CIVIL LITIGATION IN NEW YORK

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2016 Up-date Memorandum

This Up-date Memorandum to the 6th Ed. of Civil Litigation in New York was prepared by Oscar G. Chase and Robert A. Barker for the benefit of students and faculty. It integrates subsequent developments into the prior Memorandum. The closing date for materials was June 30, 2016. Permission is granted to distribute copies free of charge to students in classes using the casebook. Please note that we do not reference statutory changes in these Memoranda.

We gratefully acknowledge the excellent research assistance of Suchita Mandavilli, NYU School of Law, Class of 2018.

TABLE OF CONTENTS

Chapter 1

Jurisdiction Over the Defendant

§ 1.03 Presence—Real and Fictional

Page 26: Add new Note (2): In *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), the Supreme Court took the opportunity to again address general jurisdiction and rejected the idea that substantial and continuous contacts alone are sufficient to give a forum jurisdiction. In *Daimler*, Argentinian plaintiffs sued Daimler AG for human rights violations in Argentina. The plaintiffs alleged claims under the Alien Tort Statute and the Torture Victim Protection Act of 1991, as well as under California and Argentinian law. Plaintiffs asserted jurisdiction under California's long-arm statute, Cal. Civ. Proc. Code § 410.10 (West), which gave the State jurisdiction "on any basis not inconsistent with the Constitution of [California] or of the United States." Daimler has an indirect subsidiary with multiple offices located in California called Mercedes-Benz USA ("MBUSA"). MBUSA imported and distributed Daimler-manufactured vehicles to dealerships throughout the United States, including California. The value of the sales conducted by MBUSA in California totaled approximately $4.6 billion. Daimler moved to dismiss the action due to a lack of personal jurisdiction. Plaintiffs opposed this motion by arguing that the contacts of MBUSA should be attributed to Daimler through the agency theory, and thus Daimler should be subject to general jurisdiction in the State of California. In 2013, the United States Supreme Court reversed the decision of the Ninth Circuit and held that Daimler could not be subject to general jurisdiction in the state of California based on the contacts of MBUSA. The Court emphasized that the inquiry "is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum

state." *Id.* at 761. The Court further explained that paradigm examples of "at home" are either the corporation's principal place of business or place of incorporation, but the Supreme Court acknowledged a "possibility that in an exceptional case, a corporation's operations in a forum . . . may be so substantial and of such a nature as to render the corporation at home in that state," similar to the *Perkins* case discussed in *Goodyear*. *Id.* at 761 n.19. While the Court emphasized that Daimler's activities in California did not rise to that level, they did not describe what sort of presence would be necessary to make a corporation "at home." However, the Court stated that in determining the level of contacts required, one must not look solely at the in-state contacts, but rather at the corporation's activities "nationwide and worldwide." The Court feared that without looking at these activities in their entirety that "at home" would become the equivalent of "doing business." The majority said that allowing general jurisdiction in every state in which a corporation "engages in a substantial, continuous and systematic course of business . . . is unacceptably grasping." *Id.* at 761. The court noted that even assuming that MBUSA is at home in California, and that one can impute the contacts from MBUSA to Daimler, Daimler would still not be subject to general jurisdiction in California because the extent of their contacts would not be sufficient.

For an example of a post *Daimler* holding, see *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221 (2d Cir. 2014), where the Second Circuit noted that *Daimler* has made it clear that that "'engage[ment] in a substantial continuous and systematic course of business' is alone insufficient to render [a corporation] at home in a forum."

Page 26: Revise citation at the end of Note (1): Oscar G. Chase & Lori Brooke Day, *Re-Examining New York's Law of Personal Jurisdiction After* Goodyear Dunlop Tires Operations, S.A. v. Brown *and* J. McIntyre Machinery, Ltd. V. Nicastro, 76 Alb. L. Rev. 1009 (2013).

Page 42: Add to the end of the third paragraph in Note 2: The holding in *Beech* appears to have been undermined by the recent Supreme Court ruling in *Daimler AG v. Bauman*, discussed *supra*, because in *Daimler* the Court gave very little weight to the presence in California of an important subsidiary of the German corporation.

Revisiting Problem C, it appears that following the *Goodyear* and *Daimler* rulings that it would be extremely unlikely that CalCon would be subject to jurisdiction in New York, and even if CalCon was subject to jurisdiction, *Daimler* would appear to prohibit jurisdiction over ICI on the basis of these facts.

Page 54: Add to end of Note (1): In the recent Supreme Court Case of *Walden v. Fiore*, 134 S. Ct. 1115 (2014), the defendant, acting in his official capacity as a DEA agent, seized allegedly contraband funds from the respondents, residents of Nevada, in an airport in Atlanta, Georgia. Ultimately, the government returned the funds to the plaintiffs. Plaintiffs brought an action against the agent in Nevada claiming that the seizure was unlawful and had caused them significant financial injury. The Supreme Court held that since the arresting officer did not create any contacts with the forum state he was not subject to jurisdiction there. Jurisdiction is only proper when based on a defendant's individual contacts with a forum state, and not based solely on the relationship the defendant may have with the plaintiffs or third parties affiliated with the state.

Page 61: Add new note (5): The increasing use of the internet to solicit business, along with the increase in medical tourism, has posed novel questions regarding the interpretation of CPLR 302(a)(1). In *Paterno v. Laser Spine Inst.*, 24 N.Y.3d 370, 23 N.E.3d 988, 998 N.Y.S.2d 720 (2014) the plaintiff, a New York resident, learned of the defendant's spine surgery business via

an internet video posted on its website and then made follow-up inquiries with the defendant's Florida surgery center via telephone and emails. Plaintiff subsequently traveled to Florida to undergo spine surgery which proved unsuccessful. After returning to New York plaintiff and defendant engaged in a series of phone, text, and emails regarding the outcome of the procedures and plaintiff ultimately commenced a medical malpractice action. The Court ruled that the various interactions before and after the surgery did not amount to the transaction of business in the state within the meaning of CPLR 302(a)(1). The Court noted, first, that "passive websites … which merely impart information without permitting a business transaction, are generally insufficient to establish personal jurisdiction." Second, the court noted that interactions between the defendants and New York after the injury should be given little weight in determining whether defendants "projected" themselves into the state for jurisdictional purposes.

