WARREN COUNTY BAR ASSOCIATION, INC.

WINTER-SPRING 2024 **TIPSTAFF** Volume V Issue 2

Dear Colleagues,

Happy Spring! The fall was busy, and we are on our way to an even busier spring!

Since the last opportunity to address you, our annual Mannix Dinner, was a great success with 50 "seasoned" and young attorneys gathering for another delicious Chicken Parm and Spaghetti Dinner. Jason Carusone, once again, went home with the trophy for best dessert! Many thanks to Charlie Hoertkorn, our favorite chef, and to all the judges, who spent 2 evenings cooking and serving the group!

Thanks, again, to the hard work of Maria Nowotny, on December 5th, we hosted another informative CLE entitled, *Cybersecurity and Data Protection: Safeguards, Privacy and Your Obligations*, presented by James A. Long. Esq.

The next night, we gathered for our holiday party at Morgan & Co. What a great spot to gather on a cold winter night to share holiday cheer and toast the coming year! The food was wonderful, and we all know that the camaraderie never disappoints! Thanks to your generosity, we were able to donate plenty of hats, scarves and mittens to the children at Warren County Head Start!

As spring approaches, the Mock Trial Committee, under the direction of Hon. Glen T. Bruening, has several evenings planned for area competitions to take place. Last year, around 90 gifted students competed locally, and the amazing Greenwich High School team was the regional winner of the 2023 competition. This year is sure to be just as impressive, and we were happy to learn that the New York State Bar Association finally allowed Warren County's long sought rule-change allowing area school districts to combine (with approval from the State committee) in order to increase participation numbers.

The March Mixer Committee has already met several times to plan a very special night! This year, Dennis Tarantino, Chair; Brian Borie; Rose Place; Greg Teresi, and Jill O'Sullivan are planning the mixer, which will celebrate past WCBF scholarship recipients! Please mark your calendar to join us on Thursday, March 21st at the Queensbury Hotel!

And, as early as it may seem, Law Day Chairman Matthew Skinner and the Law Day Committee have begun plans for another meaningful celebration in early May!

As you can see, the "sun never sets" on the Warren County Bar Association. We hope you are enjoying your membership and that you can join us for some of or, better yet, all of the events we have planned in the coming months.

Please enjoy this latest edition of *Tipstaff*. Filled with many photos of our recent events, some very interesting case summaries and articles from several members, it's a great read. Please consider submitting an article in future editions. There's always room for one more!

As always, I encourage each and every one of you to reach out to your Warren County colleagues to "bounce ideas off of each other," discuss case issues, or obtain a different perspective. We have great resources amongst us, use them!

Sincerely,
Eric

THE MANNIX DINNER
NOVEMBER 15 & 16, 2023


EXIT

Nearly 50 attorneys and judges came together to share an evening of food, friendship and great conversation as we gathered at the Church of the Messiah to enjoy the annual Mannix Dinner, once again. The evening before, our judges, along with Chef Charlie Hoertkorn, prepared a delicious dinner of Chicken Parmesan, Spaghetti and salad, while our young attorneys helped set up! The next night, the judges served the attorneys the delicious meal! And, for the second year in a row, District Attorney Jason Carusone won the trophy for best dessert!

by James Cooper, Esq.

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

DON QUIXOTE HUGHES

Hughes' opponent in the 1906 contest for Governor was none other than William Randolf Hearst who had left California to establish a base in New York. He had failed in an effort to gain the presidential nomination and thereafter, ran for Mayor of New York. In the mayoral contest, he used his newspaper in New York to attack Tammany Hall. Print media then had a monopoly on information. They were more necessary to the public than the internet is now. He lost by a small margin evoking sympathy that the election had been fraudulent. He made up with Tammany and gained the Democrat nomination for Governor. He spent a fortune at the time and employed all the vitriol that his newspaper, the New York *Journal*, could generate to characterize Hughes as a cold fish and tool of corporations, notwithstanding that he controlled twenty-one corporations himself, many as tax dodges. Tammany sent a provocateur to a Hughes rally at Utica to disrupt the speaker. The audience shouted to throw him out, but the speaker, lawyer Elihu Root, said, "Let him stay. He may learn something."

Hughes proved to be a likable campaigner, jocular and gregarious. He focused on issues and refused to personalize criticism of Hearst. Hearst's press use of personal attacks including Hughes' physical appearance was offset by the major New York newspapers Hughes had won over in the gas and insurance hearings. Pulitzer's *World* was unstinting in praise of Hughes. He won the election by a significant margin, and although the Republicans were able to hold the legislature because of him, there was a down ballot bloodbath for other statewide offices. One wonders if Hearst mounted his train car back to California and whispered, "Rosebud." Hughes had put an end to his political aspirations and *ad hominum*, bombastic, campaign tactics. Bosses hopes that the Hughes campaign rhetoric against them was only to gain votes, proved to be mistaken. Their hopes that he would govern as a 'go along to get along' Governor were soon dispelled.

As Governor elect, Hughes attended a retreat at Camp Kill Kare, close neighbor to the Great Camp Sagamore near Raquette Lake. The leaders of the legislature were sounding him out to see if he could be worked with in the traditional way. Hughes enjoyed the sleigh rides and fellowship, but gave no joy to the leaders. After taking office he conducted regular morning public audiences where he listened to citizen complaints and suggestions. The party regulars were insulted that they had to wait in line with the ordinary public. Hughes accepted party suggestions for appointments to positions provided that the designee was a man of competence and proven ability. There was a honeymoon period with the press which celebrated Hughes pronouncements consistent with his campaign promises to conduct open and 'boss free' government. This tapered off when Hughes attempted to clean house from some Republican commissioners appointed by his predecessor. One such was Commissioner of the Department of Insurance.

Hughes agreed that the Kelsey was honest, but thought him hopelessly feckless. His office had been packed with patronage appointees indifferent to their duties. He attempted to get the man to agree to another post. Ultimately he asked him to resign, he wouldn't. Hughes wanted to remove him but was handicapped by state law then that required approval by the Senate. Hughes found an old statute that allowed him to "take proofs" of an office holder before

recommending a removal to the Senate. Hughes personally conducted the examination in his offices in which Kelsey admitted that what had happened under his auspices was scandalous, but that he hadn't removed subordinates because he didn't want to hurt their feelings and because he felt that their experience was important. One reporter called the examination of Kelsey "...the most cruel stripping of a man in public ever seen." The Senate voted 27 to 24 not to remove Kelsey. Because of this event and consistent refusal on Hughes' part to play ball, a majority of the Republican legislature was in full revolt.

Although Hughes had success in persuading the legislature to create a Public Service Commission, he was unable to get the legislature to act on reforms for the life insurance industry. The impasses with the legislature evolved into increasing disappointment in the press that he was failing to implement campaign promises, psychologically enhanced by thinking it the start of a long fall from a high horse.

Hughes, now without unified support from his own party, continued to propose legislation that he thought beneficial. After the Kelsey defeat, he saw the need to empower the executive branch and improve the quality of the life of New Yorkers by creating administrative agencies to regulate businesses that had no financial incentives to do so. At that time in metro New York, 500 people a year were killed by trains, 2,000 injured, for example. Hughes proposed the creation of commissions to regulate business practices to accomplish those goals. He was a capitalist and viewed these as efforts to secure safety, fairness and justice for the public while fostering vibrant growth of industry, not to dictate its practices. He met immediate opposition, scorn and ridicule from legislators. He had brazenly proposed that the Governor should have authority to remove commissioners of the agencies without Senate approval. He began an almost Quixotic effort to travel to all corners of the state to promote his reforms. He was a dynamic speaker, so his speeches were a big event for regional citizens. He was set up at a Chamber of Commerce dinner in Elmira where a prominent local politician and opponent of Hughes' reforms was placed to be the last speaker. Hughes sized up the dynamic and asked to change places. Hughes had vetoed a railroad bill. When the adversary in his closing remarks alluded to Hughes as being on retainer of the railroads, Hughes abandoned his prepared speech and extemporaneously responded that he WAS under retainer, retained by the people of New York to see that justice was done. Surprising to the political establishment, a groundswell of support developed together with passionate press endorsements. When legislators returned to their constituencies, they were beset by angry citizens demanding support for the Governor's legislation. His bill passed. He proposed others including political reform to allow primary elections and limits on campaign financing. He got the first workmens compensation law enacted. Judicial review of the acts of an agency was limited exclusively to whether there was substantial evidence upon which to base the agency determination, (unless there was unconstitutionality or violation of a statute). He thus became the father of modern administrative law.

The Governor cut things right down the middle. He vetoed popular bills when he thought them unconstitutional. A bill to give equal pay to female teachers in the city was vetoed because he held that it violated the home rule law. Popular limits on railroad fares was vetoed because the legislature had conducted no factual investigation of those business practices.

He was ahead of his time in race relations: He said that "The Negro",

> is entitled to the advantages of training and education. He is entitled , under the stimulus of free institutions, to an opportunity to prove by his works what is in him and to make his contributions, according to his talent and aptitude, to the sum of our productive labors and of our national life; and he is entitled to the rewards which his character and industry may deserve. There is no color line in good work, whether hand or brain...It has well been said that whatever problems the progress of the Negro may present, it is not comparable with that which will be presented by stagnation or retrogression. In this land the door of opportunity must be wide open to our citizens. We want neither slaves or serfs nor any body of citizens permanently below the standards which must be maintained for the preservation of the Republic. We cannot maintain our democratic ideals as to one set of our people and ignore them as to others.

We can't know exactly because it was before there was polling, but there seems to have been widespread admiration of the man. Hughes usually worked until the early hours of the morning. The energy he devoted to his job led many editorialists to comment that New York had never seen such a governor. As he had done as a lawyer, he regenerated by vacationing in wild areas. His family rented a cottage at the Saranac Inn. The following summer he hiked from Lake Placid with his son, then a junior at Brown, into the heart of the High Peaks, through Indian Pass, fished in Lake Colden, and climbed Mount Marcy. He loved it. He said that he wanted to climb all of the mountains but was before his time as the Adirondack 46rs were yet to be organized. He liked the area so much that he purchased a lakefront cottage on Upper Saranac Lake.

There continued to be struggles for him with the legislature. The irony for his administration was that he had saved the party majority in both houses, but the majority members he saved were deeply invested in the political system that had evolved in which it was expected to be financially rewarded for gaining a seat. To perpetuate this, one had to play a role in the elaborate party patronage structure that delivered votes. President Roosevelt understood the game and had manipulated it skillfully to maneuver the legislature when he was Governor. He began to be disenchanted with Hughes' refusal to play it. Reporters sensed an estrangement and to make copy played a dishonest role in encouraging Roosevelt to believe that Hughes was disparaging him behind his back. TR had a massive ego that could not shrug that off, even though untrue. Hughes eventually outlasted this misconception on TR's part to gain his support for Hughes' greatest reform priority of getting an open primary system for elections in New York. Open primaries would strike at the heart of party control of candidacies, so Hughes' legislation repeatedly failed even after he had watered it down.

He had put away life savings of $100,000. as a lawyer. As Governor he was paid a yearly salary of $10,000. Gradually he was drawing down his savings as he tapped them for formal dinners and celebrations at the Governor's Mansion. He was scrupulous to use his own money to transport staff for campaign events and non-governmental events in and out of state. He frequently spoke at political events in the Midwest. Even the Democrat Comptroller said that his assumption of personal financial responsibility was excessive and inconsistent with TR's practice to voucher everything.

As the 1908 presidential election approached there was a serious effort to draft Hughes to be the Republican candidate. He did nothing to encourage it, fully supporting W.H. Taft in opposition to W.J. Bryan. His supporters agreed with the press that Hughes would rather be Hughes than President. He made a speech for Taft in Youngstown, Ohio taking on and gutting the arguments of Bryan's campaign. The speech was so effective that thereafter Taft adopted the points and Bryan tried to run away from his former rhetoric. Wherever Hughes spoke, he was greeted with raucous enthusiasm. He was incredibly popular in the Midwest and far West. Woodrow Wilson, in his campaign as a Democrat to become Governor of New Jersey made

repeated pronouncements that he wanted to do for New Jersey what Hughes had done in New York. Hughes had his own reluctant campaign to run for reelection.

He really didn't want to serve another term, but believed that the reforms he tried to accomplish and still might, could be a wasted effort if he didn't. The Republican bosses had hoped to get rid of him somehow to national office or by nominating another, but faced the same dilemma they had the first round. In modern street *patois*, it was 'Hughes or lose.' He was re-nominated and elected but it was not a marriage made in heaven. The "Black Horse Cavalry" as the Republican bosses' legislative faction came to be called, still stifled many of the reforms Hughes had promoted. William Barnes, Jr. boss of the Albany Republicans, was a leading adversary. Taft won the White House and Hughes was reelected with a greater plurality than he had over Hearst. The party won all statewide offices.

Hughes pressed on with energy, but the frustration with the Black Horse Cavalry, the decline of his family savings, and the toll that his job was taking on his health wore him down. Still, he had that spark and a lawyer's retort as indicated in a tour of a mental hospital with a committee of the legislature. A patient accosted him demanding, "I don't know if you're a Republican or not!" A Senator snickered and asked Hughes, "Did you hear that Governor?" Hughes replied, "Yes- He's insane."

Hughes anguished when confronted with the duty to evaluate petitions for clemency or commutation of criminal convictions, especially death sentence cases. He read the transcript of Chester Gillette's trial three times to placate Gillette's desperate mother. A woman convicted of murder and sentenced to death was claimed to be mentally unfit to have assisted in defense at her trial. Hughes searched through the record and found detailed trial notes made by the woman, (there is no indication how they became incorporated in the record). He allowed her execution to proceed.

To the despair of his supporters, and the joy of William Barnes, Jr., Hughes was offered and accepted appointment by President Taft to a seat on the United States Supreme Court.[1]

The Black Horse Cavalry and Barnes in the short term won the contest regarding open primaries in New York, but the number of states that copied laws enacted under Hughes and identical efforts of successor New York Governors indicated that he was a great Governor. The average adoption rate for legislation proposed by New York Governors between 1907 and 1931 was 43.6%. Hughes' success rate was 56.5%.

Barnes rode high with the Cavalry until skinny veteran Daniel P. O'Connell campaigned in his WWI uniform as a Democrat, was elected Albany County Assessor and subsequently Democrat party committee chairman. Republican control in Albany was ended by election of William Hackett as mayor in 1921. Daniel O'Connell created an even more powerful Democrat machine that lasted 56 years through the middle of the twentieth century.

(End of chapter two, credits to be listed at the conclusion of the articles)

Jim Cooper
July 24, 2023

[1] Hughes' biographer, Merlo J. Pusey, is silent regarding confirmation hearings. Presumably Hughes lacking judicial experience was not considered significant by the Senate, nor was there apparently the partisanship of our era.

A Local Case of Interest for those Handling Summary Proceedings

STATE OF NEW YORK COUNTY OF WARREN
CITY COURT CITY OF GLENS FALLS

AMH Resources Corp. and Warren-Washington Association for Mental Health, Inc., D/B/A/ ASCEND Mental Wellness,
Plaintiffs/Petitioners

-against-

Order
Case No.: LT-0510-23/GF

Vanessa French,
Defendant/Respondent

APPEARANCES:

Bartlett, Pontiff, Stewart & Rhodes, P.C., John D. Wright, Esq., of counsel, attorneys for the Petitioners

Legal Aid Society of Northeastern New York, Barbara Lynne Gifford, Esq., of counsel, attorneys for the Respondent

HOBBS. J

BACKGROUND FACTS

The facts in this matter are not in dispute. On September 3, 2023, the Petitioners issued the Respondent a 30-day Notice terminating the Respondent's lease for the premises located at 50 Cooper Street, Apartment 101, Glens Falls, New York, on the grounds that the Respondent was an objectionable tenant for allegedly engaging in violent, assaultive, threatening behavior towards others in violation of the terms of the parties' lease agreement. The 30-day Notice terminating the lease was personally served on the Respondent on September 3, 2023.

By Notice of Petition and Petition for eviction, dated October 12, 2023, the Petitioner commenced the present summary proceeding. On October 20, 2023, at 1:34 p.m., the Petitioner's process server served the Respondent by conspicuous place (i.e., nail and mail) service. The process server lists three (3) attempts on three separate dates and times before utilizing service by conspicuous place. The mailing of the Petition and Notice of Petition was properly made on October 20, 2023.

