WARREN COUNTY BAR ASSOCIATION, INC.

TIPSTAFF

SUMMER 2021

Volume II Issue 3

IN THIS ISSUE

Greetings!

Welcome to the summer edition of the *Tipstaff*. Hopefully you are able to take some time off this summer and relax with friends and family.

While many things have changed over the past year, the Warren County Bar Association has remained constant and committed to providing valuable information, networking opportunities and services to the membership. I want to extend a sincere thank you to the Board and to Executive Director, Kate Fowler, for all the hard work over the past year dealing with COVID-19. Despite the restrictions, we continued to meet monthly, continued to offer CLE's, hosted events, and maintained contact with the membership through the *Weekly Digest.*

Under the leadership of the past president, Jessica Hugabone Vinson, Esq., we were able to increase the size of our membership last year to one of the highest totals in recent years. I would like to continue this trend and encourage our members to participate in the monthly events and activities. I ask each of you to reach out to new attorneys and past members to be involved in our association.

Our most recent event held was the presentation of the 2020 and 2021 Liberty Bell awards at Crandall Park. The event is usually held on Law Day and, although it was held a little later this year, we were able to carry on the tradition, and the event was a big success. As they say, "better late then never." Many thanks to the Law Day Committee, Amanda Kukle, Steve Perkins, and Vanessa Hutton.

Looking forward in the next few months, please look for the invitations for the September "Welcome Back" event, the October CLE, our November Mannix Dinner, and the December Holiday party. I look forward to the next year and to seeing everyone in person in September!

Best wishes,
Karen Judd

2021 Annual Dinner Meeting

Finally! Together again! On May 20th, a spectacular spring evening, members of the Warren County Bar Association were able to gather and celebrate in person! The patio and dining room of the Fort William Henry provided a spectacular view of Lake George, as cheerful waiters and waitresses served delicious dinners to over 40 WCBA members.

The weather was beautiful, the dinner delicious, and there was plenty of time for great conversations and the sharing of many stories.

Field Work

by James Cooper, Esq.

James Cooper is a frequent contributor to the *Tipstaff.*

Field Work

by James Cooper, Esq.

A fraternity brother of mine completed his post graduate work at the University of Rhode Island where he obtained a doctorate in ornithology. He and a group of classmates were in a meadow one night when a sheriff's deputy stopped his cruiser, turned on the overheads and gestured for them to come to him. They explained that they were doing field work. He continued his interrogation, "Uh huh, in this field doing field work." They sensed his skepticism. They said that they were from the university and were studying the woodcock. He was thinking that these were wise-guy college kids putting him on. His demeanor tightened, so one took it on himself to volunteer that the woodcock was a bird. The cop grew more belligerent asking, "So, whadya doin' out here at night?" One replied, "It's nocturnal." The deputy pounced with sneering confidence, "I taught you said it was a bird." This article is about different field work, the work that Charles Dudley Field II did in the mid nineteenth century that reformed the way the law was implemented here, in Great Britain, Ireland and India.

When I started practicing law in 1973, previously admitted attorneys were confronted with large changes in the way they had to practice the law. The CPLR had been recently enacted replacing the Civil Practice Act. The Uniform Commercial Code was new. Local attorney and dynamo, Richard Bartlett, had supervised the reformation that resulted in the new Criminal Procedure Law. It was difficult for established attorneys to adapt to these changes, to begin to understand what merchantability was and its implications for liability, to understand what an affirmative defense was and why they had to plead it, for instance. Still, the adjustment was insignificant compared to 1848 when the Field Code was enacted. Simplicity was promised, but at the cost of learning totally new and comprehensive manners of practice.

The eighteen forties was a period of unsettled social upheaval. 1848 was a revolutionary year of anarchy, violence and turmoil worldwide. New York State was profoundly shaken by the Anti Rent Wars of the 1830s and 1840s. There was a nascent women's rights movement. There was a land reform movement. In public discourse and within the legal profession, there was widespread dissatisfaction with the common law traditions of the courts and court proceedings, but not widespread enough for the bar to readily surrender to reform. It was only after the Anti Rent Wars coalesced with abolitionist and other period movements that New York set about creating a new constitution in 1846.

David Dudley Field II had been an unacknowledged prophet, pamphleteering, authoring articles in professional journals, and testifying at legislative hearings and urging all who would listen to the need to replace procedure under the common law with statutory revisions.

He was the oldest child of a nationally known clergyman and author. One of his brothers was Cyrus Field, the entrepreneur who conceived and laid the Atlantic telegraph cable. Another brother was Chief Justice on the California Supreme Court, and later a United States Supreme Court Justice. His sister married, and her child became a Supreme Court Justice. His family had a deep historical pedigree in New England.

Field claimed himself to be the most financially successful practicing attorney and trial lawyer in New York City. By the standards of the time, he probably was. He was not a likable man, commonly disliked for his combative and cantankerous manner. He didn't care. His view of the law and society was Dickensonian, that the law should be *laissez faire*, that it existed to enforce contracts and allow superior abilities to rise and flourish. He had no faith in judicial flexibility. He viewed discretion in judges as caprice at best and at worst, in a bad man, as odious and irresponsible tyranny. Flexibility in judicial proceedings was an anathema to him. Educated at Williams College his view of the perfect academic discipline was mathematics because of its fixed structures. He wanted the law to mirror fixed structures to allow achievement without dependence on the whims of others. He saw statutes as the antidote to variable judicial outcomes.

His first wife, a child, and brother had died in 1836. He dealt with his grief by traveling in Europe for a year where in England, France and Spain, he studied their laws and procedures. He was influenced by philosopher Jeremy Bentham's utilitarian emphasis. He was exposed in the process to English common law practice and substantive law, additionally to evolved Roman law. He returned to New York in 1837 and began a campaign to codify all law. His only existing American model was the state of Louisiana which had hybridized the Napoleonic Code with substantive common law precedents. In 1820 New York had made minor statutory changes to the common law of pleading and practice in court costs, consequences for the losing litigant and adopted an attorney fee schedule.

Field's testimony before the legislature in the 1846 constitutional process finally took root, spurred on in part by the previously mentioned social reform movements but also by a widespread public clamor for legal reform that was becoming difficult for the profession and politicians to ignore. He was appointed head draftsman of three commissioners to submit proposals for codifying and reforming procedures. The 1846 Constitution itself, eliminated the Court of Chancery and created the Supreme Court we now know with jurisdiction over law and equity issues.

His arguments for code reforms were that under the existing system, lawyers had to plead in arcane ways to have their complaints survive if they even found themselves in the right court. He convincingly demonstrated that aspects of common law pleading were illogical and vestiges of undemocratic English autocracy, that common law formalities in pleadings required privileged knowledge unavailable to the citizenry, that without statutory structure judicial practices varied from court to court, that the public needed a resource to know the law, and that a code eliminated needless technicalities.

His work dominated the commission which reported out reforms that were enacted by the legislature in 1848: An Act to Simplify and Abridge the Practice and Pleadings and Proceedings of the Courts of the State . Among the changes to the law and practice was to allow a party to testify in his own behalf, a revolutionary change in the law of torts. Lawyer supervised pretrial discovery was introduced. Attorney contingency fees were authorized.

A selling point for the profession to get on board with the code was that in the reforms of 1820, lawyers' fees were fixed and scheduled based on the components of litigation, so that, i.e., making a motion generated a fixed fee. Other aspects of practice and paperwork had scheduled fees. The consequence was that there was an irresistible incentive to churn litigation preparation

which the public was aware of and became furious about. The Field Code did away with fee schedules and allowed lawyers to negotiate fees with their clients. Field benefitted from his handiwork because he had rich commercial clients. The change allowed him to charge them all that the traffic would bear, and for the bar, allowed them to claim reform and stave off changes to their practices that were proposed at the time.

Over the course of his career, he spent forty years in his spare time drafting codes, five in all. Ironically, he had less success in New York, than in twenty four western states. Britain, Ireland and India adopted his code of procedure, his civil code, and his criminal code in 1873. California adopted his proposals wholesale, due in part to his brother being CJ of the Supreme Court there. One of his efforts was to codify all of the substantive law of New York, which was partially approved in fragments by the legislature when proposed in 1857.

The reforms enacted in New York to procedure in 1848 were supplemented by a complete code of civil and criminal procedure in 1850. These were the statutory reforms that formed the basis for adoption in the vast majority of American states. The proposals had been dominated by his personality. The degree of his authorship, overshadowed his fellow commissioners such that their contributions became subsumed as "The Field Code."

Time proved that the code of procedure was flawed. The election of Justices of the Supreme Court necessitated party nomination. In that era filling the judgeships became a well of corruption. The elected JSCs under the code had statewide jurisdiction and no obligation to give comity to rulings of other judges. That had not been a historical issue but became one when the telegraph and railroads eliminated previous logistical impediments to abuse. Field's commission had provided in the code wide latitude for judges to make *ex parte* orders and to appoint receivers. Smart lawyers and Wall Street interests quicky ascertained the opportunities for abuse of the process for power and profit. The example of this abuse was previously described in the Tipstaff article describing the Erie War, (Come to the Ex Parte). Field grasped the problem of abuse, but was unable to pry open the legislative hands of commerce and power that would not surrender advantages. His remedy was to yield to reality and exploit the same tactics in his practice. Accused of hypocrisy, Field responded, "If the law is an ass, (Charles Dickens), it is nonetheless a lawyer's obligation to his client to exploit that condition for his client's benefit."

