the complaint paragraph that it is responds to, without more. The reason is that if a defendant responds to an allegation using a "DKI," the defendant is saying in good faith that he or she does not know whether to admit or deny the allegation. If the defendant does not know whether to admit or deny because sufficient information is lacking, how can it simultaneously be said that the defendant knows enough to assert an affirmative defense against that same allegation? The two concepts are irreconcilable with each other, and untenable considering that many answers are verified by a party or counsel (CPLR 3020[b]) and all answers contain good faith attorney and *pro se* certifications as required by the Rules of the Chief Administrator (22 NYCRR 130-1.1-a). Thus, while CPLR 3018(a) provides that a "DKI" "shall have the effect of a denial," that statutory provision should be interpreted as meaning that "D" and "DKI" are treated the same only in regard to issues of proof at trial, and not be used as a substitute for the separate requirement of CPLR 3018(b) that affirmative defenses be expressly pleaded at the outset of the litigation. Once again, the *Nelson* opinion provides sage guidance that avoids the confusion that would result if a mere "D" or "DKI" were to be allowed by courts to constitute affirmative defenses, without actually pleading the defenses as such.

The *Nelson* case, while postured as one for summary judgment and an order of reference, says more about the assertion of affirmative defenses under CPLR 3211(a) than it says about CPLR 3212.

Based on the majority holding in *Nelson*, the following Second Department cases which held to the contrary are no longer good law and should not be followed in that department: *Bank of America, N.A. v. Barton*, 149 A.D.3d 676, 50 N.Y.S.3d 546 (2d Dep't. 2017), *Nationstar Mortgage, LLC v. Wong*, 132 A.D.3d 825, 18 N.Y.S.3d 669 (2d Dep't. 2015), *Bank of America, N.A. v. Paulsen*, 125 A.D.3d 909, 6 N.Y.S.3d 68 (2d Dep't. 2015), and *U.S. Bank National Association v. Faruque*, 120 A.D.3d 575, 991 N.Y.S.2d 630 (2d Dep't. 2014). If factual or legal defenses exist for defendants, counsel should robustly assert them as affirmative defenses in the answers, or in CPLR 3211 motions to dismiss, and fulfill the true purpose of CPLR 3018(a) as intended by the state legislature, which is to prevent surprise to adversary parties.

SUPPLEMENTARY PRACTICE COMMENTARIES

by John R. Higgitt

2018

C3211:6. Specifying the Ground of the Motion.

CPLR 2214, an important motion-requirement statute of general applicability, Commentary C3211:3, directs a movant to specify in the notice of motion, among other things, the grounds for the motion. CPLR 2214(a). "Grounds" means the legal reasons why the relief sought in the motion is warranted. In the CPLR 3211(a) context, identifying the specific paragraphs of subdivision (a) (e.g., CPLR 3211(a)(3), 3211(a)(7)), or stating the specific grounds (e.g., lack of capacity, failure to state a cause of action), should satisfy CPLR 2214(a). *See* Commentary 3211:6 (main vol.).

Violations of CPLR 2214(a) are not uncommon. The failure of a movant to specify in the notice of motion the grounds for the relief sought can be--but is not necessarily--fatal to the motion. If the grounds for the motion are clearly expressed in the papers supporting the motion, such as an affirmation in support or memorandum of law, and the party opposing the motion has not been prejudiced by the CPLR 2214(a) violation, the court may overlook the procedural misstep. *See* Commentary 3211:6 (main vol.). In determining whether to overlook a CPLR 2214(a) violation, a court will also consider whether the notice of motion contains a broadly-worded "wherefore" clause, i.e., a provision stating that, in addition to the specific relief sought, the movant requests "such other, further, or different relief as th[e] court may deem just and proper." *See* Commentary, C2214:5, at 114-115 (main vol.); *see also Kreamer v. Town of Oxford*, 96 A.D.3d 1130, 946 N.Y.S.2d 284 (3d Dep't 2012); *Llano v. Leading Insurance Services, Inc.*, 45 Misc.3d 131(A), 3 N.Y.S.3d 285 (table), 2014 W.L. 6638365 (App. Term, 1st Dep't 2014).

That a court *may* consider a ground that is not apparent from the face of a notice of motion doesn't mean that it *will* do so. *See Abizadeh v. Abizadeh,* 159 A.D.3d 856, 72 N.Y.S.3d 566 (2d Dep't 2018) ("Supreme Court providently exercised its discretion in denying the plaintiff's cross motion on the ground that the plaintiff's notice of cross motion was deficient. The plaintiff's notice of cross motion failed to sufficiently specify the relief sought, against whom it was sought, and the grounds therefor. Although the plaintiff's supporting papers supplied the missing information, a court is not required to comb through a litigant's papers to find information that is required to be set forth in the notice of motion") (internal citations omitted). Whether a court will overlook the movant's failure to specify the grounds for the motion is a matter of discretion. *See* CPLR 3211:6 (main vol.).

C3211:10. Defense Based on "Documentary Evidence."

A Plaintiff Can Respond to "Documentary Evidence" With Other Evidence ("Documentary" or Not) in an Effort to Defeat a CPLR 3211(a)(1) Motion.

In the main volume, we observe that, "[i]n opposing a CPLR 3211(a)(1) motion, a plaintiff is free to submit evidence demonstrating that the defendant's [documentary] evidence does not conclusively resolve the action." Commentary C3211:10, at 27. In *Matter of Koegel*, 160 A.D.3d 11, 70 N.Y.S.3d 540 (2018, Austin, J.), the Second Department highlighted the virtue of opposing a CPLR 3211(a)(1) motion with evidence. There, the party confronted with a "documentary evidence" motion beat it back by tendering some of her proof. The party against whom the motion was made submitted affidavits that suggested that, notwithstanding the movant's "documentary evidence," the challenged pleading may be meritorious. Thus, *Matter of Koegel* highlights additionally that, although a defendant is required to submit "documentary evidence" in support of a CPLR 3211(a)(1) motion, a plaintiff opposing such a motion "is free to submit [any] evidence demonstrating that the defendant's evidence does not conclusively resolve the action (or challenged causes of action)." Commentary C3211:10, at 27 (main vol.).

Court Reviews the Ways in Which Documentary Evidence May be Used to Dismiss Defamation Claims.

Defamation--libel or slander, depending on the manner in which the offensive comments were communicated--is a complex tort. Many defamation actions involve the intersection of federal constitutional and state tort law. Defamation law is beyond the scope of these Commentaries. *Cf.* 2A P.J.I.2d 3:23, et seq. In *Greenberg v. Spitzer*, 155 A.D.3d 27, 62 N.Y.S.3d 372 (2d Dep't 2017), the court, in an opinion by Justice Chambers, reviews various uses of "documentary evidence" for a defamation defendant seeking dismissal under CPLR 3211(a)(1).

C3211:12. Plaintiff's Lack of Capacity.

Court of Appeals Reviews the Issue of Whether a "Public Benefit Corporation" has the Capacity to Challenge the Constitutionality of a State Statute.

"Municipalities and other local governmental corporate entities and their officers [generally] lack capacity to mount constitutional challenges to acts of the State and State legislation." *City of New York v. State of New York*, 86 N.Y.2d 286, 289, 631 N.Y.S.2d 553, 655 N.E.2d 649 (1995, Levine, J.). That's to say that municipalities and other local governmental entities and their officers usually don't have the power to attack in court the constitutionality of state policy and state laws. *See* Commentary C3211:12 (main vol.). Does this rule apply to a "public benefit corporation"?

First of all, what is a public benefit corporation? It's one of three types of "public corporations," the other two being "municipal corporations" and "district corporations." *See* General Construction Law § 65(b). The public benefit corporation is "organized to construct or operate a public improvement wholly or partly within the [S]tate, the profits from which inure to the benefit of this or other states, or to the people thereof." General Construction Law § 66(4). These entities fund public works projects while insulating the State from direct, long-term debt. *Schulz v. State of New York*, 84 N.Y.2d 231, 244, 616, N.Y.S.2d 343, 639 N.E.2d 1440 (1994, Kaye, C.J.). Although created by the State, the public benefit corporation is independent of the sovereign.

Can a public benefit corporation, which bears some of the marks of a state entity and some of the marks of a private one, assert in court that a state statute is unconstitutional? Phrased differently, is the rule preventing municipalities and other public entities from leveling constitutional challenges against state policies and state laws applicable to public benefit corporations?

The Court of Appeals considered the subject in *Matter of World Trade Center Lower Manhattan Disaster Site Litigation*, 30 N.Y.3d 377, 67 N.Y.S.3d 547, 89 N.E.3d 1227 (2017). In an opinion by Judge Feinman, the Court

concludes that "public benefit corporations have no greater stature to challenge the constitutionality of state statutes than do municipal corporations or other local governmental entities." 30 N.Y.3d at 393, 67 N.Y.S.3d at 558, 89 N.E.3d at 1238 (rejecting the argument that a court must engage in a "particularized inquiry" to determine whether a public benefit corporation should be treated like a municipal corporation).

Above, we noted the general rule that municipalities and other local governmental entities and their officers lack the capacity to challenge the constitutionality of state action. However, a state-created or sanctioned entity does have capacity to make such challenges if the Legislature expressly authorizes that entity to do so; that's "a question of legislative intent and substantive state law." 30 N.Y.3d at 384, 67 N.Y.S.3d at 551, 89 N.E.3d at 1231. Additionally, "special circumstances" occasionally permit a public entity to bring a constitutional challenge. 30 N.Y.3d at 386-387, 67 N.Y.S.3d at 553, 89 N.E.3d at 1233. The special circumstances exceptions are ad hoc and narrow. 30 N.Y.3d at 387, 67 N.Y.S.3d at 553, 89 N.E.3d at 1234. Therefore, a public benefit corporation, like a municipality, may rebut the presumption that it lacks capacity to challenge the constitutionality of a state action by demonstrating that the public benefit corporation was expressly authorized to bring that challenge or that special circumstances warrant a dispensation from the general rule.

C3211:15. Same Parties, Same Cause of Action.

An Open Question as to Whether the Plaintiff Could Get Full Relief in a Federal Action Precludes Dismissal Under CPLR 3211(a)(4) of a Similar New York State Court Action.

CPLR 3211(a)(4) provides a remedy for a defendant to a New York action "where there is another action pending between the same parties for the same cause of action in a court of any state or the United States." To disturb an action under that paragraph, the action in which the 3211 relief is sought and the other action must involve the same parties and the same cause of action. Commentary C3211:15 (main vol.). Two actions involve the same parties and the same cause of action where the following elements of the actions are substantially similar: (1) the parties; (2) the causes of action; and (3) the relief sought. *Id.*

The court in *Rothschild v. Braselmann*, 157 A.D.3d 1027, 69 N.Y.S.3d 375 (3d Dep't 2018, Pritzker, J.), identified a unique concern that may be present when the other action pending is in federal court.

The plaintiff in *Rothschild* was an inmate at New York State correctional facilities. During his incarceration, the plaintiff suffered serious urological problems that led to hospitalization for septic shock. The plaintiff initiated three actions in three different courts seeking redress for injuries stemming from his medical ordeal. First, the plaintiff commenced a 42 U.S.C. § 1983 action in federal court, alleging that, in violation of the federal constitution's prohibition of cruel and unusual punishment, he received inadequate medical care. Second, the plaintiff filed a claim in the New York State Court of Claims, alleging negligence and medical malpractice by doctors who treated him and their employees. Third, the plaintiff commenced an action in Supreme Court; the claims of negligence and malpractice in the Supreme Court action were similar to the claims lodged in the Court of Claims action.

As is relevant here, two of the medical doctor defendants who provided contractual medical services to the inmate-plaintiff sought dismissal of the Supreme Court action as against them on the basis that the federal court and Court of Claims actions related to the same parties and same cause of action as the Supreme Court action. (We'll refer to these physicians as "the moving defendants.") Supreme Court granted that relief.

The Third Department reinstated the Supreme Court complaint as against the moving defendants. With respect to the federal action, the Third Department provided the following analysis: the federal court had subject matter jurisdiction over the plaintiff's action by virtue of his federal law claim (§ 1983); the federal law claim provided a predicate for the federal court to exercise supplemental jurisdiction over the plaintiff's state law negligence and

medical malpractice claims; stringent proof is required to prevail on a § 1983 claim and, therefore, the plaintiff's federal law claim might ultimately be dismissed by the federal court; in the event the federal court dismissed the federal law claim, that court could--but would not be required to--retain jurisdiction over the related state law claims; because the Appellate Division could not ascertain whether the federal court would retain jurisdiction over the state law claims and, relatedly, whether the federal court would ultimately adjudicate those claims on their merits, the plaintiff might be unable to obtain full relief in the federal action. 157 A.D.3d at 1028-1029, 69 N.Y.S.3d at 379. Thus, the Third Department declined to find that the federal court and Supreme Court actions involved the same parties for the same cause of action. 157 A.D.3d at 1029, 69 N.Y.S.3d at 379 ("Because it is impossible to speculate whether the federal court would dismiss or retain jurisdiction in this situation, the federal action cannot be said to be duplicative, as plaintiff may be unable to obtain full relief therein.").

Regarding the relationship between the Supreme Court and Court of Claims actions, the Third Department noted that the legal theories in the actions were nearly identical, and that both actions arose out of the same set of facts. However, there was a chance that the plaintiff could prevail in the Court of Claims action, but be left with a judgment that was wholly or partially unenforceable.

It's a possibility that exists by virtue of the relevant state-actor indemnification statutes: Correction Law § 24-a and Public Officers Law § 17. Under those provisions, a physician who provided medical care to an inmate at the request of the State Department of Correction is entitled to indemnification and a defense from the State, unless it's determined that the physician engaged in intentional wrongdoing.

If the Court of Claims determined--in that court, the judge serves as the finder of fact (see Court of Claims Act § 12(3))--that one or both of the moving defendants engaged in intentional wrongdoing, the plaintiff's recovery in that action might be diminished. That's because a plaintiff in a Court of Claims action can recover damages from the State, but not individuals. Thus, if the State doesn't owe statutory indemnity to a state actor for his or her conduct, the plaintiff will not be compensated in the context of the Court of Claims action for the fault of the state actor.

Given the factual allegations and theories of liability in the Court of Claims action, a determination that the moving defendants engaged in intentional wrongdoing was "unlikely." But the potential was there; the State neither conceded nor admitted in any of its Court of Claims submissions that the State was bound to indemnify the moving defendants. Therefore, dismissal of the Supreme Court action under CPLR 3211(a)(4) and the concomitant elimination of a forum in which the plaintiff could seek redress directly from the moving defendants was not warranted. Instead, the Third Department stayed the Supreme Court action pending the outcome of the Court of Claims action, a result that "effectively preserve[d] any rights of recovery that [the] plaintiff ha[d] available, prevent[ed] disparate outcomes and limit[ed] duplicative and costly litigation." 157 A.D.3d at 1030, 69 N.Y.S.3d at 379; *see* Commentary C3211:17 (main vol.).

C3211:21. Failure to State a Cause of Action, Generally.

A Court Reviewing a CPLR 3211(a)(7) Motion Must Focus on the Allegations in the Complaint.

CPLR 3211(a)(7)--the failure-to-state-a-cause-of-action dismissal ground--is the workhorse of subdivision (a). No other paragraph gets more exercise. That's because it allows for dismissal where the plaintiff fails to plead a cognizable claim or where the defendant submits evidence rebutting the plaintiff's factual allegations. *See* Commentary C3211:21 (2018 Pocket Part "CPLR 3211(a)(7): the Most Versatile of the Dismissal Grounds" entry).

Regardless of which type of CPLR 3211(a)(7) motion is made against a complaint, a plaintiff is aided by three rules of decision: (1) give the complaint a liberal construction, (2) accept the allegations as true, and (3) provide the plaintiff with the benefit of every possible favorable inference. Commentary C3211:21 (main vol.).

In *Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 69 N.Y.S.3d 520, 92 N.E.3d 743 (Stein, J., 2017), the Court of Appeals highlighted important caveats to those rules of decision: the court must focus on the allegations in the complaint, and avoid reading into the complaint assertions or theories that are contrary to those that were expressly pleaded by the plaintiff. *See Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 53 N.Y.S.3d 598, 75 N.E.3d 1159 (Rivera, J., 2017) ("We may not read into [the plaintiff's] allegations a claim for cognizable damages, which he did not actually incur, under the guise of liberally construing the complaint."). The application of these caveats proved critical in *Nomura*.

The majority in *Nomura* applied the familiar rules of decision to the allegations and claims asserted by the plaintiff, and concluded that the complaint could not survive the defendants' CPLR 3211(a)(7) motion. The majority declined to construe the complaint as asserting a theory that was not expressed in the complaint and was contrary to plaintiff's allegations.

CPLR 3211(a)(7): the Most Versatile of the Dismissal Grounds.

Most of the grounds in CPLR 3211(a) are narrow, allowing for dismissal under specific circumstances. Paragraph 1 provides for dismissal based on "documentary evidence"; paragraph 2 provides for dismissal based on lack of subject matter jurisdiction; paragraph 3 provides dismissal for lack of capacity or standing; paragraph 4 provides remedies where there is another action pending relating to the same matter; paragraph 5 provides dismissal for certain enumerated affirmative defenses; paragraph 6 provides for dismissal for a non-interposable counterclaim; paragraph 8 provides for dismissal for want of personal jurisdiction; paragraph 9 provides for dismissal for want of rem or in rem jurisdiction; paragraph 10 provides remedies for failure to join an important individual or entity as a party; and paragraph 11 provides for dismissal in favor of certain uncompensated officials of not-for-profit organizations. Paragraph 7, however, is a broad dismissal ground.

That's because under CPLR 3211(a)(7), the failure-to-state-a-cause-of-action tool, dismissal can eventuate for either a pleading defect or because an allegation material to a facially-sufficient complaint has been bested by evidence. *See Lubonty v. U.S. Bank National Association*, 159 A.D.3d 962, 74 N.Y.S.3d 279 (2d Dep't 2018) ("By showing [with evidence] that a material fact as claimed by the plaintiff was not a fact at all, [the defendant] established its entitlement to dismissal of the action pursuant to CPLR 3211(a)(7)").

Let's count the number of situations in which a paragraph 7 motion can generate the dismissal of a complaint (or a particular aspect of it):

1. Where the complaint does not identify a cause of action cognizable at law, e.g., civil conspiracy, educational malpractice.

2. Where the complaint identifies a cognizable cause of action, but fails to plead all of the material elements of it. *See* Commentaries C3013:3, C3013:15A (main vol.).

3. Where the complaint identifies a cognizable cause of action and pleads all of the material elements of it, but fails to set forth "[s]tatements ... sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions intended to be proved." CPLR 3013; *see Mid-Hudson Valley Federal Credit Union v. Quartararo*, 31 N.Y.3d 1090, 78 N.Y.S.3d 703, 103 N.E.3d 774 (2018); Commentaries C3013:2, C3013:15A (main vol.). Concrete factual allegations must be asserted in the complaint supporting or tending to support the elements of the cognizable cause of action. *See Sager v. City of Buffalo*, 151 A.D.3d 1908, 58 N.Y.S.3d 796 (4th Dep't 2017). Allegations consisting of bare legal conclusions will not suffice. *See Connaughton v. Chipotle Mexican Grill, Inc.*,

29 N.Y.3d 137, 53 N.Y.S.3d 598, 75 N.E.3d 1159 (2017); *Mid-Hudson Valley Federal Credit Union v. Quartararo*, 155 A.D.3d 1218, 64 N.Y.S.3d 389, *aff'd* 31 N.Y.3d 1090, 78 N.Y.S.3d 703, 103 N.E.3d 774.

4. Where the complaint identifies a cognizable cause of action, pleads all of the material elements of it, and contains sufficient factual allegations supporting those elements, but the defendant submits evidence convincingly refuting a material allegation in the complaint. *See Lubonty v. U.S. Bank National Association*, *supra*. Just how powerful must defendant's evidence be to warrant dismissal? The courts aren't in agreement on this important question. See Commentary C3211:23 (main vol.)

5. Where the complaint identifies a cognizable cause of action, pleads all of the material elements of it, and contains sufficient factual allegations supporting those elements, but the plaintiff's submissions in opposition to the motion to dismiss convincingly refute a material allegation in the complaint. *See M & B Joint Venture, Inc. v. Laurus Master Fund, Ltd*., 12 N.Y.3d 798, 879 N.Y.S.2d 812, 907 N.E.2d 690 (2009) ("Because plaintiff's own evidentiary submissions 'conclusively establish that it has no cause of action,' dismissal of the complaint as to [certain defendants] is appropriate," quoting *Rovello v. Orofino Realty Co.,* 40 N.Y.2d 633, 636, 389 N.Y.S.2d 314, 357 N.E.2d 970 [1976]) (internal brackets omitted).

An additional feature of CPLR 3211(a)(7): it can be raised either pre-or post-answer. CPLR 3211(e). Therefore, there are four different classes of CPLR (a)(7) motions: (1) a pre-answer motion unsupported by evidence, (2) a pre-answer motion supported by evidence, (3) a post-answer motion unsupported by evidence, and (4) a post-answer motion supported by evidence. Commentary C3211:26 (main vol.).

C3211:28. Lack of Personal Jurisdiction.

CPLR 3211(a)(8) Can be Used to Seek Dismissal of an Action on the Ground of Improper Joinder.

CPLR 3211(a)(8) allows a defendant to seek dismissal of a complaint on the basis that the court lacks personal jurisdiction over her. When employing this dismissal ground, the defendant is asserting that, under the circumstances of the case, the court does not have the power to render a judgment binding on her. Commentary C3211:28 (main vol.). The defendant can use paragraph 8 to raise any defect relating to personal jurisdiction. *Id*. Such defects include the absence of any basis upon which the court may exercise its jurisdiction over the defendant (i.e., the court lacks general or specific jurisdiction over the defendant), the failure of the plaintiff to effect proper service on the defendant, and the failure of the plaintiff to commence properly the action. *See id*.

Another defect touching on the court's personal jurisdiction over a defendant is the improper joinder of that party. "Improper joinder" refers to the situation where a plaintiff fails to comply with CPLR article 10 when attempting to add an individual or entity as a party--usually a defendant--to the action.

A plaintiff's failure to obtain leave of court to add the new party is an issue that arises in this context. CPLR 1003, part of the CPLR article 10 club, provides that "[p]arties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, or once without leave of court within twenty days after service of the original summons or at any time before the period for responding to that summons expires or within twenty days after service of a pleading responding to it."

The Second Department summarized the improper joinder/personal jurisdiction subject this way:

"[t]he failure to obtain leave required under CPLR 1003 create[s] the opportunity for a defendant to claim that the court lacks personal jurisdiction over it because the summons and complaint served were nullities. The purported defect in joinder thus requires a prompt motion to dismiss [under CPLR 3211(a)] or preservation by way of defense in the answer, lest it be deemed

waived (CPLR 3211, subd. [e]).” *McDaniel v. Clarkstown Central District No. 1*, 83 A.D.2d 624, 441 N.Y.S.2d 532 (1981); *see Public Administrator of Kings County v. McBride*, 15 A.D.3d 558, 791 N.Y.S.2d 570 (2d Dep't 2005); *see also Yonker v. AMOL Motorcycles, Inc.*, 161 A.D.2d 638, 555 N.Y.S.2d 416 (2d Dep't 1990); *Warner v. Kain*, 52 Misc. 3d 1209(A), 41 N.Y.S.3d 722 (table), 2016 W.L. 3884726 (Sup. Ct., St. Lawrence County 2016, Muller, J.).

There is no shortage of examples of instances in which a defendant has waived an improper-joinder argument. *See Zheng v. American Friends of the Mar Thoma Syrian Church of Malabar, Inc.*, 67 A.D.3d 639, 889 N.Y.S.2d 55 (2d Dep't 2009); *Santopolo v. Turner Construction Co.*, 181 A.D.2d 429, 580 N.Y.S.2d 755 (1st Dep't 1992); *Gross v. BFH Co., Inc.*, 151 A.D.2d 452, 542 N.Y.S.2d 241 (2d Dep't 1989); *Gavigan v. Gavigan*, 123 A.D.2d 823, 507 N.Y.S.2d 439 (2d Dep't 1986); *Wolfsohn v. Seabreeze Estate LLC*, 28 Misc. 3d 1239(A), 958 N.Y.S.2d 311 (table), 2010 W.L. 3700276 (Sup. Ct., Queens County 2010, McDonald, J.); *Moses v. City of New York*, 18 Misc. 3d 1113(A), 856 N.Y.S.2d 499 (table), 2008 W.L. 89661 (Sup. Ct., Kings County 2008, Battaglia, J.).

In *Martin v. Witkowski*, 158 A.D.3d 131, 68 N.Y.S.3d 603 (2017, NeMoyer, J.), the Fourth Department had occasion to make the point that a defendant seeking to interpose the defense of improper joinder must, under the pains of waiver, raise it in a timely CPLR 3211(a)(8) motion to dismiss, *see* Commentaries C3211:48, 55, or an answer to the amended complaint. (An amended complaint should be the title of the pleading adding a party to an action. *See* Commentaries C1003:2 [main vol.], C3025:3A [main vol.]; Siegel & Connors, New York Practice §§ 49, 65 [6th ed.].)

The court dealt with the improper-joinder subject in the context of a dispute as to who, as between a father and son of the same name, constituted the defendant in the action. The plaintiff had commenced the action against a single defendant, employing the shared name of the father and son without including a suffix (i.e., Sr. or Jr.). Because of the absence of a suffix following the defendant's name in the caption of the action, issues arose as to which gentleman was the actual defendant in the action and whether service of process was effected on the actual defendant. To identify the actual defendant and address the various procedural issues manifested by the plaintiff's failure to supply a suffix to the defendant's name, the *Martin* court reviewed thoroughly the way the law distinguishes between a father and son sharing the same name and, relatedly, the consequences of the presence or absence of “Sr.” or “Jr.” with the name of a party.

C3211:34. Motion to Dismiss Defense, Generally.

Motion to Dismiss a Defense Under CPLR 3211(b) Can be Made at Any Time and is Not Subject to *Brill v. City of New York.*

CPLR 3211(b) provides for the motion to dismiss a defense. The typical beneficiary of subdivision (b) is the plaintiff, but any party who has asserted an affirmative claim (e.g., counterclaim, cross claim) can invoke that subdivision to challenge a defense lodged against the claim. *See* Commentary C3211:34 (main vol.). (We'll assume here that it's the plaintiff that wants to employ CPLR 3211[b].) The plaintiff can seek dismissal of a defense on the ground that it has not been stated or that it has no merit. CPLR 3211(b) therefore sanctions both facial-sufficiency and merits-based challenges to a defense. Commentary C3211:36 (main vol.). One of paragraph (b)'s greatest virtues (in the eyes of the party invoking it) is that it may be made at any time. Commentary C3211:34 (main vol.).

That virtue was displayed in *Zarnoch v. Luckina*, 148 A.D.3d 1615, 50 N.Y.S.3d 709 (4th Dep't 2017). The plaintiff commenced an action to recover damages for injuries he sustained when was working on a construction project. The plaintiff, who was employed by the project's general contractor, brought the action against a subcontractor. The subcontractor obtained leave to amend its answer to assert as an affirmative defense that the plaintiff was its “special employee.” (If the plaintiff was the subcontractor's special employee, the plaintiff could be barred, under the exclusivity provisions of the Workers' Compensation Law, from maintaining a tort action against the

subcontractor. *See* 1B N.Y. P.J.I.3d 2:218 [2018].) The plaintiff sought dismissal of the special-employee affirmative defense under CPLR 3211(b) or summary judgment dismissing that defense. The motion court denied the plaintiff's motion on the basis that it was an untimely summary judgment motion. Apparently the plaintiff's motion in *Zarnoch* was made after the deadline for summary judgment motions and no satisfactory explanation was offered for the untimely motion. *See Brill v. City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261, 814 N.E.2d 431 (2004).

On appeal, however, the Fourth Department determined that the motion court erred in denying as untimely the plaintiff's motion to dismiss the special-employment affirmative defense because, "[t]o the extent that the ... motion sought relief pursuant to CPLR 3211(b), [the motion] was not subject to the time limit for summary judgment motions under CPLR 3212(a)." (The plaintiff won the procedural battle but lost the substantive war; the motion was denied because he failed to show that the affirmative defense was without merit as a matter of law. *See* Commentaries C3211:35, 36.)

C3211:43. Notice of the Conversion.

The Charting-a-Summary-Judgment-Course Exception to the Notice Requirement Only Applies Where the Parties Signal Unequivocally That They Are Laying Bare Their Proof.

CPLR 3211(c) allows a court to convert a motion to dismiss into one for summary judgment, provided the court gives the parties notice of its intention to do so and an opportunity to submit additional papers. *See* Commentary C3211:43 (main vol.). The notice requirement is important; it gives the parties, who are otherwise operating under the assumption that the motion is subject to the rules of decision and res judicata and collateral estoppel principles applicable to a CPLR 3211 motion, a chance to assemble a summary judgment record. *See Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756, 874 N.E.2d 720 (2007).

The notice requirement has the following exceptions: (1) where conversion is requested by all parties; (2) where the motion raises a pure question of law that was addressed by the parties; and (3) where the parties deliberately chart a summary judgment course. *See* Commentary C3211:43 (main vol.). Exception number three receives the most attention, and was the subject of a decision by the Appellate Term, Second Department, in *Pesce v. Leimsider*, 59 Misc.3d 23, 72 N.Y.S.3d 760 (2018).

In *Pesce*, plaintiffs commenced a property damage case against defendants, one of whom sought dismissal relief under CPLR 3211(a)(7) (failure to state a cause of action). The motion court acknowledged that a motion to dismiss was before it, and converted it to a summary judgment motion without notice. The court did so because, in its estimation, the parties had charted a summary judgment course (exception number three). Upon converting the motion, the court granted summary judgment to the movant.

The Appellate Term disagreed with the motion court's conversion of the motion without notice to the parties, stating that they neither laid bare their proof nor " 'were ... put on notice of their obligation to make a complete record and to come forward with any evidence that could possibly be considered.' " 59 Misc.3d at 26-27, 72 N.Y.S.3d at ___, quoting *Nonnon v. City of New York*, 9 N.Y.3d at 827, 842 N.Y.S.2d at 758, 874 N.E.2d at 722. Had notice been provided, the plaintiffs could have asked for material discovery or sought to obtain evidence in admissible form to oppose the motion. Therefore, the defendant's CPLR 3211(a)(7) motion should have been adjudicated as such. (Because the parties to the appeal briefed the merits of the CPLR 3211 motion, the Appellate Term reviewed whether the defendant was entitled to relief under that statute and concluded that he was not.)

C3211:53. Waiving Objection Contained in Paragraph 1, 3, 4, 5, or 6 of 3211(a).

Raising a Ground in a Pre-Answer Motion to Dismiss May Preserve the Ground Even if the Motion is Denied and the Ground is Not Included in the Subsequent Answer.

To preserve an objection under paragraph 1 (documentary evidence), 3 (capacity), 4 (other action pending), 5 (affirmative defenses) or the rarely-exercised 6 (non-interposable counterclaim), a defendant must do one of the following: raise the objection in a timely CPLR 3211(a) motion or assert it in an answer. *See* CPLR 3211(e). If the defendant wants to interpose one of these objections but doesn't do so by pre-answer motion *or* in the answer, the objection is waived. *See* C3211:53. (main vol.). (The waiver is presumptive; the court may allow the defendant to amend her answer to include an otherwise waived defense. *See* C3211:58 [main vol.].)

Here are some common waiver scenarios:

• A defendant raises a given 1/3/4/5/6 objection in a pre-answer motion and the court grants the motion, leading to dismissal of the complaint (or challenged portion of it).

• A defendant raises the 1/3/4/5/6 objection in her answer and subsequently seeks dismissal based on the objection by way of a summary judgment motion or at trial.

• The defendant doesn't raise the 1/3/4/5/6 objection in a pre-answer motion or in the answer, and the objection is therefore waived--unless the court allows for an amendment of the answer to include the previously omitted objection.

How about this: a given 1/3/4/5/6 objection is lodged in a CPLR 3211(a) motion, the motion is denied, and the defendant wants to pursue the objection again at a later juncture, after the disclosure process has flushed out the facts. Must the defendant in this situation raise the objection in her answer to preserve it? The Second Department looked at this issue in *Outlook Clothing Corp. v. Schneider*, 153 A.D.3d 717, 60 N.Y.S.3d 302 (2017).

The plaintiffs in *Outlook Clothing* commenced an action against two defendants. As against defendant A, the plaintiffs asserted a cause of action for breach of fiduciary duty (A had been an officer and shareholder of one of the plaintiff-corporations, and after resigning as an officer and selling his shares in the corporation, A entered into a lease for commercial space previously occupied by the corporation, which had been evicted from the leasehold.) The defendants made a pre-answer motion under CPLR 3211(a)(5) to dismiss the cause of action asserted against A, claiming that the cause of action was barred by a release given by the corporation to A. Supreme Court denied the motion as "premature," and the defendants (including A) interposed an answer, which didn't include the affirmative defense of release. (Following the denial of the pre-answer CPLR 3211[a] motion, the defendants had 20 days to answer the complaint. See Commentary C3211:67.) The defendants subsequently sought summary judgment dismissing, among other things, the cause of action asserted against A. Their argument: the release barred the cause of action. Supreme Court granted A summary judgment, and the plaintiffs appealed.

The plaintiffs contended that A waived the affirmative defense of release because it was not pleaded in the answer. Rejecting that contention, the Second Department wrote that:

"As with the other defenses and objections listed in CPLR 3211(a)(5), the affirmative defense of release is waived unless it is raised in a pre-answer motion to dismiss or in a responsive pleading. Here, the defendants avoided waiving the affirmative defense of release by raising it in their pre-answer motion to dismiss, and they were thereafter entitled to seek summary judgment based on that defense despite its absence from the answer." 153 A.D.3d at 718, 60 N.Y.S.3d at 304. Internal citations omitted.

What's more, the appellate court affirmed the granting of summary judgment to A.

Query whether *Outlook Clothing* will apply to the other paragraphs of subdivision a (i.e., 1, 2, 3, 4, 6, 7, 8, 9, 10, and 11)? Note that objections under paragraph 8 are the most susceptible to waiver, see Commentary C3211:55, while objections under paragraphs 2, 7 and 10 are least likely to be waived (an objection under paragraph 2--lack of subject matter jurisdiction--can't be waived). See Commentary C3211:54.

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C3211:5. Grounds of Dismissal.

Dismissal Grounds Outside of CPLR 3211(a).

In the main volume, we note that "CPLR 3211(a) is the central dismissal device, but it is not the only one," Commentary C3211:5, at 19 (main vol.), and list the following sources of dismissal that reside outside of subdivision (a): CPLR 327 (forum non conveniens), CPLR 3012(b) (failure to serve complaint), CPLR 3215(c) (failure to take default judgment proceedings timely), CPLR 3126(3) (recalcitrance in disclosure proceedings), and CPLR 3216 (failure to comply with 90-day notice to prosecute action).

Recent decisions bring to mind two other non-CPLR 3211(a) dismissal grounds.

Rosenblatt v. Doe, 54 Misc.3d 145(A), 2017 N.Y. Slip Op. 50289(U), 2017 W.L. 923496 (App. Term, 2d Dep't 2017), touched on CPLR 1021, which allows for the dismissal of an action (or part of it) in which the substitution of a party is required but the motion for substitution is not made within a reasonable time after the event necessitating the substitution, e.g., the death of a plaintiff. What constitutes a reasonable time in a given case is dictated by the particular circumstances of the case. It's a sui generis question. The court should consider various factors, including the length of time between the substitution-necessitating event and the application for substitution, the extent of prejudice to the other parties, the reasonableness of the excuse (if any) proffered for the delay, and the potential merits of the plaintiff's claim. Commentary C1021:2 (main vol.); *see Alejandro v. North Tarrytown Realty Assoc.*, 129 A.D.3d 749, 10 N.Y.S.3d 616 (2d Dep't 2015).

In *Rosenblatt*, the plaintiff commenced a personal injury action. He subsequently passed away. There was a lengthy delay in securing the appointment of the administrator of the decedent's estate, then another delay in seeking substitution for the decedent-plaintiff. The motion court permitted the substitution, thereby allowing the action to go forward. The Appellate Term, Second Department, affirmed the order allowing the substitution, finding that the motion court did not abuse its discretion in granting the motion, stressing that the defendant failed to show that she would be prejudiced by the substitution.

A dissenting Justice concluded that the action-sustaining substitution should have been denied because of the delays underlying the substitution, the substitute plaintiff's failure to demonstrate a reasonable excuse for those delays, the absence of an affidavit of merit, and the potential prejudice to the defendant stemming from the delays. 54 Misc.3d 145(A), at *2, 2017 N.Y. Slip Op. 50289(U), at *2, 2017 W.L. 923496, at *1 (Weston, J.). The dissenting Justice would've dismissed the complaint, sua sponte, upon the denial of the motion to substitute.

A couple of observations regarding dismissal under CPLR 1021.

First, the question of whether dismissal is warranted under that statute can arise in a few different ways. A party may move for dismissal; a party may cross-move to dismiss in response to a motion to substitute a party; or a court might dismiss sua sponte.

Where a proposed substitute plaintiff moves for substitution, the defendant opposes the motion but does not formally cross-move to dismiss the action, and the court concludes that the movant did not seek substitution within

a reasonable time of the substitution-necessitating event, sua sponte dismissal by the court might seem appropriate. After all, the finding that substitution was not sought within a reasonable time can serve to bar a substitution, and without a proper plaintiff how can the action go forward? However strong the allure of a sua sponte dismissal may be in a particular case, the court (and the defendant, who would benefit from the dismissal) must be cognizant of the dim view the appellate courts have of sua sponte dismissals. *See* Commentary C3211:8 (main vol.). An additional impediment to a sua sponte dismissal in the context of CPLR 1021: the last sentence of the statute ("whether or not it occurs before or after final judgment, if the event requiring substitution is the death of a party, and timely substitution has not been made[,] the court before proceeding further, *shall, on such notice as it may in its discretion direct*, order the persons interested in the decedent's estate to show cause why the action ... should not be dismissed") (emphasis added).

Second, as we noted above, the issue of what constitutes a reasonable amount of time within which to seek substitution is case-specific and determined by consideration of several factors. One of those factors is the length of delay between the occurrence of the substitution-necessitating event and the point at which substitution is sought (or a defendant seeks dismissal for want of compliance with CPLR 1021). *See* Commentary C1021:2. Some delay is typically associated in identifying and securing a proper substitute for the affected party (e.g., getting letters testamentary to administer a party-decedent's estate). The proposed plaintiff should show that she exercised diligence in seeking substitution, specify any bureaucratic or court delay that accounts for the delay in seeking substitution, and corroborate any such bureaucratic or court delay with appropriate documentation. For her part, the defendant should note the extent of delay and demonstrate how she has been prejudiced by it.

Dismissal for want of compliance with CPLR 3012-a was addressed by the Third Department in *Calcagno v. Orthopedic Assoc. of Dutchess County, PC*, 148 A.D.3d 1279, 48 N.Y.S.3d 832 (2017, Garry, J.). That statute applies in medical malpractice actions, requiring a plaintiff in such an action to submit with the summons and complaint a certificate of merit from counsel declaring that he or she has consulted with at least one physician who (1) is knowledgeable regarding the relevant issues in the action, (2) has reviewed the facts, and (3) has concluded that a reasonable basis exists for the commencement of the action. *See* CPLR 3012-a(a). (The certificate-of-merit requirement also applies in dental and podiatrical malpractice actions.)

Some courts, such as the panel in *Kolb v. Strogh* (158 A.D.2d 15, 558 N.Y.S.2d 549 [2d Dep't 1990, Bracken, J.]) and the court in *Dye v. Leve* (181 A.D.2d 89, 586 N.Y.S.2d 69 [4th Dep't 1992]), have concluded that dismissal as a sanction for a plaintiff's failure to comply with the certificate-of-merit requirement is not permissible. (Although dismissal is permissible if a court issues an order directing a plaintiff to file an adequate certificate of merit but the party fails to do so. *See Kolb v. Strogh*, *supra*; *Dye v. Leve*, *supra*; *see also Monzon v. Chiaramonte,* 140 A.D.3d 1126, 35 N.Y.S.3d 371 [2d Dep't 2016] [court conditionally granted defendant's motion to dismiss complaint unless plaintiff filed and served sufficient CPLR 3012-a(a)(1) certificate of merit within 30 days after notice of entry of order].)

Other courts permit dismissal if a plaintiff seeks but is denied an extension of time within which to file a CPLR 3012-a certificate of merit. A plaintiff's application for such an extension is governed by CPLR 2004, which allows a court to extend most procedural deadlines, provided the party seeking the extension demonstrates "good cause." *See* Commentary to CPLR 2004; *see also* Higgitt, *Requests to Extend Deadlines and the Reach of the CPLR*, Oct. 2, 2013 N.Y.L.J. If a plaintiff seeks a CPLR 2004 extension of the time within which to file a certificate of merit and the court denies the extension, a defendant's motion to dismiss for want of compliance with CPLR 3012-a may be granted. *Calcagno v. Orthopedic Assoc. of Dutchess County, PC, supra*. Dismissal is particularly appropriate in that situation if plaintiff's counsel, in opposing a defendant's motion to dismiss, is unable to make the CPLR 3012-a declaration that a reasonable basis exists for the commencement of the action. *Horn v. Boyle*, 260 A.D.2d 76, 79, 699 N.Y.S.2d 572, 575 (3d Dep't 1999, Carpinello, J.).

Calcagno highlights the need for plaintiff's counsel to take seriously the CPLR 3012-a certificate-of-merit requirement. If an application for an extension of time to comply with CPLR 3012-a is required, attention to CPLR 2004's good cause element is demanded, as is attention to the quality of the papers supporting the application. Of course, timely compliance with CPLR 3012-a--a sufficient certificate of merit accompanying the summons and complaint--prevents any litigation on the matter.

C3211:8. Sua Sponte Dismissal.

Appellate Division Decisions Show the Frailty of Sua Sponte Dismissals.

