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Presenters:
Brian D. Gwitt, Esq.
Woods Oviatt Gilman LLP

William F. Savino, Esq.
Woods Oviatt Gilman LLP

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Buffalo, New York

Biographies

William F. Savino is a Partner at Woods Oviatt Gilman LLP and has practiced as a civil litigator in both New York and Ohio for over forty years. His practice focuses on matters involving business litigation, including construction, corporate and partnership dissolution, accounting malpractice, and Uniform Commercial Code matters. Mr. Savino teaches Commercial Litigation at the University at Buffalo's School of Law and Business Law in the Management School, and is a past President of its Law Alumni Association.

Mr. Savino has repeatedly earned the designation as a Top 10 Upstate New York Attorney and was ranked third in 2013 by Super Lawyers magazine. Mr. Savino has also been selected by his peers for inclusion in The Best Lawyers in America® 2014 in the fields of Commercial Litigation, Litigation - Construction, Litigation - Bankruptcy and Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law. Additionally, he has been listed as one of Business First of Buffalo's "Who's Who in Law" List for the past seven years.

Brian D. Gwitt is a Partner at Woods Oviatt Gilman LLP in the firm's Litigation Department. Mr. Gwitt practices in both state and federal court in New York and is admitted to practice in all state and federal courts in Indiana. His practice involves business and commercial litigation, including contract disputes, Uniform Commercial Code, corporate governance, intellectual property/trade secret litigation, bankruptcy litigation, real estate litigation and debtor/creditor matters. A large part of Mr. Gwitt's practice involves handling critical matters for businesses, including seeking/defending against temporary restraining orders and preliminary injunctions, and handling other forms of emergency relief.

Mr. Gwitt is an active member of the Bar Association of Erie County and the New York State Bar Association, where he is a member of the Committee on Professional Discipline. Mr. Gwitt is also President of the University at Buffalo Law Alumni Association.

Mr. Gwitt has been recognized as Super Lawyer for Upstate New York for Business Litigation by Super Lawyers magazine, and was also named to Business First of Buffalo's "Legal Elite of Western New York." In 2012, he was listed in Business First of Buffalo's Who's Who in Law List. Mr. Gwitt is a Fellow of the Litigation Counsel of America.

What's New in New York Practice 2017

By: William F. Savino
Brian D. Gwitt
Andrea K. DiLuglio
Bernard Schenkler
Woods Oviatt Gilman LLP
1900 Main Place Tower
Buffalo, New York 14202
(716) 248-3200

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I. RECENT AMENDMENTS

CPLR § 212 (e). Actions to be commenced within ten years [Effective January 19, 2016]

> (e) By a victim of sex trafficking, compelling prostitution, or labor trafficking. An action by a victim of sex trafficking, compelling prostitution, labor trafficking or aggravated labor trafficking, brought pursuant to subdivision (c) of section four hundred eighty-three-bb of the social services law, may be commenced within ten years after such victimization occurs provided, however, that such ten year period shall not begin to run and shall be tolled during any period in which the victim is or remains subject to such conduct.

CPLR § 214-f. Action to recover damages for personal injury caused by contact with or exposure to any substance or combination of substances found within an area designated as a superfund site [Effective July 21, 2016]

> Notwithstanding any provision of law to the contrary, an action to recover personal damages for injury caused by contact with or exposure to any substance or combination of substances contained within an area designated as a superfund site pursuant to either Chapter 103 of Section 42 of the United States Code and/or section 27-1303 of the environmental conservation law, may be commenced by the plaintiff within the period allowed pursuant to section two hundred fourteen-c of this article or within three years of such designation of such an area as a superfund site, whichever is latest.

The United States Department of Health and Human Services defines a "superfund site" as any land in the United States that has been contaminated by hazardous waste and identified by the Environmental Protection Agency as a candidate for cleanup due to the risk it poses to human health and/or the

environment. The Legislature added CPLR § 214-f to provide those harmed by exposure to toxic substances more time to seek relief. Pursuant to CPLR § 214-f, an individual seeking damages for personal injury resulting from exposure to substances located in a superfund site has the greater of: (1) three years from the date of discovery of the injury by the plaintiff or the date when such injury should have been discovered through reasonable diligence, whichever is earlier; or (2) three years from the designation of the area as a superfund site.

CPLR § 2103 (b)(2). Service of papers upon an attorney by mail [Effective January 1, 2016]

> Except where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon the party's attorney. Where the same attorney appears for two or more parties, only one copy need be served upon the attorney. Such service upon an attorney shall be made:
> …
>
> 2. by mailing the paper to the attorney at the address designated by that attorney for that purpose or, if none is designated, at the attorney's last known address; service by mail shall be complete upon mailing; **where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period if the mailing is made within the state and six days if the mailing is made from outside the state but within the geographic boundaries of the United States**; or
> …

CPLR § 2106. Affirmation of truth of statement [Effective January 1, 2015]

(b) The statement of any person, when that person is physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:

I affirm this day of _____ under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, **that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States**, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

(Signature)

CPLR § 2112. Filing of papers in the appellate division by electronic means [Effective July 24, 2017]

Notwithstanding any other provision of law, and except as otherwise provided in subdivision (c) of section twenty-one hundred eleven of this article, the appellate division in each judicial department may promulgate rules authorizing a program in the use of electronic means for: (i) appeals to such court from the judgment or order of a court of original instance or from that of another appellate court, (ii) making a motion for permission to appeal to such court, (iii) commencement of any other proceeding that may be brought in such court, and (iv) the filing and service of papers in pending actions and proceedings. Provided however, such rules shall not require an unrepresented party or any attorney who furnishes a certificate specified in

> subparagraph (A) or (B) of paragraph three of subdivision (b) of section twenty-one hundred eleven of this article to take or perfect an appeal by electronic means. Provided further, however, before promulgating any such rules, the appellate division in each judicial department shall consult with the chief administrator of the courts and shall provide an opportunity for review and comment by all those who are or would be affected including city, state, county and women's bar associations; institutional legal service providers; not-for-profit legal service providers; attorneys assigned pursuant to article eighteen-B of the county law; unaffiliated attorneys who regularly appear in proceedings that are or have been affected by the programs that have been implemented or who may be affected by promulgation of rules concerning the use of the electronic filing program in the appellate division of any judicial department; and any other persons in whose county a program has been implemented in any of the courts therein as deemed to be appropriate by any appellate division. To the extent practicable, rules promulgated by the appellate division in each judicial department pursuant to this section shall be uniform.

Prior to the July 24, 2017 amendment, CPLR § 2112 prohibited the appellate division from eliminating the requirement of consent to participation in appeals using an electronic program in the following actions and proceedings: (1) matrimonial actions; (2) election law proceedings; (3) Article 70 or Article 78 proceedings; (4) proceedings brought pursuant to the mental hygiene law; (5) residential foreclosure actions involving a home loan as such term is defined in section thirteen hundred four of the real property actions and proceedings law; and (6) proceedings related to consumer credit transactions. Under the amendment, the appellate division is permitted to eliminate the consent requirement for participation in electronic filing.

CPLR § 3016. Particularity in specific actions [Effective October 5, 2015]

(i) Privacy of name in certain legal challenges to college/university disciplinary findings. In any proceeding brought against a college or university that is chartered by the regents or incorporated by special act of the legislature, which proceeding seeks to vacate or modify a finding that a student was responsible for a violation of college or university rules regarding a violation covered by article one hundred twenty-nine-B of the education law, **the name and identifying biographical information of any student shall be presumptively confidential and shall not be included in the pleadings and other papers from such proceeding absent a waiver or cause shown as determined by the court**. Such witnesses shall be identified only as numbered witnesses. If such a name or identifying biographical information appears in a pleading or paper filed in such a proceeding, the court, absent such a waiver or cause shown, shall direct the clerk of the court to redact such name and identifying biographical information and so advise the parties.

CPLR § 3212. Motion for summary judgment [Effective December 11, 2015]

(b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. **Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit.** The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be

established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If 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.

CPLR § 3216. Want of prosecution [Effective January 1, 2015]

(a) Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, **with notice to the parties**, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits.

(b) No dismissal shall be directed under any portion of subdivision (a) of this rule and no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with:

(1) Issue must have been joined in the action;
(2) One year must have elapsed since the joinder of issue **or six months must have elapsed since the issuance of the preliminary court conference order where such an order has been issued, whichever is later;**
(3) The court or party seeking such relief, as the case may be, shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him **or her** for unreasonably neglecting

to proceed. **Where the written demand is served by the court, the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.**

CPLR § 3408 (a). Mandatory settlement conference in residential foreclosure actions

1. **[Effective until February 12, 2020]** Except as provided in paragraph two of this subdivision, in any residential foreclosure action involving a home loan as such term is defined in section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, plaintiff shall file proof of service within twenty days of such service, however service is made, and the court shall hold a mandatory conference within sixty days after the date when proof of service upon such defendant is filed with the county clerk, or on such adjourned date as has been agreed to by the parties, for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to: (i) determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, including, but not limited to, a loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation option; or (ii) whatever other purposes the court deems appropriate.