His amoral, blindered ethical practices nearly got him disciplined by the newly organized New York State Bar Association. Field was the principal lawyer for the Erie Railroad and it's directors, Fisk and Gould, throughout the Erie Wars. He attended the shareholders' meeting of the Albany & Susquehanna Railroad at Fisk and Gould's request when they agreed to his terms to interrupt his vacation for an appearance fee of ten thousand dollars. His tactics on their behalf brought him into public scorn. It had absolutely no effect on him. He was defense attorney for "Boss Tweed" of the Tammany Hall Democratic machine and gained a hung jury in Tweed's first trial and a short prison sentence and a fine easily affordable with the spoils of graft in the second.

Field's time aside from his practice had been dominated by his compulsion to complete the organization of all the law, including international law into codes. His personal life was tragic, but perhaps common in the 1800s, as three wives and a child had died. He was appointed to congress to fulfill a term, but that was his only personal experience in politics.

The writing of statutes is extremely difficult, weighing the precision of each element against imagined attacks and unforseen consequences. Incorporating all the statutes an author has

created into a code of statutes is a monumental work. It invites disbelief that Field did that five times and that part or all of his work was adopted internationally and eventually into the Federal Rules of Civil Procedure. Even the unofficial codification of American substantive law was eventually accomplished by the American Law Institute in its Restatement of Law.

Gustave Eiffel is the archetype engineer to that profession for his design and construction of the Eiffel Tower. David Dudley Field II is deserving of similar recognition in the legal profession for The Field Code, but he is now largely just a historical footnote. He died in 1894 aged eighty-nine years.

It is ironic that Field's reforms and unsuccessful efforts to correct flaws in the Code were based on populist arguments when his personal societal views and ethical values could be characterized as social-Darwinian.

Jim Cooper

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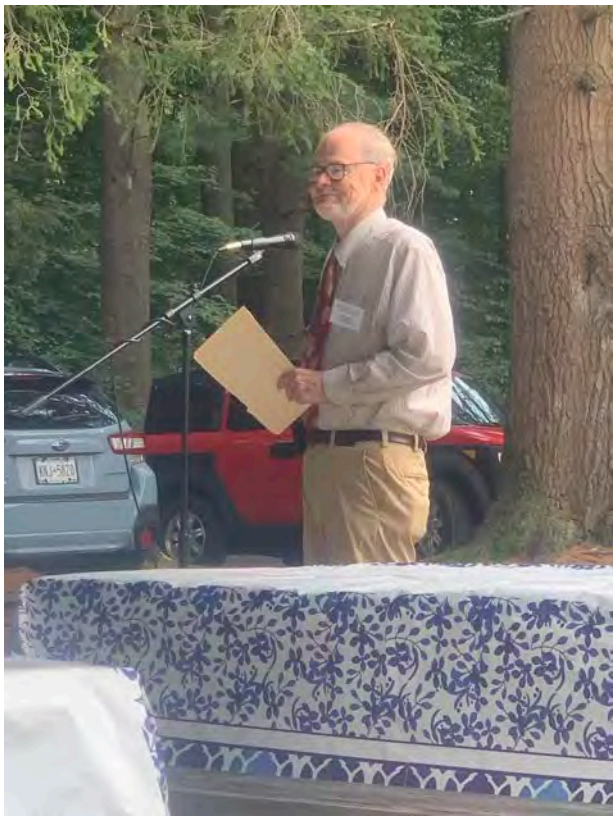
I was unable to find a biography of Field. The facts of the article are prepared from secondary sources: The Scarlet Woman of Wall Street, John Steele Gordon, Weidenfeld & Nicholson pubs., 1988; Historical Society of the New York Courts, Article, 'David Dudley Field'; NNDB, tracking the entire world, Article, 'David Dudley Field'; The Influence of the Field Code: An introduction to the Critical Issues, Kellen Funk, WorldPress.com, 2014; Law and History Review, Article, David Dudley Field II, Vol. 6 #2, Stephen S. Subrin, Board of Trustees University of Illinois, 1988; Encyclopedia Britanica; Wikipedia.

Professor Funk indicates that until recently, it was impossible, other than in generalities, to track how legislatures borrowed, adopted or modified the Field Code for their own purposes, as such analysis would require an off-putting tedious comparison of the Code side by side with statutes of various jurisdictions. Now with software programs that read and highlight differences, such a task will be easier for a scholar to undertake.

2020-2021 Liberty Bell Awards
July 15, 2021

Amanda Kukle, Chair of Law Day, welcomes over 50 people to our celebration!



Dr. John Rugge, Founder of Hudson Headwaters, remembers Joan Grishkot; Ginelle Jones, Director of Warren County Public Health, accepts the 2020 Liberty Bell Award on behalf of all health care workers in Warren County.

Karen Judd, President WCBA, explains the Liberty Bell Award, which she then presents to Rachel Gartner, Director of the Domestic Violence Program of Catholic Charities and the 2021 recipient.

Mary Withington, Supervising Attorney for Legal Aid Society of Northeastern New York, speaks about Rachel, whom she had nominated for the award.

Rachel Gartner, shares some thoughts. Senator Dan Stec and Assemblyman Matt Simpson offer congratulatory remarks with the 2020 and 2021 Liberty Bell Recipients.

More Photos

From The Judge's Chambers

Robert J. Muller, JSC
Warren County Supreme Court
Chair, Bench Book for Trial Judges – New York
Warren County Municipal Center
1340 State Route 9, Lake George, NY

71 Misc.3d 1230(A)
Unreported Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
This opinion is uncorrected and will not be published in the printed Official Reports.
Supreme Court, New York, Warren County.

Robert Barlin, on behalf of himself and all other employees similarly situated, Plaintiff,
v.
Pizza Jerks, Ltd. and IGINIO ROVETTO, Defendants.

EF2020-67771
|
Decided on June 9, 2021

Attorneys and Law Firms

Thomas & Solomon LLP, Rochester (Michael J. Lingle of counsel), for plaintiff.

Fitzgerald Morris Baker Firth, P.C., Glens Falls (John D. Aspland, Jr. of counsel), for defendants.

Opinion

Robert J. Muller, J.

***1** Defendant Pizza Jerks, LTD (hereinafter Pizza Jerks) is a restaurant owned by defendant Iginio Rovetto with two locations in Warren County, one in the Village of Lake George and the other in the City of Glens Falls. Plaintiff Robert Barlin — who worked as a delivery driver for Pizza Jerks at its Lake George location from approximately May 2017 through November 2018 — commenced this action in February 2020 on behalf of himself and others similarly situated. The complaint includes four causes of action.

In the first cause of action, plaintiff alleges that defendants paid him and others similarly situated a subminimum wage in violation of the Minimum Wage Act (*see* Labor Law § 650 *et seq.*). Specifically, plaintiff alleges that defendants required all drivers to use their own vehicles when making deliveries, and these vehicles had to "be safe, functioning, legally operated and insured." Defendants did not, however, bear any of "the costs associated with [the drivers'] vehicles, including costs of gasoline, vehicle depreciation, insurance, maintenance and repairs." According to plaintiff, he was paid $7.50 per hour and — when taking into account the Internal Revenue Service standard mileage reimbursement rate combined with the number of miles he typically traveled for deliveries — he "was effectively making around $2.14 per hour."

Plaintiff further alleges that defendants impermissibly applied a tip credit to the wages of delivery drivers. [1] In this regard, 12 NYCRR § 146-2.9 provides that "[o]n any day that a service employee or food service worker works at a non-tipped occupation (a) for two hours or more, or (b) for more than 20 percent of his or her shift, whichever is less, the wages of the employee shall be subject to no tip credit for that day." According to plaintiff, "[d]uring every single shift, [he] was required to complete prep work for the store at the

beginning and/or end of his shift[, which included] wash[ing] dishes, mak[ing] pizza dough, proof[ing] pizza dough, mak[ing] pizza sauce, portion[ing] chicken wings, slic[ing] vegetables, cut[ting] deli meats, and stock[ing] pizza boxes." Plaintiff alleges that "[d]uring the winter months, [he] spent at least 4 hours [of his 7-hour] shift performing this prep work," and "during the summer months, [he] spent approximately 3 hours per shift."

In the second cause of action, plaintiff alleges that defendants unlawfully withheld and retained gratuities from him and others similarly situated at its Lake George location. In this regard, Labor Law § 196-d provides that "[n]o employer or his agent or an officer or agent of any corporation, or any other person shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee. 12 NYCRR § 146-2.19 further provides as follows:

***2** "(a) A charge for the administration of a banquet, special function, or package deal shall be clearly identified as such and customers shall be notified that the charge is not a gratuity or tip.

"(b) The employer has the burden of demonstrating, by clear and convincing evidence, that the notification was sufficient to ensure that a reasonable customer would understand that such charge was not purported to be a gratuity.