Page 63: Add new note (3): In *Licci v. Lebanese Canadian Bank*, 20 N.Y.3d 327, 984 N.E.2d 893 (2012), several dozen Israeli residents sued the Lebanese Canadian Bank (LCB) in New York, claiming that LCB had assisted Hizballah in launching rocket attacks in Israel by facilitating millions of dollars in international transactions to Hizballah. Plaintiffs asserted personal jurisdiction under New York's long-arm statute, CPLR 302(a)(1). While LCB did not have branches, offices, or employees in the United States, the bank did have a correspondent banking account with AmEx in New York. Plaintiffs alleged that LCB used this correspondent account to conduct wire transfers on behalf of the Shahid Foundation, which the complaint identified as the "financial arm" of Hizballah. In April 2009, defendant LCB moved to dismiss the complaint for lack of personal jurisdiction. The Second Circuit certified two questions of New York law for consideration by the New York Court of Appeals: (1) whether the defendant

"transacts any business" in New York and, if so, (2) whether the cause of action "arises from" such a business transaction. First, the Court of Appeals found that the business transaction prong may be satisfied by defendant's use of a correspondent bank account in New York, "even if no other contacts between the defendant and New York can be established, *if* the defendant's use of that account was purposeful." The Court concluded that "complaints alleging a foreign bank's repeated use of a correspondent account in New York on behalf of a client—in effect, a "course of dealing"—show purposeful availment of New York's dependable and transparent banking system, the dollar as a stable and fungible currency, and the predictable jurisdictional and commercial law of New York and the United States." Second, the Court found "an articulable nexus or substantial relationship between the transaction and the alleged breaches of statutory duties [under the federal Anti-Terrorism Act and the Alien Tort Statute]." The jurisdictional inquiry requires, at minimum, "a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim." If LCB engaged in terrorist financing by using its correspondent account in New York to move the necessary dollars, then the bank arguably violated its statutory duties. Note that the Court of Appeals addressed questions pertaining to New York state law but did not inquire into the constitutionality of the court's jurisdictional reach in this case.

The U.S. Court of Appeals for the Second Circuit subsequently decided that New York's exercise of jurisdiction over LCB did not violate due process. *Licci v. Lebanese Canadian Bank*, 732 F.3d 161 (2d Cir. 2013). The majority stated that it would be reasonable to hold LCB subject to New York Jurisdiction because LCB repeatedly chose to use New York's banking system for their correspondent account, and this correspondent account was "used as an instrument to

achieve the very wrong alleged." *Id.* at 171. As a result of these actions, LCB satisfied the minimum contact requirement, and therefore was subject to New York's jurisdiction.

Page 75: Add new Note (1) following *Sybron Corp. v. Wetzel*: The holding of *Sybron Corp. v. Wetzel* appears to have been overruled by the decision of *Walden v. Fiore*, discussed *supra* page 4. In *Walden*, the Supreme Court held that jurisdiction can be based only on the defendant's contacts with the forum state, and cannot be based on the plaintiff's contacts with the forum state. In *Sybron*, the defendant had no personal contacts with New York; the only contacts alleged stemmed from the plaintiff's contacts with the forum state or the defendant's interactions with a third party. As a result, it would appear that the holding in *Sybron* would no longer be valid following the *Walden* decision.

Page 75: Add to end of Note (2): *Penguin Group* may also have been overruled by the decision in *Walden v. Fiore* because it would apparently prohibit jurisdiction based solely on a plaintiff's place of residence or principal place of business.

Chapter 2

Judicial Discretion to Decline Jurisdiction

Page 105: Add to end of first paragraph in Introductory Note: The holding of *VSL Corp.* was significantly narrowed by *Mashreqbank PSC v. Ahmed Hamad A1 Gosaibi & Bros. Co.*, 23 N.Y.3d 129 (2014). The judge in *Mashreqbank* had brought the issue of forum non conveniens to the attention of the parties. However, even though "the idea of dismissing the main complaint on forum non conveniens grounds was first mentioned by the . . . Justice, he gave the parties a full opportunity to address the issue…" *Id.* The *sua sponte* motion did not prevent the examination of the forum non conveniens motion on its merits since the only party opposed to it "neither objected to nor was prejudiced by the omission of that formality." *Id.* Reversing the Appellate Division, the Court of Appeals granted the motion.

Page 108: Add new Note (3): For a case where neither the plaintiff nor defendant were New York residents refer again to *Mashreqbank PSC v. Ahmed Hamad AI Gosaibi & Bros. Co.*, discussed *supra*, where a United Arab Emirates bank and a Saudi Arabian company had agreed to exchange American dollars for Saudi Arabian riyals. The exchange was never fulfilled and the plaintiff brought suit in New York since the plaintiff had wired money to the defendant's account in New York. The court found a lack of sufficient contacts with New York due to a number of factors, including the fact that neither party was a resident of the state. As a result, the court held that the case was suitable for the application of the forum non conveniens doctrine.

Chapter 3

Choosing the Proper Forum Within the State—Subject Matter Jurisdiction

Page 140: Add new paragraph at the end of Note (4): Effective June 2, 2014 the Uniform Rules for the Supreme and County Court were amended to allow parties to elect accelerated adjudicative procedures for cases within the exclusive jurisdiction of the Commercial Division, 22 NYCRR 202.70(g)(9). In these accelerated actions all pre-trial proceedings (including discovery, motions, and mediation) must be completed within nine months of the filing date. At that time, both parties must be ready to proceed to trial. Parties adopting these accelerated adjudicative actions are deemed to have waived any objections based on personal jurisdiction or forum non conveniens, any right to trial by jury, any right to recover punitive or exemplary damages, and any right to an interlocutory appeal, and to have accepted specified limitations on discovery. Additional changes in Commercial Division practice were effected in 2014 and 2015. Among other changes the monetary thresholds were raised significantly. In New York County the claim must seek a minimum of $500,000.00 to qualify. Lesser amounts apply in other counties. See also Commercial Division Rule 11-a (limits number of interrogatories allowed); Rule 11-b (requires privilege logs relating to claimed privileges); Rule 11-c (guidelines for discovery of electronically stored information from nonparties); Rule 11-d (limitations on depositions), among others.

Chapter 7

The Statute of Limitations and Related Concepts

§ 7.02 Finding the Applicable Statute of Limitations and Determining When it Began to Run

Page 247: Add New Note (7): In *Melcher v. Greenberg Taurig*, 23 N.Y.3d 10 (2014), the Court of Appeals held that a claim arising under Judiciary Law 487 against an attorney who intentionally attempts to deceive the court or a party is subject to a six year statute of limitations. This is in direct contrast to the normal three year statute of limitations for an ordinary attorney malpractice claim, discussed in *Chase*, *supra* on page 241.

Page 270: Add to the Note, *Walton v. Strong Mem. Hosp.*, 25 N.Y.3d 554, (2015), in which the issue was whether a fragment from a catheter placed in plaintiff's heart during surgery was a "foreign object" for the purposes of CPLR 214-a. As the fragment was not discovered until 2008, over twenty years after the original surgery, the action would be barred unless the discovery rule applied. The Court held that it did. Unlike the stent at issue in *LaBarbera* (case book p. 267) the catheter was not placed in the patient for post-surgery healing purposes but rather to serve a monitoring function during the operation. The plaintiff thus left the hospital after the operation with a therapeutically useless and dangerous foreign object in his body. The discovery rule of CPLR 214-a therefore applied and the defendant's motion to dismiss the action was denied.

§ 7.02 [D] Fraud

Page 285: Add to the end of the runover paragraph: CPLR 213(8) does not apply to a claim that a deed has been forged held a divided Court in *Faison v. Lewis*, 25 N.Y.3d 220 (2015). The

Court applied the "well settled" law that "a forged deed is void ab initio, meaning a legal nullity at its inception." *Id.* 25 N.Y.3d at 222. Therefore, the Court reasoned, the statute of limitations did not foreclose the claim at issue.

