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STATE OF NEW YORK

Court of Appeals

APL-2018-0074

ANN VANYO,

Plaintiff-Appellant,

vs.

BUFFALO POLICE BENEVOLENT ASSOCIATION, INC.,
and CITY OF BUFFALO,

Defendants-Respondents.

(Appeal No. 2.)
Erie County Index No.: 801776/2015.

BRIEF FOR PLAINTIFF-APPELLANT ANN VANYO

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Term	Definition
The amended complaint	The amended verified complaint in this action that was filed on May 21, 2015 and that appears on page A20 of the Appendix for this appeal
Appellate Division's order	The Memorandum and Order dated March 16, 2018 in the appeal in this action from the trial court's final judgment
Appendix or App.	The Appendix for this appeal
The BPBA	Defendant-respondent the Buffalo Police Benevolent Association
The CBA	The Collective Bargaining Agreement that is the subject of this action
The City	Defendant-respondent the City of Buffalo
Defendants	Collectively, defendants-respondents the Buffalo Police Benevolent Association and the City of Buffalo
The original complaint	The verified complaint that first was filed in this action on February 10, 2015 and that appears on page 31 of the Record for this appeal from the Appellate Division
Plaintiff	Plaintiff-appellant Ann Vanyo
The Record or R.	The Record for this appeal from the Appellate Division. Although there were two appeals in the Appellate Division — one of which was dismissed as being brought up for review in the other — the record that will be cited to in this appeal is the record in the appeal from the denial of plaintiff's CPLR 306-b motion because that record contains all of the documents from the other record, as well as additional documents.

JURISDICTIONAL STATEMENT

Below is a statement pursuant to 22 NYCRR 500.13(a) showing that this Court has jurisdiction over this appeal and where the questions raised are preserved in the Record.[1] Briefly, this Court has jurisdiction because the Appellate Division's order finally determined this action, two justices dissented on questions of law, and these dissents were in favor of plaintiff-appellant.

A. Jurisdiction.

This Court has jurisdiction pursuant to N.Y. CPLR 5601(a) (McKinney's 2018) because two justices at the Appellate Division dissented on several questions of law — *i.e.*, the first three questions presented as listed below — and this dissent was in favor of plaintiff (App. at A8-A12). Moreover, with respect to the fourth question presented as listed below, this Court has jurisdiction over that question because it was decided adversely to plaintiff. *See Reis v. Volvo Cars of North America*, 24 N.Y.3d 35, 41 (2014) ("an appeal properly taken under

[1] Please note that two appeals were perfected to the Appellate Division — one from the final judgment and one from the order denying plaintiff's motion for an extension of time to effect service under CPLR 306-b. The appeal from the CPLR 306-b order was dismissed by the Appellate Division because it was brought up for review in the appeal from the final judgment. Nonetheless, a record was submitted in each appeal, and both are being submitted to this Court. However, the record in the appeal from the CPLR 306-b order encompasses all of the documents from the record in the appeal from the final judgment, plus additional materials. Therefore, all record cites in the brief are to the record in the appeal from the CPLR 306-b order.

CPLR 5601(a) brings up for review all issues that the Appellate Division decided adversely to the appellant, even those on which no Appellate Division justice dissented") (citing *Holtslander v. Whalen & Sons*, 69 N.Y.2d 1016 (1987) and Arthur Karger, *Powers of the New York Court of Appeals* § 6:6 at 207–208 (3d ed. 2005)). Lastly, the Appellate Division's order finally determined this action because it affirmed the dismissal of plaintiff's amended complaint (App. at A5).

B. Preservation.

With respect to the first question listed below, this question has been preserved for this Court's review through the undisputed date of filing of the original complaint (R. at 152 (¶ 2); App. at A5), plaintiff's argument in opposition to defendants' motions (R. at 152 (¶¶ 2-4)), and the Appellate Division's order (App. at A6-A7, A9, A12).

With respect to the second question listed below, this question has been preserved for this Court's review through the defendants' notices of motion (App. at A45-A55), plaintiff's argument in opposition to those motions (R. at 12 (lines 12-16)), and the Appellate Division's order (App. at A6-A7, A9-A10).

With respect to the third question listed below, this question has been preserved for this Court's review through the undisputed fact that the amended complaint was served before the original complaint (R. at 24 (lines 1-6), 167 (¶ 12)) and the Appellate Division's order (App. at A7-A8, A12).

With respect to the fourth question listed below, this question has been preserved for this Court's review through the amended complaint (App. at A21-A32 (¶¶ 9-81), plaintiff's opposition papers (R. at 154 (¶ 13), defendants' motion papers (App. at A45-A55), and the Appellate Division's order (App. at A8, A12-A13).

QUESTIONS PRESENTED

1. Whether plaintiff's first and second causes of action were timely interposed when the complaint that initially included those claims was filed and this action properly was commenced within the applicable limitations period? (Point I, infra)

   Answer of the trial court and the majority at the Appellate Division: No.

2. Whether defendants consented to personal jurisdiction and thereby waived any objection to defective service when they made a motion under CPLR 3211(a) without raising that objection as a ground in their initial motion papers? (Point II, infra)

   Answer of the trial court and the majority at the Appellate Division: No.

3. Whether plaintiff properly amended her original complaint when defendants' time to respond to that complaint had not yet expired because it was never served on defendants? (Point III, infra)

   Answer of the trial court and the majority at the Appellate Division: No.

4. Whether plaintiff stated a cause of action for deprivation of due process based the allegations of specific instances where the City prevented her from invoking several specific protections under the controlling CBA? (Point IV, infra)

   Answer of the trial court and the majority at the Appellate Division: No.

PRELIMINARY STATEMENT

Although several arguments are preserved and presented below, this appeal essentially can be reduced down to addressing three errors. First, the opinion from the majority at the Appellate Division used the date of service of an amended complaint as the date that claims in an original complaint were interposed, rather than using the date of commencement when the original complaint with those claims first was filed. As noted by the dissent at the Appellate Division, the majority's holding in this respect constitutes a clear error in light of the Legislature's marked and deliberate change from a commencement-by-service system to a commencement-by-filing system under the 1992 amendments to CPLR § 203. On this ground alone, the dismissal of plaintiff's first and second causes of action should be reversed.

Second, the majority erroneously allowed defendants to raise a defective-service argument by bootstrapping it to their timeliness arguments. This was an error because defendants clearly waived any objection to personal jurisdiction when they filed motions under CPLR 3211(a) without identifying it as a ground for those motions. This omission obviously was a strategic choice — *i.e.*, they wanted to treat the original complaint as a nullity and move against the amended complaint because it was filed after the expiration of the applicable limitations period. Moreover, defendants did this despite knowing that the amended complaint was an ***amended*** complaint because of its title, as well as knowing that it was the third document filed in the case. Nonetheless, by failing to raise personal jurisdiction as a ground for their motions under CPLR 3211(a), defendants have consented to personal jurisdiction.

