

DEFENDANT

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President's Column

MARGARET G. KLEIN*

Dear DANY Members, Colleagues, and Sponsors:

It is such an honor to serve as President of DANY for our 2015-2016 term, DANY'S 50th year. All 49 Presidents before me have each dedicated their time and effort to this organization and each has left his/her personal touch. I am very fortunate to begin my term at a time of great growth and recognition of our organization and I pledge to work hard and build on this.

We are so fortunate to have had such dedicated past presidents, many who still sit on the Board. We are also grateful to our Board members and committee chairs and members who all work hard in making a contribution to DANY. We are especially grateful to our sponsors who make so many of our programs possible. DANY will always be grateful to Tony Celentano, who served as our executive director until his retirement in June 2015 and we wish him a happy retirement and many years of good health. We welcome Connie McClenin, who worked alongside Tony for the past 10 years, as our new executive director, and we are inspired by her hard work, enthusiasm and dedication.

We are so proud to now call DANY a statewide Defense Bar Association where we can now connect with defense attorneys in all parts of New York State. I thank all those board members who worked hard to make this happen. In October, we welcomed our first two directors from the 2nd and 3rd Department, Aileen Bucholtz and Thomas Liptag, onto the board and in the past month, we have many new members from these Departments enroll as DANY members and who are already active on our committees.

As President, my primary focus will be on engaging young lawyers throughout the state and introducing them to DANY. We owe it to our young

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* Margaret G. Klein is an attorney with Margaret G. Klein and Associates.



The Vanishing Jury Trial Part II

JOHN J. MCDONOUGH, ESQ.*

This is Part Two in our continuing series on the decline in the use of jury trials to resolve civil disputes at both the state and federal levels. This article will explore the potential causes of this phenomenon, with a heightened focus on the expanded role of judges in encouraging pre-trial settlement across the board.

Why are risk management professionals relying less on juries to resolve their civil disputes? Clearly, there is no one factor behind this decline. However, certain factors are believed to be playing the most crucial roles:

- The involvement of judges and judicial mediators in encouraging early resolution;
- An increase in the prevalence of class action lawsuits and multi-district litigation;
- The rise of alternative dispute resolution forums in both the commercial and consumer context; and
- Cost and resource constraints, together with increased discovery costs related to the use and complexity of e-discovery.

Are judges focusing more on simply disposing cases, rather than providing a forum for fair and just dispute resolution? Over the years, the number of cases that terminate during or after pre-trial has fallen, down from fifteen percent in 1963 to roughly ten percent in 2015 (27,169 cases).¹ However, the number of cases that terminated before pre-trial (but with some type of court action) rose from

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** Mr. McDonough acknowledges with gratitude the assistance of Ryan T. Kearney, Esq. and Richard Zuckerman in the preparation of this article. Mr. Kearney is an associate with Cozen O'Connor's Commercial Litigation Department, also practicing out of the firm's New York office. Mr. Zuckerman is a senior paralegal also resident in the firm's Manhattan office.

The Vanishing Jury Trial Part II

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twenty percent in 1963 to roughly seventy percent in 2015 (or 181,211 cases). Perhaps most tellingly, only 1.1 percent of all civil case dispositions in 2015 were terminated via jury trial. This drop in trial rates has been observed in every case category, suggesting that the overall decline is not related to any change in the nature or makeup of caseloads.

As the number and rate of cases reaching trial has fallen, hands-on judicial involvement in case activity has increased. At the most basic level, federal judges actively involve themselves in setting discovery schedules and trial dates, holding pre-trial conferences, and ruling on motions. In addition, judges often have a vast impact on whether parties will settle or submit to alternative dispute resolution (“ADR”). In many instances, the judges’ role has shifted away from one of presiding over trials, to now one of resolving disputes. As such, judges increasingly encourage or even induce pre-trial settlement and/or the use of ADR, as an alternative to the costly and lengthy process of trial.

For example, during the highly publicized World Trade Center litigation, involving over 10,000 lawsuits filed by rescue and recovery workers seeking damages for respiratory and other ailments, allegedly incurred during the response and cleanup efforts following the attacks of September 11, 2001, Judge Alvin K. Hellerstein of the Southern District of New York was not only adamant that the parties settle their claims, but also made these opinion known to both the parties and the media.²

While Judge Hellerstein acknowledged that he could not force the parties to settle, he maintained direct oversight over the negotiation and approval of the settlement, and, at one point, even rejected the settlement that had been negotiated for almost two years amongst the parties, as he felt that the amount was not sufficient. Judge Hellerstein acknowledged that most settlements are “private” and “the judge has no part.” However, “[t]his is different,” he said. “This is 9/11. This is a case that has dominated my docket, and because of that, I have the power of review.”

Judge Hellerstein felt workers should have ample opportunities to ask questions and get answers about the proposed settlement, and he offered to

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The Vanishing Jury Trial Part II

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go on a mini speaking tour to get information to the plaintiffs, stating, "I will make myself available in union halls, fire department houses, police precincts and schools." Later, Judge Hellerstein co-authored an article in the Cornell Law Review entitled, *Managerial Judging: The 9/11 Responders' Tort Litigation*, in which he further propounded the role of a judge in overseeing the settlement process.³ There, Judge Hellerstein stated that once he was presented with a proposed settlement in that case, he viewed his role as twofold:

First, I had to determine whether the proposed settlement agreement was fair to the plaintiffs, substantively and procedurally. And second, I had to make sure that proper mechanisms were in place to allow all plaintiffs to receive adequate information upon which to base their decisions regarding whether to join the settlement.

This level of judicial involvement in the settlement of cases not formally certified as class actions was previously a rare occurrence. However, it serves as a perfect example of the trend of increasing judicial

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John J. McDonough (Editor in Chief and Past President 1997-1998) and Thomas J. Maroney (Past President 2008-2009), pictured here with the Ambassador of Ireland to the United States Anne Anderson, were recently honored at a dinner celebrating their inclusion in the 2015 edition of the Irish Legal 100. Founded in 2008 by the Irish Voice newspaper in New York, the Irish Legal 100 is an annual compilation of the most accomplished and distinguished lawyers of Irish descent from all across America. The list includes attorneys, legal scholars and members of the judiciary who have proven themselves in their fields of endeavor. Congratulations!



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The Intersection of Negligence and Tax Lien Foreclosure Litigation



MICHAEL H. RESNIKOFF*

Overview

Although personal injury attorneys might not believe that negligence and tax lien foreclosure litigation are areas of law that intersect often, or even at all, they do and when they do, it gives rise to unique and complex applications of law. The issues come into focus when a person suffers a personal injury on property whose title search reveals that, beyond the record owner, a tax lien holder has a recorded interest in the property. Notably, whether the tax liens have become ripe for foreclosure, a foreclosure proceeding has already commenced, or the foreclosure has proceeded to the point of sale that has yet to close, in each instance the tax lien holder is exposed to liability due to the interest created via the existence of the tax lien. The most interesting scenarios, however, are when the property has gone to sale and either sold to a new purchaser, who still has to close before taking possession, or failed to sell at auction and record ownership remains in a state of limbo. In such cases where title, possession and control are not clear, determining who retains the legally cognizable duty to maintain the property in a safe condition is complicated. In short, however, an out-of-possession owner is not liable for injuries that occur on the property unless the owner has retained control over the premises or is contractually obligated to repair.ⁱ

Tax Lien 101

When a property owner fails to pay real estate taxes, the local government or municipality can issue a tax warrant, which is a legal action against the property owner that puts a lien on the real property.ⁱⁱ The lien against real property affects all rights to the property that may be foreclosed upon for nonpayment of taxes. Such tax liens are routinely sold to trust accounts who then acquire the right to collect the outstanding debt or

commence a foreclosure proceeding against the property to redeem the amount owed.ⁱⁱⁱ Notably, foreclosure by the holder of a tax lien, which is generally superior to other liens such as mortgage or judgment liens, essentially cuts off and forever bars and forecloses the record owner's right, title, and interest in the property.^{iv} During the foreclosure proceeding, however, the record owner maintains the right to redeem at any time prior to sale at a foreclosure auction.^v Thus, the owner, in many cases, maintains physical possession and control of the property throughout the protracted foreclosure proceedings up and until, and sometimes even after, the foreclosure sale.

Exposure to Premises and Personal Injury Liability

Premises liability is predicated upon ownership, occupancy, or control of real property,^{vi} thus, where none of these elements is present, a defendant may not be held liable for personal injuries caused by an alleged dangerous or defective condition on the premises.^{vii} In such cases, plaintiff's theory is that the individual or entity who owns, occupies, or controls the property should bear the responsibility for its condition, and to avoid liability a defendant must sufficiently demonstrate that either he or she was not the owner of the property when the injury took place,^{viii} or that the defendant did not operate or have any other connection with the premises.^{ix}

For example, to prove a prima facie case of negligence in a slip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition.^{ix} In sum, the law generally holds that a party owes a duty to take reasonable measures to protect others from dangerous conditions on real property where that party owns, occupies, or controls the property, or

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The Intersection of Negligence and Tax Lien Foreclosure Litigation

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makes a special use of it,^{xi} which may inadvertently expose a lienholder to liability.

Is a Tax Lienholder an Owner?

Whether a lienholder may fairly be characterized as an owner for purposes of personal injury or premises liability litigation depends upon its control over the premises.^{xii} New York courts have repeatedly upheld the principle that an out-of-possession titleholder lacking control over the property is not liable for injuries occurring thereon.^{xiii}

In application, an out-of-possession titleholder is a party that essentially retains title as security for indebtedness until such time as the debt is made current.^{xiv} Further, an out-of-possession titleholder is a party that did not maintain or control the premises, and retained no right to reenter for purposes of inspection or repair.^{xv}

More illustrative of the fact that a tax lien holder is not an owner for purposes of personal injury liability is the case of *Wali v. City of New York*.^{xvi} In *Wali*, the defendant-City provided documentary and affidavit evidence that demonstrated that though it was the holder of a foreclosed tax lien on the property, title was never transferred to it and, instead, was ultimately transferred by deed to a third party following a Judgment of Foreclosure and Sale. The Court held that the plain language of the Judgment supported the conclusion that the City did not own, occupy, or control the premises. The Court explained that the Judgment mirrored statutory language and essentially operated only to provide a procedural mechanism whereby the subject foreclosed property may transfer to a third party, upon foreclosure sale, after the requisite redemption period has passed.

Thus, the foreclosed owner, who in most cases has been and still is residing on the premises when an injury occurs, is not only the controlling party, but also the only party with title giving rise to liability. The status of being in possession subjects the foreclosed owner to liability, regardless of the cloud on title resulting from imposition of the tax lien. Even after the foreclosure sale, which operates to extinguish all rights the foreclosed owner had prior to, the foreclosed owner remains liable so long as neither the tax lien holder nor the purchaser

have come into possession or retain control over the premises.^{xvii}

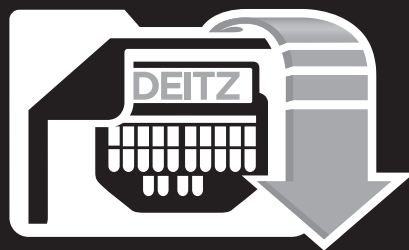
While the purchaser at the foreclosure auction will at some point become the new owner, title does not transfer to the purchaser until closing, which will be scheduled sometime after the sale.^{xviii} Thus, regardless of the sale, the successful bidder is only a contract vendee. As such, the foreclosed owner (or tenants) will not be subject to eviction until after closing of title to the foreclosure sale purchaser, leaving them in possession. Until completion of eviction proceedings, or voluntary surrender of the premises, liability will still remain with the foreclosed owner.

In conclusion, so long as the tax lien holder's intention is merely to enforce its lien until payment, and title has not yet transferred to the purchaser via closing, then the question of liability in these circumstances comes down to control. By definition, control is established by ownership.^{xix} Being that the foreclosed owner still holds title to the property, the foreclosed owner is required to maintain the property and is responsible for defects or dangerous conditions because he is in the best position to identify and prevent harm to others.^{xx}

- i *Grippio v. City of New York*, 45 A.D.3d 639, 640 (2d Dep't 2007) (The New York City Industrial Development Agency established that it was entitled to judgment as a matter of law because it demonstrated that it was an out-of-possession landlord that retained no control over the premises and was not contractually obligated to make repairs.).
- ii See Dep. of Tax & Fin, *Tax Warrants and Liens*, NY STATE: DEP. OF TAX & FIN, https://tax.ny.gov/enforcement/collections/warrants_liens.htm (last visited Apr. 4, 2014).
Lien, BLACK'S LAW DICTIONARY (10th Ed. 2014).
- iii *All About Tax Lien Foreclosure*, *supra* note 3.
- iv *All About Tax Lien Foreclosure*, NYFORECLOSURE.COM, http://www.nyforeclosures.com/mastering/taxlien_main.html (last visited Apr. 14, 2014).
- v *Id.* See also NYCTL 1996-1 *Trust v. Moore*, 51 A.D.3d 885 (2d Dep. 2008) ("The title owner of property encumbered by a mortgage or tax lien has a right to redeem at any time prior to the actual sale under a judgment of foreclosure.).
- vi *Vignapiano v. Herbert Const. Co.*, 46 A.D.3d 544, 846 N.Y.S.2d 610 (2d Dep't 2007); *Casale v. Brookdale Med. Associates*, 43 A.D.3d 418, 418, 841 N.Y.S.2d 126, 127 (2d Dept. 2007); *Perez v. Metropolitan Museum of Art*, 304 A.D.2d 481, 758 N.Y.S.2d 325 (1st Dep't 2003); *Flaherty*

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- v. American Turners New York, Inc.*, 291 A.D.2d 256, 738 N.Y.S.2d 29 (1st Dep't 2002); *O'Keefe v. Valente Industries Corp.*, 266 A.D.2d 192, 697 N.Y.S.2d 669 (2d Dep't 1999); *Aversano v. City of New York*, 265 A.D.2d 437, 696 N.Y.S.2d 233 (2d Dep't 1999).
- vii *Aversano v. City of New York*, 265 A.D.2d 437, 696 N.Y.S.2d 233 (2d Dep't 1999); *O'Brien v. Trustees of Troy Annual Conference of United Methodist Church*, 257 A.D.2d 954, 684 N.Y.S.2d 328 (3d Dep't 1999); *Soto v. City of New York*, 244 A.D.2d 544, 664 N.Y.S.2d 612 (2d Dep't 1997); *Minott v. City of New York*, 230 A.D.2d 719, 645 N.Y.S.2d 879 (2d Dep't 1996); *Turrisi v. Ponderosa Inc.*, 179 A.D.2d 956, 578 N.Y.S.2d 724 (3d Dep't 1992).
- viii *Billman v. CLF Management*, 19 A.D.3d 346, 796 N.Y.S.2d 151 (2d Dep't 2005); *Woroniecki v. Tzitzikalakis*, 255 A.D.2d 509, 680 N.Y.S.2d 606 (2d Dep't 1998); *Kay v. City of New York*, 222 A.D.2d 558, 635 N.Y.S.2d 299 (2d Dep't 1995); *James v. Stark*, 183 A.D.2d 873, 584 N.Y.S.2d 137 (2d Dep't 1992); *Bentley v. City of Amsterdam*, 170 A.D.2d 725, 565 N.Y.S.2d 533 (3d Dep't 1991).
- ix *Gennosa v. Twinco Services, Inc.*, 267 A.D.2d 200, 699 N.Y.S.2d 459 (2d Dep't 1999); *Turner v. Federated Dept. Stores, Inc.*, 182 A.D.2d 815, 583 N.Y.S.2d 19 (2d Dep't 1992).
- x *Papazian v. New York City Transit Auth.*, 293 A.D.2d 658, 658, 740 N.Y.S.2d 450, 451 (2d Dep't 2002).
- xi *Stevenson v. Saratoga Performing Arts Center, Inc.*, 115 A.D.3d 1086, 981 N.Y.S.2d 877 (3d Dep't 2014).
- xii *Koch v. Drayer Marine Corp.*, 118 A.D.3d 1300, 1301, 988 N.Y.S.2d 333, 334 (4th Dep't. 2014).
- xiii *Koch v. Drayer Marine Corp.*, 118 A.D.3d 1300, 1301, 988 N.Y.S.2d 333, 334 (4th Dep't 2014); *Bowles v. City of New York*, 154 A.D.2d 324, 545 N.Y.S.2d 799 (2d Dep't 1989).
- xiv *Bowles v. City of New York*, 154 A.D.2d 324, 545 N.Y.S.2d 799 (2d Dep't 1989)
- xv *Bowles v. City of New York*, 154 A.D.2d 324, 545 N.Y.S.2d 799 (2d Dep't 1989); *Mazurick v. Chalos*, 172 A.D.2d 805, 806, 569 N.Y.S.2d 174, 176 (2d Dep't 1991).
- xvi *Wali v. City of New York*, 22 Misc.3d 478, 485, 866 N.Y.S.2d 528, 533 (Sup. Ct. 2008), aff'd, 71 A.D. 3d 1134, 898 N.Y.S.2d 202 (2d Dep't 2010).
- xvii *Foreclosure: Sale is "Complete" When the Gavel Falls*, 43 REAL EST. L. REP. 8 (2014).
- xviii *Wali*, 866 N.Y.S.2d at 535 (alterations in original) (quoting *Goodell v. Rosetti*, 52 A.D.3d 911, 913 (3d Dep't 2008).
- xix See Control, BLACK'S LAW DICTIONARY (10th Ed. 2014).
- xx *Butler ex rel. Butler v. Rafferty*, 100 N.Y.2d 265 (2003). "[C]ontrol is the test that measures, generally, the responsibility and liability of the owner of real property." See 85 N.Y.Jur.2d Premises Liability § 130.

Any views and opinions expressed in this article are solely those of the author. Each case has different facts and issues, and any approach suggested here may not be appropriate in a given case.

President's Column

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professionals to lead the way, to assist and work with the next generation to make our practice of law more meaningful. We must assist in mentoring and providing whatever support we can. Through its committees, DANY not only offers excellent writing and speaking opportunities but also experience in leadership. These Lawyers can have their work published in the Defendant or be part of the Amicus Committee. Being a member of a committee can lead to being Chair of that committee and/or a seat on DANY's Board of Directors. We need to reach out to young lawyers to help them connect with one another and with the legal community and help them grow. They need to know what we can offer them and this why DANY has offered free membership to those admitted to practice 2 years or less and \$50 for a year's membership to those admitted 2-5 years.

I need your assistance which is why I ask you now to pass on a copy of this DEFENDANT to a young lawyer so that he/she can get a glimpse of what DANY can do for him/her.

For the second year, DANY is sponsoring the diversity initiative program which aims to teach women and diverse attorneys how to effectively compete for leadership positions in their firms, negotiate work arrangements and successfully pursue professional opportunities. Last year, not only was there extraordinary feedback from the participants as to how this program benefited them but the program was recognized by The New York Law Journal and by DRI (The Voice of the Defense Bar). The New York Law Journal, in selecting this program as one of its 2015 Diversity Honorees, noted that by offering different groups of lawyers the

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DANY's Amicus Curiae Committee



ANDREW ZAJAC*

The Amicus Curiae Committee of the Defense Association of New York, Inc. (DANY) was founded in 1997 by John J. McDonough, who was President of DANY at the time. Since then, the Committee has been submitted over 30 amicus curiae briefs to the New York Court of Appeals on issues of vital concern to the defense community in this State.

The Committee is currently comprised of Andrew Zajac and Dawn DeSimone of McGaw, Alventosa & Zajac, who co-chair the Committee, as well as Rona L. Platt of Rona L. Platt PLLC, Brendan T. Fitzpatrick of Goldberg Segalla, Jonathan Uejio / special counsel to Conway, Farrell, Curtin & Kelly, P.C., and Lisa L. Gokhulsingh of Gannon, Rosenfarb & Drossman. The members of the Committee provide their services on a voluntary basis, free of charge. Printing costs have been borne by DANY.

Many of DANY's Amicus Curiae Briefs are available on DANY's website. Among the cases in which the Committee has filed amicus curiae briefs with the Court are the following:

Hutchinson v. Sheridan Hill House Corp.; Zelichenko v. 301 Oriental Boulevard, LLC, 26 N.Y.3d 66, (2015). This is a major opinion on the trivial defect defense. The committee submitted an amicus curiae brief to address plaintiff's contention that the defense should be limited to municipal defendants or to cases involving sidewalks. The Court agreed with our contention that the trivial defect defense should not be so limited. The Court stated that the defense is equally applicable to private landlords and municipalities, and it applies to defects on stairways, including those that are inside privately-owned buildings.

World Trade Center Bombing Litigation, 17 N.Y.3d 428, 933 N.Y.S.2d 164 (2011). In a landmark decision, the Court of Appeals absolved the Port

Authority of liability for the 1993 terrorist bombing.

Ferluckaj v. Goldman Sachs & Co., 12 N.Y.3d 316, 880 N.Y.S.2d 879 (2009). Here, the New York Court of Appeals held that a lessee, who does not hire a contractor and thus does not have the right to control the injury-producing work being done, is not an "owner" within the meaning of Labor Law §240(1).

Stiver v. Good & Fair Carting & Moving, Inc., 9 N.Y.3d 253, 848 N.Y.S.2d 585 (2007). This was a significant case concerning the duty of a defendant to a non-contracting third party. The court held that a New York State certified inspection station did not owe a duty to a motorist who was injured in a subsequent collision with the inspected vehicle. The decision in this case was the subject of an article on the front page of the New York Law Journal, which included a discussion of DANY's brief and the contentions that it raised on behalf of the defendant's position.