On October 23, 2023, the Petitioner's Petition and Notice of Petition, together with the affidavit of service was filed with this Court and the schedule return date on the Petition and Notice of Petition was November 1, 2023, or only nine (9) days from the filing of the papers with the affidavit of service. At the initial appearance, the Respondent moved to dismiss for an alleged violation of RPAPL §§ 733, 735. On November 1, 2023, the parties respectively filed written arguments.

In her motion, the Respondent asserts that a "summary proceeding is a special proceeding governed entirely by statute and it is well established that there must be strict compliance with the statutory requirements to give the court jurisdiction."

(Citations omitted). The Respondent further asserts that RPAPL § 733(1) mandates that a holdover notice of petition and petition "shall be served at least ten and not more than seventeen days before the time at which the petition is noticed to be heard." Here, the Respondent asserts that, since service of process was not completed until the affidavit of service of the Petition and Notice of Petition was filed with the Court on October 23, 2023, the Respondent is deprived of her right to a minimum of 10-days' notice as required by RPAPL § 733(1) and, as a result, the Petitioner's Petition must be dismissed, regardless of whether the Respondent has suffered any prejudice. The Respondent asserts that "[o]pposing counsel's duty to complete service is distinct from his duty to file proof of service" and opposing counsel may use General Construction Law 25-A to avoid running afoul of the deadline to file the Affidavit of Service with the Court, but counsel may not use General Construction Law 25-A to deny the Respondent's right to a full 10-days' notice required under RPAPL § 733(1). Finally, the Respondent notes that the timing and method of Service of the Notice of Petition and Petition and the selection of the Court date are controlled by the Petitioner, and therefore it is incumbent on opposing counsel to make sure that all notice periods and deadlines are met.

In response, the Petitioner asserts that, to conform to the RPAPL 733(1) requirement that " the notice of petition and petition shall be served at least ten and not more than seventeen days before the time at which the petition is noticed to be heard," the last day on which service must have been completed was 10-days prior to the return date of November 1, 2023, which was Sunday, October 22, 2023. Affix and mail service is complete upon the filing of proof of service. RPAPL 735(2)(b). Absent the application of GCL § 25-A, proof of service in this matter needed to be filed by Sunday, October 22, 2023. Here, Petitioner asserts that the broad language of GCL 25-A applies to the filing of proof of service under RPAPL 735(2)(b), and since the last day to file proof of service fell on Sunday, October 22, 2023 (10 days prior to the return date), GCL § 25-A extended the Petitioner's time to file the same to the next business day, which was Monday, October 23, 2023, and the Petitioner's filing of the affidavit of service on that date was timely.

ANALYSIS

A summary proceeding commenced under RPAPL Article 7 is a special proceeding governed entirely by statute, which requires strict compliance with the statutory mandates to give the court jurisdiction. *Berkeley Assocs. Co. v. DiNolfi*, 122 A.D.2d 703, 505 N.Y.S.2d 630 (1st Dept.1986), *app. dism.*, 69 N.Y.2d 804, 505 N.E.2d 951, 513 N.Y.S.2d 386 (1987); *Liberty Place Holding Corp. v. Adolph Schwob, Inc.*, 136 Misc. 405, 241 N.Y.S. 438 (App. Term, 1st Dept.1930*), aff'd.*, 229 A.D. 841, 242 N.Y.S. 860 (1st Dept.1930); *New York Hous. Auth. v Fountain*, 172 Misc 2d 784, 785-86 [Civ Ct, City of New York, Bronx County, 1997]; *Macchia v. Russo*, 67 N.Y.2d 592, 594, 505 N.Y.S.2d 591, 496 N.E.2d 680 (1986); MSG Pomp Corp. v. Doe, 185 A.D.2d 798, 586 N.Y.S.2d 965 [1st Dept. 1992]; *Riverside Syndicate, Inc. v Saltzman*, 49 AD3d 402 [1st Dept. 2008].

Pursuant to RPAPL § 733(1), in a holdover proceeding, the notice of petition and petition must be served at least 10 days and not more than 17 days before the time at which the petition is noticed to be heard. In addition, pursuant to RPAPL § 735(2), service of the notice of petition and petition, when effected by conspicuous place (nail and mail) service, is not complete until proof of service is filed with the court. RPAPL § 735(2). *See also, Berkeley Assoc. Co. v Di Nolfi,* 122 AD2d 703, 704-06 [1st Dept 1986];

37 West 72nd Street, Inc. v. Frankel, 78 Misc 3d 637, 639, 183 N.Y.S.3d 275 [Civ. Ct., Bronx County 2023]; *Bronx 2120 Crotona Ave. L.P. v. Gonzalez*, 75 Misc 3d 753, 754, 168 N.Y.S.3d 674 [Civ. Ct., Bronx County 2022].

The issue in this case is whether the provisions of GCL § 25-A extended the Petitioner's time to file the affidavit of service with the Court to complete service on the Respondent to Monday, October 23, 2023. There is a disagreement in the courts with respect to the jurisdictional nature of the filing requirements in summary proceedings. In the Second Department, a late filing of the affidavit of service has been viewed as a *de minimus* defect where the respondent has not been prejudiced. *See, ZOT, Inc. v. Watson*, 20 Misc. 3d 1113(A), 867 N.Y.S.2d 379 (N.Y. City Civ. Ct. 2008); *Martin v. Sandoval*, 46 Misc. 3d 1216(A), 9 N.Y.S.3d 594 (N.Y. City Ct. 2015) (failure to file proof of service within three days after service not a jurisdictional defect); *Siedlecki v. Doscher,* 33 Misc. 3d 18, 931 N.Y.S.2d 203 (App. Term 2011) (court disregarded late filing of proof of service where no prejudice to respondent was shown); *Djokic v. Perez*, 22 Misc. 3d 930, 872 N.Y.S.2d 263 (N.Y. City Civ. Ct. 2008) (failure to file notice of petition within three days after mailing and failure to file proof of service at least five days prior to return date not a jurisdictional defect); *Eiler v. North*, 121 Misc. 2d 539, 467 N.Y.S.2d 960 (County Ct. 1983) (failure to file notice of petition and petition and proof of service with court within three days of personal service not jurisdictional defect). Rather, the court may order the notice of petition, petition, or affidavit of service filed *nunc pro tunc*—that is, as if they were timely filed originally. UDCA § 411; UJCA § 411; *Friedlander v. Ramos*, 3 Misc. 3d 33, 779 N.Y.S.2d 327 [App Term, 2d and 11th Judicial Districts, 2004].

In the case of *Friedlander v. Ramos*, 3 Misc. 3d 33, 779 N.Y.S.2d 327 [App Term, 2d and 11th Judicial Districts, 2004], the landlord failed to file the notice of petition, petition, and proof of service in the court within the period mandated by RPAPL § 735(2). However, the court held that "inasmuch as tenant admitted receiving the notice of petition and petition within the statutory time frame for service of the same, and neither demonstrated nor argued that he was prejudiced in any way by landlord's subsequent failure to file proof of service with the court, the court below properly permitted *nunc pro tunc* filing of proof of service."

However, the First Department continues to adhere to strict statutory compliance. *Riverside Syndicate, Inc. v. Saltzman*, 49 A.D.3d 402, 852 N.Y.S.2d 840 (1st Dep't 2008); *125 East 50th Street, Co., Lessee, LLC v. Credo International Inc.*, 75 Misc. 3d 134(A), 168 N.Y.S.3d 781 (App. Term 2022); *Bronx 2120 Crotona Avenue L.P. v. Gonzalez*, 75 Misc. 3d 753, 168 N.Y.S.3d 674 (N.Y. City Civ. Ct. 2022). If non-compliance with § 733(1) is timely raised, the courts in the First Department have dismissed the eviction proceedings, citing to *Riverside Syndicate, Inc. v. Saltzman*, 49 AD3d 402, 852 N.Y.S.2d 840 [1st Dept. 2008]. *See e.g., Bronx 2120 Crotona Ave. L.P. v. Gonzalez, supra; Matticore Holdings, LLC v. Hawkins*, 76 Misc 3d 511, 172 N.Y.S.3d 585 [Civ. Ct., Bronx County 2022]; *208 W 20th Street LLC v. Blanchard*, 76 Misc 3d 505, 173 N.Y.S.3d 439 [Civ. Ct., New York County, 2022]; *Services for the Underserved, Inc. v Mohammed*, 79 Misc 3d 1205(A) [Civ Ct 2023]. In *Riverside Syndicate, Inc. v. Saltzman*, 49 A.D.3d 402, 852 N.Y.S.2d 840 (1st Dep't 2008), the Appellate Division, First Department, held that the late filing of the affidavit of service in an eviction proceeding deprives the court of jurisdiction, and that the issue of prejudice is irrelevant, because absent strict compliance with the statute, the proceeding must be dismissed. In *Berkeley Assoc. Co. v Di Nolfi*, 122 AD2d 703, 704 [1st Dept 1986], the Respondent-Tenant moved to dismiss on the grounds that the lower court lacked

subject matter and personal jurisdiction because the affidavit of service was properly filed one day late pursuant to General Construction Law § 25-a (the last day to file was a Saturday, and proof of service was filed on the following Monday). In Berkeley, service of process was deemed to be timely; however the Berkeley court did not grant the landlord's motion to deem filing timely pursuant to RPAPL 733. Instead, the Berkeley court found that the affidavit of service was filed in violation of the requirement of RPAPL § 733, and that the time for the respondent to respond was insufficient. *Id. at* 704. Thus, the Berkeley court found that the Respondent had a meritorious procedural defense to the eviction, and the Respondent's motion to vacate the default judgment was granted and the petition dismissed for lack of personal and subject matter jurisdiction due to noncompliance with RPAPL § 733. *Id. at* 704.

The present case is factually similar to the case in *208 W 20th St. LLC v Blanchard,* 76 Misc 3d 505, 507 [Civ Ct., NY County, 2022]. Similar to the present case, in *Blanchard,* the Petitioner-Landlord asserted that it had timely filed the affidavit of conspicuous place (nail and mail) service when General Construction Law § 25-a was applied to the filing requirement. *Id. at* 507. Thus, the Petitioner argued that the short-filing under RPAPL 733 (1), which states that the affidavit of service must be filed at such a time that provides a respondent notice no more than 17 days and no less than 10 days prior to the initial appearance in court, should be forgiven by harmonizing General Construction Law § 25-a with RPAPL 733(1). *Id.* The Petitioner also asserted that, absent any demonstrable prejudice, the short filing of the affidavit of service should be considered *de minimis* and excusable. *Id. at* 507. The Blanchard court dismissed the petition, citing to *Riverside Syndicate, Inc. v. Saltzman*, 49 A.D.3d 402, 852 N.Y.S.2d 840, [1st Dept. 2008]. *Blanchard, supra at* 509.

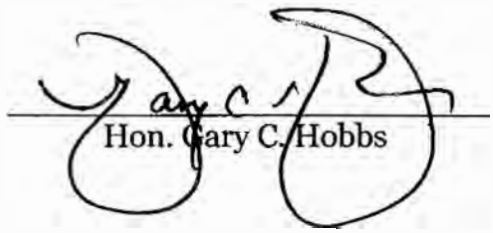
The Appellate Division, Third Department, like the First Department, has consistently held that summary landlord-tenant proceedings are "special proceeding[s] governed entirely by statute and it is well established that there must be strict compliance with the statutory requirements to give the court jurisdiction." *See, Matter of Cat Hollow Estates, Inc. v Savoia*, 46 AD3d 1293, 1294 [3d Dept 2007]; *Burke v Aspland*, 56 AD3d 1001, 1002 [3d Dept 2008].

Finally, in the present case, it is important to note that the Petition and Notice of Petition was served by conspicuous place (i.e., nail and mail) service and the mailing was completed on Friday, October 20, 2023, at 1;14 p.m. This Court was still open at that time and the Petition, Notice of Petition, and affidavit of service could have been timely filed with this Court on that date. However, proof of service was not filed until Monday, October 23, 2023. Aside from the General Construction Law § 25-a argument, the Petitioner proffers no reason as to why proof of service could not have been timely filed in compliance with RPAPL 733 (1) on Friday, October 20, 2023, or the immediately following Saturday or Sunday for that matter. Electronic filing can be made from anywhere a participating attorney has access to a computer and Wi-Fi. The Uniform Rules for the New York State Trial Courts 22 NYCRR 208.4-a (c) (2), provides that *"[w]here an action is commenced by electronic filing pursuant to this section, the original proof of service ... shall be filed with the Clerk of the Court in the county in which the action was commenced by filing with the NYSCEF site. Service is deemed complete ... upon receipt of the electronic proof of service by the NYSCEF site."* Thus, even though this Court was not open on Saturday, October 21, 2023, or Sunday, October 22, 2023, filing of the affidavit of service could have been timely made *via* the NYSCEF site on either of those dates.

NOW, therefore, based on the foregoing, it is

ORDERED, that the Respondents' application to dismiss the Petitioner's Petition and Notice of Petition for a violation of RPAPL § 733(1) is hereby is **GRANTED,** and Petitioner's Petition and Notice of Petition for eviction is hereby dismissed without prejudice.

Dated: November 6, 2023
at Glens Falls, New York



ENTER.

From The Judge's Chambers

Robert J. Muller, J.S.C.
Warren County Supreme Court
Warren County Municipal Center
1340 State Route 9, Lake George, NY 12845

CASE #1

79 Misc.3d 1234(A)
Unreported Disposition
(The decision is referenced in
the New York Supplement.)
This opinion is uncorrected and will not be
published in the printed Official Reports.
Supreme Court, New York,
Warren County.

In the Matter of WHISPERING PINES ASSOCIATES, LLC; Queensbury Holdings, LLC; and Robert Gardens North, LLC, Petitioners, for a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules
v.
TOWN OF QUEENSBURY PLANNING BOARD; Town of Queensbury Zoning Board of Appeals; Hoffman Development Corporation; and 919 State Route 9, LLC, Respondents.

Index No. EF2022-70258
|
Decided on July 27, 2023

Attorneys and Law Firms

Braymer Law, PLLC, Glens Falls (Claudia K. Braymer of counsel), for petitioners Whispering Pines Associates, LLC and Robert Gardens North, LLC.

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Opinion

Robert J. Muller, J.

***1** Respondent 919 State Route 9, LLC (hereinafter 919 State) is the owner of a 2.01-acre parcel of property located at 919 State Route 9 in the Town of Queensbury, Warren County, which property is at the northwest intersection of Weeks Road and State Route 9 (hereinafter the subject property). The subject property is zoned for "commercial intensive" use [R0002], [1] and includes a car wash that has been vacant for more than ten years. Petitioner Robert Gardens North, LLC (hereinafter Robert Gardens) owns and operates an apartment complex on the northern side of Weeks Road, directly behind the subject property and adjacent to its western boundary line. Petitioner Whispering Pines Associates, LLC (hereinafter Whispering Pines) owns and operates an apartment complex on the southern side of Weeks Road, with an entrance approximately 540 feet from the subject property. Weeks Road is a dead end and its intersection with State Route 9 provides the only means of ingress and egress to the residents of Whispering Pines and Robert Gardens.

Petitioner Queensbury Holdings LLC (hereinafter Queensbury Holdings) is the owner of a parcel of property located at 925 State Route 9, next door to the subject property and adjacent to its northern boundary line. Queensbury Holdings has a restaurant on its property, as well as a parking lot and private access road connecting to Route 9 at its intersection with Sweet Road (hereinafter the Access Road).[2] It is undisputed that this Access Road is owned and maintained by Queensbury Holdings.

On July 7, 2021, respondent Hoffman Development Corporation (hereinafter Hoffman) applied to respondent Town of Queensbury Planning Board (hereinafter the Planning Board) for site plan approval to demolish the existing car wash on the subject property and construct a 6,400 square-foot car wash building in its place, as well as queuing lanes, 18 self-serve vacuum spaces, and 6 employee parking spaces.[3] The application proposed two access points for the car wash: (1) the construction of a new access drive to connect the subject property to Weeks Road; and (2) use of Queensbury Holdings' existing Access Road to connect the subject property to State Route 9.