Page 301: Add as new Note 5: Ongoing wrongs continue to pose distinct problems in determining when the statute of limitations begins to run. In *Capruso v. Village of Kings Point*, 23 N.Y.3d 631, 16 N.E.3d 527 (2014), the plaintiffs (which included the State) alleged that the defendant Village had misused designated parkland for non-park purposes beginning in 1946 in violation of the common-law "public trust" doctrine. When the plaintiffs sued for injunctive relief, the defendants argued that the six-year statute of limitations barred the suit. The Court rejected this argument on the basis of the "continuing wrong doctrine." The doctrine governs certain cases – typically, nuisance or trespass – where the harm asserted by the complaining party, despite having a specific start date, is ongoing and continuous in nature. The court reasoned that the doctrine applied to the claim regarding misuse of parkland because "[t]he harm does not consist of the lingering effects of a single, discrete incursion, but rather is a continuous series of wrongs," each of which tolled the running of the statute of limitations. In *Capruso* the Court also rejected the defendant's argument that the plaintiffs' claims were barred by laches because laches does not apply to the State "when [it is] acting to enforce a public right or protect a public interest." Furthermore, the court noted that the doctrine of laches does not apply where the wrong complained of is a "continuing wrong," that is, one that involves ongoing violation of some legal right.

§ 7.07 [B] The New Action Toll: CPLR 205

Page 321. Add to new Note (4): The Court of Appeals has held that the six month period within which a new action may be commenced begins to run when an appeal takes as of right is dismissed or determined on the merits, *Maylay v. City of Syracuse*, 25 N.Y.3d 323 (2015).

§ 7.08 The Borrowing Statute: CPLR 202

Page 333: Add to Note (1): *Norex Petroleum Ltd. v. Blavatnik*, 23 N.Y.3d 665 (2014) deals with the effect of CPLR 202 on the "new action" saving section, CPLR 205. Plaintiff, a resident of Alberta, Canada brought an action in 2002 in the Federal District of New York claiming that the defendants had unlawfully wrested away the plaintiff's interest in a Russian oil company. The federal action was ultimately dismissed and plaintiff then commenced an action based on New York law in the Supreme Court. Defendants moved to dismiss on timeliness grounds, asserting that the New York action, commenced in 2011, was barred by the two year statute of limitations of Alberta law. Plaintiff successfully urged the Court of Appeals to apply the "new action" rule of CPLR 205 because the New York action had been commenced within six months of the federal dismissal. The Court rejected defendants' argument that the Alberta law, which had no "new action" toll, should apply along with its two year limitation rule. The action was remanded for determination, *inter alia*, whether CPLR 205 should not apply for other reasons.

§ 7.09 Conditions Precedent

Page 344. Replace Note 1, following *Matter of Newson v. City of New York* with the following: Note (1) The Court of Appeals affirmed an Appellate Division First Department case that denied

a medical malpractice claimant's application for permission to file a late notice of claim under facts similar to those at issue in *Matter of Newson*, In *Wally G. v. New York City Health and Hospitals Corp*, __ N.Y.3d __, 2016 WL 318897 the notice of claim had been filed after the 90 period had elapsed and the application was made five years after the claim arose. The "plaintiff submitted voluminous medical records along with affidavits from medical experts who, based on those records, opined that HHC's deviations from the standard of care resulted in plaintiff's injuries." *Id.* Nonetheless, holding that the Appellate Division had not abused its discretion in denying the application the Court of Appeals affirmed. It applied the general rule that "A medical provider's mere possession or creation of medical records does not ipso facto establish that it had "actual knowledge of a potential injury where the records do not *evince* that the medical staff, by its acts or omissions, inflicted any injury on plaintiff during the birth process" (*id.*[emphasis supplied])(citing and quoting *Williams v. Nassau County Med. Ctr*, 6 N.Y.3d 531, 537 (2006). Together, *Williams* and *Wally G.* substantially undercut the holding in *Matter of Newson*.

Chapter 8

Joinder of Parties

§ 8.04 Class Actions: CPLR Article 9

[C] Notice Requirements

Page 384: Add new note 6: CPLR 901(b) which provides "unless a statute creating a penalty… specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action." The issue in *Borden v. 400 East 55th Street Assocs.*, 24 N.Y.3d 382, 23 N.E.3d 997, 998 N.Y.S.2d 729 (2014) was whether plaintiffs seeking to recover damages against former landlords for overcharges in rent under Rent Stabilization Law § 26-516(a) could maintain their suit as a class action. The question before the court was whether their entitlement to treble damages under the statute, which was described as a "penalty" in the law, constituted a "penalty" for the purposes of 901(b), barring them from maintaining the suit as a class. The court ruled that the suit could proceed as a class action because the plaintiffs had waived their right to treble damages. They therefore sought compensation – not a "penalty" within the meaning of 901(b) – notwithstanding language in the Rest Stabilization Law describing the statutory remedy as a penalty. For more discussion of 901(b), see Oscar G. Chase, *Living in the Shadow: Class Actions in New York After* Shady Grove," 2014 N.Y.U. J. Legis. & Pub. Pol'y Quorum 114 (2014).

[D] Settlement and the Rights of Class Members

Page 395 Add new note (4): In *Jiannaras v. Alfant*, 27 N.Y.3d 349 (2016), the Court of Appeals declined the invitation to overrule *Woodrow*. Like *Woodrow*, *Jiannaras* dealt with a proposed

settlement of class action litigation that would extinguish damage claims without giving class members a chance to opt out. Defendants tried to distinguish *Jiannaras* by arguing that the scope of *Woodrow*'s release was larger, but the Court of Appeals held that *Woodrow* was not based on the fact that shareholders held shares at the time of the prior leveraged buyout. Defendants also tried to use *Wal-Mart Stores, Inc. v. Dukes*, discussed *supra* on page 377, to argue that binding out-of-state class members is permissible where damage claims are only incidental to equitable relief. The Court of Appeals held that *Wal-Mart* was not relevant, though, because unlike Rule 23, CPLR allows trial courts to require opt-out rights in cases where, like in *Woodrow* or *Jiannaras*, the settlement would extinguish out-of-state class members' rights to pursue any and all damage claims.

Chapter 12

Provisional Remedies

§ 12.03 Attachment: CPLR Article 62

Page 509: Add new Note (4): Where a contract between the judgment debtor and the garnishee was modified so that the garnishee was not obligated to purchase services from the debtor, there was no debt owing and thus no "bundle of rights" that could be considered attachable. *Verizon Inc. v. Transcom Inc.*, 98 A.D.3d 203 (1st Dep't, 2012), *aff'd*, 21 N.Y.3d 66 (2013).

Chapter 13

Pleadings

§ 13.03 Special Pleading Requirements

Page 543: Add to second paragraph in note (2): In *Loreley Fin. (Jersey) No. 3 Ltd. v. Citigroup Global Mkts. Inc.*, 119 A.D.3d 136, 987 N.Y.2d 299 (1st Dep't 2014) the complaint alleged fraud with respect to defendant investment bank's sale of collateralized debt obligations in that defendant selected its riskiest mortgage for sale and used a scheme to help preferred clients offload the risks of toxic mortgage-backed securities from their books. Plaintiff's failure to specify dates or employees involved was excused because the allegations were sufficient since, if they were true, only defendant would have knowledge of the details. Defendant's disclaimer regarding the credit risk involved was not a sufficient defense in view of the complaint's allegations as to defendant's "peculiar knowledge" and "secret information" not available to purchaser.