A sua sponte dismissal occurs when a court, without the prompting of a motion by a party, discards a complaint or some other affirmative claim (e.g., a counterclaim). The Appellate Division has shown little tolerance of sua sponte dismissals. Absent statutory or regulatory authority for a sua sponte dismissal (e.g., CPLR 3215[c], CPLR 3404, 22 NYCRR 202.27), a court's power to dismiss sua sponte should be exercised "sparingly and only when extraordinary circumstances exist to warrant" that ultimate relief. *First United Mortgage Banking, Corp. v. Lawani,* 147 A.D.3d 912, 48 N.Y.S.3d 190 (2d Dep't 2016); *Citimortgage Inc v. Lottridge*, 143 A.D.3d 1093, 40 N.Y.S.3d 573 (3d Dep't 2016, Peters, P.J.). Examples of "extraordinary circumstances" are few. *See* Commentary C3211:8 (main vol.). The limited power of a court to dismiss sua sponte is constrained further by due process. Even if extraordinary circumstances exist, sua sponte dismissal cannot occur unless the plaintiff had notice that dismissal could eventuate and an opportunity to be heard before the court renders the dismissal. *See Citimortgage, Inc. v. Lottridge*, *supra*; *see also First United Mortgage Banking Corp. v. Lawani, supra.*

First United Mortgage Banking Corp. and *Citimortgage, Inc.* evince the Appellate Division's understandable hostility toward sua sponte dismissals and provide a couple of lessons relating to them.

First United Mortgage Banking Corp. discourages trial courts from straying from the factual record adduced by the parties in deciding motions (save for matter that is subject to proper judicial notice, *see* Bench Book for Trial Judges--New York § 7:3 [2015-2016 ed.]). In *First United Mortgage Banking Corp.*, the plaintiff in a residential mortgage foreclosure action made a motion against the defendants for a default judgment and an order of reference. That motion was not opposed. The motion "court conducted an independent Internet investigation of certain records and digital tax maps purportedly maintained by, among others, the New York City Department of Finance. Based upon the court's research ... [it] concluded that certain discrepancies warranted [sua sponte] dismissal of the action." 147 A.D.3d at 913, 48 N.Y.S.3d at 190. The Second Department reversed the order of dismissal and remitted the matter to Supreme Court for a determination of the plaintiff's motion (sans information obtained from the Internet). The appellate court found that extraordinary circumstances were not present and, therefore, sua sponte dismissal was not warranted. Additionally, the court "caution[ed] that dismissal based almost entirely upon an independent Internet investigation, especially one conducted without providing notice of and an opportunity to be heard by any party, is improper and should not be repeated." *Id.*; *see HSBC Bank USA, NA v. Taher*, 104 A.D.3d 815, 962 N.Y.S.2d 301 (2d Dep't 2013); *see also* Hon. David B. Saxe, *"Toxic" Judicial Research*, 87 N.Y. St. B.J. 36 (Sept. 2015).

In *Citimorgtage, Inc.*, the plaintiff commenced but did not diligently prosecute a residential mortgage foreclosure action. Among other transgressions, the plaintiff allowed the action to "languish" for two years. Supreme Court attempted to spur the plaintiff to pursue the case: the court directed the plaintiff to make an application for a default judgment by a date certain. The plaintiff failed to follow the directive and the court, sua sponte, dismissed the complaint under CPLR 3215(c), which provides that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned ... unless sufficient cause is shown why the complaint should not be dismissed."

The Third Department reversed an order denying the plaintiff's motion to vacate the sua sponte dismissal order and granted the motion, thereby restoring the complaint. Dismissal was not warranted under CPLR 3215(c) because the plaintiff did take proceedings for the entry of judgment within one year of the defendants' default. The plaintiff sought (and was granted) an order of reference within the one year period, such "proceedings" manifested an intent not to abandon the action, and the action therefore could not be dismissed for the reason identified by Supreme Court. *See* Commentary C3215:12.

And the dismissal could not be sustained as a proper exercise of the court's power to dismiss sua sponte. "[W]hile plaintiff's conduct [in delaying prosecution of the action and violating a directive of the court] was certainly worthy of criticism," the record did not support a finding of a pattern of willful noncompliance with court-ordered deadlines, conduct that could provide extraordinary circumstances justifying a sua sponte dismissal. 143 A.D.3d at 1095, 40 N.Y.S.3d at 575; *see* Commentary C3211:8 at 22-23 (main vol.). That a plaintiff's conduct "frustrates our justice system," standing alone, is not sufficient to constitute extraordinary circumstances. 143 A.D.3d at 576, 40 N.Y.S.3d at 1095. Additionally, sua sponte dismissal was not appropriate because the record did not indicate that the plaintiff was on notice that dismissal might occur.

Two important observations relating to sua sponte dismissals. First, "courts do not possess the power to dismiss an action [in the pre-note of issue phase] for general delay where [the] plaintiff has not been served with a [CPLR 3216(b)] demand." *Chase v. Scavuzzo*, 87 N.Y.2d 228, 233, 638 N.Y.S.2d 587, 590, 661 N.Y.2d 1368, 1371 (1995, G.B. Smith, J.); *see* Commentary C3216:4A, Cumulative Supplementary Pamphlet, 2017 entry. Second, our "courts ... are empowered to grant the sanction of dismissal only when it has been authorized either by the [L]egislature or by court rules consistent with existing legislation." *Tewari v. Tsoutsouras*, 75 N.Y.2d 1, 7, 550 N.Y.S.2d 572, 574, 549 N.E.2d 1143, 1145 (1989, Alexander, J.). Thus, a dismissal ought to be tethered to an identifiable legal basis--a statute, a regulation, a case law principle. Mere frustration with the lack of progress of a case, while understandable and worthy of criticism, shouldn't result in the ultimate penalty of dismissal.

C3211:10. Defense Based on "Documentary Evidence"

Can an E-Mail Constitute Documentary Evidence Under CPLR 3211(a)(1)?

A defendant may seek dismissal of a complaint (or part of it) based on a defense "founded upon documentary evidence." Whether a particular document constitutes documentary evidence under CPLR 3211(a)(1) has been the subject of a lot of litigation. Rarely does the defendant succeed in persuading the court that her evidence is "documentary." That's because the test for determining whether a paper qualifies as "documentary evidence" is quite stringent; the paper must be unambiguous, of undeniable authenticity, and its contents must be essentially undeniable. Commentary C3211:10, at 25 (main vol.).

In the main volume, we note that an e-mail may (emphasize "may") constitute "documentary evidence"; it's a question that seems to have divided the First and Second Departments. *See id.* The First Department has stated that "[e]-mails can suffice as documentary evidence for purposes of CPLR 3211(a)(1)" (provided, of course, the subject e-mail satisfies the three-element test noted above). *Calpo-Rivera v. Sirioka*, 144 A.D.3d 568, 568, 42 N.Y.S.3d 19, 20 (1st Dep't 2016). The Second Department has signaled that an e-mail cannot be "documentary" in character. *See 25-01 Newkirk Avenue., LLC v. Everest National Ins. Co.*, 127 A.D.3d 850, 851, 7 N.Y.S.3d 325, 326 (2d Dep't 2015) ("letters, e-mails, and affidavits fail to meet the requirements for documentary evidence").

A recent article provides a thorough review of this inter-Department conflict and explores whether an e-mail can constitute documentary evidence under CPLR 3211(a)(1). *See* Bruce H. Lederman, *Role of Emails in CPLR 3211(a)(1) Motions*, vol. 22, no. 1 NYLitigator, N.Y.S.B.A., at 18-22 (Spring 2017).

C3211:12. Plaintiff's Lack of Capacity.

A Plaintiff Who has Attained the Age of Majority is Presumed Competent and a Defendant has the Burden of Demonstrating Otherwise.

Those are the take-away points from *Vasilatos v. Dzamba*, 148 A.D.3d 1275, 49 N.Y.S.3d 194 (3d Dep't 2017, Lynch, J.). There, the defendants moved to dismiss the complaint of the plaintiff, who claimed that, as an infant, she was exposed to and poisoned by lead particles at the defendants' respective properties. The defendants argued, among other things, that the plaintiff lacked legal capacity (i.e., the power) to bring the lawsuit. *See* Commentary C3211:12 (main vol.). The defendants relied on the complaint--verified by plaintiff's counsel--that contained an allegation that, as a result of the lead poisoning, the plaintiff had been "under a disability pursuant to CPLR 208 since infancy, which never ceased, and [the plaintiff] continues to be insane, deprived of an overall ability to function in society, of unsound mind and/or unable to protect her legal rights." Apparently the defendants offered nothing else to support their assertion that the plaintiff lacked the legal capacity to bring the action. Noting that a plaintiff's competence to commence an action is presumed, that a defendant seeking dismissal under CPLR 3211(a)(3) bears the burden of demonstrating that a plaintiff was not legally competent, and that the plaintiff in *Vasilatos* had not been judicially declared incompetent, the Court determined that "plaintiff's acknowledged cognitive and mental defects[, standing alone,] did not prevent her from commencing th[e] action in her own name." 148 A.D.3d at 1276, 49 N.Y.S.3d at 196.

Court Reviews Considerations Relevant to Whether Governmental Entity Created by a Legislative Enactment has Capacity to Sue.

"Capacity" concerns a plaintiff's power to appear before and bring an action in court. Commentary C3211:12, at 29 (main vol.). "Governmental entities created by legislative enactment ... present capacity problems." *Community Board 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 155, 615 N.Y.S.2d 644, 647, 639 N.E.2d 1, 4 (1994, Titone, J.). The Fourth Department reviews those problems in *Matter of Citizen Review Board of the City of Syracuse v. Syracuse Police Department,* 150 A.D.3d 121, 125-126, 51 N.Y.S.3d 708, 711-712 (2017, Curran, J.), and offers factors that can be employed to ascertain whether a given legislatively-created governmental entity has the capacity to commence an action. (Hint: The answer typically lies in legislation creating and governing the entity. *See Excess Line Ass'n of New York v. Waldorf &. Associates*, 30 N.Y.3d 119, 65 N.Y.S.3d 85, 87 N.E.3d 117 (Oct. 19, 2017), 2017 N.Y. Slip Op. 07301.) The Court provides guidance too on the question of whether a legislatively-created governmental entity has standing to bring an action. Capacity and standing are discreet issues; the former is concerned with whether, in the eyes of the law, the plaintiff has the power to bring a case, and the latter asks whether the plaintiff has a sufficient stake in the outcome of the litigation. *See* Commentary C3211:13 (main vol.).

Filing for Bankruptcy Does Not Necessarily Strip a Plaintiff of Standing to Sue; the Character of Bankruptcy Protection--Chapter 7, 11 or 13--is Determinative.

Generally, "[t]he failure of a plaintiff to disclose a cause of action as an asset in a prior bankruptcy proceeding, the existence of which the plaintiff knew or should have known existed at the time, deprive[s] the plaintiff of the [standing] to sue subsequently on that cause of action." *Whelan v. Longo,* 23 A.D.3d 459, 460, 808 N.Y.S.2d 95, 96 (2d Dep't 2005). But the chapter of the debtor/plaintiff's bankruptcy proceeding determines whether the general rule applies.

Chapter 7 and 11 debtors lose standing to maintain civil suits. That which is lost by the chapter 7 or 11 bankruptcy proceeding debtor is found by her bankruptcy trustee; the chapter 7 or 11 bankruptcy trustee has standing to bring or maintain an action for the benefit of the bankruptcy estate. *Collins v. Suraci,* 110 A.D.3d 1214, 973 N.Y.S.2d 828 (3d Dep't 2013, Egan, Jr., J.). A debtor in a chapter 13 bankruptcy proceeding, however, does not lose standing to bring

a civil suit. *See* *Nicke v. Schwartzapfel Partners, P.C.,* 148 A.D.3d 1168, 51 N.Y.S.3d 121 (2d Dep't 2017). Why do chapter 13 debtors retain standing while chapter 7 and 11 debtors lose it? Because "in a chapter 13 proceeding, 'the creditors' recovery is drawn from the debtor's earnings, not from the assets of the bankruptcy estate; hence, it is only the chapter 13 debtor who stands to gain or lose from efforts to pursue a cause of action that is an asset of the bankruptcy estate.' " *Collins v. Suraci,* 110 A.D.3d at 1215, n, 973 N.Y.S.3d at 830, n, quoting *Olick v. Parker & Parsley Petroleum Co.,* 145 F.3d 513, 516 (2d Cir. 1998).

Some courts have indicated that the failure of a plaintiff to disclose a cause of action as an asset in a prior bankruptcy proceeding affects the plaintiff's "capacity" to sue subsequently on that cause of action. As mentioned above, capacity and standing are separate (albeit allied) concepts. *See* Commentary C3211:13 (main vol.). Capacity concerns a party's legal power to bring an action, asking whether the plaintiff is the proper bearer of the lawsuit. Commentary C3211:12 (main vol.). Standing concerns itself with whether the plaintiff suffered an injury or other harm as a result of the defendant's alleged conduct or inaction, i.e., whether the plaintiff has a sufficiently cognizable stake in the outcome of the litigation. Commentary C3211:13.

As the language from the *Collins* decision suggests, the bankruptcy issue we are discussing here seems to concern standing. In the chapter 7 and 11 contexts, the debtor's "property," including any cause of action the debtor had, vests in the debtor's bankruptcy estate. Because a cause of action that had been the property of the debtor becomes the property of the bankruptcy estate, it is the estate that has a cognizable stake in the outcome of any litigation relating to the cause of action. Thus, the bankruptcy estate, acting through a bankruptcy trustee, has standing to pursue such a cause of action. In the chapter 13 context, it is the debtor "who stands to gain or lose" from the cause of action. *Collins v. Suraci,* 110 A.D.3d at 1215, n, 973 N.Y.S.3d at 830, n. Bankruptcy therefore affects which individual or entity has a direct stake in the outcome of a litigation.

C3211:14. "Other Action Pending," Generally.

The Importance of Service of a Complaint in Both the Present and the Prior Actions.

CPLR 3211(a)(4) authorizes (but does not require) dismissal of an action on the ground that there is another action pending in any court within the United States. Dismissal of the present action, i.e., the New York action in which the CPLR 3211(a)(4) motion is made, is only appropriate if the present action and the other action involve the same parties and the same cause of action. Commentaries C3211:14, 15 (main vol.). The present action and the other action involve the same parties and the same cause of action if the following elements of the two actions are substantially similar: (1) the parties; (2) the cause of action; and (3) the relief sought. Commentary C3211:15; *see* *Cellino & Barnes, P.C. v. Law Office of Christopher J. Cassar, P.C.*, 140 A.D.3d 1732, 35 N.Y.S.3d 606 (4th Dep't 2016).

To ascertain whether two actions are substantially similar, a court should compare the allegations in the pleadings of the respective actions. *See* *Security Title & Guaranty Co. v. Wolfe,* 56 A.D.2d 745, 392 N.Y.S.2d 30 (3d Dep't 1977); *see also* Siegel, New York Practice § 262 (Connors 5th ed.). Therefore, service of a complaint (or other appropriate pleading, i.e., a petition) in both the present action and the other action is typically necessary before the present action can be dismissed under CPLR 3211(a)(4). *See* *Wharton v. Wharton*, 244 A.D.2d 404, 664 N.Y.S.2d 73 (2d Dep't 1997); *Graev v. Graev*, 219 A.D.2d 535, 631 N.Y.S.2d 685 (1st Dep't 1995); *Sotirakis v. United Services Auto Ass'n*, 100 A.D.2d 931, 474 N.Y.S.2d 843 (2d Dep't 1984); *John J. Canpagna, Inc. v. Dune Alpin Farm Associates*, 81 A.D.2d 633, 438 N.Y.S.2d 132 (2d Dept. 1981); Siegel, New York Practice § 262; *see also Security Title & Guaranty Co. v. Wolfe*, *supra*. Use of information outside of the pleadings to compare the actions has not been permitted. *Louis R. Shapiro, Inc. v. Milspenes Corp.*, 20 A.D.2d 857, 857, 248 N.Y.S.2d 85, 87 (1st Dep't 1964) ("it is not permissible to show by parol proof what an action is for") (internal quotation mark omitted).

If there is another action pending in any court within the United States that involves the same parties and the same cause of action as the present action, the court must consult the first-in-time rule, which provides that generally the action that was commenced first will be the one that is allowed to proceed. Commentaries C3211:14, 15. The general rule favoring the action that was commenced first is not ironclad; the presence of special circumstances permits a court to depart from the first-in-time rule and favor the later-commenced action. Commentary C3211:16.

In *Quatro Consulting Group, LLC v. Buffalo Hotel Supply Co., Inc.*, 55 Misc.3d 615, 49 N.Y.S.3d 252 (Sup. Ct., Monroe County 2017, Rosenbaum, J.), the court seemed to question the prudence of the principle that service of the complaints in both actions is required before a CPLR 3211(a)(4) motion to dismiss the present action will lie.

The parties to the *Quatro Consulting Group, LLC,* action had entered into an agreement under which B provided consulting services to A. B sent a demand for payment to A, claiming that B was owed money for services rendered to A. A responded by commencing a declaratory judgment and damages action against B in Supreme Court, Erie County, by electronically-filing a summons with notice on November 22, 2016. The summons with notice allowed A to commence its action without filing and serving a complaint. (The complaint would come later, upon B's demand. *See* Siegel, New York Practice §§ 60, 231.) Approximately one week later, B commenced a breach of contract action against A in Supreme Court, Monroe County, by filing a summons and complaint with the Monroe County Clerk's Office.

In the context of its Monroe County action, B moved to consolidate that action with A's Erie County action. A then moved (also within the context of the Monroe County action) to dismiss the Monroe County action under CPLR 3211(a)(4).

Supreme Court, Monroe County, granted A's motion to dismiss the Monroe County action. The court reasoned that, under CPLR 304, A's Erie County action was commenced on November 22, 2016, approximately one week before B commenced its Monroe County action, and that, under the first-in-time rule, A's action should get priority. The court rejected B's argument, premised on case law such as *Wharton* and *Graev*, that A's action did not constitute a "prior action pending" because it was commenced by summons with notice. Stressing the plain language of CPLR 304, the court observed that an action is commenced by the filing of a summons and complaint *or* summons with notice, and, therefore, A's summons-with-notice initiated action, which was commenced before B's action, was first-in-time.

Is there any tension between the case law concluding that service of a complaint in both the present action and the other action is necessary before a CPLR 3211(a)(4) motion will lie, and the *Quatro Consulting Group, LLC* court's reasoning? Maybe, maybe not.

The court seemed to question the prudence of the principle that service of the complaints in both actions is a precondition to a CPLR 3211(a)(4) motion to dismiss the present action. But the reason for that principle is to allow the court, based on a comparison of the allegations in the complaints, to ascertain whether both actions involve the same parties and the same cause of action. That inquiry apparently wasn't necessary in *Quatro Consulting Group, LLC*. Rather, the court seemed to operate on the premise that the two actions were substantially similar, and the court focused on the order in which the actions were commenced for the purpose of applying the first-in-time rule.

Perhaps the parties in *Quatro Consulting Group, LLC*, expressly or implicitly acknowledged that the actions involved the same parties and the same cause of action. Or perhaps it was obvious to the court from the submissions on the competing motions that the actions were substantially similar. (Although resort to information outside of the pleadings to compare the actions is generally not permitted. *Louis R. Shapiro, Inc v. Milspenes Corp.*, *supra.*)

In any event, the court apparently did not need to resolve the issue of whether the two actions were substantially similar--the issue on which the principle requiring service of the complaints in both actions bears. The court's comments regarding that principle came in the context of the court's analysis of the separate and distinct issue of which action was commenced first for the purpose of applying the first-in-time rule. Therefore, the tension between the service-of-the-complaints principle and the *Quatro Consulting Group, LLC* decision may not be all that tense.

A final note on *Quatro Consulting Group, LLC*. Recall that A commenced a declaratory judgment action against B in response to B's demand for payment. Was A, which used a summons with notice to commence the action, in a hurry to get into court before B?

This matter is important because the first-in-time rule, which generally favors the action that was commenced first, yields where special circumstances are present. One factor in the special circumstances calculus: whether the prior action was filed preemptively after the plaintiff in that action learned that the opposing party intended to commence a case. Commentary C3211:16. That the prior action was brought in the form of a declaratory judgment action may serve as a strong signal that it was commenced preemptively. *Id*. That the prior action was commenced by the expedient of a mere summons with notice-instead of a summons and complaint-might be another signal of a preemptive filing. If the first action was filed preemptively, special circumstances are likely present and the later-commenced action is given priority, as the law seeks to discourage a race to the courthouse, an exercise that is not compatible with responsible litigation. *Id*.

C3211:21. Failure to State a Cause of Action, Generally.

Court Reviews the Special Principles Applicable to a Motion to Dismiss a Declaratory Judgment Action.

"An action for a declaratory judgment is one that seeks to have the court establish and promulgate the rights of the parties on a particular subject matter." Commentary C3001:1, at 257-258 (main vol.). The declaratory judgment plaintiff seeks no relief that can be enforced through the enforcement mechanisms in CPLR article 52 or by the court's contempt powers, Siegel, New York Practice § 436 (Connors 5th ed.); the plaintiff will be satisfied with a judicial declaration of the rights of the parties. Commentary C3001:1. The utility of a declaratory judgment action is that it may "serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations." *James v. Alderton Dock Yards*, 256 N.Y. 298, 305, 176 N.E.401, 404 (1931, Crane, J.).

When a defendant in a declaratory judgment action seeks to dismiss it under CPLR 3211(a)(7)--the failure-to-state-a-cause-of-action provision--the ordinary rules of decision apply. *See* Commentary C3211:21, at 47 (main vol.) ("the pleadings must be given a liberal construction, the allegations accepted as true, and the plaintiff accorded every possible favorable inference"); *see also Connaughton v. Chipolte Mexican Grill, Inc.*, 29 N.Y.3d 137, 53 N.Y.S.3d 598, 75 N.E.3d 1159 (2017, Rivera, J.). Some additional special rules apply that reflect the unique nature of the declaratory judgment action.

Guthart v. Nassau County, 55 Misc.3d 827, 52 N.Y.S.3d 821 (Sup. Ct., Nassau County 2017, Palmieri, J.), contains a recitation of those special rules. Here they are:

• A pre-answer CPLR 3211(a)(7) motion to dismiss a declaratory judgment action presents only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration

• Where a cause of action is sufficient to invoke the court's power to render a declaratory judgment, the motion to dismiss should generally be denied

• A court may reach the merits of a well-pleaded cause of action for declaratory judgment on a CPLR 3211(a)(7) motion if no questions of fact are presented by the parties' controversy

• If the controversy presents no questions of fact, the CPLR 3211(a)(7) motion may be treated as a motion for a declaration in the defendant's favor

See also Professor Connors' treatment of the *North Oyster Bay Baymen's Association* decision in Commentary C3001:22, Pocket Part, 2016 entry.

C3211:28. Lack of Personal Jurisdiction.

Fundamental Rules of Decision Applicable to Several CPLR 3211(a) Grounds Apply to Lack-of-Personal-Jurisdiction Motion.

Afford the complaint a liberal construction. Accept the facts alleged in the complaint as true. Accord the plaintiff the benefit of every possible favorable inference. Those commandments apply to motions made on several CPLR 3211(a) grounds, such as dismissal founded on documentary evidence (paragraph 1), dismissal founded on an affirmative defense (paragraph 5), and dismissal for failure to state a cause of action (paragraph 7). (They essentially apply as well to a motion to dismiss an affirmative defense [CPLR 3211(b)].) Compliments of the Court of Appeals' decision in *Rushaid v. Picket & Cie*, 28 N.Y.3d 316, 45 N.Y.S.3d 276, 68 N.E.3d 1 (2016, Rivera, J.), they apply too when the motion to dismiss is based on paragraph 8, want of personal jurisdiction.

In *Rushaid*, the issue was whether the New York court had personal jurisdiction over the defendants under the transacts-any-business aspect of New York's long arm jurisdiction statute. *See* CPLR 302(a)(1); Siegel New York Practice § 86 (Connors 5th ed.). In evaluating whether the court has personal jurisdiction over a defendant under CPLR 302(a)(1), the court asks whether (1) the defendant conducted sufficient activities to have transacted business in New York, and (2) the plaintiff's claims arise from the transactions. *Rushaid*, 28 N.Y.3d at 323, 45 N.Y.S.3d at 282, 68 N.E.3d at 7. In the course of concluding that the New York courts had personal jurisdiction over the defendants under CPLR 302(a)(1), the Court of Appeals applied to the complaint the pleader-friendly principles associated with other CPLR 3211(a) grounds.

Note that it matters not whether a plaintiff can ultimately prove the factual allegations on which the court is relying to impose personal jurisdiction over a defendant. The inquiry is whether the pleadings set forth facts establishing a basis on which to impose personal jurisdiction over the defendant. *See Licci v. Lebanese Canadian Bank,* 20 N.Y.3d 327, 340, 960 N.Y.S.2d 695, 703, 984 N.E.2d 893, 901 (2012, Read, J.).

C3211:58. Initially Raising Objection in Amended Pleading.

Defendant's Motion for Leave to Amend Answer to Include Statute of Limitations Defense That had Been Waived Under CPLR 3211(e) is Denied Based on Delay in Seeking Leave and Prejudice to Plaintiff.

CPLR 3211(e) directs that most subdivision (a) dismissal grounds must be raised in an answer or made the subject of a timely motion to dismiss. *See* Commentaries C3211:53, 55. This direction is backed by subdivision (e)'s waiver provision: a non-exempted ground is generally waived if neither interposed in the answer nor raised in a CPLR 3211(a) motion to dismiss. We say “generally” because the waiver is presumptive not absolute.

Defenses seemingly waived under subdivision (e) may be interposed by way of an amended answer. Sometimes the amendment can be made as of right under CPLR 3025(a). Owing to the narrow window afforded for an amendment

as of right, the amendment is usually sought by leave of court under CPLR 3025(b). *See generally* Commentary C3211:58. The amendment by leave is to be "freely" given. CPLR 3025(b). Leave to amend an answer to include an otherwise waived subdivision (a) ground should be granted unless the plaintiff would be prejudiced from the delay in seeking leave, or the proposed amendment is palpably insufficient or patently devoid of merit. That said, the court, in exercising its CPLR 3025(b) discretion, should consider how long the defendant was aware of the facts upon which its motion for leave is predicated and whether the defendant has a reasonable excuse for its delay. The liberality with which leave is to be afforded dissipates where the motion for leave is made long after the filing of the trial-ready signifying documents, the note of issue and certificate of readiness. In considering such a belated motion, judicial discretion in allowing amendments should be circumspect.

In a pair of similarly captioned but separate decisions, the Second Department reviews these important amendment-by-leave principles and highlights the danger to the defendant of waiting to seek leave until the action is in the post-note-of-counsel phase. *Civil Service Employees Association v. County of Nassau,* 144 A.D.3d 1075, 43 N.Y.S.3d 390 (2d Dep't 2016); *Civil Service Employees Association v. County of Nassau,* 144 A.D.3d 1077, 44 N.Y.S.3d 50 (2d Dep't 2016). In each of the actions the defendant sought leave to amend its answer (1) approximately six years after service of the initial answer, (2) after discovery had been completed, and (3) after the note of issue and certificate of readiness had been filed. Additionally, in each of the actions the facts underlying the defendant's proposed statute of limitations defense were known to the defendant at the time the initial answer was interposed, and the defendant offered no excuse for its lengthy delay in seeking leave to amend. In light of the circumstances, the plaintiff in each action suffered significant prejudice as a result of the defendant's delay, and the Appellate Division concluded that leave to amend the answers must be denied.

PRACTICE COMMENTARIES

By John R. Higgitt

In General

C3211:1. The Motion to Dismiss, Generally.

CPLR 3211 is the principal dismissal motion in New York civil practice. The motion is available to any party against whom a cause of action has been asserted; it can be used to challenge defenses as well. The availability of the motion to a party in a given situation depends on the party's negotiation of the requirements of CPLR 3211.

Here is a snapshot of CPLR 3211:

• Subdivision (a) lists the grounds on which a motion to dismiss a cause of action may be made.

• Subdivision (b) provides the motion to dismiss a defense.

• Subdivision (c) concerns the evidence permitted on a CPLR 3211 motion, the conversion of a dismissal motion into one for summary judgment, *see* CPLR 3212, and the availability of an immediate trial of issues related to a CPLR 3211 motion.

• Subdivision (d) offers a remedy to a party opposing a motion to dismiss who needs time to gather evidence.

• Subdivision (e), an unwieldy provision, contains significant rules regarding the time for making a CPLR 3211(a) motion and the waiver of certain subdivision (a) grounds, and provides the "single motion rule."

- Subdivision (f) extends a CPLR 3211 movant's time to serve a responsive pleading.

- Subdivisions (g) and (h) prescribe special standards on CPLR 3211(a)(7) motions relating to actions involving public petition and participation ("SLAPP" suits) and certain actions involving licensed architects, engineers, land surveyors, and landscape architects.

CPLR 3211 is a purely mechanical device, a procedural statute through and through. It authorizes a party to seek dismissal of a cause of action on certain grounds (or a defense on any ground) and sets forth the manner in which the party may do so. CPLR 3211 therefore provides a means by which a party may present its arguments for dismissal to the court. Whether dismissal is warranted in a given situation will depend on law (substantive, procedural or both) that comes from outside CPLR 3211's borders.

An important note: these commentaries focus on contemporary matters, with reference to the history of a provision or the history underlying a particular issue reserved for those instances in which historical context will aid the reader in understanding the law in its current state.

C3211:2. Considerations for the Potential CPLR 3211(a) Movant.

A defendant served with a summons and complaint (or some other form of initiatory papers) can make a pre-answer motion to dismiss the complaint (or parts of it). (As we discuss below, Commentary C3211:4, any party against whom an affirmative claim is asserted can make a CPLR 3211[a] motion.) Alternatively, the defendant can interpose a timely answer that contains CPLR 3211(a) grounds and seek relief on the pleaded grounds at some later time, e.g., on summary judgment. Whether a defendant should make a pre-answer CPLR 3211(a) motion is a case-specific inquiry driven by the contents of the complaint, the information and evidence available to the defendant, the litigation goals of the defendant, and the resources of the defendant. Here are some basic considerations for the defendant pondering whether to make a CPLR 3211(a) motion:

- What potential grounds exist for the motion?

- Will one or more of those grounds terminate the entire action?

- Will some or all of the causes of action be resolved conclusively by the potential grounds for dismissal, i.e., can the potential grounds serve as an absolute bar to a future action, or can the potential objections be remedied and allow for a new action?

- How strong are the arguments in support of the potential grounds?

- What expense would be incurred by the defendant in making the motion and is the defendant willing to incur it?

For an additional discussion of the matters that defense counsel should review when determining whether to make a CPLR 3211(a) motion, *see* Robert L. Haig, Commercial Litigation in New York State Courts, § 8:25 (4th ed.).

C3211:3. General Motion Considerations.

CPLR 3211 is just one motion in the expansive universe of New York civil procedure. CPLR 3211 has of course its own unique requirements, which will be reviewed below. But a CPLR 3211 motion is subject to all of the basic rules of motion practice, and a party's failure to abide by those rules can have significant consequences: for a CPLR 3211 movant, the loss of the right to have the motion potentially determined on its merits (and, therefore, additional litigation that the movant could have potentially avoided); for the party opposing the motion, the loss of the opportunity to put before the court arguments, evidence or both that might persuade the court to deny the motion. We highlight some

important general rules of motion practice that sometimes cause trouble for the parties on a CPLR 3211 motion. The particulars of these general rules are covered in more detail by Professor Connors in both his Practice Commentaries and book, initially crafted by the late Professor David D. Siegel, New York Practice. Reference to those resources is recommended.

Important General Rules of Motion Practice:

• A notice of motion must "specify the time and place of the hearing of the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefore." CPLR 2214(a); *see* Commentary C2214:3; Siegel, New York Practice § 246 (Connors 5th ed.); *see also* Commentary C3211:6.

• A motion must be served so as to comply with the notice requirements of CPLR 2214(b), and a cross motion must be served so as to comply with the notice requirements of CPLR 2215. *See* Commentaries C2214:6-21, C2215:1A-1C; Siegel, New York Practice §§ 247, 249.

• The parties must furnish the court with all papers necessary to the court's consideration of the motion. CPLR 2214(c); Commentaries C2214:22-23; Siegel, New York Practice § 246. A component of this requirement is that the CPLR 3211 movant submit a copy of the pleading challenged on the motion. *See* Commentary C3211:41.

• In an e-filed action, the parties must provide the court with "working copies" of the documents that were e-filed in connection with the motion (if required to do so by the court). *See* 22 NYCRR 202.5-b(d)(4); 22 NYCRR 202.5-bb(a)(1); Commentary C2214:23 (2014 entry), Siegel, New York Practice § 246.

Subdivision (a)

C3211:4. Parties Who May Use Subdivision (a).

Any party against whom an affirmative claim is interposed may utilize CPLR 3211(a)'s dismissal grounds to seek dismissal of a claim. CPLR 3211(a) is most commonly employed by defendants to seek dismissal of complaints (or parts of them), and the defendant-moving-against-the-complaint is the example we will use in these Commentaries (unless context calls for a different example). But others can invoke subdivision (a)--a plaintiff against whom a counterclaim has been interposed, *see Hyman v. Schwartz*, 127 A.D.3d 1281, 6 N.Y.S.3d 732 (3d Dep't 2015), a defendant against whom a co-defendant has asserted a cross claim, *see Darby Group Companies, Inc. v. Wulforst Acquisition, LLC*, 130 A.D.3d 866, 14 N.Y.S.3d 143 (2d Dep't 2015), and a third-party defendant against whom a third-party complaint has been served, *see Front, Inc. v. Khalil*, 24 N.Y.3d 713, 4 N.Y.S.3d 581, 28 N.E.3d 15 (2015). A non-party cannot move to dismiss under 3211(a) for the simple and obvious reason that no affirmative claim can be asserted against a non-party. *See U.S. Bank, N.A. v. Patterson*, 102 A.D.3d 858, 959 N.Y.S.2d 216 (2d Dep't 2013).

The motion to dismiss a defense is covered by subdivision (b). *See* Commentaries C3211:34-39.

If a defendant (or other party against whom an affirmative claim is interposed) purports to seek dismissal of a complaint (or part of it) under CPLR 3211(b), the court can disregard the mislabeling and treat the motion as made under CPLR 3211(a), provided the specific subdivision (a) grounds upon which the defendant is relying are clear from the moving papers and the plaintiff is not prejudiced by the mislabeling. *See* CPLR 2001; Commentary C3211:6; *see also D'Agostino v. Harding*, 217 A.D.2d 835, 629 N.Y.S.2d 524 (3d Dep't 1995).

C3211:5. Grounds for Dismissal.

A motion to dismiss a complaint (or part of it) under CPLR 3211(a) must be founded on a ground provided by that subdivision. The Legislature provided this dismissal device and that body determines which grounds can serve as

predicates for dismissal. So, the CPLR 3211(a) movant must find one or more grounds from the list on which to rest its motion. The good news for that party: the list is long and, thanks to the generous interpretation given to it by many courts, the motion to dismiss for failure to state a cause of action, CPLR 3211(a)(7), is a broad ground. *See* Commentary C3211:23; *see also* Commentary C3211:13 (lack of capacity ground includes lack of standing).

CPLR 3211(a) is the central dismissal device, but it is not the only one. A motion to dismiss based on a plaintiff's failure to serve a complaint in an action started with a summons with notice lies under CPLR 3012(b); a motion to dismiss based on a plaintiff's failure to take timely proceedings for the entry of default judgment is in CPLR 3215(c); a motion to dismiss based on a plaintiff's failure to satisfy its obligations in the disclosure process is in CPLR 3126(3); a motion to dismiss based on a plaintiff's failure to comply with a duly served 90-day demand is authorized by CPLR 3216; a motion to dismiss under the doctrine of forum non-conveniens comes from CPLR 327. When a dismissal motion is predicated on CPLR 3211(a) grounds, the motion must comply with the various requirements of CPLR 3211; when the dismissal motion is based on a device other than subdivision (a), the motion is subject to the requirements of the particular statute or court rule giving life to it.

C3211:6. Specifying the Ground of the Motion.

Must the CPLR 3211(a) movant specify the grounds for the motion? CPLR 3211 does not answer that question. But CPLR 2214(a), one of those important motion rules of general applicability, *see* Commentary C3211:3, offers guidance on the point. It requires that a notice of motion specify, among other things, the grounds for the motion. That requirement can be satisfied by stating the grounds in the notice of motion, e.g., lack of personal jurisdiction, statute of limitations, failure to state a cause of action. *See, e.g., Blauman-Spindler v. Blauman*, 68 A.D.3d 1105, 1106, 892 N.Y.S.2d 143, 144 (2d Dep't 2009) ("there is no requirement that a movant identify a specific statute or rule in the notice of motion"). Alternatively, the movant could identify the specific paragraphs of subdivision (a) on which the motion is based, e.g., CPLR 3211(a)(8), 3211(a)(5), 3211(a)(7). *See* Commentary C2214:3.

Note that specification of the grounds should appear in the notice of motion. If they don't, but are clearly laid out elsewhere, such as in an affirmation in support of the motion, the court can overlook the movant's failure to comply with CPLR 2214(a), provided the non-moving party was not prejudiced. *See Matter of LiMandri*, 171 A.D.2d 747, 567 N.Y.S.2d 303 (2d Dep't 1991). So, too, can the court disregard a non-prejudicial mislabeling of a ground--for instance, styling a motion as one to dismiss for failure to state a cause of action when it is in reality one to dismiss under the statute of limitations. *See* Siegel, New York Practice § 258 (Connors 5th ed.). The key is prejudice (or lack thereof): if the party opposing the motion is hindered in the preparation of its opposition papers, the court should not overlook or disregard the movant's failure to comply with CPLR 2214(a). Also, the court should not treat the motion as made under a ground that is neither specified in the notice of motion nor addressed in the movant's papers supporting the motion. *See Matter of Tognino*, 87 A.D.3d 1153, 930 N.Y.S.2d 46 (2d Dep't 2011); *see also Bowen v. Nassau County*, 135 A.D.3d 800, 24 N.Y.S.3d 143 (2d Dep't 2016). That a court can overlook a movant's failure to comply with CPLR 2214(a) does not mean that it will; it is a discretionary call for the judge. *See, e.g., Pace v. Perk*, 81 A.D.2d 444, 440 N.Y.S.2d 710 (2d Dep't 1981).

C3211:7. Subdivision (a) Grounds Available by Motion or Answer.

As noted above, *see* Commentary C3211:2, a party can (but is not required to) raise subdivision (a) grounds in a pre-answer CPLR 3211 motion. The motion is optional, with the other option being to raise the grounds in an answer and seek relief on them later. *See* CPLR 3211(e). As our overview of each of the paragraphs of subdivision (a) will disclose, most grounds must be raised in a pre-answer CPLR 3211 motion or an answer, some grounds can be raised at any time, and a couple grounds must be raised in a pre-answer motion or taken by answer and moved on with dispatch. While a defendant is free to raise some by motion and others by answer, a defendant is permitted only one CPLR 3211 motion, *see* Commentary C3211:51, and waiver provisions are associated with most of the subdivision (a)

grounds. *See* Commentaries C3211:53-55. Discussions of the "single motion rule" (CPLR 3211[e]) and the nuances of the various waiver provisions are deferred to later in the Commentaries.

C3211:8. Sua Sponte Dismissals.

CPLR 3211(a) provides a lengthy (but not quite exhaustive) list of dismissal grounds. *See* Commentaries C3211:5. Most of these grounds require or at least contemplate a motion by a party invoking one or more of them. Does the law permit a court to dismiss a complaint sua sponte; that is, on its own accord without the prompting of a party? "Yes, but rarely." That is the answer to glean from the recent case law on the subject, which has been receiving some attention in the realm of residential mortgage foreclosure litigation.

In that unique world, the question often arises whether a plaintiff has standing to maintain an action. *See* Commentary C3211:13. This is an outgrowth of the prevalence of the assignment (or other manner of transfer) of notes and mortgages from the original lenders to other banks, financial institutions and financial service companies. Such assignments and transfers were fueled by the rise of the secondary mortgage market. Because of both the volume of these transactions and that a note and the mortgage related to it may be held by separate entities, nailing down the entity that has standing to commence a particular residential mortgage foreclosure action can pose a challenge.

Some trial courts, frustrated by failures of residential mortgage foreclosure plaintiffs to demonstrate standing, have taken to dismissing complaints sua sponte. The Appellate Division has not indulged these dismissals, reversing them and stressing that a court's power to dismiss a complaint sua sponte should be exercised "sparingly and only when extraordinary circumstances exist to warrant dismissal." *E.g., U.S. Bank Nat. Ass'n v. Ahmed*, 137 A.D.3d 1106, 29 N.Y.S.3d 33 (2d Dep't 2016); *U.S. Bank Nat. Ass'n v. Flowers*, 128 A.D.3d 951, 11 N.Y.S.3d 186 (2d Dep't 2015); *Citimortgage, Inc. v. Chow Ming Tung*, 126 A.D.3d 841, 7 N.Y.S.3d 147 (2d Dep't 2015); *see Deutsche Bank Nat. Trust Co. v. Meah*, 120 A.D.3d 465, 991 N.Y.S.2d 92 (2d Dep't 2014). In New York Practice, standing generally does not relate to a court's subject matter jurisdiction over an action; it is an affirmative defense that must be raised by a defendant or it is waived. *See Wells Fargo Bank Minnesota, N.A. v. Mastropaolo*, 42 A.D.3d 239, 837 N.Y.S.2d 247 (2d Dep't 2007); *see also* Commentary C3211:13. Because standing is an affirmative defense that a defendant can waive, a plaintiff's failure to demonstrate its standing to maintain a residential mortgage foreclosure action does not present extraordinary circumstances warranting a sua sponte dismissal.

With all of the dismissal grounds authorized by CPLR 3211(a) and elsewhere, why would a court get involved in the sua-sponte-dismissal business? Maybe the court perceives a conclusive affirmative defense to an action but the defendant failed to raise or waived it. Maybe the court believes that a plaintiff is wasting the court's time with a baseless suit. *See Hurd v. Hurd*, 66 A.D.3d 1492, 885 N.Y.S.2d 655 (4th Dep't 2009); *Myung Chun v. North American Mortgage Co.*, 285 A.D.2d 42, 729 N.Y.S.2d 716 (1st Dep't 2001). Or maybe the court is offended at the conduct of a plaintiff. In light of the case law, it is unlikely that either of the first two scenarios provide sufficient cause for a court to dismiss sua sponte. The third scenario, however, might. The Court in *Chun* suggested that "egregious" conduct by a plaintiff that "flout[ed] the integrity of th[e Court]" could allow for a sua sponte dismissal. *Cf. CDR Creances, S.A.S. v. Cohen*, 23 N.Y.3d 307, 991 N.Y.S.2d 519, 15 N.E.3d 274 (2014) (finding that court has "inherent power" to address conduct meant to undermine truth-seeking function of judicial system and place in question integrity of courts and justice system [i.e., "fraud on the court"]); Commentary C3126:12, 2014 Supplementary Practice Commentaries; *Wells Fargo Bank, N.A. v. Pabon*, 138 A.D.3d 1217, 31 N.Y.S.3d 221 (3d Dep't 2016) (sua sponte dismissal inappropriate; record neither supported Supreme Court's finding that affidavit on which plaintiff relied was perjured nor showed fraud by plaintiff).