"(c) Adequate notification shall include a statement in the contract or agreement with the customer, and on any menu and bill listing prices, that the administrative charge is for administration of the banquet, special function, or package deal, is not purported to be a gratuity, and will not be distributed as gratuities to the employees who provided service to the guests. The statements shall use ordinary language readily understood and shall appear in a font size similar to surrounding text, but no smaller than a 12-point font."

According to plaintiff, Pizza Jerks charges a delivery fee at its Lake George location and has "fail[ed] to notify customers that the [fee] is not distributed in its entirety to [the] employees who provide[ ] the [delivery] service."

In the third cause of action, plaintiff alleges that defendants failed to provide him and others similarly situated with wage statements in compliance with Labor Law § 195 (3). The fourth cause of action then appears to pertain only to plaintiff and alleges that defendants failed to comply with Labor Law § 195 (1) (a) which requires that, at the time of hiring, an employee must be given a notice containing, *inter alia*, "the rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other[, and] allowances, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances."

Presently before the Court is plaintiff's motion pursuant to CPLR article 9 for an Order (1) granting class certification; (2) approving plaintiff as class representative; (3) approving Thomas & Solomon LLP as class counsel; (4) authorizing class counsel to send the proposed Notice of Class Action to all class members; (5) authorizing class counsel to post the proposed

Notice of Class Action at defendants' stores in an appropriate location within the kitchen or other non-public area; and (6) directing defendants to produce the class members' contact information. Plaintiff proposes that the following classes be certified:

"(a) *New York Minimum Wages Subclass*: All persons who worked as delivery drivers for [d]efendants at any time in the six years prior to the filing of this action through the entry of judgment in this matter.

"(b) *Illegal Retention of Gratuities Subclass*: All persons who worked as delivery drivers at the Lake George store location who, at any time six years prior to the filing of this action through the entry of final judgment in this matter, did not receive the collected gratuity automatically added on to customers' delivery bills."

A motion for class certification is governed by CPLR 901 and 902. CPLR 901 (a) — entitled "Prerequisites to a class action" — provides that members of a class may sue as representatives of the class if:

***3** "1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

"2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

"3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

"4. the representative parties will fairly and adequately protect the interests of the class; and

"5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

"These factors are commonly referred to as the requirements of numerosity, commonality, typicality, adequacy of representation and superiority" (*City of New York v Maul*, 14 NY3d 499, 508 [2010]; *accord Maor v Hornblower New York, LLC*, 51 Misc 3d 1231[A], 2016 NY Slip Op 50891[U], *2 [Sup Ct, NY County 2016]). CPLR 902 then provides that the Court shall also consider:

"1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;

"2. The impracticability or inefficiency of prosecuting or defending separate actions;

"3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

"4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum; [and]

"5. The difficulties likely to be encountered in the management of a class action."

"While the question of '[w]hether a particular lawsuit qualifies as a class action rests within the sound discretion of the trial court, [i]n exercising this discretion, a court must be mindful ... that the class certification statute should be liberally construed' " (*Maor v Hornblower New York, LLC*, 2016 NY Slip

Op 50891[U] at *2, quoting *Kudinov v Kel-Tech Constr., Inc.*, 65 AD3d 481, 481 [2009]). "The Court of Appeals has explained that the standards for certifying class actions 'should be broadly construed not only because of the general command for a liberal construction of all CPLR sections, but also because it is apparent that the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it' " (*Maor v Hornblower New York, LLC*, 2016 NY Slip Op 50891[U] at *2, quoting *City of New York v Maul*, 14 NY3d at 509 [internal quotation marks and citation omitted]; *see Stecko v RLI Ins. Co.*, 121 AD3d 542, 543-544 [2014]).

Here, plaintiff has gone through each of the factors outlined in CPLR 901 and 902 in painstaking detail in his motion papers. Specifically, with respect to CPLR 901:

1. Plaintiff contends that the class exceeds 40 members — submitting his own affidavit and the affidavits of two other delivery drivers in support of this contention — with numerosity " 'presumed at a level of 40 members' " (*Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 399 [2014], quoting *Consol. Rail Corp. v. Town of Hyde Park*, 47 F 3d 473, 483 [2d Cir 1995]).

2. Plaintiff contends that all members of the class have been injured by the same policies — which violate the same statutes and regulations — and commonality has therefore been satisfied (*see e.g. Shahriar v Smith & Wollensky Rest. Group, Inc.*, 65 F 3d 234, 252 [2d Cir 2011] [concluding that commonality satisfied "where class claims all derive from the same compensation policies and tipping practices" and "all of the class plaintiffs' claims arise under the same New York State statutes and regulations"]; *Hicks v T.L. Cannon Corp.*, 35 F Supp 3d 329, 351-352 [WD NY 2014] [finding commonality where "[d]efendants allegedly provided all class members with deficient wage and tip notices"]).

***4** 3. Plaintiff contends that his claims and defenses are typical of the claims and defenses of the class, as all members of the class were subject to the same policies — and typicality has therefore been satisfied (*see Friar v Vanguard Holding Corp.*, 78 AD2d 83, 99 [1980] [typicality has been satisfied where "plaintiff's claim derives from the same practice or course of conduct that gave rise to the remaining claims of other class members and is based upon the same legal theory"]; *Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 22 [1991] ["Plaintiff's claim is also typical of the claims of other members of the class since it arises out of the same course of conduct as the class members' claims and is based on the same cause of action."]).

4.Plaintiff contends that his counsel — Thomas & Solomon LLP — specializes in wage and hour class actions and is well qualified to handle this case, and that he has no interests which diverge from those of the other class members — and adequacy of representation has therefore been satisfied (*see Nawrocki v Proto Constr. & Dev. Corp.*, 82 AD3d 534, 535 [2011] [finding adequacy satisfied where "plaintiffs seek the same relief as the class members — to receive the wages and benefits allegedly owed to them . . . ."];

Ackerman v Price Waterhouse, 252 AD2d 179, 202 [1998] ["The factors to be considered in determining adequacy of representation are whether any conflict exists between the representative and the class members, the representative's familiarity with the lawsuit and . . . the competence and experience of class counsel."]).

5.Plaintiff contends that a class action is the superior method of adjudication
in this case because the proposed class consists of employees who have each suffered relatively small damages that may not otherwise motivate them to bring an action on their own behalf due to the costs of litigation and hiring an attorney — and superiority has therefore been satisfied (*see* *Pruitt v Rockefeller Ctr. Props.*, 167 AD2d at 21 [finding that class actions are "particularly appropriate where . . . class members have allegedly sustained damages in amounts insufficient to justify individual actions"]; *Super Glue Corp. v Avis Rent A Car Sys.*, 132 AD2d 604, 607-608 [1987] ["The small amount of damages sustained by the individual class members would discourage many of them from pursuing their claims individually, and the number of claimants would render consolidation unfeasible."]).

With respect to CPLR 902:

1. Plaintiff contends that the interest of the class members in controlling the litigation supports certifying the case as a class action because (1) requiring each employee to independently find an attorney to conduct discovery and complete a trial to determine the legality of the same pay policies would be unnecessarily expensive and time consuming; and (2) most members of the proposed classes have not suffered large enough damages to warrant hiring an attorney and funding individual litigation (*see Krebs v Canyon Club, Inc.*, 22 Misc 3d 1125[A], 2009 NY Slip Op 50291[U], *16 [Sup Ct, Westchester County 2009]).

2. Plaintiff contends that it would be inefficient and impractical for the Court to hold a separate trial for each member of the class (*see id.*);

3. It is undisputed that there is no other litigation pending relative to the claims under consideration herein.

4. Plaintiff contends that it is desirable to concentrate the litigation in this forum, given the location of the named parties — with many members of the proposed class likely located in and around Warren County as well.

5. Plaintiff contends that, even when taking into account the difficulties of class action management, the benefits of a class action still far exceed any other method of adjudication (*see id.* at *19).

***5** In opposition, defendants focus solely on the requirement of superiority under

CPLR 901 (a) (5), contending that a class action is not the superior method of adjudicating this matter. Defendants rely upon *Alix v Wal-Mart Stores, Inc.* (57 AD3d 1044 [2008]) (hereinafter *Alix*), wherein two former employees of defendant Wal-Mart Stores, Inc. commenced an action alleging that defendant "failed to properly compensate them and other similarly situated employees and former employees in violation of 12

NYCRR part 142 and Labor Law articles 6 and 19" (*id.* at 1045). More specifically, plaintiffs alleged "that defendant used its store level managers to implement a corporate-wide policy that systematically deprived many of its employees of proper compensation through the manipulation of time records and the implementation of employment practices designed to compel employees to work off the clock without compensation (*id.* at 1045-1046). Plaintiffs thereafter moved for class certification, which motion was denied by Supreme Court (Platkin, J.). The denial was then affirmed by the Third Department, which stated as follows:

"[P]laintiffs failed to establish that a class action is superior to other methods available to them to pursue these claims. Specifically, an administrative remedy is available by which plaintiffs, in their status as employees, could file wage related complaints with the [DOL]. Simply because the Commissioner of Labor's authority to pursue such claims is discretionary, this does not render such a proceeding less effective than a class action. The availability of this administrative process, and its focus on the particulars applicable to each employee's claim, make it in many ways a superior method by which the claims made by plaintiffs, and the proposed members of the class, can be pursued against defendant" (*id.* at 1048 [citations omitted]).

