New York State Law Digest

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No. 765 August 2024

Reporting on Significant Court of Appeals Opinions and Developments in New York Practice

NYSBA

A LOOK BACK . . . AND A LOOK FORWARD

With the Court of Appeals on summer hiatus, it seems like a good time to look back at the past year in the *Digest,* to review some of the significant developments and to discuss their impact and future issues.

Consent Jurisdiction and General Jurisdiction

We reported on the U.S. Supreme Court decision in Mallory v. Norfolk Southern Railway, 143 S. Ct. 2028 (2023), in which a narrow majority upheld consent by registration to general jurisdiction, with respect to a Pennsylvania statute. While the Court rejected a due process challenge, Justice Alito suggested in a concurring opinion that a dormant Commerce Clause challenge might be viable. Since the matter was sent back to the Pennsylvania courts, we await whether that argument will be advanced and whether the matter ends up back with the Supreme Court. Obviously, we will be following for any further decision by the Court.

It is important to note that for those who are looking for some type of consistency (or what they think is consistency) between this issue and the Supreme Court decision in Daimler AG v. Bauman, 134 S. Ct. 746 (2014), severely limiting general jurisdiction, they should remember, among other things, that the composition of the Court today is dramatically different than in 2014.

New York's current registration statute does not expressly condition registering on consent to general jurisdiction. In *Aybar v. Aybar,* 37 N.Y.3d 274 (2021), a majority of the New York State Court of Appeals held that compliance with the relevant statute did not constitute consent to general jurisdiction.

On two separate occasions, the New York State legislature passed an amendment conditioning registration on consent, but the governor vetoed them both. I anticipate that yet another attempt may be made to get an amendment signed into law in New York.

Thus, to review, at this point general jurisdiction over a corporation in New York is limited to those states where it is incorporated or where it has its principal place of business (and in an "exceptional case" that we are intent on locating). To state the obvious, the current status of the law is far more restrictive than what existed before *Daimler*, when the "doing business" standard was much more liberal and subjected many foreign corporations to general jurisdiction. It was also generally accepted that an authorized foreign corporation was subject to general jurisdiction.

Perhaps a trend in the other direction can be found in recent case law suggesting a liberalizing of the "arising out of" standard applicable to specific jurisdiction, from requiring a *direct* connection between the conduct and the cause of action to finding jurisdiction where the claim *relates* to the conduct. *See Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017 (2021). *See also D & R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 29 N.Y.3d 292, 298–99 (2017) ("It is not enough that a non-domiciliary defendant transact business in New York to confer long-arm jurisdiction. In addition, the plaintiff's cause of action must have an 'articulable nexus' or 'substantial relationship' with the defendant's transaction of business here (citation omitted). At the very least, there must be 'a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim' (citation omitted).").

Governmental Entities and More Stringent Pleading Requirements

In the *Digest* we have cautioned on more than one occasion to be particularly careful when litigating against governmental entities. A practitioner must be aware of possible notice of claim mandates, shorter limitation periods, and pleading re-

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quirements, among other issues. More recently, we addressed Court of Claims Act § 11(b), governing damage actions against the State, which requires a claim to "state the time when and place where such claim arose, the nature of same, and the items of damage or injuries claimed to have been sustained and the total sum claimed." The Court of Appeals has emphasized that the information supplied must be sufficiently definite "to enable the State . . . to investigate the claim[s] promptly and to ascertain its liability under the circumstances (citation omitted)." *Lepkowski v. State*, 1 N.Y.3d 201, 207 (2003). Thus, a claim should be as specific as possible to provide the requisite notice and avoid a dismissal motion. The failure to comply with filing and pleading requirements can deprive the Court of Claims of subject matter jurisdiction.

However, we pointed out that the courts seem to relax the Court of Claims pleading requirements in actions under the Child Victims Act (CVA). In *Rodriguez v. State of New York,* 219 A.D.3d 520 (2d Dep't 2023), for example, the issue was whether the claimant adequately pleaded the "time when" the claim arose. He alleged that he was sexually abused as a teenager by a state employee while in a state-operated psychiatric hospital. The Second Department ruled that the claimant's allegations providing time periods, as opposed to precise dates, and other information were sufficient:

> The claimant alleged, among other things, that "[i]n approximately 1987, when [he] was approximately sixteen (16) years old, [he] was admitted to" a State-operated psychiatric hospital "for inpatient residential treatment," and that "[while] admitted to the . . . facility" he was "sexually abused and assaulted" by a staff member on two occasions. Additionally, the claimant identified his alleged abuser in the claim and set forth the details of the two alleged assaults, including the location within the facility where they allegedly occurred. The claimant also alleged that, before the second incident of abuse occurred, he reported to his treating psychiatrist, whom the claimant identified by name, that the alleged perpetrator made the claimant "uncomfortable." "Given that the CVA allows claimants to bring civil actions decades after the alleged sexual abuse occurred, it is not clear how providing exact dates, as opposed to the time periods set forth in the instant claim, would better enable the State to conduct a prompt investigation of the subject claim" (citations omitted).

