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THE SARATOGA COUNTY BAR ASSOCIATION

SERVING THE INTEREST OF JUSTICE

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THE PRACTICE PAGE

EXECUTIVE ORDERS DURING DISASTER EMERGENCIES: FROM THE 9-11 ATTACKS TO COVID-19

HON. MARK C. DILLON *

Executive Law 29-a(1) is not a statute that we should ever wish to see utilized by the governor of our state. It is the provision in the Executive Law that authorizes the governor to take action necessary to deal with disaster emergencies, without having to seek advance approval from the state legislature. The law provides that "the governor may by executive order temporarily suspend any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster or if necessary to assist or aid in coping with such disaster." The statute specifically applies to a variety of listed disasters, including epidemics. This spring, we saw frequent use of the law when Governor Cuomo issued a series of Executive Orders necessary to deal with the health, political, economic, and judicial impacts of the covid-19 virus. Executive Orders 202.8, 202.14, and 202.28 were among them, which incrementally suspended the statute of limitations from March 20, 2020 to June 6, 2020. After all, actions and proceedings cannot be commenced when attorneys cannot meet clients or when courts and law offices are closed or disrupted.

Before now, the same provision of the Executive Law was used by Governor Pataki in response to the attacks of September 11, 2001. Executive Law 29-a(1) expressly applies to acts of terrorism. Governor Pataki issued Executive Orders that suspended the statute of limitations in the state while the disaster emergency and its fallout was pending. The 19th anniversary of the 9-11 attacks is approaching. The question of this article is: if CPLR 209 provides for the tolling of the statute of limitations on account of war, why did Governor Pataki need to issue an Executive Order to accomplish essentially the same thing in 2001?

The least utilized toll of the statute of limitations is the war toll, which is found in CPLR 209. Its evolution has been influenced by decades of world events.

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THE PRACTICE PAGE
EXECUTIVE ORDERS DURING DISASTER EMERGENCIES

HON. MARK C. DILLON*

Its current form, which has not been amended since 1962, applies to three categories of litigants. The first and second categories are where the cause of action accrues in a foreign country with which the United States or its allies were then or became at war, or where any party is a citizen of a country at war with the United States. The third category applies when a plaintiff is a resident of or traveler in a foreign country at war with the United States. For the first two categories, the toll runs from the commencement of the war to the termination of hostilities. For the third category, the toll applies for so long as the plaintiff resides or is traveling in the hostile country.

The attacks that occurred on September 11, 2001 had all the markings of a war. Airplanes were used as weapons, 2,752 persons were killed, property was destroyed, and our economy was damaged. In the days following the attacks, 14,000 attorneys were unable to access their offices. The Court of Claims at 5 World Trade Center was destroyed, OCA was displaced from its offices, and the destruction included law offices, litigation files, and case evidence. Courts in Manhattan were closed until Monday, September 17, 2001. Many claimants facing the expiration of their statute of limitations in the days following the 9-11 attacks were unable to file their actions and proceedings (Dillon, Mark, "An Overview of the Tolls of Statutes of Limitations on Account of War: Are They Current and Relevant in the Post-September 11th Era?, 13 NYU J. Legis. & Pub. Pol'y 315 [2010]).

Although the events of 9-11 looked and sounded like war, New York's war toll was of no help to litigants who, through no fault of their own, were facing the expiration of their statutes of limitations. The reason is that the language of CPLR 209 applies only when there is a war between the United States or its allies and a foreign country (CPLR 209[a-c]). Al-Qaeda, which perpetrated the attacks, was not a foreign country, but a private organization. Therefore, the only mechanism for protecting the rights of litigants to bring timely actions was to suspend the statutes of limitations via Executive Orders. Ironically, New York was the only state at the time with a statute on its books that permitted the governor, in that instance George Pataki, to "suspend" the statute of limitations via Executive Orders as a result of a "disaster emergency" (9 NYCRR 5.113.7 and 5.113.28). The Pataki Executive Orders extended the statute of limitations that would otherwise have expired to October 12, 2001, and for lawyers and litigants "directly affected" by the attacks to November 8, 2001 (Id). The time between September 11 and November 8, 2001 totaled 58 days. In one action, where the statute of limitations would have expired in the normal course on October 31, 2001, the plaintiff's complaint was dismissed as untimely because the action was commenced on December 19, 2001, beyond the extended deadline of November 8, 2001 (Randolph v CIBC World Markets, 219 F.Supp.2d 399 [SDNY 2002]). In another action, where the limitations period expired in the normal course on February 23, 2002, the plaintiff's complaint was likewise dismissed, as it was filed on March 19, 2002 and not eligible for any time extension at all (Scheja v Sosa, 44 AD2d 410 [2nd Dept. 2004]). What tripped the plaintiffs up in Randolph and Scheja was a misunderstanding of the difference between a "toll" and an "extension." Governor Pataki's executive orders did not add a 58-days toll to everyone's statutes of limitations. Rather, it merely provided that if lawyers or litigants affected by the attacks had a limitations period expiring between September 11 and November 8, 2001, the plaintiffs' time to commence their actions was "extended" to a hard deadline of November 8, 2001. One may wonder whether CPLR 209 needs to be re-tooled to better protect the rights of litigants given the nature of today's security threats. That said, the Executive Law and Executive Orders that filled the void in 2001 appeared again this year in response to the covid-19 virus. Prayerfully, we will not need to see them used in the future again.