Morejon v. Rais Const., 7 N.Y.3d 203, 818 N.Y.S.2d 792 (2006). In a favorable result for defendants, the Court held that "only in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment or a directed verdict."

Toefer v. Long Island Railroad, 4 N.Y.3d 399, 795 N.Y.S.2d 511 (2005). This was another significant victory for defendants on the issue of Labor Law § 240. Resolving a split between the Appellate Divisions, the Court of Appeals held that a fall from a flatbed truck does not implicate the absolute liability provisions of Labor Law § 240.

Blake v. Neighborhood Housing Services of New York City, Inc., 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003). This case resulted in a landmark opinion concerning the strict liability provisions of Labor

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* Andrew Zajac is a member of McGaw, Alventosa & Zajac in Jericho, New York. Mr. Zajac is a Past president of DANY, and he currently sits on its Board of Directors. In addition, he is Co-Chair of DANY's Amicus Curiae Committee.

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Law § 240. The decision expanded the scope of the defense concerning the plaintiff's actions as being the sole proximate cause of the accident.

Desiderio v. Ochs, 100 N.Y.2d 159, 761 N.Y.S.2d 576 (2003) - At issue here were the structured judgment statutes pertaining to medical malpractice cases. In this case, the jury awarded the plaintiff \$40,000,000 for future nursing care. Application of the statutes resulted in a total payout to the plaintiff of \$120,000,000. The Court was constrained to affirm this result by the statutory language and its prior precedents. Significantly, however, the Court's opinion contained strident calls for an amendment to the statutes to avoid absurd results such as ensued in this case. Shortly thereafter, the Legislature amended the statutes, intending to ameliorate results such as in Desiderio.

Peralta v. Henriquez, 100 N.Y.2d 139, 760 N.Y.S.2d 741 (2003) - In this case, the Court issued a favorable ruling for defendants on the issue of a landowner's duty concerning exterior lighting. The Court rejected the plaintiff's assertion that an unlit parking lot is per se dangerous.

Tyrrell v. Walmart Stores, Inc., 97 N.Y.2d 650, 737 N.Y.S.2d 43 (2001) - Here, the Court of Appeals refused to abolish the "speaking agent" rule. Under that rule, the statement of an employee may be received as an admission against the employer only if the proponent of the statement can establish that the employee has the authority to speak on the behalf of the principal. This rule makes it much more difficult for plaintiffs to prevail, especially in slip and fall cases.

Narducci v. Manhasset Bay Associates; Capparelli v. Zausmer Frisch Associates, Inc., 96 N.Y.2d 259, 727 N.Y.S.2d 37 (2001) - This case resulted in a landmark opinion on the scope of the absolute liability provisions of Labor Law § 240 as it applies to falling objects. The Court's decision contains language that is highly beneficial for defendants in cases of this nature.

Trincere v. County of Suffolk, 90 N.Y.2d 976, 665 N.Y.S.2d 615 (1997) - In this case, the Court of Appeals held that landowners are not responsible for trivial defects in walkways. The Court affirmed

the Appellate Division, Second Department which held that differences in elevation of approximately one inch, without more, are not actionable.

Inquiries with respect to the Committee and suggestions as to amicus briefs should be directed to Andrew Zajac at (516) 932-2832.

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Interview with Tony Celentano regarding DANY History

DANY in 2015 - 2016 has been celebrating its fifty years of existence. This history is being presented in various forms in this Spring 2016 edition of the "Defendant" journal. What follows here is an account based on a conversation with DANY's original Executive Director, Tony Celentano. Mr. Celentano was interviewed by Treasurer Patricia Zincke and by Bradley J. Corsair of DANY's Board. The below is not a literal transcript, but is very much based on what Mr. Celentano had to say. Remarkably, he has supported DANY for over 45 years, serving as Executive Director until summer of 2015.

Ms. Zincke and Mr. Corsair: Tell us about how DANY started, how you first became involved, and what it was like.

Mr. Celentano: I started with DANY in 1969. It was an organization founded by Reid Curtis, Thomas Flood and James Conway. I was working for Mr. Conway and he asked me to get involved, as DANY was growing and needed help with day-to-day operations and planning. Original DANY members included insurance companies and government agencies, such as the Transit Authority, the Port Authority, CNA, Royal Globe, Cigna, INA, and Allstate. Tom Flood was chief attorney of Allstate in the New York City area. A claims manager at INA, whose name might be McLoughlin, ran the golf outings. A Mr. Gillespie with Port Authority was active. Early supporters included the investigation company run by Ben Stolfa, and the Dietz and Diamond reporting companies.

Early on, the organization had about 250-275 individual members, a number which grew to about 600. Many members were insurance company claims managers and executives. Many, but not all were attorneys. As time went on, there was a push by Joseph Bergandano to make the organization for attorneys only. That went on to happen and is one

reason why DANY is the bar association that it is today. DANY now has many more law firm members than in the past, and more people who practice outside New York City, including members upstate. DANY is focusing on getting more upstate members who realize the benefits of joining this organization, while also respecting its tradition. Some current members are children of past members, like Lou and Anthony Martine, William Gallagher Sr. and Jr., and Roger and Paul McTiernan.

In the early days, the organization was more of a social organization where members in any year would meet at four dinners and the golf outing, and sometimes we had a dinner-dance. Many of the dinners were at the Downtown Athletic Club, where Heisman Trophy winners were portrayed. There were also presentations on the law. Now there is an even stronger emphasis on the educational mission, as CLE has really picked up in the last ten years. DANY now offers many CLE courses throughout the year, organized by Teresa Klaum and you (Brad Corsair) and others. Education has always been a vision of the by-laws, for all lawyers and especially young lawyers. But the social aspect lives on of course.

Ms. Zincke and Mr. Corsair: Were you always the Executive Director?

Mr. Celentano: Actually that didn't come about until the early 1990s and DRI was behind it. DRI is a national organization of defense attorneys and DANY is a State and Local Defense Association (SLDO), and the two have had a close relationship. DRI thought that an SLDO should have an official Executive Director and I took on that title.

Ms. Zincke and Mr. Corsair: What did you have to do as Executive Director?

Mr. Celentano: I had to keep track of the finances, make sure that members paid their dues,

Interview with Tony Celentano regarding DANY History

and get sponsors for the various events put on by DANY. I was also responsible for having DANY's journal "The Defendant" timely reach the members.

Ms. Zincke and Mr. Corsair: You just mentioned The Defendant -- can you tell us more about it?

Mr. Celentano: Members and judges always wanted to read the Defendant and couldn't wait for it to come out. People especially liked to review regular contributions like John Moore's informational "Worthy of Note" column. "Worthy of Note" is still a fixture today with thanks to Vincent Pozzuto. The idea has always been to cite cases and discuss how the cases affected the defense bar. Mr. Moore was very active in promoting the Defendant, a role later taken on by John McDonough and more recently by Vincent Pozzuto as well. A concept in the last several years is having a "dedicated issue" at times, meaning a journal devoted to one area of law. That has been very well received.

The Defendant is now sent to members electronically which is a real cost savings for DANY, keeping DANY on its feet financially. When a hard copy publication was necessary, a lot of work and expense was involved, as we've had a wide distribution and had to keep an accurate mailing list. It was financed by dues and from sponsorship somewhat, but not to the degree of today.

Ms. Zincke and Mr. Corsair: When you think back on legal issues or events that had great attention, what comes to mind?

Mr. Celentano: When the No-Fault law was first being proposed, DANY took a strong position against it. That was a really hot topic. I went with John Moore, James Conway and Al Schleiter to Albany, where they argued against passage of this law. I would prepare press releases and they would present those to the Legislature. Mr. Moore did a lot of leg work, and Mr. Schleiter was very gung-ho. Plaintiffs' attorneys did not want to see this passed either, but it did anyway.

I also remember an important DRI meeting in South Jersey that I attended with Jim Begley, John McDonough and Julian Ehrlich.

DANY incorporated in 1989 so it would have the benefits of that business form. Whether to incorporate DANY was a controversial subject.

DANY's dinners and golf outings have always mattered a lot, but in early times, financing was a challenge. Members like Lou Martine have been very generous. In tough economic times, he would often chip in extra monies to help keep the organization going. DANY's third President was Reid Curtis in 1968-1969, when I started. Mr. Curtis once paid for literally the whole golf outing. By the way, Mr. Curtis was partners with Hon. Edward V. Hart, who was DANY's tenth President, in 1975-1976. Edward Hart became a judge and eventually a Pinckney awardee.

Mr. Corsair: Thanks for sharing that. His son, Hon. Edward Hart, Jr., became a judge after being a law secretary, and I was an intern with him in the early 90s. We were all based in Supreme Nassau, and then Judge Hart Sr. went on to the Appellate Division. Small world.

Mr. Celantano: I've met many judges at DANY events over the years and they've always been very nice to me. Sometimes I would see them elsewhere - I think Judge Rolando Acosta is an example. I met him at the gym. I've been going to the gym and running marathons for a long time.

Ms. Zincke and Mr. Corsair: Wow -- tell us more about that.

Mr. Celantano: I've run 16 New York City marathons and also Boston twice and the Long Island Marathon 5 times. My best time is 3:14 in New York City in 1983. I was very close with Frank Maher. He put through a vote that my shirt and shorts would have "DANY" on them while running the marathon in New York City.

Ms. Zincke and Mr. Corsair: When you reflect on your time with DANY, what other people or personalities come to mind?

Mr. Celantano: A Mr. Callan from Brooklyn was ready to take on the world. Tom Mulligan was President and he became a Federal judge in 2001. George Siracuse, who was President in 1985 - 1986 and is still practicing. I've been close with Kristin Shea and Tom Maroney, Julian Ehrlich, and Eileen Hawkins. And many other people of course.

Ms. Zincke and Mr. Corsair: At DANY's "Pinckney" dinner next month, there will be a slide presentation so everyone can see photos of events from early years. Would you mind looking at these

Interview with Tony Celentano regarding DANY History

photos now and telling us who you recognize?

Mr. Celantano: Sure -

- Slide 1 - Judge Hart, Joseph Bergandano, James McLoughlin, Jim Conway. Maybe 1980.
- Slide 2 - Frank Maher, Ralph Alio, John Moore, Irwin Simon, Richard Duignan, possibly 1982.
- Slide 3 - John McDonough, Roger McTiernan, Robert Quirk
- Slide 4 - Joseph J. McLoughlin, Joseph Conklin, Frank Maher, James Conway, J. Robert Morris. This was in the 1980s.
- Slide 5 - Richard O'Keefe, Judge Lawrence, Judge Vaccaro, Frank Maher
- Slide 6 - Kevin Kelly
- Slide 7 - John McDonough, Ralph Alio
- Slide 8 - Richard Duignan, Peter Madison, James Conway
- Slide 9 - Ralph Alio and Peter Madison, from the 1997 Past Presidents Dinner.
- Slide 10 - Ralph Alio, John Boeggeman
- Slide 11 - Lou Martine
- Slide 12 - Lou Martine, John McDonough
- Slide 13 - Jeanne Cygan, Andrew Zajac, Anthony McNulty, Judge Acosta
- Slide 14 - Kenneth Dalton, George Siracuse
- Slide 15 - Edward Hayes, Thomas Mulligan, Paul Duffy
- Slide 16 - Richard O'Keefe
- Slide 17 - Robert Quirk and a judge
- Slide 18 - Richard O'Keefe, Peter Madison
- Slide 19 - Ralph Alio
- Slide 20 - James Conway, Judge Owen McGivern, Benjamin Purvin
- Slide 21 - Richard O'Keefe, Richard Duignan
- Slide 22 - Henry Miller, Richard Duignan
- Slide 23 - Judge Edward Hart
- Slide 24 - Richard Duignan, Frank Maher
- Slide 25 - Joseph Bergandano
- Slide 26 - Sheila Birnbaum
- Slide 27 - Richard Duignan
- Slide 29 - Reid Curtis, Richard O'Keefe
- Slide 30 - Henry Miller
- Slide 31 - Judge Mark A. Costantino
- Slide 32 - Maureen Sullivan, J. Robert Morris, Frank Maher

Slide 33 - Joseph J. McLoughlin, James Conway, Florence Conway

Slide 34 - Judge Vacarro and Frank Maher

Slide 35 - Judge McGivern, Richard O'Keefe and Richard Duignan

Slide 36 - Richard Duignan

Slide 37 - Frank Maher, Joseph Conklin

Slide 38 - Joseph Conklin, Frank Maher, James McLoughlin, Richard O'Keefe, Richard Duignan

Slide 39 - Judge Acosta, and me

Ms. Zincke and Mr. Corsair: Any final thoughts?

Mr. Celantano: As time went on, DANY grew and took on many more issues and programs. In early Board meetings, it was easier to take notes since there was only so much to discuss. I ended up working very hard but feel good about that and the good support, and had some really great times.

Ms. Zincke and Mr. Corsair: Thank you so much Tony - it is always great to see you.

The Vanishing Jury Trial Part II

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involvement in pushing cases toward resolution and away from trial, further contributing to the overall decline in the prevalence of civil jury trials in general.

In the next installment in our continuing series regarding the disposition of fewer and fewer civil matters by way of jury trial, we will explore the impact of the expanded role of alternative dispute resolution and class actions on civil litigation in general.

¹ Table C-4, U.S. *District Courts – Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending March 31, 2015*, U.S. Courts, available at www.uscourts.gov.

² See, e.g. Vanderford, Richard, *9/11 Plaintiff's Attys Demand Full Fees in 2nd Circ.*, Law360 (April 11, 2013), available at <http://www.law360.com/articles/432120/9-11-plaintiffs-attys-demand-full-fees-in-2nd-circ>.

³ Hellerstein, Henderson and Twerski, *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 Cornell L. Rev. 127 (2012), available at <http://cornelllawreview.org/files/2013/02/Hellerstein-et-al-final.pdf>.

Interview With John Moore Regarding DANY

Gary Rome: John, let's talk a little about –how about the first time you heard about DANY. Do you remember? Can you give me an early story of your first affiliation?

John Moore: I heard about it from Jim Conway. I was with Continental at the time. He was one of the people to whom we gave cases and he suggested I join it. And when I joined it they had the first or second issue of the Defendant. At that time it was in poor shape and he asked me if I would write for it and I did and he asked me if I would become the editor of it and I did and going forward it was my paper so to speak. I was the one who got the design for the eagle. I was the one who set up the magazine on an issue basis. I was the one who first set up the programs for the education.

Gary Rome: Like the CLE?

John Moore: Yeah, exactly. I started that and from there they asked me to represent them with DRI and I became a vice president in that thing.

Gary Rome: Were you a vice president in DRI or in DANY at that time?

John Moore: Probably both. But I know I became vice president at DRI and had to go out to their convention things and after that, that's about it.

Gary Rome: I remember you telling me about how DANY got involved with no-fault I believe it was what 1976, 75?

John Moore: Before it became law.

Gary Rome: Right.

John Moore: I don't know exactly when but DANY, Jim Conway was really the thing that was more responsible for DANY for doing more for our organization than anyone else I would say. Anything you wanted to do you had to speak with him first and he decided that we should go up to Albany and speak.

And he decided that there should only be one speaker and that was me. So I spoke before the congressional people of New York and we looked there were about four or five of us. Tony Celentano was with us when we were up and they asked me to make a speech and I was happy to do it and I got up before the people, there was a big stage with a ramp and we were in the audience and they were on the stage and they said okay we will listen to what everyone has to say and there were different organizations who had something to say and then it came our turn and I stood up and started to talk and the sponsor of no-fault was in the auditorium so I stopped talking. So he said to me no, no, no, continue. I said well I'll wait we came up here to speak to you I can wait for as long as you are away. So he sat down and I continued with my talk and obviously it didn't pack much influence because they passed no-fault but at least we made ourselves known. And then we started the lectures at different times. We spoke to different – there was at the time there was an upstate DANY so to speak and I went up there and gave a speech and I also spoke to the New Jersey Defense Association – whatever they call themselves. We had things like that going and we became pretty popular and eventually DRI said that your organization is the most popular one in the country and we want you to come to the main meetings and we want you to pick a vice president. And Jim didn't want it so he asked me to take it and I was happy to take it. So that entailed giving lectures when they came into this area as well as going to their meetings wherever they were.

Gary Rome: Sure. Now when you were vice president of DRI I imagine they had regional meetings at that time and they had the national meeting and you sat on the executive board?

John Moore: Yes, I sat on the executive board.

Interview With John Moore Regarding Dany

They didn't have any regional meetings. I didn't have to go to that. I went to the executive meetings which were out in Chicago I think, I'm not even sure. It was Chicago, but I'm not sure.

Gary Rome: John, let me ask you this. We've been trying very hard to rebuild a statewide organization for the last three years. When you went to speak upstate was it a separate organization because there is a Western New York Defense Association. We have upstate members now. We've added two upstate members to the Board. We're going to do more of that in the future. But at one time was it a fully statewide organization or did DANY go up there just to kind of represent downstate and not really join organizations. Can you clarify that?

John Moore: Yeah, there was some attempt to make it a statewide organization. But the organization was Western New York, it was the Albany area. That was the other Defense Association of New York. It came out of Albany.

Gary Rome: Was there any formal joining of both those groups?

John Moore: No. Not that I know of.

Gary Rome: Now currently, I know in my administration we did a lecture every month except for I think June, July and August because it's always difficult to get people in the summer time. Back during your presidency or before, well CLE didn't exist, but when CLE came into existence about how many lectures was DANY able to put forward per year?

John Moore: Well you know it was very very different in that the lectures number 1 there weren't any charges for that or anything like that. As a matter of fact we made them at the university. I can remember going to –what's the law school in uptown Manhattan?

Gary Rome: Columbia?

John Moore: No, no, no. The other one. A Catholic school.

Gary Rome: Fordham?

John Moore: Fordham. The judge in the Federal Court Brooklyn district was the dean up there and it started off by—I got up and I use to lecture at the law school to the students and then we had a

couple of seminars up there at his place because of the reciprocity I would gather and I spoke up there and the association had programs up there and the programs were like half a day and there were probably one or two a year maximum. Maximum was two. Generally they had one but it was an all day affair.

Gary Rome: Anything else about the early days of DANY that you recall or you would want to memorialize?

John Moore: I think the most important growth factor in the association was the development of The Defendant. That became like a bible. And everyone was asking about it and asking us to come out more often, more frequently and that was a big job. That was a really big significant job for the association and it got a lot of respect. And then when we started the actual seminars they were two or three hours something like that—that was good. But it eliminated the all day seminars which was kind of important to the membership at large. They'd give up a Saturday to come and they'd be there all day Saturday or until 3 o'clock Saturday that kind of thing. Those two things probably were the greatest things that I think that the organization did in growth. And at one point in time we considered ourselves as important as DRI inasmuch as doing things for the Bar for our co-partners or whatever you want to call them on Mondays and that was it.

Gary Rome: It set the foundation John for the last I'd say five or six years or probably longer of where DANY has gone. Okay John what did you want to add?

John Moore: I just wanted to add that during my involvement with the association I was able to have the arbitration organization select people from the defense bar from DRI from our DANY so that for the first time you had defense lawyers as arbiters for any arbitration that may have evolved under American Arbitration Association. So we put a number of people on that list to listen to one of the presentations. That was significant because for the first time it was not loaded with plaintiffs' attorneys.

Gary Rome: I did not know that. That is something I absolutely learned for the first time.

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President's Column

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chance to contribute and share their backgrounds and ideas with the larger community and with clients, it is moving the legal community closer to inclusion, one lawyer at a time. DRI, in recognition of DANY's strong diversity efforts, awarded DANY the 2015 State and Local Defense Organization Diversity Award at its annual meeting in October. In awarding this honor, DRI noted that DANY has demonstrated a commitment to achieve sensitivity and receptivity to diversity issues and promote the advancement and inclusion of minority and women attorneys. A number of DANY members attended DRI's annual meeting in Washington to receive this award. This was a very proud moment for DANY and for Claire Rush, who was one of the founding members of this program, and Claire now sits on DANY's Board of Directors.

I would like to see all our members become more involved in our organization. Please visit our website www.defenseassociationofnewyork.org where you can get a glimpse of what's going on at DANY. Check out our 23 committees and contact the Chair and find out how you can be involved. Check out the publications tab and not only will you find articles of educational and professional interest but you may discover what you can offer DANY in terms of writing and avail of an opportunity to be published. Check the Amicus briefs and you'll see that that DANY's Amicus Committee has contributed to some of the most important decisions of interest to the defense bar. Check out the CLE materials and you will find that DANY's programs are among the best offered by any bar organization. These are just a few of the many committees on which you can work with others in the exchange of ideas, techniques, procedures and discussion of court rulings, all calculated to enhance the knowledge and improve the skills of defense lawyers.

I sincerely hope that 2015-2016 will be a year in which we see many new faces in DANY and I can assure you all defense attorneys can benefit significantly from what DANY has to offer. Thank you so much for your continued support.

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50 Years of the Defense Association



**Past President
George Siracuse
(1985-1986)**



**Past Presidents Frank Maher ((1981-1982),
Ralph Alio ((1978-1979) and John J. Moore (1973-1974)**



Reid A. Curtis (Left) Co-Founder of Defense Association of New York



Past President Ralph Alio (1978-1979) administers the Oath of Office to John J. McDonough (1997-1998)



Hon. Joseph McLaughlin, James Conroy (Past President (1969-1970)) and his wife Flo.