Defendants contend that — just as in *Alix* — the superior method for plaintiff to adjudicate his claims is by filing a wage related complaint with the DOL. The facts in *Alix*, however, are readily distinguishable from the facts in the instant matter. There, the representative plaintiffs' claims were found "markedly different from that of the proposed class[, with] neither alleg[ing] that they were forced or directed to work off the clock by any of defendant's supervisory personnel" (*id.* at 1046). Further, the proposed class consisted of approximately 200,000 current and former employees across all 92 of defendant's locations in New York, each of whom had a different employment scenario. Indeed, in his underlying decision Justice Platkin aptly described the determination of the individual entitlements of the hundreds of thousands of class members as a "Herculean task" (*Alix v Wal-Mart Stores, Inc.*, 16 Misc 3d 844, 864 [Sup Ct, Albany County 2007).

In a later case involving plaintiffs employed as servers at defendants' restaurants and catering venues who alleged violations of Labor Law § 196-d over a three-year period, Justice Platkin found *Alix* to be distinguishable and granted class certification (*see Adams v Bigsbee Enters., Inc.*, 53 Misc 3d 1210[A], 2015 NY Slip Op 52008[U], *7 [Sup Ct, Albany County 2015]). Specifically, Justice Platkin stated as follows:

***6** "While defendants' arguments regarding the availability of an administrative remedy are not without some force, the Court finds that plaintiffs have made an adequate showing of superiority under the particular facts and circumstances of this action. Unlike in [*Alix*], adjudication of class members' claims in this case would not call for the type of intensive, individualized inquiries that are highly problematic in the context of a class-wide adjudication. Further, . . . the claims of all servers who worked during a particular

banquet will stand or fall together. Accordingly, the Court finds that the element of superiority has been sufficiently established" (*Adams v Bigsbee Enters., Inc.*, 2015 NY Slip Op 52008[U], at *7).

Class certification has also been granted in several other cases involving wage and tip disputes since *Alix* was decided (*see e.g. Ferrari v National Football League*, 153 AD3d 1589, 1593 [2017]; *Nawrocki v Proto Constr. & Dev. Corp.*, 82 AD3d 534, 536 [2011]; *Ramlochan v Westchester Shores Event Holdings, Inc.*, 67 Misc 3d 1208[A], 2020 NY Slip Op 50460[U], *5 [Sup Ct, Westchester County 2020]; *Weinstein v Jenny Craig Operations, Inc.*, 41 Misc 3d 1220[A], 2013 NY Slip Op 51783[U], *5 [Sup Ct, NY County 2013]; *Thomas v Meyers Assoc., L.P.*, 39 Misc 3d 1217[A], 2013 NY Slip Op 50650[U], *11 [Sup Ct, NY County 2013]; *Krebs v Canyon Club, Inc.*, 2009 NY Slip Op 50291[U], *17-19). It must also be noted that the Court of Appeals recently remitted a wage dispute for consideration of class certification (*see Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152, 185 [2019]).

Under the circumstances — and given that the class certification statute "must be liberally construed and any error, if there is to be one, should be in favor of allowing the class action" (*Hurrell-Harring v State of New York*, 81 AD3d 69, 72 [2011]) — the Court finds that plaintiffs have established superiority with the finding in *Alix* inapposite. Just as in *Adams v Bigsbee Enters., Inc.* (*supra* the standards for certifying class actions 'should be broadly construed not only because of the general command for a liberal construction of all CPLR sections, but also because it is apparent that the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded (*id.* at *7).

Based upon the foregoing, plaintiff's motion is granted in its entirety.

Counsel for the parties are hereby directed to appear for a conference on **June 25, 2021 at 10:00 A.M.**, with the conference to be conducted virtually using Microsoft Teams.

Therefore, having considered NYSCEF documents 3 through 15, 28 through 30 and 33 through 36, and oral argument having been heard on May 17, 2021 with Michael J. Lingle, Esq. appearing on behalf of plaintiff and John D. Aspland, Jr. Esq. appearing on behalf of defendants, it is hereby

ORDERED that plaintiff's motion is granted in its entirety; and it is further

ORDERED that counsel for the parties shall appear for a conference on **June 25, 2021 at 10:00 A.M.**, with the conference to be conducted virtually using Microsoft Teams.

The above constitutes the Decision and Order of the Court.

The original of this Decision and Order has been e-filed by the Court. Counsel for plaintiff is hereby directed to promptly obtain a copy of the e-filed Decision and Order for service with notice of entry upon defendants in accordance with CPLR 5513.

Dated: June 9, 2021

Lake George, New York

_____s/_____

ROBERT J. MULLER, J.S.C.

ENTER:

All Citations

Slip Copy, 71 Misc.3d 1230(A), 2021 WL 2371969 (Table), 2021 N.Y. Slip Op. 50534(U)

Footnotes

1 A tip credit allows an employer to pay tipped employees less than the minimum wage, provided that the tips received bring the employees' earnings up to the minimum wage (*see* "We Are Your DOL: Minimum Wage for Tipped Workers," New York State Department of Labor, available at https://labor.ny.gov/formsdocs/factsheets/pdfs/p717.pdf).

New York Official Reports

Unreported Disposition
70 Misc.3d 1218(A), 139 N.Y.S.3d 792 (Table), 2021 WL 713987 (N.Y.Sup.), 2021 N.Y. Slip Op. 50143(U)

***1** RM, Plaintiff,
v.
GM, Defendant.

Supreme Court, Warren County
53660
Decided on February 23, 2021

CITE TITLE AS: RM v GM

ABSTRACT

Husband and Wife and Other Domestic Relationships
Divorce
Amendment of Answer to Add Counterclaim —Proposed counterclaim that antenuptial agreement was unconscionable, unenforceable and should be set aside was denied as untimely.

Husband and Wife and Other Domestic Relationships
Divorce
Amendment of Answer to Add Counterclaim —Proposed counterclaim that plaintiff failed to pay child support as required under stipulation of settlement was permitted.

RM v GM, 2021 NY Slip Op 50143(U). Husband and Wife and Other Domestic Relationships—Divorce—Amendment of Answer to Add Counterclaim —Proposed counterclaim that antenuptial agreement was unconscionable, unenforceable and should be set aside was denied as untimely. Husband and Wife and Other Domestic Relationships—Divorce—Amendment of Answer to Add Counterclaim —Proposed counterclaim that plaintiff failed to pay child support as required under stipulation of settlement was permitted. (Sup Ct, Warren County, Feb. 23, 2021, Muller, J.)

APPEARANCES OF COUNSEL

Bartlett, Pontiff, Stewart & Rhodes, P.C., Glens Falls (Paula Nadeau Berube of counsel), for plaintiff.
Martin J. McGuinness, Saratoga Springs, for defendant.

OPINION OF THE COURT

Robert J. Muller, J.

Plaintiff RM and defendant GM executed an Ante-Nuptial Agreement on July 7, 1992, with plaintiff being represented by counsel and defendant "declin[ing] to obtain [legal] counsel." This Ante-Nuptial Agreement provides, in pertinent part:

> "Both parties understand, acknowledge and agree that prior to the marriage, neither has any interest whatsoever in the other's property nor do they have any of the rights and/or obligations as defined in Domestic Relations

> Law [§] 236, [p]art B. They further acknowledge and agree that absent this agreement, they would, upon marriage, acquire an unvested, contingent and undefined interest in all property acquired during the marriage and any increase in value to separate property where either party causes the property to increase in value, under Domestic Relations Law [§] 236, [p]art B. Both parties intend this agreement to be an 'opt-out' agreement as defined by Domestic Relations Law [§] 236, [p]art B, [s]ubparagraph 3 and intend to prevent the other from acquiring any rights whatsoever in any of their property under Domestic Relations Law [§] 236, [p]art B."

The Ante-Nuptial Agreement then reiterated in subsequent paragraphs that "[i]t is the unequivocal intent of the parties that they 'opt out' of Domestic Relations Law § 236 (B) as respects marital property or any increases, changes, exchanges, or other modifications of the 'separate property' even though said property or increase thereto may have occurred subsequent to their impending marriage" with "separate property" defined as "[p]roperty acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party including the spouse."

The Ante-Nuptial Agreement further provided that "[t]hat any judgment, debt, lien, liability or other obligation not directly attributable to an item of property . . . shall be the sole responsibility of the party incurring same as indicated in any judgment or other document evidencing the debt[,]" and "[w]ith respect to joint debts (those debts incurred by the parties together), each party shall be responsible to repay one-half (1/2) of said obligation." Finally, the Ante-Nuptial Agreement included a provision whereby the "Agreement [could] not be changed, discharged or terminated orally. "

The parties married on July 26, 1992 and had two children: the first born in 1994, the second in 1997. Plaintiff thereafter commenced this action for divorce by the filing of a summons with notice on February 17, 2010, alleging abandonment as grounds for the divorce (*see* Domestic Relations Law § 170 [2]). The parties thereafter executed a Stipulation of Settlement on April 23, 2010, with plaintiff agreeing to pay $400.00 per month to defendant for child support until the children "attain[ed] age twenty-one (21) years (twenty-two (22) years . . . if . . . attending college), [were] marrie[d], [or] ceased to permanently reside with the parent . . . designated as the 'custodial parent.'"