The Second Department has suggested that "a pattern of willful noncompliance with court-ordered deadlines" may also provide for extraordinary circumstances justifying such a dismissal. *U.S. Bank Nat. Ass'n v. Polanco*, 126 A.D.3d 883, 7 N.Y.S.3d 156 (2d Dep't 2015); *see Williams v. North Shore LIJ Health System*, 119 A.D.3d 935, 990 N.Y.S.2d 260 (2d Dep't 2014) (affirming Supreme Court's order dismissing complaint sua sponte based on plaintiff's failure

to comply with multiple directives to file a bill of particulars setting forth alleged negligence of each of over 100 defendants in medical malpractice action); *cf. Citimortgage, Inc. v. Petragnani*, 137 A.D.3d 1688, 27 N.Y.S.3d 780 (4th Dep't 2016) (missing single court-ordered deadline by one week did not warrant sua sponte dismissal).

But given the paucity of examples of sua sponte dismissals that have been upheld, it is hard for a judge to dismiss a complaint sua sponte with much confidence. Should a statute or other authority expressly authorize a court to dismiss sua sponte, the court can have at it, but instances in which a court is so authorized are few. *See* 22 NYCRR 202.27 (authorizing a trial court to dismiss based on a plaintiff's failure to appear for or be ready to proceed at any duly scheduled court appearance); *see also Grant v. Rattoballi*, 57 A.D.3d 272, 869 N.Y.S.2d 53 (1st Dep't 2008); *see generally Tirado v. Miller*, 75 A.D.3d 153, 160, 901 N.Y.S.2d 358, 363-364 (2d Dep't 2010) ("there are circumstances when courts may act sua sponte and others when courts may not do so. The telltale sign of the difference, for many but not all circumstances, is the enabling language of the relevant statutory provision pursuant to which the court acts").

Putting aside the circumstances under which a court might be able to dismiss a complaint in the absence of a motion by a party, due process concerns abound when a court acts sua sponte, particularly when it acts to terminate a proceeding. In *Chun v. North American Mortgage Co.*, *supra*, the Court highlighted the due process territory on which a sua sponte dismissal intrudes, observing that the plaintiff is deprived of the venerable due process duo of notice and an opportunity to be heard. Thus, a court considering, sua sponte, the ultimate relief of dismissal should gauge whether the plaintiff had any prior notice that dismissal could occur, and whether the plaintiff might have anything to offer by way of legal argument or evidence that could persuade the court not to dismiss the action. On the notice score, a prior court order, correspondence from the court, or on-the-record statements made by the court during an appearance might suffice. If the court finds that the plaintiff lacked notice, that the plaintiff could present arguments or factual submissions that may persuade the court not to dismiss the action, or both, the court should consider notifying the parties that it is contemplating dismissal and inviting submissions by the parties. *See Bank of New York v. Castillo*, 120 A.D.3d 598, 991 N.Y.S.2d 446 (2d Dep't 2014) (when a court exercises the power to grant relief sua sponte, it must afford the parties a reasonable opportunity to be heard); *see also U.S. Bank, N.A. v. McCrory*, 137 A.D.3d 1517, 29 N.Y.S.3d 594 (3d Dep't 2016); *cf. Cadichon v. Facelle*, 18 N.Y.3d 230, 938 N.Y.S.2d 232, 961 N.E.2d 623 (2011) (discussing the process a court should afford the parties before dismissing a complaint under CPLR 3216 on the court's own motion).

C3211:9. CPLR 3211(a) Motion Contrasted With Summary Judgment.

Usually, a CPLR 3211(a) motion must be made before a defendant's answering time expires. It is therefore thought of as the pre-answer dismissal device. A summary judgment motion cannot be made until issue has been joined; that is to say until a responsive pleading, such as an answer, has been served. Thus, summary judgment is the post-answer dismissal device.

A motion to dismiss under CPLR 3211(a) must be predicated on one or more grounds enumerated in that subdivision, *see* Commentary C3211:5, while summary judgment may be sought on any basis (including a CPLR 3211[a] ground) that resolves part or all of the case. *See* Siegel, New York Practice § 278 (Connors 5th ed.).

An order granting a CPLR 3211(a) motion is not a disposition on the merits of the action (unless the motion was properly converted to a summary judgment motion). Rather, it is res judicata of whatever was determined. Siegel, New York Practice § 276. The res judicata effect of a granted CPLR 3211(a) motion is explored below. *See* Commentaries C3211:62-65. Conversely, an order granting summary judgment is usually entitled to full res judicata treatment. *See* Commentary C3212:21; Siegel, New York Practice § 287.

The phenomenon known as "searching the record," the power of a court to review the motion record before it and, if warranted, grant judgment to a non-moving party even in the absence of a request to do so, is available to a court adjudicating a summary judgment motion. *See* CPLR 3212(b); Commentary C3212:23. "Searching the record" is not

permissible on a CPLR 3211(a) motion. *Torrance Construction, Inc. v. Jaques*, 127 A.D.3d 1261, 8 N.Y.S.3d 441 (3d Dep't 2015); *cf* Commentary C3211:42.

Paragraph 1

C3211:10. Defense Based on "Documentary Evidence."

CPLR 3211(a)(1) allows a defendant to seek dismissal of a complaint (or part of it) based on a defense "founded upon documentary evidence." The ground did not exist prior to the enactment of the CPLR. It was included as a backup provision, providing a dismissal mechanism in situations where a defendant has a document that defeats a cause of action but the defendant is unable to point to one of the more specific grounds listed in subdivision (a). 221 Siegel's Practice Review 2, *Second Department Shows Futility of Relying Exclusively on "Documentary Evidence" Standard of CPLR 3211(a)(1) When What Party Really Wants is Summary Judgment* (May 2010); *see Fontanetta v. John Doe 1*, 73 A.D.3d 78, 84, 898 N.Y.S.2d 569, 574 (2d Dep't 2010) ("According to th[e] [1957 First Preliminary Report of the Advisory Committee on Practice and Procedure], the purpose of CPLR 3211(a)(5) was to cover the most common affirmative defenses founded upon documentary evidence, specifically, estoppel, arbitration and award, and discharge in bankruptcy, whereas section 3211(a)(1) was enacted to 'cover all others that may arise as for example, a written modification or any defense based on the terms of a written contract' ") (citing 1957 NY Legis. Doc. no. 6[b] at 85).

A motion pursuant to CPLR 3211(a)(1) must be made within the defendant's time to respond to the complaint or raised in an answer, otherwise it is waived.

CPLR 3211 does not define the phrase "documentary evidence," but its ordinary meaning suggests that anything reduced to paper could qualify. "Documentary evidence" actually encompasses precious few documents, making CPLR 3211(a)(1) a decidedly narrow ground on which to seek dismissal. *See* Higgitt, *CPLR 3211(a)(1) and (a)(7) Dismissal Motions--Pitfalls and Pointers*, 83 New York State Bar Journal 32 (Nov./Dec. 2011). A paper qualifies as "documentary evidence" if--and only if--it satisfies the following criteria: (1) it is unambiguous; (2) it is of undeniable authenticity; and (3) its contents are essentially undeniable. *See Fontanetta v. John Doe 1*, *supra*. Most motion submissions cannot satisfy this standard. *See*, *e.g., Eisner v. Cusumano Construction, Inc.*, 132 A.D.3d 940, 18 N.Y.S.3d 683 (2d Dep't 2015) (affidavits and text messages); *JP Morgan Chase Bank, N.A. v. Balliraj*, 113 A.D.3d 821, 979 N.Y.S.2d 533 (2d Dep't 2014) (deposition testimony); *Mason v. First Central National Life Ins. Co. of N.Y.*, 86 A.D.3d 854, 927 N.Y.S.2d 894 (3d Dep't 2011) (medical records); *Integrated Construction Services, Inc., v. Scottsdale Ins. Co.*, 82 A.D.3d 1560, 920 N.Y.S.2d 166 (2d Dep't 2011) (letters). Notably, an affidavit cannot constitute "documentary evidence" because its contents can be controverted by other evidence--such as another affidavit. *See, e.g., J.A. Lee Electric, Inc. v. City of New York*, 119 A.D.3d 652, 990 N.Y.S.2d 223 (2d Dep't 2014); *Flowers v. 73rd Townhouse, LLC*, 99 A.D.3d 431, 951 N.Y.S.2d 393 (1st Dep't 2012); *Lopes v. Bain*, 82 A.D.3d 1553, 920 N.Y.S.2d 792 (3d Dep't 2011); *cf. Reiss v. Deutsche Bank National Trust Co.*, ___ Misc. 3d ___, ___ N.Y.S.3d ___, 2016 WL 4431025 (Sup. Ct., Westchester County 2016) (affidavit prepared by plaintiffs in connection with their application for loan modification could constitute "documentary evidence"; affidavit reflected out-of-court transaction). (However, an affidavit may have an important role to play on a CPLR 3211[a][1] motion, see below).

What type of evidence can attain the rank of "documentary"? Judicial records and documents reflecting out-of-court transactions, e.g., notes, mortgages, deeds and contracts, may. *Fontanetta v. John Doe 1*, *supra*; *see* Siegel, New York Practice § 259 (Connors 5th ed.); *see also Sunset Café, Inc. v. Mett's Surf & Sports Corp.*, 103 A.D.3d 707, 959 N.Y.S.2d 700 (2d Dep't 2013) (lease); *Nisari v. Ramjohn*, 85 A.D.3d 987, 927 N.Y.S.2d 358 (2d Dep't 2011) (insurance policy); *Cochard-Robinson v. Concepcion*, 60 A.D.3d 800, 875 N.Y.S.2d 224 (2d Dep't 2009) (contract); *Crepin v. Fogarty*, 59 A.D.3d 837, 874 N.Y.S.2d 278 (3d Dep't 2009) (deed); *150 Broadway N.Y. Assoc, L.P. v. Bodner*, 14 A.D.3d 1, 784 N.Y.S.2d 63 (1st Dep't 2004) (contract). So too can e-mails, maybe. *Compare Mendoza v. Akerman Senterfitt, LLP*, 128 A.D.3d 480, 10 N.Y.S.3d 18 (1st Dep't 2015); *Kolchins v. Evolution Markets, Inc.*, 128 A.D.3d

47, 8 N.Y.S.3d 1 (1st Dep't 2015); *Art and Fashion Group Corp. v. Cyclops Production, Inc.*, 120 A.D.3d 436, 992 N.Y.S.2d 7 (1st Dep't 2014); and *Amsterdam Hospitality Group, LLC* v. *Marshall-Alan Associates, Inc.*, 120 A.D.3d 431, 992 N.Y.S.2d 2 (1st Dep't 2015) *with JBGR, LLC v. Chicago Title Ins. Co.*, 128 A.D.3d 900, 11 N.Y.S.3d 83 (2d Dep't 2015); *25-01 Newkirk Ave., LLC v. Everest National Insurance Co.*, 127 A.D.3d 850, 7 N.Y.S.3d 325 (2d Dep't 2015); *Zellner v. Odyl, LLC*, 117 A.D.3d 1040, 986 N.Y.S.2d 592 (2d Dep't 2014).

If the evidence on which the defendant relies is not "documentary" the motion must be denied. *Fontanetta v. John Doe 1*, *supra*.

Above, we went on record that an affidavit prepared in connection with litigation cannot constitute "documentary evidence." Does that mean that an affidavit can play no role on a CPLR 3211(a)(1) motion? We think there is room, albeit limited, for the affidavit. One of the criteria a paper must satisfy before it gets stamped "documentary" is that it be undeniably authentic. Therefore, unless the plaintiff stipulates to or otherwise acknowledges the authenticity of a document, a defendant proffering it on a CPLR 3211(a)(1) motion should be able to tender evidence showing the document to be authentic. An affidavit (or, where appropriate, an affirmation [*see* CPLR 2106]) should be permissible for the important (but limited) purpose of authenticating the "documentary evidence." *Hefter v. Elderserve Health, Inc.*, 134 A.D.3d 673, 22 N.Y.S.3d 454 (2d Dep't 2015); *Muhlhahn v. Goldman*, 93 A.D.3d 418, 939 N.Y.S.2d 420 (1st Dep't 2012); *see VIT Acupuncture P.C. v. State Farm Automobile Ins. Co.*, 28 Misc.3d 1230(A), 958 N.Y.S.2d 64 (table), 2010 WL 3463735 (Civil Court of City New York, Kings County 2010). The affidavit would not serve as the "documentary evidence" on which the CPLR 3211(a)(1) motion is premised, but rather would demonstrate that the purported "documentary evidence" qualifies as such.

Assuming the movant has adduced "documentary evidence" in support of its CPLR 3211(a)(1) motion, what must that evidence show to warrant dismissal? Relief is appropriate where the evidence conclusively refutes the plaintiff's allegations or conclusively establishes a defense to the action. *See Spoleta Construction, LLC v. Aspen Ins. UK Ltd.*, 27 N.Y.3d 933, 30 N.Y.S.3d 598, 50 N.E.3d 222 (2016); *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 746 N.Y.S.2d 858, 774 N.E.2d 1190 (2002). In gauging whether the defendant's evidence accomplishes that feat, the familiar pro-pleader rules of decision must be applied: the complaint is to be afforded a liberal construction, the facts as alleged in the complaint accepted as true, and the plaintiff accorded the benefit of every favorable inference. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 974, 638 N.E.2d 511, 513 (1994).

In opposing a CPLR 3211(a)(1) motion, a plaintiff is free to submit evidence demonstrating that the defendant's evidence does not conclusively resolve the action (or challenged causes of action). Moreover, a plaintiff can invoke CPLR 3211(d) to forestall a decision on the merits of the motion if the plaintiff needs time to gather evidentiary materials necessary to frame its opposition. Under subdivision (d), a court can deny a subdivision (a) motion or adjourn it to allow the plaintiff an opportunity to procure affidavits or pursue disclosure. *See* Commentaries C3211:46-47.

A couple of miscellaneous matters. A valid forum selection clause dictating that an action be brought in a forum other than New York does not deprive a New York court of subject matter jurisdiction over the matter. *See* CPLR 3211(a)(2). Rather, a defendant to a New York action who believes that a forum selection clause requires the dispute to be litigated in the courts of another jurisdiction should raise the issue by motion under CPLR 3211(a)(1). Why is this the proper procedural path? Because a contractual forum selection clause may constitute "documentary evidence." *Lischinskaya v. Carnival Corp.*, 56 A.D.3d 116, 865 N.Y.S.2d 334 (2d Dep't 2008); *see Lowenbraun v. McKeon*, 98 A.D.3d 655, 950 N.Y.S.2d 381 (2d Dep't 2012). An agreement to arbitrate a dispute is not a defense to an action brought on that dispute; the proper remedy for the party seeking arbitration is to move to compel it. *Allied Building Inspectors International Union of Operating Engineers, Local Union No. 211, ALF-CIO v. Office of Labor Relations of the City of New York*, 45 N.Y.2d 735, 738, 408 N.Y.S.2d 476, 478-479, 380 N.E.2d 303, 305 (1978). Thus, an agreement to arbitrate cannot be the basis for a motion to dismiss under CPLR 3211(a)(1). *Curran v. Estate of Curran*, 87 A.D.3d 607, 928 N.Y.S.2d 463 (2d Dep't 2011).

As to the interplay between CPLR 3211(a)(1) and (a)(7) (failure to state a cause of action), *see* Higgitt, *CPLR 3211(a)(1) and (a)(7) Dismissal Motions--Pitfalls and Pointers*, 83 New York State Bar Journal 32, 34-35 (Nov./Dec. 2011). In closing, a thought for the careful practioner. Only an attorney both familiar with the limited utility of CPLR 3211(a)(1) and armed with the right evidence should rely solely on the "documentary" evidence ground. The wise move for the attorney who wants to invoke paragraph 1 is to raise paragraph 7 too.

Paragraph 2

C3211:11. Lack of Subject Matter Jurisdiction.

Subject matter jurisdiction is a question of competence: does a court have the competence to entertain a given action? *Lacks v. Lacks*, 41 N.Y.2d 71, 390 N.Y.S.2d 875, 359 N.E.2d 384 (1976). That competence comes from the New York State Constitution and statutes; the constitution, a statute or both can provide a court with the authorization to hear and decide a particular type of controversy. A court may have broad subject matter jurisdiction--the New York State Supreme Court (*Thrasher v. U.S. Liability Ins. Co.*, 19 N.Y.2d 159, 278 N.Y.S.2d 793, 225 N.E.2d 503 [1967])--or very narrow jurisdiction--a local "Justice Court" (*see* Siegel, New York Practice § 22 [Connors 5th ed.]). A court lacks subject matter jurisdiction over an action if "the matter before the court [i]s not the kind of matter on which the court ha[s the] power to rule." *Manhattan Telecommunications Corp. v. H & A Locksmith, Inc.*, 21 N.Y.3d 200, 203, 969 N.Y.S.2d 424, 426, 991 N.E.2d 198, 200 (2013).

CPLR 3211(a)(2) provides the means by which a party can seek dismissal of an action for want of subject matter jurisdiction. So fundamental is this particular objection that it can be raised any time, CPLR 3211(e); Commentary C3211:49, and cannot be waived. *Lacks v. Lacks*, 41 N.Y.2d at 75, 390 N.Y.S.2d at 878, 359 N.E.2d at 387. If the court concludes that it does not have subject matter jurisdiction over a case, it can dismiss the action on its own initiative. *Robinson v. Oceanic Steam Navigation Co.*, 112 N.Y. 315, 19 N.E. 625 (1889).

Our State Supreme Court has almost limitless subject matter jurisdiction, the significant limitations being where the federal courts have exclusive jurisdiction over a matter and where the Court of Claims has exclusive jurisdiction. Siegel, New York Practice § 12. There are some other limitations that occasionally cause the issue of subject matter jurisdiction to arise. *See Hafif v. Rabbinical Council of Syrian & Near Eastern Jewish Communities in America*, 140 A.D.3d 1017, 34 N.Y.S.3d 160 (2d Dep't 2016) (courts lack subject matter jurisdiction over certain religious disputes); *Wells Fargo Bank, N.A. v. Chukchansi Economic Development Auth.*, 118 A.D.3d 550, 988 N.Y.S.2d 160 (1st Dep't 2014) (courts lack subject matter jurisdiction over the internal affairs of Indian tribes); *Hunt Construction Group, Inc. v. Oneida Indian Nation*, 53 A.D.3d 1048, 862 N.Y.S.2d 423 (4th Dep't 2008) (courts generally lack subject matter jurisdiction over damages suits against Indian tribes). Therefore, issues relating to subject matter jurisdiction are most likely to arise in New York's lower trial courts, e.g., New York City Civil Court, city courts outside of New York City, County Courts, etc. *See* Higgitt, *A Nullity or Not?--The Status of a Default Judgment Entered Absent Compliance with CPLR 3215(f)*, 73 Alb. L. Rev. 807, 824, n.75 (2010).

A plaintiff's lack of "standing" does not affect a New York State court's subject matter jurisdiction over the action; the issue of standing is treated on par with the issue of capacity. *See* Commentary C3211:13.

An enforceable forum selection clause does not deprive a New York Court of subject matter jurisdiction over an action brought here in contravention of the clause. *Lischinskaya v. Carnival Corp.*, 56 A.D.3d 116, 865 N.Y.S.2d 334 (2d Dep't 2008). A defendant looking to enforce a forum selection clause should employ CPLR 3211(a)(1). *See* Commentary C3211:10.

Paragraph 3

C3211:12. Plaintiff's Lack of Capacity.

"Capacity" concerns a plaintiff's power to appear before and bring an action in court. *Community Board 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 155, 615 N.Y.S.2d 644, 647, 639 N.E.2d 1, 4 (1994). "Legal capacity to sue, or lack thereof, often depends purely on the [plaintiff's] status, such as that of an infant, an adjudicated incompetent, a trustee, certain governmental entities or ... a business corporation." *Security Pacific Nat. Bank v. Evans*, 31 A.D.3d 278, 279, 820 N.Y.S.2d 2, 3 (1st Dep't 2006). The inquiry here is not whether the plaintiff suffered an injury or was otherwise harmed by the defendant's alleged conduct or inaction--that gets into a plaintiff's "standing," which is a separate question (see below)--but rather whether the law recognizes the plaintiff as the proper bearer of the lawsuit.

Some situations where the capacity question may rear its head: where the plaintiff is an artificial entity (such as a corporation or an unincorporated association), *Community Board 7 of Borough of Manhattan v. Schaffer, supra*; where the plaintiff is a governmental entity created by a legislative enactment, *id.*; *see Excess Line Ass'n of New York (ELANY) v. Waldorf & Associates*, 130 A.D.3d 563, 13 N.Y.S.3d 464 (2d Dep't 2015); where the plaintiff is a municipality seeking to contest a State decision that affects the municipality in its governmental capacity or as a representative of its inhabitants, *Matter of Town of Verona v. Cuomo*, 136 A.D.3d 36, 22 N.Y.S.3d 241 (3d Dep't 2015); where the plaintiff filed for bankruptcy but failed to list its cause of action as an asset, *Whelan v. Longo*, 23 A.D.3d 459, 808 N.Y.S.2d 95 (2d Dep't 2005); *George Strokes Elec. and Plumbing Inc. v. Dye*, 240 A.D.2d 919, 659 N.Y.S.2d 129 (3d Dep't 1997); *see Collins v. Suraci*, 110 A.D.3d 1214, 973 N.Y.S.2d 828 (3d Dep't 2013); and where the plaintiff is an infant purporting to sue on his or her own behalf. Siegel, New York Practice § 261 (Connors 5th ed.).

Plaintiff's lack of capacity may be raised in a pre-answer motion or asserted in an answer; if neither step is taken, the defense is waived. CPLR 3211(e).

Capacity to sue--the right to come into court--and possession of a cause of action--the right to relief--are distinct concepts. *Rainbow Hospitality Management, Inc. v. Mesch Engineering, P.C.*, 270 A.D.2d 906, 907, 705 N.Y.S.2d 765, 766 (4th Dep't 2000); *see Edwards v. Siegel, Kelleher & Khan*, 26 A.D.3d 789, 811 N.Y.S.2d 828 (4th Dep't 2006). But the line between the two can sometimes be blurry. *See Community Board 7* or *Borough of Manhattan v. Schaffer*, 84 N.Y.2d at 155, 615 N.Y.S.2d at 647, 639 N.E.2d at 4 (1994); Siegel, New York Practice § 261. In *Rainbow Hospitality Management*, plaintiff sued defendants for damages. Defendants moved, during trial (*see* CPLR 4401), to dismiss the complaint, arguing that plaintiff had no right to relief because plaintiff did not exist when the conduct giving rise to the action occurred and sustained no injury as a result of that conduct. The Fourth Department rejected plaintiff's assertion that defendants' argument was premised on lack of capacity and therefore waived because defendants did not raise that ground in a pre-answer motion or in their answers, concluding instead that defendants' argument touched on the legal sufficiency of the complaint. *Rainbow Hospitality Management, Inc. v. Mesch Engineering, P.C.*, 270 A.D.2d at 907, 705 N.Y.S.2d at 766.

Why is the distinction between the two grounds so important? Because, as *Rainbow Hospitality Management* illustrates, an objection under CPLR 3211(a)(7) (failure to state a cause of action) can be raised any time in the litigation, while an objection under CPLR 3211(a)(3) (lack of capacity) must be raised in a pre-answer motion or in an answer otherwise it is waived. CPLR 3211(e). Fortunately, the practitioner faced with one of these close calls need not spend much time analyzing which paragraph actually applies; both grounds can be raised in the pre-answer motion or the answer.

Note that paragraph 3 deals only with the lack of capacity of the plaintiff. If the defendant's capacity is called into question because the defendant is an infant or operating under a disability, paragraph 5 is the ground for the motion. *See* Commentary C3211:18.

C3211:13. Lack of "Standing" as Going to "Capacity."

As discussed above, CPLR 3211(a)(3) provides that a defendant can seek dismissal of the complaint on the ground that the plaintiff lacks the "capacity," i.e., the power, to appear before the court. That provision does not expressly allow for dismissal based on a plaintiff's lack of "standing." A plaintiff lacks standing if it does not have a sufficiently cognizable stake in the outcome of the litigation. *Community Board 7 of the Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 615 N.Y.S.2d 644, 639 N.E.2d 1 (1996). While capacity and standing are conceptually different, *Silver v. Pataki*, 96 N.Y.2d 532, 730 N.Y.S.2d 482, 755 N.E.2d 842 (2001), they are treated as synonyms for the purposes of applying paragraph 3. *Wells Fargo Bank Minnesota, N.A. v. Mastropaolo*, 42 A.D.3d 239, 837 N.Y.S.2d 247 (2d Dep't 2007). Therefore, a defendant can challenge a plaintiff's standing by moving to dismiss pre-answer or raising lack of standing in the answer. *Id.* Dismissal under CPLR 3211(a)(2) for want of subject matter jurisdiction does not lie for lack of standing. *See id.*; Commentary 3211:11.

The practice in federal court is different. There, standing relates to a court's subject matter jurisdiction. *See* Siegel, New York Practice § 611 (Connors 5th ed.).

If a plaintiff has standing at the time the action was commenced but transfers its interest in the subject matter of the suit to another while the action is pending, the plaintiff does not necessarily lose standing. CPLR 1018 provides that, "[u]pon the transfer of an interest, the action may be continued by or against the original parties unless the court directs the persons [or entities] to whom the interest is transferred to be substituted or joined in the action." *See Wells Fargo Bank, N.A. v. Hudson*, 98 A.D.3d 576, 949 N.Y.S.2d 703 (2d Dep't 2012).

Historically, standing has not been a source of significant litigation in New York State courts. But the proliferation of contested residential mortgage foreclosure actions has created a wellspring of appellate case law addressing standing. Why is standing such a hot topic in this area? The volume of transfers of notes and mortgages, the complexity of many mortgage-related transactions, and the sheer number of foreclosure actions, among other factors, have created an environment conducive to questions on standing. Some clarity on the standing issue in the mortgage foreclosure realm was provided by the Court of Appeals in *Aurora Loan Services, LLC v. Taylor*, 25 N.Y.3d 355, 12 N.Y.S.3d 612, 34 N.E.3d 363 (2015) (holding that the note, not the mortgage, is the instrument that conveys standing to a plaintiff).

Paragraph 4

C3211:14. "Other Action Pending," Generally.

CPLR 3211(a)(4) authorizes dismissal of an action on the ground that there is another one pending involving the same subject matter. Paragraph 4's purpose is to prevent the consequences of duplicative litigation (e.g., conflicting judgments, the parties bearing the expense of litigating multiple, similar lawsuits). Note that paragraph 4 authorizes but does not require dismissal of an action that is similar to another; the provision cautions that a "court need not dismiss upon th[e] ground [that a similar action is pending] but may make such order as justice requires." Thus, a court confronted with a motion to dismiss the action before it in favor of another pending action has discretion to fashion relief appropriate under the circumstances. *See* Commentary 3211:17.

Paragraph 4 is available where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States." If the other action is pending in a foreign country, the defendant's remedy would be to seek a stay of the New York action under CPLR 2201, *see* Commentary 2201:10, or move to dismiss the New York action under the doctrine of forum non conveniens. *See* CPLR 327.

A summons and complaint (or an equivalent initiatory paper, such as a petition) must have been served in the other action, otherwise it is not "another action" within the meaning of CPLR 3211(a)(4). *Wharton v. Wharton*, 244 A.D.2d 404, 664 N.Y.S.2d 73 (2d Dep't 1997); *see John J. Campagna, Inc. v. Dune Alpin Farm Assoc.*, 81 A.D.2d 633, 438 N.Y.S.2d 132 (2d Dep't 1981). Where, for example, the prior action was commenced using a summons with notice, CPLR 305(b), and the complaint has not been served, a paragraph 4 motion does not lie. *Wharton v. Wharton, supra*.

And dismissal under paragraph 4 generally is not appropriate unless the complaint has been served in the present action. Siegel, New York Practice § 262 (Connors 5th ed.). Why is service of pleadings in both actions so important? Because it is the pleadings that allow the court to gauge whether the actions involve the same parties and the same cause of action. *Id.*

If there is "another action" pending in a New York, federal or sister state court, the next question becomes whether that action and the present action (i.e. the New York action in which the paragraph 4 motion was made) involve the same parties and the same cause of action. *See* Commentary 3211:15. If the other action and the present action do involve the same parties and the same cause of action, an important issue is which action was commenced first. *See* Commentary 3211:16. There is a solid, but rebuttable, presumption that the action that was commenced first will be the one that will be allowed to proceed. Assuming the other action and the present action are sufficiently similar, the court has a range of options. *See* Commentary 3211:17.

CPLR 3211(a)(4) must be raised in a pre-answer motion or asserted in the answer. CPLR 3211(e). The court should not dismiss an action sua sponte under paragraph 4. *Frederick v. Meighan*, 75 A.D.3d 528, 905 N.Y.S.2d 635 (2d Dep't 2010).

There is no federal statutory analog to CPLR 3211(a)(4). Where dismissal is sought in federal court of a federal action in deference to an action pending in state court, guidance must be sought from the case law. *See Bank of America v. Sharim, Inc.*, 2010 WL 5072118 (S.D.N.Y. 2010); *see* also C. Wright, A. Miller & E. Cooper, et al., 17A Fed. Prac. & Proc. Juris. § 4247 (3d ed.).

3211:15. Same Parties, Same Cause of Action.

As mentioned above, paragraph 4 seeks to prevent unnecessary duplicative litigation. If the other action and the present one are not sufficiently similar, there is no need to interfere with either one. Therefore, the court must determine whether the other action and the present one involve the same parties for the same cause of action.

Initially, it is important to stress that the other action and the present one need not be identical; substantial similarity will do. The inquiry is whether the following elements of the actions are substantially similar: (1) the parties; (2) the causes of action; and (3) the relief.

With respect to the parties, there must be substantial identity. *Scottsdale Ins. Co. v. Indemnity Ins. Corp. RRG*, 110 A.D.3d 783, 974 N.Y.S.2d 476 (2d Dep't 2013); *White Light Productions, Inc. v. On the Scenes Productions, Inc.*, 231 A.D.2d 90, 660 N.Y.S.2d 568 (1st Dep't 1997); *see Credit-Based Asset Servicing and Securitization, LLC v. Grimmer*, 299 A.D.2d 887, 750 N.Y.S.2d 673 (4th Dep't 2002); *K.S. Finance Corp. v. Grand Palace Hotel at the Park*, 272 A.D.2d 204, 709 N.Y.S.2d 512 (1st Dep't 2000). The presence of additional parties in one of the actions does not preclude a finding that the other action and the present one are substantially similar. *White Lights Productions, Inc. v. On the Scene Productions, Inc., supra*.

Despite the absence of one common defendant in the actions, there still may be substantial identity of the parties. If, for instance, the plaintiff, in separate actions, seeks the same damages for the same alleged injuries relating to the same wrongs from close corporate affiliates. *Syncora Guarantee Inc. v. J.P. Morgan Securities, LLC*, 110 A.D.3d 87, 970 N.Y.S.2d 526 (1st Dep't 2013).

The causes of action in the other action and the causes of action in the present one are substantially similar if they arise out of the same wrong or series of wrongs. *Rinzler v. Rinzler*, 97 A.D.3d 215, 947 N.Y.S.2d 844 (3d Dep't 2012); *White Light Productions, Inc., v. On the Scene Productions, Inc., supra*. This is the critical element. *Syncora Guarantee Inc. v. J.P. Morgan Securities, LLC, supra; Scottsdale Insurance Co. v. Indemnity Insurance Corp. RRG, supra*. When reviewing the causes of action in a case, it is important to account for any counterclaims, cross claims, etc., that may

have been interposed, as they count for the purpose of determining whether the causes of action in the two actions are substantially similar. *See* *Packes v. Cendent Mortgage Corp.*, 19 A.D.3d 386, 796 N.Y.S.2d 135 (2d Dep't 2005).

The relief sought in the other action and the present one must be the same or substantially the same. *White Light Productions, Inc. v. On the Scene Productions, Inc., supra*. That is not the case if the relief sought in one action is antagonistic or inconsistent with that sought in the other, or the purposes of the actions are entirely different. *Id.*, *see* *Marcus Dairy, Inc. v. Jacene Realty Corp.*, 193 A.D.2d 653, 597 N.Y.S.2d 465 (2d Dep't 1993).

If the parties, the causes of action, and the relief sought in the other action are substantially similar to those elements of the present action, it is on to consider which action was commenced first.

C3211:16. First-In-Time Rule.

Where there are two pending actions involving the same parties and the same causes of action, the court in which the first action was commenced is the one that ought to adjudicate the dispute. *City Trade & Industries, Ltd. v. New Central Jute Mills Co.*, 25 N.Y.2d 49, 302 N.Y.S.2d 557, 250 N.E.2d 52 (1969). This is the "first-in-time" rule.

In most jurisdictions, an action is commenced when the initiatory papers are filed with the appropriate clerk. Most courts in New York have such a commencement-by-filing protocol, *see* Commentary C304:1, and the federal courts look to the filing dates in determining which action came first. *See* *White Light Productions, Inc. v. On the Scene Productions, Inc.*, 231 A.D.2d 90, 96, 660 N.Y.S.2d 568 (1st Dep't 1997). The filing dates of the respective actions are therefore usually the information that will be used to establish priority between the actions. In the event the other action is pending in a sister state's court, check the law of that state to confirm that it too is a commencement-by-filing jurisdiction.

That an action was commenced first does not mean that it must be the one that is allowed to proceed. The presence of special circumstances permits a court to depart from the first-in-time rule. The following factors have been identified in the case law that may inform the court's discretionary determination of whether special circumstances exist.

One, whether the prior action was filed preemptively after the plaintiff in that action learned that the opposing party intended to commence a case. *L-3 Communications Corp v. SafeNet, Inc.*, 45 A.D.3d 1, 841 N.Y.S.2d 82 (1st Dep't 2007). The law seeks to discourage a race to the courthouse, as such an exercise creates "disincentives to responsible litigation by discouraging settlements due to fear of a preemptive strike and by providing a tactical advantage to defendants seeking a more favorable forum for litigation." *Id.*, 45 A.D.3d at 8, 841 N.Y.S.2d at 88. That the prior action was brought in the form of a declaratory judgment action may serve as a strong signal that it was commenced preemptively. *Id.*, 45 A.D.3d at 8-9, 841 N.Y.S.2d at 88-89; *see White Lights Productions, Inc. v. On the Scene Productions, Inc., supra*. That the first action was filed preemptively weighs heavily against application of the first-in-time rule and strongly in favor of finding special circumstances. *L-3 Communications Corp. v. Safenet, Inc.*, 45 A.D.3d at 9, 841 N.Y.S.2d at 89.

Two, whether the competing actions were commenced reasonably close in time. *Flintkote Co. v. American Mutual Liability Ins. Co.*, 103 A.D.2d 501, 505, 480 N.Y.S.2d 742, 745 (2d Dep't 1984), *aff'd for reasons stated* 67 N.Y.2d 857, 501 N.Y.S.2d 662, 492 N.E.2d 790 (1986); *L-3 Communications Corp., v. Safenet, Inc.*, 45 A.D.3d at 9, 841 N.Y.S.2d at 89. The closer in time the actions were commenced, the greater the likelihood the first-in-time rule will not be honored if other factors militate in favor of deferring to the subsequently-commenced action.

Three, whether New York has a significant nexus to the dispute. *L-3 Communications Corp. v. Safenet, Inc.*, 45 A.D.3d at 9, 841 N.Y.S.2d at 89; *see* *Fox Television Stations, Inc. v. Rainbow Broadcasting Limited Partnership*, 45 A.D.3d 399, 846 N.Y.S.2d 40 (1st Dep't 2007). The inquiry on this factor "is similar to that undertaken in applying the doctrine of forum non conveniens--whether the litigation and the parties have sufficient contact with [New York] to justify the

burdens imposed on our judicial system." *Flintkote Co. v. American Mutual Liability Ins., Co.*, 103 A.D.2d at 506, 480 N.Y.2d at 745-746, *aff'd for reasons stated, supra*. A New York-centric dispute suggests the New York court should keep the case; a case with tenuous New York connections should probably be dealt with by the other court. *AIG Financial Products Corp. v. Penncara Energy, LLC*, 83 A.D.3d 495, 922 N.Y.S.2d 288 (1st Dep't 2011).

Four, whether one action is further along compared to the other, and, relatedly, whether one party has been more diligent in prosecuting the action it commenced.

Five, whether one action is more comprehensive than the other. *AIG Financial Products Corp. v. Penncara Energy, LLC, supra*.

After considering these factors and any other material facts in the case, the court can ascertain whether the action that was filed first should keep its priority or whether the later-filed action should take top billing.

Where the other pending action involves the same parties and the same causes of action, and has priority over the present action, the court must decided whether to dismiss the present action or afford some other form of relief.

C3211:17. Remedies.

A court has broad discretion in considering whether to dismiss an action under CPLR 3211(a)(4). *Whitney v. Whitney*, 57 N.Y.2d 731, 454 N.Y.S.2d 977, 440 N.E.2d 1324 (1982). While dismissal of the present action is a potential disposition, the court is invited to make "such order as justice requires." The remedies available in a given case depend on whether the other action is in the same or a different court.

Other Action in Other Court

When the other action and the present action are pending in the same court, e.g., New York State Supreme Court, the court hearing the present action can direct a disposition of (or otherwise directly affect) the other action. Where, however, the other action is pending in a federal or sister state court, the court in the present action must tread carefully; directly affecting the other action is rarely appropriate. As the court in *Matter of NYSE Euronext Shareholders/ICE Litigation*, put it: "No judge in one jurisdiction, having found it appropriate to retain a case, has the ability to direct a judge in another jurisdiction, who has found it appropriate to do the same, to dismiss or stay his or her case." 39 Misc.3d 619, 626, 965 N.Y.S.2d 278, 283 (Sup. Ct., New York County 2013).

Several remedies have been recognized in the situation where the other action is pending in a federal or sister state court.

• Stay of the present action (the New York action). This is a common disposition, largely because it is the safest course of action. The court in the New York action stays the action; the other action proceeds. The stay remedy has been used where the other action would resolve issues critical in the New York action, ultimately streamlining the New York litigation, *342 West 30th Street Corp., v. Bradbury*, 30 Misc.3d 132(A), 958 N.Y.S.2d 649 (table), 2011 WL 135257 (App Term, 1st Dep't 2011); *see AIG Financial Products Corp. v. Penncara Energy, LLC*, 83 A.D.3d 495, 922 N.Y.S.2d 288 (1st Dep't 2011); the court in the New York action was concerned that the parties could not be afforded full relief in the other action, *Wells Fargo Bank, N.A. v. Pena*, 51 Misc.3d 541, 24 N.Y.S.3d 865 (Sup. Ct., Kings County 2016); *see SafeCard Services, Inc. v. American Express Travel Related Services Co., Inc.*, 203 A.D.2d 65, 65-66, 610 N.Y.S.2d 23, 23 (1st Dep't 1994) ("[o]ne alternative [measure] available to a court faced with a [paragraph 4] motion ... where it appears that the other action may be resolved in a manner which would not bar further proceedings in New York is to stay the New York action pending resolution of the other action"); and the court in the New York action found that the New York action should serve as a back-up to the other action. Allowing a stayed New York action to serve as a back-up is appropriate, among other situations, where the

defendant, who seeks dismissal of the New York action on the ground that another action is pending, has signaled that it will seek dismissal of the other action for some reasons unrelated to the merits of the dispute, e.g., that the other action is time-barred, that the court in the other action lacks personal jurisdiction over the defendant. *See Safeguard Services, Inc. v. American Express Travel Related Services, Co., supra*; Siegel, New York Practice § 262 (Connors 5th ed.). The stayed back-up action results in the New York court retaining jurisdiction and lending aid to the parties "if some unforeseen difficulty should arise in connection with the other action." *Flintkote Co. v. American Mutual Liability, Inc. Co.*, 103 A.D.2d 501, 507-508, 480 N.Y.S.2d 742, 746 (2d Dep't 1984), *aff'd for reasons stated* 67 N.Y.2d 857, 501 N.Y.S.2d 662, 492 N.E.2d 790 (1986).

• Coordination of litigation in different jurisdictions. If the court in the New York action determines that the action should proceed and the court in the other action determines that its action too should go forward, all is not lost. The two courts can coordinate the litigations, which "streamlines disclosure, minimizes conflicting rulings, and avoids burdensome and repetitive deposition appearances." Robert L. Haig, Commercial Litigation in New York State Court § 16:2 (4th ed.). A thoughtful discussion of this option can be found in *Matter of NYSE Euronext Shareholders/ICE Litigation, supra*. *See also* Commercial Litigation in New York State Courts §§ 16:1-16:2, 16:10-16:21.

• Dismissal of New York action.

• Enjoining a party from maintaining the other action. This is the nuclear option; it is rarely done as it directly interferences with the workings of another jurisdiction's courts. Examples are few. *Jay Franco and Sons Inc. v. G Studios, LLC*, 34 A.D.3d 297, 825 N.Y.S.2d 20 (1st Dep't 2006), is one. *Certain Underwriters at Lloyds, London v. Millennium Holdings, LLC*, 52 A.D.3d 295, 861 N.Y.S.2d 3 (1st Dep't 2008), is another. Only exceptional circumstances should lead a New York court to use this remedy. *See* 180 Siegel's Practice Review 3 (Dec. 2006), *Court Grants P Injunction to Stop D from Prosecuting Action in Sister State* (reviewing unusual facts underlying *Jay Franco* decision).

Other Action Pending in New York State Court

Where the other action is pending in a New York State court, the present court's options increase. If the actions are pending in the same court, say Supreme Court (our common example), and the actions involve identical parties, the court in the present action can directly affect the other action.