Hoffman contends that it is entitled to use the Access Road pursuant to an April 26, 2005 resolution whereby the Planning Board granted site plan approval to Queensbury Holding's predecessor in title to, *inter alia*, construct the restaurant now existing on Queensbury Holding's property. In this regard, the site plan attached to the resolution includes under "drawing notes" a statement indicating that "owner shall construct vehicle interconnections to the adjoining properties shown, at the time of redevelopment of those properties" [Resolution No. SP 04-2005, attached as Exhibit "1" to Palumbo Affidavit, at p 5]. The plan then identifies two "possible future site[s]" of the interconnect, one of which is at the rear of Queensbury Holdings' property near the Access Road.

***2** Hoffman initially appeared before the Planning Board relative to the application on August 24, 2021, at which time the proposed site plan was presented by Frank Palumbo — its project manager — in detail. Concerns were expressed relative to, *inter alia*, traffic safety and stormwater management, with the Planning Board requesting additional information in this regard. On October 15, 2021, Hoffman submitted a revised application which reduced the size of the proposed car wash building to 5,750 square feet,[4] as well as included parking and lighting plans and a stormwater pollution prevention plan. A public hearing was thereafter noticed for the Planning Board's November 16, 2021 meeting, at which time counsel for Whispering Pines and Queensbury Holdings, among others, appeared in opposition to the project.

Counsel for Whispering Pines focused primarily on the potential traffic impacts from the proposal, with several members of the Planning Board sharing those concerns. Hoffman hired VHB Engineering, Surveying, Landscape Architecture and Geology, PC (hereinafter VHB) to conduct a traffic impact study, but the study had not yet been completed at the time of the November 16 meeting — so the discussion relative to traffic impacts was tabled pending its completion. Counsel for

Queensbury Holdings questioned Hoffman's right to use his client's Access Road under the April 26, 2005 resolution, with the Planning Board instructing him to "contact the Planning Staff as they have access to all ... prior documents and plans and [could] provide [him] with any and all information ... regarding the history of that" [R1034].

On December 8, 2021, VHB completed its traffic impact study for Hoffman, finding that "[t]he proposed project is expected to have minimal impact on local traffic operations" [R0286]. The report was thereafter reviewed by the Town of Queensbury engineer, who submitted a report to the Planning Board on February 10, 2022 with the following comments:

> "16. The estimate of site trips is based on very limited data from the ITE Trip Generation Manual, particularly for the Saturday peak hour as there is only one data study when using the number of car wash tunnels as the independent variable. The use of the facility's square footage yields a trip estimate that is more than 4 times the amount presented in the study (41 trips versus 176 trips.)
>
> "Given the limited data in the ITE manual, local trip data should be presented to verify or modify the estimates in the study with a corresponding update to the analyses....
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> "17. An evaluation of the internal queuing using the processing times at the pay station and through the car wash should be presented to ensure that the site circulation is sufficient to prevent vehicle queues from extending out on to the side roads [R0577]."

Whispering Pines retained an engineer to review the report as well, with that engineer likewise commenting that the traffic study failed to use "an accurate trip generation estimate" [R580] and further "fail[ed] to provide a queuing analysis" [R0581]. Whispering Pines' engineer also commented that VHB's traffic study report "fail[ed] to include a crash analysis [and] any analysis of sight distance at [the proposed driveway on Weeks Road and [State] Route 9" [R0581].

A public hearing continued on the proposal at the Planning Board's February 15, 2022 meeting, at which time discussion resumed relative to potential traffic impacts. Hoffman advised that its engineer was preparing a response to the Town engineer's February 10, 2022 report, and the Planning Board chose to table that discussion pending receipt of the response. Counsel for Whispering Pines and Queensbury Holdings again appeared, with counsel for Queensbury Holdings stating as follows:

> ***3** "When we were last here we spoke briefly about the interconnect, and I was a little in the dark at the time about the interconnect because it seems to have been on the map, but there was no, my clients purchased property after the subdivision approval back in 2005 which is where the genesis of the interconnect had arisen. So I spent a lot of time going back over the minutes, historically, to find out where that came from, and it appears that when the initial subdivision application was made by the predecessor in title, the interconnect was something that was discussed in the March 2005 meeting, and there was a directive

> that the applicant make a motion for final approval for the April 2005 meeting to include the interconnect issue as being part of that motion. In reviewing the minutes from the April 2005 meeting it appears that that was not done. There was no mention of the interconnect at that time. There was no motion made to approve the interconnect, but there was on the approved map a designation indicating where the interconnect would be. So it appears that that is where the interconnect received 'approval,' but there was nothing in the minutes to indicate that that was actually done by resolution....
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> "[S]ubsequent to that, there was a subdivision request in 2011 to divide the lot that my client owned with Red Roof Inn and what was the Outback Steakhouse ..., and when that map was approved, there was no mention of the interconnect on that map.... If we set that aside and assume for the sake of argument the interconnect is a legitimate interconnect, then the issue becomes ... what is the legitimate use, or the proper use, of the interconnect? The applicant seems to be taking the position that the interconnect provides unfettered access to their property from Route 9 and I'm not sure that the interconnect is defined that accurately. I mean it says that there's an interconnect, but there's no indication [what] the scope of that interconnect is" [R1061].

On March 11, 2022, VHB submitted a response to the report prepared by the Town engineer, this time estimating site trips based upon information "provided by Hoffman's Car Wash for a similar facility located on US Route 11 in the Town of Binghamton, New York" [R0616]. VHB still found no substantial traffic impact. VHB also conducted an evaluation of the internal queuing times at the proposed facility, finding that "[t]he available onsite queuing is expected to accommodate typical, peak summer, and peak winter conditions without extending to the adjacent roadways" [R0620].

On April 19, 2022, the public hearing continued before the Planning Board. Counsel for Queensbury Holdings maintained his position that the 2005 resolution does not entitle Hoffman to unfettered use of the Access Road, this time advising the Planning Board of an additional issue with respect to the Access Road. Specifically, the Access Road and the land surrounding it was fully vested in Queensbury Holdings' predecessor in title due in part to a 2005 conveyance of a 30' x 168' rectangular parcel from 919 State's predecessor in title. In the conveyance, an easement was created over the exact same 30' x 168' parcel granting ingress and egress for the benefit of 919 State and its successors and assigns. This 2005 easement was specifically confined to a metes and bounds description which encompassed the 30' x 168' parcel, and it does not cover the entirety of the Access Road. Rather, it includes only the lane of the Access Road used for ingress from State Route 9 — not that used for egress. Counsel for Queensbury Holdings advised that his client would "not agree to permit the applicant to use any portion of the [Access Road] beyond what is specifically stated in the easement" [R1106].

Counsel for Whispering Pines, among others, was heard relative to the potential traffic impact of the proposal, with counsel highlighting the fact that neither a crash analysis nor a sight line analysis had been conducted in response to its

engineer's report. Counsel further commented as follows:

> "[I]t is not appropriate or legal for this Board to consider [as] a traffic solution ... that the traffic needs to go through private property, [namely Hoffman's,] to get to a light. This is a serious problem and it needs to be solved and one of the recommendations that we have already seen through a significant study was the [August 2019] Warren County Pathway Corridor Project Final Report recommendation saying that you should have a connection to Sweet Road right through this site, so that Weeks Road has an ability to go to a light and people can turn left or right at a signalized intersection. This Board should not make a decision on this particular project without considering the report's recommendation realigning Weeks Road to provide for a four way stop .... Otherwise[,] if this project does go forward you are foreclosing forever the opportunity to have that recommendation implemented."

***4** At the conclusion of public comment, the Planning Board conducted its review pursuant to the State Environmental Quality Review Act (*see* ECL article 8 [hereinafter SEQRA]), concluding that the project "would result in no significant adverse impacts on the environment" and issuing a negative declaration [R1119]. A resolution approving the site plan was thereafter prepared and approved by the Planning Board at its May 19, 2022 meeting.

Meanwhile, on March 15, 2022 Hoffman applied to respondent Town of Queensbury Zoning Board of Appeals (hereinafter the ZBA) for a sign variance. Specifically, while § 140-6 (2) (a) of the Town Code for the Town of Queensbury (hereinafter the Town Code) provides that freestanding signs "shall not exceed 45 square feet with a 15-foot setback or 60 square feet with a 25-foot setback," Hoffman sought to have a 138 square foot freestanding sign with a 15-foot setback on the subject property. A public hearing was noticed for the ZBA's April 20, 2022 meeting, at which time counsel for Whispering Pines and Queensbury Holdings appeared in opposition to the proposal. They voiced their concerns relative to the size of the sign, and once again focused on potential traffic impacts. Discussion ensued with the ZBA concluding that the proposed sign was too large.

Hoffman thereafter revised its application to seek an 88 square foot sign with a 20.1-foot setback. A public hearing was held relative to this revised application at the ZBA's May 18, 2022 meeting, at which time counsel for Whispering Pines and Queensbury Holdings again appeared. Their opposition notwithstanding, the ZBA issued a negative declaration under SEQRA at the meeting — finding that the proposal would "not result in any significant adverse environmental impact" [R1236] — and granted the requested variance.

Petitioners commenced this CPLR article 78 proceeding on June 16, 2022 to vacate both the Planning Board's site plan approval and the ZBA's sign variance approval as arbitrary and capricious. Petitioners assert four causes of action:

> (1) the Planning Board failed to comply with SEQRA;

(2) the Planning Board erred in approving the site plan notwithstanding questions with respect to Hoffman's right to use the Access Road;

(3) the ZBA failed to comply with SEQRA; and

(4) the ZBA failed to comply with Town Law § 267-b.

Before addressing these causes of action, the Court must first address Hoffman's contention that petitioners lack standing.[5] "To establish standing, a petitioner must show injury-in-fact, and such injury must fall within the zone of interests to be protected by the statutes or ordinances at issue" (*Matter of Center Sq. Assn., Inc. v City of Albany Bd. of Zoning Appeals*, 9 AD3d 651, 652 [3d Dept 2004]; *see* *New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]; *Matter of Sun—Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead*, 69 NY2d 406, 412 [1987]; *Matter of Barnes Rd. Area Neighborhood Assn. v Planning Bd. of the Town of Sand Lake*, 206 AD3d 1507, 1508 [3d Dept 2022]).

Here, Hoffman contends that petitioners' claims amount to allegations of economic harm, which are insufficient to constitute an injury-in-fact. Hoffman further contends that neither economic harm nor an interference with private property rights — as alleged by Queensbury Holdings — is an injury within the zone of interests sought to be protected by SEQRA.

***5** The Court finds these contentions to be wholly unavailing. Petitioners have clearly shown an injury-in-fact — and it is not economic harm. Both Whispering Pines and Robert Gardens have residents who will be impacted on a daily basis by any traffic delays and safety issues resulting from the new car wash — particularly because Weeks Road is a dead end and these residents have no choice but to use the intersection with State Route 9 when traveling to and from their homes (*see Matter of Barnes Rd. Area Neighborhood Assn. v Planning Bd. of the Town of Sand Lake*, 206 AD3d at 1509; *Matter of Center Sq. Assn., Inc. v City of Albany Bd. of Zoning Appeals*, 9 AD3d at 652-653). Queensbury Holdings will likewise be impacted by any traffic delays, especially considering that Hoffman plans to use its Access Road onto State Route 9. Indeed, as stated by counsel for Queensbury Holdings during oral argument, Queensbury Holdings' property is not adjacent to the project site — it is part of the project site. It must also be noted that traffic safety issues fall squarely within the zone of interests to be protected by SEQRA (*see* *Matter of McGrath v Town Bd. of Town of N. Greenbush*, 254 AD2d 614, 616 [3d Dept 1998], *lv denied* 93 NY2d 803 [1999]; *Matter of Lo Lordo v Board of Trustees of Inc. Vil. of Munsey Park*, 202 AD2d 506, 506 [1994]).

Planning Board's Site Plan Approval

Turning now to petitioner's first cause of action, " '[j]udicial review of an agency determination under SEQRA is limited to whether the lead agency identified the relevant areas of

environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination' " (*Matter of Brunner v Town of Schodack Planning Bd.*, 178 AD3d 1181, 1182-1183 [3d Dept 2019], quoting *Matter of Schaller v Town of New Paltz Zoning Bd. of Appeals*, 108 AD3d 821, 822-823 [3d Dept 2013] [internal quotation marks, brackets and citations omitted]; *see Matter of Mombaccus Excavating, Inc. v Town of Rochester, NY*, 89 AD3d 1209, 1210 [3d Dept 2011], *lv denied* 18 NY3d 808 [2012]).

Here, petitioners contend that — while the Planning Board identified the relevant areas of environmental concern, namely the potential traffic impacts of the project — it failed to take a hard look at them, as well as failed to make a reasoned elaboration of the basis for its determination. According to petitioners, the Planning Board should have required an environmental impact statement, with "the action ... includ[ing] the potential for at least one significant adverse environmental impact" (6 NYCRR § 617.7 [a] [1]) — traffic safety issues. In support of this contention, petitioners have submitted a copy of the Warren County Pathway Corridor Study which — as discussed during the public hearing — found traffic safety issues at the intersection of Weeks Road and State Route 9 and recommended a connection between Weeks Road and Sweet Road, with this connection to be located precisely where the project is proposed.

In opposition, respondents contend that the Planning Board took a hard look at the potential traffic impacts, requiring Hoffman to undertake a traffic study and, further, requiring Hoffman to supplement that study to address the Town engineer's concerns. The potential traffic impacts were considered and discussed by the Planning Board over the course of five meetings. Insofar as the Warren County Pathway Corridor Study is concerned, Palumbo has submitted an affidavit stating that "the Planning Department confirmed for the Planning Board that the Corridor Study was never officially adopted by the Town of Queensbury Town Board" [Palumbo Affidavit, at ¶ 23]. The minutes from the April 19, 2022 meeting appear to confirm this, with Stephen Traver — Chairman of the Planning Board — stating as follows:

> "Well I know that there was some interest in a corridor study that had been conducted, and I understand that you've had a conversation with Town representatives regarding that corridor study and what potential impact it might have on [the] application and it seems as though, if I understand correctly, there was a conclusion that this plan could go forward as proposed with regard to traffic" [R1103].

***6** Under the circumstances, the Court finds that the Planning Board identified the relevant areas of environmental concern and took a hard look at them. The Court further finds, however, that the Planning Board failed to make a reasoned elaboration for its decision not to require an environmental impact statement. In this regard, when conducting its SEQRA review at the April 19, 2022 meeting, the Planning Board stated as follows:

> "Mrs. Moore — Number Five. Will the proposed action result in an adverse change in the existing level of traffic or affect existing infrastructure for mass transit, biking or walkway?

> Mr. Traver — I would say small to moderate based on the traffic study and engineer comment.
>
> Mr. Deeb — I agree with that" [R1117].

That being said, in part 2 of the short environmental assessment form (hereinafter EAF) — which appears to have been completed by Traver — this question is then answered by checking the box "[n]o, or small impact may occur" [R1138]. The other box which could have been checked reads "[m]oderate to large impact may occur." To the extent that the Planning Board decided that the project would result in "small to moderate" changes in traffic [R1117] — and in fact there was extensive discussion relative to the potential traffic impact — it appears that this box could also have been checked in response to the question. Significantly, had this latter box been checked, then an environmental impact statement would have been required (*see* 6 NYCRR § 617.7 [a] [1]).

Turning now to the second cause of action, " '[a] local planning board has broad discretion in deciding applications for site plan approvals, and judicial review is limited to determining whether the board's action was illegal, arbitrary and capricious, or an abuse of discretion' " (*Matter of S. Realty & Dev., LLC v Town of Hurley*, —— AD3d ——, ——, 2023 NY Slip Op 03744, *3 [3d Dept 2023], quoting *Matter of 7-Eleven, Inc. v Town of Hempstead*, 205 AD3d 909, 910 [2d Dept 2022]; *see Matter of Barnes Rd. Area Neighborhood Assn. v Planning Bd. of the Town of Sand Lake*, 206 AD3d 1507, 1510 [3d Dept 2022]; *Matter of Town of Mamakating v Village of Bloomingburg*, 174 AD3d 1175, 1178 [3d Dept 2019]). " 'An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts' " (*Matter of S. Realty & Dev., LLC v Town of Hurley*, 2023 NY Slip Op 03744 at *3, quoting *Matter of Biggs v Eden Renewables LLC*, 188 AD3d 1544, 1548 [3d Dept 2020] [internal quotation marks and citations omitted]; *see Matter of Shapiro v Planning Bd. of Town of Ramapo*, 155 AD3d 741, 743 [2d Dept 2017]).