Worthy Of Note



VINCENT P. POZZUTO *

1. ASSUMPTION OF RISK

Augustin v. Grand Prix N.Y. Racing, LLC, (2016 NY Slip Op 02948, 2nd Dept. 2016)

Plaintiff was injured while driving a go-kart at a go-kart track owned and operated by the defendant. The lower Court granted defendant summary judgment under the primary assumption of risk doctrine. On appeal, the Appellate Division, Second Department, held that the lower Court improvidently exercised its discretion in declining to consider the affidavit of plaintiff's expert on the ground that the expert was not disclosed until after the filing of the note of issue as there was no evidence that plaintiff's delay in retaining the expert was intentional, willful or prejudicial to the defendant. In considering the plaintiff's expert's affidavit, the Court held that it was insufficient to create an issue of fact. The Court held that while the expert alleged that the subject go-kart did not comply with safety guidelines promulgated by the American Society for Testing and Materials, those guidelines were nonmandatory.

2. INSURANCE COVERAGE

State Farm & Cas. Co. v. Guzman, (2016 NY Slip Op 02755, 1st Dept. 2016)

In an insurance coverage action, the Court held that since it was beyond dispute that the named insured under the subject homeowner's policy did not reside at the subject premises, the subject premises was not covered. The Court further held that since the policy never provided for coverage under the subject circumstances in the first place, the timeliness of the carrier's disclaimer was irrelevant. Finally, the Court held that the defendant could not rely on the estoppel doctrine, as defendant could not establish that she was prejudiced by the issuance of the disclaimer four months before the note of issue was filed.

3. STORM IN PROGRESS RULE

Baker v. St. Christopher's Inn, Inc., (2016 NY Slip Op 02600, 2nd Dept. 2016)

Plaintiff was allegedly injured when the roof of a maintenance shed owned by the defendant partially collapsed on him. A significant amount of snow had accumulated on the roof during the course of an ongoing storm. The lower Court granted defendant summary judgment under the "storm in progress" rule, which holds that a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm. The Court held that the defendants established their prima facie entitlement to summary judgment as a matter of law by submitting evidence including the affidavit of a meteorologist, certified climatological data and the affidavit of a licensed engineer, which demonstrated that the roof of the shed collapsed due to the weight of the snow that had accumulated thereon, and that it was snowing at the time of the occurrence. As such, the burden shifted to plaintiff to demonstrate that the precipitation from the storm was not the cause of the accident and plaintiff failed to raise a triable issue of fact in this regard.

4. LABOR LAW

Batista v. Manhattanville College, (2016 NY Slip Op 03077, 1st Dept. 2016)

The Appellate Division, First Department, reversed the lower Court's grant of summary judgment to plaintiff pursuant to Labor Law Section 240. The Court held that issues of fact existed as to whether plaintiff disregarded instructions to use only pine planks for flooring on the scaffold he

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was constructing, and whether more pine planks were readily available to him either at the site, as his supervisor testified, or at his employer's yard, as a coworker testified. The Court further held that issues of fact existed as to whether plaintiff was responsible for checking the planks at the site for knots and whether he used one with a knot in it, which should not be used for flooring.

5. RELATION BACK DOCTRINE

Mileski v. MSC Indus. Direct Co., Inc., (2016 NY Slip Op 02787 2nd Dept. 2016)

Plaintiff's decedent died after suffering injuries while using a lathe machine during the course of his employment with Deer Park Hydraulics & Packing Co. Plaintiff brought suit against MSC Industrial Direct Co., Inc., the manufacturer of the machine. MSC Industrial commenced a third-party action against Deer Park for contribution and indemnification. During his deposition, the president of Deer Park testified that three other corporations operated in the same location and had access to the lathe machine. Plaintiff made a motion for leave to amend the complaint to add these three corporations as direct defendants outside of the three year statute of limitations under the relation back doctrine. The lower Court granted the motion. The Appellate Division, Second Department, reversed, holding that even if the three corporations were united in interest with Deer Park, then the immunity from plaintiff's direct claims afforded to Deer Park by the workers compensation law is extended to them as well.

6. TRIAL REVIEW

Serdans v. New York & Presbyt. Hosp., (2016 NY Slip Op 02911 1st Dept. 2016)

After a jury verdict in a case alleging disability discrimination, the Appellate Division held that the liability verdict was supported by legally sufficient evidence and was not against the weight of the evidence. The Court held that evidence that plaintiff's supervisors continued to attempt to assign her to areas outside of a certain unit and that defendant cancelled her requests for shifts with increased frequency after granting plaintiff an accommodation supported the jury's conclusion that defendant failed to implement the agreed-upon

accommodation. The Court further held that the compensatory award did not deviate materially from reasonable compensation, however, the Court reversed the grant of punitive damages, finding that the evidence did not support the conclusion that defendant engaged in intentional conduct with malice or reckless indifference to plaintiff's rights.

7. TRIVIAL DEFECT

Maldonado v. 2121 Shore Condominium, (2016 NY Slip Op 02780 2nd Dept. 2016)

Plaintiff was allegedly injured when she tripped and fell in front of her parents' condominium complex on a depressed drain near the front door entrance. A large planter which usually blocked access to the area had been removed due to ongoing construction. Defendant made a motion for summary judgment contending that the defect was trivial. In affirming the lower Court, the Appellate Division, Second Department, held that a defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risk it poses. The Court held that viewing the evidence in the light most favorable to plaintiff, including the deposition transcripts of plaintiff and the defendant witness, and a photograph, the evidence was insufficient to establish prima facie that the defect was trivial. Given that determination, the Court did not address the sufficiency of plaintiff's opposition papers.

8. INSURANCE COVERAGE

Great Am. Inc. Co. of N.Y. v. L. Knife & Son, Inc., (2016 NY Slip Op 02917 1st Dept. 2016)

Plaintiff insurance company sought to void a policy ab initio on the ground that defendants misrepresented the total insurance value ("TIV") of the premises and its contents. The Appellate Division, First Department, held that the lower Court correctly denied the plaintiff's motion for summary judgment finding that plaintiff failed to establish as a matter of law that defendants made any misrepresentation. The Court noted that defendants' broker did not provide any information

Continued on next page

on the application regarding the TIV. The Court also noted that after plaintiff issued the policy, its own investigation of the property, which could have uncovered the TIV, resulted in no underwriting activity and other internal insurance company documents suggested that the decision to issue the policy and the premium charged were not “tethered” to the TIV. The Court finally held that factual issues surrounding whether the purported misrepresentation was material are ordinarily a question of fact.

9. PROFESSIONAL MALPRACTICE – STATUTE OF LIMITATIONS

Bronstein v. Omega Constr. Group, Inc., (2016 NY Slip Op 02951 2nd Dept. 2016)

In an action alleging architectural malpractice, the defendant made a motion to dismiss based upon the statute of limitations. The Court held that regardless of whether they are framed as claims sounding in contract or tort, allegations of professional malpractice, other than medical malpractice, are governed by a three-year statute of limitations. Accrual of a claim to recover for professional malpractice occurs upon the completion of performance and the resulting termination of the professional relationship. The Court held that in response to defendant’s prima facie showing that the action was commenced against him more than three years after his withdrawal, plaintiff succeeded in raising a question of fact as to whether the continuous representation doctrine was applicable. The Court held that evidence of continuing communications between the parties, and of efforts by the defendant to remedy the alleged errors and deficiencies in the filed plans supported the denial of the motion to dismiss.

10. DIRECTED VERDICT – PREMISES LIABILITY

Noboa-Jaquez v. Town Sports Intl. LLC, (2016 NY Slip Op 02739 1st Dept. 2016)

The Appellate Division, First Department, held that the trial Court properly granted defendant a directed verdict at the close of plaintiff’s case in chief. The Court found that there was no rational process by which a factfinder could base a finding in favor of plaintiff. The Court held that the mere

presence of water on a tiled floor adjacent to showers in a gym cannot impart liability, particularly since water was necessarily incidental to the use of the area. The Court further held that liability could not be premised upon the lack of mats in the area, and that plaintiff had not established that the defendant created or had actual or constructive notice of the wet floor.

11. CLASS ACTION CERTIFICATION

Weinstein v. Jenny Craig Operations, Inc., (2016 NY Slip Op 02932 2nd Dept. 2016)

Plaintiffs, 751 putative class members, alleged that the defendant regularly underpaid each class member for time worked by deducting 30 minutes of pay for each shift worked for “break time” that was not taken. The lower Court granted class certification and defendant appealed. The Appellate Division, Second Department, affirmed holding that the lower Court properly applied New York’s liberal class action certification statute to find that plaintiff’s established commonality. Plaintiffs submitted sworn testimony from four employees and a center director attesting to defendant’s policy of routinely deducting 30 minutes from each employee’s shift for a meal break that was not taken. The Court held that this evidence was sufficient to satisfy the minimal threshold for commonality. The Court also noted that defendant’s own statistical analysis of employee time card data provides support for plaintiff’s claim that the practice was routine. The Court held that where the same types of subterfuge were allegedly employed to pay lower wages, commonality of the claims will be found to predominate, even though the putative class members have different levels of damages.

12. SPOILIATION

Kleinberg v. 516 W. 19th LLC, (2016 NY Slip Op 02936 1st Dept. 2016)

A second third-party defendant to an action filed a motion to dismiss on the grounds of spoliation of evidence, specifically a leaking roof. The lower Court denied the motion, and the Appellate Division, First Department affirmed, holding that the third-party plaintiff discharged any duty it had to advise the second third-party defendant that litigation over the integrity of the

Worthy Of Note

roof had commenced by sending them a copy of the complaint in the main action and by demanding defense and indemnity. In addition, the Court noted that the second third-party defendant, the roof installer, was involved in remediation efforts for months after the roof was installed. The Court held that the removal and replacement of the roof was not done in bad faith to harm second third-party defendant's litigation posture, but rather, for the purposes of mitigation of damages.

13. LABOR LAW

Kosinsky v. Brendan Moran Custom Carpentry, Inc., (2016 NY Slip Op 02968 2nd Dept. 2016)

Plaintiff brought suit alleging violations of Labor Law Section 240, 241(6) and 200. The Appellate Division, Second Department, held that plaintiff was not entitled to summary judgment on the Labor Law 240 cause of action as defendants raised triable issues of fact as to whether plaintiff misused the subject ladder and if so, whether that misuse was the sole proximate cause of the accident. The Court further held that defendant DiGregorio was entitled to summary judgment based upon the homeowner's exemption after she demonstrated that she did not direct or control the work being performed.

Interview With John Moore Regarding Dany

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John Moore: I forget the guy's name was a professor and I brought it up and he said well I really don't know --- the next thing you know he said submit a list of those attorneys you think would be good arbiters. And I gave a whole list of people and we started to get Defense Association people on the list of arbiters which was kind of a step forward I thought.

Gary Rome: And this was when you were taking a course at NYU or teaching?

John Moore: No, I was taking a course at NYU. I was going for my master's of law at that time.

Gary Rome: And the discussion just came up about American Arbitration Association with the professor?

John Moore: Yes.

Gary Rome: That's great. Tell me how in the world did our most distinguished award become known as the Charles Pinckney Award – the great senator from South Carolina?

John Moore: At the time there was a guy by the name of Harold Cowen. His daughter was a judge over in Supreme Brooklyn. In any event Harold was like a machine gun always shooting off—a very very excitable kind of guy who had this meeting going. We were trying to get some kind of a title to an award

that we wanted to give to an outstanding person either in or out of the organization—it didn't make any difference—we wanted someone who was at the top of the line. And all kinds of names were being professed by various people and he said I think we should have—and it was almost like a command—Pinckney and we said why—he said because he's responsible for millions for defense and nothing to settle. And everyone said yeah that sounds good, that sounds good. And then we found out subsequently after this was spread around sufficiently so everyone was a little excited about it—we found out that the millions for defense was unrelated to anything in the legal field. It was a bribe that was being paid to one of the countries on the border of one of the African countries and completely unrelated to the law but it was too late so we let it go through.

Gary Rome: John, you know we've done some further research over the years and it turned out that Pinckney wasn't the person who said it so I just want to complete the circle for you. It was always attributed to him but he never said it.

John Moore: That figures, that figures. You talk something being a screwed up affair that was it. We stayed with it because it sounded good—millions for defense—so we liked the millions.

Modern Day Discovery Disputes - Cases and Principles - Version Two



BRADLEY J. CORSAIR *

This article embodies an ongoing initiative to furnish a current, quick reference discovery guide that is also comprehensive. Here you will find a discussion of principles based on contemporary appellate determinations of discovery disputes. I have categorized these cases into a number of topics that are presented generally in alphabetical order, so readers can readily return to a topic of interest as necessary. Included is a mix of discovery items, disclosure devices, and procedural issues.

This guide is a second version. It is literally a two-fold-plus expansion of the original that is published in the Winter 2016 “Defendant” journal.¹ New content is presented in this burgundy color, whereas previous text and case citations are in black. In some instances, the end notes for principles in the first version now include additional case citations.

Basic Discovery Standards, Precautions and Privileges

CPLR 3101(a) provides that there “shall be full disclosure of all matter material and necessary in the prosecution or defense of an action,² regardless of the burden of proof.”³ “The terms ‘material and necessary’ in this statute must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.”⁴

CPLR 3120 is the statutory source for production of a document or thing: “After commencement of an action, any party may serve on any other party a notice ... to produce and permit the party seeking discovery ... to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served.”⁵

While New York’s judicial system generally fosters a pro-discovery environment, “a party is not entitled

to unlimited, uncontrolled, unfettered disclosure.”⁶ The demanded items should be “sufficiently related to the issues in litigation to make the effort to obtain them in preparation for trial reasonable.”⁷ Likewise, the obligation to search for items is not boundless: “a party cannot be compelled to produce records, documents, or information that were not in its possession, or did not exist.”⁸

“Discovery demands are improper if they are based upon hypothetical speculations calculated to justify a fishing expedition.”⁹ Moreover, “discovery demands that are overly broad, are lacking in specificity, or seek irrelevant documents are improper.”¹⁰ Likewise, it has been held that “disclosure demands may be palpably improper where they seek irrelevant information, are overbroad and burdensome, or fail to specify with reasonable particularity many of the documents demanded.”¹¹ “Palpably improper” has similarly been defined as “either overly broad, unduly burdensome, irrelevant, or vague.”¹² And “where discovery demands are overbroad, the appropriate remedy is to vacate the entire demand rather than to prune it.”¹³

As for a general standard to justify production of discovery to potentially support a defense, the First Department has called for two things. First, that there is a factual basis for the defense,¹⁴ and second, that “the discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the defense”¹⁵ or “bearing on the claims.”¹⁶ Similarly, the Second Department has expressed that a plaintiff or a defendant should “demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims.”¹⁷ “Each request must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure.”¹⁸

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Typically exchanged discovery in personal injury cases includes insurance coverage information; authorizations to obtain records concerning the plaintiff from health care providers, employers, and collateral sources; eyewitnesses; notice witnesses; opposing party statements; photographs and video of an incident scene; and incident reports prepared in the regular course of a party's business. Other popular discovery devices include depositions of parties and non-party witnesses, and defense medical examinations ("IMEs"). This is self-evident from pre-printed language in form preliminary conference orders.¹⁹

A failure to timely challenge an opposing party's discovery demand generally forecloses inquiry into the propriety of the information sought, except for requests that call for privileged information or which are palpably improper.²⁰

When served with a discovery notice that seems improper, the recipient's options include timely service of a notice of objection, or a motion for a protective order to excuse any obligation to respond.²¹ "Unlimited disclosure is not mandated, and a court may issue a protective order pursuant to CPLR 3103 denying, limiting, conditioning or regulating the use of any disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."²²

"Trial courts are vested with broad discretion to issue appropriate protective orders to limit discovery.... this discretion is to be exercised with the competing interests of the parties and the truth-finding goal of the discovery process in mind."²³ Thus, "to properly exercise such discretion, a trial court must balance the need for discovery against any special burden to be borne by the opposing party."²⁴ "If the trial court has engaged in such balancing, its determination will not be disturbed in the absence of an abuse of discretion."²⁵

Contexts that may befit a protective order include overbroad and burdensome discovery demands,²⁶ needs to curtail or avoid an oral deposition of a party²⁷ or non-party,²⁸ or to protect trade secrets²⁹ or privileged information e.g. in view of CPLR 3101(b)³⁰ or 3101(d)(2).³¹ 3101(b) ("Privileged matter") states that "[u]pon objection by a person entitled to

assert the privilege, privileged matter shall not be obtainable." "Once the privilege is validly asserted, it must be recognized and the sought-after information may not be disclosed unless it is demonstrated that the privilege has been waived."³²

Regarding a 3101(d)(2) objection, "the burden of proving that a statement is privileged as material prepared solely in anticipation of litigation or trial is on the party opposing discovery."³³ "Such burden is met by identifying the particular material with respect to which the privilege is asserted and establishing with specificity that the material was prepared exclusively in anticipation of litigation."³⁴ Given an allegation of work-product privilege, a court will examine whether the document is by an attorney acting as counsel for the objecting party, and "reflects legal research, analysis, conclusions, legal theory or strategy."³⁵

A demand for disclosure may also be challenged in view of a quality assurance privilege founded in Education Law § 6527[3] or Public Health Law § 2805-m: "Records generated at the behest of a quality assurance committee for quality assurance purposes ... should be privileged, whereas records simply duplicated by the committee are not necessarily privileged."³⁶ A redaction of non-party patient information, or an *in camera* review as to a claim of quality assurance purpose, may be necessary in this setting.³⁷

As to a subpoena that seeks documents or testimony from a non-party, a party or the non-party may move to quash that subpoena if a basis for protest exists.³⁸

Be wary about a casual denial of possession of discovery, followed by a later disclosure that ought to have made earlier, as that can have serious judicial consequences.³⁹ Lack of formal disclosure is sometimes forgiven where the information was made available or known at a deposition, as with notice witnesses for example.⁴⁰ A broader review of discovery failure is provided later in this article.

There can also be consequences where time elapses without a litigant demonstrating interest in discovery. For instance, laxity can undermine an argument that determination of an adversary's summary judgment should await discovery: "the record shows that plaintiff had, and failed to take

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advantage of, a reasonable opportunity to pursue the disclosure it now seeks.”⁴¹

Conversely, a diligent party facing an early summary judgment motion should be allowed additional time to conduct discovery, so long as adequate justification exists: “CPLR 3212(f) permits a party opposing summary judgment to obtain further discovery when it appears that facts supporting the position of the opposing party exist but cannot be stated” and “(t)his is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion.”⁴²

The fact that court-ordered discovery is outstanding is also a ground to forestall decision of a summary judgment motion.⁴³ Some valid reason to delay the motion will generally be required as “the mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion.”⁴⁴ The motion opponent must “demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition (are) exclusively within the knowledge and control of the movants.”⁴⁵

Authorizations and Various Types of Records

A wealth of disputes focuses on types of a plaintiff’s records or information that should be authorized, and corresponding time frames. Concerning **medical records**, the general rule is that authorizations are due with relation to conditions affirmatively placed in controversy.⁴⁶ It has thus been held that “a party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue.”⁴⁷

The mandate for a plaintiff to exchange medical reports and authorizations, and to do so in advance of a defense medical examination, is founded in Section 202.17 of the Uniform Rules for the New York State Trial Courts. 202.17(b) states:

(b) At least 20 days before the date of such examination, or on such other date as the court may direct, the party to be examined shall serve upon and deliver to all other parties the following, which may

be used by the examining medical provider:

- (1) copies of the medical reports of those medical providers who have previously treated or examined the party seeking recovery. These shall include a recital of the injuries and conditions as to which testimony will be offered at the trial, referring to and identifying those X-ray and technicians reports which will be offered at the trial, including a description of the injuries, a diagnosis and a prognosis. Medical reports may consist of completed medical provider, workers’ compensation, or insurance forms that provide the information required by this paragraph;
- (2) duly executed and acknowledged written authorizations permitting all parties to obtain and make copies of all hospital records and such other records, including X-ray and technicians’ reports, as may be referred to and identified in the reports of those medical providers who have treated or examined the party seeking recovery.