A common resolution (and a particularly effective one) is to order the two actions consolidated, which results in the merger of the separate actions into one. That action will have a single caption, will result in one verdict or decision, and will conclude in one judgment. Commentary C602:2. Consolidation is generally appropriate where two actions share common material questions of law or fact and no party would be prejudiced by the union of the actions. *See* CPLR 602(a). Having already concluded that the other action and the present action have the same parties and involve the same cause of action, *see* Commentary C3211:15, that general standard will likely be satisfied. *See Gutman v. Klein*, 26 A.D.3d 464, 811 N.Y.S.2d 413 (2d Dep't 2006).

Consolidation under the main consolidation statute, CPLR 602, ordinarily requires a motion by a party. Because of the phraseology of paragraph 4, the court has the power to order a consolidation on a CPLR 3211(a)(4) motion even if no party has asked for it. *See John J. Campagna, Inc. v. Dune Alpin Farm Assoc.*, 81 A.D.2d 633, 438 N.Y.S.2d 132 (2d Dep't 1981).

When consolidation is to be the result in an instance when one action is pending in Supreme Court and the other action is pending in a different New York court, it would have to be coupled with a removal under CPLR 602(b). The removal could be made only from a lower court to a higher one--only the Supreme and County Courts have removal

powers under CPLR 602(b)--and it would have to be shown that all of the parties to both actions have been notified. *See* Commentary C602:4.

An issue of the venue of the motion might be raised, although venue should not be a problem if all of the parties to both actions are the same. Assume that X is a party to the other action but not to the instant one. X can reasonably contend that even if she is notified, she may not be compelled to respond to a motion in a court to whose action she is not a party. And if she is a party to a Supreme Court action in county A but the motion is made in the action in the Supreme Court of county B, X can urge that CPLR 2212(a) protects her from the motion. The Court of Appeals has indicated that as long as notice of the consolidation application is given to all parties to all actions, consolidation can be made. *See Kent Development Co. Inc. v. Liccione*, 37 N.Y.2d 899, 340 N.E.2d 740, 378 N.Y.S.2d 377 (1975). The unfairness of directing a consolidation of actions without notifying all of the parties to all of them and giving them a chance to be heard is what has to be guarded against, indicates the Court in *Kent Development Co.* If some of the parties to the other action are not also parties to the present one, the court can direct one of the parties before it to give notice--to the as yet unnotified parties to the other action--that the court here is considering a consolidation, and that it is holding off decision until X date to afford all a hearing. That would give them a chance to address the matter, and the notice requirement should be satisfied with that. On that notice, every party can be heard on all of the issues that arise on a consolidation motion.

If the motion is granted, the questions arise of which county shall be the venue of the consolidated action and what the sequence shall be of the parties' rights to open and close to the jury. On those matters, *see* Siegel, New York Practice § 128 (Connors 5th ed.); Commentary C602:3.

When removal from a lower court to a higher one under CPLR 602(b) is directed, it is apparently sufficient that the motion in the higher court includes notice to all of the parties to the lower court suit even though one or more of the parties may not be parties to the higher court action. This must be so, or a removal under CPLR 602(b) would be defeated in every instance in which one of the parties in the lower court is not also a party in the higher one, a result inconsistent with the purpose of CPLR 602(b) and practice under it.

It would also be possible, of course, for the court in county X to condition consolidation on the approval of the court in the other county, county Y. And again, the party among the several parties to the X action who is also a party in Y (and who seeks the consolidation) could be directed to make a motion in Y for the conditioned approval, and on that motion all those parties in Y who are not also parties in X can be given due notice and should have no objections to motion venue under CPLR 2212(a).

The word “consolidation” used throughout this discussion should be deemed to embrace “joint trial” as an alternative. Both are authorized under CPLR 602(a) and should therefore be alternatives for the court to use under CPLR 3211(a)(4). For the technical differences between consolidation and joint trial, *see* Siegel, New York Practice § 127. And if the power to consolidate or jointly try, otherwise conferred by CPLR 602(a), is within the court's arsenal under CPLR 3211(a)(4), then so must be the removal power authorized by CPLR 602(b).

When related, unconsolidated actions are pending in the New York State courts in more than one judicial district, “coordination” of the litigation in those actions may be appropriate. *See* 22 NYCRR 202.69.

Paragraph 5

C3211:18. Affirmative Defenses Available on Subdivision (a) Motion.

Paragraph 5 contains a grab bag of objections all of which are classified as "affirmative defenses" by CPLR 3018(b). Most of the affirmative defenses listed in CPLR 3018(b) can support a CPLR 3211(a)(5) motion, but not all. *See* Commentary C3211:19.

The affirmative defenses available under paragraph 5 are as follows:

- arbitration and award;
- collateral estoppel;
- discharge in bankruptcy;
- infancy or other disability of the moving party;
- payment;
- release;
- res judicata;
- statute of limitations; and,
- statute of frauds.

A defendant who wishes to assert one or more of these affirmative defenses must raise the desired defenses in a pre-answer motion or the answer. CPLR 3211(e); *see Wan Li Situ v. MTA Bus Co.*, 130 A.D.3d 807, 14 N.Y.S.3d 89 (2d Dep't 2015). The failure to take either of those steps can lead to a waiver, but, as we discuss in a later section, the defendant can avoid the waiver by moving to amend the answer. *See* C3211:58.

Generally speaking, in order to establish that dismissal under a given paragraph 5 affirmative defense is warranted, the defendant must show that, as a matter of law, the defense on which it is relying bars the plaintiff's action (or the challenged portion of it). What specifically a defendant must show to discharge that burden will depend on the particular affirmative defense invoked.

The party opposing the motion (usually a plaintiff) is aided by the rules of decision applicable to a motion to dismiss under CPLR 3211(a)(5). Those rules require a court to "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Faison v. Lewis*, 25 N.Y.3d 220, 224, 10 N.Y.S.3d 185, 187, 32 N.E.3d 400, 402 (2015). These same rules apply to most other subdivision (a) grounds, most notably paragraphs 1 and 7. *See* Commentaries C3211:10, C3211:21. *Faison* highlights how important those rules are in practice.

In *Faison*, A and B inherited real property as tenants in common. By a quit claim deed, B conveyed her interest to C. C subsequently recorded a purported corrective deed, dated December 11, 2000, that included both A and B as grantors, thus conveying the entire fee to C. C then borrowed money from a bank, providing the bank with a mortgage encumbering the property. In August 2010, plaintiff, the administrator of A's estate, brought an action against, among other defendants, B, C and the bank to declare the "corrected" deed and the mortgage null and void. Plaintiff's theory: A's signature on the "corrected" deed was forged, making that deed and the mortgage void. For their part, B and C asserted that the "corrected" deed was valid. The bank moved to dismiss the complaint as against it under CPLR

3211(a)(5), arguing that the action was barred by the statute of limitations applicable to fraud actions. *See* CPLR 213(8).

The trial court granted the motion, and, as is relevant to our discussion, the Second Department affirmed.

The Court of Appeals reversed. It stated that a forged deed is void ab initio--a legal nullity at its inception--as is any encumbrance on the property based on the forged instrument. Because a forged deed and any encumbrance based on it are legal nullities, the Court concluded that "a claim against a forged deed is not subject to a statute of limitations defense." *Faison v. Lewis*, 25 N.Y.3d at 226, 10 N.Y.S.3d at 189, 32 N.E.3d at 404. Thus, plaintiff's suit survived the bank's CPLR 3211(a)(5) motion to dismiss. The Court indulged the assumption that the deed was forged because it applied those pro-pleader rules listed above (i.e., accept the plaintiff's version of the facts as true, accord the plaintiff the benefit of favorable inferences). That B and C asserted that the "corrected" deed was valid was of no moment at this procedural juncture.

Whether a particular defense has been established is dependent on the facts of the case and the law underlying the defense. Those are matters beyond these Commentaries but certain procedural points relevant to individual grounds should be highlighted.

The defense of arbitration and award is available only where a dispute has proceeded to arbitration and an award determining the dispute has been made. *See Langemyr v. Campbell*, 23 A.D.2d 371, 261 N.Y.S.2d 500 (2d Dep't 1965). Not just any old award will do; "an arbitration award may not serve as the foundation of the defense ... unless that award is subject to confirmation pursuant to CPLR article 75." *Marracino v. Alexander*, 73 A.D.3d 22, 23, 897 N.Y.S.2d 555, 556 (4th Dep't 2010). The requirement is not that the award actually be confirmed, a process permitted by CPLR 7510, but rather that the award be "subject to confirmation." Whether an award is capable or incapable of confirmation is a question for the statutes in CPLR article 75 and the case law interpreting them. *See* Commentaries to CPLR 7510 and 7511.

If a defendant is sued in court on a claim it believes is arbitrable and wants the matter sent to arbitration, defendant's remedy is a motion to compel arbitration under CPLR 7503. Siegel, New York Practice § 263 (Connors 5th ed.).

The doctrines of res judicata and collateral estoppel can apply to arbitration awards. *See* Siegel New York Practice § 456. Thus, where an arbitration award is at issue, there may be some overlap between the arbitration and award ground in paragraph 5, and the res judicata and collateral estoppel grounds. Any concern on counsel's part regarding the identity of the proper ground can be allayed by raising them all.

Collateral estoppel--issue preclusion--is a popular paragraph 5 ground. The doctrine is based on the notion that its not fair to permit a party to relitigate an issue decided against the party, and its purpose is to reduce litigation and conserve scarce court resources. *Kaufman v. Eli Lilly and Co.*, 65 N.Y.2d 449, 455, 492 N.Y.S.2d 584, 588, 482 N.E.2d 63, 67 (1985). On a CPLR 3211(a)(5) motion grounded on collateral estoppel, the movant must establish that the identical issue was necessarily decided in the prior action and that the previously decided issue is determinative in the present action. *Mahler v. Campagna*, 60 A.D.3d 1009, 876 N.Y.S.2d 143 (2d Dep't 2009). If the movant satisfies that burden, the plaintiff must demonstrate the absence of a full and fair opportunity to contest the prior determination. *Id.* Any doubts regarding the preclusive effect of a prior ruling or determination should be resolved in favor of the party against whom the estoppel would operate, *Wal-Mart Stores, Inc. v. United States Fidelity and Guaranty Co.*, 11 A.D.3d 300, 784 N.Y.S.2d 25 (1st Dep't 2004).

The "infancy or other disability" ground relates to the defendant's disability. It is a lack-of-capacity type defense; the defendant does not have the capacity, i.e., the power, to be a party to the lawsuit. Where the claim is that the plaintiff

lacks the capacity to bring suit because of infancy or some other disability, the proper dismissal ground is paragraph 3. *See* Commentary 3211:12.

With respect to the release ground, a release is a species of contract and therefore governed by the principles of law applicable to contracts. *Aetna Casualty and Surety Co. v. Jackowe*, 96 A.D.2d 37, 468 N.Y.S.2d 153 (2d Dep't 1983). Critical questions regarding the formation, construction and enforceability of a release can be answered only by reference to those principles. For a thorough overview of contract law, generally, and the law related to releases, specifically, *see* 2B N.Y. P.J.I.2d 4:1 (2017).

Res judicata--claim preclusion--dictates that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687, 688, 429 N.E.2d 1158, 1159 (1981). The doctrine of res judicata is designed to ensure finality, reduce litigation and promote judicial economy. *Xiao Yang Chen v. Fischer*, 6 N.Y.3d 94, 810 N.Y.S.2d 96, 843 N.E.2d 723 (2005). A party seeking dismissal on the res judicata ground must demonstrate the existence of a prior judgment on the merits. *Miller Manufacturing Co. v. Zeiler*, 45 N.Y.2d 956, 411 N.Y.S.2d 558, 383 N.E.2d 1152 (1978).

Where the defendant moves to dismiss on the ground that the action is time-barred, the defendant must make a *prima facie* showing that the period within which to commence a timely lawsuit has expired. If the defendant makes that showing, the burden shifts to the plaintiff to raise a question of fact as to whether the action was actually commenced within the applicable statute of limitations, the statute of limitations has been tolled, or an exception to the limitations period is applicable. *Quinn v. McCabe, Collins, McGeough & Fowler, LLP*, 138 A.D.3d 1085, 30 N.Y.S.3d 288 (2d Dep't 2016); *see Hoosac Valley Farmers Exchange v. AG Assets, Inc.*, 168 A.D.2d 822, 563 N.Y.S.2d 954 (3d Dep't 1990).

The last ground listed in paragraph 5 is the statute of frauds. The statute requires that certain agreements be reduced to a writing that reflects the particulars of the transaction, e.g., identifies the parties, states the essential terms of the agreement, and is signed by the party to be charged. *Durso v. Baisch*, 34 A.D.3d 646, 830 N.Y.S.2d 327 (2d Dep't 2007). The Pattern Jury Instructions, civil, contains a lengthy review of the statute of frauds. 2B N.Y. P.J.I.2d 4:1(VI)(D) (2017).

C3211:19. Comparison of Affirmative Defenses of CPLR 3018(b) with Dismissal Grounds of CPLR 3211(a)(5).

CPLR 3018(b) defines "affirmative defense" and lists the main defenses. All of the listed defenses are contained in paragraph 5 except for three: the culpable conduct of the plaintiff under CPLR article 14-A, facts showing illegality, and fraud. The affirmative defenses listed in paragraph 5 can be raised by pre-answer motion or in the answer; the three omitted defenses lack the pre-answer motion option. Or do they?

CPLR 3211(a)(7), which allows for dismissal based on the plaintiff's failure to state a cause of action, can be employed to direct the defense of illegality at the complaint, at least where the illegality appears on the face of the complaint. *National Recovery Systems v. Mazzei*, 123 Misc.2d 780, 475 N.Y.S.2d 208 (Sup. Ct., Suffolk County 1984); *see McCall v. Frampton*, 99 Misc.2d 159, 415 N.Y.S.2d 752 (Sup. Ct., Westchester County 1979). Given the manner in which CPLR 3211(a)(7) has been interpreted by many courts, a defendant wishing to challenge a cause of action on the ground of illegality may be able to submit evidence in support of its paragraph 7 motion and obtain dismissal even where the face of the complaint is unblemished by illegality. *See* Commentaries C3211:23. CPLR 3211(a)(7) is available too as a means for a defendant to seek dismissal of a cause of action on the affirmative defense of fraud, provided the fraud can be summarily established on the pre-answer motion. *See* Commentary C3018:20; *see also* Siegel, New York Practice § 263 (Connors 5th ed.). Given the elements of fraud and the heightened burden of the proof on a claim of it, *see* 2A N.Y. P.J.I.2d 3:20 (2017), resolution of an affirmative defense of fraud at the pre-answer stage of an action should be a rare event.

That leaves the defense of the plaintiff's culpable conduct. Can that defense be packaged as a CPLR 3211(a)(7) motion? Probably not.

That affirmative defense is based on the "culpable conduct [of the plaintiff] claimed in diminution of damages as set forth in [CPLR article 14-A]." CPLR 3018(b). CPLR article 14-A is our comparative fault law; it abrogated the common law doctrine of contributory fault that barred a plaintiff from recovering damages if she was responsible to any degree for her injuries. Commentary C1411:1. Under CPLR 1411, the statute providing the comparative fault principle, "the culpable conduct attributable to the [plaintiff], including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the [plaintiff] bears to the culpable conduct which caused the damages." When triggered, the statute calls for an apportionment of fault between the plaintiff and the defendant. *See* 1A N.Y. P.J.I.3d 2:36; 1B N.Y. P.J.I.3d 2:275. Dismissal based on a plaintiff's comparative fault is therefore not authorized under CPLR 3211(a)(7) or any other procedural device (e.g., summary judgment).

CPLR article 14-A notwithstanding, there are situations in which a plaintiff's conduct may bar her recovery. The lists is short: where a tort plaintiff's conduct is the sole proximate cause of her injuries; where a plaintiff's injuries are the direct result of the commission of serious criminal or illegal conduct; where a tort plaintiff is precluded from recovering by virtue of the doctrine of primary assumption of risk; and where a plaintiff expressly assumed the risk of the injuries for which she is suing. Commentaries C1411:3. The first three situations are not good candidates for CPLR 3211(a) treatment. Application of the legal principles barring recovery in those situations is dependent upon the facts of the particular case and the fact-sensitive question of foreseeability. The last situation, however, may provide occasion for a CPLR 3211(a) dismissal. Where the defendant wants to seek dismissal based on the plaintiff's express assumption of risk, the defendant could invoke paragraph 1 (if the assumption of risk was acknowledged in a document), 5 (on the basis of the affirmative defense of release), and 7 (failure to state a cause of action). Notice we did not choose one ground, but all that reasonably may apply.

Paragraph 6

C3211:20. Non-Interposable Counterclaim.

CPLR 3019(a) provides that "[a] counterclaim may be any cause of action in favor of one or more defendants or a person whom a defendant represents against one or more plaintiffs, a person whom a plaintiff represents or a plaintiff and other persons alleged to be liable." The law therefore allows a defendant to assert any cause of action it has against the plaintiff; the counterclaim need not bear any relation to the plaintiff's cause of action.

As an affirmative claim, a counterclaim can be challenged by a plaintiff on any relevant ground listed in subdivision (a). *See* Commentary C3211:4. Paragraph 6 provides one more dismissal tool to a plaintiff who is subject to a counterclaim. Under paragraph 6, the plaintiff may seek dismissal of the counterclaim on the basis that it may not be interposed in the action. A motion under this paragraph must be raised in a pre-answer motion or taken by answer, otherwise it is waived.

What is the meaning of this counterclaim-may-not-properly-be-interposed ground? Didn't we say above that a defendant may assert as a counterclaim any cause of action it has against a plaintiff? The defendant can do so, provided the counterclaim is against the plaintiff in the capacity in which she sued the defendant. That is to say, "[w]hen a plaintiff sues in a particular capacity, that is generally the only capacity in which the plaintiff can be counterclaimed by the defendant." Commentary C3019:3, at 393 (main volume). This is the pre-CPLR "capacity" rule and, CPLR 3019(a)'s broad language notwithstanding, it lives today and is given force by CPLR 3211(a)(6). *See* Commentary C3019:3; Siegel, New York Practice § 264 (Connors 5th ed.); *see also Ehrlich v. American Moninger Greenhouse Manufacturing Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 (1970).

Under the "capacity" rule, a paragraph 6 dismissal would seem to be appropriate in the following scenarios:

- The plaintiff is the executor of a decedent's estate and brought suit in that capacity, and the defendant asserted a counterclaim against the plaintiff in her personal capacity.

- The plaintiff is a trustee and brought suit in that capacity, and the defendant asserted a counterclaim against the plaintiff in her personal capacity.

- The plaintiff, who happens to be the guardian of another's person and property, sued the defendant in plaintiff's personal capacity, and the defendant asserted a counterclaim against the plaintiff as guardian.

CPLR 3211(a)(6) has also been employed where a defendant interposed a counterclaim in violation of a provision of a contract between the parties that barred counterclaims. *New York Merchants Protective Co. v. Raia*, 5 Misc.3d 1011(A), 798 N.Y.S.2d 711 (table), 2004 WL 2532294 (Dist. Ct., Nassau County 2004).

Dismissal in *New York Merchants Protective Co.* may have been appropriate too under CPLR 3211(a)(1) and (7). If the plaintiff has any doubt regarding which ground to use to challenge a counterclaim, she should raise paragraph 6 and any other plausible grounds.

Note that "there is no authority under the CPLR to dismiss an otherwise valid counterclaim merely because it is not convenient to have it present in the case. Such authority did exist under prior law, but the worst that can befall such a counterclaim under the CPLR is a severance, sending it off as a separate action." Siegel, New York Practice § 264 (internal footnote omitted).

Paragraph 7

C3211:21. Failure to State a Cause of Action, Generally.

Paragraph 7 is one of the most commonly used dismissal grounds under CPLR 3211(a) and one of the most important procedural statutes in litigation. CPLR 3211(a)(7) provides that a defendant may seek judgment dismissing the complaint on the ground that it fails to state a cause of action. The defendant is free to attack the entire complaint or target one or more of the specific causes of action. The motion for failure to state a cause of action is no stranger in New York practice; it is an incarnation of the common law demurrer with a modern name and, as discussed below, a bit more potency. *See* Commentary C3211:23.

There are certain fundamental rules of decision associated with the CPLR 3211(a)(7) motion. These rules (applicable to most CPLR 3211 motions) should be reviewed--if not already committed to memory--before a motion to dismiss for failure to state a cause of action is made or opposed. Here they are: the pleadings must be given a liberal construction, the allegations accepted as true, and the plaintiff accorded every possible favorable inference. *Chanko v. Am. Broad. Companies Inc.*, 27 N.Y.3d 46, 52, 29 N.Y.S.3d 879, 883, 49 N.E.3d 1171, 1175 (2016).

The party opposing a CPLR 3211(a)(7) motion may want to request an opportunity to gather evidence before the court determines the motion, *see* Commentary C3211:46, a chance to replead, *see* Commentary C3211:60, or both.

For the edification of federal practitioners, CPLR 3211(a)(7) is analogous to the dismissal ground contained in Rule 12(b)(6) of the Federal Rules of Civil Procedure. The federal terminology is "failure to state a claim upon which relief can be granted." The most apparent difference is the federal use of the word "claim" vis-a-vis the New York phrase "cause of action." Although it is sometimes asserted that there is a difference between the two phrases, *see*, *e.g., Garcia v. Hilton Hotels Intern.*, 97 F.Supp. 5 (D.C. Puerto Rico 1951), it is difficult at best to devise an explanation of what the

difference is. For practical purposes, federal practitioners will run into few pitfalls if they apply their understanding of the federal "claim" to the New York phraseology of "cause of action". And vice versa. (Note, however, that in the wake of *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), a federal pleading is subject to greater scrutiny on a rule 12(b)(6) motion than a New York State court pleading encounters on a CPLR 3211(a)(7) motion. *See* Robert L. Haig, Commercial Litigation in New York State Courts, § 12.28 [4th ed.]).

CPLR 3211(a)(7) poses a number of questions. These will be treated seriatim.

Allegations Sufficient for Pleading in Supreme Court May Not Suffice for Court of Claims Pleading

In a major decision on pleadings in the Court of Claims, *Lepkowski v. State*, 1 N.Y.3d 201, 770 N.Y.S.2d 696, 802 N.E.2d 1094 (2003), the Court of Appeals gave a strict construction to the pleading requirements of § 11(b) of the Court of Claims Act.

It does not take much to satisfy as a pleading in the Supreme Court. In a deliberate endeavor to escape the rigidities of common law pleadings, the CPLR long ago relaxed things. *See* CPLR 3013 and 3014.

Sections 8, 10, and 11 of the Court of Claims Act are a different world, made much more demanding because of the State's sovereign immunity and the need for the State to waive that immunity before suit may be brought against it. The State has long since waived the immunity, in § 8 of the act, but, stressed the Court of Appeals in *Lepkowski*, with the proviso that "the claimant complies with the limitations" imposed by, among other things, §§ 10 and 11 of the act. *See* the general discussion of the requirements for pleadings in the Commentaries following CPLR 3013 and 3014, and the more specific discussion of Court of Claims pleadings in Commentary C3013:15A; *see also Kolnacki v. State*, 8 N.Y.3d 277, 832 N.Y.S.2d 481, 864 N.E.2d 611 (2007).

C3211:22. Does Paragraph 7 Replace Common Law Demurrer?

Under the common law demurrer, the defendant conceded the truth of every factual allegation made by the plaintiff but contended that, even so, the complaint stated no cause of action cognizable under the law. The defendant could not submit evidence to contest the plaintiff's factual allegations. (A remedy in some instances was to answer and then move for summary judgment under the predecessor of CPLR 3212, an alternative still available under the CPLR.) Thus, the function of the demurrer was narrow: test the facial sufficiency of a pleading.

Like the common law demurrer, a CPLR 3211(a)(7) motion can be used to test the facial sufficiency of a pleading. Thus, the paragraph 7 motion is useful in disposing of actions in which the plaintiff has not stated a claim cognizable at law, and actions in which the plaintiff has identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action. *See Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 980 N.Y.S.2d 21 (1st Dep't 2014).

A plaintiff confronted with a motion addressed to the adequacy of her pleading has the option to submit an affidavit or other evidence in opposition to the motion to augment the allegations in the pleading or otherwise rehabilitate it. *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314, 357 N.E.2d 970 (1976). The plaintiff should avail herself of that opportunity, especially if she perceives any weaknesses within the four corners of her pleading.

Where a defendant has challenged the facial sufficiency of a complaint, the court's inquiry is limited to determining whether, applying the familiar rules of decision applicable to CPLR 3211(a) motions (*see* Commentary C3211:21), the allegations and any evidence submitted by the plaintiff have stated a claim cognizable at law. "In the context of CPLR 3211(a)(7), the word 'stated' means pleaded: Do the allegations, liberally construed and viewed in the light most favorable to the plaintiff, plead a cognizable claim?" Higgitt, *CPLR 3211(a)(1) and (a)(7) Dismissal Motions--*

Pitfalls and Pointers, 83 New York State Bar Journal 32, 33 (Nov./Dec. 2011) (internal footnote omitted). Whenever the plaintiff's allegations and evidence, taken as true, do state a cause of action, it is plain that a paragraph 7 motion unsupported by affidavits or other extrinsic proof will fail.

When the CPLR 3211(a)(7) movant omits affidavits and other proof and limits her challenge to the facial allegations of the pleading, she must be aware of the great liberalization that pleadings have undergone under the CPLR. Technicality has been largely removed. If from the four corners of the pleading, regardless of its form and draftsmanship, factual allegations can be discerned which, taken together, manifest any claim cognizable under the law, the pleading does state a cause of action and the motion will fail. These conclusions derive from a study of the Advisory Committee's intentions, which were implemented by the courts. *See Foley v. D'Agostino*, 21 A.D.2d 60, 248 N.Y.S.2d 121 (1st Dep't 1964). The practitioner would do well to note this before attempting to defeat a cause of action under paragraph 7 on the basis that it is deficient on its face. Even if the theory it purports to be based on is wrong, the existence of any other theory that would qualify the allegations as a "cause of action" will suffice to defeat the motion.

C3211:23. Attacking a Claim Valid on Its Face.

As discussed above, one function of CPLR 3211(a)(7) is to permit a defendant to seek dismissal of a complaint on the ground that it does not state--that is, plead--a cause of action. But is that its only function? Can a defendant use evidence on a CPLR 3211(a)(7) motion to attack a well-pleaded cause of action and obtain dismissal based on that evidence?

After many decades on the civil procedure scene, one would think that the role of this critical litigation device would be well-defined. But it is not. Here is the relevant history, as traced in a prior treatment of the subject. *See* Higgitt, *High Court Signals a Potential Change in Practice With CPLR 3211(a)(7)*, Aug. 5, 2013 N.Y.L.J. at 4.

CPLR 3211(a)(7) was part of the original CPLR, which became effective on September 1, 1963. Paragraph 7's language has remained the same over the years: "A party may move for judgment dismissing one or more causes of action asserted against him [or her] on the ground that: … the pleading fails to state a cause of action".

The Court of Appeals' first major decision on CPLR 3211(a)(7) came in *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314, 357 N.E.2d 970 (1976). While stressing that the principal function of an (a)(7) motion is to ascertain whether a complaint states, i.e., pleads, a cognizable cause of action, the Court observed that "affidavits submitted by the defendant [on a (a)(7) motion] will seldom if ever warrant [dismissal] *unless ... the affidavits establish conclusively that plaintiff has no cause of action*" (*id.* at 636 [emphasis added]). Although the *Rovello* Court noted that "defendants' affidavits present[ed] a seemingly strong defense," it concluded that the subject complaint did state a cause of action and directed that the motion to dismiss be denied. *Rovello*, though, opened the door--albeit only in narrow circumstances--for dismissals under CPLR 3211(a)(7) based on evidence.

The Court's next pronouncement on the subject came approximately one year later in *Guggenheimer v. Ginzberg* (43 N.Y.2d 268, 401 N.Y.S.2d 182, 372 N.E.2d 17 [1977]). The *Guggenheimer* Court stated that:

[w]hen evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it ... dismissal should not eventuate (*id.* at 275, 401 N.Y.S.2d at 185, 372 N.E.2d at 20-21).

The Court found that the essential facts in the complaint before it were not "negated beyond substantial question by the affidavits submitted ... so that it might be ruled that the pleader does not have the causes of action" (*id.*). The "establish[es] conclusively" test articulated in *Rovello* just 14 months prior was not mentioned. *Guggenheimer's* "no significant dispute/negate beyond substantial question" test appears broader than *Rovello's* "establish[es]

conclusively" test, permitting a defendant to obtain dismissal with convincing--but not conclusive--evidence. *See also Godfrey v. Spano*, 13 N.Y.3d 358, 892 N.Y.S.2d 272, 920 N.E.2d 328 (2009) and *Lawrence v. Graubard Miller*, 11 N.Y.3d 588, 873 N.Y.S.2d 517, 901 N.E.2d 1268 (2008), both of which appear to endorse the *Rovello* standard.

In light of the mixed signals sent by *Rovello* and *Guggenheimer*, the Appellate Division has grappled with the appropriate standard to apply on a CPLR 3211(a)(7) motion that is supported by evidence. Some courts have said the only question on a motion to dismiss for failure to state a cause of action is whether the complaint pleads a cause of action. *See*, *e.g., Henbest & Morrisey Inc. v. W.H. Ins. Agency Inc.*, 259 A.D.2d 829, 686 N.Y.S.2d 207 (3d Dep't 1999). Other courts have said that a CPLR 3211(a)(7) motion serves a broader function: to challenge a complaint that states a cause of action with evidence undercutting the plaintiff's allegations. Phrased differently, dismissal under CPLR 3211(a)(7) may be appropriate when, on the facts adduced by the defendant, the plaintiff does not have a cause of action. But courts of this view are divided into two camps: one asks whether the defendant's evidence conclusively establishes that the plaintiff does not, in fact, have a cause of action (the *Rovello* standard), the other asks whether the defendant's evidence negates beyond substantial question an essential fact on which the plaintiff's action rests (the *Guggenheimer* standard).

In 2013, the Court of Appeals decided *Miglino v. Bally Total Fitness of Greater New York, Inc.*, 20 N.Y.3d 342, 961 N.Y.S.2d 364, 985 N.E.2d 128 (2013), an opinion that had the potential to end this long-running debate. In relevant part, the Court considered whether a health club was entitled to dismissal under CPLR 3211(a)(7) of a common law negligence cause of action asserted by the estate of a club patron who died after experiencing cardiac arrest on the club's premises. The gist of that cause of action was that the health club breached its duty of care to persons struck down by cardiac arrest while on the club's premises by failing to employ or properly employ life-saving measures to the decedent. The health club moved to dismiss that cause of action under CPLR 3211(a)(7). In support of that motion, the health club submitted the affidavit of an employee who rendered aid to the decedent. The employee described his training and the actions he and other club personnel took to assist the decedent. The motion was denied by the trial court and the Second Department affirmed.

The Court of Appeals affirmed the Appellate Division's order, writing, in pertinent part, that:

"Bally has moved to dismiss under CPLR 3211(a)(7), which limits us to an examination of the pleadings to determine whether they state a cause of action. Further, we must accept facts alleged as true and interpret them in the light most favorable to plaintiff; and, as Supreme Court observed, plaintiff may not be penalized for failure to make an evidentiary showing in support of a complaint that states a claim on its face....

"Here, the complaint asserts that Bally did not 'employ or properly employ life-saving measures regarding [the decedent]' after he collapsed. Bally's motion is supported by affidavits that contradict this claim, by purporting to show that the minimal steps adequate to fulfill a health club's limited duty to a patron apparently suffering a coronary incident--i.e., calling 911, administering CPR and/or relying on medical professionals who are voluntarily furnishing emergency care--were, in fact, undertaken. But, as noted before, this matter comes to us on a motion to dismiss, not a motion for summary judgment. As a result, the case is not currently in a posture to be resolved as a matter of law on the basis of the parties' affidavits, and [the plaintiff] has at least pleaded a viable cause of action at common law." 20 N.Y.3d at 351, 961 N.Y.S.2d at 370, 985 N.E.2d at 134 (internal citation omitted).

One view is that *Miglino* did not change the law under CPLR 3211(a)(7), and a defendant is still free to submit evidence in support of a motion to dismiss in an effort to establish that, on the facts, the plaintiff does not have a cause of action. Another view of *Miglino* is that the Court of Appeals no longer permits a defendant to obtain dismissal under CPLR 3211(a)(7) based on evidence the defendant submits in support of the motion. The reasoning for the second view is as follows: the defendant in *Miglino* sought dismissal under CPLR 3211(a)(7) and relied on evidence; the Court of Appeals acknowledged that the defendant submitted evidence, but stressed that the only inquiry at the

CPLR 3211 stage was whether the complaint states a cause of action; the Court affirmed the denial of the motion to dismiss because the plaintiff "at least pleaded a viable cause of action"; therefore, the Court must have concluded that dismissal under CPLR 3211(a)(7) based on a defendant's evidence is not permitted. *See* Higgitt, *High Court Signals a Potential Change in Practice With CPLR 3211(a)(7)*, *supra*; *see also* Connors, *Courts Reconsider Rule Permitting Use of Affidavits on CPLR 3211(a)(7) Motion*, N.Y.L.J., Jan. 20, 2015 at 3 (reviewing CPLR 3211[a][7], *Rovello*, and *Miglino*, and concluding that "the courts should not permit consideration of defendant's factual affidavits on a CPLR 3211[a][7] preanswer motion to dismiss unless the court elects to treat the motion as one for summary judgment under CPLR 3211[c].").

A construction of paragraph 7 that limits its role to a pleading motion is consistent with the legislative history of the CPLR (Higgitt, *CPLR 3211[a][7]: Demurrer or Merits-Testing Device?*, 73 Alb.L.Rev. 99 at 102), and the plain language of that paragraph ("the pleading fails to state a cause of action"). That construction also prevents paragraph 7 from becoming a "super" ground for dismissal that crowds-out the others. (The "documentary evidence" ground in CPLR 3211[a][1] has little to no role to play if the movant can rely on evidence to support her motion to dismiss for failure to state a cause of action. Higgitt, *CPLR 3211(a)(1) and (a)(7) Dismissal Motions--Pitfalls and Pointers*, 83 New York State Bar Journal 32 at 34, n.30.) We note too that while CPLR 3211(a)(7) authorizes dismissal of a cause of action for failure to state a cause of action, subdivision (b) allows for dismissal of a defense if it is not stated *or has no merit*. The Legislature seemed to make a deliberate determination to allow for a merits-based dismissal in one situation (subdivision [b]) but not in the other ([a][7]). And, absent conversion of a CPLR 3211(a) motion into one for summary judgment (*see* subdivision [c]), shouldn't the parties be allowed to assume that the focus of the court's inquiry is on the sufficiency of the pleading and not on the merits? *See Four Seasons Hotels v. Vinnik*, 127 A.D.2d 310, 515 N.Y.S.2d 1 (1st Dep't 1987).

But we digress, for all four Departments have concluded that *Miglino* did not change the law, with the Fourth Department expressly considering--and rejecting--the contention "that *Miglino* fundamentally changed the parameters of CPLR 3211(a)(7) and effectively barred the consideration of any evidentiary submissions outside of the four corners of the complaint." *Liberty Affordable Housing, Inc. v. Maple Court Apartments*, 125 A.D.3d 85, 88, 998 N.Y.S.2d 543, 545 (2015); *see*, *e.g.*, *Clarke v. Laidlaw Transit, Inc.*, 125 A.D.3d 920, 5 N.Y.S.3d 138 (2d Dep't 2015); *Marston v. General Electric Co.*, 121 A.D.3d 1457, 995 N.Y.S.2d 646 (3d Dep't 2014); *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 980 N.Y.S.2d 21 (1st Dep't 2014). The *Liberty Affordable Housing* Court reasoned that "*Miglino* is properly understood as a straightforward application of *Rovello's* long-standing framework"; the cause of action for common law negligence in *Miglino* was not in a posture to be resolved by the health club's evidence because that evidence was insufficiently conclusive, not because it was categorically inadmissible. 125 A.D.3d at 91, 998 N.Y.S.2d at 547.

C3211:24. Result in Multi-Claim Case.

When the complaint states several causes of action, the movant must address a CPLR 3211(a) motion to the specific cause of action objected to. This is as true of paragraph 7 as it is of any other ground. If all of the alleged causes of action are defective, and the movant can show as much, the motion can of course succeed against them all. If less than all are defective, however, the movant should single out the defective ones and address the motion to them.

Note that "a motion to dismiss for failure to state a cause of action will be denied in its entirety where the complaint asserts several causes of action, at least one of which is legally sufficient and where the motion is aimed at the pleading as a whole without particularizing the specific causes of action sought to be dismissed." *Long Island Diagnostic Imaging, P.C. v. Stony Brook Diagnostic Associates*, 215 A.D.2d 450, 452, 626 N.Y.S.2d 828, 829 (2d Dep't 1995); *see Great Northern Associates, Inc. v. Continental Casualty Co.*, 192 A.D.2d 976, 596 N.Y.S.2d 938, 940 (3d Dep't 1993). But when "a motion to dismiss for failure to state a cause of action particularizes each of the claims in the complaint, even though it is nominally addressed to the complaint as a whole, the court should treat that motion as applying to each individual cause of action alleged." *Gamiel v. Curtis & Riess-Curtis, P.C.*, 16 A.D.3d 140, 141, 791

N.Y.S.2d 78, 79 (1st Dep't 2005). This allows the court to sustain the good causes of action and dismiss the bad ones, narrowing the issues in the case and streamlining the litigation.

When only a single cause of action is stated, the opening language of CPLR 3211(a) might suggest that the motion is available only as against the entire claim and not merely to a part of it. The motion is available as to any severable part of a single claim, however, whether it relates only to the relief clause or to some part of the theory or theories sued on.

C3211:25. Demanding Wrong Relief Inconsequential.

As long as the allegations taken from the complaint as a whole manifest that the plaintiff has a cause of action on which some kind of relief may be granted, it is of no moment on a paragraph 7 motion that the wrong relief was asked for. *See O'Reilly v. Cahill*, 50 Misc.2d 629, 271 N.Y.S.2d 29 (Sup. Ct., New York County 1966), *rev'd on other grounds* 28 A.D.2d 527, 280 N.Y.S.2d 338 (1st Dep't 1967). The remedy of the plaintiff who has a claim but has asked for relief unresponsive to it is to move under CPLR 3025(b) for leave to amend the relief clause. If the time for amending as of course, i.e., without leave of court, is still open under CPLR 3025(a), the plaintiff may amend without the need of a motion.

C3211:26. Time to Make Paragraph 7 Motion.

Paragraph 7 is one of the three CPLR 3211(a) paragraphs (the other two being paragraphs 2 and 10) that will support a CPLR 3211 dismissal motion made at any time. (*See* Commentary C3211:49.) For that reason, and because a movant is allowed to submit evidence in support of her motion, there are four different classes of CPLR (a)(7) motions: (1) a pre-answer motion unsupported by evidence, (2) a pre-answer motion supported by evidence, (3) a post-answer motion unsupported by evidence, and (4) a post-answer motion supported by evidence. The courts have applied the same rules of decision to an (a)(7) motion regardless of whether it was made pre-or post-answer. *See Hendrickson v. Philbor Motors, Inc.*, 102 A.D.3d 251, 955 N.Y.S.2d 384 (2d Dep't 2012); *see also Chenago Contracting, Inc. v. Hughes Associates*, *Landscape Architects PLLC*, 128 A.D.3d 1150, 8 N.Y.S.3d 724 (3d Dep't 2015).

As a matter of practice, of course, it is advisable for the movant who depends on paragraph 7 to make the motion before answering for the simple reason that if it prevails there will be no need to answer. If the answer has already been served when the motion is made, however, the answer is among the papers that the court can consider on the motion. *See Hamilton Printing Co. v. Ernest Payne Corp.*, 26 A.D.2d 876, 273 N.Y.S.2d 929 (3d Dep't 1966).

When the motion is made after answer and is based not on the face of the pleading but on extrinsic proof, the movant would often do better to move for summary judgment under CPLR 3212. A disposition under that provision will ordinarily carry the full effect of res judicata, while a CPLR 3211(a)(7) disposition may or may not. (*See* Commentary C3211:63.)

The practitioner who without good reason postpones a paragraph 7 motion may be courting unnecessary trouble. Technically, the movant can make the motion even as late as when the trial opens, but the suspicions of the trial judge are bound to be aroused. Why has a motion that could have put an early end to the litigation been delayed until the trial, with all parties put to the burden of pretrial preparation in the interim? Although the motion still lies at that time and would have to be entertained, the delay may, perhaps only unconsciously, influence the trial judge's disposition of it. The movant should have ready--whether called upon to use them or not--good reasons for the delay, such as that the proof needed for the motion became available only recently.

C3211:27. Paragraph 7 as Catch-All Ground.

In the comparison made between what CPLR 3018(b) labels as affirmative defenses on the one hand and what CPLR 3211(a) affords as grounds for a motion to dismiss on the other, it is pointed out that paragraph 7 can sometimes be

used to make available as a motion ground an affirmative defense not explicitly contained in the CPLR 3211(a) list. *See* Commentary C3211:19. "Illegality" is a prime example. The movant who can show the defect to be something that affects the merits of the cause of action, as illegality would, can make the defect a basis for a motion to dismiss under paragraph 7.

It has also been shown that paragraph 7 may overlap (supersede may, in some instances, be a better word) other paragraphs of CPLR 3211(a), in which case the objection can be based on both the other paragraph and paragraph 7 together. *See*, *e.g.*, Commentaries C3211:12 and 18. Paragraph 7 would not be superfluous in such an instance, for the reason that a motion under paragraph 7 may be made at any time, CPLR 3211(e), while the grounds in most of the other paragraphs must be exploited by a motion before the answer is served. Additionally, all types of evidence are permitted on a motion to dismiss for failure to state a cause of action. These benefits may prove helpful in a given case-at least in the eyes of the movant.

As to the interplay between CPLR 3211(a)(7) and (a)(1) (dismissal based on "documentary evidence"), *see* Higgitt, *CPLR 3211(a)(1) and (a)(7) Dismissal Motions--Pitfalls and Pointers*, 83 New York State Bar Journal 32, 34-35 (Nov./Dec. 2011).

Paragraph 8

C3211:28. Lack of Personal Jurisdiction.