Here, § 179-9-030 of the Town Code authorizes the Planning Board "to review and to approve, approve with modifications and/or conditions, or disapprove site plans" (*see also* Town Law § 274-a [2] [a]). § 179-9-050 (F) of the Town Code then provides that all site plans must include "[t]he location of all present and proposed public and private ways, off-street parking areas, driveways, outdoor storage areas, sidewalks, ramps, curbs, paths, landscaping, walls, and fences," with § 179-9-080 (F) and (G) further providing that "[t]he Planning Board shall not approve a site plan unless it first determines that such site plan meets the following standards:

> "The establishment, maintenance, and operation of the proposed use will not create public hazards from traffic, traffic congestion or the parking of vehicles and/or equipment or be otherwise detrimental to the health, safety or general welfare of persons residing or working in the neighborhood or the general welfare of the Town. Traffic access and circulation, road intersections, road and driveway widths, and traffic controls will be adequate....

> ***7** "The establishment of vehicle links between parking areas of adjacent properties [must be] provided where feasible. This furthers the Town's goal of reducing curb cuts and reducing congestion. A twenty-foot-wide connection is required. If adjacent properties are either undeveloped or previously developed without having made provision for future linkage, then a future connection must be identified and provided for in the site plan under review for such future linkage when the time arises. The Planning Board may require proof that the applicant has made contact with adjacent property owners for purposes of coordinating linkages with adjacent properties."

Petitioners contend that the Planning Board erred in approving the site plan notwithstanding substantial questions with respect to whether Hoffman has a legal right to use the Access Road to connect the subject property to Route 9. According to petitioners, neither the 2005 resolution nor the easement grant Hoffman any such right, and Hoffman made no effort whatsoever to coordinate with Queensbury Holdings relative to use of the Access Road. Petitioners further contend that, if Hoffman is unable to use the Access Road as laid out in the site plan, this will create public hazards from traffic congestion.

In opposition, 919 State and Hoffman maintain that Hoffman is permitted to use the Access Road under the 2005 resolution. Respondents further argue that any dispute relative to use of the Access Road was not properly before the Planning Board. Indeed, this position was adopted by members of the Planning Board who repeatedly stated during the public hearing that the dispute is "a civil matter ... outside [their] purview" [R1108, 1113]. In this regard, counsel for the Planning Board stated during oral argument that it is not uncommon for the Planning Board to approve a site plan where a neighbor shows up in opposition, arguing that a proposed easement included in the plan is invalid. According to counsel, the Planning Board requires only a "prima facie" showing of an applicant's right of way over neighboring property, and here that prima facie showing was made.

The Court is not persuaded. Initially, there does not appear to be any dispute that 919 State's easement over the Access Road covers only the ingress lane, leaving it without access to the egress lane. Indeed, counsel for Queensbury Holdings appeared during the public hearing and explained this issue to the Planning Board, with no meaningful opposition from Hoffman. It therefore cannot be said that Hoffman made a "prima facie" showing of its right to use the Access Road based on the easement.

Further, Hoffman is not relying on the easement in any event. Rather, it is relying on the reference to an interconnect in the site plan attached to the 2005 resolution. Although it is unclear from the record, this interconnect was presumably included in the 2005 site plan pursuant to Town Code § 179-9-080 (G). As stated by counsel for Queensbury Holdings during the public hearing, there is nothing in the record to suggest what the scope of this interconnect might be, and certainly nothing to suggest that this interconnect entitles Hoffman to unfettered use of the Access Road. There is not even an exact location for the

interconnect in the 2005 site plan, which includes two "possible future site[s]" for the roadway. Counsel for Queensbury Holdings also brought up the fact that there was no mention of the interconnect when the Planning Board approved his client's 2011 site plan to further subdivide its property. Hoffman had no response to any of these ambiguities. It therefore cannot be said that Hoffman made a "prima facie" showing of its right to use the Access Road based on the 2005 resolution.

***8** While the Court agrees that the Planning Board cannot adjudicate the dispute regarding use of the Access Road — which dispute is apparently being litigated in the context of a separate action commenced by Queensbury Holdings in December 2022 — the Planning Board likewise cannot approve a site plan where there exist so many issues relative to whether Hoffman can even use one of the access points proposed. The Planning Board cannot simply turn a blind eye to these issues — particularly where, as here, there will be substantial public hazards from traffic congestion if Hoffman cannot use the Access Drive as outlined in the plan (*see* Town Code § 179-9-080 [G]).

Briefly, counsel for the Planning Board stated as follows during oral argument:

> "These types of things come up for Planning Boards frequently where you have — you know, a different example, but to help illustrate it, it's not uncommon where a neighbor objecting to a project comes in and says, 'I have a private deed restriction right here. This can't be approved. It's not allowed on this lot.' And the answer is, not the Planning Board's problem. They can approve a project that might not ever be able to come to fruition because of some private property dispute."

This point is well taken by the Court but, as counsel indicated, the example is different. This example involves a dispute between homeowners with no substantial issues raised — no attorneys involved, nor prior site plans implicated. More significantly, however, it involves a dispute with no apparent impact on traffic and other public safety issues. The Planning Board must obviously consider the size and scope of any project and given the size and scope of Hoffman's project — as well as its potential impact on traffic — the undisputed ambiguities regarding Hoffman's right to use the Access Road could not merely be ignored as "not the Planning Board's problem."

The Planning Board could have required Hoffman to coordinate with Queensbury Holdings relative to the scope and usage of the interconnect, as envisioned under Town Code § 179-9-080 (G). It likewise could have conditioned approval of the site plan on an agreement or resolution relative to usage of the Access Road under Town Code § 179-9-030. Indeed, " 'a condition may be imposed upon property so long as there is a reasonable relationship between the problem sought to be alleviated and the application concerning the property' " (*Matter of Greencove Assoc., LLC v Town Bd. of the Town of N. Hempstead*, 87 AD3d 1066, 1066 [2d Dept 2011], quoting *Matter of International Innovative Tech. Group Corp. v Planning Bd. of Town of Woodbury, NY*, 20 AD3d 531, 533 [2005]; *see Matter of Mackall v White*, 85 AD2d 696, 696 [1981]). Instead, the Planning Board simply approved

the site plan. While mindful that the Court cannot substitute its judgment for that of the Planning Board (*see Matter of S. Realty & Dev., LLC v Town of Hurley*, 2023 NY Slip Op 03744 at *6; *Matter of Edscott Realty Corp. v Town of Lake George Planning Bd.*, 134 AD3d 1288, 1290 [3d Dept 2015]), this determination is nonetheless found to be without sound basis in the record (*see Matter of S. Realty & Dev., LLC v Town of Hurley*, 2023 NY Slip Op 03744 at *6);

Based upon the foregoing, petitioners' first and second causes of action are granted to the extent that approval of the site plan is vacated and the matter remitted to the Planning Board for further proceedings consistent with this determination, with the Planning Board specifically directed to (1) clarify its response to question No. 5 in part 2 of the EAF, providing further elaboration with respect to whether the traffic impact of the project will be "[n]o, to small" or "[m]oderate to large," and (2) reconsider the application for site plan approval in view of the several issues with respect to Hoffman's proposed use of the Access Road.

*9 *ZBA's Sign Variance Approval*

Turning now to the third cause of action, petitioners contend that the ZBA failed to comply with SEQRA because its review was limited to environmental impacts from the sign variance alone, as opposed to the entire project. The Court finds this contention to be without merit. " 'Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed [to] satisfy the substantive requirements of SEQRA' " (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986], quoting *Aldrich v Pattison*,107 AD2d 258, 266 [2d Dept 1985]; *see Coalition Against Lincoln W. v City of New York*, 94 AD2d 483, 491 [1st Dept 1983], *affd* 60 NY2d 805 [1983]). "The degree of detail with which each factor must be discussed ... will vary with the circumstances and nature of the proposal" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d at 417; *see Matter of Gabrielli v Town of New Paltz*, 116 AD3d 1315, 1318 [3d Dept 2014]). Here, the proposal before the ZBA was the sign variance — not the entire project. The ZBA thus properly considered the potential environmental impacts of the sign variance, including the potential traffic impacts it might have.

Petitioners further contend that the ZBA failed to comply with SEQRA because it did not complete an EAF as required under 6 NYCRR § 617.6 (a) (3), nor otherwise address the criteria set forth in the form.

Indeed, "[s]trict compliance with SEQRA's procedural mechanisms is mandated and anything less will result in annulment of the determination" (*Matter of Bauer v County of Tompkins*, 57 AD3d 1151, 1152-1153 [2008]; *see Matter of King v Saratoga County Bd. of Supervisors*, 89 NY2d 341, 347 [1996]; *State of New York v Town of Horicon,* 46 AD3d 1287, 1290 [2007]). Here, while the ZBA found during its May 18, 2022 meeting that the sign variance "[would] not result in any significant adverse environmental impact" [R1236] and "[gave] it a [n]egative [d]eclaration" [R1236],

it did not complete an EAF nor provide any other elaboration with respect to why it reached this conclusion. The Court thus finds that the ZBA failed to comply with SEQRA and its determination must be annulled on this basis (*see* *Matter of King v Saratoga County Bd. of Supervisors*, 89 NY2d 341, 347 [1996]; *Matter of Bauer v County of Tompkins*, 57 AD3d 1151, 1152-1153 [2008]; *State of New York v Town of Horicon,* 46 AD3d 1287, 1290 [2007]).

Finally, insofar as the fourth cause of action is concerned, Town Law § 267 (3) (b) provides that

> "in making its determination, the [ZBA] shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also consider: (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance."

***10** Here, petitioners contend that the ZBA failed to adequately consider the criteria listed in Town Law § 267 (3) (b). The Court, however, finds this contention unavailing. The ZBA reviewed each of the criteria during its May 18, 2022 meeting, expressly finding as follows:

> (1) The proposed sign will not result in an undesirable change to the character of the neighborhood nor will it be a detriment to nearby properties;
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> (2) The ZBA "could ask for a smaller sign, but [Hoffman has] reduced the sign from 138 square feet down to 88 square feet" [R1237].
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> (3) The requested sign variance is not substantial; "[i]t's slightly oversized but it's not going make a big difference" [R1237].
>
> (4) The proposed sign will have no adverse impact on the physical or environmental conditions of the neighborhood.
>
> (5) The alleged difficulty is not self-created.

Based upon the foregoing, petitioners' third cause of action is granted to the extent that the ZBA's approval of the sign variance is vacated and the matter remitted to the ZBA to complete part 2 of the EAF relative to the impact of the sign variance, and to further elaborate on its consideration of the criteria set forth in part 2 of the EAF. The relief requested in the fourth cause of action is denied.

Therefore, having considered NYSCEF document Nos. 1 through 4, 21 through 41, 46 through 50, 52 through 57, and 61 through

66, and oral argument having been heard on July 20, 2023 with Claudia K. Braymer, Esq. appearing on behalf of petitioners Whispering Pines Associates, LLC and Robert Gardens North, LLC, John D. Aspland, Esq. appearing on behalf of petitioner Queensbury Holdings LLC, Jacquelyn P. White, Esq. appearing on behalf of respondents Town of Queensbury Planning Board and Town of Queensbury Zoning Board of Appeals, Javid Afzali, Esq. appearing on behalf of respondent Hoffman Development Corporation, and John D. Wright, Esq. appearing on behalf of respondent 919 State Route 9, LLC, it is hereby

ORDERED AND ADJUDGED that petitioners' first and second causes of action are granted to the extent that approval of the site plan is vacated and the matter remitted to the Planning Board for further proceedings consistent with this determination, with the Planning Board specifically directed to (1) clarify its response to question No. 5 in part 2 of the EAF, providing further elaboration with respect to whether the traffic impact of the project will be "[n]o, to small" or "[m]oderate to large," and (2) reconsider the application for site plan approval in view of the several issues with respect to Hoffman's proposed use of the Access Road; and it is further

ORDERED AND ADJUDGED that petitioners' third cause of action is granted to the extent that the ZBA's approval of the sign variance is vacated and the matter remitted to the ZBA to complete part 2 of the EAF relative to the impact of the sign variance, and to further elaborate on its consideration of the criteria set forth in the part 2 of the EAF; and it is further

ORDERED AND ADJUDGED that the relief requested in petitioners' fourth cause of action is denied.

***11** The original of this Decision and Judgment has been e-filed by the Court. Counsel for Queensbury Holdings LLC is hereby directed to serve a copy of the Decision and Judgment with notice of entry in accordance with CPLR 5513.

All Citations

Slip Copy, 79 Misc.3d 1234(A), 192 N.Y.S.3d 918 (Table), 2023 WL 4876311, 2023 N.Y. Slip Op. 50800(U)

Footnotes

1 All references to the Administrative Return will be denoted as R followed by the page number.

2 While the intersection of Sweet Road and State Route 9 has a traffic signal, the intersection of Weeks Road and State Route 9 does not.

3 To the extent that the subject property has not been conveyed to Hoffman by 919 State and the business relationship between the entities is otherwise unclear from

the record, the Court requested information in this regard during oral argument. In response, counsel described Hoffman as the “contract vendee” and 919 State as the “contract vendor.”

4 The reason for this reduction is unclear from the record.

5 The Planning Board, ZBA, and 919 State also assert lack of standing as an affirmative defense, but only Hoffman's papers include arguments in this regard.

CASE #2

New York Official Reports

Unreported Disposition
81 Misc.3d 1224(A), 200 N.Y.S.3d 761 (Table), 2023 WL 9060440 (N.Y.Sup.), 2023 N.Y. Slip Op. 51439(U)

***1** P.C., Plaintiff,
v.
L.C., C.R., H.C. and 175 CANADA STREET, LLC, Defendants.

Supreme Court, Warren County
Index No. EF2019-67433
Decided on December 26, 2023

CITE TITLE AS: P.C. v L.C.

ABSTRACT

Stipulations
Enforcement
No Meeting of Minds—Attorney Emails Concerning Plaintiff's Alleged Offer to Discontinue Action

P.C. v L.C., 2023 NY Slip Op 51439(U). Stipulations—Enforcement—No Meeting of Minds—Attorney Emails Concerning Plaintiff's Alleged Offer to Discontinue Action. (Sup Ct, Warren County, Dec. 26, 2023, Muller, J.)

APPEARANCES OF COUNSEL

Bartlett, Pontiff, Stewart & Rhodes, P.C., Glens Falls (Paula Nadeau Berube of counsel), for plaintiff.
L.C., pro se.
McPhillips, Fitzgerald & Cullum LLP, Glens Falls (Eric C. Schwenker of counsel), for defendants C.R. and H.C.
Ludemann & Associates, P.C., Glens Falls (Matthew R. Ludemann of counsel), for defendant 175 Canada Street, LLC.

OPINION OF THE COURT

Robert J. Muller, J.

Plaintiff and defendant L.C. (hereinafter defendant) were previously embroiled in a bitter divorce battle, which culminated in a non-jury trial on February 19 and 20, 2019. A Decision, Order and Judgment was then issued on June 25, 2019, with the Court finding, *inter alia*, that defendant's 10 shares of stock in defendant 175 Canada Street, LLC (hereinafter 175 Canada Street) were marital assets and, further, that defendant's transfer of 8 of these shares to the parties' daughters, defendants C.R. and H.C. (hereinafter the daughters) -- after commencement of the action and with no consideration -- violated the automatic orders set forth in Domestic Relations Law § 236 (B) (2). The Court further found that the transfer could not be set aside, however, because it was without jurisdiction over the daughters. As a result, plaintiff was granted a distributive award of $182,600.05, which represented one half the value of the shares. The Court also granted plaintiff a distributive award of $62,500.00, which represented one half the value of the sale of D'Gino's Corporation, another marital asset; retroactive maintenance in the amount of $12,048.57; and prospective

maintenance in the amount of $2,116.89 per month for a period of 10 years from the date of entry of the Judgment of Divorce, which was entered on September 5, 2019. According to plaintiff, defendant has not paid any of the distributive award, ***2** nor any of the retroactive or permanent maintenance awards.