2. (i) Paragraph one of this subdivision shall not apply to a home loan secured by a reverse mortgage where the default was triggered by the death of the last surviving borrower unless: (A) the last surviving borrower's spouse, if any, is a resident of the property subject to foreclosure; or (B) the last surviving borrower's successor in interest, who, by bequest or through intestacy, owns, or has a claim to the

ownership of the property subject to foreclosure, and who was a resident of such property at the time of the death of such last surviving borrower. (ii) The superintendent of financial services may promulgate such rules and regulations as he or she shall deem necessary to implement the provisions of this paragraph.

(a) **[Effective February 13, 2020]** In any residential foreclosure action involving a high-cost home loan consummated between January first, two thousand three and September first, two thousand eight, or a subprime or nontraditional home loan, as those terms are defined under section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, the court shall hold a mandatory conference within sixty days after the date when proof of service is filed with the county clerk, or on such adjourned date as has been agreed to by the parties, for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to: 1. determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to including, but not limited to, a loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation option; or 2. whatever other purposes the court deems appropriate.

CPLR § 4503. Attorney [Effective August 19, 2016]

(b) Wills and **revocable trusts**. In any action involving the probate, validity or construction of a will or, **after the grantor's death, a revocable trust**, an attorney or his employee shall be required to disclose information as to the preparation, execution or revocation of any will, **revocable trust**, or other relevant instrument, but he shall not be allowed to disclose any communication privileged under

subdivision (a) which would tend to disgrace the memory of the decedent.

CPLR § 5521. Preferences [Effective May 27, 2017]

(b) Consistent with the provisions of section one thousand one hundred twelve of the family court act, appeals from orders, judgments or decrees in proceedings brought pursuant to articles three, seven, ten and ten-A and parts one and two of article six of the family court act, and pursuant to sections three hundred fifty-eight-a, three hundred eighty-three-c, three hundred eighty-four, and three hundred eighty-four-b of the social services law, **and pursuant to paragraph (d) of subdivision four of section eighty-nine of the public officers law, shall be given preference and may be brought on for argument on such terms and conditions as the court may direct without the necessity of a motion.**

II. JURISDICTION

A. Specific Jurisdiction – CPLR § 302(a)(1)

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state;
…

CPLR § 302 (a) (1) jurisdictional inquiry is twofold: (1) the defendant must have conducted sufficient activities to have transacted business in the state; and (2) the claims must arise from the transactions. *Rushaid v. Pictet & Cie*, 28 N.Y.3d 316,

323 (2016). Physical presence in the state is not required to satisfy the first prong of CPLR § 302(a)(1) analysis. Rather, to transact business in the state, the party need only to have purposefully availed "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, 380 (2007). To satisfy the second prong, that the claims arise from the transaction, "there must be an 'articulable nexus' or 'substantial relationship' between the business transaction and the claim asserted." *Licci v. Lebanese Can. Bank, SAL*, 20 N.Y.3d 327, 339 (2012) (internal citations omitted). The claim need only be arguably connected to the transaction. *Rushaid*, 28 N.Y.3d at 329.

1. ***Rushaid v. Pictet & Cie*, 28 N.Y.3d 316, 322 (2016)**

In *Rushaid*, the issue was whether the court had personal jurisdiction over the defendant, who used New York bank accounts to receive and transfer millions of dollars of illicit funds in furtherance of a bribery scheme. 28 N.Y.3d 316.

a. **Transaction of Business**

The court held that the repeated and deliberate use of a New York bank account to launder illegally obtained funds constituted a "transaction of business" in the state. *Id.* at 329. In determining whether the use of a bank account in the state constituted purposeful availment such that the defendant could be said to have "transacted business" in the state, the court stated:

> [the] unintended and unapproved use of a correspondent bank account, where the non-domiciliary bank is a passive and unilateral recipient of funds . . . does not constitute

> purposeful availment for personal jurisdiction under CPLR 302 (a) (1). **[However,] [r]epeated, deliberate use that is approved by the foreign bank on behalf and for the benefit of a customer . . . demonstrates volitional activity constituting transaction of business.** In other words, the quantity and quality of a foreign bank's contacts with the correspondent bank must demonstrate more than banking by happenstance. [*Id.* at 326-327.]

In *Rushaid*, the defendants actively used the New York correspondent bank to transfer laundered profits from the bribery scheme and such conduct "is sufficient to establish a purposeful course of dealing, constituting the transaction of business in New York under CPLR 302 (a) (1)." *Id.* at 329.

b. Claims Arise from Transaction

The defendants argued that the use of the New York correspondent bank was not substantially related to the plaintiff's allegations because the transfers occurred months after the bank accounts were created, and therefore the transfers were *incidental* to the scheme that injured the plaintiffs, since the injury would exist had payment been made by other means. *Id.* at 330. The Court disagreed, determining that allegations in the complaint easily met the nexus requirement:

> H]ere, the money laundering could not proceed without the use of the correspondent bank account, and, as plaintiffs argue, their claims require proof that the bribes and kickbacks were in fact paid. The money laundering scheme Chambaz designed relied precisely on the existence of bank accounts in different jurisdictions, through which the money would pass. . . .[P]laintiffs' claims of aiding and abetting breaches of fiduciary duties and conspiracy turn entirely on the money laundering Pictet and Chambaz

> allegedly set up and maintained, necessarily including the use of a New York bank account. [*Id.*]

2. *America/International 1994 Venture v. Mau*, 146 A.D.3d 40, 58-59 (2d Dep't 2016)

In *America/International 1994 Venture*, the Second Department determined that the defendant was not subject to personal jurisdiction under CPLR § 302(a)(1) because the claims asserted did not arise from the defendant's transactions in New York:

> The fact that there is no connection between the plaintiffs' cause of action to recover on the note and Kraft's business activities further supports a determination that the defendant is not subject to jurisdiction in New York. **"Essential to the maintenance of a suit against a nondomiciliary under CPLR 302 (subd. [a], par 1) is the existence of some articulable nexus between the business transacted and the cause of action sued upon"** (McGowan v Smith, 52 NY2d 268, 272, 419 N.E.2d 321, 437 N.Y.S.2d 643). "[A] substantial relationship' must be established between a defendant's transactions in New York and a plaintiff's cause of action" (Johnson v Ward, 4 NY3d 516, 519, 829 N.E.2d 1201, 797 N.Y.S.2d 33, quoting Kreutter v McFadden Oil Corp., 71 NY2d at 467; see Opticare Acquisition Corp. v Castillo, 25 AD3d 238, 246, 806 N.Y.S.2d 84).
>
> Here, even if Kraft were considered to be the defendant's agent for jurisdictional purposes, the plaintiffs presented no evidence that the alleged business activities in New York, conducted by Kraft on behalf of all investors including the defendant, were substantially related to or gave rise to the cause of action to recover on the note (see Storch v Vigneau, 162 AD2d 241, 242, 556 N.Y.S.2d 342). Kraft's business activities in New York were related to the operation of the joint venture. The subject cause of action arose from the defendant's failure to pay the note when it

> came due. **The subject claim resulted from the execution of the note in Illinois 20 years prior to the commencement of this action. This relationship is too remote and indirect to create an articulable nexus.**
>
> Furthermore, the defendant's appointment of Kraft as his agent in New York does not bear a substantial relationship to the subject matter of this action. "These are . . . merely coincidental' occurrences that have a tangential relationship to the present case" (Fischbarg v Doucet, 9 NY3d at 384, quoting Johnson v Ward, 4 NY3d at 520). **The defendant's appointment of Kraft as his agent and Kraft's alleged actions in New York do not form the basis of this action. The plaintiffs' claim based on the defendant's failure to pay the note is completely independent of Kraft's activities pursuant to the terms of the Subscription Agreement.**

3. *Kleinfeld v. Rand*, 143 A.D.3d 524, 524 (1st Dep't 2016)

In *Kleinfeld*, the First Department held that presence in the state for purposes of negotiation constitutes the transaction of business.

> Dismissal of the complaint for lack of personal jurisdiction was improper in this action on defendant's guaranty of a promissory note. Defendant is a New Jersey resident, but he came to New York two or three times — once or twice to negotiate the terms of the note, and once to negotiate his guaranty. Negotiating the terms of a note constitutes the transaction of business (see San Ysidro Corp. v Robinow, 1 AD3d 185, 187, 768 N.Y.S.2d 191 [1st Dept 2003]; CPLR 302[a][1]), and by analogy, so does negotiating the terms of a guaranty of a note.

B. Specific Jurisdiction – CPLR § 302(a)(3)

> (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any

non-domiciliary, or his executor or administrator, who in person or through an agent:

…

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce;

1. *Pope Invs. LLC v PacificNet Games Ltd.*, No. 650379/2009, 2017 N.Y. Misc. LEXIS 1461, *16 (Sup. Ct. Apr. 19, 2017)

For purposes of CPLR 302 (a) (3), **"the situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt."** (Cotia (USA) Ltd., 134 AD3d at 484 [internal quotation marks and citations omitted].) "In the context of a commercial tort, where the damage is solely economic, the situs of commercial injury is where the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred." (CRT Invs., Ltd. v BDO Seidman, LLP, 85 AD3d 470, 471-472, 925 N.Y.S.2d 439 [1st Dept 2011]; accord McBride v KPMG Intl., 135 AD3d 576, 576, 24 N.Y.S.3d 257 [1st Dept 2016].)