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TORTS AND CIVIL PRACTICE:
Selected Cases from the Appellate Division, 3rd Department

TIM HIGGINS, ESQ. of LEMIRE & HIGGINS, LLC

DUTY OF CARE OWED BY OUT-OF-POSSESSION LANDLORD.

Harkins v. Tuma (Mulvey, J., 4/2/20)

Plaintiff, injured when she slipped and fell on an icy step at the rental property where she lived, alleged the property owners were negligent in their maintenance of the roof and gutter system, which allowed melting snow and ice to drip onto the step. Unless exceptions apply, an out-of-possession landlord is not responsible for dangerous conditions after the tenant moves in; and here the lease agreement between the parties did specifically make the plaintiff responsible for snow/ice removal from the entrance to her apartment to the driveway. Supreme Court (Cahill, J., Ulster Co.) granted defendants' motion for summary judgment but the action was reinstated in the Appellate Division which found several questions of fact that must be decided by a jury; including whether the property owners created the dangerous condition "through any possible repair work on the gutters". That plaintiff may have failed to discover and remove the ice goes to her comparative fault but does not eliminate the defendants' responsibility to adequately maintain their property.

COURT'S $0 AWARD FOR FUTURE PAIN AND SUFFERING FOUND IMPROPER.

Serrano v. State of New York (Garry, P.J., 1/23/20)

Claimant, a state prison inmate, fell ill during a softball game, later complaining to a prison nurse about dizziness, shortness of breath and discomfort in the left chest and shoulder. The nurse did not consult with a doctor or perform an EKG. The next afternoon, a second visit to the medical unit led to an EKG and then hospitalization, where the inmate was found to have suffered a heart attack. At trial of his medical malpractice action alleging a failure to properly and timely diagnose his heart attack, the Court of Claims (Hard, J.) found for the claimant, awarding $15,000 for past pain and suffering but nothing for future pain and suffering, which the Third Department found deviated from reasonable compensation. Noting that the trial court credited the opinion of claimant's medical expert that Serrano could develop a future arrhythmia because of permanent heart muscle damage caused by the heart attack, the Appellate Division modified the verdict by awarding future damages of $10,000.

SUMMARY JUDGMENT REVERSALS.

Maguire v. Upstate Auto, Inc. (Aarons, J., 4/9/20)

An owner of a motor vehicle may be liable for the tort of negligent entrustment if the owner knew or should have known that the person permitted to use the vehicle was incompetent to operate it. Here, plaintiff's decedent was killed in an accident where she was the operator of a Honda scooter that she took for a test drive from the defendant car dealership. Supreme Court (Zwack, J., Columbia Co.) granted defendant's summary judgment motion, holding that the dealership proved it did not own the scooter. The vehicle was, however, displayed for sale on the defendant's front lot and the primary owner of the dealership did not stop the decedent from taking a helmet and the scooter from the property before the accident. Such proof, according to the Third Department (which reversed and reinstated the plaintiff's action), created a question of fact "whether defendant exerted dominion and control over the scooter so as to be its owner".

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Selected Cases from the Appellate Division, 3rd Department

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Guerin v. Robbins (Aarons, J., 4/30/20)

In this highway accident injury action, Plaintiff was a passenger in vehicle 2; which stopped suddenly after vehicle 1 entered its lane of travel. Vehicles 1 and 2 did not strike each other; but vehicle 2 was rear-ended by vehicle 3. Plaintiff settled her claim against the driver of vehicle 3. The summary judgment motion by vehicle 2's driver was denied by Supreme Court (Versaci, J. Schenectady Co.) but the Appellate Division (with one dissenter) reversed, finding the plaintiff failed to offer any evidence to support her contention that the defendant "was negligent by failing to keep a proper look out and by being inattentive".