On November 5, 2019, plaintiff commenced this action to set aside the transfer of the 8 shares of stock in 175 Canada Street to the daughters and, further, to obtain ownership and/or liquidation of these shares of stock so as to satisfy all or a part of the monies she was awarded. Issued was subsequently joined and discovery completed, with a non-jury trial scheduled for October 4, 2021.[1] On July 30, 2021, counsel for plaintiff -- Paula Nadeau Berube, Esq. -- sent an email to counsel for 175 Canada Street -- Matthew R. Ludemann, Esq. -- and counsel for the daughters -- Eric C. Schwenker, Esq. -- stating as follows:

> "Gentlemen -- My client has authorized me to discontinue the . . . action if [defendant] signs over his [2] shares to my client. Please use whatever pressure you have in your arsenal to make this happen. Please do not hesitate to contact me with any questions."

On September 20, 2021, Attorney Ludemann sent an email to Attorney Berube stating as follows:

> "I am preparing the new [c]ertificate . . . reflecting [2] shares [of 175 Canada Street] in your client's name. The LLC manager needs to sign the certificate. Once that has been done I will let you know."

Attorney Ludemann's office then emailed the certificate to Attorney Berube later that day, with a handwritten statement across the top reading "transfer is restricted by [a]greement dated May 8, 2017."[2]

Plaintiff thereafter declined to discontinue the action, contending that she "did not know nor agree that there would be any restrictions on the shares of stock . . . ." Presently before the Court is the daughters' motion for an Order under CPLR 2104 enforcing plaintiff's agreement to discontinue the action or, alternatively, for an Order under CPLR 3025 (b) authorizing them to amend their answer to include counterclaims for breach of contract, executory accord, accord and satisfaction, promissory estoppel, waiver, and release.

Turning first to that aspect of the motion which seeks to enforce plaintiff's agreement to discontinue the action, CPLR 2104 which provides that "[a]n agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney . . . ." According to the daughters, plaintiff's agreement to discontinue the action upon receipt of defendant's 2 shares of 175 Canada Street must be enforced under CPLR 2104, as the agreement is set forth in writing in an email bearing Attorney Berube's electronic signature.

The Court finds this contention to be without merit. CPLR 2014 presupposes the existence of an agreement, which requires "a meeting of the minds, such that there is a manifestation

of mutual assent sufficiently definite to assure that the parties . . . truly [concur] with respect to all material terms" (*Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016] [internal quotation marks and citations omitted]; *accord* ***3** *Harris v Schreibman*, 200 AD3d 1117, 1124-1125 [3d Dept 2021]). Here, there was no meeting of the minds. While plaintiff apparently envisioned an unrestricted transfer of the shares, the certificate provided transferred the shares subject to a certain May 8, 2017 agreement. It must also be noted that, while Attorney Ludemann responded to Attorney Berube's email, there was no response whatsoever from Attorney Schwenker.

To the extent that the daughters contend that Attorney Schwenker apprised them of Attorney Berube's email and they "reach[ed] out to [their] father to encourage . . . him to transfer his [2] remaining shares to [their] mother" in reliance on the agreement set forth therein, the Court finds this contention to be unavailing. In this regard, plaintiff filed a motion by Order to Show Cause in the divorce action on July 20, 2021 seeking to hold defendant in contempt as a result of his failure to pay the distributive and maintenance awards, which motion was returnable on August 20, 2021. Defendant further sought, *inter alia*, "an Order pursuant to Domestic Relations Law § 233 ordering sequestration of the [2] shares of stock in the name of . . . 175 Canada Street, . . . with . . . plaintiff being named as the receiver thereof, and [plaintiff being[allow[ed] to liquidate said shares of stock to apply toward the . . . arrears owed . . . ." The motion was subsequently granted in part by an Order issued on consent on September 27, 2021 which directed, *inter alia*, that a money judgment be entered against defendant and in favor of plaintiff in the amount of $51,486.46 and that defendant transfer his remaining 2 shares in 175 Canada Street to plaintiff. It is thus evident that defendant had to transfer the shares irrespective of whether his daughters "encourage[d]" him to do so.

Under the circumstances, the Court denies that aspect of the daughters' motion seeking an Order under CPLR 2104 enforcing plaintiff's agreement to discontinue the action.

The Court further denies the latter aspect of the motion wherein the daughters seek to amend their answer. At the outset, insofar as there was no meeting of the minds and defendant had to transfer his 2 shares in 175 Canada Street to plaintiff in any event under the terms of the September 27, 2021 Order, the proposed counterclaims appear to be devoid of merit (*see Lakeview Outlets Inc. v Town of Malta*, 166 AD3d 1445, 1446 [3d Dept 2018]; *Belair Care Ctr., Inc. v Cool Insuring Agency, Inc.*, 161 AD3d 1263, 1265-1266 [3d Dept 2018]; *Palmatier v Mr. Heater Corp.*, 156 AD3d 1167, 1169 [3d Dept 2017]; *NYAHSA Servs., Inc., Self--Ins. Trust v People Care Inc.*, 156 AD3d 99, 102 [3d Dept 2017]). It must also be noted that CPLR 3025 (b) requires that "[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made" and, here, a proposed amended answer was not submitted.

Based upon the foregoing, the daughters' motion is denied in its entirety.

Counsel for the parties are hereby directed to appear for a conference on January 18,

2024 at 10:00 A.M. at the Warren County Courthouse to select a new date for the non-jury trial.Therefore, having considered NYSCEF document Nos. 105 through 113, [3] it is hereby

ORDERED that the motion of defendants C.R. and H.C. is denied in its entirety; and it is further

ORDERED that counsel for the parties shall appear for a conference on January 18, 2024 at 10:00 A.M. at the Warren County Courthouse to select a new date for the non-jury trial.

The original of this Decision and Order has been e-filed by the Court. Counsel for plaintiff is hereby directed to serve with notice of entry.

Dated: December 26, 2023

Lake George, NY

HON. ROBERT J. MULLER, J.S.C.

ENTER:

FOOTNOTES

Footnotes

1 While defendant sent correspondence to the Court on December 26, 2019 in answer to the complaint and in opposition to a motion for a preliminary injunction filed by plaintiff simultaneous with the complaint, he has not otherwise appeared in this action.

2 This agreement is not in the record and, as such, it is unclear what restrictions are included.

3 Several conferences were held to discuss this motion, as well as other issues that have arisen in the case. During a November 11, 2022 conference, Attorney Berube stated on the record that plaintiff wished to discontinue the action as against her daughters, but continue it as against defendant. By correspondence dated September 8, 2023, Attorney Schwenker requested that “the transcript of [this] conference . . . act as a supplement” to the daughters' pending motion. The Court declines this request, however, noting that the parties were invited to submit a “carefully worded stipulation of discontinuance” at the conclusion of the conference and, to date, this stipulation has not been received.

End of Document

CASE #3

New York Official Reports

Unreported Disposition
80 Misc.3d 1238(A), 198 N.Y.S.3d 507 (Table), 2023 WL 7480942 (N.Y.Sup.), 2023 N.Y. Slip Op. 51188(U)

***1** Shell Consulting Group LLC, Plaintiff,
v.
Chad E. Nims, Hunt's Tree Care & Pest Control, and Nims Hospitality, Inc, Defendants.

Supreme Court, Washington County
Index No. EC2022-34658
Decided on November 6, 2023

CITE TITLE AS: Shell Consulting Group LLC v Nims

ABSTRACT

Limited Liability Companies
Capacity to Sue
Defendant failed to show that plaintiff LLC formed under Florida law was ""doing business" in New York without certificate of authority within meaning of Limited Liability Company Law § 808 (a) and was therefore without standing and capacity to sue.

Shell Consulting Group LLC v Nims, 2023 NY Slip Op 51188(U). Limited Liability Companies—Capacity to Sue—Defendant failed to show that plaintiff LLC formed under Florida law was "doing business" in New York without certificate of authority within meaning of Limited Liability Company Law § 808 (a) and was therefore without standing and capacity to sue. (Sup Ct, Washington County, Nov. 6, 2023, Muller, J.)

APPEARANCES OF COUNSEL

Miller, Mannix, Schachner & Hafner, LLC, Round Lake (Thomas W. Peterson of counsel), for plaintiff.
Monaco Cooper Lamme & Carr, PLLC, Albany (Laura M. Gulfo and Jacob F. Lamme of counsel), for defendants.

OPINION OF THE COURT

Robert J. Muller, J.

On March 17, 2022, defendant Chad E. Nims -- who is owner of defendant Hunt's Tree Care & Pest Control (hereinafter Hunt's Tree Care) and sole shareholder of defendant Nims Hospitality, Inc. -- received a "cold call from a sales representative of [p]laintiff." The representative advised that plaintiff could help Nims to obtain certain tax credits in exchange for plaintiff receiving a 20% commission on the credits obtained. Nims directed the representative to reach out to his employee, Bill Johnson, to further discuss the proposal.

On March 18, 2022, Robert Plocharczyk reached out to Johnson on plaintiff's behalf and the two then met on March 19. A second meeting subsequently took place on March 20, 2022, this one with Johnson, Robert Plocharczyk, and Nims. On March 22, 2022, Robert Plocharczyk sent Nims a

proposed Client Services Agreement between plaintiff and Nims, Hunt's Tree Care, and Nims Hospitality, respectively. This Agreement was then executed that same date and, on April 6, 2022, Robert Plocharczyk again met with Johnson and Nims to go over certain documents necessary for obtaining the tax credits. Each of these meetings took place in the Town of Queensbury, Warren County, with Plocharczyk apparently advising that he typically works out of plaintiff's office in Naples, Florida but had traveled to New York for client meetings.

According to plaintiff, it thereafter obtained tax credits in the amount of $497,309.96 for Nims, $434,207.94 for Hunt's Tree Care, and $68,702.22 for Nims Hospitality. It sent invoices ***2** to defendants for the commissions due and owing, but no payments were received.[1] As a result, plaintiff commenced this action for breach of contract and unjust enrichment on December 13, 2022. Presently before the Court is defendant's pre-answer motion to dismiss the complaint.

Defendants contend that plaintiff -- a limited liability company formed under the laws of Florida -- is doing business in New York without a certificate of authority to do business in the State and is therefore without standing and capacity to sue (*see* CPLR 3211 [a] [3]). Defendants rely upon Limited Liability Company Law § 808 (a), which provides as follows:

> "A foreign limited liability company doing business in this [S]tate without having received a certificate of authority to do business in this [S]tate may not maintain any action, suit or special proceeding in any court of this [S]tate unless and until such limited liability company shall have received a certificate of authority in this [S]tate."

Those few cases discussing Limited Liability Company Law § 808 (a) rely upon the case law analyzing Business Corporation Law § 1312, which has nearly identical language (*see Matter of Mobilevision Med. Imaging Servs., LLC v Sinai Diagnostic & Interventional Radiology, P.C.*, 66 AD3d 685, 686 [2d Dept 2009]).[2] That being said, "[i]n order for a court to find that a foreign corporation is 'doing business' in New York within the meaning of Business Corporation Law § 1312 (a), 'the corporation must be engaged in a regular and continuous course of conduct in the State'" (*Highfill, Inc. v Bruce & Iris, Inc.*, 50 AD3d 742, 743 [2d Dept 2008]; *see Commodity Ocean Transp. Corp. of NY v Royce*, 221 AD2d 406, 407 [2d Dept 1995]). "A defendant relying upon Business Corporation Law § 1312 (a) as a statutory barrier to a plaintiff's lawsuit bears the burden of proving that [plaintiff] corporation's business activities in New York were not just casual or occasional, but so systematic and regular as to manifest continuity of activity in the jurisdiction" (*Highfill, Inc. v Bruce & Iris, Inc.*, 50 AD3d at 743 [internal quotation marks omitted]; *see S & T Bank v Spectrum Cabinet Sales*, 247 AD2d 373, 373 [2d Dept 1998]; *Peter Matthews, Ltd. v Robert Mabey, Inc.*, 117 AD2d 943, 944 [3d Dept 1986]).

"A foreign company will only be prevented from maintaining an action in New York [S]tate under Business Corporation Law § 1312 (a) if . . . defendant can prove that . . . plaintiff not only operates in New York [S]tate, but that their

business is wholly intrastate as well" (*SLM Private Credit Student Loan Trust 2004-B v Bonet*, 49 Misc 3d 1204[A], 2015 NY Slip Op 51399[U] *5 [Civ Ct, Bronx County 2015]; *see Highfill, Inc. v Bruce & Iris, Inc.*, 50 AD3d at 744; *see also Domino Media, Inc. v Kranis*, 9 F Supp 2d 378, 385 n 70 [SD NY 1998]). "A foreign company's business is intrastate when it is permanent, continuous, systematic and regular within the [S]tate and the intrastate business essential to the corporation" (*SLM Private Credit* ***3** *Student Loan Trust 2004-B v Bonet*, 2015 NY Slip Op 51399[U], at *5; *see Highfill, Inc. v Bruce & Iris, Inc.*, 50 AD3d at 744). In other words, "the foreign corporation must do more than make a single contract, engage in an isolated piece of business, or an occasional undertaking; it must maintain and carry on business with some continuity of act and purpose" (*Intl. Fuel & Iron Corp. v. Donner Steel Co.*, 242 NY 224, 230 [1926]; *accord SLM Private Credit Student Loan Trust 2004-B v Bonet*, 2015 NY Slip Op 51399[U], at *5).

"Business Corporation Law § 1312 (a) does not apply when a company's activities in New York are merely incidental to its business in interstate . . . commerce" (*SLM Private Credit Student Loan Trust 2004-B v Bonet*, 2015 NY Slip Op 51399[U], at *6; *see* *Audemars Piguet Holding S.A. v Swiss Watch Intl., Inc.*, 46 F Supp 3d 255 [SD NY 2014]). Indeed, Business Corporation Law § 1312 (a) cannot preclude "a foreign corporation doing business in New York [S]tate from bringing suit when it is engaged in interstate commerce under the protection of USCA Const art I, § 8" (*SLM Private Credit Student Loan Trust 2004-B v Bonet*, 2015 NY Slip Op 51399[U], at *6; *see Colonial Mtge. Co. v First Fed. Sav. and Loan Assn. of Rochester*, 57 AD2d 1046, 1046 [4th Dept 1977]). "If a foreign corporation's business in New York is merely soliciting business, no matter how extensive those contacts may be, then the foreign corporation is engaged in interstate commerce and is constitutionally beyond [the] reach of Business Corporation Law § 1312 (a)" (*SLM Private Credit Student Loan Trust 2004-B v Bonet*, 2015 NY Slip Op 51399 [U], at *6; *see Paper Manufacturers Co. v Ris Paper Co.*, 86 Misc 2d 95, 98 [Cic Ct, NY County 1976]).

Here, defendants contend that plaintiff's business activities in New York were regular and continuous because its sale representative placed a cold call to Nims in New York, and Robert Plocharczyk then followed this cold call up with three separate meetings in New York. In this regard, defendants submit an email Robert Plocharczyk sent to one of its employees which identifies him as "Robert from Shell Consulting Group, LLC in Warrensburg." Defendants further note that plaintiff has brought two nearly identical actions in New York: (1) *Shell Consulting Group LLC v Baker* in Saratoga County Supreme Court, commenced on August 24, 2022 under Index No. EF20221850; and (2) *Shell Consulting Group LLC v Michael Christine Catering,* LLC in Montgomery County Supreme Court, commenced on December 13, 2022 under Index No. EF2022-684 -- thus demonstrating that plaintiff has several clients in this State.

Plaintiff, on the other hand, contends that its business activities in New York are not regular and continuous but, rather, are intermittent and incidental to its interstate business --

which spans 27 States, including New York. Plaintiff has submitted the affidavit of its owner, John Plocharczyk, who states that "Robert Plocharczyk . . . is not an owner, office [sic], member or employee of [plaintiff, and h]is connection to [plaintiff] is that he occasionally refers clients to it for which he receives a commission, . . . as do others in other [S]tates."[3] John Plocharczyk further states that plaintiff does not rent any space in New York, have any employees in New York, have a telephone number in New York, or have a bank account in New York, and while it occasionally receives referrals for contracts in New York, these contracts are either "received by electronic means [or, like] the one in this case, . . . signed at the customer's location and mailed to [plaintiff's] Florida office." Additionally, all work on the contracts is performed in plaintiff's ***4** Florida office.