To justify authorizations for records not relating to treatment or testing of injuries specified in bills of particulars, a defendant may need to demonstrate that the information sought is material and necessary to a claim or defense. The showing should be made with the original motion rather than awaiting reply papers, when seeking authorizations as to a **primary care physician** or **cardiologist** for example.⁴⁸

Where a plaintiff has claimed **loss of enjoyment of life**, authorizations for release of **alcohol and drug abuse** records have been directed,⁴⁹ as well as for **psychological treatment records**,⁵⁰ **mental health records**,⁵¹ **pharmacy and health insurance** records,⁵² for **social security disability** records,⁵³ and for records concerning serious medical conditions that are unrelated to the subject accident, such as **diabetes**,⁵⁴ **kidney disease**,⁵⁵ and **cardiac conditions**.⁵⁶ “The defense is entitled to review records showing the nature and severity of the plaintiff’s prior medical conditions which may have an impact upon the amount of damages, if any, recoverable for a claim of loss of enjoyment of life.”⁵⁷

A purported need to take prescription narcotic medications implicates a plaintiff’s **mental condition**,⁵⁸ as that allegation affirmatively places that condition in issue.⁵⁹ On the other hand, an

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authorization for **methadone treatment records** was denied where the records were not shown to relate to the happening of the accident or “the injury sued upon,” and any claim for mental injuries was withdrawn.⁶⁰ Also significant, in that same case, it was not evident that the interests of justice significantly outweighed the need for confidentiality so as to permit disclosure pursuant to Mental Hygiene Law § 33.13(c)(1).⁶¹

It is commonly appropriate to pursue authorizations to access information relating to a plaintiff’s **prior** or **subsequent** traumatic event, and/or **pre-existing condition**. “The nature and extent of previous injuries and medical conditions are material and necessary to claims of having sustained a serious injury within the meaning of Insurance Law § 5102(d), as well as any claims of loss of enjoyment of life.”⁶² In a case involving multiple bodily injury, i.e. neck, back and right knee, the Second Department has directed authorizations for the plaintiff’s records reflecting her “medical history” and “preexisting physical conditions” including records of a non-medical custodian (Witness Security Office pertaining to Witness Protection Program) reflecting her physical condition.⁶³

An allegation of an **exacerbation of a pre-existing condition** or the like opens the door in a similar way. In a First Department case, the defendant was accused of causing “aggravation of a pre-existing latent and asymptomatic degenerative condition. Accordingly, defendants sought authorizations for those portions of plaintiff’s dental records that discuss her medical history. Inasmuch as plaintiff has clearly voluntarily put her prior medical condition at issue, such disclosure is material and necessary for the defense of this action so that defendants may ascertain her condition.”⁶⁴ In this scenario, the Second Department has directed release of all medical records for the five years preceding the subject accident.⁶⁵ And where the plaintiff has **congenital conditions** of relevance, there may be cause for authorizations relative to an extended or even life-long medical history.⁶⁶

Regarding **employment** records, it is well understood that authorizations as to work attendance are appropriate, especially where the plaintiff claims disability or the like. And it is also standard for a plaintiff to authorize wage

records where loss of earnings is claimed. However, sometimes a plaintiff should permit a broader range of records from an employer. For example, an “authorization for any medical records related to the claimed injuries in his employment file from one year prior to the motor vehicle accident at issue to the present” has been required.⁶⁷

A plaintiff who is self-employed and claiming damages for lost earnings has been required to allow defendants to obtain **tax returns** filed by him and his company.⁶⁸ Additionally, a plaintiff may be compelled to provide an authorization for tax returns where the defendant has been unable to obtain salary history from the plaintiff or other sources such as purported former employers, and where such information is indispensable to the litigation.⁶⁹ In litigation generally, requests for tax returns are treated with heightened scrutiny since they are confidential by their nature, and disclosure of tax returns can be made subject to an order of confidentiality.⁷⁰

A plaintiff might decline to provide an authorization for information from a **social networking** service, or the service might fail to respond to such an authorization. There is, however, judicial precedent for obtaining social networking user information directly from a plaintiff. The **Appellate Division** has directed an *in camera* review of a plaintiff’s post-accident **Facebook** postings for identification of information relevant to that plaintiff’s injuries.⁷¹ To justify such relief, one must establish a factual predicate. “Defendants must establish a factual predicate for their request by identifying relevant information in plaintiff’s Facebook account - that is, information that contradicts or conflicts with plaintiff’s alleged restrictions, disabilities, and losses, and other claims.”⁷² An example would be a showing that a photograph or a text post, that is publicly available on social media, tends to contradict a material contention that the plaintiff has made by way of deposition testimony, an affidavit, or a verified pleading.⁷³

A similar foundation is where the plaintiff’s **Facebook** user profile “contained a photograph that was probative of the issue of the extent of her alleged injuries, and it is reasonable to believe that other portions of her Facebook profile may contain further evidence relevant to that issue.”⁷⁴ Thus, in that case, it was held that at least some of the discovery

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sought “will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on her claim.”⁷⁵ Accordingly, Supreme Court was to inspect “all status reports, e-mails, photographs, and videos posted on (the plaintiff’s) Facebook profile since the date of the subject accident to determine which of those materials, if any, are relevant to her alleged injuries.”⁷⁶

For more background in this area, see the section below titled “Photographs, Video or Audio of a Party - Surveillance, Social Media and Otherwise” and particularly *Forman v. Henkin*.⁷⁷ See also the article by Paul Zola titled “*Obtaining Social Media Evidence During Discovery*” in the Winter 2016 “Defendant” journal,⁷⁸ and the article noted in the next paragraph.

An authorization for **cell phone** usage records can be required in an appropriate case.⁷⁹ For example, in an action involving a motor vehicle accident, such an authorization can be justified where the question of whether a driver was using a cellular phone is relevant to a claim of negligent operation of a motor vehicle.⁸⁰ A demand for access to a party’s cellular telephone records can be “reasonably calculated to lead to the discovery of information” bearing on a claim or defense.⁸¹ Cell phone records are not invariably required on request, however. Bare speculation that a plaintiff was using a cell phone at the time of an accident does not, of itself, warrant disclosure of records.⁸² For more information, see the article by Andrea M. Alonso and Kevin G. Faley titled “*Social Media and Cell Phone Requests: Not a LOL Matter*” in the Summer 2013 “Defendant” journal.

When a party receives a copy of a subpoena directed to its **accountant** that seeks **financial records**, the party can potentially object to their disclosure “on the basis of their confidential and private nature.”⁸⁴

Bills of Particulars

One could write an entire journal article on the law as to propriety of a bill of particulars and a demand for the same, updating a bill of particulars, and implications of its content or deficiency. The focus here is on the legislative framework and recent decisions.

The statutory authority for a bill of particulars is CPLR 3041 through 3044. Based on 3041, “any party may require any other party to give a bill of

particulars of such party’s claim.”

CPLR 3042 provides procedure as to a demand, response, amendment, failure to respond, and penalties. Under 3042(a), “a demand for a bill of particulars shall be made by serving a written demand stating the items concerning which particulars are desired.” Within thirty days of service of a demand, “the party on whom the demand is made shall serve a bill of particulars complying with each item of the demand, except any item to which the party objects, in which event the reasons for the objection shall be stated with reasonable particularity.”

For changing a bill of particulars, CPLR 3042(b) states: “in any action or proceeding in a court in which a note of issue is required to be filed, a party may amend the bill of particulars once as of course prior to the filing of a note of issue.”

CPLR 3042(c) addresses failure to respond or to comply with a demand. “If a party fails to respond to a demand in a timely fashion or fails to comply fully with a demand, the party seeking the bill of particulars may move to compel compliance, or, if such failure is willful, for the imposition of penalties pursuant to subdivision (d) of this rule.” 3042(d) adds that “if a party served with a demand for a bill of particulars willfully fails to provide particulars which the court finds ought to have been provided pursuant to this rule, the court may make such final or conditional order with regard to the failure or refusal as is just” including relief per CPLR 3126.

If a demand for a bill of particulars is thought to be improper or unduly burdensome, the court pursuant to 3042(e) may vacate or modify the demand, or make such order as is just.

CPLR 3043(a) sets forth a list of subjects as to which a personal injury plaintiff must provide particulars upon demand, i.e.:

- (1) The date and approximate time of day of the occurrence;
- (2) Its approximate location;
- (3) General statement of the acts or omissions constituting the negligence claimed;
- (4) Where notice of a condition is a prerequisite, whether actual or constructive notice is claimed;
- (5) If actual notice is claimed, a statement of when and to whom it was given;

- (6) Statement of the injuries and description of those claimed to be permanent;⁸⁵
- (7) Length of time confined to bed and to house;
- (8) Length of time incapacitated from employment; and
- (9) Total amounts claimed as special damages for physicians' services and medical supplies; loss of earnings, with name and address of the employer; hospital expenses; nurses' services.

CPLR 3043(b) allows a "supplemental" bill of particulars with respect to claims of continuing special damages and disabilities without leave of court except where that would occur less than thirty days prior to trial. No new cause of action or injury may be alleged, however. Significantly, any party who receives a supplemental bill of particulars becomes "entitled to newly exercise any and all rights of discovery" with respect to such continuing special damages and disabilities, upon seven days of notice.

Under CPLR 3043(c), a court may deny any one or more of the foregoing particulars, or the court may grant other, further or different particulars.

CPLR 3044 is the statutory source as to whether a bill of particulars is to be verified: "If a pleading is verified, a subsequent bill of particulars shall also be verified. A bill of particulars of any pleading with respect to a cause of action for negligence shall be verified whether such pleading be verified or not."

Bills of Particulars - Amendments

Where a party seeks to amend a bill of particulars after a note of issue has been filed, the party must move for leave of court and provide a reasonable explanation for the timing.⁸⁶ "Generally, such leave should be freely granted, especially where the proposed amendment is not palpably insufficient or patently devoid of merit, and there is no evidence that it would prejudice or surprise the opposing party."⁸⁷ And, "where this standard is met, the sufficiency or underlying merit of the proposed amendment is to be examined no further."⁸⁸

One scenario where merit is evaluated is where a plaintiff proposes an amendment to allege violations of Code provisions. "Leave to amend or supplement the pleadings to identify the relevant Code provision may properly be granted, even after the note of issue has been filed, where the plaintiff makes a

showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant."⁸⁹ On the other hand, such an amendment is properly denied where those provisions are inapplicable to the action.⁹⁰

Leave is not so freely given when a trial is about to begin. "The decision to permit an amendment to a pleading or bill of particulars, especially on the eve of trial, is committed to the sound discretion of the IAS court."⁹¹ "At or on the eve of trial, judicial discretion in allowing such amendment should be discreet, circumspect, prudent and cautious,"⁹² and "should be exercised sparingly."⁹³

Factors to be considered may include whether the amendment would prejudice an opposing party,⁹⁴ and the amount of time that has passed since commencement of the action and service of the original bill of particulars.⁹⁵ The latter factor will typically be in play where the proposed allegations are based on information that has been available all along, such as a plaintiff's exact accident location,⁹⁶ photographs,⁹⁷ and the existence of an injury and its relationship to an accident.⁹⁸ Additional factors are delay in having sought expert opinion predicate for the desired allegation,⁹⁹ and delay in making the motion,¹⁰⁰ and whether the amendment is proposed in opposition to summary judgment.¹⁰¹

A plaintiff who wants to allege a new injury¹⁰² or a new category of "serious injury" in an auto case¹⁰³ would be amending rather than supplementing the original bill of particulars.

Bills of Particulars - Implications

The collective content of pleadings and bills of particulars remains important for later developments in litigation, including summary judgment motions, expert disclosure disputes, and other aspects of a trial. As a general rule, "when a party attempts to introduce evidence at trial which does not conform to the bill of particulars, the appropriate remedy is the preclusion of that evidence."¹⁰⁴ In accord with this, an expert witness will generally be precluded from supporting a theory of liability that is not contained in a complaint, affirmative defense, or bill of particulars.¹⁰⁵ Further, a court may decline to consider opposition to summary judgment that is based on a liability theory,¹⁰⁶ an injury,¹⁰⁷ or a category of serious injury¹⁰⁸ not

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contained in a bill of particulars. That does not always happen, however, since “modern practice permits a plaintiff to successfully oppose a motion for summary judgment by relying on an unpleaded cause of action which is supported by the plaintiff’s submissions,”¹⁰⁹ albeit “protracted delay in presenting new theories of liability warrants the rejection of these new claims.”¹¹⁰

Bills of Particulars - Improper Allegations

A plaintiff cannot use a bill of particulars to transform the nature of the case that is framed in the complaint. “The purpose of the bill of particulars is to amplify the pleadings, and may not be used to supply allegations essential to a cause of action that was not pleaded in the complaint.”¹¹¹ Nor may the bill of particulars “add or substitute a new theory or cause of action.”¹¹² Accordingly, a defendant is entitled to a dismissal of claims that are not alleged in a complaint and are asserted for the first time in a bill of particulars.¹¹³

Similarly, if the action is against a public entity, a consideration is how the allegations of a bill of particulars compare with the content of any notice of claim that was served. A query from a defense perspective is whether allegations in the notice of claim “were not sufficient to put defendant on notice of the allegations in the bill of particulars.”¹¹⁴ An issue is whether it can be “fairly inferred” from the notice of claim that the plaintiff would later assert the contention under scrutiny.¹¹⁵ Allegations that amount to new theories of liability that cannot be fairly implied from a notice of claim are properly struck.¹¹⁶

Some degree of specificity of allegation will be required. A bill of particulars should not be “replete with overly broad and factually vague statements, which failed to particularize and amplify the pleadings.”¹¹⁷ Where co-defendants had different roles vis-à-vis the dispute at hand, there should not be identical allegations on subjects such as how each defendant was purportedly negligent.¹¹⁸

Custodian of Evidence is Defunct (MRI Films)

It is routine practice to demand and receive authorizations to obtain medical records, films, and other kinds of evidence. But it occasionally happens that a third party source of such information ceases operations, and the information cannot be obtained elsewhere. What is a defendant to do?

One possibility is a motion under CPLR 3124 and

3126 to compel the plaintiff to make the information available for inspection, and to preclude the plaintiff from introducing such as evidence if it is not produced. This was done in a case where a custodian of MRI films was ultimately no longer in business.¹¹⁹ There, it was proper “to compel the plaintiffs to make the MRI films available for duplication or, pursuant to CPLR 3126, be precluded from offering the films and/or the reports related to the films into evidence at the time of trial.”¹²⁰ Such plaintiffs may be relieved of any burden, however, where the subject medical records or things are “not in their possession or control or the possession and control of their counsel, treating physicians, experts, or anyone under their control.”¹²¹

Depositions - Adjournments

Adjourning a court-ordered deposition without advance judicial permission can result in a sanction. And courts frequently stress that “if the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.”¹²² However, there is still authority to support forgiveness in some circumstances, at least if some legitimate excuses can be provided; “multiple adjournments of a party’s deposition are generally not grounds for dismissal” or for a stricken pleading¹²³ particularly “in the absence of any evidence of willful or contumacious conduct.”¹²⁴ It can be understandable for an attorney to not attend a noticed deposition of a non-party, where the witness could not appear on the date that was selected, and the attorney contacts opposing counsel about that in advance of the examination day.¹²⁵

Depositions - Business Entity Party

“A corporate entity has the right to designate, in the first instance, the employee who shall be examined.”¹²⁶ A party’s officer, director, member, agent or employee is a potential candidate for a mandatory deposition.¹²⁷ However, the party need not necessarily produce such persons of a parent or sibling business, especially where control over the witness is lacking.¹²⁸

Depositions - Former Employee

Perhaps you have attended a business client’s deposition revealing that a former employee has key knowledge, and then heard disappointment that the person hadn’t already been produced. But

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it is a “well-established principle that a party may not be compelled to produce a former employee for a deposition.”¹²⁹ Be wary though that an attorney’s course of conduct, such as volunteering to produce a former employee or appearing to represent him, can translate to an obligation to make the witness available.¹³⁰

Depositions - Inadequate Witness / Further Deposition

“A further deposition may be allowed where the movant has demonstrated that (1) the employee already deposed had insufficient knowledge, or was otherwise inadequate, and (2) the employee proposed to be deposed can offer information that is material and necessary to the prosecution of the case.”¹³¹ Where a party’s deposed witness was generally unknowledgeable, or lacked knowledge on just one critical issue, that can be grounds for preclusion where that party then breached an order requiring a further deposition.¹³²

There can be cause for a “supplemental deposition” of a plaintiff as to a surgery that the plaintiff underwent following the initial deposition. “Based on the plaintiff’s testimony that the surgery, if successful, would alleviate several of the major injuries and limitations for which she seeks compensation, and the medical records of the surgery reflecting its nature and purpose, the movants established that further discovery on the limited issue of the surgery and any resultant changes in the plaintiff’s condition would be ‘material and necessary’ to the defense of the action.”¹³³

Depositions - Non-Party - Misconduct

Where one party’s attorney deposes a non-party, and then the non-party terminates the deposition before other counsel can question him, one can expect a court to refuse to consider any of the deposition testimony.¹³⁴ Trial testimony of such a witness might well be precluded as well.

Depositions - Non-Resident Plaintiff

“As a general rule, a non-resident plaintiff who has invoked the jurisdiction of New York State by bringing suit in its courts must stand ready to be deposed in New York unless it is shown that undue hardship would result.”¹³⁵ The burden is on the deponent to establish that traveling from his foreign residence to New York to be deposed would cause

undue hardship.¹³⁶ Depending on the equities, a court has the option to direct a deposition to occur in a foreign country, or by video conference¹³⁷ or “remote electronic means.”¹³⁸

Depositions - Transcript Errata Sheet

CPLR 3116(a) provides that a witness may make changes in form or substance to deposition testimony, as long as such changes are accompanied by a statement of the reasons given by the witness for making them.¹³⁹ “A correction will be rejected where the proffered reason for the change is inadequate” and “material or critical changes to testimony through the use of an errata sheet is also prohibited.”¹⁴⁰ It is thus improper for a plaintiff to make numerous and significant corrections that would substantively change portions of this deposition testimony, while also conflicting with his past GML § 50–h hearing testimony as to the basis for alleged negligence.¹⁴¹ In such a scenario, it does not avail a deponent to assert that he “mis-spoke” or is “clarifying his testimony.”¹⁴²

Depositions - Treating Physicians

A party is not categorically entitled to depose the plaintiff’s treating physicians. This kind of deposition is not countenanced where the desired testimony only “relates directly to diagnosis and treatment,”¹⁴³ and the plaintiff has exchanged authorizations allowing access to medical records and permitting the physicians to speak with defense counsel.¹⁴⁴ A rationale is that if a defendant’s views differ from those of the physicians, the medical records can be reviewed by defense medical experts, who can offer their own testimony.¹⁴⁵ Accordingly, for this kind of deposition to be directed, a party must generally show that “the testimony sought is unrelated to diagnosis and treatment and is the only method of discovering the information sought.”¹⁴⁶

The First Department did, however, enable depositions of a plaintiff’s pathologists who had diagnosed cancer and mesothelioma.¹⁴⁷ The court emphasized that the precise nature of the plaintiff’s affliction appeared to be central to the resolution of the parties’ dispute, and the testimony would be addressed to “a potentially dispositive issue.”¹⁴⁸ Further, the Second Department allowed a deposition of a physician whose records had indicated skepticism about the plaintiff’s claims as to the cause of her injuries.¹⁴⁹ In that matter, the

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defendants satisfied the notice requirement of CPLR 3101(a)(4), having served a subpoena stating the circumstances or reasons for the deposition, with an authorization that permitted an interview of the doctor. The plaintiff was therefore burdened “to establish that the deposition testimony sought was irrelevant to this action, which she failed to do.”¹⁵⁰

Expert Witnesses - Effect of Bill of Particulars and 3101(d) Notice

As noted above, an expert witness will generally be precluded from supporting a theory of liability that is not contained in a pleading or bill of particulars.¹⁵¹ Absent that kind of omission, the starting point for analysis of permissibility of proposed expert testimony is typically the notice demanded and served pursuant to CPLR 3101(d)(1)(i),¹⁵² which states in part: “Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert’s opinion.”

A litigant dissatisfied with the adequacy of such 3101(d) notice may be less likely to obtain a preclusion of an adversary’s expert, if that litigant did not previously move “for an amplification or to require the witness to provide a more complete explication of his theory.”¹⁵³

Expert Witnesses - Timing of Disclosure

“CPLR 3101(d)(1)(i) does not require a party to respond to a demand for expert witness information at any specific time nor does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute, unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party.”¹⁵⁴ This is true even where an adverse party had demanded expert disclosure during the discovery phase.¹⁵⁵

As this illustrates, there is generally no bright line standard for evaluating timeliness of a post-note of issue expert exchange. There is however the possibility that a local court-wide rule, a court part or judge rule, and/or a discovery phase order

will speak to this.¹⁵⁶ Further, with relation to a plaintiff’s treating physicians / medical experts, note that 22 NYCRR 202.17(g) contemplates that any supplemental medical report shall be served “not later than 30 days before trial” so long as the plaintiff is available for an additional defense medical examination.¹⁵⁷

Of course, there comes a point where a disclosure is arguably or obviously late. In that situation, factors as to whether the expert will be permitted may include whether there is “good cause” for the delay¹⁵⁸ versus willful or intentional failure to disclose and/or prejudice to an opposing party.¹⁵⁹ On a related note, beware that a delayed motion *in limine* to exclude an expert can itself be rejected due to lateness, especially where the belated motion timing is deliberate. That tactic has been described as “an intentional avoidance of the strictures of the CPLR’s notice provisions” and “something akin to an ambush.”¹

In a medical malpractice action, a history of service of the expert exchange several months before trial, no rejection of it or objection to it at pre-trial conferences, and earlier notice of its theories via bills of particulars, all weigh against granting a motion *in limine* to exclude it.¹⁶¹ In a legal malpractice action, an expert should have been allowed where an alleged disclosure deficiency was first raised by motion *in limine* and then cured by a supplemental response, and where the substance of the proposed testimony was known from a past affidavit of the expert in opposition to summary judgment.¹⁶²

Post-note expert disclosure timeliness in a summary judgment context had been something of a sub-category. However, CPLR 3212(b) now mandates that where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment made on or after December 11, 2015, “the court shall not decline to consider the affidavit because an expert exchange was not furnished prior to the submission of the affidavit.”¹⁶³ For discussion about what the law was before December 11, 2015, see the original version of this article that is published in the Winter 2016 “Defendant” journal.¹⁶⁴

That a late expert disclosure was a violation of an explicit court directive, especially a willful violation, is a factor in favor of excluding it.¹⁶⁵ Potential prejudice to an adverse party from

allegedly late expert disclosure can sometimes be ameliorated by a trial adjournment of e.g. several weeks, to thereby allow time for responsive trial preparation.¹⁶⁶ A lack of prejudice has also been found where all parties' experts had been present concurrently at an inspection.¹⁶⁷

Freedom of Information Law

The statutory foundation for obtaining information from New York governmental entities is Article 6 of the Public Officers Law, known as the "Freedom of Information Law" or "FOIL."¹⁶⁸ As stated in Public Officers Law § 84, "government is the public's business" and "the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article."