Third, the Appellate Division — both the majority and the dissent — erred in affirming the dismissal of the fourth cause of action on the grounds that plaintiff failed to state a claim for deprivation of due process. This part of the Appellate Division's order was an error because it — like the trial court — had to presume that the allegations in the complaint were false and construe those allegations against plaintiff, which clearly is an error when deciding a motion

under CPLR 3211(a)(7). When accepting these allegations as true and drawing all reasonable inferences in plaintiff's favor, her allegations specify several particular instances whereby she was deprived of and prohibited from invoking the procedural protections to which she was entitled under the CBA.

Accordingly, for these reasons, this Court should reinstate plaintiff's first, second, and fourth causes of action — each of which obviously have merit in light of the allegations of specific violations of the CBA. In fact, plaintiff's entire 16-year career as a police officer has been decimated by a myriad of improper, retaliatory manipulations of the disciplinary process by defendants. Again, this mistreatment is set out at length in a *20-plus-page, 124-paragraph*, *verified* complaint. Therefore, plaintiff respectfully requests that this Court reinstate plaintiff's first, second, and fourth causes of action.

STATEMENT OF FACTS

Plaintiff served as a police officer for the City of Buffalo for more than 16 years — from July of 1998 until October of 2014 (App. at A21 (¶ 9)). From the time that she began her lengthy career as a police officer and until October of 2012, plaintiff had not been disciplined or served with any disciplinary charge, except a single minor violation in or around 2008 (*id.* at A21-A22 (¶¶ 10,

13, 15)). However, in October of 2012, plaintiff was served with several disciplinary charges for conduct that occurred between 2009 and 2012 (*id.* at A22, A27-A28 (¶¶ 13, 15, 49)). At this time, plaintiff was going through an emotionally and financially difficult time as a result of a "bitter divorce" (*id.* at A23, A27 (¶¶ 16, 49 (line labeled "2012-188")); R. at 158 (¶ 5)).

Following the issuance of the disciplinary charges in October of 2012, the City issued a series of contradictory, double-guessing, and ultimately improper penalties based on those charges. First, the City suspended plaintiff without pay, but then rescinded that suspension and reassigned plaintiff to the "camera room" (App. at A22, A23 (¶¶ 15, 17)). Plaintiff, however, successfully challenged her reassignment as "punitive and without just cause," thereby reversing the reassignment (*id.* at A23 (¶¶ 18, 19)). Following her successful challenge, the City indefinitely suspended plaintiff with pay (*id.* (¶¶ 20, 21)). Plaintiff again successfully challenged this suspension through arbitration, including obtaining an award that directed that plaintiff be reinstated to her previous duties and that she be compensated for lost overtime (*id.* (¶¶ 21-23)).

On January 14, 2014, being represented by the BPBA at the time, plaintiff then commenced a proceeding under Article 75 of the CPLR to confirm

the arbitration award (App. at A24 (¶ 30)). On the <u>same date</u> that plaintiff commenced this proceeding, the City again suspended plaintiff on the same charges that were the basis for the prior penalties — each of which had been previously reversed or abrogated (*id.* at A23, A24 (¶¶ 24, 30)). Again, at the time of this most recent suspension, plaintiff had not been served with any new disciplinary charges since those in October of 2012 (*id.* at A24 (¶¶ 28, 29)). On September 2, 2014, plaintiff's Article 75 proceeding was settled for a de minimis amount, without her approval or consent, and without any payment directly to plaintiff (*id.* at A24-A25 (¶¶ 32-34)). Plaintiff immediately filed a formal objection to the BPBA for settling without her consent, but the BPBA took no action in response to this objection (*id.* at A25 (¶¶ 35, 36)).

In May of 2014 and before the conspicuous, unauthorized settlement in the Article 75 proceeding, the BPBA and the City amended the CBA in order to provide for an expedited "triage" hearing process for disciplinary charges (App. at A25, A26 (¶¶ 39, 41)). The amendment was effective for only a two-year period (*id.* at A26 (¶ 42)). Despite the fact that older charges were to be resolved first in the order of when they were issued, plaintiff's charges were rushed through the process notwithstanding the existence of 40 to 50 older charges that should have been given priority (*id.* (¶¶ 44-46)). Again, plaintiff's charges that were being

submitted to the triage process still were only those that were issued to her in October of 2012 (*see id.* at A24, A27-A28 (¶¶ 29, 49)).

In June of 2014, the hearing officer in the triage hearing resolved six charges against plaintiff based on conduct that dated as far back as 2009 (App. at A27-A28 (¶ 49)). As a result of a settlement, the hearing officer issued various dispositions ranging from the dismissal of several charges, a letter of reprimand, and suspension without pay for a total of eight days (*id.* (¶¶ 49, 50)). Although, the CBA was in place during this triage hearing, plaintiff was denied several crucial procedural rights that were promised under the CBA (*id.* at A27, A28-A29, A30 (¶¶ 47, 50-58, 64, 66)). Specifically, plaintiff was not informed that the charges were being submitted to the triage hearing, she was not allowed to be present at the hearing, she was not allowed to approve of any settlement, and she was deprived of effective legal representation in several key respects (*id.*).

Oddly, one charge based on conduct from 2012 was withheld from the initial triage hearing and was submitted to a second, separate triage hearing following the settlement in the initial hearing (App. at A30 (¶¶ 68, 69)). Contrary to the CBA, this second triage hearing was before the same hearing officer who, again, had just presided over a hearing on six other charges against plaintiff

(*id.* at A31, A32 (¶¶ 70, 71, 81)). Not surprisingly, on October 14, 2014, the hearing officer imposed a penalty of terminating plaintiff's employment following the second triage hearing (*id.* (¶¶ 71-72)). Again, however, plaintiff was deprived of and not allowed to pursue most of the procedural protections under the CBA (*id.* at A30-A32 (¶¶ 64, 66, 68-78)).

Nonetheless, plaintiff's employment was terminated by the City on October 16, 2014, which was only two days following the issuance of the decision in the second triage hearing (App. at A31 (¶¶ 72, 73)). Despite several attempts to challenge the termination through various administrative processes, plaintiff no longer is employed as a police officer with the City (*see id.* at A54 (¶ 17)). Accordingly, after a "long and hard" effort to find counsel who would be willing to commence an action on plaintiff's behalf with only a minimal retainer, plaintiff commenced this action seeking redress for her obvious mistreatment by the City and the BPBA in connection with the disciplinary procedures that ultimately led to the termination of her employment (R. at 157-58 (¶¶ 2, 7)).