Subject matter jurisdiction, covered above (*see* Commentary C3211:11), asks whether a particular court has the authority to hear and resolve a particular type of action. Personal jurisdiction asks whether the court, under the particular facts of the case, has the power to render a judgment binding on the defendant herself. Personal jurisdiction is one of three forms of jurisdiction over persons, property and status, the other two being in rem and quasi in rem (more on these two forms of jurisdiction below). *See* Commentary C301:1. Personal (or in personam) jurisdiction over a defendant allows the court to adjudicate the defendant's liability or obligation to the plaintiff, and adjudge that the defendant is personally liable or responsible for the relief awarded in the action. *Id.*

Personal jurisdiction has three elements: (1) a basis for the exercise of jurisdiction over the defendant (i.e., general jurisdiction over the defendant or specific [a/k/a long arm] jurisdiction over her); (2) notice to the defendant of the action; and (3) proper commencement of the action. *See* Siegel, New York Practice §§ 58, 63 (Connors 5th ed.). All must be present for a court to obtain personal jurisdiction over a defendant. (Although a defendant may waive an objection to a defect relating to personal jurisdiction.).

CPLR 3211(a)(8) is the device that allows a defendant to seek dismissal of an action on the ground that the court lacks personal jurisdiction over her. She can use paragraph 8 to raise any defect relating to personal jurisdiction. The defendant may claim that no basis exists to call her before a New York court--that is to say, the defendant is not subject to the jurisdiction of the New York courts, generally, and is not subject to their jurisdiction for the purposes of the particular action in which she was named a defendant. *See* Commentaries C301:2-10; C302:1-15; Siegel, New York Practice §§ 66, 80-89. The defendant may assert that she was not served with the initiatory papers, that they were served defectively, or that they were served in an unauthorized manner. The defendant may complain that the action was not properly commenced.

Because of the waiver provisions of subdivision (e), a defendant must carefully consider when and how to raise defenses related to lack of personal jurisdiction. *See* Commentary C3211:55.

Paragraph 8 should not be confused with paragraph 9, which addresses those two other forms of jurisdiction over persons, property and status: in rem and quasi in rem. Any uncertainty on the part of the defendant regarding the

category of jurisdiction on which the plaintiff is relying should be resolved by invoking both paragraphs and leaving it to the court to determine which category ultimately applies. *See* Commentary C3211:31.

Under paragraph 8, where the defendant duly raises a lack of personal jurisdiction defense, the plaintiff bears the burden of proof on the issue of whether such jurisdiction exists. *Shore Pharmaceutical Providers, Inc. v. Oakwood Care Center, Inc.*, 65 A.D.3d 623, 885 N.Y.S.2d 88 (2d Dep't 2009).

The plaintiff may need discovery on jurisdiction-related issues, particularly regarding whether a basis exists for the New York court to impose its jurisdiction on the defendant. Questions on this front sometimes arise when a plaintiff claims that a defendant is amenable to suit in New York under our longarm jurisdiction statute (CPLR 302). The plaintiff can request that the court afford her an opportunity to conduct jurisdictional discovery before determining the motion to dismiss. *See* Commentary C3211:46.

C3211:29. Jurisdictional Basis Depending on Complaint.

Certain unique problems can arise in a case when the summons was served without an accompanying complaint, which is permissible under CPLR 305(b) and 3012, and the defendant moves to dismiss under paragraph 8 before the complaint is served. If service was purportedly made within New York and the defect relates to the mechanics of service, the motion should lie immediately and can be disposed of promptly. (In that instance the motion would be to dismiss "the action," since one cannot move to dismiss a non-existent complaint.) But when the summons is served outside the State and the defendant contends not that the method of service was defective, but rather that the court lacks a basis for extraterritorial jurisdiction, it may be impossible for the court to determine the question until the complaint is served.

If the extraterritorial jurisdictional basis relied on is the fact that the defendant is a New York domiciliary, *see* CPLR 313, affidavits should be adequate to determine the domiciliary status and the paragraph 8 motion should lie before service of the complaint. But if the basis is longarm jurisdiction under CPLR 302, the issue of whether the basis exists depends on geographical factors connected with the cause of action, and the cause of action cannot be seen until the complaint is served. For this reason, the motion to dismiss for lack of personal jurisdiction in such a case should await service of the complaint. *Fraley v. Desilu Productions, Inc.*, 23 A.D.2d 79, 258 N.Y.S.2d 294 (1st Dep't 1965) (denying motion to dismiss made before service of complaint, without prejudice to renewal after service).

The moral is that a defendant served outside New York with a summons but not the complaint ought to limit her next step to demanding a copy of the complaint. Nothing is lost by so doing: a defendant who demands a complaint after being served with the summons has 20 days after the complaint is finally served in which to answer or move against it. *See* CPLR 3012(b).

Paragraph 9

C3211:30. Lack of Rem Jurisdiction.

In rem and quasi in rem jurisdiction are predicated on the presence of property (or some other res) in the State. The plaintiff in an action founded on in rem jurisdiction is asserting an interest in a particular thing. *Majique Fashions, Ltd. v. Warwick & Co., Ltd.*, 67 A.D.2d 321, 326, 414 N.Y.S.2d 916, 919 (1st Dep't 1979) ("In rem jurisdiction ... involves an action in which a plaintiff is after a particular thing, rather than seeking a general money judgment, that is, [s]he wants possession of the particular item of property, or to establish h[er] ownership or other interest in it, or to exclude the defendant from an interest in it."). The plaintiff in a quasi in rem action wants a money judgment but cannot get personal jurisdiction over the defendant. So, the plaintiff looks to the defendant's in-State property. By employing the provisional remedy of attachment, the plaintiff can pursue her cause of action against the defendant and, if the plaintiff prevails in the action, the attached property will be applied toward the judgment. Commentary C314:4. The

utility of quasi in rem jurisdiction is not what it once was, but that form of rem jurisdiction is still available under the right set of circumstances. *See* *Banco Ambrosiano, S.P.A. v. Artoc Bank & Trust Limited*, 62 N.Y.2d 65, 476 N.Y.S.2d 64, 464 N.E.2d 432 (1984).

Paragraph 9 affords a ground for dismissal when service has been made under CPLR 314 or 315, the provisions governing in rem and quasi in rem actions. Whenever it is clear that the plaintiff is not claiming personal jurisdiction, but is bringing the action solely on a rem foundation, and the defendant can show that even rem jurisdiction does not exist--whether for lack of service or the fact that the res is not in New York or for any other reason that divests rem jurisdiction--the defendant's weapon is the motion to dismiss under CPLR 3211(a)(9).

Reliance on paragraph 9 exclusively is usually possible only when the plaintiff is not even making an argument that there is personal jurisdiction--when personal jurisdiction, in other words, is not in the picture at all--and when the defendant believes she can also show that not even the claimed rem jurisdiction exists. In any other situation it may be inappropriate for the defendant to rely solely on paragraph 9. If the defendant has any doubt whatever about the category of jurisdiction plaintiff claims to exist and defendant can show the absence of either category of jurisdiction, or of both, she had best caption the motion under both paragraphs 8 and 9 and let the court decide whether any jurisdiction exists and, if so, which kind it is. *See* Commentary C3211:31.

C3211:31. Confusion as to Kind of Jurisdiction Asserted.

When the defendant knows precisely what category of jurisdiction the plaintiff claims, and the defendant contends that the claimed basis does not exist, the defendant can caption the motion under either paragraph 8 or paragraph 9, whichever is applicable. The defendant can do this, in any event, when it is clear that the basis the plaintiff claims is the only possible one and that the existence of the unclaimed one is not even remotely possible. In any other instance, the defendant may face a dilemma. If the defendant has any doubt whatever about the kind of jurisdiction the plaintiff is asserting, the defendant should caption the motion to dismiss under both paragraphs 8 and 9 and ask the court to determine clearly which, if any, jurisdictional ground exists.

If the defendant claims neither basis exists, she would clearly invoke both grounds and move to dismiss the case entirely. *See* *Kalman v. Neuman*, 80 A.D.2d 116, 438 N.Y.S.2d 109 (2d Dep't 1981). If the defendant admits that one exists but contends that the other does not, she would move to dismiss on the ground describing the latter.

If the jurisdiction is only in rem, the defendant may be able to withdraw from the litigation without personam consequences. If it is only quasi in rem, the defendant may be able to stay on and defend without personam consequences. (For the distinctions between these categories of rem jurisdiction, *see* Siegel, New York Practice § 101 [Connors 5th ed.]) All these conclusions derive from CPLR 320(c). *See* Commentary C3211:39. What they manifest for our present purpose is that the defendant must be certain that the order disposing of the jurisdictional motion states specifically what kind of jurisdiction exists, if any does. *See* Siegel, New York Practice § 267. The defendant will have to depend on that determination to govern her future participation in the case.

Paragraph 10

C3211:32. Absence of a Person Who Should be A Party.

Paragraph 10 allows for dismissal of an action when the court determines that it "should not proceed in the absence of a person who should be a party." The statute does not talk about the absence of an "indispensable party"; that was the phrase used prior to the CPLR. The old "indispensable party" doctrine could be harsh. Under it, if an unjoined and unjoinable person was "indispensable," the action would be dismissed. *See generally* *Carruthers v. Jack Waite Mining Co.*, 306 N.Y. 136, 116 N.E.2d 286 (1953); Siegel, New York Practices § 131 (Connors 5th ed.). Paragraph 10 distances itself from the old law, abandoning both the words "indispensable party" and the principle that the absence of a person

important in the scheme of the action must result in dismissal. *See Red Hook/Gowanus Chamber of Commerce v. New York City Board of Standards and Appeals*, 5 N.Y.3d 452, 805 N.Y.S.2d 525, 839 N.E.2d 878 (2005). Indeed, under the CPLR, dismissal for failure to join a necessary party is the last resort. Siegel, New York Practice § 133.

CPLR 3211(a)(10) can only be understood and applied if read in conjunction with CPLR article 10. Of particular significance is CPLR 1001. Subdivision (a) of that statute instructs that "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." (To avoid the now taboo concept of the "indispensable party," we'll call the important non-party the "necessary party"). Subdivision (b) tells us what is to happen if a necessary party has not been included in the caption. The easy part: if the necessary party is subject to the court's jurisdiction, the court must direct that the necessary party be joined as a party. *Dime Savings Bank of N.Y. v. Johneas*, 172 A.D.2d 1082, 569 N.Y.S2d 260 (4th Dep't 1991). If the necessary party cannot be joined and will not voluntarily appear in the action, the court must engage in a balancing of numerous factors to ascertain whether justice requires that the action proceed without her.

These are the CPLR 1001(b) factors:

"1. Whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;

"2. The prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;

"3. Whether and by whom prejudice might have been avoided or may in the future be avoided;

"4. The feasibility of a protective provision by order of the court or in the judgment; and

"5. Whether an effective judgment may be rendered in the absence of the person who is not joined."

No one factor is determinative and each of them must be considered by the court. *Swezey v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 19 N.Y.3d 543, 950 N.Y.S.2d 293, 973 N.E.2d 703 (2012); *Red Hook/Gowaus Chamber of Commerce v. New York City Board of Standards and Appeals, supra*. Also, the court can consider that dismissal is the last resort, and that the purposes of the dismissal remedy are to prevent multiple, inconsistent judgments relating to the same controversy, and to protect the non-party from embarrassment from a judgment purporting to bind her rights or interests. *See Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 766 N.Y.S.2d 654, 798 N.E.2d 1047 (2003).

The framework of the analysis of a motion to dismiss under CPLR 3211(a)(10) is as follows:

Initially, inquiry must be made into whether the non-party is a necessary one under CPLR 1001(a). If she isn't, the motion can be denied; if she is, the court must consider whether the non-party is subject to the court's jurisdiction. If she is, the court can order her joinder; if not, the court must consider and weigh the five factors listed in CPLR 1001(b) to ascertain whether justice requires that the action proceed without the non-party.

The path to dismissal is difficult, just the way the drafters of the CPLR intended it. *See* Siegel, New York Practice § 133.

A fine example of the consideration and balancing of the factors can be viewed in *L-3 Communications Corp. v. Safenet, Inc.*, 45 A.D.3d 1, 841 N.Y.S.2d 82 (1st Dep't 2007).

What if it is not clear to the court whether the necessary party is subject to the court's jurisdiction? The court can deny the paragraph 10 motion without prejudice and grant the plaintiff leave to join the necessary party within a certain period of time. *Williams v. Somers*, 91 A.D.2d 545, 457 N.Y.S.2d 19 (1st Dep't 1982). If the plaintiff is unable to do so, she should move to be excused from joining the necessary party under CPLR 1001(b), and that motion should be supported by an affidavit demonstrating why the necessary party isn't subject to the court's jurisdiction. *Id.* The without-prejudice dismissal of the CPLR 3211(a)(10) motion would permit the defendant to make another motion to dismiss under that ground if the plaintiff fails to comply with the prior order.

As to the timing of a paragraph 10 motion, it is a member of that exclusive club of subdivision (a) grounds (along with paragraphs 2 and 7) that can be made at any time. CPLR 3211(e); *City of New York v. Long Island Airports Limousine Service Corp.*, 48 N.Y.2d 469, 475, 423 N.Y.S.2d 651, 654, 399 N.E.2d 538, 541 (1979) ("[a] court may always consider whether there has been a failure to join a necessary party"). Does that mean that a defendant's delay in making a CPLR 3211(a)(10) motion must go without consequence? Maybe the delay, if sufficiently lengthy, will be considered by the court in the course of its review and balancing of the CPLR 1001(b) factors, particularly with respect to factor number three. Commentary C1001:2. But delay, no matter its length, will not result in a waiver of the defendant's right to make the paragraph 10 motion. *D.M.I. Painting, Inc. v. Eastern Long Island Hospital*, 74 A.D.2d 838, 839, 425 N.Y.S.2d 633, 635 (2d Dep't 1980) ("failure of the [defendant] to move until the eve of trial is deplorable but does not constitute a waiver").

CPLR 3211(a)(10) does not expressly allow for conditions to be imposed in connection with a dismissal for failure to join a necessary party. But CPLR 1001(b)'s factor four makes plain that reasonable conditions are authorized. *See* Siegel, New York Practice § 268. For some examples of appropriate conditions, *see id.* at § 133.

Paragraph 11

C3211:33. Dismissal in Favor of Uncompensated Official of Not-for-Profit Organization.

CPLR 3211(a)(11) provides a narrow class of individuals with a very special, very specific dismissal device. That ground applies to directors, officers and trustees who serve without compensation in not-for-profit entities. Under Not-For-Profit Corporation Law (N-PCL) § 720-a, an uncompensated director, officer or trustee enjoys qualified immunity from most lawsuits; the immunity is stripped only if the conduct of the individual constituted gross negligence or was intended to cause harm. Paragraph 11's aim is to reduce protracted litigation against certain persons engaged in non-paid charitable activities. *Kabushka v. Marks*, 229 A.D.2d 899, 646 N.Y.S.2d 392 (3d Dep't 1996). How does it do that? By providing an expedited procedure, a mini-summary judgment of sorts, for the testing of the defendant's claim of immunity under N-PCL § 720-a. *Krackeler Scientific, Inc. v. Ordway Research Institute, Inc.*, 97 A.D.3d 1083, 949 N.Y.S.2d 286 (3d Dep't 2012). Here's how CPLR 3211(a)(11) works.

First, the court must ascertain whether the defendant moving for relief under paragraph 11 is entitled to the qualified immunity provided by N-PCL § 720-a. *Kamchi v. Weissman*, 125 A.D.3d 142, 1 N.Y.S.3d 169 (2d Dep't 2014). That statute is explicit: the uncompensated director, officer or trustee must serve an entity described in § 501(c)(3) of the United States Internal Revenue Code (26 U.S.C. 501[c][3]). *See Bernbach v. Bonnie Briar Country Club*, 144 A.D.2d 610, 534 N.Y.S.2d 695 (2d Dep't 1988). CPLR 3211(a)(11) facilitates the defendant's proof by accepting as presumptive evidence of the entity's 26 U.S.C. 501(c)(3) status certain Internal Revenue Service letters and publications. The affidavit of the chief financial officer of the entity attesting to the defendant's status as an uncompensated director, officer or trustee of the entity is presumptive evidence of such status. CPLR 3211(a)(11). Those presumptions can be rebutted by the plaintiff.

If the defendant's evidence on the motion establishes, *prima facie*, both that the entity with which the defendant is affiliated is a not-for-profit organization under 26 U.S.C. 501(c)(3), and that the defendant is an uncompensated director, officer or trustee thereof, the court must next consider whether there is a "reasonable probability" that

the defendant's alleged conduct constituted gross negligence or intentional harm. If there is no such "reasonable probability" the action must be dismissed.

The burden of proof on the "reasonable probability" element would appear to rest on the plaintiff. *Rabushka v. Marks, supra*; *see Brown v. Albany Citizens Council on Alcoholism, Inc.*, 199 A.D.2d 904, 605 N.Y.S.2d 577 (3d Dep't 1993). Thus, once the defendant makes a prima facie showing of entitlement to the qualified immunity of N-PCL § 720-a, the ball moves to the plaintiff's court to "come forward with evidentiary proof showing a fair likelihood that ... she will be able to prove that the defendant was grossly negligent or intended to cause the resulting harm." *Rabushka*, 229 A.D.2d at 900, 646 N.Y.S.2d at 395. A plaintiff in that position cannot rely on the favorable rules of decision applicable to most other CPLR 3211(a) grounds, and the plaintiff is compelled to lay bare her proof that the defendant's conduct was grossly negligent or intended to cause harm. *Kamchi v. Weissman*, 125 A.D.3d at 161, 1 N.Y.S.3d at 184; *Krackeler Scientific, Inc. v. Ordway Research Institute, Inc.*, 97 A.D.3d at 1084, 949 N.Y.S.2d at 287.

A plaintiff must submit evidence in admissible form showing a fair likelihood that she will be able to prove that defendant was grossly negligent or intended to cause harm. A detailed affidavit by one with personal knowledge of the relevant facts may do the trick. *Rabushka v. Marks, supra*; *Brown v. Albany Citizens Council on Alcoholism, Inc., supra*. A detailed pleading verified by one with familiarly with the facts may also suffice. *Cf. Krackeler Scientific, Inc v. Ordway Research Institute, Inc., supra*. The key is detailed factual averments by a knowledgeable witness or equivalent evidence. *See Kamchi v. Weissman*, 125 A.D.3d at 161-162, 1 N.Y.S.3d at 184 ("given the nature of the specific allegations as well as certain undisputed circumstances ... we conclude that there is a reasonable probability that the plaintiffs can establish that the defendants' actions constituted gross negligence or were intended to cause the resulting harm.").

In light of the unique purpose of CPLR 3211(a)(11) and the treatment it has received from the courts, it would appear that CPLR 3211(d), which allows a party opposing a CPLR 3211(a) or (b) motion to seek to forestall a decision on the motion for the purpose of gathering evidence, has limited, if any application on a paragraph 11 motion.

CPLR 3211(a)(11) sets up a summary judgment-like procedure relating to the immunity issue. Therefore, the court need not convert the paragraph 11 motion into one for summary judgment (*see* CPLR 3211[c]), provided the court confines its summary judgment-type review to the question of the defendant's immunity.

Interestingly, neither CPLR 3211(a)(11) nor CPLR 3211(e) indicate whether a motion under paragraph 11 must be made before service of an answer. Does that mean that it can be made at any time (like a motion under paragraph 2, 7 or 10)? The Third Department has considered the question and concluded that a CPLR 3211(a)(11) motion must be made before service of the answer. *Woodford v. Benedict Community Health Center*, 176 A.D.2d 1115, 575 N.Y.S.2d 415 (3d Dep't 1991). The court observed, however, that a defendant who fails to make a pre-answer motion to dismiss under paragraph 11 can move for summary judgment on that ground, provided it was raised in the answer. *Id.*

The unique dismissal ground provided by paragraph 11 is available to individuals entitled to qualified immunity under N-PCL § 720-a, as well as individuals entitled to qualified immunity under Arts and Cultural Affairs Law § 20.09.

Subdivision (b)

C3211:34. Motion to Dismiss Defense, Generally.

Subdivision (a) addresses a motion to dismiss an affirmative claim--a cause of action, a counterclaim, a cross claim, etc. Subdivision (b) provides a device to the pleader of an affirmative claim to seek dismissal of a defense interposed against the claim.

The mission of subdivision (b) is captured in one simple sentence: "A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." Any matter in a pleading that manifests a "defense" can be the target of a subdivision (b) motion. While a defendant seeking to dismiss a cause of action must find a specific subdivision (a) ground on which to rest the motion, *see* Commentary C3211:5, a plaintiff using subdivision (b) can raise any cognizable ground against a defense. Thus, the plaintiff can rely on any basis in law or fact that warrants dismissal of a defense. Another important feature of a subdivision (b) motion: it can be made at any time. *See* Commentary C3211:48.

CPLR 3211(e) allows the defense of failure to state a cause of action to be made the subject of a pre-answer motion, asserted in an answer or raised at some later time. If a defendant avails itself of option number two and interposes the CPLR 3211(a)(7) defense in its answer, can the plaintiff move to dismiss that defense under subdivision (b)? No, because such a motion would amount to an attempt by the plaintiff to test the sufficiency of her own claim. *Butler v. Catinella*, 58 A.D.3d 145, 150, 868 N.Y.S.2d 101, 105 (2d Dep't 2008). The CPLR 3211(a)(7) defense is therefore impervious to a CPLR 3211(b) challenge. *Id.*; *see Riland v. Frederick S. Todman & Co.*, 56 A.D.2d 350, 393 N.Y.S.2d 4 (1st Dep't 1977).

C3211:35. Standards on a CPLR 3211(b) Motion.

A plaintiff seeking dismissal of a defense has the burden of demonstrating that the defense is without merit as a matter of law. When faced with a CPLR 3211(b) motion, a court must liberally construe the pleadings in favor of the defendant and afford the defendant the benefit of every reasonable inference. *Bank of New York v. Penalver*, 125 A.D.3d 796, 1 N.Y.S.3d 825 (2d Dep't 2015); *see 534 E. 11th Street Housing Development Fund Corp. v. Hendrick*, 90 A.D.3d 541, 935 N.Y.S.2d 23 (1st Dep't 2011). Any doubt as to the availability of the defense or as to whether it should be dismissed should be resolved in favor of the defendant. *See Nahrebeski v. Molnar*, 286 A.D.2d 891, 730 N.Y.S.2d 646 (4th Dep't 2001); *see 534 E. 11th Street Housing Development Corp. v. Hendrick*, 90 A.D.3d at 542, 935 N.Y.S.2d at 24 ("A defense should not be stricken where there are questions of fact requiring trial."). The standards applicable to a CPLR 3211(b) motion to dismiss a defense are therefore akin to the rules of decision applicable to motions to dismiss a cause of action under CPLR 3211(a)(1), (5) and (7). *See* Commentaries C3211:10, 18, and 21.

C3211:36. Motion Not Limited to Defense Defective on its Face.

Subdivision (b) may be used to seek dismissal of a defense that is defective on its face. Such a legal-sufficiency-of-the-pleading challenge would not require the plaintiff to submit evidence in support of the motion. CPLR 3211(b) is also available to lodge a merits-based attack against a defense. The plaintiff is free to submit evidence of any kind (as long as it is in admissible form), *see* Commentary C3211:40, to undercut any facts on which the defense is founded. If the plaintiff's evidence demonstrates that the defense is without merit as a matter of law, *see* Commentary C3211:35, and the defendant does not submit any evidence rehabilitating the defense, dismissal is appropriate. *See Leonard v. Leonard*, 31 A.D.2d 620, 296 N.Y.S.2d 375 (1st Dep't 1968). (The defendant may avoid dismissal if she needs time to gather evidence, *see* Commentary C3211:46).

CPLR 3211(b) and 3211(a)(7) are analogous, each allowing for both a facial sufficiency and a merits-based challenge to a pleading. *See* Commentary C3211:23. CPLR 3211(b) explicitly authorizes dismissal of a defense on either basis ("A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit."). CPLR 3211(a)(7), on the other hand, appears at first blush to support only a facial sufficiency dismissal. Judicial construction of (a)(7), however, has expanded the role of that dismissal ground. *See* Commentary C3211:23.

C3211:37. Motion to Dismiss Defense May Lead to "Searching the Record."

"Searching the record" is a process whereby the court, called on by a moving party to grant that party relief on a cause of action, looks at the motion record to ascertain whether some other party is entitled to judgment on that

claim. It is a familiar concept in summary judgment practice, where searching the record is expressly authorized. *See* CPLR 3212(b) ("[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."). The power to search the record is not conferred directly by CPLR 3211(b), but is available by implication. CPLR 3211(c) permits a court, on notice to the parties, to convert a CPLR 3211 motion into one for summary judgment. *See* Commentary C3211:42. Upon a CPLR 3211 motion's conversion to one for summary judgment, the option to search the record provided by CPLR 3212(b) becomes available to the court. (We say "option" because the determination of whether to search the record is a discretionary one. *See Raine v. Gleason*, 194 A.D.2d 395, 598 N.Y.S.2d 504 [1st Dep't 1993]).

A plaintiff considering whether to move under subdivision (b) must therefore think long and hard before doing so. The CPLR 3211(b) motion, made with the expectation that it will lead to a paring down of the answer and the elimination of a defense to the plaintiff's action, allows the court, in its discretion, to consider whether the defense being challenged by the plaintiff actually warrants dismissal of the complaint.

Note that a court's power to search the record is confined to those claims, defenses and issues that are the subject of the underlying motion. *Dunham v. Hilco Construction Co., Inc.*, 89 N.Y.2d 425, 429-430, 654 N.Y.S.2d 335, 337, 676 N.E.2d 1178, 1180 (1996); Commentary C3212:23; *see Mann v. Rusk*, 14 A.D.3d 909, 788 N.Y.S.2d 686 (3d Dep't 2005). For that reason, a motion to dismiss a counterclaim under CPLR 3211(a) does not search the record and allow a court to dismiss a defense. *Key Bank of Northern New York, N.A. v. Lake Placid Co.*, 103 A.D.2d 19, 28, 479 N.Y.S.2d 862, 869 (3d Dep't 1984); *see Croce v. Alicakos*, 45 A.D.2d 970, 359 N.Y.S.2d 581 (2d Dep't 1974).

C3211:38. Move to Dismiss Jurisdictional Defense Promptly.

As is more fully developed in the discussion of subdivision (e), *see* Commentary C3211:52, a subdivision (a) dismissal ground need not be taken by motion. The defendant can instead use the ground as a defense in the answer. As to most of the subdivision (a) grounds, the defendant's use of the ground as a defense rather than on a motion to dismiss will not contain any special dangers for the plaintiff. If the ground, for example, is that the cause of action is barred by res judicata or release, etc., the impact of the defendant's tactic is only to postpone a determination of the issue to the trial or, perhaps, to a later motion for summary judgment. In these instances, where the determination will effectively bar the plaintiff from beginning the action again, at least in a New York court, it is of relatively less moment to the plaintiff that the determination is made later rather than sooner.

In some instances, however, a postponement of an adjudication of the defense's validity can have serious consequences for the plaintiff. This is the case when the defendant's objection is that the court lacks in personam (CPLR 3211[a][8]) or rem (CPLR 3211[a][9]) jurisdiction. *See* Commentaries C3211:28 and 30. It concerns the statute of limitations.

CPLR 205(a) permits a plaintiff whose cause of action has been dismissed on some threshold ground--without reaching the merits--to begin a new action on the same claim within six months after the dismissal, notwithstanding that the original period of limitations applicable to the claim has already expired. There are some important exceptions in CPLR 205(a), however, one of which is a dismissal for lack of personal jurisdiction over the defendant. *See* Siegel, New York Practice § 52 (Connors 5th ed.). This means that if a dismissal for lack of personal jurisdiction is postponed until after the original statute of limitations has expired, the dismissed plaintiff will find herself barred by the statute of limitations and without the six months that CPLR 205(a) might otherwise offer for a new action.

When the defendant takes the jurisdictional objection by way of defense in the answer rather than by motion, time is running and with it the date on which the statute of limitations will expire draws near. One remedy of the plaintiff is to move promptly to dismiss the jurisdictional defense under CPLR 3211(b), which will bring it to early adjudication. The plaintiff must also recognize, however, that the court on such a motion has the power to deny it without passing on its merits (*see* Commentary C3211:47), thus deferring the issue until the main trial. The plaintiff should spare

no reasonable effort in pointing out to the court the limitations consequences that may attend such a postponement, urging the court to decide the motion on its merits rather than exercise its discretion to defer it.

A plaintiff may also take the precautionary step--and often prefers to if the jurisdictional defense has any chance whatever of succeeding--of commencing the same action all over again, this time being more careful to assure that jurisdictional requirements have been satisfied. If the alleged jurisdictional defect relates to service of the process or the manner in which the action was commenced, *see* Commentary C3211:28, the plaintiff can initiate the new action in the same court, taking care this time to ensure that all i's are dotted and t's crossed. Should the jurisdictional issue arise because there is a question as to whether there is a Constitutionally sufficient basis upon which to subject the defendant to the New York court's jurisdiction, *see, id.*, the plaintiff should consider bringing a back-up action in a forum that has basis jurisdiction over the defendant.

If an issue of fact exists and prevents the summary determination of a motion to dismiss the jurisdictional defense, the moving plaintiff should remind the court of its power to order immediate trial of the issue. *See* Commentary C3211:44.

C3211:39. Peculiarities in "Rem" Cases Caused by Operation of CPLR 320(c)(2).

When the plaintiff sues only on an in rem (as opposed to a quasi in rem) foundation, the consequences of the defendant's appearance in the action are governed by the difficult provisions of CPLR 320(c)(2). The plaintiff may have to follow a convoluted course to preserve her rights under CPLR 3211(b).

CPLR 320(c)(2) provides that where the in rem defendant "proceeds with the defense after asserting the [in rem jurisdictional] objection," she forfeits all further objection and submits to the in personam jurisdiction of the court. There should be no difficulty when the defendant moves to dismiss on the in rem jurisdictional ground, i.e., under CPLR 3211(a)(9). If she prevails on the motion, the case is dismissed. If she does not prevail on it, she has a clear opportunity to withdraw from the litigation, leaving behind only an "in rem default," which assures that no resulting judgment can operate against her in personam. This is an advantage that CPLR 320(c)(2) gives her.

The difficulty arises when the defendant does not use the in rem jurisdictional objection under CPLR 3211(a)(9) on a motion to dismiss, but rather incorporates it as a defense in the answer, which the defendant may do under CPLR 3211(e). In that instance both sides are going to have difficulty in determining what constitutes "proceeding with the defense" sufficient to submit the defendant to personal jurisdiction under the language of CPLR 320(c)(2). Take an example:

There is no in personam jurisdiction in the case. There is only in rem jurisdiction. Assume that the defendant answers with defenses under both categories of jurisdiction. The plaintiff can move under 3211(b) to strike out the objection to in rem jurisdiction, which motion--because in rem jurisdiction does exist (and so the court finds)--would be granted. The plaintiff would not succeed, however, in getting the defense to in personam jurisdiction stricken, because there was no in personam jurisdiction to start with, meaning that the defense is a good one. And by merely including a defense of lack of personal jurisdiction in the answer--in this situation in which there was in rem jurisdiction at the outset--the defendant does not, under CPLR 320(c)(2), thereby submit to personal jurisdiction. Under CPLR 320(c)(2), the defendant does not waive the objection to personal jurisdiction unless she proceeds with the defense of the action "after asserting the objection to jurisdiction."

If, therefore, the plaintiff promptly moves to strike out the defendant's defense of lack of personal jurisdiction just as soon as the defendant serves the answer containing it, the court will have to deny the motion.

But suppose that the defendant, after the sustaining of the rem jurisdiction, goes forward and defends the action on the merits. Under the terms of CPLR 320(c)(2), the defendant thereby submits to the personam jurisdiction of the court. Continuing to defend on the merits after the sustaining of rem jurisdiction constitutes a submission to personam

jurisdiction even though there was none to begin with. Hence the plaintiff can now move to strike out the in personam jurisdictional defense, a defense that was sustained earlier. Whenever a defense of lack of personal jurisdiction is contained in the original answer in an in rem case, thus presenting the possibility that the defendant will go forward on the merits (after answering) and thereby submit to personal jurisdiction, the plaintiff can move to strike out the defense whenever--at that post-answer time--the defendant does go forward.

In regard to what constitutes proceeding "with the defense" after asserting a jurisdictional objection, especially where the defense is asserted in the answer rather than used on a motion to dismiss, the courts have maintained a rather consistent silence. Since the very service of an answer containing the defense is an "assertion" of it, one can argue that anything the defendant does in the action after serving the answer submits her to personal jurisdiction. That would be an unfair result, but if the defendant experiences any difficulty with it she can blame herself for not using the motion procedure of CPLR 3211(a), which would have afforded her an early adjudication of the defense and enabled her to decide intelligently under CPLR 320(c)(2) whether or not to proceed in the action. The courts obviously do not like this aspect of CPLR 320, whose dictates become confused when the alternative of pleading the defense in the answer is used, as allowed by CPLR 3211(e)

It has been held that a demand for a bill of particulars served along with the answer is not a going forward under CPLR 320(c)(2) such as will forfeit an objection to personal jurisdiction. *Solarino v. Noble*, 55 Misc.2d 429, 286 N.Y.S.2d 71 (Sup. Ct., New York County 1967). The best advice to the defendant, to whom the potential consequences of these confusing requirements are greater than they are to the plaintiff, is to use the 3211(a) (8 and 9) motion rather than the answer to make the jurisdictional objections.

The occasions for the kind of problem noted above were reduced by a 1969 amendment of CPLR 320(c). In the quasi in rem case in which jurisdiction is based solely on an attachment of the defendant's property, the amendment allows the defendant to defend in full without in personam consequences. *See* CPLR 320(c)(1). Thus, the problems under discussion should arise today only when the jurisdiction is in rem rather than quasi in rem, i.e., where CPLR 320(c)(2) governs. In rem examples would be foreclosure of a mortgage on local real property, replevin of a local chattel, or a matrimonial action, etc., in which there is initially no personal jurisdiction of the defendant.

Purely "in rem" jurisdiction is a casualty of the CPLR's 1963 adoption. The expansion of the bases for extraterritorial personal jurisdiction adopted under the longarm statute, CPLR 302, supplies personal jurisdiction in most of the situations that would previously have had only rem jurisdiction to rely on. Hence the infrequent need to attend to these in rem complications today.

Subdivision (c)

C3211:40. Evidence Permitted on CPLR 3211 Motion.

The first sentence of CPLR 3211(c) provides that, "[u]pon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment." Therefore, any evidence in admissible form may be submitted in support of or opposition to a CPLR 3211(a) or (b) motion. *See* Commentary C3212:15. That means the affidavit is available. So too are deposition transcripts, all types and forms of records, and admissions. You name it, if it is in admissible form, it is welcome on the CPLR 3211 motion.

There is, however, one situation in which the type of evidence available to the CPLR 3211(a) movant is limited (and drastically at that). That is where the defendant moves to dismiss a cause of action under the "documentary evidence" ground. CPLR 3211(a)(1). As discussed above, *see* Commentary C3211:10, a defendant relying on that ground must tender a paper with certain characteristics; the document must be unambiguous and of undeniable authenticity, and its contents must be essentially undeniable. Most evidence cannot satisfy those criteria. That is why it is recommended

that the CPLR 3211(a) movant invoke the documentary evidence ground along with one or more other potentially relevant grounds (such as failure to state cause of action [CPLR 3211(a)(7)]).

A CPLR 3211(a)(7) movant can rely on any evidence in support of her motion to dismiss for failure to state a cause of action. That principle finds significant case law support. But there is some authority to the contrary that would prevent a defendant from obtaining dismissal of a well-pleaded complaint under paragraph 7 based on evidence. *See* Commentary C3211:23.

Regardless of whether the evidence submitted in support of a CPLR 3211 motion can or does support dismissal, the evidence can serve a very valuable function: it can help the court to ascertain whether to convert the CPLR 3211 motion into one for summary judgment. *See* Commentary C3211:42.

C3211:41. Evidence required on CPLR 3211 Motion--Pleadings.

CPLR 3212(b) requires the summary judgment movant to submit with her motion a complete set of the pleadings in the action. *See* Commentary C3212:15. There is no similar requirement in CPLR 3211 for motions to dismiss. But, by virtue of the application of CPLR 2214(c), which requires the moving party to furnish to the court all papers necessary for the court's consideration of a motion, the CPLR 3211 movant must submit a copy of the pleading that is being attacked. *See Alizio v. Perpignano*, 225 A.D.2d 723, 640 N.Y.S.2d 191 (2d Dep't 1996); Siegel, New York Practice §§ 246, 257 (Connors 5th ed.). To be safe, the movant should submit all of the pleadings interposed in the action (assuming there is more than one pleading at the time the motion is made, which will be the case, among other situations, with any post-answer subdivision [a] motion and any subdivision [b] motion). A court may, in its discretion, overlook the movant's failure to submit a pleading--where, for instance, the court obtains it from another source (*Asinoff v. Asinoff*, 39 Misc.3d 1207[A], 2013 WL 1406215 [Sup. Ct., Kings County 2013])--or permit the movant to submit it belatedly. *See* CPLR 2001 ("At any stage of an action ... the court may permit a mistake, omission, defect or irregularity ... to be corrected ..., or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded."). But why test a court's tolerance for sloppy practice? Submit the pleading (or pleadings if there's more than one) and keep the court's attention on the merits of the motion.

We tip our cap to Professor Connors, who has brought to the fore this potential trap for the unwary CPLR 3211 movant. *See* Siegel, New York Practice §§ 246, 257.

C3211:42. Converting CPLR 3211 Motion into One for Summary Judgment.

Normally, summary judgment is not available until after issue has been joined. *See* CPLR 3212(a). The second sentence of CPLR 3211(c), however, provides that, "[w]hether or not issue has been joined, the court, after adequate notice to the parties, may treat the [subdivision (a) or (b)] motion as a motion for summary judgment." This conversion from a motion to dismiss to a motion for summary judgment will entitle any order granting accelerated-judgment to res judicata treatment. *See* Commentary C3211:64. Also, it enables the court to "search the record," CPLR 3212(b), and grant relief to a non-moving party. *See* Commentary C3211:37.

Any subdivision (a) or (b) motion has the potential to trigger a subdivision (c) conversion; the court's power to treat a motion to dismiss as one for summary judgment does not depend on the CPLR 3211 ground on which the motion was made. The usual suspect, though, responsible for triggering a conversion is CPLR 3211(a)(7). Paragraph 5 of subdivision (a), which provides for dismissal based on certain enumerated affirmative defenses, *see* Commentary C3211:18, and subdivision (b), the dismissal-of-defenses provision, *see* Commentary C3211:34, are in on the action too.

Why do these types of CPLR 3211 motions generate a disproportionate number of subdivision (c) conversions? Because they are the ones most likely to produce a factual record that resembles the one developed on an outright,

post-joinder of issue motion for summary judgment. It is a developed factual record that suggests to the court that there are no material issues of fact in the matter, which, in turn, may lead to the court to convert the motion. *See Born to Build LLC v. Saleh*, 36 Misc.3d 590, 950 N.Y.S.2d 236 (Sup. Ct., Nassau County 2012). After all, if the record is complete (or could be made so upon the conversion), the action can be put to rest expeditiously, sparing the parties needless expense, providing finality to them sooner rather than later, and allowing the court to concentrate its efforts on other matters.

Conversion does not lie to "resurrect" an untimely motion to dismiss under CPLR 3211(a) or to otherwise "cover" for an attorney's mistake that led to the waiver of a defendant's right to invoke a subdivision (a) ground. *Born to Build LLC v. Saleh*, 36 Misc.3d at 593, 950 N.Y.S.2d at 238. (New members of the Bar, as well as experienced practitioners who have developed bad habits in motion practice, should read the *Born to Build* decision; it serves as a stark reminder of the importance of minding good procedure). A CPLR 3211(a) movant must therefore identify the grounds in that subdivision that may apply to the action and, if they are subject to waiver, duly raise them in either a pre-answer motion to dismiss or the answer.

C3211:43. Notice of the Conversion.

The court determines whether conversion is to occur, although the parties are free to ask or encourage the court to convert the motion. The court must provide the parties with adequate notice of its intention to invoke subdivision (c). The point of this requirement is to provide the parties with an opportunity to make an appropriate record before the court decides the motion. *Mihlovan v. Grozavu*, 72 N.Y.2d 506, 534 N.Y.S.2d 656, 531 N.E.2d 288 (1988). The notice of conversion must clearly and unambiguously alert the parties that the court intends to treat the motion as one for summary judgment. *See 20 Pine Street Homeowners Assoc. v. 20 Pine Street LLC*, 109 A.D.3d 733, 971 N.Y.S.2d 289 (1st Dep't 2013). This is important. The parties cannot be made to guess whether they are facing a merits-based summary judgment determination.

Notice of the conversion must come from the court when the action is in the pre-joinder-of-issue phase. But what if a post-answer CPLR 3211(a) motion invokes a ground that, under CPLR 3211(e), should have been raised by pre-answer motion or in the answer? Such a motion would be, in effect, one for summary judgment because no post-answer CPLR 3211(a) motion lies on a ground that may be waived. The list of grounds that may be waived is long--paragraphs 1, 3, 4, 5, 6, 8, 9, and 11. Must the court give notice of its intention to "convert" the motion in that instance or can it disregard the mislabeling of the motion and just treat it as a summary judgment motion? The Court of Appeals' decision in *Rich v. Lefkovits*, 56 N.Y.2d 276, 452 N.Y.S.2d 1, 437 N.E.2d 260 (1982), suggests that the court should give the notice.

In *Rich*, the CPLR 3211(a) motion was based on paragraph 8, lack of personal jurisdiction (a ground subject to waiver), and the motion was made long after the joinder of issue. The trial court considered the motion under CPLR 3211 and granted it. The First Department affirmed. The Court of Appeals reversed the order of the Appellate Division and remanded the matter to the trial court to provide the parties with notice of a CPLR 3211(c) conversion. The Court found that the trial court erred in not converting the motion into one for summary judgment because that was the only procedural device available under the circumstances, the defendant having waived the right to make a CPLR 3211(a) motion by not moving pre-answer. *See* Commentary C3211:55. The Court stated that "[r]equiring that a motion addressed to lack of personal jurisdiction made after answer pleading that lack as an affirmative defense be made by motion specifying that it is made under CPLR 3212 or, if made under 3211, that the parties be given notice that the court will consider it as a 3212 motion[,] reduces the possibility of gamesmanship, while at the same time permitting the court to deal with the issue in the most efficient manner ..." 56 N.Y.2d at 282, 452 N.Y.S.2d at 4-5, 437 N.E.2d at 263-264. The Court observed that, based on the record before it, it could not be said that the plaintiff was not prejudiced by the failure of the trial court to convert the motion. The motion should have been one for summary judgment, conversion was therefore required, and had conversion occurred the plaintiff would have been provided with notice and the opportunity to lay bare his proof on the jurisdictional issue raised on the motion.