§ 13.09 Amendments

Page 573: In note 3 strike the paragraph re *Lucido v. Mancuso* and substitute the following: In *Kismo Apartments, LLC v. Gandhi,* 24 N.Y.3d 403, 998 N.Y.S.2d 740, 23 N.E.2d 1008 (2014), the Court held that it was permissible to amend a counterclaim during or after trial if no prejudice is shown.

Chapter 15

Disclosure

§ 15.02: The Scope of Disclosure: CPLR 3101

Page 597: Add to end of note (4): In a personal injury action where plaintiff's counsel surreptitiously videotaped plaintiff being examined by defendant's doctor, failure to disclose the tape violated CPLR 3101. *Bermejo v. New York City Health & Hosp. Corp*., 133 A.D.3d 808, 21 N.Y.S.3d 78 (2d Dep't 2015).

Add to end of Note (5): The Court of Appeals resolved the conflict in favor of the First Department approach, *Matter of Kapon v. Koch*, 23 N.Y.3d 32 (2014). The Court stated that there is nothing in CPLR 3101 that requires a party seeking disclosure from a nonparty witness to demonstrate that it cannot obtain the information from any other source or to satisfy any requirements other than that of CPLR 3101(a). As a result, the Court of Appeals held that "so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty." *Id.*

p.598: Add note (7): In *Matter of Kapon v. Koch*, 23 N.Y.3d 32, 988 N.Y.S.2d 559, 11 N.E.3d 709 (2014) the Court laid out the requirements of CPLR 3101(a)(4) respecting non-party witnesses: The subpoena must state the "circumstances or reasons" underlying the subpoena; a motion to quash must show either that the information sought is "utterly irrelevant" or that "futility of the process to uncover anything legitimate is inevitable or obvious"; should the witness meet that burden the subpoenaing party must then establish that the information sought is

"material and necessary," but need not show that it cannot obtain the information form any other source.

Page 619. Add sentence at the end of the first paragraph of note (4): In 2015 CPLR 3212(b) was amended and its provisions essentially conformed to the *Birnbaum* and *Kozlowski* decisions thus eliminating confusion arising from an Appellate Division case which had imposed a ban on expert witnesses not disclosed prior to the Note of Issue (*Construction by Singletree, Inc. v. Lowe*, 55 A.D.3d 861, 866 N.Y.S.2d 702 (2d Dep't 2008).

p. 619: Add at the end of note (4): Where defendant failed to disclose an expert witness in a dental malpractice case in its answer to plaintiff's discovery demand prior to the filing of the note of issue and certificate of readiness, the IAS Court had the discretion to preclude defendant from offering the expert's affirmation in support of its motion for summary judgment where there was no excuse for the omission. *Kozlowski v. Oana*, 102 A.D.3d 751 (2d Dep't 2013).

p.642: Add at end of the Note on Medical Information: Where adult plaintiffs alleged physical and mental injuries as a result of exposure to lead-based paint during childhood and where many of the alleged injuries may never have been diagnosed or treated, the court held that it could be prohibitively expensive for them to provide specific detail to satisfy NYCRR 202.17(b)(1). They need only produce reports from medical providers who have previously treated or examined them and those providers should furnish as much information as they possibly can. *Hamilton v. Miller*, 23 N.Y.3d 592, 992 N.Y.S.2d 190, 15 N.E.3d 1199 (2014).

§ 15.04: Compelling and Avoiding Disclosure

Page 647: Add new Note (3): In *Richards v. Hertz Corp*., 100 A.D.3d 728 (2d Dep't 2012), plaintiffs sued to recover damages for injuries resulting from an automobile accident. After plaintiff testified during a deposition that the accident "impaired her ability to play sports," defendants discovered photographs posted on Facebook that depicted plaintiff on skis in the snow. Defendants sought access to other Facebook postings protected by the site's privacy settings. Plaintiffs cross-moved for a protective order pursuant to CPLR 3103 striking demands for authorization to access status updates, emails, photographs, and videos posted on Facebook. The Appellate Division found that defendants had made a showing that at least "some of the discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on [plaintiff's] claim." Citing the private nature of material posted on Facebook, however, the Appellate Division directed the Supreme Court to conduct an *in camera* inspection and then revisit plaintiff's motion for a protective order.

Page 649: Add new Note (1): In the 2013 Supplement we reported *CDR Créances S.A.S. v. Cohen*, 104 A.D.3d 17 (1st Dep't 2012) which has since been affirmed and modified in part, *CDR Créances S.A.S. v. Cohen,* 23 N.Y.3d 307 (2014). Plaintiff's cause of action was essentially for recovery of payment on a loan agreement entered into as part of a hotel business venture. The claims involved an extensive and intricate conspiracy designed to conceal stock transfers and other transactions orchestrated by the principal defendants who had responded to discovery orders by outright lies and deception. The Appellate Division had affirmed the IAS court's dismissal of the defense and granting of a default judgment stating that fraud on the court had been proved by a preponderance of the evidence. (A Federal District Court had meanwhile

found the principal defendants guilty of evading taxes in relation to these facts and specifically found they had perpetrated fraud on the Supreme Court in New York.) The Court of Appeals affirmed the default judgment, but held that the standard of proof of fraud on the court was not merely preponderance of the evidence but was clear and convincing evidence, which was here found in abundance. In defining the necessary elements of fraud on the court language from *McMunn v. Mem. Sloan-Kettering Cancer Ctr.*, 191 F.Supp.2d 440, 445 (S.D.N.Y. 2002) was quoted as follows: There must be a showing "that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." The Court of Appeals opinion went on to state that dismissal would be "inappropriate where the fraud is not central to the substantive issues in the case … or where the court is presented with 'an isolated instance of perjury, standing alone [which fails to] constitute a fraud upon the court'", noting that in such instances other remedies may be imposed. The Court's modification of the Appellate Division's determination had to do with a defendant whose deceptions were not central to the main scheme to hide information from the courts.

Page 649: Add new note (2): Spoliation is the intentional destruction, alteration, or concealment of evidence. In *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543 (2015), the Court of Appeals tackled questions relating to the alleged spoliation of electronically stored information (ESI). The Court held that a party seeking such sanction must prove three elements: (1) the party that controlled the evidence must have had an obligation to preserve it when it was destroyed, (2) the party must have destroyed the evidence with a "culpable state of mind," and (3) the evidence was such that a trier of fact could find that it would support the claim or defense.

See VOOM HD Holdings LLC v. EchoStar Satellite LLC, 93 A.D.3d 33, 45 (1st Dep't 2012). If evidence is shown to have been intentionally destroyed, the evidence's relevancy is presumed; if the evidence is negligently destroyed, though, the party seeking sanctions must establish that the destroyed evidence was relevant.