Id. at 522.

Note, however, that not every pleading can pass muster. *See Musumeci v. State of New York,* 220 A.D.3d 877, 879 (2d Dep't 2023), where the same court found that "[t]he claimant failed to satisfy the 'time when … [the] claim arose' requirement of Court of Claims Act § 11(b), since the claim failed to correctly identify the range of dates on which the alleged negligence and injury occurred."

The simple lesson is to provide as much information as possible.

The COVID Toll

Back in 2020, we posited that the Governor's Executive Orders amounted to a toll (rather than a mere suspension). After a bit of a wait, the Second Department in *Brash v. Richards*, 195 A.D.3d 582 (2d Dep't 2021), agreed, and the other Departments followed. More recently, the Court of Appeals acknowledged the toll. *See Jaime v. City of New York*, 2024 N.Y. Slip Op. 01581, n. 2 (March 21, 2024) ("Supreme Court granted the petition only with respect to the false arrest and malicious prosecution claims. Those claims were timely because they accrued on December 24, 2018, the date Orozco was released from jail, and thus the limitations period of one year and 90 days prescribed in General Municipal Law § 50-i (1) had not expired before March 20, 2020, the date the governor issued an executive order containing a provision that tolled all limitations periods due to the COVID-19 pandemic (citation omitted). That provision . . . remained in effect in July 2020 when Orozco filed his late notice of claim (see 9 NYCRR 8.202.72 [lifting the toll as of November 4, 2020]). Supreme Court denied the petition with respect to the remaining claims, which were time-barred because they had earlier accrual dates (citations omitted)."); *Favourite Ltd. v. Cico,* 2024 N.Y. Slip Op. 01496 (March 19, 2024).

We have explained that a toll "stops the clock" for statute of limitations purposes during a period that begins with the event that gives rise to the toll and ends with the expiration of the time allotted or the lifting of whatever disability was the reason for the toll. Significantly, as we recently discussed, a toll applies regardless of whether the plaintiff has actually been deprived of an opportunity to commence an action. *State of New York v. Williams*, 224 A.D.3d 1356 (4th Dep't 2024).

Although years have passed since the end of the COVID toll, it still has implications for possible causes of actions carrying longer statutes of limitations, such as breach of contract.

The Concerns Associated With the Use of Texts and Emails

The ease of communication via email and text has been a boon in so many ways. Among other advantages, it can make such communication much more efficient, it can be accomplished virtually anywhere and under an array of conditions, and it can ease one's anxiety to know that they can be reached and can reach others. Nevertheless, aside from the fact that this can also provide one with no refuge from the outside world, this ease of transmission can result in unfortunate consequences. There are those who seem to perceive that there is an absolute privacy to these communications, or at least they act that way. In fact, to be safe, one should not draft a text or an email that that person would *not* be comfortable with *anyone* seeing.

The relative informality of it all and the fact that these communications can be sent out with such rapidity engenders a certain degree of sloppiness and a lack of care in deciding whether the language you have used, and the points you are making, might need some more introspection. These communications can come to haunt someone when they are revealed in the discovery process. All of the above applies to social media, even to the discovery of plaintiff's private (non-public) information, if relevant. *See Forman v. Henkin*, 30 N.Y.3d 656 (2018).

Recently in the *Digest*, we have dealt with a different issue

as to the circumstances in which an exchange of emails or texts can constitute an enforceable agreement. On the one hand, one must be careful not to communicate the acceptance of an agreement inadvertently if that is not the intent. Conversely, if one wants to "seal the deal," it is essential that the informality noted above does not lull that person into failing to set forth the essential terms of such an agreement. We again cautioned attorneys and others to be careful about what they write in emails and texts. Thus, we reported on *Maxgain LLC v. Rai,* 222 A.D.3d 488 (1st Dep't 2023), where the Second Department held that there was no settlement of a lease dispute because the exchange of texts was merely an unenforceable "agreement to agree." Thus, the trial court "properly concluded that the exchange of texts did not contain all material terms of a settlement agreement. Furthermore, since the parties indicated they did not intend to be bound until an agreement was drafted and signed, these text messages could not constitute a contract (citations omitted)." *Id*. at 489.