A litigant dissatisfied with a response to a FOIL request for information may commence a CPLR article 78 proceeding to compel a governmental respondent to comply with a FOIL request. An issue may be whether any requested items are exempted from disclosure under Public Officers Law § 87. If however the petitioner substantially prevails in this proceeding, the court may award a reasonable attorney's fee and other litigation costs, if "(i) the agency had no reasonable basis for denying access, or (ii) the agency failed to respond to a request or appeal within the statutory time."¹⁶⁹

"IME" (Defense Medical Examination) - Emotional Distress

A claim of emotional distress can warrant an IME in some circumstances. A plaintiff in a wrongful termination case¹⁷⁰ pled causes of action for, among other things, intentional infliction of emotional distress. Her allegations included "extreme mental and physical anguish" and "severe anxiety" and she sought \$15 million for emotional distress damages. Though the plaintiff did not blame the defendant for any diagnosed psychiatric condition and hadn't retained a medical expert as to emotional distress, her deposition did indicate manifestations such as eczema, hair pulling, anxiety, depression, and suicidal feelings. This amounted to unusually severe emotional distress allegations such that the plaintiff had placed her mental condition "in controversy." Consequently, a mental examination by a psychiatrist was warranted to enable the defendant to rebut the

emotional distress claims.

"IME" (Defense Medical Examination) - Further IME

A further IME is permissible provided the party seeking the examination demonstrates the necessity for it.¹⁷¹ A potential example is where the plaintiff, after the original IME, has served a supplemental bill of particulars alleging injury to a part of the body not previously known to be implicated. In that scenario, a defendant is typically "entitled to newly exercise any and all rights of discovery with respect to such newly alleged continuing disabilities. Defendant's discovery rights include the right to take a further deposition, and to notice a physical examination."¹⁷² Moreover, the defendant has the option of designating a defense medical examiner who is different than the original IME doctor.¹⁷³ **Any bill of particulars on which a motion is predicated should be included as an exhibit.**¹⁷⁴

A further defense medical examination may also be indicated where a plaintiff has been examined by his medical expert long after the original IME, especially where a child is involved. Accordingly, in such circumstances, it was held that "fairness demands that defendant be permitted to have additional IMEs performed at this later stage of the infant plaintiff's development and not be relegated to reliance on IMEs conducted years before. Logically, plaintiffs cannot propose to present expert evidence based on the later examinations and, at the same time, assert that the expert evidence based on the later examinations will not materially change the nature of the injuries for which recovery is sought."¹⁷⁵

As stated in the forgoing discussion about authorizations, 22 NYCRR 202.17 establishes a framework whereby a plaintiff is to exchange medical reports and authorizations as a prelude to defense medical examinations. A plaintiff's noncompliance with 202.17 in advance of IMEs can translate to cause for additional IMEs after a plaintiff belatedly exchanges medical reports and/or authorizations. Depending on the circumstances, a further IME by an existing defense medical expert, and/or an IME by a new physician of a different specialty, may be called for.¹⁷⁶

The fact that a defendant's examining physician was placed on a suspension subsequent to the IME and the

filing of the note of issue does not justify an additional examination by another physician.¹⁷⁷ Concern that the plaintiff may impeach the examining physician's credibility with this information is not a sufficient basis for such relief.¹⁷⁸ If a party's medical expert is temporarily unavailable, a potential remedy is a delay of the trial until the expert is ready to testify.¹⁷⁹

"IME" (Defense Medical Examination) - Multiple Exams with Same Specialty

The notion of having multiple defense medical examinations to reflect all specialties of a plaintiff's treating physicians is well familiar to legal practitioners. Indeed, it is long settled that CPLR 3121(a) has no limitation on the number of medical examinations to which a plaintiff may be subjected.¹⁸⁰ Perhaps lesser known, though, is the potential for entitlement to defense medical examinations by separate physicians of the same specialty, who concentrate in different bodily areas.

In a recent Second Department case,¹⁸¹ the defendant designated one orthopedist to examine the plaintiff's spine and another orthopedist to examine the plaintiff's knee. After the first orthopedist did his exam, which was limited to the spine, the plaintiff refused to attend the other exam. The lower court then declined to compel the plaintiff to visit the second defense orthopedist, but did direct the plaintiff to be examined again by the first orthopedist. The defendant then obtained an affidavit from the first orthopedist stating that he didn't feel qualified to examine as to the knee. In view of that affidavit, it was held on appeal that an examination by the second orthopedist as to the knee was warranted.

Although not involving literally one specialty, I also note here that there is precedent indicating that with a claim of traumatic brain injury (TBI), a defendant should be entitled to both neuropsychiatric and neuropsychological IMEs.¹⁸²

"IME" (Defense Medical Examination) - Non-Resident Plaintiff

As discussed above concerning depositions, a non-resident plaintiff who has sued on account of personal injuries must generally stand ready to be medically examined in New York. However, where that would involve undue hardship, a defendant wanting an IME may need to have it done in the

foreign jurisdiction.¹⁸³ Who must incur any extra cost can vary from case to case.¹⁸⁴

"IME" (Defense Medical Examination) - Plaintiff Representative and Video of Examination

In November 2015, the Appellate Division / Second Department opined in *Bermejo v. New York City Health and Hospitals Corp.*¹⁸⁵ that an IME should not be videotaped -- surreptitiously or otherwise -- without advance judicial permission upon a showing of "special and unusual circumstances."¹⁸⁶ The Court noted that there is no explicit authority for the videotaping of medical examinations in CPLR 3121 or 22 NYCRR 202.17. The absence of express statutory authority for videotaping an IME has been emphasized in other appellate opinions on this subject.¹⁸⁷ In the Third Department, requests to videotape IMEs have been adjudicated case-by-case, and video has not been allowed absent special and unusual circumstances.¹⁸⁸ An example of such circumstances is where the plaintiff is seemingly unaware of his environment and unresponsive to the actions of individuals in his presence.¹⁸⁹

A plaintiff can generally have an attorney or perhaps a non-attorney representative present during the examination.¹⁹⁰ A defendant can seek to exclude a plaintiff's attorney or other representative, but must establish that such person's presence would "impair the validity and effectiveness of the particular examination that is to be conducted."¹⁹¹ Additionally or alternatively, a party can ask a court "to define the parameters of the physical, electronic or other presence of plaintiffs' attorney or such other representative as the court may approve" in order to minimize that person's "impairment of the validity and effectiveness of the examinations."¹⁹²

It would be improper for a plaintiff's attorney or representative to be "instructing the plaintiff to refuse to respond to questions relating to her relevant past medical history."¹⁹³ As for a remedy when that happens, "to the limited extent that questions were not answered during the examinations, the court appropriately directed plaintiffs to provide affidavits as to the missing responses."¹⁹⁴ The role of a plaintiff's attorney is "limited to the protection of the legal interests of his client' and in regard to the 'actual physical examination ... he has no role.'"¹⁹⁵ Moreover, "[w]hat the law of this state does not

contemplate is plaintiffs' attorneys taking it upon themselves to surreptitiously videotape an IME, without the knowledge of the examining physician, without notice to the defendants' counsel, and without seeking permission from the court."¹⁹⁶

The Second Department also held in *Bermejo* that a video recording of an IME of a party should be timely disclosed to opposing counsel pursuant to CPLR 3101(i).¹⁹⁷ The Court explained that while CPLR 3101(i) was enacted primarily to prevent unfair surprise where a defendant has obtained surveillance video to potentially challenge claims of injury severity, the statute is not limited to that scenario and "requires disclosure of *any* films, photographs, video tapes or audio tapes of a party, regardless of who created the recording or for what purpose."¹⁹⁸ This "full disclosure" is required "without regard to whether the party in possession of the recording intends to use it at trial."¹⁹⁹ *Bermejo* and this subject are discussed further in the section below titled "Photographs, Video or Audio of a Party - Surveillance, Social Media and Otherwise."

For more information about the conduct of IMEs and related issues, see the article by Colin F. Morrissey titled "*Conduct of Physical Examinations: Turning The Exam Room Into A Hearing Room?*" in the Winter 2015 "Defendant" journal.²⁰⁰

"IME" (Defense Medical Examination) - Waiver, or Not

A right to conduct an IME may be considered waived especially where the defendant both failed to designate a physician or to hold the examination by a court-ordered deadline, and also failed to move to vacate an ensuing note of issue within twenty days after its service.²⁰¹ A motion seeking discovery that is made at a later time generally requires a demonstration that "unusual or unanticipated circumstances" developed subsequent to the note of issue filing, requiring additional pretrial proceedings to prevent substantial prejudice.²⁰² Without such a showing, one should not expect a belated IME to be granted.

In contrast, a late IME may be allowed where a note of issue filing was on the heels of an expired IME exam deadline, and the defendant then promptly designated the IME and moved to compel it. In this context, the defendant's motion can be granted upon considerations that only a short delay was involved,

and the plaintiff is not prejudiced because the case is staying on the trial calendar.²⁰³

Jurisdictional Discovery

A plaintiff facing a motion to dismiss pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction can oppose that motion by asserting a need for discovery on that issue.²⁰⁴ The plaintiff must "submit affidavits specifying facts that might exist but could not then be stated that would support the exercise of personal jurisdiction."²⁰⁵ Put another way, the plaintiff must offer "some tangible evidence which would constitute a 'sufficient start' in showing that jurisdiction could exist, thereby demonstrating that its assertion that a jurisdictional predicate exists is not frivolous."²⁰⁶

Motion to Compel Discovery - Good Faith Effort Requirement

The Appellate Division continues to espouse the general rule that a motion to compel discovery shall include an affirmation of good faith, i.e., an affirmation representing that the movant made good faith effort to resolve the discovery problem, before resorting to motion practice.²⁰⁷ If such an affirmation is absent from the motion papers, the motion is supposed to be denied, without regard to its merit.²⁰⁸ This is also true for motions that seek to vacate a note of issue because discovery is purportedly not complete.²⁰⁹ As for the content of the affirmation, it is to comply with the requirements of 22 NYCRR 202.7.²¹⁰

Non-Party as Source of Discovery

"Pursuant to CPLR 3101(a)(4), a party may obtain discovery from a nonparty in possession of material and necessary evidence, so long as the nonparty is apprised of the circumstances or reasons requiring disclosure."²¹¹ A subpoena or accompanying disclosure notice should literally state these circumstances or reasons, and the discovery will be due if it is relevant to the prosecution or defense of the action.²¹² **Again, a party or the non-party may move to quash a subpoena that seeks documents or testimony if a basis for protest exists.**²¹³ The objector must show that what the subpoena seeks would be "utterly irrelevant" or that "the futility of the process to uncover anything legitimate is inevitable or obvious" whether it is deposition testimony²¹⁴ or documents²¹⁵ that are sought.

Note of Issue, Extension, and Vacatur

A note of issue with certificate of readiness for trial is the document that a party files to place an action on the trial calendar of Supreme Court.²¹⁶ It is almost always the plaintiff who files a note of issue. However, nothing prohibits a defendant or third party defendant from doing so, and that does happen on occasion.²¹⁷

A plaintiff who files a note of issue waives any objection to the adequacy of a defendant's disclosures.²¹⁸ A party who needs additional discovery but who faces a note of issue filing deadline may move for an extension of that deadline pursuant to CPLR § 2004.²¹⁹ A defendant wanting to oppose this outcome would be better positioned by having made a 90-day demand under CPLR 3216.²²⁰ Absent a failure to comply with such a demand, a court has discretion to grant a plaintiff's request for an extension upon a reasonable excuse for the delay and a lack of prejudice to the defendant.²²¹

The certificate of readiness for trial is a representation that discovery is complete. In accord with this, discovery is deemed complete once a note of issue is filed. To compel additional discovery at that point, a motion to vacate the note of issue is made pursuant to 22 NYCRR 202.21(e).²²² The motion is to be served within twenty days after the date that the note of issue was served.²²³ If the note of issue was filed prior to a discovery conclusion date, analysis of whether discovery is due should be similar to evaluation of a pre-note of issue motion to compel, especially if the movant had not been dilatory. Potential factors include whether the movant is "entitled to additional disclosure" and whether there is "demonstrated inability of the parties to reach an agreement."²²⁴

After expiration of the twenty day time frame of 22 NYCRR 202.21(e), a motion seeking discovery is made under 22 NYCRR 202.21(d). At that juncture, it is mandatory that "unusual or unanticipated circumstances"²²⁵ or "good cause"²²⁶ call for discovery to be countenanced. The movant must also demonstrate that it would be substantially prejudiced if its motion were denied,²²⁷ and show "special and extraordinary circumstances" for an amended bill of particulars to be allowed.²²⁸ It may suffice if there were "material misstatements of fact in the certificate of readiness" and if "a

number of unforeseen circumstances stalled the completion of discovery."²²⁹

In practice, a typical outcome of a note of issue vacatur motion in Supreme Court is that justified discovery is directed, but the action retains its awaiting trial posture. The Appellate Division will also reach that kind of conclusion.²³⁰ However, in an apt situation, the Appellate Division will reverse an order that declined to vacate a note of issue.²³¹ For example, the Second Department did so in March 2016 in a case where depositions of the parties and nonparty witnesses had not occurred, physical examinations of the plaintiff had not taken place, properly executed medical authorizations had not been provided, and there were still other outstanding requests for discovery.²³²

Notice to Admit

Under CPLR 3123(a), a party may serve upon any other party a written request for admission of the genuineness of any papers or documents, or the correctness or fairness of representation of any photographs.²³³ CPLR 3123(a) also authorizes a notice to admit the truth of any matters of fact set forth in the request, as to which the party requesting admission reasonably believes there can be no substantial dispute at trial, and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry.²³⁴

Generally speaking, the matter is deemed admitted unless the target party serves a sworn statement either denying specifically the matters of which an admission is requested, or setting forth the reasons why he cannot truthfully either admit or deny those matters. The time to respond to avoid an admission is twenty days after service of the notice to admit, or such further time as a court allows.²³⁵ However, items that are palpably improper should not be deemed admitted, even if the target party failed to respond.²

"The purpose of a notice to admit is only to eliminate from contention those matters which are not in dispute in the litigation and which may be readily disposed of."²³⁷ It is "not to be employed to obtain information in lieu of other disclosure devices, or to compel admissions of fundamental and material issues or contested ultimate facts."²³⁸ Thus, it is not for seeking concessions that would

contravene pleading allegations, or go to the “essence of the controversy between the parties”²³⁹ or “the heart of the matter at issue.”²⁴⁰ The propounding party should reasonably believe that the admissions sought are not in substantial dispute.²⁴¹ Thus, one should not seek an admission that an actionable condition existed at an accident scene.²⁴²

Photographs, Video or Audio of a Party - Surveillance, Social Media and Otherwise

²⁴³ that CPLR 3101(i) “requires disclosure of *any* films, photographs, video tapes or audio tapes of a party, regardless of who created the recording or for what purpose.”²⁴⁴ This “full disclosure” is required “without regard to whether the party in possession of the recording intends to use it at trial.”²⁴⁵ CPLR 3101(i) does state that “there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof” involving a party, or the officer, director, member, agent or employee of a party, and “there shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use.”

It remains to be seen whether other courts will share the view that 3101(i) is not limited to materials created during surveillance, and so even audio, video and photographs not intended for trial use are open to disclosure. The December 17, 2015 opinion of a divided (3 - 2) First Department in *Forman v. Henkin*,²⁴⁶ addressing materials stored on Facebook, represents a narrower outcome: “in accordance with standard pretrial procedures, plaintiff must provide defendant with all photographs of herself posted on Facebook, either before or after the accident, *that she intends to use at trial*. Plaintiff concedes that she cannot use these photographs at trial without having first disclosed them to defendant.”²⁴⁷ The defendant had demanded of plaintiff “all photographs of herself privately posted on Facebook after the accident that do not show nudity or romantic encounters.”²⁴⁸

A fundamental issue debated in *Forman* is whether social media disclosure should flow from conventional discovery standards without court involvement, versus the current judicial paradigm of “some threshold showing before allowing access to a party’s private social media information.”²⁴⁹ The statutory provision under focus in *Forman* was CPLR 3101(a); there is no mention of 3101(i) or

of *Bermejo* in the majority or dissenting opinions. However, in discussing how social media commonly provides insight about a person’s customary being, the *Forman* dissent did opine that “the breadth of information posted by many people on a daily basis creates ongoing portrayals of those individuals’ lives that are sometimes so detailed that they can rival the defense litigation tool referred to as a ‘day in the life’ surveillance video.”²⁵⁰

In digesting concurrently these two late 2015 appellate outcomes, one might ponder whether posting of photos and video on social media cloaks them in privacy and thereby immunizes materials that would otherwise be disclosed. Responding to the dissent, the *Forman* majority did express that “the discovery standard we have applied in the social media context is the same as in all other situations—a party must be able to demonstrate that the information sought is likely to result in the disclosure of relevant information bearing on the claims”²⁵¹ and “the discovery standard is the same regardless of whether the information requested is contained in social media accounts or elsewhere.”²⁵²

The view of the *Forman* dissent is that “if a plaintiff claims to be physically unable to engage in activities due to the defendant’s alleged negligence, posted information, including photographs and the various forms of communications (such as status updates and messages) that establish or illustrate the plaintiff’s former or current activities or abilities will be discoverable.”²⁵³ The majority sees such a standard as contrary to precedent, which it is bound to follow “particularly here where no party asks us to revisit it.”²⁵⁴ The majority opinion adds that the dissent’s position “would allow for discovery of all photographs of a personal injury plaintiff after the accident, whether stored on social media, a cell phone or a camera, or located in a photo album or file cabinet.”²⁵⁵ Query: isn’t that what *Bermejo* calls for? Given the 3-2 divide in *Forman*, we may hear from the Court of Appeals about this before long.

Sanctions for Discovery Failure - Basis for Sanction

A court has broad discretion in supervising disclosure,²⁵⁶ and CPLR 3126 affords discretion to impose a sanction for discovery failure.²⁵⁷ “If a party refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds

ought to have been disclosed ... the court may make such orders with regard to the failure or refusal as are just.”²⁵⁸

The classic foundation for a sanction in this realm is willful and contumacious conduct,²⁵⁹ and/or bad faith,²⁶⁰ prejudice²⁶¹ or being “substantially prejudiced.”²⁶² What constitutes willful and contumacious conduct is somewhat of a case by case inquiry. It “may be inferred from the party’s repeated failure to comply with court-ordered discovery, and the absence of any reasonable excuse for those failures, or a failure to comply with court-ordered discovery over an extended period of time.”²⁶³ It has been found to exist where, for example, the discovery failure continued despite court conferences, hearings, and issuance of multiple disclosure orders, including a conditional order of preclusion, together with contradictory excuses.²⁶⁴

The papers comprising a motion for a sanction for discovery failure should include, as applicable, any discovery notices, deposition notices, correspondence, and disclosure orders that collectively demonstrate the movant’s efforts to obtain the discovery and the adverse party’s failure to comply.²⁶⁵ Conversely, an adverse party’s good-faith effort to locate items is a factor weighing against a sanction, even though the items were not found.²⁶⁶ A moving party’s own discovery delay can be a factor for consideration as well.²⁶⁷ **Delay in seeking relief can be a consideration too, and a prospective movant generally cannot await the outcome of a trial; “by failing to move for sanctions pursuant to CPLR 3126 until after trial, the appellant waived his claim that (another party) had failed to meet his disclosure obligations.”**²⁶⁸

As for what relief should be requested or expected, that depends naturally on the extent of the discovery failure and its effect on the movant’s ability to prove a claim or defense. **“The nature and degree of the penalty to be imposed pursuant to CPLR 3126 lies within the sound discretion of the Supreme Court” and “the sanction imposed should be commensurate with the particular disobedience, if any.”**²⁶⁹ A discussion of potential outcomes now follows.

Sanctions for Discovery Failure - Conditional and Absolute Preclusion

It has been said that public policy strongly favors

the resolution of actions on the merits whenever possible.²⁷⁰ This is not a license to flout discovery obligations, however, and thus the “self-executing” conditional order of preclusion is a common judicial response to a repeated failure of disclosure.²⁷¹ Such an order “requires a party to provide certain discovery by a date certain, or face the sanctions specified in the order.”²⁷² **Conditional preclusion has been imposed upon a repeated failure for several years to comply with discovery demands and directives, e.g. five court orders, without adequate excuse.**²⁷³

Beware that a court may impose the penalty of preclusion even if no last chance for compliance had been provided. This has happened, for example, where the defendant customarily would create the requested discovery (photographs) in the course of rendering services, and yet inexplicably had failed to search for the items during litigation: “As a sanction against a party who ‘refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed,’ a court may issue an order ‘prohibiting the disobedient party ... from producing in evidence designated things or items of testimony.’”²⁷⁴

A plaintiff who is obligated by a conditional order of preclusion, and who cannot produce the discovery, faces a two-fold burden to be relieved of the discovery mandate and the preclusion: “the plaintiff was required to demonstrate a reasonable excuse for its failure to comply with the order and the existence of a potentially meritorious cause of action.”²⁷⁵ And the burden on any variety of party wanting relief from a disclosure obligation or preclusion has been similarly stated: a reasonable excuse for the failure to produce the requested items **or appear for a directed examination, as applicable,** and the existence of a meritorious claim or defense.²⁷⁶

When a party in this situation neither produces the discovery nor demonstrates cause for relief, the conditional order becomes absolute.²⁷⁷ At that point, the order should preclude proof as to matters not furnished²⁷⁸ and/or preclude a party from testifying at a trial,²⁷⁹ **and even a stricken answer and a default judgment can occur.**²⁸⁰ Prohibition of a party’s testimony often follows from a party’s failure to attend a deposition²⁸¹ or a defense medical examination²⁸² by a date specified in a conditional order of preclusion.