2. *McBride v KPMG Intl.*, 135 A.D.3d 576, 577 (1st Dep't 2016)

The motion court correctly found that New York lacks personal jurisdiction over KPMG UK pursuant to CPLR 302 (a) (3) (ii). While plaintiffs allege that KPMG UK committed a tort outside the state (negligently auditing nonparty Madoff Securities International, Ltd. [MSIL] in the United Kingdom), and their causes of action arise out

> of that tort, KPMG UK's act did not cause injury to a person or property within the state. "[T]he situs of commercial injury is where the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred" (CRT Invs., Ltd. v BDO Seidman, LLP, 85 AD3d 470, 471-472, 925 NYS2d 439 [1st Dept 2011]).

C. Specific Jurisdiction – Fourteenth Amendment Due Process

Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017)

In determining whether California's long arm statute comports with the Fourteenth Amendment's limitation on personal jurisdiction of state courts, the United States Supreme Court held:

> Our settled principles regarding specific jurisdiction control this case. In order for a court to exercise specific jurisdiction over a claim, there must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." Goodyear, 564 U. S., at 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (internal quotation marks and brackets in original omitted). When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State. See id., at 931, n. 6, 131 S. Ct. 2846, 180 L. Ed. 2d 796 ("[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales").
>
> For this reason, the California Supreme Court's "sliding scale approach" is difficult to square with our precedents. Under the California approach, the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims. Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction. For specific

> jurisdiction, a defendant's general connections with the forum are not enough. As we have said, "[a] corporation's 'continuous activity of some sorts within a state . . . is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.'" Id., at 927, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (quoting International Shoe, 326 U. S., at 318, 66 S. Ct. 154, 90 L. Ed. 95).
>
> The present case illustrates the danger of the California approach. The State Supreme Court found that specific jurisdiction was present without identifying any adequate link between the State and the nonresidents' claims. As noted, the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. The mere fact that other plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims. As we have explained, "a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction." Walden, 571 U. S., at ___, 134 S. Ct. 1115, 188 L. Ed. 2d 12, 21. This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents. Nor is it sufficient—or even relevant—that BMS conducted research in California on matters unrelated to Plavix. What is needed—and what is missing here—is a connection between the forum and the specific claims at issue. [*Id.* at 1781].

D. General Jurisdiction – CPLR § 301

Pursuant to CPLR § 301, "[a] court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." "The bases for jurisdiction recognized by our common law before the date of the enactment of the

CPLR were physical presence within the State, domicile or consent. *Chen v Guo Liang Lu*, 144 A.D.3d 735, 737 2d Dep't 2016) (internal citations and quotations omitted).

1. Due Process Limitations on General Jurisdiction Over Corporations

a. Daimler AG v. Bauman, 134 S. Ct. 746, 749 (2014)

In 2014, the Supreme Court made a momentous decision regarding due process limitations on the exercise of general personal jurisdiction over corporations. For large corporate defendants that have operations in many states, plaintiffs would frequently file an action in whatever forum they felt was most favorable to them provided that the defendant had an adequate track record of contacts with the forum (*e.g.*, selling or distributing products in a state, though not maintaining a place of business there).

The test for general jurisdiction is "when [a defendant's] affiliations with the State are so **'continuous and systematic'** as to render them **essentially at home** in the forum State." *Daimler AG v. Bauman,* 134 S. Ct. 746, 749 (2014) (emphasis added). The second prong of that test had lost practical significance in case law. The Supreme Court held in *Daimler* that only in an "exceptional" case will a corporate defendant be subject to general personal jurisdiction beyond the places where it is either incorporated or has its principal place of business, limiting the exercise of general personal jurisdiction under California's long-arm statute. *Id.* at 761 n.19. The High Court rendered its decision based on the due process clause of the Fourteenth

Amendment and on notions of "comity" (*i.e.*, where one forum is required to show deference to other forums that have a greater interest in resolving a debate).

The ruling in *Daimler* portends a sea change in personal jurisdiction over corporate defendants in federal practice and its rationale has crept into arguments over long-arm jurisdiction at the state level. New York is a state where there has been a liberal exercise of jurisdiction over corporate defendants with significant contacts even where the "cause of action sued upon has no relation in its origin to the business here transacted." *See Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 265 (1917). *Daimler's* effects have been felt in a handful of recent New York lower court decisions. *See e.g.*, *Fernandez v. Daimler Chrysler, A.G.*, 143 A.D.3d 765, 766 (2d Dep't 2016) ("Contrary to the plaintiff's contention, exercising general jurisdiction over Daimler does not comport with due process."); *Magdalena v Lins*, 123 A.D.3d 600, 601 (1st Dep't 2014) (New York Courts do not have general jurisdiction over a defendant under CPLR § 301 unless the entity is incorporated in New York or has its principal place of business in New York).

b. <u>Foreign Corporations Registered to do Business in New York</u>

After *Daimler*, it remains unclear whether a foreign entity registered to do business in New York consents to general jurisdiction in New York. The United States District Court for the Southern District of New York recently declined to conclude that registering to do business and appointing an agent for service of

process constitutes consent to general jurisdiction. *Taormina v. Thrifty Car Rental*, No. 16-CV-3255 (VEC), 2016 U.S. Dist. LEXIS 176673, *17-19 (S.D.N.Y. Dec. 21, 2016).

> No appellate authority exists on whether a foreign corporation's consent to jurisdiction based solely on New York's registration statute survives *Daimler*, . . . and federal district courts have expressed competing views. Supplemental Practice Commentaries, N.Y. C.P.L.R. § 301 (McKinney 2016) (comparing Beach v. Citigroup Alt. Invs. LLC, No. 12 Civ. 7717 (PKC), 2014 U.S. Dist. LEXIS 30032, 2014 WL 904650, at *6 (S.D.N.Y. 2014) ("Notwithstanding [Daimler and Goodyear], a corporation may consent to jurisdiction in New York under CPLR § 301 by registering as a foreign corporation and designating a local agent.") with Chatwal Hotels & Resorts LLC v. Dollywood Co., 90 F. Supp. 3d 97, 2015 WL 539460, at *6 (S.D.N.Y. 2015) ("After Daimler, with the Second Circuit cautioning against adopting 'an overly expansive view of general jurisdiction,' Gucci, 768 F.3d at 135, the mere fact of [the defendant's] being registered to do business is insufficient to confer general jurisdiction in a state that is neither its state of incorporation or its principal place of business.")).
>
> At least one New York state trial court has concluded, post-*Daimler*, that an out-of-state corporation "is deemed to have consented to personal jurisdiction over it when it registers to do business in New York and appoints the Secretary of State to receive process for it pursuant to Business Corporation Law §§ 304 and 1304." Serov v. Kerzner Int'l Resorts, Inc., 52 Misc. 3d 1214[A], 43 N.Y.S.3d 769, 2016 NY Slip Op 51150[U], 2016 WL 4083725 (N.Y. Sup. Ct. July 26, 2016). That court, however, relied on pre-Daimler cases and did not discuss the impact of Daimler on the viability of predicating general jurisdiction on consent through the business-registration statutes.
>
> Another New York state trial court has concluded that Daimler did not "change the law with respect to personal

> jurisdiction based on consent," but that court relied solely on Beach v. Citigroup Alt. Invs. LLC, No. 12 Civ. 7717 (PKC), 2014 U.S. Dist. LEXIS 30032, 2014 WL 904650, at *6 (S.D.N.Y. 2014), without further analysis. Bailen v. Air & Liquid Sys. Corp., Index No. 190318/12, 2014 N.Y. Misc. LEXIS 3554 (N.Y. Sup. Ct. Aug. 5, 2014).
>
> New York's business registration statutes do not expressly require consent to general jurisdiction, and in the absence of any clearer legislative authority or any post-*Daimler* authority on the issue, this Court declines to conclude that Hertz's registration to do business and appointment of an agent for service of process constitute consent to general jurisdiction. "If mere registration and the accompanying appointment of an in-state agent—without an express consent to general jurisdiction—nonetheless sufficed to confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and Daimler's ruling would be robbed of meaning by a back-door thief." Brown, 814 F.3d at 640; Bonkowski, 2016 U.S. Dist. LEXIS 116492, 2016 WL 4536868, at *2.

Similarly, in *Mischel v Safe Haven Enters., LLC*, 2017 N.Y. Misc. LEXIS 1402, *3-6 (Sup. Ct. Apr. 17, 2017), the Supreme Court held that, under *Daimler*, a foreign corporation or limited liability company registered to do business in New York is not automatically subject to general jurisdiction:

> All 50 states require registration of foreign corporations to do business (Tanya J. Monestier, Registration Statutes, General Jurisdiction, and the Fallacy of Consent, 36 Cardozo L Rev 1343 [2015]). If, after Daimler, these statutes were deemed to meet due process standards, foreign corporations seeking to avoid general jurisdiction in a state would be faced with unenviable choices: (1) not doing business in the state; (2) registering and subjecting themselves to general jurisdiction; or (3) doing business in the state without registration and thereby breaking the law

(id.). As Monestier suggests, the net effect of finding jurisdiction by registration would be coercive.