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PROCEDURAL POSTURE

A. Commencement and Service.

Plaintiff commenced this action by filing a verified complaint — *i.e.*, the original complaint — through the NYSCEF system on February 10, 2015 (R. at 152 (¶ 2)). The original complaint included the following four causes of action: the first against the BPBA for a breach of the duty of fair representation; the second against the City for a breach of the CBA; the third against all defendants for conspiracy to breach the duty of fair representation and the CBA; and the fourth against the City for a deprivation of due process (R. at 43-49 (¶¶ 83-113)). Due to ongoing problems with her then attorneys, the original complaint never was served (*see* R. at 157-58 (¶¶ 3-13)).

Instead, plaintiff's prior attorneys withdrew their representation and merely provided plaintiff with a copy of the amended complaint with instructions that "[d]efendants must be served by June 7, 2015" (R. at 158 (¶¶ 11, 12)). The amended complaint basically was identical to the original complaint, with the exception that the former included an additional fifth cause of action for gender discrimination (*compare* R. at 43-49 (¶¶ 83-113) *with* App. at A32-A40 (¶¶ 83-124)). The amended complaint clearly was labeled "Amended Verified Complaint" and clearly was marked as the third document that was filed on the

NYSCEF system (App. at A20 (caption)). Having difficulties finding new counsel, plaintiff herself procured service of the amended complaint through the sheriff's office on May 26, 2015 (App. at 158 (¶ 16)).

B. Proceedings Before the Trial Court.

Following service of the amended complaint, defendants filed motions to dismiss on timeliness grounds — *i.e.*, CPLR 3211(a)(5) — and on the ground that plaintiff had failed to state a cause of action — *i.e.*, CPLR 3211(a)(7) (App. at A45, A50). In their supporting papers, defendants clearly were moving against the amended complaint — as opposed to the original complaint — because their timeliness argument used the date on which the amended complaint was filed or served as the date that all of the claims were interposed (*id.* at A47, A48 (¶¶ 3, 7), A53 (¶¶ 3, 9)). The City also argued for the dismissal of the fifth cause of action, which, again, was included only in the amended complaint (*id.* at A54 (¶¶ 16-17).

Defendants' motions, however, were not based on CPLR 3211(a)(8) — an objection to personal jurisdiction (*see* App. at A45, A50). Instead, defendants first raised this objection in their reply papers because they claimed to not know of the existence of the original complaint, despite that amended complaint clearly was labeled "Amended Verified Complaint" and clearly was

marked as the third document that was filed on the NYSCEF system (R. at 12 (lines 14-16), 15 (lines 8-24); App. at A20 (caption)). Even though plaintiff's counsel opposed the improperly raised objection based on personal jurisdiction, he nonetheless filed a "defensive[]" motion under CPLR § 306-b to extend the time to serve the original complaint (R. at 12 (lines 16-24)). Plaintiff's motion was based on the fact that difficulties with her former attorneys and improper advice from them caused her to omit serving the original complaint and to delay serving the amended complaint (*id.*; *see also id.* at 157-60)).

Nevertheless, the trial court denied plaintiff's motion and granted defendants' motions on the grounds that the action was untimely under the applicable four-month limitations period (*see* R. at 27-28). The trial court apparently held that the failure to serve the original complaint prevented plaintiff from relying on the commencement date to interpose the claims that were included in that complaint and then carried over to the amended complaint (*see id.*). The trial court also apparently dismissed the fourth and fifth causes of action for failure to state a claim, since a timeliness argument was not made with respect to those claims (*see id.* at 11B; App. at A45-A55). Following the entry of judgment

denying plaintiff's motion and dismissing the action, plaintiff duly filed and perfected an appeal to the Appellate Division, Fourth Department (R. at 1-2, 6-8).[2]

C. The Appellate Division's Order.

In a Memorandum and Order dated March 16, 2018, the Appellate Division affirmed the trial court's judgment (App. at A5). However, two judges dissented from the majority with respect to the dismissal of the first and second causes of action on timeliness grounds (*see id.* at A8-A13). The majority held that these claims were not interposed until the service of the amended complaint because plaintiff had failed to serve the original complaint (*id.* at A6-A7). The majority also held that plaintiff did not properly amend her complaint, even though it simultaneously analyzed the merits of that complaint in its opinion (*id.* at A6-A8). The majority also rejected plaintiff's alternative argument that even if these claims were interposed on the date that the amended complaint was served or filed, those claims should relate back to the date of commencement (*id.* at A7).

The dissent disagreed with the majority and reasoned that the date of commencement constituted the date on which those claims were interposed, and

[2] Plaintiff had filed and perfected a separate appeal from the denial of her motion seeking leave for late service under CPLR 306-b, but that appeal was dismissed because that denial was brought up for review in the appeal from the judgment dismissing the complaint (App. at 2).

the amended complaint did not supersede the commencement date — even if it superseded the original complaint (App. at A9, A12). The dissent also reasoned that defendants had waived their objections to service and personal jurisdiction by not raising them in their initial motion papers (*id.* at A9-A10). The dissent further held that plaintiff properly amended her complaint as of right, as well as that any and all claims in the amended complaint would relate back to the date on which the original complaint was filed (*id.* at A9, A11-A12).

Regardless of their disagreement on the first and second causes of action, both the majority and dissent agreed that the third through fifth causes of action properly were dismissed (App. at A8, A11-A12). With respect to the fourth cause of action in particular, both the majority and dissent held that plaintiff had failed to state a cause of action for a deprivation of due process (*id.*). This holding presumably was based on the existence of the CBA, despite that plaintiff alleged that defendants prevented her from exercising her rights under the CBA (*see id.*). Lastly, both the majority and dissent held that the trial court had properly denied plaintiff leave for late service under CPLR § 306-b, despite that such leave was not necessary under the dissent's holding (*id.* at A6, A8).

ARGUMENT

In this appeal, plaintiff is arguing for the reversal of the dismissal of the first, second, and fourth causes of action. With respect to the first and second causes of action, the majority's opinion should be reversed because: (1) these claims were timely interposed because the commencement date must be used to measure timeliness (Point I, infra); (2) the failure to serve the amended complaint is irrelevant because defendants waived any objection to that failure and consented to personal jurisdiction (Point II, infra); and (3) plaintiff's amendment of the complaint was proper (Point III, infra).[3] With respect to the fourth cause of action, the Appellate Division's order must be reversed because plaintiff has stated a claim for deprivation of due process based on the allegations that the City denied and prevented her from exercising the procedures in the CBA (Point IV, infra)

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[3] A reversal of this part of the Majority's holding is not necessary to reinstate the first and second causes of action because based on the first two points, those causes of action were timely interposed and defendants cannot object to improper service or personal jurisdiction.