Similarly, in *Harleysville Ins. Company/Nationwide Gen. Ins. Co. v. Estate of Otmar Boser,* 219 A.D.3d 469, 470 (2d Dep't 2023), the Second Department held that emails between the parties' counsel did not evidence a clear mutual accord because they contained "a discussion of further occurrences necessary to finalize the [settlement] agreement." Moreover, in *Vlastakis v. Mannix Family Mkt. @ Veteran's Rd., LLC,* 220 A.D.3d 908, 908–09 (2d Dep't 2023), the same court found that the requisites to enforce a purported settlement agreement were lacking because the subject email "stated that it was memorializing the 'tentative resolution' of the case and was sent by counsel for the defendant, which is the party seeking to enforce the agreement. There is no email subscribed by the plaintiff, who is the party to be charged, or by her attorney confirming the agreement (citation omitted)."

Simple advice: If your intent is to formalize an agreement via email or text, make sure to include all material terms, leaving nothing to the imagination.

Make Sure to Use the Appropriate Language When Completing an Affirmation

In the November 2023 edition of the *Digest*, we referred to the amendment to CPLR 2106 effective January 1, 2024, allowing a statement by "any person, wherever made, subscribed and affirmed by that person to be true under the penalties of perjury" to be used in a New York action in lieu of and with the same force and effect as an affidavit. We noted that this eased the burden in obtaining statements, particularly from those witnesses located outside of the state. Previously, the latter statements required a notarized affidavit and, in an excess of caution, an accompanying certificate of conformity.

We also emphasized that the statute provided the *express* language to be used in the affirmation, that is:

> I affirm this ___ day of _____, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

If a statute requires certain language to be included and sets forth that language verbatim, it is critical that practitioners do not become sloppy or "creative": just use the precise language! *See Great Lakes Ins. v. American Steamship Owners Mut. Protection & Indem. Assoc. Inc*., 2024 N.Y. Slip Op. 03083 (1st Dep't June 6, 2024) (defendant's affirmation was found to be inadmissible because it did not contain the CPLR 2106 language).

Filing Errors Persist

The *Digest* has preached for a long time the critical importance of proper filing and related commencement issues. The failure to file properly, including what and where you file, has jurisdictional implications, resulting in the dreaded characterizations: a nonwaivable jurisdictional defect, a "nullity," or a lack of subject matter jurisdiction. Even with electronic filing pervasive throughout the state we continue to hear of cases where the required pleadings are not properly filed.

We noted recently the case of *Park Premium Enters., Inc. v. Norben Lofts, LLC,* 220 A.D.3d 661(2d Dep't 2023), where the plaintiff filed a complaint *without* a summons. The Second Department affirmed the trial court's grant of defendants' motion to dismiss, emphasizing that pursuant to CPLR 304(a) an action is generally commenced by the filing of a summons and complaint or summons with notice, the common denominator being that a summons must be included. The court held that the failure to do so here was a nonwaivable, jurisdictional defect, which rendered the action a nullity. The court properly rejected the argument that CPLR 2001 could bail the plaintiff out here because "'the complete failure to file the initial papers necessary to institute an action is not the type of error that falls within the court's discretion to correct under CPLR 2001' (citation omitted)." *Id*. at 662.

So, I beseech you, please follow the filing requirements (both as to what and where to file). And while you are at it, file well before the statute of limitations is to run (if possible) and attempt service immediately. If you follow these prescriptions, I can promise you fewer sleepless nights.

Service by Mail

There have been complaints over the years as to what some believe to be New York's antiquated statutes relating to the service of the initiating pleadings. In this advanced technological era, the statutes' primary focus on personal delivery or the like seems passé. Suggestions that email service be permitted in the first instance cannot survive scrutiny and risk thwarting the precise reason for service: notice to the defendant. For example, we are all told in our 101 email/internet education that you should *never* open an email from a source you do not recognize, and you should *never* open an unknown attachment. In addition, spam technology has become more and more sensitive and might pull emails containing complaints into the spam folder or worse. So, email as an independent initial type of service seems unreasonable.

Note, of course, that courts have permitted email service alone, or sometimes coupled with additional service, where the plaintiff has shown that other methods of service were impracticable under CPLR 308(5). *See Weinstein, Korn & Miller, New York Civil Practice* ¶ 308.15 (David L. Ferstendig, ed. 2024).

But how about taking one of our existing methods and improving it? CPLR 312-a mail service has its heart in the right place but fails in one key area: the defendant can just choose to ignore the service with the consequences merely being its obligation to pay the cost of alternative service.