Then there is the problem of notice. The New York registration statute (BCL § 304), while designating the secretary of state
as the registrant's agent for service of process, is silent on the jurisdictional effect of registering to do business here. In apparent recognition of this omission, a bill was introduced in the State Assembly to make plain that registration constituted consent to the general jurisdiction of the courts of this state (2014 NY Assembly Bill S7078). The proposed statute was **not** enacted.

Here, defendant Safe Haven is a foreign limited liability company. Limited Liability Company Law § 301(a) provides that the secretary of state "shall be the agent of...every foreign limited liability company upon which process may be served pursuant to this chapter." Subsection (b) provides, "No...foreign limited liability company may be formed or authorized to do business in this state under this chapter unless its articles of organization or application for authority designates the secretary of state as such agent." The registration provisions of the Limited Liability Company Law (§ 301) precisely track the language of BCL § 304(a) and (b) designating the secretary of state as the agent for service of process for foreign corporations authorized to do business in this state. **As is the case with the provisions of the BCL, the Limited Liability Company Law gives no notice to the registrant that registration confers consent to the general jurisdiction of the New York courts. Thus, interpreting this statute as providing such consent is inconsistent with due process standards.** [*Id.* (Emphasis added.)]

2. Individual Must Be Domiciled in State When Action is Commenced for Exercise of General Jurisdiction

"[D]omicile means living in [a] locality with intent to make it a fixed and permanent home.'" It is the place "where one

always intends to return to from wherever one may be temporarily located.'" An individual may have multiple residences, but only one domicile. In making a determination as to a defendant's domicile, examination of the defendant's intent to permanently reside in a given locality is essential. In this respect, courts must look to the defendant's intent as it existed at the time the plaintiff commenced the action. Where the defendant is not domiciled in New York at the time the action is commenced, New York courts lack personal jurisdiction over the defendant on that basis.

Here, in opposing dismissal of the complaint pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction, the **plaintiffs failed to make a prima facie showing that the defendant was domiciled in New York at the time the action was commenced in July 2013**. Evidence of the defendant's ownership of a cooperative apartment in Queens is, on its own, insufficient to confer personal jurisdiction over him absent evidence of his intent to make the apartment his "fixed and permanent home." The record demonstrated that the defendant resided in Shanghai, China, while his wife and daughter resided in the cooperative apartment in Queens. It was undisputed that the defendant had not even visited New York since March 2013. Further, **while the defendant's immigration status may be indicative of an intent on the part of the defendant to reside in the United States at the time a petition for an employment-based immigrant visa was filed on his behalf in December 2009, it does not demonstrate an intent to make New York his fixed and permanent home at the time this action was commenced in July 2013**, four months after his departure from the United States. Accordingly, the plaintiffs failed to make a prima facie showing that the defendant intended to make New York his permanent home such that he was subject to personal jurisdiction on the basis of domicile. [*Chen v Guo Liang Lu*, 144 A.D.3d 735, 737-738 (2d Dep't 2016) (internal citations omitted)].

E. Subject Matter Jurisdiction – Dissolution of Foreign Limited Liability Company

Based on the "internal affairs" doctrine, a New York court does not have subject matter jurisdiction over the judicial dissolution of a foreign business entity, regardless of whether that entity has its principal place of business in New York, has members residing in New York or is owned by a New York business entity. *Matter of Raharney Capital, LLC v. Capital Stack LLC*, 138 A.D.3d 83, 84-85 (1st Dep't 2016); see also, *115 W. 27th St. Assoc. LLC v. Perez*, No. 654343/2015, 2016 N.Y. Misc. LEXIS 3041, *15 n. 8 (Sup. Ct. Aug. 19, 2016) ("[O]nly courts in the state of incorporation may dissolve or revive corporate entities."); *Capone v Castleton Commoditites Intl. LLC*, No. 651794/2015, 2016 N.Y. Misc. LEXIS 1053, *9 (Sup. Ct. Mar. 29, 2016) ("A New York court should not rule on the existence or cancellation of a Delaware corporate entity.").

III. STATUTE OF LIMITATIONS

A. Tolling/ Continuous Representation

***Carbone v. Brenizer*, 148 A.D.3d 1806, 50 N.Y.S.3d 783 (4th Dep't 2017)**

Plaintiff ex-spouse commenced attorney malpractice action claiming failure to properly advise her during matrimonial settlement negotiations. Defendant moved, in part, to dismiss based on the 3-year statute of limitations for legal malpractice (CPLR § 214(6)). The Court noted that the statute of limitations is tolled "where there is a mutual understanding of the need for further representation on the specific subject

matter underlying the malpractice claim" and, notwithstanding when the cause of action accrued, the attorney's representation ended, at the earliest, when the judgment of divorce was entered, in June 2014 (within the 3-year limitations period). 148 A.D.3d at 1807.

B. Includes Columbus Day

***Wilson v. Exigence of Team Health*, 151 A.D.3d 1849 (4th Dep't 2017)**

Plaintiff commenced action for retaliatory discharge pursuant to Labor Law 741 which provided for a two-year statute of limitation. Defendant moved to dismiss pursuant to CPLR § 3211(a)(5), alleging that the limitations period expired October 10, 2015, and the summons and complaint were not electronically filed until October 13, 2015. The Fourth Department held that because the two year limitation period expired on a Saturday, General Construction Law § 25-a[1] extended the limitation "until the next succeeding business day." Columbus Day was on the following Monday, making the next business day October 13, 2015. Thus, the summons and complaint were timely filed.

IV. COMMENCEMENT OF AN ACTION OR PROCEEDING

A. Failure to File Initiating Papers

Failure to file the requisite initiating papers, such as a complaint, summons, summons with notice or petition is a non-waivable defect, rendering the action or proceeding a nullity due to lack of jurisdiction, despite liberal amendment rights in CPLR § 2001.

CPLR § 2001. Mistakes, omissions, defects and irregularities

At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.

1. *JPMorgan Chase Bank*, N.A. v. Diaz, No. 7812-2013, 2017 N.Y. Misc. LEXIS 2321, *6 (Sup. Ct. June 2, 2017)

Accordingly, the legislative intent of CPLR § 2001 was to excuse non-prejudicial defects in court filings, not defects pertaining to jurisdiction. Here, the affidavit at issue is plaintiff's affidavit of purported service. Therefore, contrary to plaintiff's contentions, CPLR § 2001 is not curative of plaintiff's failure to comply with CPLR § 2309(c). If an out-of-state affidavit of service is defective for failure to comply with the certificate of conformity requirements of CPLR § 2309(c), such defect may be waived or cured only by a subsequent affidavit that corrects such defect. Since the plaintiff has again failed to submit a certificate of compliance with the out-of-state affidavit of service as required by CPLR § 2309(c), and has failed to submit an affidavit curing such defect, jurisdiction over the defendant has not been properly established. [*Id.* (Internal citations omitted)].

2. *Town of Cicero v. Lakeshore Estates, LLC,* 2017 N.Y. App. Div. 5373 (4th Dep't July 7, 2017)

The Town obtained an Order to Show Cause to require removal of certain structures. The Supreme Court denied the Town's "Petition" and the Town appealed. The Fourth Department held that "the valid commencement of an action is a

condition precedent to [Supreme Court's] acquiring the jurisdiction even to entertain an application for an . . . injunction. . . . Here, however, there is no action supporting the application for an injunction." 2017 N.Y. App. Div. LEXIS 5373, * 1-2. The Town may not seek an injunction by motion. Thus, the Supreme Court lacked jurisdiction to entertain the Towns' request, and the "order" is not even an appealable paper.

3. *Dealy-Doe-Eyes Maddux v Schur*, 139 A.D.3d 1281, 1281 (3d Dep't 2016)

> Here, although plaintiff purchased an index number and filed a complaint, she never filed a summons or summons with notice. Given plaintiff's failure, the purported action was a nullity, and Supreme Court properly dismissed it for want of subject matter jurisdiction

4. *DiSilvio v Romanelli*, 150 A.D.3d 1078, 1079 (2d Dep't 2017)

> Under CPLR 304(a), an action in Supreme Court is ordinarily commenced "by filing a summons and complaint or summons with notice." The failure to file the initial papers necessary to commence an action constitutes a nonwaivable, jurisdictional defect, rendering the action a nullity. Here, the appellant undertook no steps to commence a third-party action, despite his unilateral amendment of the caption of the action in his motion papers to include the nonparty respondents as "third-party defendants." Consequently, the jurisdiction of the court was never invoked and the purported third-party action was a nullity. As a result, all relief sought by the appellant against the nonparty-respondents was properly denied. [*Id.* (internal citations omitted)].

B. Notice of Claim

In *Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 N.Y.3d 455, 465-466 (2016), the Court of Appeals held:

> [A] finding that a public corporation is substantially prejudiced by a late notice of claim cannot be based solely on speculation and inference; rather, a determination of substantial prejudice must be based on evidence in the record.
> …
> [T]he burden initially rests on the petitioner to show that the late notice will not substantially prejudice the public corporation. Such a showing need not be extensive, but the petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice
>
> The rule we endorse today—requiring a petitioner to make an initial showing that the public corporation will not be substantially prejudiced and then requiring the public corporation to rebut that showing with particularized evidence—strikes a fair balance. We recognize that a petitioner seeking to excuse the failure to timely comply with the notice requirement should have the initial burden to show that the public corporation will not be substantially prejudiced by the delay. The public corporation, however, is in the best position to know and demonstrate whether it has been substantially prejudiced by the late notice. We have long held in other contexts that where 'the facts are within the defendant's peculiar knowledge, . . . he [or she] should, therefore, prove them.' Requiring the public corporation to come forward with a particularized showing is appropriate in this context given that the public corporation is in the best position to provide evidence as to whether the late notice has substantially prejudiced its ability to defend the claim on the merits.(Internal citations omitted).