POINT I

THE APPELLATE DIVISION ERRED WHEN IT HELD THAT THE FIRST AND SECOND CAUSES OF ACTION WERE UNTIMELY BECAUSE THOSE CLAIMS WERE TIMELY INTERPOSED *IRRESPECTIVE* OF THE RELATION-BACK DOCTRINE, AND THAT DOCTRINE NEVERTHELESS WOULD APPLY IF NECESSARY.[4]

The majority held that this action was not timely because the original complaint was not served and the amended complaint was not within the relation-back doctrine. Simply put, however, the law is well settled that a "claim" is timely if it is pled in a complaint that is used to commence an action before the expiration of the applicable limitations period. *E.g.*, N.Y. CPLR § 203(a), (c) (McKinney's 2018); *Spodek v. New York State Com'r of Taxation and Finance*, 85 N.Y.2d 760, 763 (1995). Moreover, although the relation-back doctrine does not change this well-settled rule, it does permit for "a *new* claim" in an amended pleading to relate back to those in the original pleading if it does not cause "undue prejudice." *See Buran v. Coupal*, 87 N.Y.2d 173, 177 (1995) (emphasis added). Accordingly, this Court should reverse the majority on this issue because: (1) this action was commenced within the applicable limitations period, regardless of the relation-back doctrine; and (2) that doctrine nevertheless would apply if necessary.

[4] To be clear, plaintiff is arguing that the relation-back doctrine is *not necessary* to render the claims from the original complaint — *i.e.*, the first four causes of action — timely. The doctrine merely is raised in the alternative and only if this Court determines that the doctrine would be necessary to render those claims timely.

A. The First and Second Causes of Action Were Timely Because They Were Interposed At the Time That the Action Was Commenced, Which Was Within the Applicable, Four-month Limitations Period.

The calculus here is simple — a claim in a complaint that is filed to commence an action is deemed interposed at the time of filing, and plaintiff here filed the original complaint with the first and second causes of action within the applicable, four-month limitations period. These two points are decisive, and they are not disputed. As the dissent incisively noted, New York has a commencement-by-fling system whereby a claim is deemed interposed when the complaint that includes it first is filed. *E.g.*, N.Y. CPLR § 203(a), (c) (McKinney's 2018); *Spodek v. New York State Com'r of Taxation and Finance*, 85 N.Y.2d 760, 763 (1995). The Legislature's imposition of this system in 1992 constituted a *marked* and *deliberate* change from the prior system, which focused on the time of service rather than filing. *Spodek*, 85 N.Y.2d at 763. Thus, for the purposes of timeliness, the date of service is irrelevant. *See id.*

In illustrating the significance of this change, this Court addressed a procedural posture in *Spodek* that is strikingly similar to the posture here. The petitioner in *Spodek* commenced a proceeding in the Appellate Division on the date on which the four-month limitations period expired. *Spodek*, 85 N.Y.2d at

762. The petitioner's attempts to effect service, however, were a "total failure." *Id.* The respondents moved to dismiss the petition based on the failure to effect service within the limitations period, and the Appellate Division granted the motion on this ground. *Id.* This Court, however, reversed because the petition was timely under the new commencement-by-fling system, since it was filed within the limitations period. *Id.* at 763-64.[5] Hence, this Court clearly and correctly clarified that the commencement date is the "*crucial* date for determining whether the Statute of Limitations is satisfied," which, again, was an unambiguous directive from the Legislature when it changed CPLR § 203. *Id.* at 763.

Here, analogous to *Spodek*, plaintiff timely interposed her first and second causes of action because she filed the original complaint that included those claims within the four-month limitations period (App. at A31 (¶ 71); R. at 152 (¶ 2)).[6] The majority — as well as defendants and the trial court — literally ignored this commencement date and, instead, focused on the amended complaint

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[5] This Court nevertheless dismissed the proceeding because the petitioner had not acquired personal jurisdiction over the respondents due to his failure to effect service. *Spodek v. New York State Com'r of Taxation and Finance*, 85 N.Y.2d 760, 763 (1995). To the contrary, here, plaintiff has acquired personal jurisdiction over defendants because they filed a motion under CPLR 3211(a) without challenging personal jurisdiction (Point II, infra).

[6] To be clear, the accrual date is October 17, 2014 because that was the day after plaintiff was terminated (App. at A31 (¶ 71)), and February 10, 2015 was the date on which the first and second causes of action were interposed because that is the date on which the original complaint was filed (R. at 152 (¶2)).

because only that complaint was served (App. at A7). By doing so, however, they emphasized service over filing, thereby running afoul of the commencement-by-filing system. In *Spodek*, this Court unambiguously disapproved of such an approach, as it had to in light of the clear legislative intent on this issue. Again, this legislative intent was to make the commencement date determinative of timeliness, which was evinced by a marked and deliberate change in CPLR § 203.

In sum, as the dissent correctly noted, "[w]hile the complaint may have been superseded by the amended complaint, the *commencement* of the action was not" (App. at A12). In fact, neither the majority nor defendants provided any authority for overlooking the commencement date, which, again, is the "crucial" date for determining timeliness according to the case law from this Court. Clearly, the majority adopted a personal jurisdictional or service argument cloaked in a timeliness argument, which is erroneous given that the "Legislative change . . . to a commencement-by-filing system segregated these concepts and made them mutually exclusive" (*id.*). Therefore, the first and second causes of action were timely interposed because this action was commenced within the four-month limitations period, and this Court should reverse the dismissal of these causes of action on this ground alone.

B. Assuming, Arguendo, That the First and Second Causes of Action Need To Meet the Requirements of the Relation-back Doctrine, They Do Because They Arise Out of the Same Occurrences.

Under the unambiguous language of CPLR § 203(f), claims asserted in an amended pleading are deemed interposed at the time that the claims in the original pleading were interposed. N.Y. CPLR § 203(f) (McKinney's 2018). According to the statutory text, the sole qualification to this rule is if "the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." *Id.* The purpose of this qualification, of course, is to avoid any prejudice to the opposing party that may arise from depriving that party of notice of the transactions or occurrences that are the basis of the newly added claims. *See Buran v. Coupal*, 87 N.Y.2d 173, 180 (1995).[7]

The prejudice that is contemplated under CPLR § 203(f), however, is a creature of preparation, or, more specifically, the lack thereof that results from being deprived of an opportunity to investigate and prepare a defense against potential claims or damages. *See Scheff v. St. Johns Episcopal Hosp.*, 115 A.D.2d

[7] As the dissent correctly noted, the stringent notice standard that the majority applied was based on case law addressing the relation-back doctrine in a different context, which is the addition of a new party after the statute of limitations has expired (App. at A11). In the context of naming a new party, several additional requirements apply to successfully invoke the doctrine. *See Buran v. Coupal*, 87 N.Y.2d 173, 178 (1995).