The Stipulation of Settlement further provided as follows:

> "Each party represents and warrants to the other that there are no debts or obligations that either has incurred which are not identified on the Schedule of Debts. In the event that a party has incurred a debt or obligation not so identified [he or she] shall be solely responsible for repayment of such unidentified loans or obligation. Neither party will at any time in the future, incur any debt or obligation whatsoever for which the other party,

> his or her heirs, representatives, and successors and assigns, may be or become liable, and shall hold the other party, his or her heirs, representatives, and successors and assigns harmless and indemnified from any and all debts and obligations."

The Schedule of Debts attached to the Stipulation of Settlement then indicates that neither party has any debts or obligations. [1]

Defendant also executed an affidavit on April 23, 2010 "admit[ting] service of the [s]ummons with [n]otice[, and] consent[ing] to [the] action being placed on the uncontested divorce calendar immediately."

The action then sat dormant until September 19, 2019, at which time plaintiff -- then pro se -- filed a note of issue, among other things, in an effort to finalize the divorce (*see* Domestic Relations Law § 211). In response, defendant -- through counsel -- filed a motion to dismiss the action. By letter Order dated January 14, 2020, this motion was granted to the extent that (1) the statements set forth in the affidavit executed by defendant on April 23, 2010 were disregarded, with the exception of the statement admitting service of the summons with notice; (2) the note of issue filed on September 19, 2019 was vacated; and (3) defendant's time to file a notice of appearance and demand for complaint was extended to February 14, 2020.

Defendant subsequently served his notice of appearance and demand for complaint on January 17, 2020. Plaintiff then served her complaint on February 14, 2020, this time alleging cruel and inhuman treatment and irretrievable breakdown of the relationship as grounds for the ***2** divorce (*see* Domestic Relations Law § 170 [1], [7]). Defendant served an answer on March 2, 2020, asserting a counterclaim for divorce on the grounds of irretrievable breakdown of the relationship (*see* Domestic Relations Law § 170 [7]). Defendant also asserted a counterclaim relative to an alleged agreement he had with plaintiff whereby he "performed work on . . . the parties' formal [sic] marital home in Chestertown and a cabin in North Creek, . . . both of which were owned by [p]laintiff or her family prior to the parties' marriage[, with p]laintiff promis[ing that he could have] lifetime use of the properties in exchange." Defendant seeks damages in "the fair market value of the work he performed." Finally, defendant asserted a counterclaim alleging that "[d]uring the course of the marriage, [he] took out a credit card in his name . . . because [p]laintiff had bad credit[, and] the parties spent thousands of dollars on the card that was not paid which resulted in a default on the debt." Defendant alleges that "[p]laintiff is equally liable for [the] marital debt, along with all other debt incurred during the course of the marriage."

In June 2020, plaintiff served a document which appeared to be a response to these counterclaims, which document was rejected by defendant as untimely. Plaintiff thereafter retained counsel in July 2020, with counsel for plaintiff filing a second note of issue on September 25, 2020. Presently before the Court is (1) plaintiff's motion "seeking to file a [r]eply to [d]efendant's [c]ounterclaims in the divorce action, summary judgment [and] a Judgment of Divorce against defendant which incorporates, but does not merge, [the]

Stipulation of Settlement, together with an award of attorney's fees and costs in the sum of $5,000.00; and (2) defendant's cross motion to amend his answer.[2] The motion and cross motion will be addressed *ad seriatim*.

PLAINTIFF'S MOTION

At the outset, defendant concedes that his answer was served just prior to the start of the COVID pandemic and, as such, plaintiff's time to reply was tolled by the several Executive Orders issued by the Governor.[3] Defendant thus does not oppose the first aspect of plaintiff's motion seeking permission to reply to his counterclaims.

Insofar as the second aspect of the motion is concerned, CPLR 3212 (b) provides that "[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." Here, the complaint ***3** annexed to the motion papers is different than the complaint that was filed and served upon defendant. While the differences are largely inconsequential and can likely be disregarded as " defects[s] or irregularit[ies]" under CPLR 2001,[4] neither version of the complaint makes any reference to the parties' Stipulation of Settlement. This of course is the more significant issue, as summary judgment cannot be awarded for relief which has not been requested in the complaint (*see Encarnacion v Manhattan Powell*, 258 AD2d 339 [1999]). Additionally, the grounds for divorce set forth in the complaints do not conform with the grounds set forth in the summons with notice. The grounds for divorce upon which plaintiff seeks summary judgment are thus unclear as well.

It must also be noted that summary judgment cannot be awarded where issue has not yet been joined (*see* CPLR 3212 [a]). To the extent that plaintiff has not yet served a reply to defendant's counterclaims, she is not entitled to summary judgment dismissing them as a matter of law -- which would be necessary for issuance of the Judgment of Divorce.

Under the circumstances, the second aspect of plaintiff's motion is denied.[5] Likewise plaintiff is not entitled to attorneys' fees or costs at this juncture and the third aspect of the motion is also denied.

Based upon the foregoing, plaintiff's motion is granted to the extent that she may serve a reply to defendant's counterclaims, and that the motion is otherwise denied.

Defendant's Cross Motion

Defendant is seeking to amend his answer to add two additional counterclaims: (1) that the Ante-Nuptial Agreement is "unconscionable, unenforceable and should be set aside"; and (2) plaintiff failed to pay child support as required under the Stipulation of Settlement.

"Pursuant to CPLR 3025 (b), a party may amend its pleadings 'at any time by leave of [the] court,' which 'shall be freely given upon such terms as may be just' " (*NYAHSA Servs., Inc., Self--Ins. Trust v. People Care Inc.*, 156 AD3d 99, 101 [2017]; *see Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]). The Appellate Division,

Third Department "previously adhered to a rule requiring the proponent of a motion for leave to amend a pleading to make a sufficient evidentiary showing to support the proposed claim'" (*NYAHSA Servs., Inc., Self--Ins. Trust v People Care Inc.*, 156 AD3d at 101-102, quoting *Cowsert v Macy's E., Inc.*, 74 AD3d 1444, 1445 [2010]). In other words, the movant had "to make an 'evidentiary showing that the proposed amendments have merit' " (*NYAHSA Servs., Inc., Self--Ins. Trust v People Care Inc.*, 156 AD3d at 102, quoting *Dinstber v Allstate Ins. Co.*, 110 AD3d 1410, 1412 [2013]). Recently, ***4** however, the Third Department "depart[ed] from that line of authority and follow[ed] the lead of the other three Departments, ... hold[ing] that '[n]o evidentiary showing of merit is required under CPLR 3025 (b)' " (*NYAHSA Servs., Inc., Self--Ins. Trust v People Care Inc.*, 156 AD3d at 102, quoting *Lucido v Mancuso*, 49 AD3d 220, 229 [2008]; *see Cruz v Brown*, 129 AD3d 455, 456 [2015]; *Holst v Liberatore*, 105 AD3d 1374, 1374-1375 [2013]).

"Thus, the rule on a motion for leave to amend a pleading is that the movant need not establish the merits of the proposed amendment and, '[i]n the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit'" (*NYAHSA Servs., Inc., Self--Ins. Trust v People Care Inc.*, 156 AD3d at 102, quoting *Lucido v Mancuso*, 49 AD3d at 222; *see Kimso Apts., LLC v Gandhi*, 24 NY3d at 411; *LaLima v Consolidated Edison Co. of NY, Inc.*, 151 AD3d 832, 834 [2017]; *Cruz v Brown*, 129 AD3d at 456). As stated by the Third Department, "[t]he rationale for adopting this rule is that the liberal standard for leave to amend that was adopted by the drafters of the CPLR is inconsistent with requiring an evidentiary showing of merit on such a motion" (*NYAHSA Servs., Inc., Self--Ins. Trust v People Care Inc.*, 156 AD3d at 102). "If the opposing party [on a motion to amend] wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment [or to dismiss] upon a proper showing'" (*NYAHSA Servs., Inc., Self--Ins. Trust v People Care Inc.*, 156 AD3d at 102, quoting *Lucido v Mancuso*, 49 AD3d at 229 [citation omitted]).

Here, plaintiff first contends that she "would be completely and utterly prejudiced if defendant were allowed to amend his answer more than 10 years after the action was commenced." She fails, however, to outline the prejudice she would suffer. Indeed, to the extent that plaintiff waited until September 2019 to finalize the divorce, this contention appears to be somewhat disingenuous. Circumstances have clearly changed in the last 10 years. In this regard, defendant's counterclaim relative to child support did not even exist at the time of commencement of the action.