See also, Tate v State Univ. Constr. Fund, 151 A.D.3d 1865, 1866 (4th Dep't 2017) ("Finally, we agree with respondent that claimant failed to sustain his burden of showing that a late notice of claim would not substantially prejudice respondent's interests. Indeed, respondent affirmatively showed that it would be prejudiced.").

V. VENUE

CPLR § 510. Grounds for change of place of trial

The court, upon motion, may change the place of trial of an action where:

1. the county designated for that purpose is not a proper county; or

2. there is reason to believe that an impartial trial cannot be had in the proper county; or

3. the convenience of material witnesses and the ends of justice will be promoted by the change.

A. Designation for Place of Business by Foreign Entity Controls Venue

1. *Crucen v Pepsi-Cola Bottling Co. of N.Y., Inc.*, 139 A.D.3d 538, 539 (1st Dep't 2016)

In support of its motion, defendant, a foreign corporation, submitted a certified copy of its application for authority to do business filed with the Secretary of State in which it stated that its principal place of business "is to be located" in New York County. Defendant's designation of New York County as its principal place of business in the application for authority is controlling for venue purposes Contrary to plaintiff's arguments, even if defendant does not actually have an office in New York County, and although it has notified the Department of State to forward process to an address in Bronx County, the designation

made by defendant in its application for authority still controls for venue purposes. (Internal citations omitted).

2. *Mendoza v. Raveh Realty, LLC*, No. 150031/2016, 2016 N.Y. Misc. LEXIS 3010, *4 (Sup. Ct. Aug. 10, 2016)

To the extent that plaintiff now argues that venue was proper in New York County based on defendant's residence, the fact that defendant selected Nassau County as its principal place of business in its filings with the Secretary of State belies that position. (Ex. D to Aff. in Supp.) Contrary to plaintiff's arguments, it is well settled that a corporation's designation of a particular county as its principal place of business in its filings with the Secretary of State 'is controlling for venue purposes.' Thus, defendant's motion is granted. (Internal citations omitted).

B. Convenience of Witnesses

1. *Gularte v Khabir*, 2017 N.Y. Misc. LEXIS 1782, *4-5, 2017 NY Slip Op 30983(U), 3-4 (N.Y. Sup. Ct. May 11, 2017)

Here, movants have made the requisite showing regarding the inconvenience of the proposed witnesses and demonstrated that several nonparty material witnesses are willing to testify, but would be inconvenienced by having to travel to New York County (see Vered v Wittenberg, 138 AD3d 646, 28 N.Y.S.3d 871 [1st Dept 2016]). The Court notes that although venue in all three cases was properly placed in New York County based upon the New York County residences of parties Julio Gomez and Luis Aguero Duran (defendants in this case and plaintiffs in the related cases), venue could also have been properly placed in Sullivan County based upon the residence of Defendant Carl Gerard.

Upon careful consideration and weighing of various factors, including, but not limited to, the convenience of the non party material witnesses and whether venue could have been properly placed in Sullivan County, the court exercises its discretion and the motion, pursuant to CPLR §

510(3), to change venue of all three related actions from this court to the Supreme Court, County of Sullivan is GRANTED.

2. *Vered v. Wittenberg*, 138 A.D.3d 646, 646-647 (1st Dep't 2016)

Supreme Court improvidently exercised its discretion in denying defendant's motion to change venue pursuant to CPLR 510 (3). Defendant showed that nonparty material witnesses—including the police officer, detective, and paramedics who responded to the scene of the accident in Suffolk County—were willing to testify, but would be inconvenienced by having to travel to New York County. Moreover, most of the medical records and witnesses are located in Suffolk County. In response to defendant's showing, plaintiffs have not shown that New York County, where they reside, is preferable to Suffolk County, where they own a home. (Internal citations omitted).

VI. PLEADINGS

CPLR § 3025. Amended and supplemental pleadings

(a) Amendments Without Leave. A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.

(b) Amendments and Supplemental Pleadings by Leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. 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.

A. Palpably Insufficient or Devoid of Merit

***Munoz Trucking Corp. v. Darcon Constr., Inc.*, No. 2015-12516, 2016-07179, 2017 N.Y. App. Div. LEXIS 6250, *3-4 (2d Dep't Aug. 23, 2017)**

As a general rule, leave to amend a pleading pursuant to CPLR 3025(b) should be freely granted in the absence of prejudice or surprise resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit. Here, there was no surprise or prejudice to Pavarini resulting from any delay by the plaintiff in seeking leave, and the proposed amendment was neither palpably insufficient nor patently devoid of merit. Accordingly, the Supreme Court improvidently exercised its discretion in denying the plaintiff's motion for leave to serve a supplemental summons and amended complaint adding Pavarini as a defendant. (Internal citations and quotations omitted.)

B. Prejudice

***Forcucci v. Board of Educ. of Hamburg Cent. Sch. Dist.*, 151 A.D.3d 1660, (4th Dep't 2017)**

Prejudice has been defined as a special right lost in the interim, a change in position, or significant trouble or expense that could have been avoided had the original pleading contained the proposed amendment. Here, plaintiff established that she would suffer prejudice as a result of the amendment, and it therefore cannot be said that the court abused its discretion in denying the cross motion. (Internal citations and quotations omitted).

C. Clear Showing of Changes or Additions

***325 E. 118th St., LLC v. Roach Bernard, PLLC*, 2017 N.Y. Misc. LEXIS 3079, *3-4 (Sup. Ct. Aug. 7, 2017)**

Roach Bernard's proposed amended third-party complaint shows clearly the proposed changes and additions to the

> complaint. Third-party defendants' argument that the proposed amended third-party complaint does not comply with CPLR 3025 (b) because it does not contain highlights, redlines, or otherwise delineating marks is unpersuasive.
>
> A plaintiff's failure to submit a proposed amended pleading with the original moving papers is a "technical defect, which the court should . . . overlook[] . . . , particularly after plaintiff provide[s] those documents with his reply" and when "the proposed amendments [are] clearly described in the moving papers" and do not prejudice the defendant.
>
> Roach Bernard attaches the proposed amended third-party complaint to its cross-motion to amend its complaint. **Even though Roach Bernard does not redline or otherwise highlight the changes it made to its amended complaint, the amended complaint contains the proposed amendments.** Third-party defendants are not prejudiced by the fact that Roach Bernard did not highlight the proposed changes. Third-party defendants recognized the proposed changes — they refer to the changes in their reply papers. Also, Roach Bernard provides a highlighted version of its proposed amended third-party complaint in its reply papers. (Internal citations omitted).
>
> ***M&T Bank v. Benjamin*, 145 A.D.3d 1519, 44 N.Y.S.3d 301 (4th Dep't 2017)**

Plaintiff lender commenced suit on a debt owed by the borrower defendant. The Fourth Department affirmed the grant of summary judgment in favor of the lender and the denial of the cross-motion for leave to amend the answer noting defendant "failed to support the request for leave to amend the answer with a copy of the "proposed amended . . . . pleading clearly showing the charges or additions to be made." 145 A.D.3d at 1520.

VII. DISCLOSURE

A. Protective Order

***Rivera v. Rochester Gen. Health Sys.*, 144 A.D.3d 1540, 40 N.Y.S.3d 840 (4th Dep't 2016)**

The Fourth Department held that it had the authority to substitute its own discretion for that of the trial court and concluded that a site inspection of the entire building, not just the floor where the injury occurred (plaintiff tripped on a wheel chair scale in a hallway), was "material and necessary" to the prosecution of the action. The Court remitted to the Supreme Court to consider reasonable restrictions to protect the privacy of the residents.

***Margerum v. City of Buffalo*, 148 A.D.3d 1755, 50 N.Y.S.3d 749 (4th Dep't 2017)**

The Fourth Department noted that there are times when seeming privileged material must be disclosed, even attorney-client and work product documents, where the client is deemed to have waived the privilege by selective disclosure or where invasion of the privilege is necessary to determine the validity of the client's defense and application of the privilege would deny the adversary of vital information. Privileges are "meant to operate as a shield or sword, but not both at once." 148 A.D.3d at 1759.

B. Common Interest Privilege

***Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616 (2016)**

The Court of Appeals held that communications made in furtherance of a common legal interest are protected but that "such communications must relate to litigation, either pending or anticipated, in order for the exception to apply." 27 N.Y.3d at 620.

***21st Century Diamond, LLC, Allfield Trading, LLC*, 2017 N.Y. Misc. LEXIS 2921 (Supt. Ct. N.Y. Co. August 2, 2017)**

On remand from the First Department which held that the common interest privilege, if any, had not been waived, the Supreme Court held that the joint defense agreement at issue was not privileged. The agreement did not detail a specific common interest or joint strategy specific to the case but, rather, the defendant and a non-party sought to limit discovery obligations. Although it made good business sense, "proof of only a desire to minimize or avoid discovery is not a 'common legal interest' for purpose of the common interest exception." 2017 N.Y. Misc. LEXIS 2921, *25.