Under the circumstances, the Court finds that defendants have failed to demonstrate that plaintiff is doing business in New York, as defined under Limited Liability Company Law § 808 (a). While plaintiff solicited defendants' business in New York and Robert Plocharczyk then met with plaintiff three times in this State, these activities were incidental to and in furtherance of plaintiff's business in interstate commerce. The fact that plaintiff has two other breach of contract actions pending in New York is not sufficient to demonstrate otherwise -- especially given the nature of its business and its presence in 27 different States (*see SLM Private Credit Student Loan Trust 2004-B v Bonet*, 2015 NY Slip Op 51399[U], at *6; *Paper Manufacturers Co. v Ris Paper Co.*, 86 Misc 2d at 98). At this juncture, there is simply nothing in the record to "prove that . . . plaintiff not only operates in New York [S]tate, but that [its] business is wholly intrastate as well" (*SLM Private Credit Student Loan Trust 2004-B v Bonet*, 2015 NY Slip Op 51399[U] at *5; *see Highfill, Inc. v Bruce & Iris, Inc.*, 50 AD3d at 744).

"Absent sufficient evidence to establish that a plaintiff is doing business in this [S]tate, 'the presumption is that . . . plaintiff is doing business in its State of incorporation . . . and not in New York" (*Highfill, Inc. v Bruce & Iris, Inc.*, 50 AD3d at 743-744, quoting *Cadle Co. v Hoffman*, 237 AD2d 555, 555 [2d Dept 1997]). Defendants' motion to dismiss is therefore denied without prejudice. Defendants are hereby directed to serve an answer within thirty (30) days of the date of this Decision and Order.[4]

Briefly, even if defendants had successfully demonstrated that plaintiff is doing business in New York without a certificate of authority, this would not require dismissal of the action. Indeed, under Limited Liability Company Law § 808 (a) plaintiff must be provided with a reasonable opportunity to cure its noncompliance prior to dismissal (*see Matter of Mobilevision Med. Imaging Servs., LLC v Sinai Diagnostic & Interventional Radiology, P.C.*, 66 AD3d at 686; *see also Aybar v Aybar*, 37 NY3d 274, 311 [2021, Wilson, J., dissenting]; *Showcase Limousine v Carey*, 269 AD2d 133, 134 [1st Dept 2000]; *Uribe v Merchants Bank of NY* , 266 AD2d 21, 22 [1st Dept 1999]; *Tri-- Terminal Corp. v CITC Indus.*, 78 AD2d 609, 609 [1st Dept 1980]).

Therefore, having considered NYSCEF document Nos. 14 through 20, 24, and 26

through 31, and oral argument having been heard on November 2, 2023 with Thomas W. Peterson, Esq. appearing on behalf of plaintiff and Laura M. Gulfo, Esq. appearing on behalf of defendants, it is hereby

ORDERED that defendants' motion to dismiss is denied without prejudice; and it is further

ORDERED that defendants shall serve an answer within thirty (30) days of the date of this Decision and Order.

This Decision and Order has been efiled by the Court. Counsel for plaintiff is hereby directed to serve with notice of entry.

Dated: November 6, 2023

Lake George, New York

ROBERT J. MULLER, J.S.C.

FOOTNOTES

Footnotes

1 Plaintiff sent an invoice to Nims for $99,461.39, to Hunt's Tree Care for $90,841.59, and to Nims Hospitality for $13,740.44. While the invoices sent to Nims and Nims Hospitality appear to represent 20% of the tax credits obtained, the invoice sent to Hunt's Tree Care is more than 20% of $434,207.94 -- which is $86,841.59. The reason for this $4,000.00 discrepancy is unclear from the record.

2 Business Corporation Law §1312 (a) provides, in pertinent part: “A foreign corporation doing business in this [S]tate without authority shall not maintain any action or special proceeding in this [S]tate unless and until such corporation has been authorized to do business in this [S]tate . . . .”

3 John Plocharczyk and Robert Plocharczyk are presumably related, but how so is not clear from the record.

4 If discovery yields additional information relative to the extent of plaintiff's business in New York, defendants are of course free to renew their motion.

CYBERSECURITY AND DATA PROTECTION: SAFEGUARDS, PRIVACY AND YOUR ETHICAL OBLIGATIONS

James Long, Esq.

WCBA DONATES HATS AND MITTENS TO THE CHILDREN OF WARREN COUNTY HEAD START

From The Judge's Chambers

Martin D. Auffredou, J.S.C.
Warren County Supreme Court
Warren County Municipal Center
1340 State Route 9, Lake George, NY 12845

CASE #1

STATE OF NEW YORK
SUPREME COURT COUNTY OF WARREN

RAYMOND J. GIBLIN,

Plaintiff,

-against-

MCKENNA S. FRANK and STEVEN A. FRANK,

Defendants.

DECISION AND ORDER

Index No. EF2022-69897
RJI No. 56-1-2022-0219

Appearances:

Breedlove Law PLLC, Queensbury (*Brian H. Breedlove* of counsel), for plaintiff.

Law Offices of John Trop, Tarrytown (*Kevin M. Mathewson* of counsel), for defendants.

AUFFREDOU, J.

Motion by plaintiff for partial summary judgment on the issue of defendants' negligence and dismissing defendants' first affirmative defense, which asserts plaintiff's comparative fault.[1]

On August 31, 2021, the then-70-year-old plaintiff was riding his bicycle in a generally southeasterly direction on the Warren County Bikeway, approaching its intersection with a public highway named Ridge Street, a two-lane highway that runs in a generally north-south direction in the City of Glens Falls, Warren County, New York. The Bikeway intersects and traverses Ridge Street at a roughly 45-degree angle somewhat to the south of Ridge Street's intersection with another street named Sanford Street, which is governed by a traffic light. The Bikeway's path across Ridge Street is marked by a crosswalk that crosses Ridge Street diagonally in a generally

[1] Plaintiff's notice of motion seeks partial summary judgment on the issue of liability as against both defendants. However, the "wherefore" clauses of counsel's affirmation and the memorandum of law in support of that relief request a finding of liability only as to defendant McKenna S. Frank. Insofar as liability against defendant Steven A. Frank is based only upon his ownership of the vehicle that McKenna S. Frank was operating, with his permission, any finding that McKenna S. Frank's negligence was a cause of plaintiff's injuries would also result in a finding that Steven A. Frank was liable, and the court will construe the motion as seeking partial summary judgment as to the liability of both defendants (*see* Vehicle and Traffic Law § 388 [1]).

northwest to southeast direction. The length of the crosswalk is thus considerably greater than the width of Ridge Street. There is room for several cars to be present on Ridge Street between the Bikeway crosswalk and the traffic light at Ridge and Sanford Streets, which lies to the north of the crosswalk.

As a bicyclist proceeds southeasterly on the Bikeway toward Ridge Street, he or she encounters a small stop sign, which is set back from the crosswalk approximately 25 feet. There are trees and vegetation at the westerly corners where the Bikeway meets Ridge Street, that prevent a bicyclist from peering up and down Ridge Street when stopped at the small stop sign. Thus, plaintiff, who frequently biked the Bikeway, did not stop at the small stop sign on August 13, 2021 but, rather, slowly rolled toward Ridge Street. As he did, the light governing traffic at the intersection of Ridge and Sanford Streets turned from red to green and traffic began to move. At this time, defendant McKenna S. Frank (hereinafter defendant) was driving her large, dark-colored SUV in the northbound lane, either stopped or slowly rolling behind the crosswalk,[2] with other vehicles between her and the traffic light at Ridge and Sanford Streets.

As plaintiff approached the crosswalk at Ridge Street, looking and assessing the traffic conditions, he observed a vehicle oncoming in the southbound lane to his left (i.e., the lane nearest to him) and defendant's vehicle at the crosswalk in the northbound lane (i.e., the lane furthest away from him). He allowed the southbound vehicle to pass and claims that defendant waved him across the street. He therefore proceeded, without stopping, out into the crosswalk over Ridge Street, all the while looking to his left for any other southbound vehicles. His progress was arrested when he struck the side of defendant's SUV, which had then advanced into the crosswalk without his having noticed it. Defendant implicitly denies having waved plaintiff on, insofar as she claims that she

[2] Plaintiff's account is that defendant was stopped. She cannot recall whether she was stopped or rolling. This factual discrepancy is irrelevant to the court's determination herein.

looked both ways before entering the crosswalk and saw nothing. Rather, she claims to have noticed plaintiff only as his bicycle struck her SUV. In any case, the impact caused plaintiff to fly up in the air then fall to the pavement in the crosswalk, resulting in significant injuries.

Plaintiff commenced suit by the filing of a complaint alleging a single cause of action sounding in negligence. Defendants joined issue by the filing of their answer, in which they asserted, as relevant here, an affirmative defense sounding in comparative negligence, and plaintiff now moves as aforesaid.[3] Upon review of the affirmation of Brian H. Breedlove, Esq., dated July 13, 2023, with exhibits; plaintiff's memorandum of law in support of the motion, dated July 13, 2023; the affirmation in opposition of Kevin M. Mathewson, Esq., dated July 31, 2023, with exhibits; and the reply affirmation of Brian H. Breedlove, Esq., dated August 2, 2023, with exhibit; and due deliberation having been had upon all the foregoing, decision is hereby rendered as follows.

> "A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries. To be entitled to summary judgment on the issue of a defendant's liability, a plaintiff does not bear the burden of establishing the absence of his or her own comparative negligence.
>
> "[A] violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se. A driver has a statutory duty to use due care to avoid colliding with [bicyclists] on the roadway pursuant to Vehicle and Traffic Law § 1146, as well as a common-law duty to see that which he or she should have seen through the proper use of his or her senses" (*Beityaaghoob v Klein*, 216 AD3d 724, 725 [2d Dept 2023] [internal quotation marks, brackets and citations omitted]).

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[3] Defendants' first affirmative defense alleges both the defense of comparative fault and the defense of assumption of risk, and plaintiff's notice of motion purports to seek dismissal of both. The parties, however, constrain the arguments in their papers herein to comparative fault, addressing no specific legal argument to the legally distinct defense of assumption of risk. The court finds, therefore, that no challenge to the defense of assumption of risk is mounted herein and that affirmative defense will survive this motion regardless of the court's determination as to comparative fault.

Plaintiff carried this burden as to defendant's negligence by establishing defendant's ostensible violation of Vehicle and Traffic Law § 1146 (a) and that she failed to see him as he traversed an entire lane of traffic, on a diagonal course, before reaching her vehicle (*see Beityaaghoob*, 216 AD3d at 725-726; *Higashi v M&R Scarsdale Rest., LLC*, 176 AD3d 788, 789-790 [2d Dept 2019]). Defendant fails to raise a triable issue of fact in this regard. The question of whether she waved plaintiff on is not material to the issue of her negligence. Either she waved him on, as he testified in deposition, then negligently proceeded into the crosswalk in violation of Vehicle and Traffic Law § 1146 (a), or she looked both ways and failed to see him, as she testified in deposition, in breach of her common-law duty to see what was there to be seen with the proper use of her senses. Either way, her negligence is established (*see Higashi*, 176 AD3d at 789-790).

The deposition testimony of Sean Dion, a southbound motorist who was approaching the traffic light on Ridge Street from the north, about 130 feet away from where the collision occurred, also fails to raise a triable issue of fact. His testimony is riddled with inconsistencies about his ability to perceive the events at issue and what he, in fact, saw. Insofar as he claims to have been not paying attention to those events, his testimony that he saw something moving out of the corner of his eye "at a good clip" then a bicycle fly up in the air does not establish that plaintiff darted out into the crosswalk, which is the ostensible purpose for which defendants submitted it (*see Beityaaghoob*, 216 AD3d at 726; *Wood v Converse*, 263 AD2d 860, 862 [3d Dept 1999]). To the extent that, in deposition, Dion identified the thing that he saw moving out of the corner of his eye as plaintiff on his bicycle, this contradicts his prior statement to police in which he claims not to have seen the bicycle until impact (*see Burdo v Cold Spring Harbor Cent. Sch. Dist.*, 219 AD3d 1481; 2023 NY Slip Op 04748, *2 [2d Dept 2023]). And, in any event, it defies reason to suggest that plaintiff could cross an entire lane of traffic at a 45-degree angle so quickly on his bicycle that

he could be considered to have darted out into defendant's vehicle, affording her no opportunity observe him and comply with Vehicle and Traffic Law § 1146 (a) (*see Beityaaghoob*, 216 AD3d at 726).

A different result obtains with respect to plaintiff's application for summary judgment dismissing the first affirmative defense. Plaintiff admits that he did not stop before proceeding into Ridge Street along the crosswalk, establishing his violation of Vehicle and Traffic Law § 1234 (c). "'[A]n unexcused violation of the Vehicle and Traffic Law . . . constitutes negligence per se (*McCleod v Taccone*, 122 AD3d 1410, 1411 [4th Dept 2014], quoting *Long v Niagara Frontier Transp. Auth.*, 81 AD3d 1391, 1392 [4th Dept 2011]; *see Beityaaghoob*, 216 AD3d at 725). Plaintiff's apparent reason for not stopping before entering the crosswalk is that defendant waved him on. Thus, the factual issue of whether defendant waved him on is material to the question of his comparative fault and precludes summary judgment in that regard. Moreover, a jury could find this reason for not stopping unsatisfactory to excuse the violation.

Plaintiff also testified that, as he traversed the crosswalk, he never looked back from his left, conduct to which the putative wave is also germane. If a jury believed that the wave occurred, it might conclude that plaintiff's looking only to his left for southbound traffic in reliance on defendant's remaining stationary, as would be consistent with her having waved him on, was reasonable. Conversely, if a jury believed that no wave occurred, it could reasonably conclude that it was negligent of plaintiff to fail to look back to his right or check for whatever may have been transpiring in front of him. Indeed, a jury could find that plaintiff's not looking back from his left as he proceeded across Ridge Street was unreasonable whether defendant had waved him on or not.

Arguments not specifically addressed herein have been examined and determined to be without merit or academic in light of the foregoing. Based upon the foregoing, it is hereby

ORDERED that plaintiff's motion is granted to the extent that he is granted summary judgment on the sole cause of action in the complaint, the negligence of defendant McKenna S. Frank is established, and the liability of both defendants is established; and it is further

ORDERED that plaintiff's motion is otherwise denied and the issue of his comparative fault is reserved for resolution at trial.

The within constitutes the decision and order of this court.

Signed this 13th day of November 2023, at Lake George, New York.

ENTER:

HON. MARTIN D. AUFFREDOU
JUSTICE OF THE SUPREME COURT

The court is uploading the decision and order to the New York State Courts Electronic Filing System (NYSCEF). Such uploading does not constitute service with notice of entry (*see* 22 NYCRR 202.5-b [h] [2]).

Distribution:
Brian H. Breedlove, Esq.
Kevin M. Mathewson, Esq.

Giblin v Frank
Warren County
Index No. EF2022-69897

CASE #2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WARREN

BREEDLOVE & NOLL, LLP,

Plaintiff,

-against-

DANIEL LEWIS and JOAN LEWIS,

Defendants.

DECISION AND ORDER

Index No. EF2022-70584
RJI No. 56-1-2023-0307

APPEARANCES:

Breedlove Law PLLC, Queensbury (*Brian H. Breedlove* of counsel), for plaintiff.

James Kleinbaum, Attorney at Law, PC, Chatham (*John W. Hillman* of counsel), for defendant Joan Lewis.

AUFFREDOU, J.

Motion by defendant Joan Lewis to dismiss the complaint, cross motion by plaintiff to strike the answer of defendant Joan Lewis (Joan) for failure to respond to discovery, and motion by plaintiff for default judgment or, alternatively, summary judgment against defendant Daniel Lewis (Daniel).

Defendants are a cohabitating married couple who live in Dutchess County. Plaintiff is a law firm with its place of business in Warren County. According to the allegations in the complaint, as amplified by plaintiff's affidavits on the motion (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]), on July 20, 2021, Daniel retained plaintiff to represent him in connection with an indictment pending in Dutchess County Court. The indictment charged him with the crimes of vehicular assault in the second degree, a class E felony, and driving while intoxicated, an unclassified misdemeanor, which arose from an incident in which he crashed his vehicle into a building and utility pole while operating it in an intoxicated condition, causing serious physical injury to his passenger (*see* Penal Law § 120.03 [1]; Vehicle and Traffic Law § 1192 [3]). Plaintiff's

first appearance in the criminal action was at Daniel's arraignment on the indictment, at which, plaintiff alleges, it was able to advocate for Daniel's release to "house arrest" with an ankle monitor, in the face of the judge's stated intention to incarcerate him pending prosecution.