DEFAULT JUDGMENT ON INSURANCE FRAUD CLAIM REVERSED.

Preferred Mutual Ins. Co. v. DiLorenzo (Reynolds Fitzgerald, J., 5/14/20)

The defendant alleged injuries to his low back, knees and teeth after an auto accident and sought no-fault and SUM benefits from the plaintiff. During the insurer's investigation of the claim, defendant acknowledged under oath that he had previously treated for back and right knee complaints, leading to the auto claims being denied. Further, the insurer brought an action for breach of contract and fraud, and when defendant served his Answer one week after his 30-day allowance to do so, Supreme Court (Burns, J., Chenango Co.) granted plaintiff's motion for a default judgment. The Third Department found that ruling was an abuse of discretion and reversed, noting that the delay was de minimis and non-prejudicial; there was a meritorious defense; and that "public policy favors the resolution of cases on the merits".

BONUS OPINIONS: COURT OF APPEALS.

Colon v. Martin (Feinman, J., 5/7/20)

Plaintiffs Wilfredo and Ramona Colon were the driver and passenger in a vehicle that was rear-ended by a pickup truck owned by the City of New York. Plaintiffs hired the same attorney, who served a joint Notice of Claim, after which the defendant served separate notices to take the plaintiffs' testimony at a (General Municipal Law Section) 50-h hearing. Plaintiffs' counsel, however, refused to let the 50-h hearings proceed unless each plaintiff could be present while the other testified. Defendant rejected the demand and no 50-h hearings ever occurred. Plaintiffs then filed suit, and defendant's' motion to dismiss the action (for failure to comply with Section 50-h) was granted by Supreme Court and affirmed by the Second Department (with two dissenters). Addressing what it called a "novel statutory interpretation issue", the Court of Appeals affirmed the dismissal, ruling that while Section 50-h permits a claimant to have a relative or other representative present for the defendant's physical examination, that right does not apply to an examination upon oral questions.

Biaca-Neto v. Boston Road II Housing Dev. Fund Corp. (2/18/20)

Plaintiff, employed on a construction site, was injured when he fell about seven feet onto a scaffold platform after he unhooked his safety belt and tried to enter the building under construction through a window cut-out; a method of building entry that had been specifically prohibited by the defendant general contractor. The First Department affirmed dismissal of plaintiff's Labor Law § 240(1) cause of action but the Court of Appeals reversed, citing evidence in the record that despite the contractor's standing order, workers on the job site had nonetheless been entering the building through the window cut-outs which created a "triable issue of fact...as to whether plaintiff knew he was expected to use the safety devices provided to him".

IMMIGRATION AND COVID-19 (5.0)

DAVID W. MEYERS, ESQ. | MEYERS & MEYERS, LLP

My kids are of the age where I am still watching movies like Minions. Truth be told, I like them. Indeed, on some level, particularly with respect to their soundtracks, I think they're made with adults in mind. According to Merriam-Webster, the definition of a "minion" is "a servile dependent, follower, or underling," generally to someone powerful (or someone who perceives him or herself to be powerful). The origin of the word is French.

I've used the word "minion" in these articles from time to time, generally with reference to Stephen Miller, the President's policy advisor who reportedly is the primary architect of the President's restrictionist immigration policy, including the President's recent proclamations restricting entry of some foreign nationals to the United States.

On April 22, 2020, the President signed a proclamation temporarily suspending the entry of certain "immigrants" into the United States in light of the COVID-19 pandemic. Exactly two months later, on June 22, 2020, the President signed yet another proclamation continuing his original proclamation and also now suspending the entry of certain "nonimmigrants" into the United States. As I've previously noted, the practical effect of these proclamations is not much since most embassies and consulates around the world are working at drastically reduced operations and visa issuance has all been suspended in any event since mid-March. So why did the President put out this second proclamation? As always, politics as usual. Red meat to his base.

It has always amazed me, however, that Mr. Miller, himself a descendent of immigrants, could be advocating for such restrictionist positions. According to published accounts, Mr. Miller's family arrived through Ellis Island from what is now Belarus. His relatives fled anti-Jewish pogroms and forced childhood conscription in the Czar's army at the beginning of the 20th century. According to news reports, the first decedent of Mr. Miller arrived in the United States knowing no English and with $8.00 in his pocket. He peddled street corners and worked in sweatshops. And by all news accounts, he worked hard and became very successful. It's a great American success story.

Is Mr. Miller ashamed of his immigrant past? I am open to any reasonable explanation as to why Mr. Miller advocates for these anti-immigrant positions.