In *Pegasus Aviation*, plaintiffs served a notice to produce ESI. During the discovery process it was found that defendant's email backup system only began in 2008 (after the litigation had already begun) and that subsequent computer crashes had resulted in the loss of much ESI. The Supreme Court held that defendant's failure to issue a "litigation hold" was gross negligence as a matter of law and therefore that the relevance of the ESI should be presumed. The Appellate Division reversed, holding that the failure to preserve the ESI did not amount to gross negligence. The Court of Appeals agreed with the Appellate Division's conclusion that defendants' actions were at most simple negligence. However, since the Appellate Division mostly ignored plaintiffs' arguments as to the relevance of the documents, the Court of Appeals remitted the case to the Supreme Court to determine whether the negligently destroyed ESI was relevant to plaintiff's claims and, if so, what sanction is warranted. The Court of Appeals also held that a trial adverse inference charge is not "tantamount to granting plaintiffs summary judgment," as the Appellate Division claimed and that such sanctions may be appropriate even when evidence is negligently destroyed. Judge Stein dissented, holding that defendants acted with gross negligence in failing to preserve the ESI. She argued that under *VOOM*, destruction of evidence as a result of gross negligence also leads to the presumption of relevance. As such, Judge Stein would have presumed the evidence to be relevant in this case and would have remitted to the Appellate Division to determine whether a sanction is warranted.

Chapter 16

Accelerated Judgment

§ 16.01 Motions To Dismiss A Claim Or Defense: CPLR 3211

Documentary Evidence

p. 654: Add to footnote 2: In a suit involving sale of real property the only documentary evidence submitted by defendants on motion to dismiss was the contract of sale which did not refute plaintiff's cause of action. Defendants own affidavits, their attorney's affirmation, and correspondence between the parties' attorneys were not documentary evidence. *Attias v. Costiera*, 120 A.D.3d 1281, 993 N.Y.S.2d 59 (2d Dep't 2014).

§ 16.03 Failure to State A Cause Of Action: CPLR 3211(a)(7)

p. 662: Add to note (2): The *Held* case's interpretation and reaffirmation of *Rovello* received a boost in 2015 with the Appellate Division's analysis in *Liberty Hous., Inc. v. Maple Ct. Apts.*, 125 A.D.3d 85, 998 N.Y.S.2d 543 (4th Dep't 2015). The Fourth Department there concluded that Court of Appeals' language in *Miglino v. Bally Total Fitness of Greater N.Y., Inc.*, 20 N.Y.3d 342, 961 N.Y.S.2d 364, 985 N.E.2d 128 (2013) did not alter the *Rovello* holding that dismissal of the complaint could not be granted absent conversion of the motion to one for summary judgment, unless defendant's evidentiary submissions were "sufficiently conclusive." The absence of the quoted language in *Miglino*, where the court cited *Rovello* with apparent approval, was not seen as changing the *Rovello* rationale.

p. 663: Add note 8. An expelled dental student's article 78 petition for reinstatement to NYU's College of Dentistry was dismissed by the IAS court; this determination was reversed by the

Appellate Division which directed her reinstatement. The Court of Appeals reversed, holding that CPLR 7804(f) requires that NYU should have been permitted to answer the petition unless it was clear that there were no triable issues of fact. Here the Court found triable issues of fact and remanded for further proceedings. *Matter of Kickertz v. New York Univ.*, 25 N.Y.3d 942, 6 N.Y.S.3d 546, 29 N.E.3d 942 (2015).

Page 671: Add to second paragraph in Note on summary judgment in negligence cases: Plaintiff was a passenger in a stopped vehicle rear-ended by defendant. Plaintiff's motion for summary judgment was granted despite defendant's claim that his vehicle skidded on an oil slick. The Appellate Division reversed on the ground defendant had raised an issue of fact which if proved could excuse him. It was noted that rear-end collisions do not summarily establish the negligence of the following driver. There appears to be a *prima facie* establishment of fault in rear-end cases which can be overcome. *See Philip v. D & D Carting Co., Inc.*, 136 A.D.3d 18, 22 N.Y.S.3d 75 (2d Dep't 2015).

Page 679. Add sentences to Note (2). In *Bennett v. St. John's Home*, 128 A.D.3d 1428, 7 N.Y.S.3d 918 (4th Dep't 2015), plaintiff consented to defendant's request to delay its (defendant's) summary judgment motion until after the 120-day time period and this agreement was then approved by the court on motion made by defendant. Then, on appeal, plaintiff maintained that the motion should have been denied, but the Appellate Division ruled that plaintiff had waived the argument that the motion was untimely by expressly consenting to it. The dissenter pointed out that under *Brill* the court had no power to grant the motion on the mere

consent of plaintiff without there being any "good cause shown," the language in the 120-day rule as stated in CPLR 3212(a).

§ 16.05 Judgment by Default

Page 692: Add to Note [1] : Yet where plaintiff's proof of service, the facts constituting the personal injury claim, and defendants default were clearly shown, the court retained the discretion to relieve defendant where there was a reasonable explanation for its failure to appear and a showing that it had a potentially meritorious defense. *Fried v. Jacob Holding, Inc.*, 110 A.D.3d 56 (2d Dep't 2013).

Page 692: Add paragraph to note (4):

New rules governing default judgments involving consumer credit transactions require detailed affidavits of facts accompanied by exhibits in support of a default application whether the plaintiff is the original creditor or a "debt buyer" creditor. These provisions all become effective on July 1, 2015. *See* § 22 NYCRR 202.27-a. Detailed notice provisions that must be served on the debtor are found in § 202.27-b.

Page 693: Add new Note (7): CPLR 3215(f) requires an applicant for a judgment by default to file "proof of the facts constituting the claim." In *Manhattan Telecomm. Corp. v. H&A Locksmith, Inc*., 21 N.Y.3d 200 (2013), the Court of Appeals examined whether "non-compliance with this requirement is a jurisdictional defect" that voids the default judgment. Plaintiff alleged defendant had failed to pay for telephone services. Defendant moved to vacate a default judgment. The Appellate Division found that because "plaintiff failed to provide . . . evidence that [defendant] was personally liable for the stated claims . . . the default judgment

was a nullity." The Court of Appeals reversed, finding that a "failure to submit the proof required by CPLR 3215(f) should lead a court to deny an application for a default judgment, but a court that does not comply with this rule has merely committed an error . . . The error can be corrected by the means provided by law . . . It does not justify treating the judgment as a nullity."

Chapter 17

Settlements and Stipulations

Page 704: Add to last paragraph of Sec. 17.02: But see *Abreu v. Barkin & Assoc. Realty*, 115 A.D.3d 624 (1st Dep't 2014), where the court held that under CPLR 3220 a defendant was entitled to attorney's fees if the plaintiff did not accept the defendant's compromise offer but did not obtain a more favorable recovery. The court held that since the plaintiff ultimately "failed to obtain a more favorable judgment than [the defendant's] offer, [the] plaintiff became liable for costs and fees." *Id.* Without explanation the court held that this included attorney's fees. *Abreu* appears to be the first case holding that a defendant is able to recover attorney's fees from a plaintiff pursuant to CPLR 3220.

Chapter 18

Pre-Trial and Calendar Practice

Page 716. Add paragraph at end of note (2): Effective January 2, 2015, CPLR 3216(a) was amended to require that where the court on its own motion proposes to dismiss the action notice must be provided to the parties. CPLR 3216(b) was also amended so that in addition to the one year period that must elapse from joinder of issue before a motion to dismiss can be made, an additional six month delay period will occur where there has been a preliminary court conference order. And CPLR 3216(b)(3) was amended to provide that, as in *Cadichon* where the written demand is served by the court, it must set forth specific conduct constituting the neglect which would show a general pattern of delay.