C. Metadata and Hard Drives

***Gilbert v. Highland Hosp.*, 52 Misc. 3d 555, 31 N.Y.S.3d 397 (Sup. Ct. Monroe Co. 2016)**

The Supreme Court ordered production of the "audit trail" of decedent's medical records based on "metadata" that was "secondary information, not apparent on the face of the document that describes an electronic document's characteristics, origins and usage." 52 Misc. 3d at 556. The audit trail would show the sequence of

use and access to medical records. Here, the Court determined that the metadata would be relevant in establishing who received what information and when it is important to the claims or defenses of a party." 52 Misc. 3d at 559.

Matter of Nunez, 2016 N.Y. Misc. LEXIS 2891, 52 Misc.3d 1216(A) (Surr. Ct., Erie Co. 2016)

In a will dispute, an attorney claimed he prepared a will using Microsoft Word for Mac and deleted the digital file as soon as the will was printed, thereby destroying all digital format. The Court determined that such Electronic Stored Information (ESI) was material and necessary and that the hard drive is discoverable. The objectants to the will offered a computer forensic examiner who proposed to copy and clone the hard drive. The Court noted the testimony of the examiner that "until we look, we don't know," and set up a protocol to ensure confidentiality of the computer and the cloned records, and that the examiner was to report he findings directly and only to the Court.

D. Out of State Subpoena

***Matter of Harris v. Seneca Promotions, Inc.*, 149 A.D.3d 1508 (4th Dep't 2017)**

The California Attorney General commenced a special proceeding to enforce a subpoena signed by a California judge for documents of Seneca Promotions Inc. pursuant to CPLR § 3119 relating to contraband cigarettes including documents relating to non-party Native Wholesale Supply Company. The Fourth Department held that although non-party Native Wholesale had standing to move for a protective

order, Native Wholesale failed to demonstrate that the information sought was irrelevant to the Attorney General's investigation.

E. Scope of Discovery

***Matter of Steampipe Explosion at 41st Street & Lexington Ave.*, 27 N.Y.3d 985 (2016) aff'd, 127 A.D.3d 554, 8 N.Y.S.3d 88 (1st Dep't 2015)**

The trial court improperly applied a restrictive test excluding evidence submitted in opposition to a summary judgment motion. "We are not concerned with the ultimate admissibility of the evidence at trial, but with the discovery of information concerning the prior incident, as to which a more liberal standard applies." 127 A.D.3d at 555.

F. Signing Deposition Transcript

***Safier v. Saggio Rest., Inc.*, 151 A.D.3d 543, 54 N.Y.S.3d 272 (1st Dep't 2017)**

The plaintiff claimed his bicycle skidded on a large slick of cooking oil near the restaurant. On the defendants' summary judgment motion, the cooking oil collector submitted its affidavit and the unsigned transcript of the restaurant owner stating that the restaurant had not been serviced for more than a year before the accident. The Supreme Court denied the motion because the transcript was unsigned. On appeal, the Appellate Division noted that the deponents had been served with notices to execute more than 60 days prior to the summary judgment motion, the court reporter certified each transcript and neither the plaintiff nor the defendants challenged the

accuracy of the transcripts. Accordingly, the First Department reversed the Supreme Court and entered summary judgment in favor of the defendants.

***Murillo v. City of New York*, 2016 N.Y. Misc. LEXIS 4807 (Sup. Ct. N.Y. Co. December 16, 2016)**

The plaintiff, who claimed he was injured when his bicycle came in contact with a hole in the roadway, was deposed on January 8, 2016 with the use of a Spanish translator. He submitted a signed and acknowledged errata sheet dated February 17, 2016 but with no explanation of the substantive and material changes in testimony and not accompanied by an affidavit from a Spanish translator. A Spanish translation was submitted on March 30, 2016. The City moved to strike the plaintiff's errata sheet. The Court held that the initial errata sheet was improper because there was no explanation for the changes. Although the 60-day deadline for changes to the transcript required by CPLR § 3116 expired April 6, 2016, on April 12, 2016, the plaintiff e-filed an opposition to the City's motion to strike that included explanations for the changes. The Court rejected the late-filed submission, even though it was only a few days late, because plaintiff failed to give any justification for the tardiness. Additionally, the Court held that the profferred explanations--that plaintiff "misspoke"--were inadequate. Further, there was no indication in the deposition transcript that the plaintiff did not understand the interpreter.

VIII. MOTIONS

A. Summary Judgment

1. *Sua Sponte*

***Dotzler v. Buono,* 144 A.D.3d 1512, 40 N.Y.S.3d 846 (4th Dep't 2016)**

The plaintiff made a down payment to the defendant for the purchase of a mobile home. The defendant refused to deliver the keys and the plaintiff commenced an action to recover the down payment. The plaintiff later learned that the defendant sold the mobile home and obtained a TRO enjoining the defendant from diverting or alienating the proceeds of sale. The plaintiff mailed the TRO to the defendant's attorney, who in turn mailed it to the defendant's home address. Unbeknownst to counsel, the defendant had moved and did not receive the TRO until after he spent the sale proceeds. The Supreme Court granted the plaintiff's motion for civil contempt, struck the answer, and granted the plaintiff the relief sought in the complaint. The Fourth Department reversed. There was no clear and convincing evidence that the defendant had actual knowledge of the TRO. Further, the Fourth Department held that the Supreme Court erred "in awarding plaintiff summary judgment without affording adequate notice to defendant . . . . We note that neither party moved for summary judgment nor made any request for such relief . . . we conclude that the court's inquiry [at the contempt hearing] did not give the parties

notice that the court planned to award summary judgment to plaintiff." 144 A.D.3d at 1514.

2. Feigned or Clarified Testimony

***Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 N.Y.3d 1048 (2016)**

In a legal malpractice action, the defendant's affidavit submitted on a summary judgment motion "did not flatly contradict his prior deposition testimony" and, hence, did not run afoul of the prohibition that "a party may not create a feigned issue of fact to defeat summary judgment." 27 N.Y.3d at 1049.

***Cox v. McCormick Farms, Inc.*, 144 A.D.3d 1533, 40 N.Y.S.3d 837 (4th Dep't 2016)**

The plaintiff's tractor-trailer wheels entered a ditch on a farm's snow-covered driveway, which caused the entire tractor-trailer to tip over. The Fourth Department concluded that the driver's affidavit in opposition to a summary judgment motion was not "feigned" because "plaintiff was not asked at his deposition whether the ditch was obscured by snow, and thus the statement in his affidavit is merely 'more specific' than his deposition testimony." 144 A.D.3d at 1534.

***Piche v. Synergy Tooling Sys., Inc.*, 150 A.D.3d 1694, 54 N.Y.S.3d 255 (4th Dep't 2017)**

The plaintiff, an electrician, fell while wearing stilts in order to install ceiling tiles. He claimed he tripped on a flexible electrical conduit on the floor. The Fourth Department held that, in an affidavit opposition to the defendant's summary

judgment motion, "plaintiff clarified his deposition testimony with respect to how and why he fell." 140 A.D.3d at 1694.

***Cf. Estate of Mijani v. DiVito*, 135 A.D.3d 616, 24 N.Y.S.3d 263 (1st Dep't 2016)**

In the certified police report and in the deposition provided to a police officer, the plaintiff claimed he did not remember how the accident happened. The plaintiff then testified in his deposition that he regained his memory several months later after visiting the accident scene. The First Department held that the motion court properly rejected this testimony as feigned issue of fact.

3. Tax Return Estoppel

***Matter of Tehan*, 144 A.D.3d 1530, 40 N.Y.S.3d 858 (4th Dep't 2016)**

Petitioner, as executrix of the estate of her husband, commenced an action for dissolution of a corporation under Business Corporation Law 1104-a based on shareholder oppression by a holder of shares representing 20% of the votes of all shares. Although summary judgment was ultimately granted to the respondent corporation, the Fourth Department held that the trial court properly concluded that the respondent was estopped from taking a position on standing contrary to the position taken in the tax returns that decedent's estate owned a 20% interest in the respondent. *Tehan* cited to *Mahoney-Buntzman v. Butzman*, 12 N.Y.3d 415, 422 (2009), which held "A party to litigation may not take a position contrary to a position taken in an income tax return."

B. Motion to Renew

Ehlers v. Byrnes, 2017 N.Y. Misc. LEXIS 1872 (Sup. Ct. Erie Co. March 29, 2017)

The plaintiff suffered injuries in a motor vehicle accident. The defendant was granted summary judgment dismissing the complaint, and the plaintiff appealed. Shortly after summary judgment was granted, the plaintiff was examined by two additional doctors who provided a new diagnosis and the plaintiff then moved to renew pursuant to CPLR § 2111(e). The Supreme Court denied the motion and explained that leave to renew is based on new or additional facts which were unknown to movant and, hence, not brought to the Court's attention. Additionally, movant must provide a valid excuse why the new information was not previously presented. The Court concluded that the "new facts" were simply new diagnoses from new doctors that could have been available to the plaintiff at the time of the original motion—and the plaintiff could have also sought to adjourn the motion pending the additional examinations. Granting the motion to renew under these circumstances would give Plaintiff "two bites at the apple" and "seemingly sanction unending litigation."