A civil action against both defendants herein also arose from the incident—against Joan because she owned the vehicle, which Daniel was driving without a license—and plaintiff alleges that their insurance coverage was insufficient to cover the injured parties' damages. It thus worked in tandem with defendants' civil counsel to coordinate the best possible defense of both actions, for the benefit of both defendants, which strategy included using the civil discovery process to depose the police officers involved in the criminal case and obtain information from them that defendants would not ordinarily have in the criminal context. Plaintiff avers that this was its idea, and that the "outstanding" results of those depositions, of which the District Attorney was initially unaware, enabled an aggressive and successful defense in the criminal matter. Ultimately, Daniel avoided incarceration and instead was sentenced to a term of five years' probation.

Plaintiff alleges that, at the conclusion of the criminal case, there was due and owing to it for its services the sum of $23,271.84. It sent a bill and account stated letter for this sum to only Daniel; Joan was not named on these documents. Indeed, Joan is not a signatory to the retainer agreement for plaintiff's services to Daniel in the criminal action. However, plaintiff avers that Daniel, who was unemployed and subject to house arrest when he retained plaintiff, promised that his wife would pay any fees beyond a $10,000 initial retainer fee, which he paid up front, from a substantial bequest that she was expecting. Joan, on the other hand, claims that she was unaware that Daniel had retained plaintiff, paid it the $10,000 initial retainer, or committed her to pay additional fees. She further swears that, had she known, she would not have allowed any of it.

When the outstanding bill went unpaid, plaintiff commenced the instant lawsuit, asserting liability against both Daniel and Joan, notwithstanding that Joan was not named in the retainer agreement, based upon the so-called "doctrine of necessities," a common-law rule that makes one spouse liable for the expenses of the other when such are incurred for necessary expenses (*see Elder v Rosenwasser*, 238 NY 427, 429-430 [1924]; *Our Lady of Lourdes Mem. Hosp. v Frey*, 152 AD2d 73, 74-75 [3d Dept 1989]). The complaint names three causes of action—breach of contract against both defendants, account stated against both defendants, and unjust enrichment against Joan. Joan joined issue with the filing of her answer, in which she asserts, as relevant here, an affirmative defense for lack of privity. Daniel filed a notice of appearance and demand for service of the complaint on or about August 28, 2023. However, he had already been served with the complaint in October 2022, never answered it, and is therefore in default.

Joan now moves to dismiss the complaint for failure to state a cause of action and based on a defense founded upon documentary evidence (*see* CPLR 3211 [a] [1], [7]). Plaintiff opposes the motion and cross-moves to strike Joan's answer based upon her failure to respond to its interrogatories, combined discovery demands and notice of deposition. During the pendency of the motion and cross motion, plaintiff also moved against Daniel for default judgment or, alternatively, summary judgment. All three motions are now before the court for determination.

Upon consideration of the pleadings filed herein; the affirmation of John W. Hillman, Esq., dated July 20, 2023, with exhibit; the affidavit of Joan Lewis, sworn to July 19, 2023; the affirmation of Brian H. Breedlove, Esq., dated August 4, 2023, with exhibits; plaintiff's memorandum of law, dated August 4, 2023; the reply affirmation of John W. Hillman, Esq., dated August 25, 2023; the reply affidavit of Joan Lewis, sworn to August 25, 2023; the reply affirmation

of Brian H. Breedlove, Esq., dated August 25, 2023; and the affirmation of Brian H. Breedlove, Esq., dated September 15, 2023, with exhibits, decision is hereby rendered as follows.

"'On a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a claim, [this court] must afford the complaint a liberal construction, accept the facts as alleged in the pleading as true, confer on the nonmoving party the benefit of every possible inference and determine whether the facts as alleged fit within any cognizable legal theory'" (*Hilgreen v Pollard Excavating, Inc.*, 193 AD3d 1134, 1136 [3d Dept 2021], quoting *Graven v Children's Home R.T.F., Inc.*, 152 AD3d 1152, 1153 [3d Dept 2017] [internal quotation marks and citations omitted]). A motion to dismiss under CPLR 3211 (a) (1) may be granted when "'the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim[s]'" (*Carr v Wegmans Food Mkts., Inc.*, 182 AD3d 667, 668 [3d Dept 2020], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 83-84 [2d Dept 2010] [internal quotation marks and citation omitted]).

There is no dispute as to the existence or contents of the retainer agreement between plaintiff and Daniel, that plaintiff rendered services to Daniel pursuant to the retainer agreement, or that plaintiff's bills and account stated letter went unanswered. Rather, the core contention between the parties is as to whether plaintiff has stated a claim against Joan for liability in contract under the doctrine of necessities. Thereunder, a spouse who is obliged to support the other may be liable for the reasonable contractual debts of the other when such were incurred for services that are necessary to the other's support and were furnished on the credit of the spouse (*see Elder*, 238 NY at 429-430; *Our Lady of Lourdes Mem. Hosp.*, 152 AD2d at 74-75). There is a presumption in favor of a creditor that necessaries were furnished on the credit of the spouse (*see Our Lady of*

Lourdes Mem. Hosp., 152 AD2d at 75; *Saks & Co. v Nager*, 74 Msc 2d 855, 857 [Civ Ct, NY County 1973]).

The court finds that plaintiff has stated a claim for breach of contract against Joan. As observed, there is no question as to the contract or its breach by Daniel and plaintiff has alleged facts that, if proven, would establish that the contract should be imputed to Joan under the doctrine of necessities. Though the doctrine, which had its genesis during a time when wives were incompetent to contract and were generally beholden to their husbands for support, was traditionally applied at common law to make husbands liable for the debts of their wives, it has long been reciprocally applied (*see Our Lady of Lourdes Mem. Hosp.*, 152 AD2d at 74-75). There can be no dispute that spouses, joined as they are in the economic partnership of marriage, have mutual obligations to support one another (*see id.* at 75). Further, plaintiff has alleged specific facts that establish that Daniel was, in practicality, dependent upon his wife's support; to wit, when he retained plaintiff, he was unemployed, under indictment and under house arrest. A spouse's legal defense in a criminal matter that could result in the spouse's incarceration was long ago held to be necessary to the spouse's support (*see Elder*, 238 NY at 429-430). It cannot be said as a matter of law that plaintiff's bill is unreasonable, given plaintiff's allegations as to the nature of the charges against Daniel, the scope of the work performed, and the additional time and logistical challenges presented by Daniel's calling upon plaintiff to defend him in a criminal action in a county that is over 100 miles from plaintiff's place of business. On that point, the allegations that plaintiff's work resulted in a favorable outcome for Daniel in the criminal action also bear noting. Finally, plaintiff alleges that Daniel promised that his wife would pay unpaid fees under the retainer agreement and that it entered the agreement with Daniel in reliance on that promise. Daniel's alleged reference to a substantial distribution from an estate as the source of his wife's

ability to pay suffices to establish that it was within Joan's means to pay plaintiff's bill for purposes of a motion to dismiss (*see Medical Bus. Assoc. v Steiner*, 183 AD2d 86, 91 [2d Dept 1992]). In light of the aforesaid presumption in plaintiff's favor, it has also adequately alleged that its representation of Daniel was furnished on Joan's credit. Additionally, although a written contract qualifies as documentary evidence that may warrant dismissal of a cause of action, the doctrine of necessities' application to this case precludes a finding that the retainer agreement herein conclusively resolves all the factual issues in the case or conclusively disposes of plaintiff's claim, even though Joan is not named in it (*see Carr*, 182 AD3d at 668). As such, the first cause of action should not be dismissed as against Joan on this motion.

The court reaches a similar result as to the third cause of action, alleging unjust enrichment against Joan. "To recover under a theory of unjust enrichment, a litigant must show 'that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Columbia Mem. Hosp. v Hinds*, 38 NY3d 253, 275 [2022], quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks omitted]; *accord Citibank, N.A. v Walker*, 12 AD3d 480, 481 [2d Dept 2004]). To be sure, such a claim lies only when no express contract exists that governs the subject matter of the alleged quasi-contact (*see Catlyn & Derzee, Inc. v Amedore Land Devs., LLC*, 166 AD3d 1137, 1139 [3d Dept 2018]). However, there is no express contract alleged between plaintiff and Joan. Rather the contract is alleged to be implied or imputed to her under the doctrine of necessities. There is also no question that the plaintiff law firm committed the time and expertise of one or more lawyers in its employ to the defense of the criminal action against Daniel, at its expense. The Court of Appeals long ago recognized the benefits to one spouse of providing a legal defense to the other for the purpose of avoiding the other's incarceration, such as

maintaining the other's presence in the home and the resultant continuation of his or her contributions to the household, marriage or economic partnership (*see Elder*, 238 NY at 429-430). Further, plaintiff alleges specific benefits that inured to Joan in the context of the civil case against her that resulted from its representation of Daniel in the criminal action. It is thus adequately alleged that equity would call for Joan to pay plaintiff's fee. Thus, if liability against Joan cannot be founded upon a breach of contract theory by resort to the doctrine of necessities, she may yet be liable in equity and the third cause of action is properly alleged against Joan in the alternative. It should, therefore, not be dismissed on this motion.

The court reaches a different conclusion as to the second cause of action, for account stated, to the extent that it is alleged against Joan. The invoice and account stated letter are not addressed to Joan and there is no evidence or allegation that Joan paid any part of the cost of Daniel's representation to plaintiff (*see CodeFab, LLC v WG, Ltd.*, 2017 NY Slip Op 31089 [U], *41 [Sup Ct, NY County 2017]; *Brown Rudnick Berlack Israels LLP v Zelmanovitch*, 11 Misc 3d 1090 [A], 2006 NY Slip Op 50800 [U], *6 [Sup Ct, Kings County 2006]). Moreover, the existence of a valid implied contract between plaintiff and Joan, while sufficiently alleged in the complaint, is not yet established and an account stated claim cannot "be made an instrument to create liability when none otherwise exists but assumes the existence of some indebtedness between the parties" (*Martin H. Bauman Assoc., Inc. v H & M Intl. Transp., Inc.*, 171 AD2d 479, 485 [1st Dept 1991]). Either Joan is liable to plaintiff under the contract via the doctrine of necessities or she is not and, if she is, plaintiff can recover under the first cause of action (*see id.*). The second cause of action should thus be dismissed to the extent that it is alleged against Joan.

Plaintiff's cross motion requires little discussion. Its papers set forth a willful failure to disclose information that ought to be disclosed herein and Joan offers no real defense in that

regard—her opposition, in totem, is that the cross motion should be dismissed because her motion to dismiss is meritorious (*see* CPLR 3126). In the alternative, she requests a conference to set a discovery timeline. This is tantamount to presenting no defense to the claim at all. The cross motion is therefore granted. However, insofar as the pendency of the motion to dismiss (or its imminent interposition, as the case may be) furnished some excuse to hold off on conducting discovery and incurring the costs and fees attendant thereto; and since plaintiff failed to comply with this court's rules by requesting a conference as a prerequisite to making the cross motion, which may well have obviated the need for it, the court declines to strike Joan's answer at this time. Rather, Joan is directed to respond to plaintiff's interrogatories and combined discovery demands, and to schedule a time for (but not necessarily sit for) her deposition with plaintiff's counsel, within 60 days of plaintiff's service of this order upon her with notice of entry. Should she fail to do so, the court will strike her answer upon an affirmation from plaintiff's counsel that establishes the failure.

Turning to plaintiff's motion for default judgment or summary judgment against Daniel, initially, summary judgment is inappropriate because Daniel never joined issue (*see* CPLR 3212 [a]). Moreover, plaintiff is not entitled to default judgment at this time, notwithstanding that it has timely moved for same and demonstrated due service, Daniel's default and a meritorious cause of action, because his application is lacking proof of the additional notice required by CPLR 3215 (g) (3) (*see* CPLR 3215 [a], [c], [f]). Such is required in this case because the "default judgment [is] based upon nonappearance [and] is sought against a natural person in an action based upon nonpayment of a contractual obligation" (CPLR 3215 [g] [3] [i]). As such, plaintiff's motion for default judgment or summary judgment against Daniel is denied, without prejudice to renewal upon proof of the required additional notice.

Accordingly, it is hereby

ORDERED that the motion to dismiss of defendant Joan Lewis is granted to the extent that the second cause of action in the complaint is dismissed as against her, and the motion is otherwise denied; and it is further

ORDERED that plaintiff's cross motion to strike the answer of defendant Joan Lewis is granted as conditioned herein; defendant Joan Lewis is directed to respond to plaintiff's interrogatories and combined discovery demands, and to schedule (but not necessarily sit for) her deposition, within 60 days of plaintiff's service upon her of this order with notice of entry; and, upon the failure of defendant Joan Lewis to respond to plaintiff's interrogatories and combined discovery demands, and to schedule her deposition within 60 days of such service, plaintiff may apply by affidavit to strike the answer of defendant Joan Lewis; and it is further

ORDERED that plaintiff's motion for default judgment or, alternatively, summary judgment against defendant Daniel Lewis is denied, without prejudice to renewal, for the reasons stated herein.

The within constitutes the decision and order of this court.

Signed this 15th day of December 2023, at Lake George, New York.

ENTER:

HON. MARTIN D. AUFFREDOU
JUSTICE OF THE SUPREME COURT

The court is uploading the decision and order to the New York State Courts Electronic Filing System (NYSCEF). Such uploading does not constitute service with notice of entry (*see* 22 NYCRR 202.5-b [h] [2]).

Distribution:
Brian H. Breedlove, Esq.
John W. Hillman, Esq.

The Practice Page

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

THE PRACTICE PAGE

THOSE PESKY VENUE SELECTION CLAUSES

Hon. Mark C. Dillon *

So you finally schedule that long-planned ski vacation at a resort hotel in the mountains of Resort County in upstate New York, to share with family or lifetime school friends. You look forward to the opportunity to have a well-deserved winter respite from Westlaw research, pleadings, real estate closings, probate proceedings, and judges. On your first day while you are skiing the mountain, one of your legs is caused to slip too far forward, converting your person-to-earth angle from that of vertical to horizontal. Unfortunately, you are also somewhat injured in the process. The only good news is that there was no video recording of your fall that might be televised on an episode of America's Funniest Home Videos.

The accident was of course not your fault as lack of balance could not possibly have been a factor in your fall given your terrific physique despite your ever-advancing age. Fault, you believe, was in the unexpected trap-like roll of the ground surface on the ski slope that the resort knew or should have known about had it exercised reasonable diligence and which foreseeably created a danger to patrons, or the negligent failure of the resort to properly pack the slope with sufficient snow cover, or the absence of appropriate warning signs about the curve that was ahead. Primary assumption of the risk for the dangers of the sporting activity? Absolutely not.

You decide to commence an action. Not that you are a litigious person. You bring the action in your home county for the convenience of the local venue. You've frequently enjoyed conversation with the county's judges at bar association events while eating Swedish meatballs and ziti with them. However, you later receive a demand from the defendant to change venue to Resort County on the ground that when you signed up for your ski vacation, there was fine print in the documents that in the event of any litigation, the venue would be in *that* county, far away. You may be unfamiliar with the town where its county courthouse is located. Chances are, members of a potential jury pool have friends or family with favorable views of the very ski resort that you are suing, or of others like it.

But for the grace of God go any of us. What are we to do with those pesky contracts and their more-pesky venue selection clauses? Even we, as trained and experienced attorneys, sometimes sign personal documents containing standard legalese that we may not have carefully read, or do so knowing that the language is not truly negotiable anyway.

A contractual forum selection clause is *prima facie* valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court (*KMK Safety Consulting, LLC v Jeffrey M. Brown Assoc., Inc*., 72 AD3d 650, 651 [2010]. *See Casale v Sheepshead Nursing & Rehabilitations Ctr*., 131 AD3d 436 [2015]; *Molino v Sagamore*, 105 AD3d 922 [2013]). A forum selection agreement will control absent a strong showing that it should be set aside (*Bernstein v Wysoki*, 77 AD3d 241 [2010]). This legal standard for challenging contractual venue is difficult for most plaintiffs to meet. In *Molino v Sagamore*, *supra*, a plaintiff from Queens County signed a rental

agreement at the defendant resort hotel providing that in the event of legal action over claims or disputes, the parties' venue would be Warren County. The court rejected the plaintiff's argument that the venue selection clause was unfair and unenforceable adhesion language, since the rental agreement in *Molino* was not a product of high pressure tactics or deceptive language as required for setting adhesion provisions aside. A similar result was reached in *Karlsberg v Hunter Mountain Ski Bowl, Inc*., 131 AD3d 1121 (2015), which pitted a Suffolk County plaintiff against a Greene County resort. There, the plaintiff was provided upon his arrival at the facility with an Equipment Rental Form containing a forum selection clause, which the court found did not qualify as an unenforceable contract of adhesion and was not otherwise against public policy.