532, 534 (2d Dep't 1985). Accordingly, establishing this kind of prejudice is difficult if the party claiming it did, in fact, know of the transactions or occurrences that are the basis of the claims or damages because that party then had "a fair opportunity to investigate claims against them and prepare defenses." *See id.* Therefore, if a party had an opportunity to prepare for claims or damages and knew that such preparation was important at the time of or shortly after the transactions or occurrences at issue, it has not suffered the type of prejudice that is contemplated under CPLR § 203(f). *See id.*[8]

Here, even if the first and second causes of action needed to fall within the ambit of the relation-back doctrine — which they do not — the essence of that doctrine has been satisfied — *i.e.*, defendants have not been prejudiced by the amended complaint because they had prior knowledge of the relevant occurrences and, more importantly, knew that they may give rise to claims or damages (*see* App. at A26-A29, A30-A32 (¶¶ 44-58, 68-78); R. at 93-127). Also, defendants had the opportunity to and did, in fact, prepare defenses because they had this knowledge at the time or close to the time of the relevant occurrences (*see*

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[8] The principle that notice abrogates prejudice if it is sufficient to allow a prompt investigation into a matter and to prepare defenses applies in other contexts as well, such as notices of claims. *Brown v. City of New York*, 95 N.Y.2d 389, 393 (2000) ("[t]he test of the sufficiency of a Notice of Claim is merely 'whether it includes information sufficient to enable the city to investigate'") (quoting *O'Brien v. Syracuse*, 54 N.Y.2d 353, 358 (1981)).

id.). The fact that defendants prepared cannot be disputed in light of the extensiveness of the triage hearing that led to plaintiff's dismissal, as well as various other pre-action administrative hearings (*see id.*; R. at 93-150)

Therefore, even under the relation-back doctrine and even if notice is the "linchpin" for that doctrine in these circumstances, the first and second causes of action in the amended complaint should be held to be timely under that doctrine. Given the extensive, *pre-action* procedural history of the instant dispute between the parties, defendants cannot plausibly claim that they were prejudiced or even surprised by any of the claims in the amended complaint. Even more importantly, defendants do not provide or even try to provide any specific example of how they were prejudiced. Accordingly, to the extent that the relation-back doctrine is necessary for the first and second causes of action to be timely, the requirements of that doctrine clearly have been met.

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POINT II

THE TRIAL COURT ERRED WHEN IT RELIED ON DEFECTIVE SERVICE TO DISMISS THE FIRST AND SECOND CAUSES OF ACTION BECAUSE DEFENDANTS CONSENTED TO PERSONAL JURISDICTION AND THEY NEVER MADE A MOTION ON THIS BASIS.

The trial court relied on untimely service when it granted defendants' motions (R. at 26 (lines 12-17)). By doing so, however, the trial court erred and the majority erred to the extent that it affirmed the trial court's holding in this respect because: (1) service pertains to personal jurisdiction, and defendants consented to personal jurisdiction (Sub-point A, infra); and (2) defendants did not make a motion under CPLR § 306-b, which certainly is not "academic" because courts repeatedly have held that such a motion is necessary to obtain relief under that section (Sub-point B, infra).

A. Defendants Consented To Personal Jurisdiction and Thereby Waived Any Objection To Service Because They Filed Motions Under CPLR 3211(a), But Did Not Raise Personal Jurisdiction As a Ground For Those Motions In Their Initial Papers.

Put simply, the failure to serve the original complaint is irrelevant because defendants consented to personal jurisdiction, thereby waiving their ability to dismiss for defective service. It is axiomatic that an objection to the service of commencement papers is within the ambit of an objection to personal jurisdiction. *See, e.g.*, *Dorfman v. Leidner*, 76 N.Y.2d 956, 957-58 (1990). It also is axiomatic

that a defendant consents to personal jurisdiction by making a motion to dismiss under CPLR 3211(a) and failing to include an objection to personal jurisdiction as a ground for that motion. *E.g.*, N.Y. CPLR 3211(e) (McKinney's 2018); *Addesso v. Shemtob*, 70 N.Y.2d 689, 690 (1987). Accordingly, an objection to service is waived if a defendant does not include it as a basis for a motion that he or she makes under CPLR 3211(a). *Addesso*, 70 N.Y.2d at 690.

Furthermore, once a motion under CPLR 3211(a) is made, a party cannot retroactively change the scope of that motion to include an objection based on personal jurisdiction or defective service. *See Iacovangelo v. Shepherd*, 5 N.Y.3d 184, 187 (2005); *Addesso*, 70 N.Y.2d at 690. The "plain language" of CPLR 3211(e) unambiguously requires that this objection be raised as a ground for any motion that is made under CPLR 3211(a). N.Y. CPLR 3211(e); *see also Addesso*, 70 N.Y.2d at 690. More importantly, a party cannot retroactively "amend a motion" under that rule to include this objection because no "statutory right" exists to do so. *Iacovangelo*, 5 N.Y.3d at 187. Therefore, if a party makes a motion under CPLR 3211(a) without making an objection to service or personal jurisdiction a ground for that motion, he or she has waived that objection. *Id.*

Here, the trial court erred when it relied on untimely service as a ground to dismiss the first and second causes of action, and the majority erred in affirming the trial court's holding in this respect. This was an error because defendants had made pre-answer motions to dismiss under paragraphs (a)(5) and (a)(7) of CPLR 3211, but did not include paragraph (a)(8) of CPLR 3211 as a ground for their motions (App. at A45, A50). This omission is proven, ipso facto, by their initial motion papers, which do not raise, identify, or even address defective service or any other objection to personal jurisdiction (*id.* at A45-A55). Therefore, by doing so, defendants consented to personal jurisdiction and, accordingly, waived any objection on that ground, including an objection to service. Any contrary result would contravene the well-settled, longstanding law and principles concerning personal jurisdiction.