C. Motion to Dismiss

1. Declaratory Judgment Action

Kaplan v. State, 147 A.D.3d 1315, 47 N.Y.S.3d 535 (4th Dep't 2017)

In a taxpayer action for a declaration that the State unconstitutionally ceded its taxing authority to the federal government, a dismissal of a declaratory action pursuant to CPLR § 3211(a)(7) "should be taken as a motion for a declaration in plaintiff's favor and treated accordingly." 147 A.D.3d at 1316.

***Matter of City of Buffalo,* 150 A.D.3d 1675, 51 N.Y.S.3d 918 (4th Dep't 2017)**

The plaintiff commenced an action seeking a declaration that he has a valid security interest in certain floating docks. The Supreme Court granted the City's motion to dismiss pursuant to CPLR § 3211(a)(7). The Fourth Department noted that "because this is a declaratory judgment action, the court erred in dismissing the complaint," 150 A.D.3d 150 A.D.3d at 1675, and then reversed on the grounds that the evidentiary submissions did not conclusively establish that the plaintiff did not have a security interest in the docks.

2. Not a Responsive Pleading

***Harris v. Ward Greenberg Heller & Reidy LLP*, 151 A.D.3d 1808 (4th Dep't 2017)**

The plaintiff commenced an action and all of the defendants moved to dismiss pursuant to CPLR § 3211. While the motions were pending, the plaintiff filed notices of voluntary discontinuance. Nonetheless, the Supreme Court granted the motions to dismiss and also awarded sanctions against the plaintiff. On appeal, the Fourth Department reversed and noted that CPLR § 3217 permits voluntary discontinuance "at any time before a responsive pleading is served," and that a motion to dismiss

pursuant to CPLR § 3211 is not a "responsive pleading" for purposes of CPLR § 3217. Thus, the voluntary discontinuance was timely, and once discontinued "everything done in the action is annulled and all . . .orders in the case are nullified." 150 A.D.3d at 1810.

3. Dismissal Based on Conclusory Allegations

***Sager v. City of Buffalo*, 2017 N.Y. App.Div. LEXIS 5461 (4th Dep't June 30, 2017)**

The Fourth Department held that Supreme Court erred in denying motion to dismiss under CPLR § 3211(a)(7) of individual liability of a defendant in a wrongful death action in the operation of "Molly's Pub." The complaint made conclusory allegations that the individual was owner of the Pub or had an ownership interest. The Fourth Department explained that, although the court must assume the truth of a complaint's allegations, "such an assumption must fail where there are conclusory allegations lacking factual support . . . unsupported by factual allegations." 2017 N.Y. App. Div. LEXIS 5461, *4.

4. First in Time Survives

***Quatro Consulting Group, LLC v. Buffalo Hotel Supply Co., Inc.*, 55 Misc.3d 615, 49 N.Y.S.3d 252 (Sup. Ct. Monroe Co. 2017)**

In a dispute over payment of consulting services, Buffalo Hotel Supply Co. ("BHS") filed a summons with notice electronically with the Erie County Clerk on November 22, 2016 against Quatro Consulting ("Quatro). However, by reason of the Thanksgiving holiday, no index number was assigned until November 28, 2016.

Quatro, meanwhile, filed its action against BHS in Monroe County on November 29, 2016. Both parties filed motions pursuant to CPLR § 3211(a)(4) to dismiss the other's action and consolidate the respective actions with the first-filed action. The Monroe County Judge concurred that the Erie County action was first-filed, though only a summons with notice was filed and no index number was assigned until after Quatro had filed its action in Monroe County. Thus, the Supreme Court ordered Quatro's action dismissed upon consolidation with the Erie County action.

5. Failure to Prosecute

CPLR § 3404. Dismissal of abandoned cases

> A case in the supreme court or a county court marked "off" or struck from the calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute. The clerk shall make an appropriate entry without the necessity of an order.

CPLR § 3216. Want of prosecution

> (a) Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, with notice to the parties, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits.
>
> (b) No dismissal shall be directed under any portion of subdivision (a) of this rule and no court initiative shall be

> taken or motion made thereunder unless the following conditions precedent have been complied with:
>
> (1) Issue must have been joined in the action;
> (2) One year must have elapsed since the joinder of issue or six months must have elapsed since the issuance of the preliminary court conference order where such an order has been issued, whichever is later;
> (3) The court or party seeking such relief, as the case may be, shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him or her for unreasonably neglecting to proceed. Where the written demand is served by the court, the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.
> …

No automatic dismissal under CPLR § 3404, absent 90-day demand pursuant to CPLR § 3216, where a note of issue as not been filed or case has been reverted to pre-note of issue status.

CPLR § 3404 does not apply to effectuate automatic dismissal where, prior to being marked off the calendar, the matter had a pre-note of issue status, no 90-day demand was made pursuant to CPLR § 3216,and no order was issued dismissing the action under 22 NYCRR 202.27. *Behan v Behan*, 145 A.D.3d 653, 655 (2d Dep't 2016); *JPMorgan Chase Bank, N.A. v Mehrnia*, 143 A.D.3d 946, 947 (2d Dep't 2016); *Florexile-Victor v Douglas*, 135 A.D.3d 903, 903 2d Dep't 2016); *See also, Liew v Jeffrey Samel & Partners*, 149 A.D.3d 1059, 1061 (2d Dep't 2017) ("The Supreme Court erred in, sua

sponte, directing the dismissal of the action pursuant to CPLR § 3404 as abandoned. When the note of issue was vacated, the case reverted to its pre-note of issue status and CPLR § 3404 did not apply.").

When a note of issue has not yet been filed, or was filed and subsequently vacated, dismissal can only be effectuated by the procedures set forth in CPLR § 3216 or 22 NYCRR 202.27. *Novastar Mtge., Inc. v. Melius*, 145 A.D.3d 1419, 1421 (3d Dep't 2016).

> CPLR 3404, which permits the dismissal of cases that are 'struck from the calendar . . . and not restored within one year thereafter,' does not apply to cases that have not been placed on the trial calendar because no note of issue has been filed. **Here, as a note of issue had not been filed, dismissal for lack of prosecution was governed by CPLR 3216**. This statute sets forth strict preconditions that must be satisfied before an action may be dismissed and 'is extremely forgiving of litigation delay.' An action may not be dismissed pursuant to this provision until, among other things, the court or the party seeking dismissal has served the opposing party with a written demand to serve and file a note of issue within 90 days and the opposing party has failed to do so. When no note of issue has been filed and no 90-day demand has been served, 'courts do not possess the power to dismiss an action for general delay.' [*Id.* (internal citations omitted) (emphasis added).]

See also, Stewart v Makhani, 146 A.D.3d 703, 703-704 (1st Dep't 2017) ("CPLR 3404 does not apply to pre-note of issue cases such as this case. Dismissal of a pre-note of issue case may be predicated on CPLR 3216 and Uniform Rules for Trial Courts."); *Turner v City of New York*, 147 A.D.3d 597, 597 (1st Dep't 2017) ("CPLR 3404 does not apply to cases in which no note of issue has been filed or the note of issue has

been vacated. Rather, avenues for dismissal are limited to CPLR § 3216 and/or 22 NYCRR 202.27).

IX. SANCTIONS

A. Discovery

***Integrated Voice & Data Sys., Inc. v. Groh*, 147 A.D.3d 1302, 46 N.Y.S.3d 335 (4th Dep't 2017)**

The plaintiff commenced an action for injunctive relief against former employees restraining disclosure of confidential or proprietary information. After the defendants failed to respond to discovery demands and a discovery order, the Supreme Court struck the answers, granted a permanent injunction and imposed monetary sanctions. While the motion was pending, the defendants produced most of the items demanded by plaintiff. The Fourth Department held that the Supreme Court abused its discretion in granting such drastic remedies, particularly since the defendants complied with discovery demands, though tardily. Further, striking the answer unconditionally was more relief than the plaintiff requested, and there was no basis for imposing a permanent injunction.

***Place v. Chafee-Sardinia Volunteer Fire Co.*, 143 A.D.3d 1271, 39 N.Y.S.3d 568 (4th Dep't 2016)**

The plaintiff commenced an action for sexual harassment and thereafter refused to comply with discovery demands and orders and submitted an affidavit with a material falsehood. The Fourth Department affirmed the Supreme Court's refusal

to strike the complaint, even though the "plaintiff's conduct in this case was unacceptable" but reversed the denial of sanctions under 22 NYCRR 130-1.1; sanctions were appropriate because of the frivolous conduct by the plaintiff.

***Mosey v. County of Erie*, 148 A.D.3d 1572, 50 N.Y.S.3d 641 (4th Dep't 2017)**

The plaintiff commenced an action for wrongful death against Erie County. Based on a "repeated refusal to comply" with discovery orders, the plaintiff moved to strike the County's answer. The Fourth Department held that the Supreme Court did not abuse its discretion in refusing to strike the pleading. Such drastic relief is "appropriate only upon a clear showing that a party's failure to comply with a discovery demand or order is willful, contumacious, or in bad faith." 148 A.D.3d at 1574. Here, based on a change in the County's legal representation and differing interpretations of communications, the Fourth Department declined to disturb the court's determination that the "extreme sanction' of striking the answer is not warranted.