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Chapter 19

Trial

§ 19.03 Some Procedural Aspects of Trial

Page 744: Add new Note (4): CPLR 8001(a) provides that any person whose attendance is compelled by a subpoena is entitled to a $15 daily attendance fee and $0.23 per mile in mileage fees. In *Caldwell v. Cablevision Sys. Corp.*, 20 N.Y.3d 365 (2013), the Court of Appeals considered whether the testimony of a subpoenaed witness who receives a fee far in excess of CPLR 8001(a)'s requirement is inadmissible as a matter of law. Plaintiff commenced a negligence action against defendant Cablevision Systems Corporation (CSI) and testified that she had stepped into a "dip in the trench" in the road after CSI had failed to re-pave the street. In response, CSI subpoenaed an emergency room physician who testified concerning his note that plaintiff "tripped over a dog." Defendant paid its witness $10,000 for appearing and testifying. While the Court of Appeals stated that it would protect "compensation that enhances the truth seeking process by easing the burden of testifying witnesses," it admitted that it was "troubled" by the "unflattering intimation that the testimony is being bought or, at the very least, has been unconsciously influenced by the unflattering intimation being provided." The Court of Appeals held that the Supreme Court should have issued a bias charge to the jury specifically tailored to address the payment CSI made to the doctor. The Supreme Court should have instructed the jury that fact witnesses may be compensated for their lost time, but that "the jury should assess whether the compensation was disproportionately more than what was reasonable of the loss of the witness's time from work or business" and "whether it had the effect of influencing the witness's testimony." However, the Court of Appeals also found the error harmless in these circumstances because the witness limited his testimony to verifying a documented note.

By contrast, see *Thomas v. City of New York*, 293 F.R.D. 498 (S.D.N.Y. 2013), where the court vacated a jury verdict and judgment for plaintiff in the amount of $450,000 after a fact witness improperly tainted proceedings. Plaintiff brought an action under 42 U.S.C. § 1983, alleging false arrest and excessive force. After the jury had awarded damages, the court learned that plaintiff had entered into an agreement with his then-girlfriend, who testified as a key fact witness. Plaintiff "promised [the witness] 20% of any recovery [plaintiff] received and made her liable for 10% of legal fees if his case was unsuccessful and the Defendants sought costs." Citing *Caldwell*, 20 N.Y.3d at 371, the court noted that under New York law, "an agreement to pay a fact witness in exchange for favorable testimony, where such payment is contingent upon the success of a party to the litigation is not permitted and [is] against public policy." The court found that the agreement amounted to misconduct within the meaning of Fed. R. Civ. P. 60(b)(3) ("On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . misconduct by an opposing party."). The court also found that the misconduct merited a "presumption of substantial interference" with the state's case, noting that plaintiff "took conscious steps to hide [the agreement] from Defendants' attention." However, the court did deny defendant's motion to dismiss the complaint with prejudice, writing, "[A]t base, this is a credibility issue, which is best resolved by a jury. If the jury chooses to credit [plaintiff's] version of events despite the contract, Defendants will have still had the opportunity to fully and fairly present their case."

§ 19.04 Post-Trial Motions

Page 783: Add to second paragraph in note (2): In a medical malpractice case the trial court ordered a new trial unless defendants stipulated to increase all damages to $17.4 million. Defendants refused opting for a new trial which produced a verdict even higher - $17.8 million.

Defendants, of course, wanted to retreat to the first verdict. But the Court of Appeals held them foreclosed since a motion for additur or remittitur must be made prior to any new trial. *Oakes v. Patel*, 20 N.Y.3d 633 (2013).

Chapter 20

Judgments and Relief from Judgments

§ 20.03 Relief from Judgments

Page 803: Add new Note (3): Plaintiff was injured in the 1993 World Trade Center bombing. Her case was tried jointly with one brought by one Ruiz arising out of the same event. Each plaintiff obtained a judgment based on a single order entered in the two cases. The Ruiz judgment was ultimately overturned by the Court of Appeals which found defendant Port Authority immune from liability. But the Port Authority had not appealed plaintiff's judgment which she argued was final and binding since the time to appeal it had run out. Using CPLR 5015(a)(5) the court held that it provided relief to defendant because it applied where the judgment was "entered in the same lawsuit as, and led directly to the later judgment." Section 5015(a)(5) provides for relief from a judgment where there has been a "reversal, modification or vacatur of a prior judgment or order upon which it is based." Section 5015(a)(5) applies to both judgments that are still in the appellate process and those in which the time for appellate review has run out. Two judges dissented from this interpretation arguing that it "offends well-settled principles concerning the finality of judgments for which appellate rights have been exhausted." *Nash v. Port Auth. NY & N.J.*, 22 N.Y.3d 220 (2013). On remand the First Department held that upon remand the motion court wrongly vacated plaintiff's final judgment. By strategically deciding not to appeal *Nash*, Port Authority abandoned its claim. Any discretion a court might have under CPLR 5015(a) to vacate a final judgment "must be sparingly exercised lest final judgments be subject to never-ending attack, undermining the sanctity and finality of judgments." *Nash v. Port Auth. of N.Y. & N.J.*, 131 A.D.3d 164, 166 (1st Dep't 2015).

Page 819. Add new note (7): Prejudgment interest is recoverable in actions commenced pursuant to Civil Service Law § 75-b, the state whistleblower statute. Labor Law § 740(5), applicable to public employees, provides for recovery including the compensation for lost wages, benefits and "other remuneration." Here, plaintiff, a New York City employee, had been demoted as a result of his whistleblowing activities which deprived him of a higher salary and thus awarding him back pay with interest would serve to make him whole. (*Tipaldo v. Lynn*, 26 N.Y.3d 204, 21 N.Y.S.3d 173, 42 N.E.3d 670 (2015)).

Chapter 21

Appeals

§ 21.02 Appellate Division

Page 826. Add new Note (4). Plaintiff, injured while driving on a state highway as a result of the fall of a tree branch overhanging the highway, sued the owner of the property upon which the tree was located in Supreme Court, and sued the State in the Court of Claims. In Supreme Court defendant moved *in limine* for a jury charge on apportionment of liability between defendant and the State. The motion was denied and the Appellate Division ruled the order appealable. Ordinarily said the Court a ruling which limits the admissibility of evidence is neither appealable as of right nor by permissions. But here the Court saw the order as the "functional equivalent" of a motion for summary judgment on the question of the State's liability. A majority went on to hold that the trial judge should allow the jury to apportion the damages. The dissenter, while agreeing that it was proper for the trial court to allow the jury to consider the State's wrongdoing in figuring the landowner's liability, said that it should not be allowed to make an apportionment. Lamenting the "archaic aspect of our state court system," which requires plaintiff to bring two lawsuits, he pointed out that, although the jury's verdict would not be binding in the Court of Claims, the state would be the "Constitutionally mandated empty chair in the courtroom and could neither appear nor offer any defense." (*Artibee v. Home Place Corp.*, 132 A.D.3d 96, 14 N.Y.S.3d 817 (3rd Dep't 2015)).