In light of *Rich*, if a party mislabels what ought to be a CPLR 3212 motion as one pursuant to CPLR 3211(a), the court should notify the parties that the motion will be converted, invite submissions and convert the motion. *See JP Morgan Chase Bank v. Johnson*, 129 A.D.3d 914, 10 N.Y.S.3d 446 (2d Dep't 2015). Where, however, the mislabeling has not caused prejudice to the non-moving party (maybe because the motion papers made it clear that what the defendant was really seeking was summary judgment), courts have overlooked the mistake and treated the motion as one for summary judgment without giving the non-moving parties any additional notice. *See Schultz v. Estate of Sloan*, 20 A.D.3d 520, 799 N.Y.S.2d 246 (2d Dep't 2005); *Hertz Corp. v. Luken*, 126 A.D.2d 446, 510 N.Y.S.2d 590 (1st Dep't 1987); *see also Guzov v. Manor Lodge Holding Corp.*, 13 A.D.3d 482, 787 N.Y.S.2d 84 (2d Dep't 2004).

There are three exceptions to the requirement that the court give notice to the parties of its intention to convert a CPLR 3211(a) or (b) motion into one for summary judgment. If one of the exceptions is applicable, the court can simply treat the CPLR 3211 motion as one for summary judgment and the absence of notice of a subdivision (c) conversion will be overlooked. The exceptions are as follows: (1) where subdivision (c) treatment is requested by all of the parties; (2) where the motion raises a pure question of law addressed by all of the parties; and (3) where the parties, by laying bare their respective proofs, deliberately chart a summary judgment course. *Hendrickson v. Philbor Motors, Inc.*, 102 A.D.3d 251, 955 N.Y.S.2d 1 (2d Dep't 2012); *see Mihlovan v. Grozavu*, 72 N.Y.2d 506, 534 N.Y.S.2d 656, 531 N.E.2d 288 (1988); *see also Richard A. Hellander, M.D., P.C. v. Metlife Auto & Home Ins. Co.*, 48 Misc. 3d 59, 15 N.Y.S.3d 537 (App. Term, 2d Dep't 2015) (charting summary judgment course). If the procedural posture of the case is equivocal and a party does not appreciate the need to submit all of her evidence and arguments in connection with the motion, the third exception will not apply. *See generally Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756, 874 N.E.2d 720 (2007).

In the event that the trial court treats the CPLR 3211 motion as one for summary judgment without giving the parties clear notice of its intention to do so (and none of the exceptions to the notice requirement applies), an appellate court will apply the standards applicable to a motion to dismiss. *Jones v. Rochdale Village, Inc.*, 96 A.D.3d 1014, 948 N.Y.S.2d 80 (2d Dep't 2012); *Sta-Brite Services, Inc. v. Sutton*, 17 A.D.3d 570, 794 N.Y.S.2d 70 (2d Dep't 2005).

One last note on conversion. A motion to dismiss for failure to state a cause of action (CPLR 3211[a][7]) can be made at any time. *See* Commentary 3211:49. The movant employing a paragraph 7 motion can seek dismissal of a complaint on the basis that it is facially deficient or on the basis that the cause of action stated is resolved conclusively by evidence. *See* Commentary C3211:23. Evidence submitted on the CPLR 3211(a)(7) motion might suggest to the court that summary judgment treatment is appropriate. *See* Commentary C3211:42.

A CPLR 3211(a)(7) motion made long after the joinder of issue and supported by evidence is a particularly attractive candidate for conversion to summary judgment.

When a CPLR 3211(c) conversion takes place, the motion to dismiss becomes one for summary judgment. A summary judgment motion (unlike a CPLR 3211[a][7] motion) must be made within a certain period of time. (CPLR 3212[a] provides, in relevant part, that "the court may set a date after which no [summary judgment] motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.")

The Court of Appeals has made plain that summary judgment motion deadlines must be taken seriously: if a summary judgment motion is untimely, the motion must be denied unless the movant provides a satisfactory explanation for the untimeliness. *Brill v. City of New York*, 2 N.Y.3d 648, 652, 781 N.Y.S.2d 261, 264, 814 N.E. 2d 431, 434 (2004). Neither the merits of the motion nor the absence of prejudice to the non-moving party is relevant in ascertaining whether good cause exists to consider a late motion. *Id.*; *see* Commentary C3212:12.

Thus, when a conversion is effected on a CPLR 3211(a)(7) motion that was made after the deadline for summary judgment motions, the movant must demonstrate "good cause"--a satisfactory explanation for the untimely summary judgment motion--otherwise the motion should be denied. *See Neil v. New York City Housing Auth.*, 15 Misc.3d 1115(A), 2007 WL 1005525, at *6 (Sup. Ct., Kings County 2007); Connors, *CPLR 3212(a)'s Timing Requirement for Summary Judgment Motions*, 71 Brook. L. Rev. 1529, 1577--1578 (Summer 2006). If the timeliness provision of CPLR 3212(a) did not apply to a CPLR 3211(a)(7) motion converted to one for summary judgment under CPLR 3211(c), parties would be encouraged to turn to paragraph 7 where the deadline for making a summary judgment motion has passed and the *Brill* holding would be undermined significantly. *See Neil v. New York City Housing Auth.*, 15 Misc.3d 1115(A), 2007 WL 1005525, at *6, Connors, *CPLR 3212(a)'s Timing Requirement for Summary Judgment Motions*, *supra*, at 1577-1578.

C3211:44. Immediate Trial of Issue of Fact.

The last sentence of subdivision (c) states that "[t]he court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion." "The motion" is one made under subdivision (a) or (b). The power to direct a hearing in connection with a CPLR 3211 motion would exist if the last sentence was omitted: CPLR 2218 allows a court to direct a hearing to resolve a fact issue on a motion.

With one notable exception treated below, immediate trials in aid of the determination of CPLR 3211 motions are not common. They are reserved for situations in which the resolution of a disputed issue of fact can resolve the entire case or a significant part of it. That is the effect of the "when appropriate for the expeditious disposition of the controversy" clause. If an action or most of it can be resolved early in the life of the case after an immediate trial, the parties may be spared significant expenses and burdens associated with prolonged litigation.

The immediate trial has particular utility on a motion to dismiss for want of personal jurisdiction under CPLR 3211(a)(8) because that dismissal ground must be raised on a pre-answer motion to dismiss or in an answer, *see* Commentary C3211:55, and it has the potential to resolve the action. Furthermore, the plaintiff may have a strong incentive to get an early determination of the personal jurisdiction question. If the statute of limitations is still alive on the plaintiff's claim, a new action can be commenced and the alleged defect depriving the court of personal jurisdiction may be cured. The plaintiff will want to know if she must avail herself of that option. (We suggest that the new action be brought anyway as backup. *See* Commentary C3211:38). The synergy of the plaintiff's need (and, sometimes, strong desire) to raise the personal jurisdiction issue in the infancy of the action and the ability of a personal jurisdiction defect to bring an action to an end, makes issues of fact on motions to dismiss for want of personal jurisdiction great candidates for subdivision (c) immediate trial treatment.

Personal jurisdiction comprises three elements: a basis for the exercise of jurisdiction over the defendant, notice to the defendant of the action, and proper commencement of the action. *See* Commentary C3211:28. An immediate trial can be used to consider factual questions related to any one of those elements. *See*, *e.g.*, *Vandermark v. Jotomo Corp.*, 42 A.D.3d 931, 839 N.Y.S.2d 670 (4th Dep't 2007) (immediate trial directed on issue of whether defendant's creation and maintenance of web site constituted transaction of business under CPLR 302[a][1] sufficient to confer longarm jurisdiction over that defendant). It is the notice element, though, that generates the most immediate trials. The issue on the notice score is whether the defendant was served properly with the initiatory papers. So common are "trials" on the issue of proper service that they have developed their own name in civil procedure idiom: the traverse hearing.

The subdivision (c) immediate trial has also proven itself useful in addressing fact questions related to whether an action was time-barred, *see Bronx-Lebanon Hospital Center v. Daines*, 101 A.D.3d 1431, 956 N.Y.S.2d 660 (3d Dep't 2012); *Ryan v. Borg*, 88 A.D.2d 637, 450 N.Y.S.2d 767 (2d Dep't 1982); *Back O'Beyond, Inc. v. Telephonic Enterprises, Inc.*, 76 A.D.2d 897, 429 N.Y.S.2d 250 (2d Dep't 1980); whether an action-barring release was procured through fraud or duress, *see Anger v. Ford Motor Co., Dealer Dev.*, 80 A.D.2d 736, 437 N.Y.S.2d 165 (4th Dep't

1981); *Purta v. Cisz*, 42 A.D.2d 594, 344 N.Y.S.2d 737 (2d Dep't 1973); and whether a tort plaintiff was an employee of the defendant at the time of the accident giving rise to the action (a finding that would trigger the exclusivity provisions of the Workers' Compensation Law). *See Duboff v. Board of Higher Ed. of City of New York*, 34 A.D.2d 824, 312 N.Y.S.2d 726 (2d Dep't 1970).

What is meant by an "immediate" trial? The word "immediate" indicates that the subdivision (c) trial should be given a preference. *See* Siegel, New York Practice § 271 (Connors 5th ed.). Just how potent the preference proves to be is a matter for the judge taking into account the other matters on her calendar. *Id.*

Who should decide the issue presented on a subdivision (c) immediate trial, the judge or a jury? That subject is addressed below in Commentary C3211:45.

C3211:45. Jury Trial of Motion Issue?

In allowing the immediate trial of an issue of fact arising on a CPLR 3211 motion, CPLR 3211(c) does not say whether the trial must be by jury. Here CPLR 2218 might be turned to for guidance, but it, too, has little to offer: it directs trial by jury if the issue is "triable of right" by jury, thus begging the question.

This issue turns on three things:

(1) whether the case is one in which the merits would be triable of right by jury;

(2) whether a jury has been demanded; and

(3) the nature of the ground on which the motion is based.

If no part of the action itself--such as where it is one in equity for an injunction--would be triable by jury, no issue of fact being tried on a CPLR 3211 motion in the case need be tried by jury.

If the case is triable by jury--such as an ordinary money action--and trial by jury has been duly demanded or the time in which to demand it is still open (*see* CPLR 4102), item (2) on the above list is satisfied, leaving only item (3) to be negotiated.

If the ground of the motion is such that resolution of the fact issue in favor of the movant will dismiss the case and preclude suit from being brought upon the cause again in New York, a jury trial will be required if either side insists on it. *See* CPLR 2218. Grounds that fall under this category would be release, res judicata, payment, statute of limitations, etc. If the grant of the motion dismissing the case would not prevent suit from being brought again, jury trial of the issue of fact would not be required. Examples of these grounds would be lack of jurisdiction (personal, rem, or subject matter), temporary disability of a party, other action pending (CPLR 3211[a][4]), failure to join a party, etc.

Even on these latter grounds, however, a situation can arise in which a trial by jury should be granted. If it appears that a dismissal for lack of personal jurisdiction, for example, will take place at a time that would prevent the plaintiff from suing anew because of the statute of limitations, *see* Commentary C3211:38 above, the impact of the dismissal would be permanently to oust the plaintiff from the New York courts and the issue of fact on the jurisdictional motion should therefore be tried by jury.

In *Cerrato v. Thurcon Constr. Corp.*, 92 A.D.2d 89, 459 N.Y.S.2d 765 (1983), the First Department so held, but not without dissent. The court divided 3-2 on the issue, the dissent writing that the mode of trial should not depend on the stage at which an issue is raised, but rather on the nature of the issue itself. In essence the dissent says that whether there is a right to reach the merits is an issue for the court rather than a jury to determine.

The Second Department appeared to be of a different view on an analogous issue in *Yannon v. RCA Corp.*, 131 A.D.2d 843, 517 N.Y.S.2d 205 (1987). The issue in *Yannon* was whether the action was timely. It was if the plaintiff was insane, because the insanity would have meant that the statute of limitations was tolled under CPLR 208; but the case would have been dead if the plaintiff was sane. The immediate issue, then, was the sanity. Even though the whole case depended on it, the court held that the issue is triable by the court, not by a jury. (It then went on to hold that the plaintiff did suffer from the disability, that there was a toll under CPLR 208, and that the action was therefore timely.)

Subdivision (d)

C3211:46. Resisting Party's Need of More Evidence.

When a motion is made under CPLR 3211, it is generally assumed that the moving party has already amassed all of the evidence needed to support the motion. But it may be that the opposing party has not yet done so, or has tried but been unable to. Subdivision (d) covers that situation.

CPLR 3211(d) provides that "[s]hould it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his [or her] responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just." Thus, the burden on the opposing party is to convince the court in the opposing affidavits that facts "may exist" that would defeat the motion; mere hope that discovery will yield helpful information will not forestall a determination of the CPLR 3211 motion. *See Cracolici v. Shah*, 127 A.D.3d 413, 4 N.Y.S.3d 506 (1st Dep't 2015). The opposing party need not convince the court that facts essential to oppose the motion actually exist because that obviously cannot be known until further investigation is had. The party seeking the benefit of subdivision (d) should specify the facts that need to be developed and explain why those facts are material to the opposition. *See Warshaw Burnstein Cohen Schlesinger & Kuh, LLP v. Longmire*, 106 A.D.3d 536, 965 N.Y.S.2d 458 (1st Dep't 2013). The court should also be shown the sources through which the opposing party believes the needed evidence can be secured. While not expressly required by the statute, the opposing party should, of course, make a specific request for subdivision (d) relief. *See SNS Bank, N.V. v. Citibank, N.A.*, 7 A.D.3d 352, 777 N.Y.S.2d 62 (1st Dep't 2004).

If the evidence can be secured simply by getting additional affidavits, the opposing party should explain why those affidavits were not gotten in time to resist the motion. If that is reasonably explained and it is just a matter of giving the opposing party more time in which to get them, the motion can be adjourned for the requisite time.

It may also happen, of course, that the affidavit will not be available because the witness who knows the facts will not volunteer them or because the needed facts are in the knowledge of an adverse party. Here the deposition procedure may suffice, and the court has explicit power under subdivision (d) to adjourn or continue the motion so as to afford the opposing party an opportunity to seek a deposition or use any other disclosure device against the person or party who holds a possible key to the facts.

Another alternative for the court in such a situation is merely to deny the motion and allow the moving party to put the objection into its pleading, thereby in effect deferring the issue until the trial or, perhaps, the making of a motion for summary judgment under CPLR 3212 (which would be made after the opposing party has had a sufficient time to amass other evidence). This is the subject of Commentary C3211:47.

Another situation is where the movant herself holds the key to the facts. *See Cantor v. Levine*, 115 A.D.2d 453, 495 N.Y.S.2d 690 (2d Dep't 1985). It may be unfair to grant the CPLR 3211 motion in a situation in which the opposing party must depend entirely on the moving party's testimony to support her own position. If that's the case, the opposing party should advise the court that the nature of the case requires her to depend on cross-examination of the movant at

the trial. An illustration of this would be the situation in which the plaintiff is a personal representative suing for the wrongful death of a decedent and where the death resulted from an accident which only the defendant (the movant) survived. If the defendant is the only one who can testify to what occurred at the scene, the plaintiff should have a chance to cross-examine the movant in front of the fact-trier. An early dismissal motion by the defendant in those circumstances, such as under CPLR 3211(a)(7), would not ordinarily be granted.

Plaintiff's Need of Jurisdictional Evidence in "Longarm" Case

A conceptual difficulty frequently arises when the plaintiff relies on the "longarm" statute (CPLR 302) for extraterritorial jurisdiction against the defendant, who moves to dismiss for lack of personal jurisdiction contending that CPLR 302 is not applicable. Whether the statute applies depends on whether the New York contacts required by CPLR 302 are present in the particular case. Since the court's jurisdiction over the defendant turns on that issue, a potential cart-before-the-horse argument arises. Its most sensitive appearance is when the longarm defendant moves to dismiss under CPLR 3211(a)(8) and the plaintiff in responding papers claims the need of disclosure under CPLR 3211(d).

The defendant's position at that moment is that the plaintiff must at least establish a prima facie basis for jurisdiction under CPLR 302 before the court can put the defendant to the burden of making disclosure, even if the disclosure is sought only as to the jurisdictional facts. That is, the defendant argues that the court does not even have the jurisdiction to order the disclosure unless and until the plaintiff factually, through affidavits or otherwise, establishes at least a prima facie set of facts invoking the longarm statute.

In *Peterson v. Spartan Industries*, 33 N.Y.2d 463, 354 N.Y.S.2d 905, 310 N.E.2d 513 (1974), the Court of Appeals held that the plaintiff in that situation does not have to make a prima facie showing of jurisdiction. The plaintiff "need only demonstrate that facts 'may exist' whereby to defeat the [dismissal] motion. It need not be demonstrated that they do exist. This obviously must await discovery." 33 N.Y.2d at 466, 354 N.Y.S.2d at 908, 310 N.E.2d at 515.

The Court said that to impose on the plaintiff the burden of establishing prima facie jurisdiction "may impose undue obstacles ... particularly ... under the 'long arm' statute." 33 N.Y.2d at 467, 354 N.Y.S.2d at 908, 310 N.E.2d at 515. The plaintiff in the *Peterson* case did show some local contacts on the part of the defendant. The Court found that with these "the plaintiffs have made a sufficient start, and shown their position not to be frivolous" on the question of jurisdiction.

With the "sufficient start" inquiry, the Court appeared to be pronouncing a kind of good faith test. Unless the court can be convinced, from what facts have been shown, that the plaintiff is guilty of bad faith in arguing that longarm jurisdiction exists, the plaintiff will get the benefit of the doubt and the defendant will be required to furnish further information that may reflect on jurisdiction. *See West Mountain Corp. v. Seasons of Leisure International, Inc.*, 82 A.D.2d 931, 440 N.Y.S.2d 729 (3d Dep't 1981).

Where the court determines that jurisdictional discovery will be permitted, it should deny the motion to dismiss without prejudice to renewal of the motion upon the completion of the jurisdictional discovery. *Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dep't 2013). Alternatively, the court could order a continuance of the motion, providing an opportunity for the discovery, then decide the motion. *See Jacobson v. Princess Hotels International, Inc.*, 101 A.D.2d 757, 475 N.Y.S.2d 846 (1st Dep't 1984).

C3211:47. Denying Motion with Leave to Plead the Objection.

An alternative course for the court to follow in a situation in which the opposing party does not yet have the evidence needed to resist a CPLR 3211 motion is to deny it with leave to the movant to plead it in the responsive pleading, if any. Where the defendant has moved to dismiss a cause of action under CPLR 3211(a), the denial would be without

prejudice to the defendant to plead the objection as a defense in the answer. If the plaintiff has moved to dismiss a defense under CPLR 3211(b), and the defense is contained in an answer that requires no responsive pleading (*see* CPLR 3011), the denial would merely have to specify that it is not on the merits of the motion or that it is without prejudice to the movant to litigate the issue at the trial, or by subsequent motion under CPLR 3212 (summary judgment), etc.

If the issue raised on a CPLR 3211 motion, whether made under subdivision (a) or (b), can be resolved on the paper proof submitted on the motion, it of course should be. If its resolution depends on a fact of which the opposing party must still secure evidence and the evidence can be secured by pretrial methods, as discussed in Commentary C3211:46, the remedy is an adjournment or continuance to enable the opposing party to get affidavits or to use the disclosure devices.

If an issue of fact connected with the motion cannot be resolved by paper proof already appearing in the motion papers or available for addition to them by an adjournment or continuance, a hearing may be necessary. The court may order that it take place promptly. *See* Commentary C3211:44.

With all of these alternatives available to the court, it would seem that a denial of the motion without passing on its merits, thereby leaving the matter for resolution by later summary judgment motion under CPLR 3212 or at the trial, should be used only where the nature of the particular case makes it especially appropriate. If the ground of the CPLR 3211 motion is such that an early resolution of the fact issue can result in a dismissal of the case or a final judgment in favor of either side, the issue is one that should not ordinarily be deferred until the trial.

If the issue arising on the motion is inextricably intertwined with the basic merits of the case itself, on the other hand, a strong argument appears for deferring its resolution to the trial proper. In such an instance an early trial of the issue under the court's power to direct immediate trial pursuant to subdivision (c) of CPLR 3211 can in effect become an early trial of the entire case, i.e., a back-door preference. That was not the purpose of subdivision (c), which may be said to contemplate an instance in which the fact issue arising on the motion is relatively sharp, can be isolated from the action's main issues, and can on a narrow point dispose of the whole case. *See* Commentary C3211:44.

Even where the issue is intertwined with the merits of the entire claim, strong countervailing reasons can appear to justify an immediate trial of the motion's fact issue. An example of this is where the plaintiff bases jurisdiction on the longarm statute (CPLR 302), the defendant pleads as a defense lack of jurisdiction, and the plaintiff moves to dismiss the defense under CPLR 3211(b). Even if resolution of the issue will not itself dispose of the case on the merits, as in the example where it relates only to jurisdiction, but the deferment of it until the trial can itself result in a disposition which will prevent the merits from ever being reached, the issue should not be deferred. An example would be where the statute of limitations expires in the interim so that a later dismissal for lack of jurisdiction will disable the plaintiff from suing anew. The issue in that situation should be ordered to immediate trial under CPLR 3211(c). *See* Commentaries C3211:38 and C3211:44.

Subdivision (e)

C3211:48. Time for Making CPLR 3211 Motion.

CPLR 3211(e) requires that a motion to dismiss a cause of action under CPLR 3211(a) be made before service of the responsive pleading "is required." The responsive pleading includes not just the answer to the complaint, but also an answer to a cross-claim, a reply to a counterclaim, an answer to a third-party claim, etc., depending on what pleading contains the cause of action being attacked. But for purposes of discussion we will assume the common situation in which the attacked cause of action is in the complaint and the motion to dismiss it is made by the defendant.

When the defendant must respond to a cause of action contained in the complaint that accompanied a summons, the responding time is 20 or 30 days, depending on the place and method of service. If the defendant is responding to a cause of action contained in a subsequent pleading, the responding time is a straight 20 days. These are the rules spelled out by the interplay of CPLR 320 and 3012. (The subsequent complaint can be an amended or supplemental one, or even the original one if the plaintiff has started the action with a CPLR 305[b] notice instead of a complaint and the complaint is served only after the defendant has served a demand for it.)

These periods, which dictate how long the defendant has to respond, therefore dictate as well how long she has to move to dismiss under CPLR 3211 in lieu of pleading.

It is generally contemplated, and it is surely the better practice, that the movant make the CPLR 3211 motion before pleading. If disposed to move pre-answer, the defendant should therefore move to dismiss before serving an answer. *See Wahrhaftig v. Space Design Group, Inc.*, 29 A.D.2d 699, 700, 286 N.Y.S.2d 442, 443 (3d Dep't 1968) (as a result of defendants' "failure to proceed by motion before service of the responsive pleading they must be deemed to have elected to proceed solely by means of the affirmative defense pleaded in the amended answer.") (internal quotation marks omitted); *see also Incorporated Village of Laurel Hollow v. Laverne, Inc.*, 43 Misc.2d 248, 250 N.Y.S.2d 951 (Sup. Ct., Nassau County 1964), *mod'd* 24 A.D.2d 615, 262 N.Y.S.2d 622 (2d Dep't 1965).

A defendant who has carelessly interposed an answer containing as a defense a ground on which she now wants to move to dismiss under CPLR 3211 can of course move under CPLR 3212 instead, and perhaps should do that. A ground that would have supported a CPLR 3211 motion before the service of the answer will ordinarily support a summary judgment motion after the service of the answer. *See* Commentary C3212:20.

If a motion is based on CPLR 3211 but is made after the service of the answer, the court can treat the motion as one for summary judgment, a power expressly conferred on it by CPLR 3211(c). *See* Commentary C3211:42. That would avoid the barrier otherwise presented by subdivision (e), and allow the court to get to the issues raised on the motion.

The time limit under discussion does not apply to all CPLR 3211 motions. There are three exceptions, as discussed in Commentary C3211:49.

C3211:49. Time Limitation Inapplicable to Certain Grounds.

If the motion is to dismiss a defense under subdivision (b), there is no time limit on it. The time limitations of CPLR 3211(e) operate only on the motion to dismiss a cause of action under subdivision (a). And there are three grounds even under CPLR 3211(a) that are excepted from the time requirement. A motion predicated on paragraph 2, 7, or 10 of subdivision (a) may be made at any time--the objections of lack of subject matter jurisdiction, failure to state a cause of action, and failure to join a necessary party--and may be made notwithstanding the service of an answer and even though the objection was not even included in the answer as a defense. *See* Commentary C3211:54.

C3211:50. Effect of Extensions of Responding Time.

Since the time in which to make a motion under CPLR 3211(a) is keyed by CPLR 3211(e) to the responding time, it will generally be true that anything that extends the responding time will also extend the time in which to move under CPLR 3211(a). A motion by the defendant to correct the complaint under CPLR 3024 will constitute such an extension, for example. *See* CPLR 3024(c). The CPLR 3211 motion itself has this effect under CPLR 3211(f). *See* Commentary C3211:67.

If the plaintiff amends the complaint, whether as of course under CPLR 3025(a) or by leave of court under CPLR 3025(b), the answering time and hence the responding time will run anew as to the amended complaint. *See* CPLR 3025(d). The same is true of a supplemental complaint under those provisions, and the same conclusions reached as

to the complaint will of course govern as to a cause of action contained in other pleadings, such as a cross-claim or counterclaim in an amended answer.

If a stipulation is made extending the time to respond, a frequent occurrence in practice, it should automatically extend the time in which to move under CPLR 3211(a). *See* *Bob v. Cohen*, 105 A.D.3d 530, 967 N.Y.S.2d 690 (1st Dep't 2013); *see also* *Rich v. Lefkovits*, 56 N.Y.2d 276, 280-281, 452 N.Y.S.2d 1, 3, 437 N.E.2d 260, 262 (1982). The stipulation can be more restrictive, however: it can provide that the extension is given only with respect to pleading and that it does not extend the time to move under CPLR 3211. A stipulation negating an extension of time to move should ordinarily be upheld. The would-be movant who has a CPLR 3211(a) objection, which could otherwise have been taken on a CPLR 3211 motion to dismiss, is not undone by this: she can serve a responsive pleading including the objection as a defense and then use a summary judgment motion under CPLR 3212 based on it.

The court clearly has power to extend the time to answer. *See* CPLR 3012(d). But the courts are perhaps not as free with an extension of time for a motion. In *Smith v. Pach*, 30 A.D.2d 707, 292 N.Y.S.2d 333 (2d Dep't 1968), the court extended the time to answer but specifically refused to permit a motion within the extended time, holding that "[g]ood cause for an extension of time to move was not shown." Perhaps the reason for this is that a refusal to extend the pleading time will result in a default judgment against the would-be pleader, while a refusal to allow more time to make a CPLR 3211 motion will not (as long as the defendant does serve a timely answer, of course).

Nothing discussed here should be confused with CPLR 3211(f), which automatically extends the time to serve a responsive pleading when the would-be responder moves to dismiss under CPLR 3211 as a first step in lieu of serving an answer, and the motion is denied. *See* Commentary C3211:67.

Defendant's Waiver of Defense as Quid Pro Quo for Extension of Time to Answer

It is always a wise thing for the plaintiff, when asked for an extension of the answering time by the defendant, to inquire into whether the defendant is planning to interpose a jurisdictional objection. Indeed, it may be tactically indispensable to do so if the case was brought with only a short time left on the statute of limitations, for the reason that if the case should be dismissed for lack of jurisdiction after the statute has expired, CPLR 205(a) will not offer the case its six months for a new action and the case will be dead. When the plaintiff discerns that the defendant has such an objection, and its resolution may occur too late for the plaintiff to start over, the plaintiff should try to get from the defendant, as a quid pro quo for the time extension, a waiver of jurisdictional objections. See on this subject the three-part series in the New York State Law Digest on the various ingredients that go into this tactical occasion (New York State Law Digest Nos. 274-6, entitled "The Urgency of Timing the Adjudication of Jurisdictional Objections").

A defendant who has agreed to the stipulation should check it out very carefully when it is reduced to writing to make sure that only jurisdictional objections are waived. A defendant who stipulated to waive "all affirmative defenses" found that she even waived the defense of the statute of limitations. *See* *Stefaniw v. Cerrone*, 130 A.D.2d 483, 515 N.Y.S.2d 66 (2d Dep't 1987).

The *Stefaniw* situation was more unusual still, because it was the defendant who drafted the stipulation, honoring the plaintiff's request that the defendant waive all affirmative defenses. The defendant apparently overlooked what a big bag that is. It would not be amiss, of course, for the plaintiff to insist also on a waiver of a statute of limitations defense, too. But the defendant's offer of such a waiver, if there is any possible merit at all to the limitations defense (which might put a permanent end to the plaintiff's case), and for the quid pro quo of nothing more than a little more time to answer, is a quid that goes far beyond the quo. (Or is it a quo that goes far beyond the quid?) An all-around bad contract, anyway. Waiving "all" affirmative defenses is worse still, when one considers just what that takes in.

The major affirmative defenses are listed in CPLR 3018(b). A simple scanning of that provision reveals how many substantive rights a defendant may give up with a waiver of "all" defenses. Does the defendant intend to waive, for

example, defenses such as res judicata or fraud, or, indeed, the fact that the defendant has already paid the obligation? (Payment and release are also on the list.) And in a personal injury case even comparative fault on the plaintiff's part is officially an affirmative defense. *Stefaniw* wasn't a personal injury case, but if it was, would it have been the defendant's intention to waive so casually the defense of the plaintiff's comparative fault?

A defendant who stipulates to waive "all affirmative defenses" might just as generously offer the plaintiff summary judgment instead. A defendant who offers the plaintiff summary judgment will be surprised by how generous the plaintiff will be with an extension of the defendant's time to answer.

C3211:51. Single-Motion Rule.

There shall be but one motion to dismiss under subdivision (a). (There is no limitation stated on the number of motions that can be made to dismiss defenses under CPLR 3211[b]). And if there are several causes of action stated, this provision means that the movant must gather together all of her subdivision (a) objections, or such of them as she wants to take by motion, for use on that single CPLR 3211 opportunity. This requirement has both procedural and administrative missions. It is designed to protect the pleader from being harassed by repeated CPLR 3211(a) motions and to spare the court's motion calendars the burden of a CPLR 3211 motion more than once in the same case.

It would appear that a second CPLR 3211 motion would be allowable if based on the want of subject matter jurisdiction under paragraph 2 of CPLR 3211(a), for the simple reason that this objection is an unwaivable one and can be raised at any time. And for CPLR 3211 purposes, the objections of paragraphs 7 (failure to state a cause of action) and 10 (failure to join a party) are in the same category as paragraph 2. *See* subdivision (e) of CPLR 3211. Subdivision (e) specifies that a motion on a ground specified in paragraph 2, 7, or 10 of subdivision (a) may be made at any time. Because of this common treatment of the three paragraphs, it might be thought that a second motion under CPLR 3211 could also be made if based on paragraph 7 or 10 of CPLR 3211(a). It was at one time so held, *e.g., Higby Enterprises, Inc. v. City of Utica*, 54 Misc.2d 405, 282 N.Y.S.2d 583 (Sup. Ct., Oneida County 1967), *aff'd* 30 A.D.2d 1052, 295 N.Y.S.2d 428 (4th Dep't 1968), but the Court of Appeals held otherwise in *McLearn v. Cowen & Co.*, 60 N.Y.2d 686, 468 N.Y.S.2d 461, 455 N.E.2d 1256 (1983).

It should be stressed, however, that omitting the paragraph 7 ground (failure to state a cause of action) from the initial CPLR 3211 motion will not waive it; subdivision (e) allows the paragraph 7 motion to be made at any time. It is just a matter of determining what mechanical device to use for the paragraph 7 objection when the CPLR 3211 motion has been used up. The device should be the summary judgment motion of CPLR 3212. The best counsel to the defendant, of course, is to join, in any CPLR 3211 motion made on any ground, a paragraph 7 objection as well, if the defendant has one.

When the CPLR 3211 motion is made prematurely and is denied for that reason--as where it is made to dismiss for lack of jurisdiction under CPLR 3211(a)(8) after the service of a summons without a complaint and the court cannot determine the motion until the complaint is served--the motion can be denied without prejudice to its renewal. *See Fraley v. Desilu Productions, Inc.*, 23 A.D.2d 79, 258 N.Y.S.2d 294 (1st Dep't 1965). Because the court seemed unsure in *Fraley* about whether the CPLR 3211 motion in that situation could be duplicated, it took the precaution of suggesting that what the defendant might do in the alternative is wait for the complaint, serve an answer, and then move for summary judgment under CPLR 3212, using the same objection (lack of jurisdiction) to ground it. Of course the objection would have had to be preserved by being included as a defense in the answer.

If the first CPLR 3211 motion made by a defendant is addressed to the complaint, a second one afterwards made against a cross-claim in a co-defendant's answer is permissible. The indication is that it will not be barred by the single-motion rule, whose purpose, which is to protect the pleader from repeated motions, is not undermined when the pleadings are those of different parties. *Nassau Roofing & Sheet Metal Co. Inc., v. Celotex Corp.*, 74 A.D.2d 679, 424 N.Y.S.2d 786 (3d Dep't 1980).

May a defendant, who made a CPLR 3211(a) motion against the initial complaint, move against an amended complaint on a CPLR 3211(a) ground, or did the prior motion against the earlier complaint "use up" the single motion? A second motion should lie, provided the claims that the defendant wishes to challenge were not set forth in the prior complaint. *See Kocourek v. Booz Allen Hamilton, Inc.*, 114 A.D.3d 567, 981 N.Y.S.2d 392 (1st Dep't 2014); *cf. Swift v. New York Medical College*, 48 A.D.3d 671, 850 N.Y.S.2d 906 (2d Dep't 2008) (service of amended complaint containing no new causes of action, but merely restating and renumbering certain causes of action, did not provide defendant with basis for circumventing single motion rule). The test is whether the defendant, on the prior CPLR 3211(a) motion, had the opportunity to address the claims she wishes to attack on the subsequent motion. *Barbarito v. Zahavi*, 107 A.D.3d 416, 968 N.Y.S.2d 422 (1st Dep't 2013). If she did, the new motion should be barred by the single motion rule; if she didn't the new motion is permitted.

When the omitted objection is to personal or rem jurisdiction, based on paragraph 8 or 9 of subdivision (a), different considerations may arise, discussed in Commentary C3211:55.

The general rule that only one CPLR 3211(a) motion may be allowed to a defendant does not bar a later made motion to dismiss on the ground of forum non conveniens under CPLR 327. *Harp v. Malyn*, 166 A.D.2d 848, 563 N.Y.S.2d 181 (3d Dep't 1990); *see F G II, Inc. v. Saks Inc.*, 46 A.D.3d 305, 847 N.Y.S.2d 185 (1st Dep't 2007).

If the defendant makes a CPLR 3211 motion, and the plaintiff alleges new facts in her answering papers, the defendant may, without violating the single-motion rule, include in reply papers additional dismissal grounds not covered in the defendant's initial motion. In that context it is all deemed part of a single motion. *Held v. Kaufman*, 91 N.Y.2d 425, 694 N.E.2d 430, 671 N.Y.S.2d 429 (1998).

C3211:52. Pleading Objection Instead of Moving on It.

As to all of the grounds listed in subdivision (a), CPLR 3211(e) gives the responding party an option. She can either move to dismiss on the stated ground or grounds, or instead plead them as defenses in her answer. This is true of all of the subdivision (a) grounds, without exception, and as long as the party uses all of her available grounds in the one form or the other, i.e., either uses them all to ground a CPLR 3211 motion or uses them all as defenses in the answer, she will not be held to waive any of them. It is where she divides them up and elects to take some of the objections by motion while saving others to use in the answer (if the motion is denied) that the risk of a waiver arises.

The treatment of waiver should be separately addressed to three distinct groups of objections contained on the subdivision (a) list: those contained in

a. paragraphs 1, 3, 4, 5, and 6;

b. paragraphs 2, 7, and 10; and

c. paragraphs 8 and 9.

The ensuing Commentaries treat these three categories separately. But an admonition to the practitioner at this point is warranted: the real trouble centers about the jurisdictional objections contained in paragraphs 8 and 9 of CPLR 3211(a). It is in regard to those objections that a "dividing-up" of objections for use partly by motion and partly by answer contains the waiver prospect.

While the defendant most commonly directs her jurisdictional objections against the plaintiff, the defendant must also pay some attention to the specific modes of preserving a jurisdictional objection against co-defendants who have cross-claimed. In *Bides v. Abraham & Strauss Division of Federated Dept. Stores, Inc.*, 33 A.D.2d 569, 305

N.Y.S.2d 336 (2d Dep't 1969), the danger to a co-defendant who has been cross-claimed against, in failing to make an independent objection (regarding the cross-claim) to the court's jurisdiction, resulted in a forfeiture of the objection although, ironically, the objection was successful against the plaintiff's main claim. The whole problem arose because the defendant who objected to jurisdiction took the objection as a defense in the answer rather than moving to dismiss based on it.

The plaintiff sued A and B. A pleaded lack of jurisdiction in the answer and, the matter thereby being deferred to the trial, A prevailed on it at the trial and plaintiff's claim against A was thereupon dismissed. But defendant B had cross-claimed A, and in A's answer to the cross-claim A did not assert or repeat the jurisdictional objection. As against B, therefore, A was held to have waived the jurisdictional objection.

A bizarre result. Since the jurisdiction the plaintiff originally secures against defendants is also generally assumed to constitute the jurisdictional foundation on which a cross-claim also rests, A's doing in the *Bides* case does not seem unreasonable. The court apparently chose to regard A's appearance, without repeating the jurisdictional objection against B, as superseding the original jurisdiction--the jurisdiction acquired by the plaintiff against A initially.

It was not unreasonable for A to do what was done in *Bides*. Since CPLR 3211(e) permits any defendant to take a jurisdictional objection by way of motion or answer, and a motion to dismiss successfully made against the plaintiff would presumably dismiss B's cross-claim as well, A should have been able to assume that the later disposition of a jurisdictional objection taken by way of answer would have the same effect.

Reasonable assumption or not, A is yet another litigant whose case has sounded a warning note for others. The warning is that any objection to personal jurisdiction that a given defendant, X, may have had is best be asserted independently as against each person in the litigation who has made a claim against X. On facts like those of *Bides*, A should, in the answer to the cross-claim, allege as a defense that the lack of jurisdiction A claims as against the plaintiff is claimed also against B. That should preserve the objection if taken by way of answer instead of by way of motion.

Note that only a properly pleaded defense will preserve a defendant's right to seek relief on it at some later point in the litigation, i.e., on summary judgment or at trial. If the purported defense is not pleaded with sufficient particularity, a court may conclude that it has been waived.

In *Scholastic Inc. v. Pace Plumbing Corp.*, 129 A.D.3d 75, 8 N.Y.S.3d 143 (1st Dep't 2015), the defendant attempted to raise the statute of limitations defense in its answer. Overly embracing the maxim that brevity is a virtue, the defendant pleaded that defense, along with 15 others, in "a boilerplate, catchall paragraph"; in that same paragraph the defendant reserved the right to plead any other potential affirmative defense. After some disclosure, the defendant moved for summary judgment on several grounds, including that the action was time-barred. In opposition to the statute of limitations ground, the plaintiff argued that the defense was waived because it had not been adequately pleaded. The trial court agreed.

The First Department also agreed, finding that the "[d]efendant failed to properly plead the statute of limitations, because its inclusion of the defense within a laundry list of predominantly inapplicable defenses did not provide [the] plaintiff with the requisite notice." *Id.* at 79; 8 N.Y.S.3d at 146. The Court concluded that the plaintiff was prejudiced by the defendant's failure to properly plead the statute of limitations defense: the plaintiff was induced by the contents of the answer to forego disclosure relevant to the statute of limitations issue, disclosure that may have yielded evidence to use to oppose the motion.

What was the consequence of the defendant's failure to properly plead the defense? Although the Court could have treated the defense as waived, *see* CPLR 3211(e); Commentary C3211:53, it declined to so because, under the circumstances, that punishment would not fit the defendant's offense. "Instead, the prejudice c[ould] be cured by

allowing [the] defendant to amend its pleading and then allowing [the] plaintiff to conduct disc[losure] on the statute of limitations issue." 129 A.D.3d at 81, 8 N.Y.S.3d at 148 (internal citation omitted).

For a thorough treatment of *Scholastic*, including useful tips for a defendant regarding the pleading of affirmative defenses, *see* Connors, *Back to Basics: Careful Pleading Under CPLR Article 30*, N.Y.L.J., May 18, 2015.

C3211:53. Waiving Objection Contained in Paragraphs 1, 3, 4, 5, or 6 of 3211(a).

The only time a defendant, will waive an objection under paragraphs 1, 3, 4, 5, or 6 of CPLR 3211(a) is where the defendant raises it neither by motion to dismiss under CPLR 3211 nor as a defense in the answer. If the defendant raises it in the one form or the other, it is preserved. *See*, *e.g., Wan Li Situ v. MTA Bus Company*, 103 A.D.3d 807, 14 N.Y.S.3d 89 (2d Dep't 2015). And the defendant can divide these objections up, taking some by motion and saving others for use as pleaded defenses if the motion fails. *See*, *e.g., Kinberg v. Schwartzapfel, Novick, Truhowsky, Marcus, PC*, 136 A.D.3d 431, 24 N.Y.S.3d 614 (1st Dep't 2016); *Hertz Corp. v. Luken*, 126 A.D.2d 446, 510 N.Y.S.2d 590 (1st Dep't 1987).

If the defendant omits to take any of these objections in either form, the defendant waives it, although the defendant may seek to assert it in an amended pleading, a subject discussed in Commentary C3211:58.

C3211:54. Waiving Objection Contained in Paragraphs 2, 7, or 10 of 3211(a).