Moreover, this Court should reject defendants' arguments that they can raise this objection after making their initial motions for two reasons. First and foremost, permitting this would contravene the longstanding principle that a party consents to personal jurisdiction by requesting relief from a court and failing to raise an objection to such jurisdiction at the same time or before. Here, defendants made motions to dismiss on grounds other than personal jurisdiction because they did not object to personal jurisdiction until their reply papers, which is completely

improper because they already had moved for relief at that point.[9] According to *Iacovangelo*, such an omission cannot be remedied. *Importantly, the insufficiency of defendants' objection to personal jurisdiction is supported by the majority's avoidance of this issue, which is painfully obvious.*

Second and more importantly, this Court should reject defendants' attempts to raise this objection in a reply because their alleged reason for doing so simply is *unbelievable*. Defendants claim that at the time that they made their motions, they had no way of knowing that an original complaint had been filed (R. at 15 (lines 8-24)). However, this argument utterly is belied by the following two facts: (1) the amended complaint clearly is labeled as an "*Amended* Verified Complaint," thereby notifying defendants that an original complaint existed; and (2) the amended complaint clearly is marked as "NYSCEF DOC. NO. *3*," thereby signifying that two other documents previously had been filed (App. at A20

[9] Actually, other than a colluded statement at oral argument, there is no indication in the record as to how extensively defendants made these objections. Accordingly, this Court cannot determine whether these papers sufficiently remedied the defects in the motions. As plaintiff was represented by other counsel before the trial court and the Appellate Division, I do not know why defendants' reply papers were not included in the record on appeal. However, defendants apparently consented to this omission (*see* R. at 171-72).

(caption)) (emphasis added)). Thus, defendants clearly knew of the existence of the original complaint and had access to it before they filed their motions.[10]

In actuality, it is obvious that defendants chose to disregard the original complaint and to rely on the amended complaint because the latter was filed after the expiration of the four-month limitations period, which was favorable to their motion under CPLR 3211(a)(5). In other words, defendants ignored the existence of the original complaint — or the facts that made its existence readily apparent — because it was strategically advantageous to do so at the time. Nevertheless, by failing to raise an objection to personal jurisdiction or CPLR 3211(a)(8) as a ground in their initial motion papers, they have waived that objection and consented to personal jurisdiction. Accordingly, the failure to serve the original complaint cannot be used as a basis to dismiss any claim in this action.

B. The Failure To Make a Motion Under CPLR § 306-b Is Fatal To Any Objection Based On Defective Service Because a Motion Under That Section Is *Necessary*.

The well-settled law is that in order to obtain relief under CPLR § 306-b, a party must file a motion based on that section. *See* David D. Siegel,

[10] The original complaint was freely accessible to defendants because it was filed on the NYSCEF system, which allowed them to access it even before they appeared in the action through the "case search" feature.

New York Practice § 63 (6th ed. 2018) (citing *Komanicky v. Contractor*, 146 A.D.3d 1042 (3d Dep't 2017) (relief under CPLR § 306-b cannot be sought informally in answering papers, and, instead, a motion is necessary to obtain relief under that section); *Matter of Ontario Sq. Realty Corp. v. LaPlant*, 100 A.D.3d 1469 (4th Dep't 2012) (same); *Lee v. Colley Group McMontebello*, 90 A.D.3d 1000 (2d Dep't 2011) (same)). These cases impose the requirement of filing a motion to obtain an extension of time to serve, which cannot be obtained merely requesting it in opposition papers. *Id.* There is no valid reason why the same requirement should not likewise be required when seeking to dismiss under CPLR § 306-b. In this respect, requiring a motion for a plaintiff to obtain an extension of time and not for a defendant seeking to dismiss would be patently unfair.

Here, defendants never filed any motion under CPLR § 306-b — or CPLR 3211(a)(8) — and, therefore, cannot rely on the failure to serve the original complaint as a ground for dismissal. Instead, for the same reason that relief under CPLR § 306-b was denied in the cases discussed above, defendants *merely requested this relief in their opposition papers* to plaintiff's motion (R. at 168 (¶¶ 16-19)). Also, as the dissent pointedly noted, allowing defendants to object to this failure in this manner would unfairly deprive plaintiff of appellate review. Furthermore, contrary to the majority's reasoning, this issue certainly is not

academic because the failure to serve the original pleading was its entire justification to disregard the actual commencement date, which was the crux of its timeliness holding. Accordingly, the failure to serve the original pleading cannot be relied on — in any manner — as a basis to dismiss this action because defendants never filed a motion under CPLR § 306-b or CPLR 3211(a)(8).

POINT III

THE AMENDED COMPLAINT IS CONTROLLING BECAUSE AN AMENDMENT WITHOUT LEAVE WAS PERMITTED UNDER A STRICT READING OF CPLR 3025(a) AND DEFENDANTS NEVERTHELESS WAIVED ANY OBJECTION TO THE AMENDED COMPLAINT.

Even though the majority discussed and analyzed the merits of the amended complaint, it nonetheless held that plaintiff had not properly amended her original complaint. However, CPLR 3025(a) permits a party to amend a pleading as a matter of right and without leave "at any time before the period for responding to it expires." N.Y. CPLR 3025(a) (McKinney's 2018). Also, even if a pleading is not properly amended, a party waives any right to object to the amendment by proceeding with the action as though the amended pleading is controlling. *See Nassau County v. Incorporated Village of Roslyn*, 182 A.D.2d 678, 679 (2d Dep't 1992). Here, the majority's holding that the amended complaint was not properly before the trial court was erroneous because: (1) plaintiff was permitted to

amend her complaint under a strict reading of CPLR 3025(a); and (2) defendants nonetheless waived any objection to the amended complaint.

A. An Amendment Without Leave Was Permitted Under a Strict Reading of CPLR 3025(a) Because Defendants' Time To Respond To the Original Complaint Had Not Yet Expired.

Under CPLR 3025(a), a party is entitled to amend a pleading as a matter of right and without leave "at any time before the period for responding to it expires." N.Y. CPLR 3025(a) (McKinney's 2018). Generally, depending on the manner of service, a defendant has to respond between 20 to 30 days from the date when a complaint is served. *Id.* 320(a). A defendant's deadline to respond, however, can be delayed for a number of reasons, but a delay generally does not detract from the unambiguous language of CPLR 3025(a) that allows a plaintiff to amend as of right before the response period expires. *See O'Keefe v. Baiettie*, 72 A.D.3d 916, 917 (2d Dep't 2010) (failure to serve the original complaint allowed the plaintiff to serve an amended complaint as of right); *STS Management Development v. New York State Dept. of Taxation and Finance*, 254 A.D.2d 409, 410 (2d Dep't 1998) (a motion under CPLR 3211 delayed the deadline to respond and thereby also extended the time to amend as of right).

Here, under a strict reading of the statutory text of CPLR 3025(a), plaintiff was permitted to amend her complaint as of right and without leave because defendants' time period to respond to the original complaint had not expired yet. This period had not expired because defendants had not yet been served with the original complaint (*see* R. at 157-58 (¶¶ 3-13)). Moreover, like the cases discussed above, this strict reading of the text of CPLR 3025(a) is not affected by an event or occurrence that delays the time within which defendants must respond to the original complaint. More specifically, the *O'Keefe* decision provides precedent for the proposition that a delay attributable to a failure to serve an original complaint should not detract from the right to amend that complaint under CPLR 3025(a).