Page 832: Add new Note [4]: Where the appeal is from New York City Civil Court to the Appellate Term the appellate court has full review over the law and facts; but if there is a further appeal to the Appellate Division that court's review of the facts is limited since, like the Court of

Appeals, it would be the second reviewing court. *409-411 Sixth St., LLC v. Mogi*, 22 N.Y.3d 875 (2013).

§ 21.03 The Court of Appeals

Page 838: Add new Note (5): In *Strauss, Inc. v. East 149th Realty Corp.*, 20 N.Y.3d 37 (2012), the Court of Appeals addressed whether defendants' appeal from a judgment in a commercial dispute brought up for review by the Appellate Division a non-final Supreme Court order dismissing defendants' counterclaims and third-party complaint. CPLR 5501(a)(1) states that "an appeal from a final judgment brings up for review . . . any non-final judgment or order which necessarily affects the final judgment." The Court of Appeals found that to "satisfy "necessarily affects" in this context, it is not required . . . for the reinstatement of [defendants'] counterclaim upon a reversal or modification to overturn completely the [final] judgment." The Court of Appeals stated: "Because Supreme Court's dismissal of the counterclaims and third-party claim necessarily removed that legal issue from the case (i.e., there was no further opportunity during the litigation to raise the question decided by the prior non-final order), that order necessarily affected the final judgment."

Page 838: Add new Note (6): In *Oakes v. Patel*, 20 N.Y.3d 633 (2013), the Court of Appeals examined whether, under CPLR 5501(a)(1), an order denying defendant's motion to amend pleadings necessarily affected a final judgment. Defendants challenged a medical malpractice judgment rendered after plaintiff suffered an aneurysm in a blood vessel near his brain. After an initial jury verdict of $4 million, defendant Kaleida Health moved to amend its answer to assert a defense of release, and to dismiss plaintiff's claims against Kaleida. The trial court denied the

motion on grounds that plaintiffs would be prejudiced. A jury at a second trial then awarded damages totaling $16.7 million. On appeal, defendant Kaleida argued that its motion to amend its answer between the trials should have been granted. The Court of Appeals held that "we cannot adhere to the rule that the grant or denial of a motion to amend is always unreviewable on appeal from a final judgment. There will be times, such as this one, when such a ruling "necessarily affects" the final judgment under any common sense understanding of those words . . . We hold that in such cases — when an order granting or denying a motion to amend relates to a proposed new pleading that contains a new cause of action of defense — the order necessarily affects the final judgment."

Chapter 22

Enforcement of Judgments

§ 22.01 Introduction

Page 850: Add to Note (1): For a harsh criticism of *Hotel Mezz*, *see* James L. Schroeder and David Gray Carlson, Where Corporations Are: Why Casual Visits to New York Are Bad for Business, 76 Albany L. Rev. 1141 (2012/2013) (argues that jurisdiction over various garnishees was unconstitutional because they lacked New York contacts.)

§ 22.02 Enforcement Devices

Page 853: Add new Note (4). CPLR 5022-a provides that a bank which receives a judgment creditor's restraining order against an account of a judgment debtor must notify the judgment debtor and provide the debtor with notice of possibly applicable exemptions and with related forms. Where the bank neglects this requirement the judgment debtor has no action for damages against the bank, but must resort to a special proceeding under CPLR 5222 to be relieved from the restraining order. *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61 (2013). Further, CPLR 5222-a(b)(3) provides that the garnishee bank must give the judgment debtor notice of the restraining order within two business days of its receipt so that the judgment debtor can have an opportunity to claim any exemptions that might apply. The bank's failure to comply with the notice requirement deprives the judgment debtor of her due process rights. The restraining notice will not be terminated, but the judgment debtor will be given time to claim any exemptions. *Distressed Holdings, LLC v. Ehrler*, 113 A.D.3d 111, 976 N.Y.S.2d 517 (2d Dep't 2013).

Page 853: Add new Note (8): Under CPLR 5222(b), a party seeking to enforce a judgment may seek "to restrain or prohibit the transfer of a judgment debtor's property in the hands of a third-party." In *Verizon New England, Inc. v. Transcom Enhanced Servs., Inc.*, 21 N.Y.3d 66 (2013) Verizon sought to collect a $57.7 million judgment awarded by the United States District Court for the District of Massachusetts against Global NAPs, Inc. (GNAPs). Verizon served a restraining notice and information subpoena on Transcom, which did business with the GNAPs. The Supreme Court of New York, however, found that "there is no property or debt in the instant matter subject to a restraining order, levy or turnover pursuant to Article 52 of the CPLR." The Appellate Division affirmed, noting that Transcom "owed no debt, but rather held a credit balance with GNAP[s] [and] the undisputed modified agreement between [the parties] dispensed with any contractual obligations or 'bundle of rights that could be considered attachable property.'" The Court of Appeals affirmed again, finding that "because Transcom prepaid for services to be provided for GNAPs on a week-to-week basis, without any commitment or promise for additional services, or any assurance of a continued purchase of services, Transcom neither owed any debt to, nor possessed any property of, GNAPS that could be subject to a restraint notice."

Page 857: Add to Note (3): Distinguishing *Koehler,* the Court held that property in the possession of the garnishee's subsidiary which is not subject to jurisdiction in New York, the turnover of the property may not be compelled. The statute requires that it be in the actual custody or possession of the garnishee and these words are strictly construed so that even if the subsidiary is under the control of the garnishee the property is barred from recovery.

Commonwealth of Northern Mariana Islands v. Canadian Imperial Bank of Commerce, 21 N.Y.3d 55 (2013).

And in *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149, 996 N.Y.S.2d 594, 21 N.E.3d 223 (2014) the Court held that the "separate entity" rule applies to bank accounts held in foreign branches, i.e., a restraining notice served on a New York branch has no effect on funds held in a branch outside the United States. *Koehler* was distinguished, first because the separate entity rule had not there been raised, and second because the separate entity rule "would not have aided the bank in *Koehler* because that case involved neither bank branches nor assets held in bank accounts." The court noted that "the scope of CPLR article 52 is generally tied to the exercise of personal jurisdiction over a garnishee." The Court left open the question whether the separate entity rule would apply were branches located in the State or in the United States.

The separate entity rule does not bar court from compelling a bank to produce information related to foreign branches. *Matter of B&M Kingstone, LLC v. Mega Int'l Commercial Bank Co.*, 131 A.D.3d 259, 266 (1st Dep't 2015).

§ 22.06 Foreign Judgments

Page 866: Add paragraph: Where a contract between a British Company (Landauer) and a New York Company (Monani) included a clause which provided that the courts of England have exclusive jurisdiction over any contract dispute, a default judgment obtained by Landauer in England could be enforced in New York through a motion for summary judgment in lieu of a complaint. Even if service of process might have been incorrectly served on Monani in the New York summary judgment proceeding, the facts showed Monani had received actual notice of the

proceeding and that, because of the contract's venue clause and because Monani had fair notice of the foreign court proceeding, proper jurisdiction had been obtained over Monani in England. *Landauer Ltd. v. Joe Monani Fish Co.,* 22 N.Y.3d 1129 (2014).