The objections contained in paragraphs 2, 7, and 10 of CPLR 3211(a) are the least likely to be waived by careless pretrial procedure. Any or all of the three objections can be taken either by CPLR 3211 motion or by way of defense in the responsive pleading. And they can be divided, one or more used on a CPLR 3211 motion and the rest saved for use in the pleading if the motion fails. If taken by neither a CPLR 3211 motion nor by way of defense in the responsive pleading, they are still not necessarily waived. Paragraphs 2, 7 and 10 can be raised at any time and made the subject of a summary judgment motion or invoked at trial. *See* Commentary C3211:49.

C3211:55. Waiving Objection Contained in Paragraphs 8 or 9 of 3211(a).

This is one of the busiest of the CPLR 3211(e) categories. It covers a lot of ground. Division is made into subcaptions to facilitate treatment.

In General

The objections to lack of personal (paragraph 8) or rem (paragraph 9) jurisdiction under CPLR 3211(a) are singled out for special treatment by CPLR 3211(e).

If the defendant has available either of these objections she may take them by motion under CPLR 3211 before answering or by way of defense in the answer. It is no longer required that the defendant make the jurisdictional objection by motion in a special appearance, as was required by § 237-a of the old Civil Practice Act (superseded by the CPLR in 1963). The special appearance has been abolished and it now suffices for the defendant to object to personal or rem jurisdiction either by motion to dismiss under CPLR 3211 or in the answer.

But if the defendant does have either of these objections available, she is not to waste the court's or the plaintiff's time on any CPLR 3211 motion on any ground at all unless on that motion she joins the jurisdictional ground. *See Competello v. Giordano*, 51 N.Y.2d 904, 434 N.Y.S.2d 976, 415 N.E.2d (1980). If the defendant makes no CPLR 3211 motion on any ground, she may then safely include the jurisdictional defense in the answer without fear that she has waived it. (The objection of improper service faces a separate time limit after assertion in the answer, however, as will be noted in a separate caption below.) But if she makes any CPLR 3211 motion, regardless of ground, she

must include the jurisdictional objection in the motion or she waives it. She may not, if the CPLR 3211 motion made on other grounds is denied, then turn around and serve an answer containing the jurisdictional objection. *Montcalm Publishing Corp. v. Pustorino*, 125 A.D.2d 188, 508 N.Y.S.2d 455 (1st Dep't 1986) ("A defendant may not, upon denial of the motion under CPLR 3211 which omits a jurisdictional defense, serve an answer containing the jurisdictional defense.").

Of course, as with the objections contained in paragraphs 1, 3, 4, 5, and 6, the omission to make the paragraph 8 or 9 objection either by motion or answer will waive it. *See* Commentary C3211:53 above, and also Commentary C3211:58, regarding amendment of the answer to add the objection.

Motion Without Jurisdictional Objection Waives It Even If Motion Aborts

The making of a CPLR 3211(a) motion without including the personal jurisdiction objection will destroy the objection immediately. *Addesso v. Shemtob*, 70 N.Y.2d 689, 518 N.Y.S.2d 793, 512 N.E.2d 314 (1987); *see Competello v. Giordano, supra*; *cf. Gliklad v. Cherney*, 97 A.D.3d 401, 948 N.Y.S.2d 48 (1st Dep't 2012). In *Addesso*, the defendant moved under CPLR 3211(a)(7) to dismiss the complaint for failure to state a claim. The plaintiff amended the complaint while the motion was pending and apparently stated the claim right. The defendant then served an answer to the amended complaint and in it included the jurisdictional objection not previously raised. It was held to be too late. The Court said the objection was waived by the making of the motion against the original complaint without including the jurisdictional objection. (See the discussion of *Addesso* case in the lead note in New York State Law Digest No. 335.)

If no motion is made, and an answer is then served without including the jurisdictional objection, it was held in *Solarino v. Noble*, 55 Misc.2d 429, 286 N.Y.S.2d 71 (1967), that an amendment of the answer made as of course under CPLR 3025(a) can include the objection as a matter of right and avoid the waiver. The Court of Appeals agreed with the *Solarino* court's assessment. *Iacovangelo v. Shepherd*, 5 N.Y.3d 184, 185, 800 N.Y.S.3d 116, 116, 833 N.E.2d 259, 259 (2005) ("[A] defendant who omits from an answer a defense based on lack of personal jurisdiction has not waived the defense if the defendant corrects the omission before the time to amend the answer without leave of court has expired."). This point is pursued further in Commentary C3211:58.

Jurisdictional Defense Not Waived by Defending on Merits

CPLR 3211(e) clearly permits the defendant either of two modes in which to interpose an objection to personal jurisdiction: as a motion to dismiss under CPLR 3211(a)(8) or as a defense in the answer. If the answer method is used, the defendant must obviously be permitted to put every other defense she has into that answer, including her denials. By using the answer method, in other words, the defendant is signaling that she is willing to wait until some later point--perhaps the trial itself--for resolution of the issue, and that's the defendant's right under CPLR 3211. *See Calloway v. National Services Industries, Inc.*, 93 A.D.2d 734, 461 N.Y.S.2d 280 (1st Dep't), *aff'd* 60 N.Y.2d 906, 470 N.Y.S.2d 583, 458 N.E.2d 1260 (1983). (The right is qualified when the jurisdictional objection is addressed to improper service, as noted in a separate Commentary below.) Meanwhile, the defendant must also be allowed to prepare for the trial in respect of the merits.

Remember that the matter of when the jurisdictional objection should be determined is not lodged exclusively in the defendant's hands. If the defendant uses the answer method, the plaintiff has in CPLR 3211(b)--the motion to strike a defense--a tool for bringing the matter to an early adjudication.

Motion for Judgment May Eclipse and Thus Forfeit Jurisdictional Defense Asserted in Answer

If the case is not disposed of before trial, and reaches the trial stage, it is fair enough to conclude that the jurisdictional defense can be adjudicated at that time, having been duly preserved all the while in the answer. (An exception is the jurisdictional defense based on improper service, which has a 60-day time restriction under CPLR 3211[e], for which see the Commentary below.) But suppose that the case goes to judgment on the merits before then; that one of the parties moves for summary judgment on the merits during the pretrial stage, for example, and that the motion is granted.

If the defendant is the successful movant, she will gladly forfeit the jurisdictional defense that she interposed. But assume that the plaintiff is the successful movant. If the defendant has not been able to defeat the summary judgment motion, and has also failed to inject the jurisdictional objection into the motion, the defendant will likely be held to have forfeited the objection despite its inclusion in the original answer. (*See* the lead note in Issue 33 of Siegel's Practice Review, also treating the differences between New York and federal practice on the issue of how long a jurisdictional objection asserted by way of defense in the answer may be allowed to survive in the action.)

Jurisdictional Defense Based on Improper Service Must Be Brought to Adjudication by Defendant Within 60 Days

Zeroing in on only one category of objection to personal jurisdiction--the objection of improper service--an amendment of CPLR 3211(e) that took effect in 1997 requires a relatively prompt adjudication of the objection even when taken by answer. Within 60 days after serving the answer containing the objection, the defendant must "move for judgment on that ground."

Since the service of an answer cuts off the defendant's right to make a CPLR 3211 motion (except on certain grounds not relevant here), the defendant's application for adjudication of the defense apparently contemplates a motion for summary judgment.

If the defendant fails to make the motion within the allotted 60 days, the objection is waived and the court's personal jurisdiction assumed. *Wiebusch v. Bethany Memorial Reform Church*, 9 A.D.3d 315, 781 N.Y.S.2d 6 (1st Dep't 2004), highlights just how seriously the 60-day rule is taken by the courts. In *Wiebusch*, the defendant made the motion to dismiss for want of proper service beyond the 60 days. The court held that it could deny the motion on its own initiative; that the plaintiff need not move to strike the defense nor even oppose the defendant's motion by citing the tardiness issue. It's still a good idea for the plaintiff to take either step. It isn't every court that's going to notice and dispose of the defect on its own motion. *See generally Misicki v. Caradonna*, 12 N.Y.3d 511, 519, 882 N.Y.S.2d 375, 381, 909 N.E.2d 1213, 1218 (2009) (courts "are not in the business of blindsiding litigants, who expect [courts] to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made").

Note that only the specific ground of improper service is involved here. Other objections that go to personal jurisdiction--like want of a jurisdictional basis for extraterritorial service, defective contents of the summons, failure to include either a complaint or default notice with the summons, etc.--are defects of personal jurisdiction but are not among those that have to be made the basis for a dismissal motion within 60 days after being pleaded. They can be postponed of adjudication until much later, when the statute of limitations has expired and when a dismissal of the action can indeed be fatal because CPLR 205(a) does not offer its six months for a new action when the earlier one was dismissed for lack of personal jurisdiction. (Unless, of course, the plaintiff presses the defendant's lack of personal jurisdiction affirmative defense by way of a CPLR 3211[b] motion.)

When the defendant makes a motion to bring the improper service defense to adjudication, and the plaintiff opposes it, the plaintiff must include in the opposing papers a copy of proof of service, even if proof of service has already been filed in the case.

Generally, the tenant in a summary proceeding is not subject to this 60-day time limit. The assertion of a jurisdictional objection in an answer in the summary proceeding thus remains valid despite the expiration of the 60 days. This is the accomplishment of CPLR 3211(e)'s citation of subdivisions 1 and 2 of RPAPL 711, which cover the most numerous of the summary proceedings: those based on holding over after the expiration of the lease term and those based on the nonpayment of rent.

The 60-day waiver provision of CPLR 3211(e) does not apply in the Court of Claims because the failure to comply with the service requirements in the Court of Claims Act touches on that special court's subject matter jurisdiction over an action. *See Zoeckler v. State*, 109 A.D.3d 1133, 971 N.Y.S.2d 760 (4th Dep't 2013); *see also Diaz v. State*, 174 Misc.2d 63, 662 N.Y.S.2d 719 (Ct.Cl. 1997).

A coordinate amendment of CPLR 3214(b) was made in the same 1997 law that amended CPLR 3211(e). CPLR 3214(b) automatically stays all outstanding disclosure proceedings when the defendant makes a motion under CPLR 3211 (motion to dismiss), CPLR 3212 (motion for summary judgment), or CPLR 3213 (motion for summary judgment in lieu of complaint). Under the amendment of CPLR 3214(b), if the motion is based on the improper service ground addressed in CPLR 3211(e), the motion does not automatically suspend disclosure.

Only Showing of "Undue Hardship" Can Extend the 60 Days

The court can extend the 60 days, but only on the ground of "undue hardship." This provision has had a lot of attention, usually with bad news for the defendant. The phrase has been given a strict construction.

The lighter showing exacted under a "good cause" or "in the interests of justice" standard, applicable under diverse other procedural statutes, does not suffice under the "undue hardship" criterion of CPLR 3211(e). So concludes *Abitol v. Schiff*, 180 Misc.2d 949, 691 N.Y.S.2d 753 (Sup.Ct., Queens County, 1999, treated in Issue 84 of Siegel's Practice Review), *modified on other grounds* 276 A.D.2d 571, 714 N.Y.S.2d 880 (2d Dep't 2000). The court cites, and rejects for CPLR 3211(e) application, the more liberal measures of CPLR 306-b (extension of time to serve summons and complaint), CPLR 2004 (extension of time for taking procedural steps in general), and CPLR 3212(a) (extension of time to make motion for summary judgment). The defendant in *Abitol* did not make any showing of "undue hardship" to excuse the delay, and the jurisdictional objection was held waived.

In this light, certainly the general--and liberal--time extending power of the court under CPLR 2004 is superseded for CPLR 3211(e) purposes by the "undue hardship" provision.

A connected question arose in *Zucco v. Antin*, 257 A.D.2d 421, 682 N.Y.S.2d 354 (1st Dep't 1999): whether the 60-day period will start to run anew from an amended answer. The court said no: even if the original answer had the objection, the failure to bring it to judgment within 60 days from service of the original answer waives it; an amended answer will not offer a new 60-day period.

Does Removal to Federal Court Effect Waiver of Objection to Personal Jurisdiction?

In *Cain v. Commercial Publishing Co.*, 232 U.S. 124, 34 S.Ct. 284 (1914), the U.S. Supreme Court held that the removal of an action from state court to federal court does not waive an objection to personal jurisdiction, and many a defendant's lawyer will confirm that one of the considerations in whether to remove a case may be to have the federal rather than the state court rule even on a mere objection to personal jurisdiction that the defendant has raised in the state court. The Appellate Division has more recently held, however, that an objection of improper service--which is of course a category of personal jurisdiction--does get waived by the defendant's removing the case to federal court. *Quinn v. Booth Memorial Hosp.*, 239 A.D.2d 266, 657 N.Y.S.2d 680 (1st Dep't 1997).

The removal in *Quinn* was held to be a general appearance, at least to the extent that when the case was afterwards remanded, the waiver was held to apply by the New York court. As noted above, however, one of the purposes of the removal may have been to have the federal court rule on the objection. Perhaps the defendant in *Quinn* was somehow remiss in preserving the jurisdictional objection before the removal. One counseling point for a defendant bent on removal is to at least assert the objection in the state court before the removal, even if in no other form than as a defense in a promptly served answer--always mindful, of course, of the 30-day time limit on removal from state to federal court under 28 U.S.C.A. 1446(b).

If the ground of the jurisdictional objection is improper service and the defendant has chosen to assert it as a defense in the answer--and the answer has already been served at the time of removal--the defendant must also attend to New York's 60-day time limit on bringing the objection to judgment. To be on the safe side, the defendant should promptly, after removal, make a motion for judgment in the federal court based on the jurisdictional objection, being certain that the motion in the federal court also falls within the 60-day period following the service of the answer in the state court. By doing that, the defendant can avoid having to rely on a federal court determination of whether the CPLR 3211(e) 60-day time limit would have to be applied by the federal judge.

And if the defendant chooses to remove the case before answering, the defendant would do well to make a prompt motion to dismiss in the federal court after the removal, under Rule 12(b) of the Federal Rules of Civil Procedure, based on the improper service objection.

By so proceeding, the defendant should be able to preserve the objection through the process of removal to federal court, and even through the process of removal and remand, should the case be sent back. It is in any event hard to think that a defendant intent on removing a case should be held, despite all procedural precautions, to forfeit an objection to the court's personal jurisdiction by the mere fact of the removal. *See Benefits by Design Corp. v. Contractor Management Services, LLC*, 75 A.D.3d 826, 905 N.Y.S.2d 340 (3d Dep't 2010).

Answer by Unserved Defendant Is Not Jurisdictional Waiver

In authorizing a defendant to object to personal jurisdiction either with a motion to dismiss under CPLR 3211(a)(8) or with a defense in the answer, the CPLR has in mind a defendant on whom service of process has at least been attempted. But suppose that there has been no service at all. Will the defendant's service of an answer in that situation--duly setting forth a jurisdictional objection--preserve it? It will, holds the Second Department in *Colbert v. International Security Bureau, Inc.*, 79 A.D.2d 448, 437 N.Y.S.2d 360 (2d Dep't 1981).

A situation like this arises, as it did in *Colbert*, when there are several named defendants in the case, of which X is only one. The rest have been served, so that there is a pending action in which, X learns, she is also a named defendant, and yet there has been no summons served on her. X may nevertheless have an objection to jurisdiction, not for want of service, obviously, but based on some other ground, such as the absence of a jurisdictional basis for extraterritorial jurisdiction.

The plaintiff contended in *Colbert* that because no service was attempted on X, X's service of an answer constituted a voluntary appearance and submission to jurisdiction; that the modes of a CPLR 3211 motion or a defense in the answer are available only to defendants upon whom service was at least attempted. The court rejected those arguments. X need not stand by idly, knowing that an action is pending in which she is a named party and can be served at any time, the court says. As long as X is named, X may, if she contends that there is no jurisdiction over her, take the initiative of having the court so hold. She has the right to appear in the action and state the jurisdictional objection, and since one of the ways the CPLR allows for the assertion of the objection is an answer, X may serve an answer and the answer can include the jurisdictional objection as well as plead whatever else is appropriate to an answer.

If the plaintiff does not want to serve X, and does not want X serving papers and making objections, the plaintiff should approach X with the offer to stipulate to drop X from the action entirely.

Jurisdictional Objection Arising Later Is Assertable Later

It may sometimes happen that at the outset of the litigation, at the juncture at which a jurisdictional objection is most appropriate, the jurisdictional objection does not yet exist. Since CPLR 3211(e) requires that an objection to jurisdiction--we refer here to personal or rem as opposed to subject matter jurisdiction--be asserted either by a CPLR 3211 motion before answering or as a defense in the answer, what should a defendant do when the jurisdictional objection does not arise until after the time for the making of the CPLR 3211 motion has expired and the answer has already been served? In a situation like that arising in *Rich v. Rich*, 103 Misc.2d 723, 426 N.Y.S.2d 936 (Sup. Ct., New York County 1980), the court held that the defendant may make a motion for summary judgment based on the newly arising jurisdictional objection. *See* Siegel, New York Practice § 111 (Connors, 5th ed.).

The problem in the case revolved around an attachment. Under the procedures of article 62 of the CPLR, an attachment properly levied at the outset validates jurisdiction, but it is subject to the condition subsequent of a perfection of the levy by appropriate steps. In the interim, the time for making a CPLR 3211 motion, and for serving an answer, the two devices by which a jurisdictional objection may be asserted, expires. The time for perfecting a levy of the attachment may not yet have expired when the answering time does, however; perfection may yet take place, so there is not as yet any jurisdictional defect. But then suppose the time for perfection does expire, and without appropriate steps by the plaintiff. The *Rich* case holds that as soon as it becomes plain that the levy has been voided for want of perfection, thus undoing the jurisdiction that the levy had initially secured, the objection may be raised by the defendant and an appropriate expedient for the raising is a motion for summary judgment. That motion, which is governed by CPLR 3212, has no pre-answer time limit such as CPLR 3211 imposes.

Consistent with the procedural realities of the case in such a situation, the plaintiff's contention that the defendant "waived" a jurisdictional objection at a moment when she did not have one is of course rejected.

C3211:56. Counterclaim or Cross-Claim as Waiving Jurisdictional Objection.

If the plaintiff has an objection under paragraphs 8 or 9 of CPLR 3211(a)--that jurisdiction in personam or in rem is lacking--the plaintiff may assert it by a motion to dismiss under CPLR 3211(a). Or, if the plaintiff makes no motion, she may assert the objection by way of defense in the answer. The mere service of an answer containing a defense of lack of jurisdiction preserves the objection under the CPLR; it is not a waiver of it.

But assume that the defendant also includes a counterclaim in the answer. It was held early in the life of the CPLR that inclusion of a counterclaim does not waive the jurisdictional objection. *Goodman v. Solow*, 27 A.D.2d 920, 279 N.Y.S.2d 377 (1st Dep't 1967).

Since that time the rule has been refined, evolving a distinction between a counterclaim related to the plaintiff's claim, and an unrelated one. The related one (it was a related one in *Goodman*) does not waive the jurisdictional objection, but the interposition of an unrelated counterclaim does. *See Liebling v. Yankwitt*, 109 A.D.2d 780, 486 N.Y.S.2d 292 (2d Dep't 1985), in which the court holds that

[w]hen defendant interposed a counterclaim unrelated to the plaintiff's claim, he placed himself in the position of a plaintiff who initially invokes the jurisdiction of a court and by so doing effectively waives any jurisdictional objection he might have had against the prime action.

How does one test whether a counterclaim is "related" to the main claim? The Court of Appeals addressed the matter in *Textile Technology Exchange, Inc. v. Davis*, 81 N.Y.2d 56, 595 N.Y.S.2d 729, 611 N.E.2d 768 (1993), holding that

the doctrine of issue preclusion (collateral estoppel) holds the answer. When there are issues in common between the counterclaim and the plaintiff's main claim, such that an adjudication of an issue in the course of trying the main claim would necessarily be dispositive of the same issue when it afterwards becomes relevant on the trial of the counterclaim, then the counterclaim is to be deemed a related one and, practically speaking, the defendant really has no choice but to interpose it. Interposing it, therefore, does not waive a jurisdictional defense that the defendant may also have.

The defendant who is in doubt about the relatedness of the counterclaim and who wants at least a preliminary test of the merits of the jurisdictional objection should use the motion method to contest jurisdiction, i.e., move to dismiss under CPLR 3211(a)(8). The mere making of the motion extends the answering time, CPLR 3211(f), and the defendant will shortly have at least the trial court's view of whether the jurisdictional objection is valid.

As is plain from the Appellate Division stage of the *Textile* case, the judges will sometimes disagree about whether the counterclaim is related to the main claim. The adoption of the issue preclusion doctrine to test the point will help to avoid that, but is not likely to be a talisman in its own right.

What about a cross-claim? The *Goodman* case indicates that the inclusion of a cross-claim against a co-defendant may constitute a jurisdictional waiver, but it would be best to qualify that conclusion, too, so as to apply the waiver only to a cross-claim wholly unrelated to anything else in the action.

The same rationale that enables a defendant to interpose a related counterclaim without waiver consequences should apply to a related cross-claim as well. If a defendant fails to interpose a related cross-claim, she will be risking the consequences of the issue preclusion (collateral estoppel) doctrine: issues decided in the case will be binding on the defendant if they also turn up in a later, separate suit by the defendant on what would have been the cross-claim.

The interposition of an unrelated cross-claim, on the other hand--the cross-claim that neither seeks indemnity for something interposed against the defendant by some other party nor has any issue of law or fact in common with anything else in the case--marks the defendant's intention to exploit the forum for her own purposes, a posture inconsistent with the contention that the forum lacks jurisdiction.

Impleader of Third-Party Defendant as Waiving Jurisdictional Objection

The general rule that the interposition of a related counterclaim or cross-claim by the defendant should not be deemed a waiver of a jurisdictional defense that is also contained in the answer, has also been extended to a defendant's use of the impleader device. Thus, where the defendant included in her answer a defense of lack of jurisdiction of her person and then served a third-party summons and complaint on X, she did not forfeit the jurisdictional objection. That would be tantamount to forcing the defendant to raise the jurisdictional objection by motion, which in turn would divest her of her clear CPLR right to assert it by defense in the answer as an alternative. *Italian Colony Restaurant v. Wershals*, 45 A.D.2d 841, 358 N.Y.S.2d 448 (2d Dep't 1974).

Even under the expanded use of the impleader device of CPLR 1007, permitting it for anything related to something else in the case rather than restricting it--as a tight reading of the statute's language would indicate--only to a claim of indemnification to cover liability of some other claim, the device is limited to claims having at least some relationship to a matter already in the case. That relatedness should assure that the inclusion of a claim of want of jurisdiction will not run into any argument of waiver.

Risk of Moving for Summary Judgment on Counterclaim If Defendant Has Also Asserted Jurisdictional Objection

As noted, the mere assertion of a related counterclaim does not prevent the defendant from also including in the answer a jurisdictional objection. But other conduct may forfeit the objection, as illustrated in the bizarre goings-on in *Flaks, Zaslow & Co. v. Bank Computer Network Corp.*, 66 A.D.2d 363, 413 N.Y.S.2d 1 (1st Dep't 1979).

The defendant took the jurisdictional objection by answer instead of by motion, also including a related counterclaim in the answer. Then the defendant apparently had a change of heart and wanted the jurisdictional point disposed of early. Too late now to make a CPLR 3211(a)(8) motion, the defendant made the jurisdictional objection the subject of a summary judgment motion (or, in any event, the equivalent of a summary judgment motion), which is a permissible alternative. Moreover, the defendant won on the point: plaintiff's action was dismissed for want of jurisdiction.

The counterclaim survived, however, and now the defendant moved for summary judgment on it on the merits. Although the mere interposition of the counterclaim did not waive the jurisdictional objection, the motion for summary judgment on the counterclaim--after the jurisdictional point in respect of the plaintiff's main claim was raised and disposed of in the defendant's favor--did. The plaintiff contended, in any event, that these merits proceedings by the defendant in respect of the counterclaim evinced an intention to submit to the court's general jurisdiction, and the court accepted this contention and permitted the plaintiff, with an amendment, to re-assert the main claim (the one which had been dismissed when the defendant's jurisdictional objection was sustained). Perhaps it would be more accurate to describe the situation as one in which a defendant, against whom jurisdiction was initially lacking, submitted to jurisdiction with the equivalent of an informal appearance, that is, a voluntary participation on the merits of the case, when he no longer had to (the claim against him having been dismissed).

The defendant brought this on itself. Had the defendant wanted the action dismissed for lack of jurisdiction, the defendant should have made a prompt motion under CPLR 3211(a)(8), which would have been granted and the action dismissed. Perhaps the defendant had calculated that with an answer instead of a motion the case could have been so set up that the defendant could obtain the services of the court for its counterclaim while denying them to the plaintiff for the main claim. The scheme, if that it was, did not work. Said the court, "If 'man bites dog' in this case, it is purely the defendant's fault," and with those words the court proceeded to add insult to injury: the defendant still had at least some hope of prevailing with the summary judgment motion that the defendant had made on the counterclaim. Here, too, a disappointment was in store for the defendant. A summary judgment motion "searches the record." *See* Commentary C3212:23 on McKinney's CPLR 3212. This means that the court will look behind the pleading being attacked (in this case the plaintiff's reply to the counterclaim), and back to the pleading containing the claim on which summary judgment is being sought (in this case the counterclaim in the defendant's answer). If that claim is defective, the search-the-record doctrine authorizes the court to grant summary judgment dismissing it even though the opposing party, in this case the plaintiff, has not asked for such relief. That is what happened in the *Flaks* case. The plaintiff, having been awarded jurisdiction (of the plaintiff's main claim) that the court did not initially have, was now also the beneficiary of a summary judgment (on the defendant's counterclaim) that the plaintiff did not ask for.

The case is one of the most vivid illustrations of the pitfalls that await a defendant who first elects to take a jurisdictional objection as a defense in her answer rather than by a clear-cut preliminary motion, and who then confounds the situation by presuming to impose on the court's jurisdiction with her own counterclaim after it has been advised that the court is willing to uphold the defendant's jurisdictional objection against the plaintiff.

C3211:57. Tools of CPLR 308(5) Designee.

On an ex-parte motion by the plaintiff pursuant to CPLR 308(5), the court can devise--literally invent--a method of summons service. One of the things the courts occasionally do under that provision is designate a person having some relationship to the defendant, directing the plaintiff to effect service on that person in the defendant's behalf. The premise is that the relationship of the designated person to the defendant is such as to make it reasonable to assume that the defendant will be notified through the designee.

It may be true, however, that no such relationship exists, despite the fact that the plaintiff claimed it did on her ex-parte motion under CPLR 308(5). How does the designated person call to the court's attention the fact that she does not bear the assumed relationship to the defendant, or that she has no knowledge of the defendant's whereabouts, or, indeed, that she is even hostile to the defendant? The possibilities are many.

If it is quite clear that the designee does bear a relationship to the defendant such as to justify the designation-for-service under CPLR 308(5), it may be reasonable to require the designee to state any objections she has to the designation through the same routes that would be open to the defendant herself. *Cf. Cosby v. Moyant*, 55 Misc.2d 393, 285 N.Y.S.2d 980 (Sup. Ct., New York County 1967). The routes open to the defendant herself are the motion to dismiss under CPLR 3211 or the answer by way of defense. Clearly, however, the designee cannot be asked to assert her objections in an answer; she is not the defendant and cannot be asked to answer anything. Nor would it be appropriate to limit such a designee to the expedient of moving to dismiss under CPLR 3211(a)(8). Since she is not a party, but a mere expedient through whom the plaintiff seeks to notify the defendant, she should not be compelled to retain her own attorney and formally move under CPLR 3211. It would also seem that CPLR 3211 is not available to her, since it is the tool of the party against whom a claim is asserted. A person's designation under CPLR 308(5) as a person to be served in the defendant's behalf does not make her the equivalent of the defendant's attorney or empower her to act in the defendant's behalf.

The court nevertheless may hear anything the designee has to say about her designation. The court must recognize that her designation was made on only the ex-parte proof of the plaintiff, which could have been false or mistaken. The designee should not be bound to any particular course of procedure in bringing to the court's attention objections to her designation. Whatever means she chooses should be accepted by the court. If she has been served with or has otherwise obtained a copy of the ex-parte order designating her, so that she knows the name of the judge who signed the order, and she contacts the court, it could take the initiative in setting up a procedure whereby the designee's objections can be heard. The designee can be invited to chambers, the plaintiff being notified to attend and the matter resolved there.

The court should recognize the difficult position of the CPLR 308(5) designee and hear her objections regardless of the procedural route through which they come to the court's attention.

C3211:58. Initially Raising Objection in Amended Pleading.

If the party does not make a motion based on a subdivision (a) objection and also fails to include the objection in a responsive pleading, the objection is waived. Apparently excepted from the operation of this rule are the objections contained in paragraphs 2, 7, and 10 of CPLR 3211(a). *See* Commentary C3211:54. We thus address discussion here to the other grounds of objection contained under subdivision (a).

Assume that the defendant neither moves to dismiss on the particular ground nor includes it as a defense in the initial answer. May the defendant include it as a defense in an amended answer? In answering this question it will help to distinguish between the amendment of right allowed by CPLR 3025(a) and the amendment that requires court leave under CPLR 3025(b).

Amendment of Course; CPLR 3025(a)

If the amendment is one made of right (without court leave) under CPLR 3025(a), the amended pleading may include the previously omitted defense for the first time. *See*, *e.g., Iacovangelo v. Shepherd*, 5 N.Y.3d 184, 800 N.Y.S.3d 116, 833 N.E.2d 259 (2005); *Moezinia v. Ashkenazi*, 136 A.D.3d 990, 25 N.Y.S.3d 632 (2d Dep't 2016). The as-of-course amendment allowed by CPLR 3025(a) is designed to permit each pleader to correct her pleading at least once without leave of court, and this category of amendment must be made so close in time to the service of the original pleading that it may be said to be nothing more than a final version of the original one. The time limit on the amendment as

of course under CPLR 3025(a) will itself guarantee in almost all instances that the adverse party will not be able to claim any prejudice traceable to the brief delay in asserting the objection in an as-of-course amendment.

We turn attention now more specifically to the amendment that requires court leave.

Amendment by Leave; CPLR 3025(b)

If the time to amend as of course has expired under CPLR 3025(a), and the pleader wishes to assert a CPLR 3211(a) objection for the first time in an amendment for which leave is needed under CPLR 3025(b), the pleader now faces an exercise of the court's discretion. Although CPLR 3025(b) directs that leave to amend be "freely given," the allowance of the amendment is in the last analysis for the court to determine on a case by case basis. The best rule of thumb under CPLR 3025(b), for the purpose of permitting an amendment to include a previously omitted CPLR 3211(a) objection, is that the amendment should be allowed if the adverse party cannot claim any significant prejudice due to the mere delay in asserting the objection. The court should consider too whether the proposed amendment is palpably insufficient or patently devoid of merit. *See*, *e.g.*, *Onewest, F.S.B. v. Goddard*, 131 A.D.3d 1028, 17 N.Y.S.3d 142 (2d Dep't 2015).

Here the likelihood of prejudice is greater than with the of-right amendment. If, for example, the objection is that the court lacks jurisdiction of the defendant's person and its omission from the original answer has prompted the plaintiff to go to substantial trouble or expense preparing the case on the merits, on the assumption that no jurisdictional objection has been asserted, the amendment to add the objection would properly be denied. But if the amendment is sought reasonably close in time to the service of the pleading to be amended and the plaintiff can show no prejudice because of the mere passage of time, the amendment should be allowed. It should also be allowed when a substantial period of time has passed unless the plaintiff can demonstrate that she has taken such steps in the interim as would enable the court to say that the delay in assertion of the objection by itself significantly prejudices the plaintiff.

Discourse like the foregoing should not be necessary for the careful practitioner. Once again: it is obviously the sounder practice to include the objection in the original pleading or in an amendment of right so as not to have to depend on an exercise of the court's discretion.

An additional dimension appears when the objection that a party seeks to interpose by way of amendment did not come into being until after service of the original pleading, as where a defense like res judicata (or payment, release, etc.) arises only afterwards. There the time to amend as of course under CPLR 3025(a) may have expired, necessitating leave to amend under CPLR 3025(b). This is a different scenario. Here the party is technically seeking to "supplement" the pleading rather than merely amend it, and the very fact that the objection came into being after service of the earlier pleading would appear to mandate a grant of leave to add the objection. *See Lance International, Inc. v. First National City Bank*, 86 A.D.3d 479, 927 N.Y.S.2d 56 (1st Dep't 2011); *George Strokes Electrical and Plumbing Inc. v. Dye*, 240 A.D.2d 919, 659 N.Y.S.2d 129 (3d Dep't 1997). That would be so, in any event, if the motion is made within a reasonable time after the objection comes into existence.

Leave to amend an answer to include a waived defense and summary judgment based on that defense can be sought in one motion. *Armstrong v. Peat, Marwick, Mitchell & Co.*, 150 A.D.2d 189, 540 N.Y.S.2d 799 (1st Dep't 1989).

C3211:59. Raising Objection in Answer to Amended Complaint.

Assume that the plaintiff serves a complaint and the defendant answers it without including an objection to personal jurisdiction, a CPLR 3211(a) ground of objection. Then the plaintiff, as allowed by CPLR 3025(a), amends the complaint as of right. The defendant must serve a new answer to it under CPLR 3025(d). The defendant now asserts the jurisdictional defense in her answer to the amended complaint. This was held permissible in *Blatz v. Benschine*, 53 Misc.2d 352, 278 N.Y.S.2d 533 (Sup. Ct., Queens County 1967), but later cases, such as *Boulay v. Olympic Flame,*

Inc., 165 A.D.2d 191, 565 N.Y.S.2d 905 (3d Dep't 1991), indicate no, at least in general language. *Boulay* and like cases may reach the right result on their facts, but they should not be taken as setting forth a hard and fast rule in their reading of the Court of Appeals *Addesso* case. In *Boulay*, there may have been a little chicanery on the defendant's part in getting the plaintiff to amend the complaint to assert a different date for the accident--the change of date does not appear to have been of any consequence by itself--just so that the defendant, who failed to make a jurisdictional defense to the original complaint, might now make it against the amended one. The court would not countenance that.

Whether a defendant who has interposed no jurisdictional objection against the claim in the original complaint should be permitted to interpose one against an amended complaint should depend on what the amended one contains, and on the nature of the jurisdictional defect alleged. If, for example, the defendant claims never to have been served with a summons at all, or was served in a defective manner, such an objection would have just as much bearing on the original complaint as on the amended one. The fact that it was omitted from the CPLR 3211 motion made against the original complaint, or from an answer addressed to the original complaint, should therefore mean that it is waived so that it cannot be used against an amended complaint either. But if the particular ground of jurisdictional objection depends on the contents of the complaint, a waiver should not necessarily result. It is quite possible that an objection exists legitimately against a claim appearing for the first time in an amended complaint while the defendant may have had no jurisdictional objection to claims asserted in the original complaint. A situation involving longarm jurisdiction illustrates:

The plaintiff effects service of the summons and original complaint on the defendant, a nondomiciliary, in Ohio. The defendant concedes that the claims asserted in the original complaint arise out of the defendant's New York acts and, making no jurisdictional objection, the defendant appears in the action by serving an answer on the merits. The plaintiff then amends the complaint as a matter of right, as the plaintiff may do under CPLR 3025(a), and adds yet another cause of action, claiming that this one, too, has a longarm basis in CPLR 302. (Note also, in this situation, CPLR 302[c].) The defendant does not concede longarm jurisdiction of this new claim, however, and wants to assert a jurisdictional defense to it. The defendant should of course be permitted to. If general language in *Boulay* and like cases indicate that the defendant is barred from making the objection, the courts are likely to narrow the language so as to preserve what seems plainly to be the defendant's right in the example just put.

It is the plaintiff, when she amends the original complaint, who injects new matter into the case, and the defendant should be able, in answering the amended complaint, to address the new matter just as if the answer to the amended complaint is the only answer to appear in the case--the original answer deemed as effectively superseded by the amended answer as the original complaint is by the amended complaint.

A lesson from all of this for the plaintiff is that if the plaintiff has the remotest suspicion of the existence of a CPLR 3211(a) objection that the defendant has omitted from the initial answer, the plaintiff had best think twice before invoking CPLR 3025(a) and amending the complaint.

C3211:60. Leave to Replead on (a)(7) or (b) Motion.

The motion to dismiss a cause of action under CPLR 3211(a)(7) or to dismiss a defense under CPLR 3211(b) may be made to attack the cause of action or defense as defective on its face, or, conceding that it is good on its face, to attack it for lack of underlying merit.

If the basis of the defendant's attack on the plaintiff's claim is a defect in its pleading and the plaintiff now wishes to remedy the defect by amendment, the plaintiff may ask in the opposing papers for leave to replead. If the plaintiff is in doubt about whether the objection goes to the face of the pleading, the plaintiff should include the repleading request as a precaution. Perhaps the best rule of thumb here is that the plaintiff should make the request in the opposing

papers, at least as an alternative, in any instance in which the plaintiff is confronted with a motion under subdivision (a)(7). The same is true for the defendant when it is defendant's defense that is attacked for facial invalidity.

The party who has at hand evidence to establish the validity of a claim or defense may of course submit it in or with his opposing papers. Affidavits used to support leave to replead should be made by those with knowledge of the facts. The courts constantly remind the bar that the affidavit of one lacking knowledge will not suffice and that leave to replead will be denied, although perhaps with leave to reapply on adequate papers. *See, e.g., Young v. Nelson*, 23 A.D.2d 531, 256 N.Y.S.2d 649 (4th Dep't 1965). The party who does not, merely needing time to secure supportive affidavits or to conduct disclosure proceedings to get the requisite evidence, *see* CPLR 3211(d), should so state in opposing papers.

If the party seeking leave to replead includes no extrinsic proof and relies solely on the face of the attacked pleading, all of that pleading's allegations are assumed to be true. And if the pleading is defective only as a matter of draftsmanship, as where it omits an essential allegation that can be shown to exist in fact, the court will be more disposed to grant leave to replead. Even in the situation in which the movant uses no extrinsic proof, however, the opposing party might still do well to submit extrinsic proof of the validity of the claim and the existence in fact of all of the elements on which it depends. The party who does that goes as far as possible to encourage the court to grant leave to replead if a defect is found to exist.

CPLR 3211(e) used to require a party desiring leave to replead to expressly request that relief in the opposing papers and demonstrate that she had "good ground" to support the claims she wished to replead. And the court was authorized to insist that the party produce evidence demonstrating the merit of those claims. These requirements were deleted as a result of a 2005 amendment of CPLR 3211(e). L.2005, ch. 616.

In the first significant appellate treatment of the post-amendment CPLR 3211(e), the Second Department in *Janssen v. Inc'd Village of Rockville Ctr.*, 59 A.D.3d 15, 869 N.Y.S.2d 572 (2d Dep't 2008), made several important points about the leave-to-replead device. First, in amending the law to eliminate the requirements previously associated with seeking leave to replead, the Legislature did not eliminate repleader. Second, the standard to be employed by a court in considering whether to grant a request or motion for leave to replead is the same as the standard employed on a motion for leave to amend a pleading (i.e., relief should be freely granted absent significant prejudice unless new claim is devoid of merit or palpably insufficient). *See, e.g., Rabos v. R&R Bagels & Bakery, Inc.*, 100 A.D.3d 849, 955 N.Y.S.2d 109 (2d Dep't 2012). Third, there is no time limitation on a motion for leave to replead.

With respect to the third point, the plaintiff pleaded several claims (including for harassment and retaliatory action) against several defendants (we'll call them collectively the defendant), along with their village employer. The court on the defendant's motion dismissed several of these. The plaintiff did not request leave to replead in the papers answering the motion. Months after that, with the action still pending, the plaintiff moved for leave to replead--couched also in the form of a motion to amend (which is in effect the same thing)--and the defendant argued that the motion was too late; that it was, by analogy if nothing else, limited to the time for appealing under CPLR 5513 or the time for moving to reargue under CPLR 2221(d)(3). The court rejected both analogies and held plaintiff's motion, made half a year after the original dismissal, timely enough. Neither the amendment itself nor any statement in its legislative bill jacket prescribes any time limit on a motion for leave to replead, the court pointed out.

A party desiring leave to replead should not take *Janssen* as an invitation to make a repleader motion at some remote point in the action. The motion will be judged under the standards applicable to a CPLR 3025(b) motion, and the principal consideration on the motion to amend is whether the non-moving party would be significantly prejudiced by the proposed amendment. The greater the delay in moving to amend, the greater the likelihood that such prejudice can be demonstrated. *See* Siegel, New York Practice § 275 (Connors 5th ed.).

Courts occasionally insist that the party seeking leave to replead submit with her motion a proposed amended pleading. *Parker Waichman LLP v. Squier, Knapp & Dunn Communications, Inc.*, 138 A.D.3d 570, 28 N.Y.S.3d 603 (1st Dep't 2016); *Fletcher v. Boies, Schiller & Flexner, LLP*, 75 A.D.3d 469, 906 N.Y.S.2d 212 (1st Dep't 2010); *see JJM Sunrise Automotive, LLC v. Volkswagen Group of America, Inc.*, 49 Misc.3d 1208(A), 26 N.Y.S.3d 724 (table), 2015 WL 5971752 (Sup. Ct., Nassau County 2015). This requirement flows naturally from the *Janssen* court's conclusion that a motion for leave to replead is to be viewed in the same light as a motion for leave to amend. *See* CPLR 3025(b) ("Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.").

If repleading is allowed, the disposition of the motion should be a grant with leave to replead. The action itself would not be dismissed.

C3211:61. Amendment of Objectionable Pleading as Abating Motion.

It may happen that while defendant's CPLR 3211(a) motion against plaintiff's complaint is pending, the plaintiff amends the complaint as of right (without leave of court) under CPLR 3025(a). Upon such an amendment, the amended complaint supersedes the original pleading and becomes the only complaint in the action. *D'Amico v. Correctional Medical Care, Inc.*, 120 A.D.3d 956, 991 N.Y.S.2d 687 (4th Dep't 2014). Should such an amendment be deemed to abate the motion?

No amendment as of right of the pleading that asserts the cause of action should be deemed to abate a motion to dismiss under CPLR 3211(a). That rule has particular force where the amendment did not substantively alter the causes of action being challenged on the motion. *See Sim v. Farley Equipment Company LLC*, 138 A.D.3d 1228, 30 N.Y.S.3d 736 (3d Dep't 2016); *EDP Hospital Computer Systems, Inc. v. Bronx-Lebanon Hospital Ctr.*, 212 A.D.2d 570, 622 N.Y.S.2d 557 (2d Dep't 1995).