Plaintiff next contends that defendant's counterclaim relative to the Ante-Nuptial Agreement is barred by the statute of limitations and thus patently devoid of merit. Plaintiff relies upon CPLR 213 (2), which establishes a 6-year statute of limitations for breach of contract causes of action. Such reliance is misplaced, however, as CPLR 213 (2) does not apply to prenuptial agreements like that under consideration herein. Rather,

Domestic Relations Law § 250 applies, which provides as follows:

> "1. The statute of limitations for commencing an action or proceeding or for claiming a defense that arises from an agreement made pursuant to [Domestic Relations Law § 236 (B)] entered into (a) prior to a marriage or (b) during the marriage, but prior to the service of process in a matrimonial action or proceeding, shall be three years.
>
> "2. The statute of limitations shall be tolled until (a) process has been served in such matrimonial action or proceeding, or (b) the death of one of the parties."

Here, defendant was served with process on April 23, 2010 and, as such, the statute of limitations relative to the Ante-Nuptial Agreement expired on April 23, 2013 (*see* Domestic Relations Law § 250 [1], [2]). Accordingly, defendant's proposed counterclaim relative to the Ante-Nuptial Agreement is barred by the statute of limitations and shall not be permitted.

Finally, plaintiff contends that defendant's counterclaim relative to child support is patently devoid of merit because -- in essence -- she paid all child support due and owing. ***5** Specifically, plaintiff contends that the parties' son moved in with her shortly after the Stipulation of Settlement was executed and, as such, she was no longer required to pay child support for him. She further contends that the parties' daughter was emancipated as of 2013. While these contentions dispute the allegations in the counterclaim, they fail to demonstrate that such allegations are patently devoid of merit. The Court thus finds that this proposed counterclaim is permissible.

Based upon the foregoing, the cross motion is granted to the extent that defendant may amend his answer to assert the counterclaim relative to child support, and the cross motion is otherwise denied. Defendant shall serve his amended answer with cross claims within thirty (30) days of the date of this Decision and Order, and plaintiff shall then have twenty (20) days in which to submit her reply.

In view of this determination, the second note of issue filed by plaintiff on September 25, 2020 is hereby vacated, with counsel to appear for a conference on April 19, 2021 at 10:00 A.M. at the Warren County Courthouse to establish a new filing date for the same. This conference will be conducted virtually using Microsoft Teams.

Briefly, the Court notes that defendant filed a motion on October 14, 2020 seeking to vacate the second note of issue. This motion -- which was held in abeyance pending the issuance of this Decision and Order -- has now been rendered moot.

Therefore having considered the Affidavit of Paula N. Berube, Esq. with Exhibits "A" and "B" attached thereto, sworn to October 1, 2020, submitted in support of the motion; Affidavit of RM with Exhibits "A" through "K" attached thereto, sworn to October 1, 2020, submitted in support of the motion; Affirmation of Martin J. McGuinness, Esq. with Exhibits "A" through "M " attached thereto, dated November 2,

2020, submitted in opposition to the motion; Affirmation of Martin J. McGuinness, Esq. with Exhibits ”A“ through ”C “ attached thereto, dated November 2, 2020, submitted in support of the cross motion; Affidavit of Paula N. Berube, Esq. with Exhibits ”A“ through ”C “ attached thereto, sworn to November 11, 2020, submitted in opposition to the cross motion; Affidavit of Paula N. Berube, Esq. with Exhibits ”A“ through ”F “ attached thereto, sworn to November 11, 2020, submitted in further support of the motion; and oral argument having been heard relative to the motion and cross motion on February 5, 2021, with Paula Nadeau Berube, Esq. appearing on behalf of plaintiff and Martin J. McGuinness, Esq. appearing on behalf of defendant, it is hereby

ORDERED that plaintiff's motion is granted to the extent that she may serve a reply to defendant's counterclaims, and the motion is otherwise denied; and it is further

ORDERED that defendant's cross motion is granted to the extent that defendant may amend his answer to assert the counterclaim relative to child support, and the cross motion is otherwise denied; and it is further

ORDERED that defendant shall serve his amended answer with cross claims within thirty (30) days of the date of this Decision and Order, and plaintiff shall then have twenty (20) days in which to submit her reply; and it is further

ORDERED that the second note of issue filed on September 25, 2020 is vacated, and it is further

ORDERED that counsel shall appear for a conference on April 19, 2021 at 10:00 A.M. at the Warren County Courthouse to discuss a new date for filing of the note of issue, with this conference to be conducted virtually using Microsoft Teams; and it is further

ORDERED that defendant's motion to vacate the second note of issue is hereby deemed ***6** withdrawn as moot.

The original of this Decision and Order has been filed by the Court together with the Notice of Motion dated October 1, 2020, Notice of Cross Motion dated November 2, 2020 and the submissions enumerated above. Counsel for defendant is directed to obtain a filed copy of the Decision and Order for service with notice of entry upon counsel for plaintiff in accordance with CPLR 5513.

Dated: February 23, 2021

Lake George, New York

s/

_____

ROBERT J. MULLER, J.S.C.

ENTER:

FOOTNOTES

Footnotes

1 Neither party was represented by counsel relative to the execution of this Stipulation of Settlement.

2 Defendant had also filed a Notice of Motion dated October 14, 2020 which included the affirmation of Martin J. McGuinness, Esq. dated October 14, 2020 together with Exhibits ”A“ through ”F“ to vacate the second note of issue which motion was held in abeyance pending the outcome of this motion and cross motion. The same is attended to herein to abide the present Decision and Order.

3 Specifically, plaintiff's time to reply was tolled under Executive Order 202.8 -- issued on March 20, 2020 -- until April 19, 2020. Executive Order 202.55 -- issued on August 5, 2020 -- then extended this toll to September 4, 2020; and Executive Order 202.60 -- issued on September 4, 2020 -- extended it to October 4, 2020. Plaintiff then filed her motion on October 5, 2020.

4 Although unclear, it appears that plaintiff attempted to handwrite duplicate originals of the complaint but failed to make them exact duplicates. For example, one indicates that the parties were married in the ”Town of Chestertown“ while the other simply states that the parties were married in ”Chestertown.“

5 Plaintiff may renew this aspect of the motion seeking summary judgment, but she must first amend her complaint to seek incorporation of the Ante-Nuptial Agreement and Stipulation and Settlement, and she must also serve a reply to defendant's counterclaims.

Torts and Civil Practice: Selected Cases from the Appellate Division, 3rd Department

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Torts and Civil Practice: Selected Cases from the Appellate Division, 3rd Department

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Parent's negligent supervision claim survives SJ motion.

Justin M. v. Beadle (Reynolds Fitzgerald, J., 2/18/21)

Plaintiff's 11-year old son was catastrophically injured as a result of his attempt to perform a flip off a picnic table into snow. The boy had spent the night at the home of his 13-year old friend - per the agreement of the friend's mother, who was in a long-term relationship with the plaintiff (although they maintained separate residences). The boys were supposed to go to school that morning but schools were closed due to snow, and the mother went to work, leaving the boys home with her college-age daughter. Supreme Court (Burns, J., Chenango Co.) denied the defendants' motion for summary judgment on the plaintiff-father's negligent supervision cause of action which the Third Department modified by dismissing the claim against the daughter Cno duty to supervise the infant") but affirmed non-dismissal against the mother, noting that adequacy of supervision and proximate cause are issues that generally must be resolved by a jury.

Hole in attic floor sinks landlord's summary judgment motion.

Hill v. Aubin (Colangelo, J., 11/25/20)

Plaintiff fell and suffered severe hip injuries after stepping on a wooden floorboard plank that cracked as she exited the attic of defendant's two-family home (where she rented and lived in the second floor apartment). The floorboard that snapped had been cut by the prior owners of the home to accommodate a ventilation pipe into the attic. The defendant, who purchased the property (and lived on the first floor) in 2008, moved for summary judgment dismissing the complaint, arguing that the allegedly dangerous condition was a latent defect about which he had neither actual nor constructive notice. Plaintiff testified that she and a friend went to the attic at the defendant's request to relocate boxes she was storing and to remove other boxes she no longer needed. Plaintiff disputed defendant's contention that the boxes obstructed any view of the ventilation pipe, and defendant acknowledged that he went into the attic once or twice a year to change a furnace filter. Supreme Court (Powers, J.,

Schenectady Co.) denied the defendant's motion and the Third Department affirmed, agreeing that "a reasonable person" looking at the floorboard would have seen the large cutout to accommodate the pipe "and questioned the structural integrity" of that part of the attic floor.

Failure to file proof of service vacates default judgment.

Miller Greenberg Mgt. Group, LLC v. Couture (Egan, J., 4/29/21)

The defendant was served with plaintiff's breach of contract action on November 20, 2017; after which plaintiff filed its affidavit of service with the Albany County Clerk. Defendant failed to answer or otherwise appear, leading to a default judgment in plaintiff's favor. Supreme Court (Hartman, J., Albany Co.) denied defendant's motion to vacate the default judgment but the Third Department reversed, concluding that plaintiff's filing of the affidavit of service was untimely (4 days later than the maximum 20 days permitted under CPLR § 308(2)); meaning that "service of process was never completed". The Appellate Division noted that while the failure to timely file a proof of service is not a jurisdictional defect, the procedural irregularity was not cured by court order, making this default a nullity because the defendant's time to answer never began to run.

Recalcitrant worker defense fails in Labor Law § 240(1) injury claim.