The majority circumvents a strict reading of CPLR 3025(a) by relying on several decisions that seemingly use the time limit for service under CPLR § 306-b as a gauge by which to measure how long a plaintiff can delay service and then amend as of right due to that delay (App. at A7). These decisions, however, provide no reasoning for and some do not even adopt this approach, which also is not found in the text of CPLR 3025(a) or CPLR § 306-b. More importantly, this approach seemingly contravenes the literal text of CPLR 3025(a) because that provision allows an amendment as of right if the responding time period has not

expired, which it has not if the original complaint is never served. Actually, in the context of these provisions, this approach is illogical because a defendant's time period for responding would theoretically be the time period for service under CPLR § 306-b *plus* the time periods for responding under CPLR 320 — *i.e.*, 20 or 30 days depending on the manner of service.

Lastly, defendants likely will argue that strictly reading CPLR 3025(a) in this manner would allow an indefinite extension of time to amend because a plaintiff could always delay service. This argument, however, is academic because an improper delay in service is alone a ground for dismissal under either CPLR 3211(a)(8) — as an objection to personal jurisdiction in general — or under CPLR § 306-b — as an objection to the timeliness of service in particular. Thus, a plaintiff could not indefinitely extend the time to amend as of right because he or she could subject the entire action to dismissal by taking such an approach. Nevertheless, under CPLR 3025(a), plaintiff properly amended her original complaint because she amended it before defendants had to respond to it.

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B. Defendants Waived Any Objection To the Amendment of the Original Complaint Because They Failed To Reject It When They Moved Against It.

Precedent from the Appellate Divisions supports the proposition that the failure to obtain leave of court to amend a pleading is a "waivable defect," even when the amended pleading is "served . . . well beyond the period within which an amended pleading may be served as of right." *He-Duan Zheng v. American Friends of Mar Thoma Syrian Church of Malabar*, 67 A.D.3d 639, 640 (2d Dep't 2009); *Jordan v. Altagracia Aviles*, 289 A.D.2d 532, 533 (2d Dep't 2001). For example, in *He-Duan Zheng*, the Second Department affirmed a trial court's order denying a motion to dismiss an amended complaint that improperly joined another defendant. *He-Duan Zheng* , 67 A.D.3d at 640. The Second Department reasoned that the failure to obtain leave of court was waivable, and that the defendant had waived an objection on that ground because it had not raised that objection in its pre-answer motion to dismiss or its answer. *Id.* Moreover, the Second Department also held that an objection to the service of the pleading was an objection to personal jurisdiction that could not be cast as an objection to the failure to secure leave of court. *Id.*

Likewise, in *Jordan v. Altagracia Aviles*, the Second Department reversed a trial court's order that denied a defendant's motion for leave to serve an

amended answer nunc pro tunc. *Jordan*, 289 A.D.2d at 532-33. The Second Department held that the plaintiff had waived any objection to the defendant's failure to obtain leave of court before serving the amended answer. *Id.* at 533. More specifically, the plaintiff had waived any right to object to the amendment because she "retained" it and only objected on the ground of improper amendment when she opposed the defendant's motion for summary judgment. *Id.* Furthermore, the Second Department held that the plaintiff had waived this objection despite that the defendant "served her amended answer well beyond the period within which an amended pleading may be served as of right." *Id.*

Here, the facts are highly analogous to those in *He-Duan Zheng* and *Jordan* because defendants proceeded in this action as though the amended complaint was controlling. Specifically, defendants filed a motion against the amended complaint and based each of their arguments in that motion on the amended complaint (App. at A45-A55). For example, their timeliness arguments were based on the date that the amended complaint was filed — *i.e.*, May 21, 2015 (*id.* at A47, A48 (¶¶ 3, 7), A53 (¶¶ 3, 9)). In fact, even the majority acknowledged that "defendants clearly were taking the position that May 21, 2015 was the date on which plaintiff's claims were interposed" (*id.* at A7). Also, the City clearly argued

against the merits of the fifth cause of action, which was included only in the amended complaint (*id.* at A54 (¶¶ 16-17)).

Therefore, defendants clearly proceeded on the merits of this action as though the amended complaint was controlling and thereby waived any challenge under CPLR 3025(a), which they never even mentioned in their papers in the first place (App. at A45-A55). Moreover, this waiver is clear from reading the majority's opinion because it clearly analyzes the amended complaint, as opposed to the original complaint (*see generally id.* at A5-A8). Lastly, to the extent that it is relevant here, this Court should reject defendants' argument that they did not have any reason to know that the amended complaint, in fact, was an amended complaint because this argument simply is unbelievable for the reasons discussed above (Point II.A., supra). Accordingly, defendants waived any objection based on CPLR 3025(a) because they proceeded in the action as though the amended complaint was controlling with full knowledge — actual or constructive — of the existence of the original complaint.

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POINT IV

THE MAJORITY ERRED WHEN IT AFFIRMED THE DISMISSAL OF THE FOURTH CAUSE OF ACTION BECAUSE PLAINTIFF ALLEGED THAT SHE WAS DENIED THE PROCEDURAL PROTECTIONS AFFORDED BY THE CBA.

When affording both of the complaints a liberal construction, assuming all allegations in them are true, and affording plaintiff all reasonable inferences, she clearly has stated a claim for deprivation of due process because she alleged that the City failed to follow the procedures in the CBA. Generally, when deciding whether to dismiss a complaint under CPLR 3211(a)(7), the liberal standard is whether the plaintiff has a cause of action under any cognizable legal theory, rather than whether he or she has pled one. *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). More specifically, when applying this liberal standard, courts must apply the following three rules: (1) the allegations in the complaint must be afforded a liberal construction; (2) the allegations in the complaint must be accepted as true; and (3) the plaintiff must be afforded "the benefit of every possible inference." *E.g.*, *id.*; *accord. Goshen v. Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002).