Problematically for a plaintiff, this sometimes proves to be a predicate for a dismissal of the entire action: “Since the plaintiff is precluded from offering evidence at trial with respect to information sought in discovery and will be unable, without that evidence, to establish a prima facie case, the Supreme Court properly directed the dismissal of the complaint.”²⁸³ A dismissal does not invariably follow from a preclusion of a plaintiff’s testimony, however; a defendant seeking that result must “demonstrate that the plaintiff was precluded from offering other evidence with respect to the issue of liability or her injuries” and that based on that such preclusion or another prohibition, the plaintiff is “unable to make out a prima facie case.”²⁸⁴ A preclusion of testimony as to a plaintiff’s medical condition typically makes a personal injury case non-viable.²⁸⁵ An affidavit or testimony from an officer or employee of a precluded party can plausibly be accepted for the benefit of a different party.²⁸⁶

Sanctions - Preclusion for Unavailable Discovery - Dogs Included

As seen from the foregoing discussion and cited cases, if a party is unable to produce court-ordered discovery and risks a sanction as a consequence, a motion to vacate that order may well be indicated,²⁸⁷ with a showing of a reasonable excuse for failure to produce items, and existence of a meritorious claim or defense.²⁸⁸ Moreover, that the evidence has moved elsewhere, even if seemingly for a good reason, will not necessarily excuse an obligation of production. In one recent case, the “item” was actually a dog that the plaintiffs had adopted from the defendant animal control center, and returned to the defendant after multiple attacks.²⁸⁹ After suing for e.g. negligent misrepresentation, the plaintiffs obtained a conditional order of preclusion that required the defendant to produce the dog for a “behavioral examination.” The defendant had already sent the dog to an animal rescue in another state. Regardless, since the defendant had not challenged the plaintiffs’ showing of need for the production, a motion to vacate was required to seek forgiveness from that obligation.

Sanctions for Discovery Failure - Stricken Pleading

“CPLR 3126(3) authorizes the court to strike

pleadings for refusal or willful failure to disclose information which the court finds ought to have been disclosed. The drastic remedy of striking a pleading is not appropriate absent a clear showing that the failure to comply with discovery demands is willful and contumacious.”²⁹⁰

Thus, a stricken pleading is a plausible sanction for egregious discovery failure, but, as mentioned, is viewed as a drastic remedy.²⁹¹ A pleading may be stricken, however, for willful and contumacious failure to provide court-ordered disclosure, or to disclose information which ought to have been disclosed,²⁹² or for “repeated failure to appear for a continued deposition without a reasonable excuse.”²⁹³ That kind of conduct can warrant a self-executing order of dismissal, which, as with a self-executing preclusion order, becomes absolute if the discovery does not occur by the prescribed date.²⁹⁴ This is so long as the order is “sufficiently specific to be enforceable.”²⁹⁵

As for the implications of this, “a defendant whose answer is stricken as a result of a default admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff’s conclusion as to damages,”²⁹⁶ unless perhaps a sum certain is involved.²⁹⁷ One defendant’s stricken answer can benefit another defendant, whose cross claims can thereby be admitted, warranting summary judgment on those cross claims.²⁹⁸

The penalty of a stricken pleading is typically prescribed in an order which decides a motion that requested such a result. There is, however, precedent for a self-executing compliance conference order by which a pleading is deemed stricken upon a failure to meet a discovery requirement.²⁹⁹ An aggrieved party may ultimately be awarded attorneys’ fees and costs from a disobedient party.³⁰⁰

Spoliation - Standards and Sanctions

“Under the common-law doctrine of spoliation, a party may be sanctioned where it negligently loses or intentionally destroys key evidence.”³⁰¹ “A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a ‘culpable state of mind,’ and that ‘the destroyed evidence was relevant to the party’s claim or defense

such that the trier of fact could find that the evidence would support that claim or defense.”³⁰²

A spoliator may be subject to sanction even if the evidence was destroyed before the spoliator became a party, provided the spoliator was on notice that the evidence might be needed for future litigation.³⁰³ A failure to institute a litigation hold is a factor that can be considered as to whether a spoliator had a culpable state of mind.³⁰⁴

Where the evidence was intentionally or wilfully destroyed, its relevancy is presumed.³⁰⁵ “On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party’s claim or defense.”³⁰⁶

As for whether or what sanctions should result from spoliation, a court has “broad discretion to provide proportionate relief to a party deprived of lost or destroyed evidence, including the preclusion of proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action.”³⁰⁷ A factor if not a requirement is whether the movant has shown that the spoliator “fatally compromised its ability to prove its claim or defense.”³⁰⁸ Where a movant plaintiff was not “deprived of his ability to prove his case,” a monetary sanction was indicated, rather than the more significant penalty of an adverse finding of prior notice of a defect.³⁰⁹

“When a party negligently loses or intentionally destroys key evidence, thereby depriving the nonresponsible party from being able to prove a claim or defense, the court may impose the sanction of striking the responsible party’s pleading.”³¹⁰ However, a court may impose a less severe sanction, or no sanction, where the missing evidence does not deprive the moving party of the ability to establish the case or defense.³¹¹ That is a scenario where an adverse inference charge may be appropriate.³¹²

There are also circumstances where no penalty is indicated at all. For example, “where a party did not discard crucial evidence in an effort to frustrate discovery, and cannot be presumed to be responsible for the disappearance of such evidence, spoliation sanctions are inappropriate.”³¹³ Another example is where the ostensibly aggrieved party is

not prejudiced because alternative evidence is or can be made available, such as photographs of the lost item and a deposition of an expert who had inspected it.³¹⁴

Social Security Number

The Spring 2005 “Defendant” journal has an article by Sean R. Smith titled “*Discovering Social Security - Discovery of Social Security Numbers in Personal Injury Cases in New York State*.”³¹⁵ That article was written more than a decade ago but remains informative. Mr. Smith observed that, surprisingly, the issue of whether a personal injury plaintiff is required to disclose his or her social security number had not been resolved by New York’s appellate courts.

One of the Appellate Terms addressed this issue in 2011.³¹⁶ According to that court, social security numbers constitute information of a confidential and private nature and so are “generally not discoverable in the absence of a strong showing that the information is indispensable,”³¹⁷ i.e. “indispensable to (defendants) in order to obtain information necessary for their defense.”³¹⁸ However, this court seemed potentially amenable to a demand for a social security number if coupled with “a demand for authorizations to obtain any documents identifiable only by reference to such numbers” or “other showing of relevance or necessity.”³¹⁹

In 2013, the topic of a personal injury plaintiff’s social security number was germane to a debate about having a supplemental deposition.³²⁰ In her original deposition, the plaintiff had refused to answer certain questions, ostensibly in view of her participation in a U.S. witness protection program. The Second Department directed the supplemental deposition, finding that the facts and circumstances surrounding the plaintiff’s entry into the program were material in that litigation. One consideration was that “the information may bear on the plaintiff’s credibility in light of the fact she provided differing explanations at her depositions as to why she has two social security numbers.”³²¹

In practice, a social security number may be listed in a plaintiff’s medical records, employment records, W-2 tax records, or another source that a defendant obtains through discovery or investigation. However, if a plaintiff’s social security number is unavailable, a defendant seeking its disclosure may need to amass

as many justifications as possible. One potential point is that it is needed so a defendant's insurer can fulfill a duty of reporting to the Centers for Medicare & Medicaid Services (CMS), pursuant to Section 111 of the Medicare, Medicaid & SCHIP Extension Act of 2007. Another contention is that a plaintiff should disclose any social security number he has so a defendant can evaluate credibility, by independently investigating whether that plaintiff is indeed associated with that number and/or other social security numbers. The foregoing Second Department case is arguably support

Another consideration is that a plaintiff who alleges loss of enjoyment of life is supposed to provide an authorization for his social security disability records.³²³ Those records will presumably if not always reveal the plaintiff's social security number. Some plaintiffs' depositions indicate that they applied for benefits through a governmental agency or intermediary, but cannot specify what types of benefits were sought. In this setting, perhaps an authorization with a social security number should be produced so a defendant can inquire of the Social Security Administration. A rationale for obtaining that authorization even from a plaintiff who has denied receipt of such benefits is to verify the accuracy of that representation, given the collateral source rule of CPLR 4545 and common law prohibition of a double recovery.

Vocational Rehabilitation Examination

There is no statutory authority to compel the examination of an adverse party by a non-physician vocational rehabilitation specialist.³²⁴ This does not preclude a court from directing it, however.³²⁵ A defendant can be entitled to have the examination occur, even if the plaintiff has not retained a vocational expert.³²⁶ The examination may well be appropriate where the plaintiff has "placed his ability to work in controversy by claiming that, as a result of his injuries, he suffered loss of future wages and reduced earning capacity and by testifying at his examination before trial that his future career opportunities were limited."³²⁷ Additional circumstances favoring compulsion of the examination are where the plaintiff did not object when it was noticed or complain that he would be prejudiced or burdened, and no note of issue had been filed.³²⁸

911 Call Materials

The Second Department in December 2015 directed a County custodian to produce 911 call recordings and records, holding that County Law § 308(4) does not categorically prohibit such disclosure to a civil litigant.³²⁹ County Law § 308(4) states that records of calls made to a municipality's E 911 system shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency, another government agency or body, or EMS or the like. In this wrongful death case, the claimant had argued that the material should be discoverable under CPLR 3101 since it may reveal why the decedent's vehicle left the roadway, the length of time the vehicle's occupants experienced conscious pain and suffering, and the amount of time it took for police to respond to the scene.

The Appellate Division concluded that the statute is not intended to prohibit the disclosure of matter that is material and relevant in a civil litigation, and accessible by a so-ordered subpoena or directed by a court to be disclosed.³³⁰ It was emphasized that in analogous criminal practice, 911 tapes and records are frequently made available to individual defendants and admitted at trials to describe events as present sense impressions of witnesses, and to identify perpetrators as present sense impressions or as excited utterances.³³¹

Conclusion

As now seen, there still continues to be a steady flow of appeals involving both common and uncommon discovery disputes. It remains my hope that the foregoing review has been informative and will enhance your practices.

(Endnotes)

¹ The "Defendant" is the journal of the Defense Association of New York ("DANY"). The Winter 2016 edition and many other past "Defendant" journals are available via links on the "Publications" page of DANY's website: <http://defenseassociationofnewyork.org/page-856696>.

² *D'Alessandro v. Nassau Health Care Corp.*, 2016 NY Slip Op 68627(U), 2016 WL 1235118 at *1 (2d Dept 2016). In contrast to actions, there is no disclosure in special proceedings absent leave of court pursuant to CPLR 408, except for notices to admit under CPLR 3123. Factors as to whether disclosure should be granted under CPLR 408 include whether the requested information is material and necessary, whether the request is carefully tailored to obtain the necessary information, and whether undue

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delay will result from the request. See *Suit-Kote Corp. v. Rivera*, 26 N.Y.S.3d 642 (3d Dept 2016).

³ *Berkowitz v. 29 Woodmere Blvd. Owners, Inc.*, 135 A.D.3d 798, 799, 23 N.Y.S.3d 352 (2d Dept 2016); *Eremina v. Scparta*, 120 A.D.3d 616, 618, 991 N.Y.S.2d 438 (2d Dept 2014).

⁴ *D'Alessandro*, 2016 WL 1235118 at *1; see also *Hayes v. Bette & Cring, LLC*, 135 A.D.3d 1058, 1059, 22 N.Y.S.3d 680 (3d Dept 2016).

⁵ *Deer Park Associates v. Town of Babylon*, 121 A.D.3d 738, 740, 993 N.Y.S.2d 761 (2d Dept 2014), quoting from CPLR 3120[1][i].

⁶ *D'Alessandro*, 2016 WL 1235118 at *1; *Jordan v. City of New York*, 2016 WL 1126026 at *1 (2d Dept 2016); see also *Berkowitz*, 135 A.D.3d at 799.

⁷ *D'Alessandro*, 2016 WL 1235118 at *1

⁸ *Id.*; *Smith v. County of Nassau*, 2016 WL 1354991 at *2 (2d Dept 2016)

⁹ *Forman v. Henkin*, 134 A.D.3d 529, 530, 22 N.Y.S.3d 178 (1st Dept 2015).

¹⁰ *Ferrara Bros. Building Materials Corp. v. FMC Construction LLC*, 2016 WL 1355743 (2d Dept 2016); *Jacobs v. Mostow*, 134 A.D.3d 765, 766, 19 N.Y.S.3d 902 (2d Dept 2015).

¹¹ *Jordan v. City of New York*, 2016 WL 1126026 at *1 (2d Dept 2016).

¹² *McMahon v. Cobblestone Lofts Condominium*, 134 A.D.3d 646, 22 N.Y.S.3d 50 (1st Dept 2015).

¹³ *Berkowitz*, 135 A.D.3d at 799.

¹⁴ See *SNI / SI Networks LLC v. DIRECTV, LLC*, 132 A.D.3d 616, 18 N.Y.S.3d 342 (1st Dept 2015).

¹⁵ *Id.*

¹⁶ *Forman v. Henkin*, 134 A.D.3d 529, 530, 22 N.Y.S.3d 178 (1st Dept 2015).

¹⁷ *D'Alessandro*, 2016 WL 1235118 at *1

¹⁸ *Id.*

¹⁹ Additionally, preliminary conference orders usually enable parties to indicate if any bills of particulars as to claims or defenses have been served, or will be. The statutory authority regarding bills of particulars is CPLR 3041, 3042, 3043 and 3044. It is technically an amplification of a pleading, and, accordingly, is not among the disclosure devices set forth within CPLR Article 31. However, like a discovery device, it can serve as a means for disclosure of information on select subjects, e.g., in personal injury actions, the subjects listed under CPLR 3043. Bills of particulars are discussed later in this article.

²⁰ *Jordan v. City of New York*, 2016 WL 1126026 at *1 (2d Dept 2016); *McMahon v. Cobblestone Lofts Condominium*, 134 A.D.3d 646, 22 N.Y.S.3d 50 (1st Dept 2015).

²¹ See *Deleonardis v. Hara*, 136 A.D.3d 558, 25 N.Y.S.3d 185 (1st Dept 2016).

²² *Berkowitz v. 29 Woodmere Blvd. Owners, Inc.*, 135 A.D.3d 798, 799, 23 N.Y.S.3d 352 (2d Dept 2016); *Ligoure v. City*

of New York, 128 A.D.3d 1027, 1028, 9 N.Y.S.3d 678 (2d Dept 2015); see also *Cascardo v. Cascardo*, 136 A.D.3d 729, 24 N.Y.S.3d 742 (2d Dept 2016).

²³ *Cascardo*, 136 A.D.3d at 729.

²⁴ *Hayes v. Bette & Cring, LLC*, 135 A.D.3d 1058, 1059, 22 N.Y.S.3d 680 (3d Dept 2016).

²⁵ *Id.*; see also *Berkowitz*, 135 A.D.3d at 799.

²⁶ *Berkowitz*, 135 A.D.3d at 799.

²⁷ *Cascardo*, 136 A.D.3d 729.

²⁸ See *Tuzzolino v. Consolidated Edison Company of New York*, 135 A.D.3d 447, 22 N.Y.S.3d 430 (1st Dept 2016).

²⁹ *JP Morgan Chase Funding Inc. v. Cohan*, 134 A.D.3d 455, 20 N.Y.S.3d 363 (1st Dept 2015) (standard of "concern that competitors may gain some competitive advantage as a result of discovery of secret business procedures and information").

³⁰ *Washington v. Alpha-K Family Medical Practice, P.C.*, 128 A.D.3d 687, 6 N.Y.S.3d 501 (2d Dept 2015).

³¹ *Ligoure*, 128 A.D.3d 1027.

³² *Washington*, 128 A.D.3d at 687.

³³ *Ligoure*, 128 A.D.3d at 1028.

³⁴ *Id.* See also *State v. Baumslag*, 134 A.D.3d 451, 452, 21 N.Y.S.3d 51 (1st Dept 2015) (investigator work product not privileged absent evidence that the investigator's interviews were conducted in anticipation of litigation).

³⁵ *State v. Baumslag*, 134 A.D.3d at 452.

³⁶ *Gabriels v. Vassar Brothers Hospital*, 135 A.D.3d 903, 905, 24 N.Y.S.3d 189 (2d Dept 2016).

³⁷ *Id.*

³⁸ *Cascardo*, 136 A.D.3d 729; see also *Anderson v. State of New York*, 134 A.D.3d 1061, 21 N.Y.S.3d 356 (2d Dept 2015).

³⁹ See e.g. *Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 A.D.3d 201, 959 N.Y.S.2d 74 (2d Dept 2012) (eyewitnesses and photographs), and *Dunson v. Riverbay Corp.*, 103 A.D.3d 578, 960 N.Y.S.2d 40 (1st Dept 2013) (notice witness).

⁴⁰ See *Brown v. Howson*, 129 A.D.3d 570, 12 N.Y.S.2d 54 (1st Dept 2015).

⁴¹ *Alcor Life Extension Foundation v. Johnson*, 136 A.D.3d 464, 24 N.Y.S.3d 629 (1st Dept 2016).

⁴² *Rodriguez v. DeStefano*, 72 A.D.3d 926, 898 N.Y.S.2d 495 (2d Dept 2010); see also *Dhanlaxmi, Inc. v. Schiller*, 119 A.D.3d 728, 989 N.Y.S.2d 329 (2d Dept 2014).

⁴³ *Daniels v. City of New York*, 117 A.D.3d 981, 986 N.Y.S.2d 516 (2d Dept 2014).

⁴⁴ *Colantonio v. Mercy Medical Center*, 135 A.D.3d 686, 693, 24 N.Y.S.3d 653 (2d Dept 2016); see also *Guerrero v. Milla*, 135 A.D.3d 635, 636, 24 N.Y.S.3d 63 (1st Dept 2016).

⁴⁵ *Colantonio*, 135 A.D.3d at 693.

⁴⁶ *Gumbs v. Flushing Town Center III, L.P.*, 114 A.D.3d 573, 981 N.Y.S.2d 394 (1st Dept 2014); see also *Kenneh v. Jey Livery Service*, 131 A.D.3d 902, 16 N.Y.S.3d 726 (1st Dept 2015).