The President's most recent proclamation essentially blocks access by U.S. companies and others to certain nonimmigrant workers until at least the end of 2020, including H-1B, H-2B, J-1 and L-1 nonimmigrants (and their family members). As reported in one of my local newspapers, the Albany Times Union, the President's proclamation will negatively impact employers, families, colleges and universities, health care facilities, and seasonal businesses. The President's proclamation will also delay America's economic recovery from the COVID-19 pandemic.

The H-1B is a visa that allows a foreign national to work temporarily for a U.S. employer in a specialty occupation position such as architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts. The H-2B is a visa that allows a person to work in the United States for a U.S. employer in a seasonal field outside of agriculture, like a hotel worker in a resort community. The J visa refers to, among several other possibilities, an exchange visitor and under the President's most recent proclamation is limited to those working in specific capacities, like as a camp counselor, teacher, au pair, or pursuant to the J-1 summer work travel program. Finally, an L visa refers to intracompany transferees who work in positions that require specialized knowledge or who are working in an executive or managerial capacity.

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IMMIGRATION AND COVID-19 (5.0)

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The continued use and availability of these visas to a large cross-section of U.S. businesses and industries is absolutely essential to a successful economic recovery from the COVID-19 pandemic.

The premise behind the President and his minion's policy is to protect U.S. workers, particularly as we work (no pun intended) our way through the economic consequences of the COVID-19 pandemic. The White House has said that these proclamations will protect or create over half a million jobs. (Although significant, it's a drop in the bucket when you consider the overall job loss since March 2020.)

But the President and his minion's basic premise is still fundamentally flawed. And I've written about this ad nauseum in this space over the last several years. Bottom line. Immigrants, whether those here temporarily or those who strive to be here permanently, are a positive influence on the U.S. economy. You can find any number of resources that support this premise, but for those who may suspect my views, feel free to check out The George W. Bush Presidential Center's "Economic Growth Initiative", which does an excellent job debunking all these ridiculous myths about the negative impact of immigrants on our nation and our economy.

Forget right and left. Let's move forward, all of us, together.

WHITEMAN OSTERMAN & HANNA LLP and McNAMEE LOCHNER P.C. ANNOUNCE JOINT DISCUSSIONS

Whiteman Osterman & Hanna LLP and McNamee Lochner, P.C. are pleased to announce that they are exploring a relationship under which most of the attorneys of McNamee Lochner would join their practices with Whiteman Osterman & Hanna LLP.

"We're excited to have the opportunity to align our firms and bolster the practice areas and legal experience available to our clients. The attorneys at McNamee offer depth of experience in sophisticated practice areas, and we believe that our combined strength will prove to be an asset to our clients and the community" said John Henry, Co-Managing Partner of Whiteman Osterman & Hanna LLP. "Joining our practices will allow our clients to draw upon the collective experience, depth and breadth of both firms" said Scott Barbour Co-Managing Partner of McNamee Lochner.

Both firms anticipate announcing further details of their arrangement within the coming weeks.

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Whiteman Osterman & Hanna, the Capital Region's largest law firm with 75 attorneys, has developed a reputation for innovative solutions and professional leadership. For over 40 years, the Firm has served the public and private sectors with a broad range of practice areas and industry expertise including business, commercial, education, energy, utility regulation, environmental, land use, immigration, intellectual property, labor and employment, real estate development, federal and state taxation, cybersecurity and data privacy, estate planning and administration, government relations and litigation.

McNamee Lochner, founded in 1863, has been a stable and enduring legal presence in the shaping and growth of the Capital Region and offers a statewide practice with nearly 30 attorneys and has concentrations in several areas of law, including banking, corporate and taxation, environmental and land use, litigation and dispute resolution, matrimonial and family law, real estate, and trusts, estates and elder law.

E. STEWART JONES HACKER MURPHY LLP

E. Stewart Jones Hacker Murphy LLP is pleased to announce that Benjamin F. Neidl has joined the firm as of counsel. Ben's practice focuses on commercial litigation and appeals, zoning and municipal law, representation of licensed and regulated entities before administrative agencies, and regulatory advice and counsel to businesses of all sizes in the financial services, health and human services, hospitality and other sectors. Having practiced for nearly twenty years in national law firms in New York City and Albany, Ben looks forward to serving institutional and individual clients alike in what he regards as one of the Capital region's finest law firms.

E. Stewart Jones Hacker Murphy LLP

E. Stewart Jones Hacker Murphy dates back to its founding in Troy in 1898. The firm provides expert legal services in personal injury, medical malpractice, criminal defense, commercial litigation, property tax disputes and eminent domain. The firm's new Schenectady office will open during the first quarter of 2020.

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