To review briefly, CPLR 312-a(a) provides for service of the summons and complaint "by first class mail, postage prepaid . . . together with two copies of a statement of service by mail and acknowledgment of receipt in the form set forth in subdivision (d) of this section, with a return envelope, postage prepaid, addressed to the sender." Significantly, "[s]ervice is complete on the date the signed acknowledgement of receipt is mailed or delivered to the sender." CPLR 312-a(b)(1).

We discussed *Carney v. Metropolitan Transp. Auth.*, 221 A.D.3d 447 (1st Dep't 2023), where the plaintiff failed to send the required statement of service by mail or an acknowledgment of receipt to the defendants. The First Department noted that under CPLR 312-a service is complete only where the defendant returns a signed acknowledgment of receipt. Because service was never completed, "the action was never properly commenced." More important, even where the plaintiff complies strictly with statute, the defendant can sabotage the service merely by ignoring the attempted service and not returning the signed acknowledgment.

To make this method of service useful and workable, perhaps CPLR 312-a should be amended to provide for more severe penalties for failing to the return the acknowledgment or add a second component of follow-up service and *require* the defendant to respond to avoid a default.

Service Is "Complete" Conundrum

In *Deutsche Bank Nat'l Trust Co. v. Heitner,* 226 A.D.3d 967 (2d Dep't 2024), we noted the Second Department's distinction in the language between CPLR 205-a (service "completed") and CPLR 205 (service "effected") with respect to the requirement of filing *and* service within six months after termination of the prior action. This resulted in the court concluding that service was not "completed" within the six-month period.

The concept of "completed" service is referenced throughout various statutes, including the most notable, CPLR 308(2) (leave and mail); CPLR 308(4) (nail and mail, implicated in the *Heitner* case); CPLR 320(a) (appearance required within 30 days after service is complete); CPLR 3012(c) (answer required within 30 days after service is complaint); BCL § 306 (service on domestic or authorized foreign corporation); and BCL § 307 (service on unauthorized foreign corporation).

There are those who believe that the service rules in general and specifically those that sometimes require the filing of proof of service (e.g., CPLR 308(2), (4)) but in other circumstances do not, create confusion among other difficulties. In addition, in those instances in which filing of proof of service is *not* required, checking the court file about a service issue may be futile. Thus, there is a feeling that the CPLR should be amended to require that proof of service be filed in *all* situations and actions, but to provide that the failure to file the proof of service will not deprive the court of jurisdiction.

Primary Assumption of Risk Is Alive and Well

Recently, we have had a flurry of cases implicating the primary assumption of risk doctrine. Here we go back a bit over a year, to our discussion of the Court of Appeals decision in *Grady v. Chenango Val. Cent. Sch. Dist.*, 40 N.Y.3d 89 (2023). There, the Court was dealing with the applicability of the doctrine with respect to two cases on appeal. We explained that notwithstanding the adoption of comparative fault in 1975, a form of primary assumption of risk doctrine has been retained in very limited circumstances, specifically with respect to athletic and recreative activities, based on the premise that "[o]ne who takes part in . . . a sport, accepts the dangers that inhere in it so far as they are obvious and necessary." In *Grady*, Judge Rivera believed, however, that it was time to abandon the doctrine. That has not happened.

More recently, in *Gilliard v. Manhattan Nuvo LLC,* 223 A.D.3d 563 (1st Dep't 2024), the First Department found the doctrine to be inapplicable to an incident in a hookah bar, refusing to equate a hookah lounge with a sports venue or to conclude that the plaintiff took part in a sporting activity:

> Although attending a birthday party may be viewed as a recreational activity, the activities at the facility did not possess the "beneficial aspects of sports" that courts have found as justification for the continued applicability of the doctrine. Defendant's duty to plaintiff was to maintain its facility in a reasonably safe condition in view of all the circumstances (citation omitted).

Id. at 564.

Moreover, even if the doctrine applied, the court noted that a plaintiff is not deemed to have assumed the risks of reckless or intentional acts, or concealed or unreasonable risks, which were present here.

In *Katleski v. Cazenovia Golf Club, Inc.,* 225 A.D.3d 1030 (3d Dep't 2024), a majority of the Third Department ruled that a golfer's action for injuries sustained on a golf course was precluded by the primary assumption of risk doctrine. The Second Department applied the doctrine to a plaintiff injured while sparring in a Brazilian Jiu Jitsu class, pointing to the plaintiff's voluntary participation and training and experience, but refused to do so where a college soccer player was injured while weightlifting, finding the injury was not inherent in playing soccer. *See Santana v. Torres BJJ, LLC*, 226 A.D.3d 842 (2d Dep't 2024); *Mazze v. Manhattanville Coll.*, 226 A.D.3d 887 (2d Dep't 2024).

ISSN 0028-7636 (print) ISSN 2379-1225 (online)