Bennett v. Savage (Garry, P.J., 3/4/21)

Plaintiff, standing on a wooden, A-frame ladder while insulating the defendant's building, felt the ladder move forward; causing him to fall and sustain injuries. Defendant, emphasizing plaintiff's testimony that the ladder was "sturdy" and positioned (by him) to prevent it from "wiggling", argued that plaintiff was a recalcitrant worker who acted recklessly. Supreme Court (Tait, J., Broome Co.) disagreed and granted plaintiff's motion for liability under Labor Law § 240(1), which the Appellate Division affirmed. Agreeing with the trial court that the plaintiff's deposition testimony was unclear whether he maintained a "three-point safety stance while on the ladder", the Third Department noted that even if that issue was decided in defendant's favor, evidence of a plaintiff's comparative negligence does not relieve a defendant of liability under Labor Law § 240(1).

Governmental immunity doctrine blocks claims against firefighters.

Stevens & Thompson Paper Co. v. Middle Falls Fire Dept., et al. (Devine, J., 11/25/20)

Arson was suspected as the cause of a large fire at a vacant paper mill in Greenwich. Without access to fire hydrants, firefighters used a fire engine to

pump water from a nearby canal fed by the Battenkill River. Plaintiff, the former owner of the paper mill, owned and operated an adjacent hydroelectric facility which sustained significant mechanical damage – due to a stream of water that passed over the facility during the course of extinguishing the paper mill fire. The plaintiff's negligence, nuisance and trespass claims against the fire departments were dismissed by Supreme Court (Auffredou, J., Washington Co.) and the Third Department affirmed in reliance on the governmental immunity doctrine that "shields public entities from liability for discretionary actions". Plaintiff's negligence claims against the property owner were also dismissed on a finding that while the defendant company may have had reason to secure the mill against trespassers; "there was no prior history or other reason to suspect that arson was a risk".

Plaintiff's amendment to complaint fails "relation back" test.

Fasce v. Smithem (Reynolds Fitzgerald, J., 11/25/20)

Plaintiff, as administrator of decedent's estate, brought this medical malpractice and wrongful death action against a nurse practitioner, physician and hospital arising out of a 5-day hospitalization in 2016. After expiration of both applicable statutes of limitation, plaintiff successfully moved in Supreme Court (Schick, J., Sullivan Co.) for leave to amend the complaint, using the "relation back" doctrine to add two medical groups (Crystal Run) as defendants, while discontinuing all claims against the nurse practitioner and doctor. Reversing, the Third Department ruled the amended complaint was improper, finding plaintiff failed to show that the Crystal Run defendants were united in interest with the original defendants and that the would-be defendants knew or should have known that but for plaintiff's identification mistake, the action would have been brought against them.

Jury verdict for plaintiff in trip-and-fall action reversed.

Vnuk v. City of Albany (Colangelo, J., 2/4/21)

Plaintiff was hurt after tripping and falling over the footing of a traffic pole and signal that protruded from the sidewalk after the traffic signal had been removed. The defendant, which asked for the signal to be removed as a part of a private developer's hotel renovation project, moved for summary judgment on the ground that it did not receive prior written notice of the alleged defect – as required by the City Code. Supreme Court (Platkin, J., Albany Co.) denied the motion, and rejected the argument a second time when the City moved for judgment as a matter of law at the close of evidence during trial (which ended with a verdict for plaintiff). Reversing that judgment and dismissing the complaint, the Third Department found no proof that the defendant was on

notice of the defect and further ruled that "the City's failure to inspect the sidewalk is an omission that does not constitute affirmative negligence that excuses compliance" with the City's written notice requirement (because non-inspection did not *immediately* cause the defective condition).

Court of Appeals: "Zone of danger" rule expanded to include claim by grandparent.

Greene v. Esplanade Venture Partnership (2/18/21)

New York's "zone of danger" rule permits a plaintiff who was threatened with bodily harm due to a defendant's negligence to make a recovery for emotional distress resulting from witnessing the death of or serious physical injury to a member of the plaintiff's immediate family. Considering the claim of a grandmother whose 2-year old granddaughter died after being struck by debris that fell from the façade of the defendant's building, the Court of Appeals – reversing a divided Appellate Division – concluded that "a grandchild is the 'immediate family' of a grandparent" when applying the zone of danger rule.

The Practice Page

Mark C. Dillon is a Justice of the Appellate Division, 2nd Dept., an Adjunct Professor of New York Practice at Fordham Law School, and a contributing author of CPLR Practice Commentaries in McKinney's.

THE PRACTICE PAGE

Hon. Mark C. Dillon *

AUTHENTICATING RECORDS UNDER CPLR 4540-a

CPLR 4540-a is a relatively new statute, effective on January 1, 2019 (L.2018, ch. 219, sec. 1). The statute is only two sentences long. The first sentence directs that if a party provides discovery pursuant to CPLR Article 31, and includes material "authored or otherwise created" by the responding party itself, the adverse party receiving the material may offer it into evidence with a presumption of authenticity. The second sentence provides that the presumption may be rebutted by a preponderance of the evidence that the material is not authentic. Since legal presumptions may always be rebutted, the second sentence of the statute adds little, other than to define the preponderance standard applicable to this instance of rebuttal. The second sentence also states that a rebuttal to authenticity does not preclude any other objection to the material's admissibility. In other words, the statute is only what it is.

Some observations are in order. Material provided by a party during discovery may be of admissible relevance at both summary judgment and at trial. CPLR 4540-a is written broadly enough to be applicable to both. Practitioners may therefore proffer material authored or created by the adversary as evidence in chief, without having to establish its authenticity. Examples may conceivably include accident reports, photographs, recorded statements, business records, and tax returns. If a party moves for summary judgment, for example, and attaches an adversary's self-authored discovery material to meet the prima facie burden of proof on the motion, the opposing party cannot object on authentication grounds unless prepared to contest the authenticity of its own previously-disclosed material.

The legislative intent behind the statute is to relieve parties of proving the authenticity of an adversary's self-created material offered as evidence, when authenticity would typically not be a contested issue anyway. The presumption of authenticity saves the offering party the time, trouble, and expense of establishing the material's genuineness, and saves the court the trouble of adjudicating the issue. In the rare event that a party's disclosed material is a product of forgery, fraud, or other defect, the disclosing party may utilize the backstop provision of CPLR 4540-a to challenge the legal presumption, by producing a preponderance of evidence that the material is not authentic. By that means, the producing party may protect itself from the pitfalls of being victimized by an unwitting disclosure of inauthentic material.

The statute is limited to material authored or created by the party providing it in discovery (*Sands Bros. Venture Capital II, LLC v Park Ave. Bank*, 67 Misc.3d 1216[A] [Sup. Ct. NY Co. 2020]) . The statutory presumption does not extend to material authored or created by third parties outside of the producing party's vicarious control, or to material obtained from non-parties.

CPLR 4540-a does not displace other methods of authenticating evidence, but merely augments the means by which it may be established. A party proffering material as evidence at summary judgment or trial may, if it chooses, use other recognized methods for establishing the material's authenticity and admissibility.

The statute is still too young to have generated much decisional authority. So far, the Fourth Department held the statute inapplicable to the medical records of a plaintiff's physician, as they were not created by the plaintiff herself (*McCarthy v Hameed*, 191AD3d 1462 [Feb. 11, 2021]). The result would likely be different in a medical malpractice action involving records disclosed by a defendant physician as the self-generating party. One reported decision from the Supreme Court, Monroe County, *Messinger v Messinger*, 66 Misc.3d 1222(A), involved a dispute between ex-spouses over their proportional responsibilities toward a child's college expenses. The spouses' respective contributions would be affected by their incomes and assets. At trial, the court held that the father had "created" a document that he had downloaded from his pension account and was within CPLR 4540-a, even though the actual contents were derived from a state pension website. However, the court also directed that the father could establish in a supplemental submission that the documentary material was inauthentic under the second sentence of CPLR 4540-a. The holdings of *McCarthy* and *Messenger* may not be entirely consistent with one another, as in both cases the records in question were created by a non-party but produced different results.

Stay tuned for further court decisions on this statute.

Mediation in Warren County

Elizabeth E. Little is of counsel to FitzGerald, Morris, Baker, Firth, PC. She is a newly trained mediator for civil law and family disputes and is a Part 146 panelist for the 4th Judicial District. Ms. Little is involved in the community serving as President of the Crandall Park Beautification Committee, a trustee of Crandall Library and an Advisory Board member of the World Awareness Children's Museum. She is married to Robert Hogan and resides in Glens Falls with her four children.

Mediation in Warren County
by Elizabeth E. Little, Esq.

With Chief Judge Janet DiFiore's desire to "transform the old culture of 'litigate first' to a new culture of 'mediate first' in all appropriate cases", the role of mediation in our justice system is on the rise. I have a Pollyanna like enthusiasm for mediation, but attorney buy in to this culture shift seems to be slow moving. This article explores the benefits of mediation.

First a little background.

Mediation, a form of Alternative Dispute Resolution (ADR), involves parties voluntarily and confidentially working with a mediator to develop a resolution of their conflict. Unlike arbitration, a mediator will not decide the case. The mediator is a neutral person who is trained to help the parties explore the issues and develop a mutually acceptable solution. If the parties reach a resolution, a mediator may help draft a settlement agreement. The parties, not the attorneys, play the central role in mediation.