⁴⁷ *Graziano v. Cagan*, 105 A.D.3d 701, 702, 962 N.Y.S.2d 643

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- (2d Dept 2013); see also *M.C. v. Sylvia Marsh Equities, Inc.*, 103 A.D.3d 676, 959 N.Y.S.2d 280 (2d Dept 2013).
- 48 *Gumbs*, 114 A.D.3d 573.
- 49 See *Azznara v. Strauss*, 81 A.D.3d 578, 579, 915 N.Y.S.2d 868 (2d Dept 2011); *Steward v. New York City Housing Authority*, 302 A.D.2d 449, 753 N.Y.S. 748 (2d Dept 2003).
- 50 *Montalto v. Heckler*, 113 A.D.3d 741, 742, 978 N.Y.S.2d 891 (2d Dept 2014).
- 51 *Moreira v. M.K. Travel and Transport, Inc.*, 106 A.D.3d 965, 967, 966 N.Y.S.2d 150 (2d Dept 2013).
- 52 Accord *Azznara v. Strauss*, 81 A.D.3d at 579.
- 53 See *Graziano v. Cagan*, 105 A.D.3d 701.
- 54 See *Vodoff v. Mehmood*, 92 A.D.3d 773, 938 N.Y.S.2d 472 (2d Dept 2012), *Abdalla v. Mazl Taxi, Inc.*, 66 A.D.3d 803, 887 N.Y.S.2d 250 (2d Dept 2009), and *Amoroso v. City of New York*, 66 A.D.3d 618, 887 N.Y.S.2d 163 (2d Dept 2009).
- 55 *Amoroso*, 66 A.D.3d at 618.
- 56 *Id.*
- 57 *Montalto v. Heckler*, 113 A.D.3d 741, 978 N.Y.S.2d 891 (2d Dept 2014); *M.C. v. Sylvia Marsh Equities, Inc.*, 103 A.D.3d 676, 679, 959 N.Y.S.2d 280 (2d Dept 2013).
- 58 *Graziano v. Cagan*, 105 A.D.3d at 702.
- 59 *Id.*
- 60 See *Gough v. Panorama Windows, Ltd.*, 133 A.D.3d 526, 19 N.Y.S.3d 169 (1st Dept 2015).
- 61 *Id.*
- 62 *Bravo v. Vargas*, 113 A.D.3d 577, 578, 978 N.Y.S.2d 313 (2d Dept 2014).
- 63 *M.C. v. Sylvia Marsh Equities, Inc.*, 103 A.D.3d at 679.
- 64 *Colwin v. Katz*, 102 A.D.3d 449, 961 N.Y.S.2d 2 (1st Dept 2013).
- 65 See *Gutierrez v. Trillium USA, LLC*, 111 A.D.3d 669, 974 N.Y.S.2d 563 (2d Dept 2013).
- 66 See *Shamicka R. v. City of New York*, 117 A.D.3d 574, 985 N.Y.S.2d 569 (1st Dept 2014).
- 67 *Almonte v. Mancuso*, 132 A.D.3d 529, 17 N.Y.S.3d 857 (1st Dept 2015).
- 68 *Singh v. Singh*, 51 A.D.3d 770, 771, 857 N.Y.S.2d 707 (2d Dept 2008).
- 69 See *McKanic v. Amigos del Museo del Barrio*, 74 A.D.3d 639, 903 N.Y.S.2d 394 (1st Dept 2010).
- 70 *JP Morgan Chase Funding Inc. v. Cohan*, 134 A.D.3d 455, 20 N.Y.S.3d 363 (1st Dept 2015).
- 71 *Spearin v. Linmar, L.P.*, 129 A.D.3d 528, 11 N.Y.S.3d 156 (1st Dept 2015); *Imanverdi v. Popovici*, 109 A.D.3d 1179, 971 N.Y.S.2d 911 (4th Dept 2013); *Richards v. Hertz Corp.*, 100 A.D.3d 728, 730, 953 N.Y.S.2d 654 (2d Dept 2012).
- 72 *Tapp v. New York State Urban Dev. Corp.*, 102 A.D.3d 620, 958 N.Y.S.2d 392 (1st Dept 2013).
- 73 See *Spearin*, 129 A.D.3d at 528.
- 74 *Richards*, 100 A.D.3d at 730.
- 75 *Id.*
- 76 *Id.*
- 77 134 A.D.3d 529, 22 N.Y.S.3d 178 (1st Dept 2015).
- 78 This edition and many other past “Defendant” journals are available via links on the “Publications” page of DANY’s website: <http://defenseassociationofnewyork.org/page-856696>.
- 79 See *D’Alessandro v. Nassau Health Care Corp.*, 2016 NY Slip Op 68627(U), 2016 WL 1235118 (2d Dept 2016), *D’Alessandro*, 2016 WL 1235118 at *2.
- 80 *d.*
- 81 *d.*
- 82 See *Gough v. Panorama Windows, Ltd.*, 133 A.D.3d 526, 19 N.Y.S.3d 169 (1st Dept 2015).
- 83 See the “Publications” page of DANY’s website: <http://defenseassociationofnewyork.org/page-856696>.
- 84 *Deleonardis v. Hara*, 136 A.D.3d 558, 25 N.Y.S.3d 185 (1st Dept 2016).
- 85 Additionally, where negligence in the use or operation of a motor vehicle in New York and Insurance Law 5104(a) are involved, a defendant may require particulars as to in what respect the plaintiff has sustained a “serious injury” as defined in Insurance Law 5102(d), or economic loss greater than basic economic loss as defined in Insurance Law 5102(a).
- 86 *Gomez v. City of New York*, 2016 WL 1421165 at *1 (1st Dept 2016).
- 87 *Lynch v. Baker*, 2016 WL 1355684 at *2 (2d Dept 2016); *Garguilo v. Port Authority of New York & New Jersey*, 137 A.D.3d 708, 2016 WL 1249248 at *1 (1st Dept 2016); see also *Doe v. Rochester City School Dist.*, 137 A.D.3d 1761, 2016 WL 1165350 at *2 (4th Dept 2016) (leave shall be freely given “unless prejudice would result to the nonmoving party or the proposed amendment is lacking in merit”).
- 88 *Lynch*, 2016 WL 1355684 at *2
- 89 *Kelly v. City of New York*, 134 A.D.3d 676, 678, 20 N.Y.S.3d 572 (2d Dept 2015).
- 90 *Id.*; see also *Hernandez v. Callen*, 134 A.D.3d 654, 21 N.Y.S.3d 621, 622 (1st Dept 2015).
- 91 *Reuling v. Consolidated Edison Company of New York, Inc.*, 2016 WL 1369648 at *1 (1st Dept 2016).
- 92 *Garguilo*, 2016 WL 1249248 at *1.
- 93 *Canals v. Lai*, 132 A.D.3d at 626-627 (2d Dept 2015).
- 94 *Garguilo*, 2016 WL 1249248 at *1; see also *Reuling*, 2016 WL 1369648 at *1.
- 95 *Gomez v. City*, 2016 WL 1421165 at *1; see also *Garguilo*, 2016 WL 1249248 at *1.
- 96 *Id.*
- 97 *Garguilo*, 2016 WL 1249248 at *1.
- 98 *Reuling*, 2016 WL 1369648 at *1.
- 99 *Id.*
- 100 *Id.*; see also *Canals v. Lai*, 132 A.D.3d 626, 17 N.Y.S.3d 311 (2d Dept 2015).
- 101 *Stamps v. Pudetti*, 137 A.D.3d 1755, 2016 WL 1165383 at *1 (4th Dept 2016).
- 102 *Id.*
- 103 *Id.*
- 104 *Weinberger v. New York State Olympic Regional Dev.*

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- Auth.*, 133 A.D.3d 1006, 19 N.Y.S.3d 625 (3d Dept 2015).
- 105 See *Reuling*, 2016 WL 1369648 at *1; *Lewis v. New York City Housing Auth.*, 135 A.D.3d 444, 445, 24 N.Y.S.3d 16 (1st Dept 2016).
- 106 See *Atkins v. Beth Abraham Health Services*, 133 A.D.3d 491, 492, 20 N.Y.S.3d 33 (1st Dept 2015).
- 107 See *Boone v. Elizabeth Taxi, Inc.*, 120 A.D.3d 1143, 1144, 993 N.Y.S.2d 302 (1st Dept 2014).
- 108 See *Stemps v. Pudetti*, 137 A.D.3d 1755, 2016 WL 1165383 at *1 (4th Dept 2016).
- 109 *Sacino v. Warwick Valley Cent. School Dist.*, 2016 WL 1355042 at *2 (2d Dept 2016); *Begley v. City of New York*, 111 A.D.3d 5, 35, 972 N.Y.S.2d 48 (2d Dept 2013).
- 110 *Sacino*, 2016 WL 1355042 at *2; see also *Begley*, 111 A.D.3d at 35.
- 111 *Paterra v. Arc Development LLC*, 136 A.D.3d 474, 475, 24 N.Y.S.3d 631 (1st Dept 2016).
- 112 *Id.*
- 113 *Paterra*, 136 A.D.3d at 474-475.
- 114 *Thomas v. New York City Housing Auth.*, 25 N.Y.3d 1087, 12 N.Y.S.3d 617 (2015).
- 115 *Lewis v. New York City Housing Auth.*, 135 A.D.3d 444, 445, 24 N.Y.S.3d 16 (1st Dept 2016).
- 116 *Id.*
- 117 *Sealy v. Uy*, 132 A.D.3d 839, 840, 18 N.Y.S.3d 160 (2d Dept 2015).
- 118 *Id.*
- 119 *Eremina v. Scparta*, 120 A.D.3d 616, 991 N.Y.S.2d 438 (2d Dept 2014).
- 120 *Eremina*, 120 A.D.3d at 618.
- 121 *Id.*
- 122 *Sealy v. Uy*, 132 A.D.3d at 840, quoting *Gibbs v. St. Barnabus Hosp.*, 16 N.Y.3d 74, 81, 917 N.Y.S.2d 68.
- 123 *De Leo v. State-Whitehall Co.*, 126 A.D.3d 750, 752, 5 N.Y.S.3d 277 (2d Dept 2015), which notes that striking a pleading is a “drastic remedy.”
- 124 *Caban v. Rzak Development Inc.*, 132 A.D.3d 937, 18 N.Y.S.3d 358 (2d Dept 2015).
- 125 See *Pezhman v. Chanel, Inc.*, 135 A.D.3d 596, 25 N.Y.S.3d 75, 76 (1st Dept 2016).
- 126 *Schiavone v. Keyspan Energy Delivery NYC*, 89 A.D.3d 916, 917, 933 N.Y.S.2d 310 (2d Dept 2011).
- 127 See *Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc.*, 41 A.D.3d 362, 363, 841 N.Y.S.2d 225 (1st Dept 2007), citing CPLR 3101(a)(1).
- 128 *Id.*
- 129 *Hann v. Black*, 96 A.D.3d 1503, 946 N.Y.S.2d 722 (4th Dept 2012), citing *McGowan v. Eastman*, 291 N.Y. 195, 198, 2 N.E.2d 625 (1936).
- 130 See *Hann v. Black*, 96 A.D.3d 1503.
- 131 *Schiavone v. Keyspan Energy Delivery NYC*, 89 A.D.3d at 917.
- 132 See *Dominguez v. OCG, IV, LLC*, 82 A.D.3d 434, 918 N.Y.S.2d 406 (1st Dept 2011).
- 133 *Bravo v. Vargas*, 113 A.D.3d 577, 579, 978 N.Y.S.2d 313 (2d Dept 2014).
- 134 See *Gonzalez v. 231 Ocean Associates*, 131 A.D.3d 871, 16 N.Y.S.3d 542 (1st Dept 2015).
- 135 *Gabriel v. Johnston's L.P. Gas Service, Inc.*, 98 A.D.3d 168, 175, 947 N.Y.S.2d 716 (4th Dept 2012).
- 136 *Born to Build, LLC v. Saleh*, 115 A.D.3d 780, 781, 982 N.Y.S.2d 355 (2d Dept 2014).
- 137 *Gabriel*, 98 A.D.3d at 176.
- 138 *Feng Wang v. A & W Travel, Inc.*, 130 A.D.3d 974, 976, 14 N.Y.S.3d 459 (2d Dept 2015); *Yu Hui Chen v. Chen Li Zhi*, 81 A.D.3d 818, 819, 916 N.Y.S.2d 525 (2d Dept 2011).
- 139 *Torres v. Board of Education of City of New York*, 2016 WL 1230626 at *1 (2d Dept 2016).
- 140 *Id.*
- 141 *Id.*
- 142 *Id.*
- 143 *Tuzzolino v. Consolidated Edison Company of New York*, 135 A.D.3d 447, 448, 22 N.Y.S.3d 430 (1st Dept 2016); *In re New York City Asbestos Litigation*, 87 A.D.3d 467, 468, 928 N.Y.S.2d 513 (1st Dept 2011).
- 144 See *Carson v. Hutch Metro Center*, 110 A.D.3d 468, 469, 974 N.Y.S.2d 346 (1st Dept 2013).
- 145 *Tuzzolino*, 135 A.D.3d at 448.
- 146 *Tuzzolino*, 135 A.D.3d at 448.
- 147 *In re New York City Asbestos Litigation*, 87 A.D.3d 467.
- 148 *In re New York City Asbestos Litigation*, 87 A.D.3d at 468.
- 149 See *Bianchi v. Galster Management Corp.*, 131 A.D.3d 558, 15 N.Y.S.3d 189 (2d Dept 2015).
- 150 *Bianchi*, 131 A.D.3d at 559.
- 151 See *Reuling v. Consolidated Edison Company of New York, Inc.*, 2016 WL 1369648 at *1 (1st Dept 2016); *Lewis v. New York City Housing Auth.*, 135 A.D.3d 444, 445, 24 N.Y.S.3d 16 (1st Dept 2016).
- 152 As to an action for medical, dental or podiatric malpractice, see also CPLR 3101(d)(1)(ii). Note also that concerning proposed testimony of a plaintiff’s treating physician, the common written framework is that doctor’s reporting served pursuant to 22 NYCRR 202.17.
- 153 *Sadek v. Wesley*, 117 A.D.3d 193, 199, 986 N.Y.S.2d 25 (1st Dept 2014).
- 154 *Burbige v. Siben & Ferber*, 115 A.D.3d 632, 633, 981 N.Y.S.2d 537 (2d Dept 2014) (allowing expert to testify at a re-trial); *Arcamone-Makinano v. Britton Property, Inc.*, 117 A.D.3d 889, 891, 986 N.Y.S.2d 372 (2d Dept 2014) (same); see also *Inchauspe v. Take On, LLC*, 2016 WL 1590065 (1st Dept 2016); *Frankel v. Vernon & Ginsburg, LLP*, 118 A.D.3d 479, 480, 988 N.Y.S.2d 28 (1st Dept 2014).
- 155 See *Ramsen A. v. New York City Housing Auth.*, 112 A.D.3d 439, 976 N.Y.S.2d 73 (1st Dept 2013).
- 156 See e.g. *Kane v. Utica First Ins. Co.*, 68 A.D.3d 1667, 890 N.Y.S.2d 878 (4th Dept 2009).
- 157 See also *Giles v. A. Gi Yi*, 105 A.D.3d 1313, 964 N.Y.S.2d 319 (4th Dept 2013).
- 158 *Newark v. Pimental*, 117 A.D.3d 581, 986 N.Y.S.2d 89 (1st Dept 2014); see also *Coleman v. New York City Transit*

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- Auth.*, 134 A.D.3d 427, 428, 21 N.Y.S.3d 46 (1st Dept 2015).
- 159 *Banks v. City of New York*, 92 A.D.3d 591, 939 N.Y.S.2d 39 (1st Dept 2012); see also *Coleman*, 134 A.D.3d at 428.
- 160 *Sadek v. Wesley*, 117 A.D.3d 193, 986 N.Y.S.2d 25 (1st Dept 2014), an interesting read on several issues relative to expert witnesses.
- 161 See *Dedona v. DiRaimo*, 2016 WL 959026 at *1 (1st Dept 2016); accord *Banks v. City of New York*, 92 A.D.3d at 591.
- 162 See *Frankel*, 118 A.D.3d at 479-480.
- 163 The full text of CPLR 3212(b) in this regard is as follows: “Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit.”
- 164 This edition and many other past “Defendant” journals are available via links on the “Publications” page of DANY’s website: <http://defenseassociationofnewyork.org/page-856696>.
- 165 See *Arcamone-Makinano*, 117 A.D.3d at 891.
- 166 See *Burbige v. Siben & Ferber*, 115 A.D.3d at 633; see also *Elgart v. Berezovsky*, 123 A.D.3d 970, 972, 999 N.Y.S.2d 515 (2d Dept 2014); *Arcamone-Makinano*, 117 A.D.3d at 891; accord *Inchauspe v. Take On, LLC*, 2016 WL 1590065 (1st Dept 2016) (no prejudice from late disclosure of damages expert where damages trial had not been scheduled yet).
- 167 See *Arcamone-Makinano*, 117 A.D.3d at 891.
- 168 See *South Shore Press, Inc. v. Havemeyer*, 136 A.D.3d 929, 25 N.Y.S.3d 303 (2d Dept 2016).
- 169 *South Shore Press, Inc. v. Havemeyer*, 136 A.D.3d at 930-931.
- 170 See *Clark v. Allen & Overy, LLP*, 125 A.D.2d 497, 4 N.Y.S.3d 20 (1st Dept 2015).
- 171 *Bermejo v. New York City Health and Hospitals Corp.*, 135 A.D.3d 116, 142, 21 N.Y.S.3d 78 (2d Dept 2015); *Rebollo v. Nicholas Cab Corp.*, 125 A.D.3d 452, 2 N.Y.S.3d 471 (1st Dept 2015).
- 172 *Brown v. Brink Elevator Corp.*, 125 A.D.3d 421, 998 N.Y.S.2d 884 (1st Dept 2015).
- 173 *Id.* See also *Daniels v. Rumsey*, 111 A.D.3d 1408, 1409, 975 N.Y.S.2d 303 (4th Dept 2013); *Lewis v. John*, 87 A.D.3d 564, 928 N.Y.S.2d 78 (2d Dept 2011).
- 174 *O’Berry v. Gelco Corp.*, 128 A.D.3d 597, 10 N.Y.S.3d 68 (1st Dept 2015).
- 175 *Ramsen A. v. New York City Housing Auth.*, 112 A.D.3d 439, 440, 976 N.Y.S.2d 73 (1st Dept 2013).
- 176 See e.g. *Drame v. Ambulette P.R.N., Inc.*, 137 A.D.3d 631, 26 N.Y.S.3d 853 (1st Dept 2016) (directing a further orthopedic exam and a first-time neurological exam).
- 177 *Rebollo v. Nicholas Cab Corp.*, 125 A.D.3d 452, 2 N.Y.S.3d 471 (1st Dept 2015); *Giorgano v. Wei Zian Zhen*, 103 A.D.3d 774, 959 N.Y.S.2d 545 (2d Dept 2013); *Carrington v. Truck-Rite Dist. Systems Corp.*, 103 A.D.3d 606, 607, 959 N.Y.S.2d 258 (2d Dept 2013).
- 178 *Giorgano*, 103 A.D.3d at 774; *Carrington*, 103 A.D.3d at 607.
- 179 See *Black v. St. Luke’s Cornwall Hospital*, 112 A.D.3d 661, 976 N.Y.S.2d 562 (2d Dept 2013); *Hodges v. City of New York*, 22 A.D.3d 525, 802 N.Y.S.2d 231 (2d Dept 2005).
- 180 See *Bermejo v. New York City Health and Hospitals Corp.*, 135 A.D.3d at 142; *Giorgano v. Wei Zian Zhen*, 103 A.D.3d 774, 959 N.Y.S.2d 545 (2d Dept 2013).
- 181 *Marashaj v. Rubin*, 132 A.D.3d 641, 18 N.Y.S.3d 79 (2d Dept 2015).
- 182 *Chaudhary v. Gold*, 83 A.D.3d 477, 921 N.Y.S.2d 219 (1st Dept 2011).
- 183 *Feng Wang v. A & W Travel, Inc.*, 130 A.D.3d 974, 977, 14 N.Y.S.3d 459 (2d Dept 2015).
- 184 *Id.*
- 185 135 A.D.3d 116, 21 N.Y.S.3d 78 (2d Dept 2015).
- 186 *Bermejo*, 135 A.D.3d at 119 and 144.
- 187 The *Bermejo* Court noted its review of precedent in other appellate departments and cited *Flores v. Vescera*, 105 A.D.3d 1340, 963 N.Y.S.2d 884 (4th Dept 2013), *Lamendola v. Slocum*, 148 A.D.2d 781, 538 N.Y.S.2d 116 (3d Dept 1989), *Cooper v. McInnes*, 112 A.D.3d 1120, 977 N.Y.S.2d 767 (3d Dept 2013), and *Savarese v. Yonkers Motors Corp.*, 205 A.D.2d 463, 614 N.Y.S.2d 4 (1st Dept 1994).
- 188 *Flores v. Vescera*, 105 A.D.3d at 1340, quoting *Lamendola v. Slocum*, 148 A.D.2d at 781.
- 189 *Mosel v. Brookhaven Mem. Hosp.*, 134 Misc.2d 73, 509 N.Y.S.2d 754 (Sup Ct / Suffolk Cty 1986).
- 190 See e.g. *Guerra v. McBean*, 127 A.D.3d 462, 4 N.Y.S.3d 526 (1st Dept 2015); *Cooper v. McInnes*, 112 A.D.3d 1120, 977 N.Y.S.2d 767 (3d Dept 2013).
- 191 *A.W. v. County of Oneida*, 34 A.D.3d 1236, 1238, 827 N.Y.S.2d 790 (4th Dept 2006); accord *Guerra v. McBean*, 127 A.D.3d at 462.
- 192 *Id.*
- 193 *Tucker v. Bay Shore Stor. Warehouse, Inc.*, 69 A.D.3d 609, 610, 893 N.Y.S.2d 138 (2d Dept 2010); see also *Guerra v. McBean*, 127 A.D.3d at 462-463; *Cooper v. McInnes*, 112 A.D.3d at 1120 (family history).
- 194 *Guerra v. McBean*, 127 A.D.3d at 462-463.
- 195 *Bermejo*, 135 A.D.3d at 143, quoting *Lamendola v. Slocum*, 148 A.D.2d at 782, and *Jakubowski v. Lengen*, 86 A.D.2d 398, 401, 450 N.Y.S.2d 612 (4th Dept 1982).
- 196 *Bermejo*, 135 A.D.3d at 145.
- 197 See *Bermejo*, 135 A.D.3d at 119 and 146.
- 198 *Bermejo*, 135 A.D.3d at 146.
- 199 *Id.*, citing *Tai Tran v. New Rochelle Hosp. Medical Center*, 99 N.Y.2d 383, 388.
- 200 This edition and many other past “Defendant” journals are available via links on the “Publications” page of DANY’s website: <http://defenseassociationofnewyork.org>.