B. Spoliation

***One Flint St. LLC v. Exxon Mobil Corp.*,145 A.D.3d 1490, 44 N.Y.S.3d 288 (2016)**

The action pertained to discharge liability for petroleum contamination. The Fourth Department held that the Supreme Court did not abuse its discretion in denying defendants' motion for leave to amend their answer to allege spoliation of

evidence, citing *Ortega v. City of New York*, 9 N.Y. 3d 69 (2007) (spoliation of evidence is not a cognizable tort in New York).

***Burke v. Queen of Heaven R.C. Elem. Sch.*, 151 A.D.3d 1608 (4th Dep't 2017)**

The plaintiff slipped and fell on the stairs at the defendant's premises. The defendant undeniably committed spoliation of evidence by destroying and replacing the stairs **after** plaintiff gave notice of their intent to have their expert inspect the stairs. *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 547 (2015) held:

> In order to obtain sanctions for spoliation of evidence, plaintiff had the burden of showing "that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense . . . Where the evidence is determined to have been intentionally or wil[l]fully destroyed, the relevancy of the destroyed [evidence] is presumed . . .
> On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed [evidence was] relevant to the party's claim or defense" [151 A.D.3d at 1608].

Nonetheless, the Fourth Department in *Burke* held that the Supreme Court abused its discretion in striking defendant's answer and granting partial summary judgment in favor of the plaintiff. The record did not show that plaintiff was "prejudicially bereft" of the means of prosecuting her case, since she had other evidence of the condition of the stairs, including photographs. Thus, the appropriate

sanction should be an adverse inference at trial for any unavailable evidence of the condition of the stairs. *Accord Lilavois v. JP Morgan Chase*, 151 A.D.3d 711, 54 N.Y.S.3d 664 (2d Dep't 2017) (holding that the appropriate remedy for spoliation of surveillance videos was an adverse inference, rather than striking the pleading).

C. Fraud on the Court

***Iris Mediaworks v. Vasisht*, 2017 NYLJLEXIS 1643 (Sup. Ct. N.Y. Co. June 26, 2017)**

The defendant hacked 2,000 of the plaintiff's emails during the litigation. The Court found "this can only be seen as an attempt to undermine plaintiff's case" and that the extreme sanction of striking the answer was warranted because hacking "without going through proper discovery channels is an egregious act and sidesteps discovery procedures."

***CDR Creances S.A.S. v. Cohen*, 23 N.Y.3d 307 (2014)**

The Court of Appeals adopted the federal standard to determine whether there had been a fraud on the court. The non-offending party must establish by clear and convincing evidence that the offending "party has acted knowingly in an attempt to hinder the fact finder's fair adjudication of the case and his adversary's defense of the action." 23 N.Y.3d at 320. The Court affirmed striking answers and entering default judgment based on perjury, witness tampering, forged and falsified documents.

X. MISCELLANEOUS

A. Judiciary Law § 470

> § 470. Attorneys having offices in this state may reside in adjoining state
>
> A person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state.

The Court of Appeals has interpreted Judiciary Law § 470 as requiring nonresident attorneys to maintain a physical office in New York. *Schoenefeld v State of New York*, 25 N.Y.3d 22, 25 (2015).

1. Requiring Non-Resident Attorneys to Maintain a New York Office is not Unconstitutional

In *Schoenefeld v. Schneiderman*, 821 F.3d 273, 276 (2d Cir. 2016), the Second Circuit held:

> [Section] 470 does not violate the Privileges and Immunities Clause because it was not enacted for the protectionist purpose of favoring New York residents in their ability to practice law. To the contrary, the statute was enacted to ensure that nonresident members of the New York bar could practice in the state by providing a means, i.e., a New York office, for them to establish a physical presence in the state on a par with that of resident attorneys, thereby eliminating a service-of-process concern. We identify no protectionist intent in that action. Indeed, it is Schoenefeld who, in seeking to practice law in New York without a physical presence in the state, is looking to be treated differently from, not the same as, New York resident attorneys. Such differential treatment is not required by the Privileges and Immunities Clause.

2. Non-Waivable

The requirement of Judiciary Law § 470 that a non-resident lawyer maintain an office for the practice of law in New York is not waivable. *Stegemann v. Rensselaer County Sheriff's Off.*, No. 521653, 2017 N.Y. App. Div. LEXIS 6070, *3-4 (3d Dep't Aug. 10, 2017).

> Upon our review of Judiciary Law § 470, we find that it unambiguously provides, without exception, that a prerequisite for a nonresident attorney to practice law in this state is that he or she maintain a physical law office here. In our view, Fee's and Lawless' requests for a waiver of the clear mandate of Judiciary Law § 470 "finds no support in the wording of the provision and would require us to take the impermissible step of rewriting the statute" (Schoenefeld v State of New York, 25 NY3d at 28). In addition to holding that no statutory authority [*4] exists for granting the waivers, we also find that creating an avenue for nonresident attorneys to obtain a waiver of the law office requirement would amount to the type of rulemaking reserved for the Court of Appeals (see generally Judiciary Law § 53). Accordingly, Fee's and Lawless' applications are denied. [*Id.*]

3. What does it Mean to "Maintain an Office?"

A pleading filed by an attorney who fails to maintain a local office, as required by § 470, should be dismissed without prejudice. *Arrowhead Capital Fin., Ltd. v. Cheyne Specialty Fin. Fund L.P.,* No. 651962/2014, 2016 N.Y. Misc. LEXIS 2728, *7 (Sup. Ct. July 21, 2016). An attorney fails to maintain an office for the operation of legal business when he merely hangs a sign and receives mail and documents within the state. *Id.* To "maintain an office" in New York, an attorney must have a physical

office space with a telephone. *See id.*; *Reem Contr. v. Altschul & Altschul*, 117 A.D.3d 583, 584 (1st Dep't 2014).

B. Failure to Timely Submit Order

Uniform Rule 202.48 requires proposed orders to be submitted to the Court within 60 days of the decision or the motion or action will be deemed abandoned. *Matter of Ishakis v. Lieberman*, 150 A.D.3d 1114, 54 N.Y.S.3d 654 (2d Dep't 2017) held that since the order "did not expressly direct that the judgment be settled on notice, the provision of 22 NYCRR 202.48 did not apply." 150 A.D.3d at 1115. *Cf. Burns v. Burns*, 2017 N.Y. Misc. LEXIS 2085 (Sup. Ct. Monroe Co. May 26, 2017) (Dollinger, J.) explicitly directing the parties to "Submit Order on Notice. 22 NYCRR 202.48." 2017 N.Y. Misc. LEXIS 2085, * 22.

C. Unverified Pleading

***Larke v. Moore*, 150 A.D.3d 1620, 54 N.Y.S.3d 239 (4th Dep't 2017)**

The plaintiffs appealed from the dismissal of their complaint on the grounds that they rejected an unverified answer, which the plaintiffs claimed should be treated as a nullity pursuant to CPLR § 3022. (CPLR § 3020(b) requires certain answers to be verified.) However, the Fourth Department noted that the plaintiffs "proceeded on the theory that they had to prove their claims as if they stood controverted. They did not seek to proceed as if upon a default. . . . Furthermore, plaintiffs waived any objection to the lack of verification by waiting nearly two months to reject the answer.

. . . We therefore concluded that plaintiff failed to act with "due diligence" as required by CPLR 3022." 150 A.D.3d at 1622 [internal quotation marks omitted.]

D. Law of the Case

***Baumann Realtors, Inc. v. First Columbia Century-30, LLC*, 2017 N.Y. App. Div. LEXIS 5393 (4th Dep't 2017).**

A real estate broker commenced an action for commission base on a 2011 lease that it claimed was a renewal of a 2001 lease. The owner and lessee claimed the 2011 lease was not a renewal but was a new lease. In a prior appeal, the Fourth Department had reversed the grant of summary judgment dismissing the complaint because the documentary evidence did not conclusively establish that the 2011 lease was a new lease. After full discovery, the Supreme Court denied summary judgment dismissing the complaint but the Fourth Department reversed. The broker argued that the Court was bound by the law of the case doctrine. The Fourth Department held that "the law of the case doctrine therefore does not apply, because our holding in relation to the prior motion to dismiss was based on the facts and law presented by the parties in that procedural posture and no more." 2017 N.Y. App. Div. LEXIS 5393, *3. On the new appeal, the parties presented evidence after full discovery regarding the circumstances of the 2011 lease, and the defendants met their burden to establish that the 2011 lease was a new lease.

E. Acceptance of Late Filings

***Matter of Lavell v. Jaeger*, 56 Misc. 3d 1216(A), 2017 N.Y. Misc. LEXIS 3069 (Sup. Ct. Erie Co. August 10, 2017)**

In a petition under the Election Law, the petitioner objected to the submission of late-filed affirmations after the hearing date. The court held that it had broad discretion to accept or reject supplemental briefing because "every court is vested with powers that permit them to do things necessary for the administration of justice including, but not limited to, accepting late papers, sur-reply papers, or otherwise regulate proceedings." 2017 N.Y. Misc. LEXIS 3069, * 9.