What if the defendant is located in another state? The same legal standard applies in determining the enforceability of the forum selection clause. In *Bernstein v Wysoki*, *supra*, which involved an infant injured at a summer camp in Wayne County, Pennsylvania, the court enforced a forum selection clause requiring that claims be adjudicated in that Pennsylvanian county. Where the selected forum is out of state, the New York action must be dismissed in favor of recommencing the action in the other forum (*Bernstein v Wysoki*, 77 AD3d at 253), since a mere intra-state change of venue is obviously not possible (*Fritsche v Carnival Corp*., 132 AD3d 805 [2015] [action in Richmond County dismissed on the basis of enforceable language on a plaintiff's cruise ticket requiring that disputes be litigated in the federal Southern District of Florida, and failing a basis for federal jurisdiction there, in a state court within Miami-Dade County]; *DiRuocco v Flamingo Beach Hotel & Casino, Inc*., 163 AD2d 270 [1990] [case of scuba diver dismissed on basis of forum selection agreement that claims be litigated in the Caribbean where the plaintiff's accident occurred]). When courts dismiss a New York action in favor of a foreign state venue clause, they should consider doing so on the condition that the defendant, in seeking to enforce its venue, waive any statute of limitations defense that might have arisen in the foreign jurisdiction after the commencement of the New York action.

A defendant's motion to change venue on the basis of a contractual venue selection clause is not subject to the requirements of CPLR 511(a) and (b) that a demand be made before or with the answer and that a motion be made within 15 days of the answer (*Puleo v Shore View Center for Rehabilitation and Health Care*, 132 AD3d 651 [2015]). Instead, the motion must be made within a "reasonable time after commencement of the action" (CPLR 511[a]; *Hendrickson v Birchwood Nursing Home Partnership*, 26 AD3d 187 [1st Dep't. 2006]; *Medina ex rel. Valentin v Gold Crest Care Ctr., Inc*., 117 AD3d 633 [1st Dep't. 2014]). The reason is that notwithstanding the provisions of CPLR 511, the parties' contractual agreement on venue is what ultimately controls the issue (CPLR 501; *Bhonlay v Raquette Lake Camps, Inc*., 120 AD3d 1015 (2014]). A defendant's contractual venue motion was found to have been unreasonably delayed when brought two years (*Brown v United Odd Fellow & Rebekah Home, Inc*., 184 AD3d 478 [2020]), 14-months (*Williams v Bronx Harbor Health Care Complex, Inc*., 213 AD3d 430 [2023]), and as little as one year from the commencement of the action (*Mena v Four Wheels, Inc*., 272 AD3d 223 [2000]). Meaning, that defendants seeking to enforce a contractual venue clause should not sit on their right.

Actually, the best advice is to stay upright on your skis, accident-free. 

***Mark C. Dillon is a Justice of the Appellate Division, 2nd Dep't., an Adjunct Professor of New York Practice at Fordham Law School, and is a contributing author to the CPLR Practice Commentaries in McKinney's.**

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EXIT

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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Plaintiff's counsel cannot be excluded from neuropsychology IME.

McNamara v. Buresh (Powers, J., 1/4/24)

As permitted by CPLR § 3121, defendant arranged for the plaintiff (who alleged a traumatic brain injury after a car crash) to undergo a 2-day neuropsychological examination. Plaintiff's counsel sought to be present for the entirety of the exam, to which defendant objected, claiming attendance during the testing portion might compromise the validity and reliability of that part of the expert's assessment. Supreme Court (Weinstein, J., Albany Co.) denied defendant's motion to preclude, and the Third Department affirmed, citing a hole in defendant's proof – "evidence of an industry-wide standard, accepted within the neuropsychology field, pronouncing that test validity is adversely impacted by the presence of a third-party observer".

Sporting activity injury claims sunk by assumption of risk doctrine.

Stanhope v. Burke (Clark, J., 10/26/23)

Under New York's primary assumption of risk doctrine, participants in sporting activities "may be held to have consented to those injury-causing events which are known, apparent or reasonably foreseeable". But plaintiffs are not deemed to have assumed the risk of "unique" conditions caused by a defendant's negligence or any such condition "over and above the usual dangers" inherent in the given sport/activity.

Here, plaintiff Stanhope was injured when he was "bucked" off a horse owned by the defendant Conway. An experienced rider (50-60 prior rides), plaintiff admitted that he was familiar with the horse that threw him, having ridden the horse once before the date of accident and having been involved in caring for the horse several times a week. Supreme Court (Burns, J., Otsego Co.) denied the defendant's motion for summary judgment but the Third Department reversed, concluding that a horse suddenly stopping is an inherent risk of

horseback riding and that there was no evidence that the horse owner had concealed any unusual risks specific to this horse.

Fritz v. Walden Playboys M.C., Inc. (Fisher, J., 6/29/23)

Plaintiff was hurt at the defendant's motocross track when he lost control of his bike after going off a jump and landing in what he called a "pothole"; which he estimated to be about 3 feet long, 2 feet wide and 8 inches deep. Supreme Court (Mott, J., Ulster Co.) denied the defendant's motion for summary judgment, finding questions of fact whether the property owner created an unreasonable risk of harm by failing to remedy the hole (which plaintiff claimed was merely filled with dry soil). Citing the plaintiff's 43 years of experience riding motocross (describing him as "the quintessential motocross expert"), the Appellate Division reversed and dismissed the complaint, noting plaintiff's admission that before his fall, he had landed the same jump which caused the back of his bike to "kick up", but he was able to recover.

Premises liability claims.

McIntyre v. Bradford White Corp. (Lynch, J., 12/7/23)

Supreme Court (Auffredou, J., Washington Co.) granted summary judgment to the defendant owner of the rental property where plaintiff alleged her infant child was burned by "an unexpected surge of hot water" from the kitchen sink (where the child was being bathed), rejecting plaintiff's theory of liability (that a mixing valve on a water heater malfunctioned due to the internal build-up of scale) as speculative and not supported by an evidentiary basis. Affirming dismissal of the complaint, the Third Department noted a lack of proof that the property owner had actual or constructive notice of the alleged defect and that plaintiff's experts did not refute defendant's claim that a visual inspection of the mixing valve did not show any evidence of scaling. Plaintiff's reliance on res ipsa loquitor, said the Appellate Division, was unfounded because the temperature of the water flowing from the kitchen faucet "was at least partly within plaintiff's control".

Guzman v. State of New York (Clark, J.P., 11/2/23)

Claimant, walking with her adult daughter through an I-87 rest stop in Clifton Park, contended she tripped and fell when she stepped into a "cracked, uneven" depression in the parking lot pavement. After a liability-only trial, the Court of Claims (Ferreira, J.) ruled the claimant had failed to prove the State of New York was negligent in maintaining the property, and the Third Department affirmed the trial verdict. Noting that the claimant and her daughter both testified that the weather was dry and clear on the date of accident, the Appellate Division

said claimant's photo evidence of the hole, taken a day after the fall and showing a hole filled with rainwater, "prevented the Court of Claims from conducting a proper visual examination of the hole".

Thomas v. Albany Housing Authority (Reynolds Fitzgerald, J., 5/25/23)

Although a New York property owner has a duty to maintain its property in a reasonably safe condition, a landowner need not "guard against an obvious danger created by misuse of property which is not otherwise defective". The Third Department, noting settled law that "the purpose of a window screen is not to prevent people from falling out of the window", affirmed Supreme Court's (Kushner, J., Albany Co.) grant of summary judgment to the defendant, the owner/landlord of the apartment property where plaintiff lived and was injured in a five-story fall out a screen-less window. Defendant's expert witness opined that the purpose of a window screen is to prevent insect infestations, and by the plaintiff's own admission, the window was otherwise in good working order.

Dewan-Zemko v. Hunter Mountain Ski Bowl, Inc. (Fisher, J., 6/22/23)

While snow tubing at the defendant's resort, the plaintiff was hurt when she collided head-first into a hay bale. Tubers using the lanes on the mountain were initially slowed by rubber mats, after which were located the barrier of hay bales. The hay was wrapped in plastic to keep out moisture, which could cause the bales to become solid, harder and more dangerous when they froze. Defendant's motion for summary judgment, relying on the plaintiff's alleged assumption of risk, was denied by Supreme Court (Silverman, J., Greene Co.). The Third Department affirmed, noting that the proof offered by the plaintiff (who had gone snow tubing only once prior to the date of accident) raised a factual dispute whether the defendant's hay bale barrier alignment "concealed or unreasonably increased" the risk of injury.

"Storm in progress" doctrine.

Gagne v. MJ Properties Realty, LLC (Fisher, J., 11/16/23)

Slip-and-fall on snow/ice actions are often defended under the "storm in progress" doctrine, under which a property owner is relieved of the duty to clear the subject area "while continuing precipitation or high winds are simply re-covering (the property)…as fast as they are cleaned, thus rendering the effort fruitless". Finding the defendant property owner entitled to such relief, Supreme Court (Ferreira, J., Schoharie Co.) dismissed the complaint of this plaintiff, who alleged she was hurt when she slipped and fell on the icy sidewalk outside a Clifton Park building where she worked. Both parties submitted expert affidavits by meteorologists, who generally agreed that there were total

accumulations of between .01 and .02 of an inch of precipitation for the entire day of the incident. Reversing and reinstating the plaintiff's Complaint, the Third Department (in a 3-2 split decision) concluded that "a trier of fact should be charged with determining whether there was a lull or ongoing storm in progress" that would modify the defendant's duty to remedy a hazardous condition.

Anson v. Monticello Raceway Management, Inc. (Egan, J., 6/22/23)

Plaintiff claimed he was hurt in a fall on an icy sidewalk outside the defendant's casino, but defendant (relying on the storm in progress doctrine) moved for summary judgment. Supreme Court (Gilpatric, J., Ulster Co.) denied the motion and the Appellate Division affirmed, noting that while the defendant offered two expert witness (meteorology) affidavits, it submitted "no evidence to show that anyone had seen precipitation falling at the casino that day", and that the casino's own incident report "left the section labeled 'weather' conspicuously blank".

Dismissal of complaint reversed in fatal grain elevator accident.

Pierce v. Archer Daniels Midland, Co. (Reynolds Fitzgerald, J., 11/30/23)

Plaintiff's decedent was fatally injured in a grain elevator during the course of his employment. In lieu of answering, defendants (parent company and its subsidiary) moved for dismissal of the complaint (CPLR 3211(a)(7)), arguing that all claims against them were barred under the exclusivity provisions of the Workers' Compensation Law. Supreme Court (Zwack, J., Columbia Co.) granted defendants' motion but the Third Department reversed, in part, finding the subsidiary (ADM Milling) was shielded from liability because plaintiff applied for and received workers' compensation benefits from that entity. However, the Appellate Division found the parent company (Archer Daniels) must defend the action as plaintiff's complaint alleged that each of the defendants were responsible for safety on the site of the accident and that the claim "is unsuited for resolution on a pre-answer, pre-discovery motion to dismiss, especially here, where defendants are in exclusive possession of such information".

Medical malpractice claims.

Herlica v. Patel (Aarons, J., 6/22/23)

Plaintiff's father died one month after being diagnosed with lung cancer, which was 11 months after decedent had an x-ray and CT scan of the chest that were interpreted as negative. Plaintiff sued her father's primary care doctor, Lourdes Hospital and the radiologist who read the chest imaging, alleging a failure to

diagnose and treat decedent's lung cancer (which her expert claimed was evidenced by a 6.7 x 3.6 centimeter mass in the right lung). Supreme Court (Blaise, J., Broome Co.) granted the defendants' motions for summary judgment and the Third Department affirmed, agreeing that plaintiff's medical experts failed to refute or even address the defendants' *causation* argument; that "surgical treatment for the mass that decedent had was unavailable once it exceeded 4 centimeters and that surgery…was contraindicated due to his comorbidities".

Rich v. Lavelle (Garry, P.J., 5/18/23)

Plaintiff's suit, filed in 2016, alleged negligence arising out of back surgery performed by defendant in 2012, which was followed by post-operative treatment from the same physician, including a second spinal surgery in 2014. Defendant moved for partial summary judgment, contending a 16-month interruption of post-op treatment should bar any claims of malpractice prior to July 2013. New York's "continuous treatment doctrine" stays the 2-½ year statute of limitations from running "when the course of treatment (that) includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint". Supreme Court (Faughnan, J., Tioga Co.) denied defendants' motion and the Third Department affirmed, noting that "a patient's consultation with a new physician does not necessarily evince an intention, in and of itself, to terminate a continuous treating relationship", and that in this case neither of the doctors with whom the plaintiff later treated were consulted for the purpose of considering back surgery.

Durivage v. Albany Medical Center (Clark, J., 7/20/23)

Plaintiff filed suit in 2018, alleging that medical negligence by defendant's staff caused injuries to her newborn daughter. Defense counsel later objected to the sufficiency of plaintiff's expert witness disclosure – issues which remained unresolved despite further attorney exchanges and court conferences. Defendant's motion to compel plaintiff to provide further BOP and expert responses was granted (in 2022) in part by Supreme Court (Ryba, J., Albany Co.) but the dispute dragged on, culminating in another motion by defendant to preclude plaintiff's expert proof and for summary judgment, which the Court granted. The Third Department agreed that plaintiff's counsel's conduct "cannot be condoned" and imposed a $5,000 sanction, but vacated the order precluding plaintiff's expert proof and reversed the order granting summary judgment, "given the strong public policy favoring resolution of actions on the merits".

Jury verdict for defendant in auto crash claim survives appeal.

Salamone v. Ginsberg's Institutional Foods, Inc. (Aarons, J., 5/11/23)

The defendant's tractor trailer driver, northbound in the right lane, entered the left driving lane for the purpose of making a wide right turn into a parking lot so as to avoid a nearby telephone pole. Upon making the right turn, the tractor trailer was positioned partially in both the right and left lanes, and was struck by the plaintiff's approaching car. Plaintiff's personal injury action went to trial and the jury returned a defense verdict, which Supreme Court (Mott, J., Ulster Co.) refused to set aside (CPLR 4404) upon plaintiff's motion. Affirming, the Third Department noted that the defendant rebutted plaintiff's contention that the tractor trailer driver was negligent per se for committing an unexcused violation of the Vehicle & Traffic Law, and that "great deference is given to the jury's interpretation of the evidence".

Plaintiff's $800K pain and suffering awards not excessive.

Bradley-Chernis v. Zalocki (Egan, J., 11/2/23)

Plaintiff was injured when her car was struck head-on by the defendant's New York State police vehicle when it, responding to a 911 call, failed to negotiate a sharp curve in the road and crossed into the oncoming lane of traffic. At a bench trial, Supreme Court (Gilpatric, J., Ulster Co.) found the defendant was negligent and that his driving reflected a "reckless disregard for the safety of others" (Vehicle & Traffic Law § 1104(e)). During a bench trial on damages, the 44-year old plaintiff offered evidence of her injuries, including a rotator cuff tear and traumatic shoulder bursitis (which required surgical repair), a bulging disk in the neck and post-traumatic stress disorder (for which plaintiff testified she was treating with a mental health professional). Supreme Court found plaintiff met the "serious injury" threshold of Insurance Law § 5102, and awarded damages for past and future pain and suffering ($400K and $432K), and $56K in economic loss. Despite "conflicting proof in the record" as to the extent of plaintiff's injuries and their impact upon her, the Third Department accorded deference to the findings of the trial court and affirmed the damages award which "did not deviate from what would be reasonable compensation".

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HON. ERIC SCHWENKER, President WCBA
KATE FOWLER, Executive Director WCBA
Deadline for submissions for next edition
MAY 1, 2024

Art Work: Paper Pinwheel Quilt made by St. Mary's-St. Alphonsus students in Mrs. Peggy Clohessy's Grade 3 Art Class. On display in the Warren County Municipal Center's Family Court.