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- ²⁰¹ See *Gianacopoulos v. Corona*, 133 A.D.3d 565, 18 N.Y.S.3d 558 (2d Dept 2015).
- ²⁰² *Id.*, citing 22 NYCRR 202.21[d].
- ²⁰³ See *Jones v. Grand Opal Constr. Corp.*, 64 A.D.3d 543, 883 N.Y.S.2d 253 (2d Dept 2009).
- ²⁰⁴ See *Williams v. Beemiller, Inc.*, 100 A.D.3d 143, 152, 952 N.Y.S.2d 333 (4th Dept 2012).
- ²⁰⁵ *McBride v. KPMG International*, 135 A.D.3d 576, 24 N.Y.S.3d 257 (1st Dept 2016); see also *Williams v. Beemiller*, 100 A.D.3d at 152.
- ²⁰⁶ *SNS Bank, N.V. v. Citibank, N.A.*, 7 A.D.3d 352, 354, 777 N.Y.S.2d 62 (1st Dept 2004); *Mandel v. Busch Entertainment Corp.*, 215 A.D.2d 455, 626 N.Y.S.2d 270 (2d Dept 1995); see also *Peterson v. Spartan Industries, Inc.*, 33 N.Y.2d 463, 467, 354 N.Y.S.2d 905 (1974); *Cotia (USA) Ltd. v. Lynn Steel Corp.*, 134 A.D.3d 483, 485, 21 N.Y.S.3d 231 (1st Dept 2015); *Williams v. Beemiller*, 100 A.D.3d at 152.
- ²⁰⁷ See *Pardo v. O'Halleran Family Chiropractic*, 131 A.D.3d 1214, 16 N.Y.S.3d 781 (2d Dept 2015).
- ²⁰⁸ *Id.*, citing 22 NYCRR 202.7[a][2].
- ²⁰⁹ See *Ponce v. Miao Ling Liu*, 123 A.D.3d 787, 123 A.D.3d 787 (2d Dept 2014); *Martinez v. 1261 Realty Co., LLC*, 121 A.D.3d 955, 995 N.Y.S.2d 581 (2d Dept 2014).
- ²¹⁰ See *Ovcharenko v. 65th Booth Associates*, 131 A.D.3d 1144, 16 N.Y.S.3d 763 (2d Dept 2015).
- ²¹¹ *Bianchi v. Galster Management Corp.*, 131 A.D.3d 558, 559, 15 N.Y.S.2d 189 (2d Dept 2015).
- ²¹² *Id.*
- ²¹³ *Cascardo*, 136 A.D.3d 729; see also *Anderson v. State of New York*, 134 A.D.3d 1061, 21 N.Y.S.3d 356 (2d Dept 2015).
- ²¹⁴ *Bianchi*, 131 A.D.3d at 559.
- ²¹⁵ *State v. Baumslag*, 134 A.D.3d 451, 452, 21 N.Y.S.3d 51 (1st Dept 2015).
- ²¹⁶ See CPLR 3402. There are similar procedures for placing cases on trial calendars of other trial courts in New York State. For example, in New York City Civil Court, a party files a “notice of trial” pursuant to New York City Civil Court Act § 1301.
- ²¹⁷ See e.g. *Canandaigua Emergency Squad, Inc. v. Rochester Area Health Maintenance Organization, Inc.*, 130 A.D.3d 1530, 14 N.Y.S.3d 251 (4th Dept 2015); *Sansone v. Sansone*, 114 A.D.3d 748, 979 N.Y.S.2d 856 (2d Dept 2014); *Carranza v. Brooklyn Union Gas Co.*, 233 A.D.2d 287, 649 N.Y.S.2d 464 (2d Dept 1996); *Espindola Restaurant Corp. v. 4143 CA, LLC*, 2015 WL 5917003 (Sup Ct, NY Cty 2015) (defendant filed a note of issue; the plaintiff moved to vacate it, unsuccessfully); *R.F. Schiffmann Associates, Inc. v. Baker & Daniels LLP*, 41 Misc.3d 1235(A), 981 N.Y.S.2d 638 (Sup Ct, NY Cty 2013) (defendants filed note of issue seeking a non-jury trial; plaintiffs filed a “cross-note of issue” with a jury demand).
- ²¹⁸ See *K-F/X Rentals & Equipment, LLC v. FC Yonkers Associates, LLC*, 131 A.D.3d 945, 15 N.Y.S.3d 891 (2d Dept 2015).
- ²¹⁹ See *New York Timber, LLC v. Seneca Companies*, 133 A.D.3d 576, 19 N.Y.S.3d 78 (2d Dept 2015); see also *Yunga v. Yonkers Contracting Company, Inc.*, 134 A.D.3d 1031, 21 N.Y.S.3d 716 (2d Dept 2015).
- ²²⁰ *Id.*
- ²²¹ *Id.*
- ²²² See e.g. *Singh v. CBCS Construction Corp.*, 2016 WL 1230769 (2d Dept 2016).
- ²²³ See 22 NYCRR 202.21(e); *Gianacopoulos v. Corona*, 133 A.D.3d 565, 18 N.Y.S.3d 558 (2d Dept 2015); *Saravullo v. Tillotson*, 132 A.D.3d 1399, 17 N.Y.S.3d 263 (4th Dept 2015). Note that pursuant to CPLR 2103(b)(2), “where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period if the mailing is made within the state.” Thus, where a note of issue is served only by regular mail, a motion to vacate it should be heard if made within 25 days after that service; see *Levy v. Schaefer*, 160 A.D.2d 1182, 1183, 555 N.Y.S.2d 192 (3d Dept 1990).
- ²²⁴ *Middleton v. Russell*, 120 A.D.3d 477, 478, 989 N.Y.S.2d 906 (2d Dept 2014); accord *Breytman v. Olinville Realty, LLC*, 110 A.D.3d 753, 972 N.Y.S.2d 680 (2d Dept 2013).
- ²²⁵ See 22 NYCRR 202.21(d); *Bermejo v. New York City Health and Hospitals Corp.*, 135 A.D.3d 116, 141, 21 N.Y.S.3d 78 (2d Dept 2015); *Gianacopoulos v. Corona*, 133 A.D.3d 565, 18 N.Y.S.3d 558 (2d Dept 2015); *Rebollo v. Nicholas Cab Corp.*, 125 A.D.3d 452, 2 N.Y.S.3d 471 (1st Dept 2015).
- ²²⁶ *Sansone v. Sansone*, 114 A.D.3d 748, 749, 979 N.Y.S.2d 856 (2d Dept 2014).
- ²²⁷ *Saravullo v. Tillotson*, 132 A.D.3d at 1400; see also *Singh v. City of New York*, 68 A.D.3d 1096, 1097, 890 N.Y.S.2d 333 (2d Dept 2009).
- ²²⁸ *Stewart v. Dunkleman*, 128 A.D.3d 1338, 1339, 8 N.Y.S.3d 515 (4th Dept 2015).
- ²²⁹ *Sansone v. Sansone*, 114 A.D.3d 748, 749, 979 N.Y.S.2d 856 (2d Dept 2014).
- ²³⁰ See e.g. *Hoffman v. Biltmore 47 Associates, LLC*, 130 A.D.3d 478, 14 N.Y.S.3d 690 (1st Dept 2015).
- ²³¹ See *Singh v. CBCS Construction Corp.*, 2016 WL 1230769 (2d Dept 2016); *Amoroso v. City of New York*, 66 A.D.3d 618, 887 N.Y.S.2d 163 (2d Dept 2009).
- ²³² *Singh*, 2016 WL 1230769.
- ²³³ See CPLR 3123(a).
- ²³⁴ *Id.*
- ²³⁵ *Id.* Accord *32ND Avenue LLC v. Angelo Holding Corp.*, 134 A.D.3d 696, 698, 20 N.Y.S.3d 420 (2d Dept 2015).
- ²³⁶ See *32ND Avenue LLC*, 134 A.D.3d at 696.
- ²³⁷ *32ND Avenue LLC*, 134 A.D.3d at 698.
- ²³⁸ *Id.*
- ²³⁹ *Id.*
- ²⁴⁰ *Smith v. County of Nassau*, 2016 WL 1354991 at *2 (2d

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- Dept 2016).
- 241 *32ND Avenue LLC*, 134 A.D.3d at 698-699. See also *Smith*, 2016 WL 1354991 at *2.
- 242 See *Smith*, 2016 WL 1354991 at *2.
- 243 *Bermejo v. New York City Health and Hospitals Corp.*, 135 A.D.3d 116, 21 N.Y.S.3d 78 (2d Dept 2015).
- 244 *Bermejo*, 135 A.D.3d at 146.
- 245 *Id.*, citing *Tai Tran v. New Rochelle Hosp. Medical Center*, 99 N.Y.2d 383, 388.
- 246 134 A.D.3d 529, 22 N.Y.S.3d 178 (1st Dept 2015).
- 247 *Forman*, 134 A.D.3d at 531 (*italics supplied*).
- 248 *Forman*, 134 A.D.3d at 530.
- 249 *Forman*, 134 A.D.3d at 530-531.
- 250 *Forman*, 134 A.D.3d at 542.
- 251 *Forman*, 134 A.D.3d at 532.
- 252 *Id.*
- 253 *Id.*
- 254 *Forman*, 134 A.D.3d at 533.
- 255 *Id.*
- 256 *Ferrara Bros. Building Materials Corp. v. FMC Construction LLC*, 2016 WL 1355743 (2d Dept 2016)
- 257 See e.g. *Shah v. Oral Cancer Prevention International, Inc.*, 2016 WL 1355009 (2d Dept 2016)
- 258 *Smith v. County of Nassau*, 2016 WL 1354991 at *2 (2d Dept 2016)
- 259 See *Mizrahi-Srouf v. Srouf*, 2016 WL 1442274 (2d Dept 2016); *Shah v. Oral Cancer Prevention International, Inc.*, 2016 WL 1355009 (2d Dept 2016); *McLeod v. Taccone*, 122 A.D.3d 1410, 1412, 997 N.Y.S.2d 555 (4th Dept 2014); *Asim v. City of New York*, 117 A.D.3d 655, 656, 987 N.Y.S.2d 49 (1st Dept 2014).
- 260 *McMahon v. Cobblestone Lofts Condominium*, 134 A.D.3d 646, 22 N.Y.S.3d 50 (1st Dept 2015).
- 261 *McLeod*, 122 A.D.3d at 1412.
- 262 *Flanagan v. Wolff*, 136 A.D.3d 739, 741, 26 N.Y.S.3d 102 (2d Dept 2016); *Iscowitz v. County of Suffolk*, 54 A.D.3d 725, 864 N.Y.S.2d 78 (2d Dept 2008).
- 263 *Richards v. RP Stellar Riverton, LLC*, 136 A.D.3d 1011, 25 N.Y.S.3d 346 (2d Dept 2016); *New York Timber, LLC v. Seneca Companies*, 133 A.D.3d 576, 19 N.Y.S.3d 78 (2d Dept 2015).
- 264 See *Parker Waichman, LLP v. Laraia*, 131 A.D.3d 1215, 16 N.Y.S.3d 774 (2d Dept 2015); see also *Shah v. Oral Cancer Prevention International, Inc.*, 2016 WL 1355009 at *2 (2d Dept 2016); *CPS LLC v. Brody*, 135 A.D.3d 607, 608, 22 N.Y.S.3d 871 (1st Dept 2016) (failure to comply with a conditional order requiring compliance, and “pattern of disobeying discovery orders”).
- 265 See *Krause v. Lobacz*, 131 A.D.3d 1128, 16 N.Y.S.3d 601 (2d Dept 2015).
- 266 See *New York Timber, LLC v. Seneca Companies*, 133 A.D.3d 576; see also *Smith v. County of Nassau*, 2016 WL 1354991 at *2 (2d Dept 2016).
- 267 See *Tantaro v. All My Children, Inc.*, 133 A.D.3d 491, 19 N.Y.S.3d 159 (1st Dept 2015) (affirming outcome of marking deposition dates as final rather than striking the defendants’ answer).
- 268 *Flanagan v. Wolff*, 136 A.D.3d 739, 741, 26 N.Y.S.3d 102 (2d Dept 2016).
- 269 *Smith v. County of Nassau*, 2016 WL 1354991 at *2 (2d Dept 2016); see also *Singer v. Riskin*, 2016 WL 1033517 at *2 (2d Dept 2016).
- 270 *Singer*, 2016 WL 1033517 at *2; *Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 A.D.3d 201, 210, 959 N.Y.S.2d 74 (2d Dept 2012).
- 271 See e.g. *Arzuaga v. Tejada*, 133 A.D.3d 454, 19 N.Y.S.3d 280 (1st Dept 2015); *Lawrence v. North Country Animal Control Center*, 133 A.D.3d 932, 20 N.Y.S.3d 197 (3d Dept 2015).
- 272 *Hughes v. Brooklyn Skating, LLC*, 120 A.D.3d 758, 991 N.Y.S. 326 (2d Dept 2014).
- 273 See *Richards v. RP Stellar Riverton, LLC*, 136 A.D.3d 1011, 25 N.Y.S.3d 346 (2d Dept 2016).
- 274 *Romano v. Persky*, 117 A.D.3d 814, 985 N.Y.S.2d 633 (2d Dept 2014), quoting from CPLR 3126[2].
- 275 See *Lee v. Barnett*, 134 A.D.3d 908, 909, 22 N.Y.S.3d 122 (2d Dept 2015); *Mona and Jack’s Clothing, Inc. v. Ola, Inc.*, 133 A.D.3d 642, 19 N.Y.S.3d 325 (2d Dept 2015); see also *Hughes v. Brooklyn Skating*, 120 A.D.3d 758.
- 276 *Id.*; *Arzuaga v. Tejada*, 133 A.D.3d 454, 19 N.Y.S.3d 280 (1st Dept 2015). For cases addressed specifically to a defendant seeking such relief, see *Carillon Nursing and Rehabilitation Center, LLP v. Fox*, 118 A.D.3d 933, 989 N.Y.S.2d 68 (2d Dept 2014), and *Julien-Thomas v. Platt*, 133 A.D.3d 824, 20 N.Y.S.3d 415 (2d Dept 2015).
- 277 See *Julien-Thomas v. Platt*, 133 A.D.3d at 825; *Lee v. Barnett*, 134 A.D.3d at 909; *SRN Realty, LLC v. Scarano Architect, PLLC*, 116 A.D.3d 693, 694, 983 N.Y.S.2d 276 (2d Dept 2014); *Legaretta v. Neal*, 108 A.D.3d 1067, 1069, 969 N.Y.S.2d 305 (4th Dept 2013).
- 278 See *Wilson v. Galicia Contracting & Restoration Corp.*, 10 N.Y.3d 827, 830, quoting from *Weinstein-Korn-Miller*, N.Y. Civ Prac ¶ 3126.03.
- 279 See *Lee v. Barnett*, 134 A.D.3d at 908; *Harrison v. Bailey*, 79 A.D.3d 811, 914 N.Y.S.2d 187 (2d Dept 2010).
- 280 See *CPS LLC v. Brody*, 135 A.D.3d 607, 608, 22 N.Y.S.3d 871 (1st Dept 2016).
- 281 See e.g. *Lee v. Barnett*, 134 A.D.3d at 909.
- 282 See e.g. *Arzuaga v. Tejada*, 133 A.D.3d 454, 19 N.Y.S.3d 280 (1st Dept 2015).
- 283 *SRN Realty, LLC v. Scarano Architect, PLLC*, 116 A.D.3d 693, 694, 983 N.Y.S.2d 276 (2d Dept 2014). See also *Sealy v. Uly*, 132 A.D.3d 839, 18 N.Y.S.3d 160 (2d Dept 2015); *Vitolo v. Suarez*, 130 A.D.3d 610, 13 N.Y.S.3d 177 (2d Dept 2015).
- 284 *Lee v. Barnett*, 134 A.D.3d at 910.
- 285 *Arzuaga v. Tejada*, 133 A.D.3d 454, 455, 19 N.Y.S.3d 280 (1st Dept 2015).
- 286 See *Jardin v. A Very Special Place, Inc.*, 2016 WL 1577069 at *2 (2d Dept 2016).

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- ²⁸⁷ See *Lawrence v. North Country Animal Control Center*, 133 A.D.3d 932, 20 N.Y.S.3d 197 (3d Dept 2015).
- ²⁸⁸ *Id.*
- ²⁸⁹ *Id.*
- ²⁹⁰ *Shah v. Oral Cancer Prevention International, Inc.*, 2016 WL 1355009 at *2 (2d Dept 2016); *Singer v. Riskin*, 2016 WL 1033517 at *2 (2d Dept 2016); see also *McMahon v. Cobblestone Lofts Condominium*, 134 A.D.3d 646, 22 N.Y.S.3d 50 (1st Dept 2015).
- ²⁹¹ See *Parker Waichman, LLP v. Laraia*, 131 A.D.3d 1215, 16 N.Y.S.3d 774 (2d Dept 2015); see also *New York Timber, LLC*, 133 A.D.3d 576, 19 N.Y.S.3d 78 (2d Dept 2015); *Yunga v. Yonkers Contracting Company, Inc.*, 134 A.D.3d 1031, 1033, 21 N.Y.S.3d 716 (2d Dept 2015).
- ²⁹² *Id.*; see also *Lazar, Sanders, Thaler & Associates, LLP v. Lazar*, 131 A.D.3d 1133, 16 N.Y.S.3d 326 (2d Dept 2015); *Anron Heating and Air Conditioning, Inc. v. AMCC Corp.*, 133 A.D.3d 542, 19 N.Y.S.3d 414 (1st Dept 2015) (three violated discovery orders); *Silberstein v. Maimonides Medical Center*, 109 A.D.3d 812, 971 N.Y.S.2d 167 (2d Dept 2013) (dismissal of the complaint).
- ²⁹³ *Ozeri v. Ozeri*, 135 A.D.3d 838, 839, 23 N.Y.S.3d 363 (2d Dept 2016) (defendant failure to attend a continued deposition); see also *Muboyayi v. Quintero*, 136 A.D.3d 497, 498, 24 N.Y.S.3d 642 (1st Dept 2016) (plaintiff failure to attend a continued deposition).
- ²⁹⁴ See *Iskalo Electric Tower LLC v. Stantec Consulting Services, Inc.*, 113 A.D.3d 1105, 979 N.Y.S.2d 212 (4th Dept 2014).
- ²⁹⁵ *Iskalo Electric Tower*, 113 A.D.3d at 1106.
- ²⁹⁶ *Shah v. Oral Cancer Prevention International, Inc.*, 2016 WL 1355009 at *2 (2d Dept 2016).
- ²⁹⁷ See *CPS LLC v. Brody*, 135 A.D.3d 607, 608, 22 N.Y.S.3d 871 (1st Dept 2016).
- ²⁹⁸ See *Aur v. Manhattan Greenpoint Ltd.*, 132 A.D.3d 595, 2015 WL 6511172 (1st Dept 2015).
- ²⁹⁹ *Id.*
- ³⁰⁰ See *CPS LLC v. Brody*, 135 A.D.3d 607, 608, 22 N.Y.S.3d 871 (1st Dept 2016).
- ³⁰¹ *Doviak v. Finkelstein & Partners, LLP*, 137 A.D.3d 843, 27 N.Y.S.3d 164, 169 (2d Dept 2016).
- ³⁰² *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 547, 26 N.Y.S.3d 218 (2015); see also *Doviak*, 22 N.Y.S.3d at 169.
- ³⁰³ *Doviak*, 22 N.Y.S.3d at 169.
- ³⁰⁴ *Pegasus Aviation I*, 26 N.Y.3d at 553
- ³⁰⁵ *Pegasus Aviation I*, 26 N.Y.3d at 547
- ³⁰⁶ *Pegasus Aviation I*, 26 N.Y.3d at 547-548.
- ³⁰⁷ *Pegasus Aviation I*, 26 N.Y.3d at 551; compare *Dedushaj v. 3175-77 Villa Avenue Housing Dev. Fund Corp.*, 135 A.D.3d 421, 21 N.Y.S.3d 883 (1st Dept 2016) (precluding defendants from denying prior notice of a claimed defect was not proportionate to their misconduct; a monetary sanction was appropriate instead).
- ³⁰⁸ *Doviak*, 22 N.Y.S.3d at 169, 170.
- ³⁰⁹ See *Dedushaj*, 135 A.D.3d at 421 (the fact that the non-produced documents were not relevant to the subject liability issue was also a consideration).
- ³¹⁰ *Hughes v. Covey*, 131 A.D.3d 581, 582, 15 N.Y.S.3d 195 (2d Dept 2015); see also *Eremina v. Scparta*, 120 A.D.3d 616, 991 N.Y.S.2d 438 (2d Dept 2014).
- ³¹¹ *Hughes v. Covey*, 131 A.D.3d at 583.
- ³¹² *Id.*
- ³¹³ *Eremina v. Scparta*, 120 A.D.3d at 617.
- ³¹⁴ See *Neve v. City of New York*, 117 A.D.3d 1006, 986 N.Y.S.2d 606 (2d Dept 2014).
- ³¹⁵ This edition and many other past “Defendant” journals are available via links on the “Publications” page of DANY’s website: <http://defenseassociationofnewyork.org/page-856696>.
- ³¹⁶ *Sullivan v. 40/40 Club*, 34 Misc.3d 138(A), 2011 WL 6934522.
- ³¹⁷ *Sullivan*, 2011 WL 6934522 at *4
- ³¹⁸ *Id.*
- ³¹⁹ *Id.*
- ³²⁰ See *M.C. v. Sylvia Marsh Equities, Inc.*, 103 A.D.3d 676, 959 N.Y.S.2d 280 (2d Dept 2013).
- ³²¹ *M.C. v. Sylvia Marsh Equities, Inc.*, 103 A.D.3d at 678.
- ³²² i.e., *M.C. v. Sylvia Marsh Equities, Inc.*, 103 A.D.3d at 678.
- ³²³ See *Graziano v. Cagan*, 105 A.D.3d 701, 962 N.Y.S.2d 643 (2d Dept 2013).
- ³²⁴ *Hayes v. Bette & Cring, LLC*, 135 A.D.3d 1058, 1059, 22 N.Y.S.3d 680 (3d Dept 2016).
- ³²⁵ *Hayes*, 135 A.D.3d at 1060, citing *Kavanagh v. Ogden Allied Maintenance Corp.*, 92 N.Y.2d 952, 954, 683 N.Y.S.2d 156 (1998).
- ³²⁶ *Hayes*, 135 A.D.3d at 1060, citing *Smith v. Cardella Trucking Co., Inc.*, 113 A.D.3d 750, 750, 978 N.Y.S.2d 888 (2d Dept 2014); *Allen v. New York City Tr. Auth.*, 35 A.D.3d 230, 231, 828 N.Y.S.2d 301 (1st Dept 2006); *Smith v. Manning*, 277 A.D.2d 1004, 1005, 716 N.Y.S.2d 844 (4th Dept 2000).
- ³²⁷ *Hayes*, 135 A.D.3d at 1060; see also *Smith v. Cardella Trucking*, 113 A.D.3d at 750 (“the plaintiffs placed the injured plaintiff’s ability to engage in future employment in issue, thereby making an evaluation by a vocational rehabilitation expert appropriate”).
- ³²⁸ *Hayes*, 135 A.D.3d at 1060; see also *Smith v. Cardella Trucking*, 113 A.D.3d at 750 (“discovery was still ongoing in the action and the note of issue had not been filed”).
- ³²⁹ *Anderson v. State of New York*, 134 A.D.3d 1061, 21 N.Y.S.3d 356 (2d Dept 2015).
- ³³⁰ *Anderson*, 134 A.D.3d at 1062.
- ³³¹ *Anderson*, 134 A.D.3d at 1063.
- Any views and opinions expressed in this article are solely those of the author. Each case has different facts and issues, and any approach suggested here may not be appropriate in a given case.

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