Mediation should not be thought of as a version of a settlement conference where typically the attorneys and the judge hammer out a way to avoid a trial. Mediation is a chance for the parties to communicate with each other and to listen to each other without the lens of their attorneys. The parties are protected by confidentiality and may speak freely to each other and explain why the relief sought is important to them. For most civil litigation, once a lawsuit starts the parties essentially lose control. All communication happens through their attorney. Mediation can be thought of as a "timeout" where the parties can talk directly to each other to express what they need and why. The lawyer is not on the sidelines here and may actively participate in the mediation. The attorney will advise the client of the alternatives to a negotiated agreement and assist the client in the mediation. If an agreement is developed, the mediator will advise the parties to review the agreement with their attorney. In all circumstances, mediation works best when the client meaningfully participates.

What is an appropriate case?

Cases that are appropriate for presumptive ADR will be determined by the court. They will generally involve matters where a power imbalance does not exist or where it would not be unhealthy, unsafe or inappropriate to force the parties to communicate with each other. Criminal matters and matters with allegations of abuse are presumed exempt from ADR. The court system maintains a list of other types of cases presumed exempt such as Habeas Corpus, Election Law,

Paternity and Abuse and Neglect proceedings. A full listing of exempt matters may be found at https://ww2.nycourts.gov/courts/4JD/ADR.shtml.

When will ADR happen?

The 4th Judicial District has determined that for each appropriate case, an ADR plan will be established at the preliminary conference with counsel or the party, if self-represented. In non-matrimonial Supreme Court cases the assigned judge will determine the "ADR Track" which will include one of the following measures:

1. Arbitration – compulsory
2. Mediation with court staff
3. Mediation with a Part 146 neutral
4. Mediation with a privately retained neutral
5. Neutral Evaluation by a Part 146 neutral
6. Settlement conference with Judge
7. Settlement conference with court staff (including a JHO)
8. Summary Jury Trial

The 4th Judicial District has established similar guidelines for Matrimonial, Family Court, Surrogate Court and City Court cases.

Attorneys and their clients may choose to participate in mediation before the court selects the ADR track. Mediation may happen before litigation is commenced or anytime thereafter. With clients of limited means or when the parties have an important relationship with those with whom they have a dispute, early mediation is especially helpful. Mediation can save the parties money while keeping the dispute private.

Who pays for this?

For decades, mediation services have been available through local Community Dispute Resolution Centers (CDRC) such as Mediation Matters which covers Warren County. CDRCs are grant funded and waive fees for individuals seeking services. Mediation services are provided by paid staff and trained volunteers. The majority of mediations handled at Mediation Matters involve small claims, parenting issues, landlord tenant cases, youth in school and intra-family challenges. A recent development in mediation is Part 146 of the Rules of the Chief Administrative Judge. Mediators who serve on the court roster as a Part 146 panelists have to meet training and experience requirements. Each judicial district has its own set of rules pertaining to neutrals on their panels and the method of selection. Apart from the Part 146 panel, anyone can say they are a mediator and start a mediation practice as this is a fairly unregulated area; however, courts are not likely to assign

someone without training or experience. A recent Ethics Opinion (1222 [04/12/2021]) held that attorneys and non-attorneys cannot form a mediation practice if the attorney will provide legal services to the clients.

Concerning mediator compensation in the 4th Judicial District, mediators may be paid $90 an hour for necessary pre-mediation work (2-hour limit) and shall be paid $150 per hour for the first two hours of mediation. These fees are to be split between the parties unless one of the parties does not have the means to pay. Mediators are required to provide pro bono services on every fifth case they are assigned. Many courts also have mediators on staff who are able to mediate a case at no charge to the parties. The judge assigned to the case will make the decision if the case is appropriate for ADR and will instruct the parties as to the method of ADR. Private mediators, working outside of the Part 146 structure or after the initial two hours of mediation, set their own fees.

Best practices…

Experienced mediator Attorney Jaclyn Brilling, who has mediated cases for over thirty-five years, states as follows: "I find that disputants, especially families in conflict over custody and visitation issues, retain better control over the outcome of the conflict in a mediation than in a litigated proceeding. Mediation assists the family in establishing communication for the long term. Mediation can be used to resolve part of the problem. Specifically, the parties can use mediation to draft partial agreements on a "ramp-up" or trial basis if the parties are willing to ease into an agreement. Parties then come back to the mediation table after a few months to see how the interim agreement is working. In this way, mediation represents a less costly method of resolving a conflict than through court litigation."

Our local Judge's thoughts on mediation……

The Honorable Robert J. Muller, Supreme Court Justice commented, "When cases before me settle at any point before the verdict I have always made it a point to compliment the litigants for having the wisdom to avoid the uncertainties of a verdict and settle their controversy on their own and entirely non-appealable terms. In those final moments, as I have often observed, none of the parties are particularly satisfied with the terms of their settlement and take little comfort when, from the Bench, I suggest that their equally shared disappointment is their best evidence of a fair settlement. When observations such as these can be effectively communicated by the Court with some degree of formality at a preliminary conference the enthusiasm for mediation looks the more

logical and practical alternative to protracted litigation which, we all know, is costly in one's time, personal turmoil, and treasure. Mediation? I'm all for it."

When asked why trial attorneys should embrace mediation, the Honorable Kathleen B. Hogan, Court of Claims Judge and Acting Supreme Court Justice, stated that, "People seek attorneys who know how to navigate the law to fix their problems. But not all problems need to be resolved by a lawsuit in a courthouse. If you want a reputation as an attorney who gets things done, mediation is an important quiver in your arsenal. Litigants, particularly those with limited resources, stress not only about the uncertainty and delay in litigation but also the expense. Your efforts on their behalf, while noble, cannot eliminate any of those worries. An attorney who guides a client through a mediated outcome will be credited as the reason there was a good, cost effective result. You will be viewed as the fixer. In a community like ours, when you develop the reputation for getting good results for your clients, you have plenty of work to keep you busy and the satisfaction of knowing you did right by people when they needed you most. "

The Honorable Martin D. Auffredou, Supreme Court Justice also had a positive view of mediation. He stated, "The benefits of engaging in mediation are readily apparent. Employing the assistance of a trained neutral to mediate disputes should be encouraged at all stages of litigation. In my experience, all too often, consideration of mediation pre-commencement of an action is overlooked and opportunity to achieve certainty of result at significantly reduced cost is lost. Mediation is a unique and invaluable mechanism which, with the assistance of a neutral, permits the parties to engineer outcomes that may not otherwise be achieved if the fate of the underlying dispute is left to a jury or judge. There is never a downside to mediation."

Local bar's thoughts….

Greg Canale has found that "litigation attorneys are not effective mediators. Almost by default, the dynamic of the attorney-client relationship often drives the analysis into a sum-zero paradigm, extenuating the strengths and mitigating the weaknesses. A mediator is the first neutral, non-stakeholder who will carefully listen to your client's story. It's the first time the client gets empathy and unvarnished feed-back---free from the unconscious bias of their lawyer. There is a cathartic feeling when a client finally expresses their story to a neutral mediator: After which, the client seems far more open to personally tailoring a resolution and much less interested in giving up that power to the uncertain perceptions of a judge or jury."

The ability to eliminate uncertainty with a mediated settlement agreement is what is appealing to Attorney Jace Cullum who said, "Mediation is an excellent means of circumventing

uncertainty, i.e. risk, by tempering the amount of damages in cases where there is a risk of an unfavorable liability outcome. Its value is even more apparent in the "all or nothing case" where damages are substantial, and the uncertain liability outcome poses a great risk to both sides. Even where liability risk is minimal, economic and non-economic damage issues standing alone can often be subject to resolution by mediation. At the same time, litigation expenses can be kept proportionate to case value via mediation where, for example, trial witnesses are numerous, expensive or difficult to produce." In terms of choosing a mediator, Mr. Cullum advises litigation experience in addition to mediation training. He stated that "In most of these cases involving common law liability and damage issues, the parties benefit by the use of a mediator with litigation experience beyond mediation training."

Conclusion

As Administrative Judge Felix J. Catena recently stated, "We expect the use of mediation in our judicial district to grow and help reduce court congestion. It is cost effective and time efficient, a true benefit to the people who seek solutions in our court system." Mediation as a form of ADR may benefit your clients and improve your practice. Although, injecting a client-controlled element into litigation may seem like a risky gamble; it can yield great results and is protected by confidentiality. It is hoped that attorneys will not request to opt out of mediation unless true good cause exists. Mediation is the future and has the potential to assist the public in quickly resolving disputes in a manner that suits their personal interests. Many of our local justices as well as many in the bar support mediation. Trial attorneys need not wait for an ADR track to be assigned to them; they may help to solve their client's disputes in a cost effective and confidential manner by meaningfully engaging in early mediation. Mediators with litigation experience are available to assist achieving a less expensive, quicker and personal process to solve a dispute.

Footnotes: The 4th Judicial District has established a set of rules regarding ADR that can be found at: https://www.nycourts.gov/LegacyPDFS/courts/4jd/Part146ProgramRules4thJD.pdf

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