A motion that seeks merely to compel an amendment of the pleading, on the other hand, should be deemed abated upon amendment of the pleading moved against. A motion to require a separate statement and numbering of allegations under CPLR 3024 would be an example. *See* the Commentaries on 3024 and 3025. Since CPLR 3211(e) requires the court on a CPLR 3211(a)(7) motion to consider not merely whether the plaintiff has properly pleaded the cause of action but whether the plaintiff in fact has a cause of action, an amendment of the objectionable pleading while a motion is being brought on under CPLR 3211(a)(7) should not, under the CPLR, be deemed automatically to abate the motion. If the pleader has no cause of action, no quantity of amendments is going to give her one, for which reason the CPLR 3211(a)(7) motion does not necessarily lose its vigor because of the amendment. And whether or not it does is also a matter likely to engender disagreement between the parties, which only the court can resolve.

The court in *Sholom & Zuckerbrot Realty Corp. v. Coldwell Banker Commercial Group, Inc.*, 138 Misc.2d 799, 525 N.Y.S.2d 541 (Sup. Ct., Queens County 1988), held that plaintiff's amendment of the complaint after the defendant has made a motion under CPLR 3211 to dismiss it does not automatically abate the motion. It says that the "better rule" gives the movant "the option of withdrawing its motion or pressing it with regard to the amended pleading," observing that a rule that would have the amendment abate the motion automatically would only invite "additional motion practice." It is a good idea for the parties to be in touch to discuss the matter. Perhaps the defendant can be convinced that the amendment meets her objection and makes the motion academic, prompting its withdrawal.

Reviewing this subject in *Sage Realty Corp. v. Proskauer Rose LLP*, 251 A.D.2d 35, 675 N.Y.S.2d 14 (1998), the First Department held that the moving party "has the option to decide whether its motion should be applied to the new pleadings." In *Sage*, the defendant asked the court to treat the original motion as being addressed to the amended complaint as well. This was permissible, held the court. And because plaintiff did not object to the treatment, plaintiff could claim no prejudice. *See Sobel v. Ansanelli*, 98 A.D.3d 1020, 951 N.Y.S.2d 533 (2d Dep't 2012); *Toikach v. Basmanov*, 31 Misc.3d 615, 918 N.Y.S.2d 844 (Sup. Ct., Kings County 2011).

By making such a request, the defendant must of course be satisfied that the amended complaint does not add anything new, or at least does not add any new matter to which the original motion has not addressed itself. But that's up to the defendant. If there is anything at all in the amended complaint that was not present in the original one, the defendant may well wish to respond to it.

It would seem that the defendant could do so, if so disposed, by asking the court to retain the original motion papers and consider them as a response to the amended complaint, while perhaps offering the court additional affidavits responsive to just the new matter contained in the amended complaint. If the nature of the pleadings makes that feasible, it could save the effort that the total redoing of the answering papers might entail.

While *Sage* indicates that the matter should be left to the defendant in first instance, if the defendant chooses a course that encumbers the court's consideration of the motion after the plaintiff has amended the complaint, the court can direct the parties to do whatever's necessary to remove the encumbrance.

Most of the grounds stated in CPLR 3211(a) appear to be of the kind that cannot be cured by mere amendment of the pleading.

It has been held that where the plaintiff serves an amended complaint pursuant to a court order (as opposed to an amendment as of course) disposing of a CPLR 3211(a) motion, the service of such an amended pleading does make the original issues academic on an appeal from the order. *See* *Langer v. Garay*, 30 A.D.2d 942, 293 N.Y.S.2d 783 (1st Dep't 1968). This is a kind of abatement coming about because of an amended pleading--but only for appeal purposes. If there is some dispute about whether the amended complaint satisfies the order that permitted it, the dispute should be resolved by the judge who made the order before an appellate court is imposed on to determine the point.

C3211:62. Res Judicata Treatment of Granted CPLR 3211 Motion.

If a motion under CPLR 3211 is granted, the order or judgment in which it culminates is entitled to res judicata treatment. But it will of course be res judicata only of the point it decides.

If the motion was based on a ground in absolute bar of the action, such as release or payment, it will have the effect of a final judgment on the merits and will be entitled to future res judicata treatment as such. If it was based only on a ground in abatement, it will have narrower effect. Thus, where the action is dismissed on a CPLR 3211(a)(8) motion for lack of jurisdiction of the defendant's person, the plaintiff may of course sue anew if she can afterwards get jurisdiction; the only point decided is that the court lacked jurisdiction in the first action.

Most of the grounds listed in CPLR 3211(a)(5) are the so-called objections "in bar," and their application will ordinarily result in complete res judicata treatment precluding future suit on the same cause of action. Among these grounds are arbitration and award, collateral estoppel, discharge in bankruptcy, payment, release, and res judicata. The objection of infancy or disability, however, is only an objection "in abatement" and will not preclude future suit when the disability is removed or rectified.

The statute of limitations and statute of frauds objections cannot be as easily categorized. A limitations dismissal will bar future suit on the same claim in New York, at least to this extent: when the plaintiff sues anew in New York she can be met by the objection that the fact of untimeliness is res judicata, thereby necessitating dismissal of the second suit without relitigation of the timeliness issue. *See* *Spindell v. Brooklyn Jewish Hospital*, 35 A.D.2d 962, 317 N.Y.S.2d 963 (2d Dep't 1970), *aff'd* 29 N.Y.2d 888, 328 N.Y.S.2d 678 (1972). But if the first adjudication purported only to apply the New York period of limitation in a case with foreign elements, without any investigation or application of any foreign period of limitations, it may be possible for the plaintiff to sue anew in the foreign forum whose statute of limitations is applicable and under which the claim is still timely. If, however, the New York court in

making the adjudication applied a foreign period of limitations under the so-called "borrowing statute," CPLR 202, the adjudication should preclude suit anew both in New York and in the foreign forum whose statute was applied. The objection to the second suit in either instance would be that the fact of untimeliness is res judicata, and it would be entitled to full faith and credit in the foreign forum.

The statute of frauds dismissal will bar future suit on the alleged agreement, but it may or may not bar a second suit based on a quantum meruit (depending on whether the particular statute of frauds applicable in the first action is construed to intend a complete bar to all recovery emanating from the transaction or merely to bar a claim based on the alleged agreement itself). Here, too, the impact of the New York dismissal may have differing results if the second suit is brought elsewhere. Much remains to be determined in this difficult conflict of laws realm, which is further discussed in Commentary C3211:65.

Many of the CPLR 3211(a) grounds are objections in mere abatement. A dismissal based on one of these grounds will not necessarily preclude future suit. Thus, a dismissal under paragraph 2 will not preclude suit in a court of adequate jurisdiction; one under paragraph 3 will not preclude future suit when the capacity to sue is achieved; one under paragraph 4 will not preclude future suit if the earlier action whose pendency wrought the dismissal is itself later dismissed for lack of jurisdiction; one under paragraph 10 will not preclude future suit in which the necessary party is brought under the court's jurisdiction.

A nice illustration of an objection in mere abatement at work is provided by *Landau, P.C. v. LaRossa, Mitchell & Ross*, 11 N.Y.3d 8, 862 N.Y.S.2d 316, 892 N.E.2d 380 (2008). *Landau, P.C.*, involved a disbarred lawyer unable to keep his firm name (Eisen, P.C.) after the disbarment. So he dissolved the Eisen, P.C. firm and filed a certificate renaming it Landau, P.C., after his daughter, Debbi (also a lawyer). The gist of the dispute was a legal malpractice action by Landau, P.C. against the law firm (the defendant) that represented Eisen in an earlier action brought by New York City against Eisen for fraud and various other activities. Eisen claimed the firm didn't properly resist the city's summary judgment motion in that case.

The legal malpractice action was dismissed for lack of both "standing" and "capacity." Eisen couldn't sue for Eisen, P.C., because, since he was no longer a lawyer, he lacked "standing." And Eisen, P.C., could not be a plaintiff and initiate the action for itself because, as a dissolved corporation, it had no "capacity". The action by both attempted plaintiffs was therefore dismissed on those grounds, the judgment of dismissal reciting that it was "without prejudice."

Now, with Landau, P.C., as plaintiff, the legal malpractice action was brought with "a virtually identical summons and complaint." The defendant moved to dismiss this one on several grounds, but we address here only the res judicata ground. The Court of Appeals held that the earlier action was not res judicata.

The case occasioned a review of which of the various dismissal grounds listed in CPLR 3211(a) count as merits dispositions in actuality or in effect so as to bar a subsequent action under the res judicata doctrine. The grounds of the earlier dismissal here--lack of capacity and lack of standing--do not count as such grounds, the Court held, thus leaving the merits to be adjudicated when the "capacity" or "standing" defect was cured with a proper substitution of Landau, P.C., as plaintiff. *See Brown v. Lutheran Medical Ctr.*, 107 A.D.3d 837, 968 N.Y.S.2d 526 (2d Dep't 2013) (lack of capacity dismissal did not bar subsequent action).

Paragraph 7 dismissals merit separate treatment. *See* Commentary C3211:63.

C3211:63. Impact of Dismissal under CPLR 3211(a)(7).

The objection of failure to state a cause of action under CPLR 3211(a)(7) today tests not just the face of the pleading, but its basic merits as well. *See* Commentary C3211:23.

If the paragraph 7 dismissal is based solely on the facial insufficiency of the pleading of the cause of action, the plaintiff may sue anew with a complaint that corrects the deficiency, *see*, *e.g.*, *Addeo v. Dairymen's League Co-op. Ass'n*, 47 Misc.2d 426, 262 N.Y.S.2d 771 (Sup. Ct., New York County 1965); the prior dismissal, which was not on the merits, will not be given res judicata effect. *Hock v. Cohen*, 125 A.D.3d 722, 4 N.Y.S.3d 70 (2d Dep't 2015). But if the complaint in the second suit is "virtually identical" to the one dismissed for insufficiency in the first, res judicata will be a basis for the second's dismissal. *Flynn v. Sinclair Oil Corp.*, 20 A.D.2d 636, 246 N.Y.S.2d 360 (1st Dep't 1964) *aff'd* 14 N.Y.2d 853, 251 N.Y.S.2d 967, 200 N.E.2d 633 (1964); *Grinstein v. Official Laura Branigan Fan Club*, 174 A.D.2d 545, 571 N.Y.S.2d 725 (1st Dep't 1991).

What about the situation where the granted CPLR 3211(a)(7) motion was supported by evidence? Is that dismissal entitled to res judicata effect, barring a subsequent similar action? The answer appears to be no. *See Amsterdam Savings Bank v. Marine Midland Bank, N.A.*, 140 A.D.2d 781, 528 N.Y.S.2d 184 (3d Dep't 1988); *Plattsburgh Quarries, Inc. v. Palcon Industries, Inc.*, 129 A.D.2d 844, 513 N.Y.S.2d 861 (3d Dep't 1987).

Of course, if the paragraph 7 motion in the first action was converted to one for summary judgment under CPLR 3211(c) and the converted motion is granted, the judgment or order from the first action should be entitled to res judicata effect. *See* Commentary C3211:64.

C3211:64. Impact of CPLR 3211 Motion "Treated" as Summary Judgment.

As previously discussed in Commentary C3211:42, the court is empowered to treat any CPLR 3211 motion as one for summary judgment. If it elects to do so, regardless of the ground on which the CPLR 3211 motion is made, it is in effect saying that the claim or defense lacks merit--a holding equivalent to a final judgment after trial--and it should as a rule be accorded full res judicata (claim preclusion) treatment in any future suit on the same cause. It should also be given full collateral estoppel (issue preclusion) treatment in a future suit on a different cause of action regardless of what the dismissed party may do in the interim.

But here we must hedge. The res judicata realm is one of the most subtle in the law. Even a dismissal made upon an outright motion for summary judgment under CPLR 3212 may carry less than res judicata consequences, as where judgment was granted summarily based on a mere objection "in abatement," such as lack of jurisdiction. This point is more fully developed in Commentary C3212:21 on CPLR 3212.

Ironically, the "treatment" of a CPLR 3211 motion as one for summary judgment may be more apparently a disposition on the merits than a dismissal made on a direct summary judgment motion under CPLR 3212. The court's election to "treat" the CPLR 3211 motion as one for summary judgment is its shorthand term to indicate that it has a complete body of evidence before it on the motion, that it has examined the evidence carefully, that it finds the claim or defense to lack merit, and that it therefore wants the judgment to be on the whole merits rather than limited to the particular CPLR 3211 ground on which the motion was made. But since a summary judgment motion under CPLR 3212 can be predicated on a ground that would have been a basis for a dismissal motion under CPLR 3211--as long as the objection has been preserved by being included as a defense in the answer--a situation may arise in which such a narrowly based summary judgment under CPLR 3212 can occur without the judgment or order specifying the limited ground of it. The fact that a CPLR 3211 motion has been treated as one for summary judgment, on the other hand, should always appear in the judgment or order itself. *See* Commentary C3211:42.

The practitioner should see to it that the order or judgment resulting from either a CPLR 3211 or CPLR 3212 motion fully clarifies its scope. Its future availability (or unavailability) for preclusion use will depend largely on that. If the matter is omitted and the judge who decided the case wrote no opinion, it may become difficult and sometimes impossible to know the precise ground of the disposition, thereby necessitating a rehearing that might otherwise have been avoided.

C3211:65. Res Judicata in Later Suit in Foreign Forum.

The problems that res judicata and its family can present in the most usual of situations--when sought to be applied to a final judgment rendered only after a full trial--are ample enough and are not a topic of discussion here. When it is sought to append res judicata to a pretrial dismissal such as one resulting under CPLR 3211(a), the problems multiply, and that's the current subject. If one essays to determine how a foreign forum will treat a New York CPLR 3211 disposition, the problems can become more complicated still and will often involve the full faith and credit clause of the federal constitution.

Stating only a few essentials, we may take as the general rule that a New York disposition made with jurisdiction will be just as binding in the foreign forum as it would be in New York. But the scope that New York intended the disposition to have will be a prime source of contention in many cases. Here is one example.

New York dismisses the case on motion under CPLR 3211(a)(5) because the claim is on an oral contract and is barred by the statute of frauds. If the statute of frauds of State X would allow such suit, will the New York disposition be res judicata in State X? This will depend on a number of factors. Did the New York disposition presume to declare only that the case was barred in New York and intend to leave open the possibility of suit later in a forum that allows it? Did the court in New York look at the statutes of all of the related jurisdictions and then decide that the New York statute of frauds was the proper one to apply based on the contacts that the case had with New York? Did the New York court treat the matter as purely a "procedural" question? (If it did, then the adjudication may carry no effect at all in a foreign forum.) To resolve issues like these would require more space than we have here.

We raise the issues only to call to the practitioner's attention the fact that unique factors may be involved if foreign states also have contacts with the case and if jurisdiction of the defendant can be secured in a foreign forum and a suit is commenced anew there. Both sides would do well in such a case to anticipate the possible res judicata questions that can arise after a grant of a CPLR 3211 motion, researching foreign law in advance of the motion. A revelation concerning foreign law and its possible application later can dictate a step to be taken now in connection with the CPLR 3211 motion.

Assume, for example, that State X will apply its own longer statute of limitations to the case if it is shown that the New York court, in dismissing for untimeliness, looked only to the New York statute of limitations and gave no treatment to the foreign one. (*See* CPLR 202.) If the plaintiff can discern this to be the State X approach, and suit would be timely in State X after the New York dismissal, the plaintiff should see to it that either the order or judgment concluding the CPLR 3211 motion, or an opinion of the court written in connection with it, clarifies that only the New York statute of limitations was considered and applied.

The old adage about letting sleeping dogs lie might be invoked here to dictate that these matters not even be discussed within the framework of a general CPLR 3211 Commentary. The difficulty is that this sleeping dog may wake up later on, and wake up hungry, when a second suit is brought elsewhere. Research into foreign law in advance of making or answering a CPLR 3211 motion--whenever there is a prospect of a later foreign suit on the same or a connected claim--can suggest procedures that will be of great moment in the later suit but which would not have occurred to the party in the present action in New York without that little bit of foresight and research.

C3211:66. Denial of CPLR 3211 Motion as "Law of the Case."

The "Law of the Case" doctrine is a kind of intra-action res judicata. Within the framework of a single action it prevents relitigation of a point already adjudicated in it. The denial of a motion under CPLR 3211 will generally invoke this doctrine and prevent the adjudicated point from again being litigated within the action. *See* Siegel, New York Practice § 448 (Connors 5th ed.).

Thus, the denial of a motion to dismiss for (e.g.) lack of jurisdiction of the defendant's person is a determination that the court has such jurisdiction and precludes relitigation of the point. While the defendant may appeal the order denying the motion, *see* CPLR 5701(a)(2), and may do so immediately or as part of an appeal from a later final judgment on the merits, *see* CPLR 5501(a)(1), she may not, after a denial of the motion, plead the objection as a defense in her answer and expect that the trial judge will hear the matter a second time.

The law of the case doctrine is invoked only when the court has actually adjudicated the point urged on the motion. If it has denied the motion without prejudice to its assertion by way of defense in a responsive pleading or otherwise indicated that it is not passing on its merits but rather deferring it to the trial or some later pretrial juncture--which the court has express power to do under CPLR 3211(d)--the matter is in no sense disposed of and may of course be determined at that future time.

If the point was adjudicated, however, the loser cannot raise the point at trial level again. Of course, she may move to reargue the motion; or, if she has additional and recently uncovered proof justifying a different result, she may move to renew the motion, but that is a different matter entirely. (On the reargument and renewal of motions, *see* Siegel, New York Practice § 254 and the Commentaries on CPLR 2221.)

Subdivision (f)

C3211:67. Motion Automatically Extends Responding Time.

The defendant or other person who must respond to a pleading (such as the plaintiff to a counterclaim) need not fear being in default by making a CPLR 3211 motion instead of pleading. The mere making of the motion during the time in which to respond automatically extends the responding time until 10 days after the movant is served with notice of entry of the order that disposes of the motion. CPLR 3211(f). A party gets the benefit of subdivision (f) only if the pre-answer motion was made within the time the party had to respond to the pleading. *See Wenz v. Smith*, 100 A.D.2d 585, 473 N.Y.S.2d 527 (2d Dep't 1984). As any practitioner can attest, that 10-day period, measured as it is by service of notice of entry of the order resolving the CPLR 3211 motion, can be a long time and can sometimes cover many months. *See* CPLR 2219(a). Note that if notice of entry of the order denying the motion isn't served, the CPLR 3211 movant's time to serve a responsive pleading will not begin to run. *De Falco v. JRS Confectionary, Inc.*, 118 A.D.2d 752, 500 N.Y.S.2d 143 (2d Dep't 1986); *Moore v. Latovitzki*, 25 Misc.3d 130(A), 901 N.Y.S.2d 908 (table), 2009 WL 3378381 (App. Term, 2d Dep't 2009).

Although subdivision (f) speaks only of service of "notice of entry" of the order, which is usually entered on the initiative of the prevailing party, it is customary to include with it a copy of the order itself.

If the dismissal motion is granted, resulting in a dismissal of the attacked pleading, there is of course nothing to answer. If several causes of action were pleaded, however, and the motion was aimed, successfully, at only one of them, only that one would be dismissed and the rest would now have to be responded to in a pleading.

If the motion is one by the plaintiff under CPLR 3211(b) to dismiss a defense contained in an answer that has no counterclaim, the answer requires no responsive pleading (*see* CPLR 3011) and the plaintiff therefore need not be concerned about the time element. If the answer does contain a counterclaim, however, it will require a reply, in which event the same time rules that govern the defendant's answer will govern the plaintiff's reply.

Since the making of a motion under CPLR 3211 extends the movant's responding time, it will ipso facto extend the time within which the opposing party can amend the attacked pleading as of right. CPLR 3025(a). Thus, where the defendant moves to dismiss the complaint and thereby extends her own time to answer until 10 days after notice of entry of the resulting order, the plaintiff can, within that extended period, amend the complaint as of right.

The question of whether an amendment of the attacked pleading abates the motion being made against it is discussed in Commentary C3211:61.

Where a party's CPLR 3211 motion is denied and she does not serve a responsive pleading within CPLR 3211(f)'s 10-day window period, that party is in default. To be relieved from that default, the party must make a motion for an extension of time to serve the responsive pleading (*see* CPLR 3012[d]) or to vacate the default under CPLR 5015(a)(1). If no default judgment or order has been entered, the former mechanism can be used; if a default judgment or order has been entered, the latter should be invoked. *See Munroe v. Burgher*, 43 A.D.3d 891, 841 N.Y.S.2d 636 (2d Dep't 2007); *Rockland County Patrolmen's Benevolent Assoc., Inc.*, 288 A.D.2d 456, 733 N.Y.S.2d 874 (2d Dep't 2001).

C3211:68. Time to Respond Where Only Part of Pleading Attacked.

Assume that the plaintiff has pleaded multiple causes of action in the complaint. The defendant moves to dismiss the first one only. Must the defendant serve an answer to the others within the original responding time? No, because a CPLR 3211 motion made against any part of a pleading extends the time to serve a responsive pleading to all of it. Siegel, New York Practice § 277, n.3 (Connors 5th ed.), citing *United Equity Services, Inc. v. First Amer. Title Ins. Co. of N.Y.*, 75 Misc.2d 254, 347 N.Y.S.2d 377 (Sup. Ct., Nassau County 1973); *see Chagnon v. Tyson*, 11 A.D.3d 325, 783 N.Y.S.2d 29 (1st Dep't 2004). Thus, where the defendant moves to dismiss claim #1, she should be able to rely on subdivision (f) and its extension of time to serve her answer to the other claims (which answer would of course respond to the first claim, too, if the CPLR 3211 motion to dismiss it is denied).

Even if the construction were otherwise, the court's general power to extend time (CPLR 2004) is so broad--and its propensity to forgive defaults when reasonable ground is offered so widespread--that a plaintiff who seeks a default judgment on claim #2 simply because the defendant has deferred answering until after the disposition of a CPLR 3211 motion made against claim one will often be doing nothing more than wasting time.

The multiple-claim situation can get stickier when an appeal is also involved. Look at the situation in *Rotondo v. Reeves*, 192 A.D.2d 1086, 596 N.Y.S.2d 272 (4th Dep't 1993). The defendant was a county, which, under CPLR 5519(a)(1), gets an automatic stay of enforcement of an order when it takes an appeal. The defendant moved to dismiss two claims. The court granted the dismissal of claim one but not two. The defendant appealed the order--aggrieved that claim two was not also dismissed--but served no answer to claim two in the interim on the assumption that the need to answer was suspended. The court holds that it wasn't; that only proceedings to "enforce" the order are stayed, and that the obligation to answer was not a proceeding to "enforce" the order. The plaintiff was therefore granted a default judgment against the defendant. The Second and Third Departments would probably agree with that outcome; the First Department may well have gone the other way. *See* Robert L. Haig, Commercial Litigation in New York State Courts, § 8:74 (4th ed.).

Subdivision (g)

C3211:69. Easier Standard for Dismissing "SLAPP" Suit.

Subdivision (g) was added to CPLR 3211 in 1992, designed to deter what is sometimes referred to as a "SLAPP" suit, an acronym standing for "strategic lawsuit against public participation." A little background will make clear what a SLAPP suit is.

Developers, property owners, and a variety of others who must secure public approval of a project from some public agency, such as in the form of a permit, license, certificate, or like authorization, are often opposed before the agency by members of the public for an assortment of reasons, some publicly minded and some privately motivated.

Whatever the source of the opposition, these "opposers," to use a handy reference word, don't make the applicants very happy, and it has become increasingly common, in an effort to discourage such opposition, for the applicant, during or after the agency proceedings, to bring an action against the opposer for damages, perhaps for defamation, perhaps on other grounds. *See 600 W. 115th Street Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 589 N.Y.S.2d 825, 603 N.E.2d 930 (1992). Legislation adopted in Chapter 767 of the Laws of 1992 is designed to deter such "SLAPP" suits--which the Legislature describes as an "action involving public petition and participation"--by tightening up the legal requirements for them and by making it easier for the opposer (the defendant in the damages action) to get them dismissed.

Two of the several amendments with that purpose affect the CPLR: subdivision (g), added to CPLR 3211, and subdivision (h), added to CPLR 3212. These are best negotiated a little further on, after the more substantive parts of the package are briefly analyzed.

The more substantive parts of the package are in the Civil Rights Law, in §§ 70-a and 76-a. Subdivision (1)(a) of the latter contains the "public petition and participation" definition quoted above. *See National Fuel Gas Distribution Corp. v. PUSH Buffalo*, 104 A.D.3d 1307, 962 N.Y.S.2d 559 (4th Dep't 2013); *OSJ, Inc. v. Work*, 180 Misc.2d 804, 691 N.Y.S.2d 302 (Sup. Ct., Madison County 1999). The crux of the legislation is in subdivision 2 of § 76-a, which permits the recovery of damages in such an action only if the plaintiff (the applicant before the agency) establishes by "clear and convincing evidence" that the statement made before the agency by the defendant (the opposer before the agency) was made "with knowledge of its falsity or with reckless disregard of whether it was false," at least when falsity is at issue.

Section 70-a goes even further by enabling the opposer, either in the same suit by way of counterclaim or with a separate action against the applicant, to recover damages from the applicant, including attorneys' fees, if it can be shown that the applicant brought the action "without a substantial basis in fact and law." The "substantial" basis is supposed to be more stringent than the standard that would otherwise apply--"reasonable" rather than "substantial"--but, as the first Governor Cuomo noted in his approval message, the difference may be more theoretical than real.

If it is found that the applicant was motivated by harassment or intimidation in bringing the suit--and such a finding won't be hard if the action is determined to lack "substantial basis"--punitive damages can be assessed against the plaintiff/applicant, in addition to such compensatory damages as may be called for. The function of the two CPLR provisions in this whole design is to facilitate the early dismissal of the "SLAPP" suit if the proper showing can be made.

Subdivision (g) of CPLR 3211 provides that if the defendant/opposer moves to dismiss the action under subdivision (a)(7) of CPLR 3211 and demonstrates that the action is a SLAPP suit, the burden is thrust onto the plaintiff/applicant to establish that the claim has the requisite "substantial basis." *See Matter of Related Properties, Inc. v. Town Board of Town/Village of Harrison*, 22 A.D.3d 587, 802 N.Y.S.2d 221 (2d Dep't 2005). Subdivision (g) also requires that the "hearing of such motion" be granted a preference. That may be helpful if the court's or the individual judge's motion calendar is clogged. The preference instruction is a legislative statement that it wants this motion to go up front. What it probably really means to grant a preference to, however, is not just the "hearing" of the motion, but the trial of an issue of fact if such an issue should arise on the motion and hold up its disposition. *See* subdivision (c) of CPLR 3211.

The matter may come up on a summary judgment motion under CPLR 3212 made after the service of the answer instead of on a pre-answer CPLR 3211 motion. The same burden alights upon the plaintiff/applicant in the summary judgment context. That's what subdivision (h), added to CPLR 3212, prescribes. It also calls for a preference, but in this instance that may be a more substantial gift than it is under the counterpart CPLR 3211(g). If subdivision (h) of CPLR 3212 is construed to require not just a prompt entertainment of the motion, but the ordering of a prompt trial

of any issue of fact arising on the motion, it will be by-passing the rule that subdivision (c) of CPLR 3212 applies on summary judgment motions generally.

Under that subdivision, the only time an immediate fact trial can be ordered in the summary judgment context is when it concerns only damages (as opposed to liability), or when the motion is based on one of the grounds enumerated in subdivision (a) or (b) of CPLR 3211. That authorization contained in CPLR 3212(c) was probably not intended to authorize the immediate trial of an issue of fact arising on a motion under CPLR 3211(a)(7), however--where the ground is that the complaint fails to state a cause of action--because that would open the door to the immediate trial of any issue of fact at all. *See* Commentary C3212:22. But given the general background and history of the "SLAPP" suit, the "preference" instruction of subdivision (h) of CPLR 3212 can reasonably be construed to permit just such an immediate trial--even of an issue going to liability under the new "SLAPP" suit standards.

As to whether CPLR 3211(g) applies in federal court actions, *see Egiazaryan v. Zalmayev*, 2014 WL 1244790, *2 (S.D.N.Y. 2014); *Douglas v. New York State Adirondack Park Agency*, 895 F.Supp.2d 321, 384-385 (S.D.N.Y. 2012); *Yeshiva Chofetz Chaim Radin, Inc. v. Village of New Hempstead by its Board of Trustees of the Village of New Hempstead*, 98 F.Supp.2d 347, 358-360 (S.D.N.Y. 2000).

Subdivision (h)

C3211:70. Greater Scrutiny of Complaint Where Defendant is Design Professional.

Subdivision (h) provides a special dismissal tool to certain design professionals who are named as defendants in tort actions. If a licensed architect, engineer, land surveyor or landscape architect is a defendant in an action that is subject to CPLR 214-d ("Limitations on certain actions against licensed engineers and architects") and moves to dismiss the action under CPLR 3211(a)(7), the plaintiff must, to defeat the motion, "demonstrate[ ] that a substantial basis in law exists to believe that the performance, conduct or omission complained of such [design professional] ... was negligent and that such performance, conduct or omission was a proximate cause of [the plaintiff's damages]." CPLR 3211(h).

CPLR 214-d and 3211(h) (as well as CPLR 3212[i]) were added by the Legislature in 1996 to ameliorate the effects of New York's tort law, which, at the time, "tended to facilitate marginal claims against design professionals based on defects arising long after their work was completed and the improvements for which they were initially responsible had been in the owner's possession and subject to the owner's use and maintenance." *Castle Village Owners Corp. v. Greater New York Mutual Ins. Co.*, 58 A.D.3d 178, 183, 868 N.Y.S.2d 189, 192 (1st Dep't 2008).

As a result of subdivision (h)'s "substantial basis" element, a court reviewing a CPLR 3211(a)(7) motion in a qualifying action (*see* CPLR 214-d) must ask whether the plaintiff's claim is "supported by 'such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.' " *Castle Village Owners, Corp.*, 58 A.D.3d at 183, 868 N.Y.S.2d at 192, quoting Senate Memorandum in Support, L.1996, ch. 682, 1996 McKinney's Session Laws of N.Y., at 2614. While the plaintiff need not adduce evidence demonstrating that the claim is supported by a preponderance of the evidence--that's the burden that the plaintiff must meet at trial (*see* 1A N.Y. P.J.I.3d 1:23 [2016])--the bar at the motion-to-dismiss stage is set higher for the plaintiff. *See* Practice Commentaries for CPLR 214-d.

In the typical case, the CPLR 3211(a)(7) motion will be denied if the complaint states, i.e., pleads, a cognizable cause of action. When the motion to dismiss for failure to state a cause of action is augmented by subdivision (h), the plaintiff must adduce allegations and evidence that demonstrate the existence of triable issues of fact regarding the design professional's negligence and proximate cause. *See Castle Village Owners Corp.*, 58 A.D.3d at 183, 868 N.Y.S.2d at 192. Detailed allegations of negligence and the affidavit of an expert can go a long way in helping the plaintiff to defeat a CPLR 3211(a)(7) motion by a design professional. *See Schmitt v. Spector*, 129 A.D.3d 1052, 11 N.Y.S.3d 680 (2d Dep't 2015); *Castle Village Owners Corp. v. Greater New York Mutual Ins. Co., supra*.

A motion subject to subdivision (h) is to be afforded a "preference," just like one subject to CPLR 3211(g). *See* Commentary C3211:69.

LEGISLATIVE STUDIES AND REPORTS

The First Report of the Revisers to the Legislature notes that this rule, taken from §§ 30 and 237(a)(1) of the civil practice act and rules 106, 107, 109 and 110 of the rules of civil practice, allows a motion at any time before a responsive pleading is required, with or without supporting proof, asserting specified objections which, if sustained, will dispose of the action.

In the original draft of subd. (a) of this rule, the Revisers eliminated the motion to dismiss for failure to state a cause of action which was authorized by rule 106(4) of the rules of civil practice. They comment that lawyers, judges and commentators have long been concerned about the ineffectiveness and dilatory nature of the motion to dismiss for legal insufficiency on the face of a pleading. Requiring a determination on the basis of allegations rather than facts, it does not perform well its traditional function of terminating groundless suits. With free amendment permitted, it more often serves only to secure a new and more technically acceptable pleading in place of one omitting an essential allegation or stating a claim in conclusory or other uninformative terms. The round of demurrers and amendments continues while the facts underlying the controversy remain hidden behind a wall of unsupported allegation. See, e.g., Dulberg v. Mock, 286 A.D. 1008, 145 N.Y.S.2d 533 (1st Dep't 1955), reversed, 1 N.Y.2d 54, 133 N.E.2d 695 (1956).

It is further stated that legal sufficiency should be tested on the basis of facts, rather than the allegations, to the extent that they may be ascertained prior to trial. To that end, the jurisdictions following the Federal rules allow proof outside the pleading to be submitted, both on a motion to dismiss and a motion for judgment on the pleadings, converting the motion into one for summary judgment. See rule 12(b), (c) of the Federal Rules of Civil Procedure, 28 U.S.C.A. This rule goes a step further, dispensing with the motion prior to answer and requiring that a preliminary challenge to legal sufficiency be made by motion for summary judgment after answer. Since such an attack, particularly when it goes beyond the pleadings, usually requires some preparation by counsel on the whole case, there is no extra burden in requiring an answer. At the same time, certain benefits ensue: since answer will not be stayed, the motion is less attractive as a delaying tactic. Moreover, the submission of the responsive pleading permits disclosure to proceed, it defines the issues, and it enables the court to grant judgment against the moving party where such a disposition is indicated.

Nor should the de-emphasis of the statement of the claim condone or encourage poor pleading. For the same reasons that dictate omission of rule 106(4) of the rules of civil practice, this rule abolishes the other motions directed to the legal sufficiency of a pleading on its face under rules 109(5), 109(6), 111 and 112 of the rules of civil practice.

Nevertheless, in the final draft of this subdivision, the Revisers inserted par. 7, which is derived from rule 106(4), and states that it reflects a middle view between the original proposal that the motion to dismiss for legal insufficiency should be abolished, and the feeling of some bar association committees that, despite abuses, such motions often perform a valuable function in permitting a party to have a defective pleading dismissed before being required to frame a responsive pleading and perhaps submit to disclosure proceedings unjustifiably extended by the scope of the defective pleading. The words "facts sufficient to constitute" were not carried forward into par. 7 to conform with the pleading rule which does not use this phrase.

It is further explained in the First Report that there is good reason to continue the provisions for a preliminary motion under rules 107 and 110 of the rules of civil practice and, indeed, to expand them. As separable and easily demonstrable bars to an action, they may often save a lawyer considerable time and effort preparing an answer in a complicated case. There is little danger that they will delay the litigation since, by their nature, they are difficult to fabricate and raise issues that are relatively easily resolved. The commentators have highly praised the New York provisions. See, e.g., Millar, Civil Procedure of the Trial Court in Historical Perspective 250-52 (1952); Atkinson, Pleading the Statute of Limitations, 36 Yale L.J. 914, 930-32 (1927). Similar provisions exist in Illinois and Michigan. Ill.Ann.Stat. c. 110, § 48 (Smith-Hurd Supp.1955); 6A Mich.Comp.Laws Annotations, app. 4, Court Rule 18 (1948).

A new par. 1, relating to defense founded upon documentary evidence, was added by the Revisers, and they also included the defenses of estoppel, arbitration and award and discharge in bankruptcy in par. 5. The latter were chosen because they represent affirmative defenses that are usually easily established. Discharge in bankruptcy is an enumerated objection in the analogous Illinois provision, but this rule has not adopted the phrase "other affirmative matter" used in Illinois. Although par. 5 includes the most common defenses founded upon documentary evidence, par. 1 is added to cover all others that may arise, as for example, a written modification or any defense based on the terms of the written contract.

The words "in a court of any state or the United States" have been added in par. 4, in order to do away with the anomalous doctrine that an action in another state is not "another action pending" within the meaning of the rule. See Squier v. Houghton, 131 Misc. 129, 226 N.Y.S. 162 (Supp.Ct.1927). In the final draft of par. 4, the Revisers inserted provisions to give the court discretion to make an order other than dismissal, and they comment that in some cases, for example, stay of one of the actions or consolidation might be a more desirable solution.

Pars. 8 and 9 of subd. (a) of this rule were inserted to cover jurisdiction over the person and in rem or quasi in rem jurisdiction.

The objection of nonjoinder is covered by par. 10, and it is said that the rule that this objection is nonwaivable has been placed in subd. (e) of this rule.

Subd. (b) of this rule is derived from rule 109(6) of the rules of civil practice. As noted above in the discussion of subd. (a) of this rule, the Revisers originally planned to eliminate this provision. However, since they included the motion to dismiss for legal insufficiency, they carried forward rule 109(6) in this subdivision. The words "facts sufficient to constitute" a defense were omitted since this language in not used in the pleading rule.

Subd. (c) of this rule authorizes submission of evidence upon the hearing of a motion. The Revisers state in the First Report to the Legislature that rules 107 and 110 of the rules of civil practice, as to the evidence permitted, mention only affidavits, but "it is clear that the motion is in essence one for summary judgment."

Rule 108 of the rules of civil practice, permitting the court to direct an immediate trial of the issues raised, is continued in the second sentence of subd. (c). It is said that as to the specified defenses, it makes possible an accelerated judgment even though a genuine issue of fact exists which would defeat a motion for summary judgment. The Illinois and Michigan provisions analogous to rules 107 and 110 allow such a preliminary trial except where a jury trial is required. See note, 33 Chi.-Kent Law Rev. 191 (1955). The procedure seems worthy of retention, although courts are sometimes reluctant to use it because of the fear of two separate trials if the determination is against the moving party. See, e.g., Rizzuto v. U.S., Shipping Board Emergency Fleet Corp., 213 A.D. 326, 210 N.Y.S. 482 (2d Dep't 1925); Gordon v. Prishkoff, 67 N.Y.S.2d 373 (Sup.Ct.1946), aff'd 272 A.D. 872, 72 N.Y.S.2d 402 (1st Dep't 1947). A trial on any of the enumerated objections will usually be short; if it is before the court, it will require little more time than the motion itself. As often as not, it will result in a speedy disposition without calendar delay or the necessity of trying the whole case.

Rule 56(f) of the Federal Rules of Civil Procedure, 28 U.S.C.A., is the source of subd. (d) of this rule. The discussion accompanying this subdivision in the First Report to the Legislature states that rule 108 of the rules of civil practice permits the court, in its discretion, to deny the motion and "allow the same facts to be alleged in the answer as a defense." Although the rule offers no criteria for exercise of this discretion, it would undoubtedly cover the situation where the facts are then unavailable to the opposing party This subdivision goes beyond this, allowing the court to retain the motion while permitting disclosure. Further, under the power to make "such other order as is just," it is contemplated that the court could require service of an answer during the continuance for disclosure and thereafter treat the motion as one for summary judgment.

Subd. (e) of this rule is based on § 279 of the civil practice act. As originally drafted this subdivision provided: "A party may combine in a single motion two or more of the enumerated objections, and no more than one motion shall be permitted under

this rule. Any objection or defense enumerated in this rule except jurisdiction over the subject matter is waived unless it is raised by motion or in the responsive pleading." The Revisers explained in the First Report to the Legislature that this subdivision is designed to prevent the delay before answer that could result from a series of motions under this rule. With only a relatively short period ordinarily required for disposition of this motion, there is no serious need for allowing subsequent motions based on newly discovered evidence. In any event the party will lose no rights by failing to move or to include all available grounds in his motion, for he still may assert in his answer or reply any defense or objection not raised by motion.

The Revisers also stated that the waiver provision in the original draft does not change existing law. Affirmative defenses may not be proved unless pleaded. The generally non-waivable objections of nonjoinder and failure to state a cause of action or defense (cf. C.P.A. § 279; Rule 12(h) of the Federal Rules of Civil Procedure, 28 U.S.C.A.) are not affected because the provision applies only to objections or defenses enumerated in this rule. The rules concerning amendments and summary judgments, however, de-emphasize the objection of failure to state a cause of action and focus instead upon whether a cause of action actually exists.

Section 278 of the civil practice act provides for waiver of certain of the enumerated objections if they are not taken by motion; the purpose of that section, however, is merely to preserve the common law doctrine that dilatory pleas and pleas in abatement are waived unless claimed before trial. Thus, the doctrine is satisfied by the provision that they are waived unless claimed by motion or answer.

The final draft of subd. (e) of this rule inserted provisions relating to time, the rule of non-waiver of objection of legal insufficiency or of non-joinder, and the last sentence.

The rules of non-waiver of objections of legal insufficiency or of non-joinder were originally omitted from this subdivision becase of the proposal of the Revisers to omit the defense of legal insufficiency from subd. (a) of this rule. However, since the defense was included within subd. (a), the rules of non-waiver were required to be incorporated in subd. (e).

The last sentence was also added as part of the compromise approach toward the motion to dismiss for legal insufficiency. It is designed to remove the major objection to such objections--i.e., the liberality with which leave is granted to plead over without any showing that a legally sufficient claim exists. The combined operation of par. 7 of subd. (a) of this rule and this provision is to allow the motion at any time but also to put the burden on the opposing party to show that he has a good claim or defense even if he has not stated it; otherwise leave to plead over will not be granted.

The Sixth Report notes that subd. (e) of this rule, in its final form, is very flexible. If the judge hearing the motion wishes, he may insist that the party seeking leave to amend furnish him and the opponent with a proposed new pleading which can be considered in the light of the argument on the motion to dismiss and the information, if any, set forth in the opposing papers.

Subd. (f) of this rule follows the law under § 283 of the civil practice act. It will not operate to relieve a party's default if his time to plead expired before a motion was made, absent a stipulation or court order extending his time.

Official Reports to Legislature for this rule:

1st Report Leg.Doc. (1957) No. 6(b), p. 83.

2nd Report Leg.Doc. (1958) No. 13, p. 152.

5th Report Leg.Doc. (1961) No. 15, p. 482.

6th Report Leg.Doc. (1962) No. S, p. 329.

Notes of Decisions (4987)

McKinney's CPLR Rule 3211, NY CPLR Rule 3211
Current through L.2024, chapters 1 to 212. Some statute sections may be more current, see credits for details.

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