With respect to a claim based on the deprivation of due process in the context of public employment, procedures provided for under a collective bargaining agreement can be sufficient to satisfy due process. *E.g.*, *Millon v.*

Coughlin, 147 A.D.2d 765, 766 (3d Dep't 1989). Importantly, however, a municipality's failure to follow those procedures or its impediment of a public employee from availing himself or herself of those procedures can constitute the deprivation of due process. *McMahon v. Bd. of Trustees of Village of Pelham Manor*, 1 A.D.3d 363, 363 (2d Dep't 2003). For example, the decision in *McMahon* involved a petition to challenge the denial of benefits under section 207-a of the General Municipal Law. *Id.* Although the municipality had entered into a collective bargaining agreement that set forth procedures to apply for and to determine those benefits, the municipality did not follow those procedures when denying the application at issue. *Id.* Accordingly, the Appellate Division upheld an award of benefits to the petitioner. *Id.*

Here, the *20-plus-page*, *124-paragraph*, *verified* complaints include ample allegations — which *must be assumed as true* — that defendants failed to follow the procedures in the CBA and even deprived plaintiff of those procedures (*see generally* App. at A20-A41). Moreover, these allegations are not conclusory or vague, but, instead, identify specific instances when this deprivation occurred. In particular, the following allegations are included in the complaints:

- The City retaliated against plaintiff for successfully challenging a reassignment, which is supported by the fact that she was suspended after that challenge without the imposition of any new charges (App. at A23-A24 (¶¶ 17-27, 29));

- The City retaliated against plaintiff for successfully challenging a suspension, which is supported by the fact that she was re-suspended on the same date that she filed an Article 75 proceeding to confirm the arbitration award in her favor (*id.* at A23, A24 (¶¶ 24, 30)).

- Plaintiff was not informed that six charges — arising from conduct that occurred between 2009 and 2012 — against her were being submitted to a triage hearing in or around June of 2014 and she was not allowed to attend that hearing (*id.* at A27, A30 (¶¶ 47, 64, 66));

- Plaintiff was deprived of effective, competent representation in the triage hearing in or around June of 2014 because various charges were settled without her consent or knowledge, she was not consulted prior to the hearing, witnesses were not interviewed or prepared to testify on her behalf in the hearing, statements supporting charges were not scrutinized, the City's witnesses were not interviewed, and the hearing officer was not informed that several underlying criminal charges against plaintiff had been dismissed (*id.* at A28-A29, A30 (¶¶ 50-58, 64, 66));

- The City arbitrarily chose to withhold one charge from the triage hearing and to submit that charge to a second, separate hearing in front of the same hearing officer in order to argue to that officer that plaintiff had committed another violation even though the officer had just imposed penalties on her for other violations (*id.* at A32 (¶ 79));

- At the second triage hearing in or around July of 2014, plaintiff was not allowed to be represented by her own counsel and was not allowed to testify in her own defense (*id.* at A31 (¶¶ 74-75)); and

- Plaintiff was deprived of effective, competent representation in the second triage hearing because she was not allowed to testify in her own defense, crucial evidence in the form of telephone logs was not presented on her behalf to the hearing officer, a witness was not allowed to testify on her behalf, the hearing officer at this hearing was the same hearing officer who had just ruled on six other charges in a triage session that had occurred approximately one month earlier, and this hearing officer still was not informed that several underlying

criminal charges against plaintiff had been dismissed (*id.* at A30-A32 (¶¶ 68-78)).

Plaintiff alleged that each of these specific occurrences constituted a clear violation of the CBA (*id.* at A27, A30, A32 (¶¶ 48, 64, 66, 81)). Hence, irrespective of the procedures provided for in the CBA, plaintiff was denied those procedures (*id.*). Therefore, assuming these allegations to be true and affording plaintiff the benefit of every reasonable inference, she clearly has stated a claim that the City failed to adhere to the due-process protections under the CBA.

Importantly, the City never has offered any ***meaningful*** analysis for why these allegations do not constitute a deprivation of due process or, more particularly, why they do not allege a failure to follow the CBA. Instead, the City merely has suggested that it allowed plaintiff the ability to exercise these rights, but she directly contradicted any such suggestion in a ***verified*** complaint.[11] At best, the City's arguments in this respect create questions of fact that are inappropriate for resolution under CPLR 3211(a)(7). More importantly, in order to

[11] From an evidentiary perspective, the amended complaint clearly outweighs the conclusory affirmations from defendants' attorneys who have no first-hand knowledge of whether plaintiff was prevented from availing herself of the procedures under the CBA. *See Sanchez v. Nat'l R.R. Passenger*, 21 N.Y.3d 890, 891-92 (2013) (analyzing N.Y. CPLR 105(u) (McKinney's 2018), which the Court held to "allow[] [a] verified complaint . . . to be considered as [an] affidavit[]"); *Conti v. City of Niagara Falls Water Bd.*, 82 A.D.3d 1633, 1634 (4th Dep't 2011) ("[i]t is well established [] that an affirmation submitted by an attorney who has no personal knowledge of the facts is without evidentiary value").

disregard these points, the trial court and the Appellate Division must have presumed that the allegations in the complaint were false and must have drawn inferences against plaintiff, which clearly was erroneous. Nonetheless, since plaintiff's allegations support a claim for deprivation of due process, since these allegations must be assumed to be true, and since plaintiff must be afforded all reasonable inferences, the dismissal of the fourth cause of action for failure to state a claim was erroneous.

CONCLUSION

Therefore, the first and second causes of action should be reinstated because they were timely commenced pursuant to the commencement-by-filing system, and the majority's emphasis on service was incorrect. Additionally, defendants failed to preserve any objection to personal jurisdiction or service because they did not raise it as a ground in their notices of motions to dismiss under CPLR 3211(a). Also, to the extent that it is relevant or necessary, plaintiff properly amended her complaint and defendants nevertheless waived any objection to that amendment. Lastly, the fourth cause of action should be reinstated because accepting the allegations in the verified complaints as true and drawing all reasonable inferences in plaintiff's favor, she clearly has pled a claim.

Therefore, plaintiff respectfully requests that this Court: (1) reverse the dismissal of the first, second, and fourth causes of action; (2) remit the matter to the trial court; and (3) grant plaintiff such other and further relief that this Court deems just and proper.

Dated: October 24, 2018
Saratoga Springs, New York

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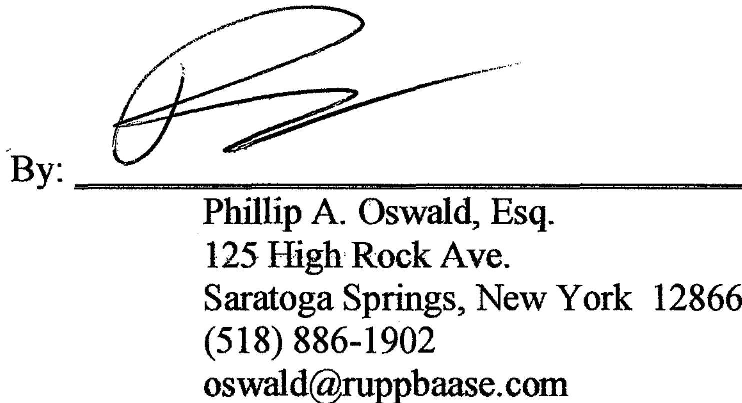

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