In another case involving jurisdiction over the judgment debtor, the plaintiff obtained judgment against defendant in an English court after defendant appeared and did not contest jurisdiction. Judgment was entered awarding plaintiff damages and prejudgment interest. Plaintiff brought an action in New York to domesticate and enforce the English judgment pursuant to CPLR 5303. Defendant argued that there was no personal jurisdiction over it in New York, the cause of action had no connection to New York, and defendant possessed no assets in New York and that therefore the New York enforcement action should be dismissed. Defendant's motion was denied: In a proceeding under CPLR Art. 53 the judgment creditor does not seek any new relief against the judgment debtor, but merely asks the court to perform the ministerial duty of recognizing the foreign judgment and converting it to a New York judgment. This procedure was intended to clarify and codify existing case law applicable to foreign judgments based on principles of international comity and also to promote the enforcement of New York judgments abroad so that foreign jurisdictions could be assured that their judgments would receive enforcement here. *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting and Financial Services Co.*, 117 A.D.3d 609 (1st Dep't 2014).

The separate entity rule does not bar courts from compelling a bank to produce information related to foreign branches. *Matter of B&M Kingstone, LLC v. Mega Int'l Commercial Bank Co.*, 131 A.D.3d 259, 266 (1st Dep't 2015).

Chapter 23

Res Judicata

§ 23.03 Issue Preclusion

Page 894: Add new paragraph to Note: The parties in the first action in Surrogate's Court were plaintiff, who claimed assets under decedent's securities account, and defendants, the coexecutors of decedent's estate. The parties in the second action were the same plaintiff and a new defendant, Merrill Lynch, which held the securities account. Plaintiff sought to vacate the Surrogate's decree admitting the will to probate and to force defendant to turn over the assets pursuant to a purported letter previously sent by decedent. Obviously there was no identity of parties, and the court ruled that service of the previous petition on Merrill Lynch had not made it a party. Nor was there any identity of issues. The only issue before the Surrogate was whether the will should be admitted to probate. There was no issue as to what assets constituted the probate estate. (*Arroyo-Traulau v. Merrill*, 135 A.D.3d 1, 19 N.Y.S.3d 221 (1st Dep't 2015)).

Page 900: Add new Note (5): *Auqui v. Seven Thirty One Limited Partnership*, 22 N.Y.3d 246 (2013) presented the question whether the finding of a Workers' Compensation Law Judge that claimant no longer suffered from a work related disability was a finding of fact having preclusive effect in claimant's related personal injury action. After initially holding that collateral estoppel was applicable to the personal injury action, this decision was changed upon reargument, the Court now concluding that the finding of the administrative proceeding did not estop the plaintiff from litigating his claim of ongoing disability in the negligence action. It was held that in the administrative proceeding the purpose of awarding benefits is to provide funds on an expedited basis that will function as a substitute for an injured employee's wages. The focus of the law is

on the employee's ability to perform employment duties. In a negligence action, on the other hand, the focus is on making the injured party whole for the "enduring consequences" of his injury and the inquiry goes to the question of the impact of the injury over the party's lifetime. Therefore the defendant had not met its burden of showing that the issue presented in the worker's compensation proceeding was identical to that presented in the personal injury case and collateral estoppel could not apply.

Chapter 24

Confronting Unlawful Government Activity

§ 24.04: CPLR 217, Time Limitation

Page 953: Add to Note (2): Where the District Attorney brought an Article 78 proceeding seeking prohibition coupled with an action for declaratory judgment, both of which sought to prohibit certain judges from entertaining certain matters, the four month provision was applicable. If prohibition is a proper remedy as it was here, then CPLR 217 applies also to the declaratory relief sought. *Matter of Doorley v. DeMarco*, 106 A.D.3d 27 (4th Dep't 2013).

Page 953. Add paragraph to Note (3): Proceedings challenging the termination of petitioners' section 8 rent subsidy benefits by the New York City Housing Authority (NYCHA) were time-barred where commenced more than four months after receipt of the notice of default letter. The NYCHA produced employee affidavits showing proper mailing of the default letters thus establishing a presumption of mailing which was not overcome by each petitioner's bare denial of receipt. (*Matter of Banos v. Rhea*, 25 N.Y.3d 266, 11 N.Y.S.3d 515, 33 N.E.3d 471 (2015)).

p.953: Add new note (4):

In *Matter of Johnson v. Carro*, 24 A.D.3d 140, 806 N.Y.S.2d 15 (1st Dep't 2005), lv denied, 7 N.Y.3d 704, 819 N.Y.S.2d 871, 853 N.E.2d 242 (2006), the court ordered a mistrial in a criminal case and more than four months from that determination the defendant brought a proceeding in the nature of prohibition seeking to prevent retrial on the grounds of double jeopardy. The court held the proceeding not to be time-barred since the respondent Justice's assertion of authority to retry petitioner was seen as continuing. This has been seen as a "tolling provision" for continuing harm; but the Court of Appeals on similar facts has now held that

"once the People definitively demonstrated their intent to re-prosecute and the court began to calendar the case for eventual trial, [petitioner] was obligated to initiate his … article 78 challenge within the statutorily prescribed time frame…" *Matter of Smith v. Brown*, 24 N.Y.3d 981, 996 N.Y.S.2d 207, 20 N.E.3d 987 (2014). It appears, then, that the four-month period is not triggered until the trial judge begins to calendar the retrial.

Chapter 25

Arbitration: An Alternative to Litigation

Page 975. Add paragraph to Note (3): An award that reinstated an employee, terminated following a sexual harassment investigation, the arbitrator finding this disposition violated the parties' collective bargaining agreement, was vacated as violative of public policy. The employer's policy conformed to Title II of the Civil Rights Act and the New York State and City Human Rights Laws. The arbitrator's award of reinstatement effectively precluded the employer from satisfying its legal obligation to police sexual harassment in the workplace and would as a practical matter dampen victims desire to come forward. *Phillips v. Manhattan & Bronx*, 132 A.D.3d 149, 15 N.Y.S.3d 331 (1st Dep't 2015).

Page 983. Add paragraph to end of Note (4): Three contracts involving properties in Florida and New York contained arbitration provisions deemed by the Court of Appeals to be governed by the FAA since use of the properties involved interstate commerce. Plaintiffs brought a fraud action in New York which was dismissed since the Statute of Limitations had run. In that action defendants had agreed *inter alia* that the FAA should not apply since the agreements did not evidence interstate transactions, a position rejected by the Court of Appeals. The Court went on to hold that in any event plaintiffs had waived arbitration since that remedy was not sought until after the collapse of the civil action. *Cusimano v. Schnull*, 26 N.Y.3d 391, 23 N.Y.S.3d 137, 44 N.E.3d 212 (2015).

Where the FAA was applicable in an arbitration the Second Circuit held the arbitrators and not the courts were to decide whether the result of a prior arbitration involving the same properties, confirmed by the court, would bar the second arbitration, a determination which would be the same were the matter governed by CPLR Article 75. *Citigroup v. Abu Dhabi Investment Auth.*, 766 F.3d 126 (2d Dep't 20 Cir. 2015).