ALL IS NOT FORGIVEN—THE APPLICATION OF CPLR 2001 TO *MENDON PONDS* DEFECTS

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I. INTRODUCTION

The purpose of this article is to review the courts' application of CPLR 2001, as amended, in the context of commencement time errors, which may occur when filing an action or when serving process. CPLR 2001, entitled "[m]istakes, omissions, defects and irregularities"[1] is also known as the "Forgiveness Statute"[2] since it allows a court to correct or ignore various types of procedural errors that may occur throughout the litigation.[3] It provides in relevant part:

> At any stage of an action, *including the filing of a summons with notice, summons and complaint or petition to commence an action*, the court may permit a mistake, omission, defect or irregularity, *including the failure to purchase or acquire an index number or other mistake in the filing process*, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.[4]

The aim of the legislature in granting the court the power of forgiveness over certain procedural missteps was to prevent

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[1] N.Y. C.P.L.R. 2001 (McKinney 2011).

[2] *See* Patrick M. Connors, *Two Informative Opinions on 'Forgiveness' Statute, Among Other Rulings*, N.Y. L.J., Aug. 22, 2011, at S2, *available at* http://www.law.com/jsp/article.jsp?id=1202511386134&slreturn=1.

[3] *See* N.Y. C.P.L.R. 2001 (McKinney 2011) (noting a variety of procedures at the outset of litigation that can be corrected by proper use of the statute).

[4] *Id.* (emphasis added).

otherwise valid causes of action from being dismissed on technical, nonprejudicial grounds, thereby ensuring that such actions could proceed to a final resolution on the merits.[5]

Notably, prior to the 2007 amendment, CPLR 2001 provided authority for the court to correct nonprejudicial errors at any time during an action except for those errors occurring at the time of commencement.[6] These commencement time defects are now known as "*Mendon Ponds*" defects and are so named after a well-known 2002 Court of Appeals case.[7] The result was that cases were dismissed on technicalities under the theory that such defects impacted the court's subject matter jurisdiction.[8] Because of this, the New York State Legislature saw fit to amend the statute in 2007 to address these nonprejudicial commencement time errors.[9]

Interestingly, despite the 2007 amendment to CPLR 2001, *Mendon Ponds*-type defects can still result in the dismissal of otherwise meritorious cases due to errors at the commencement stage of an action.[10] Since *Mendon Ponds* defects deprive the court of subject matter jurisdiction, it is critical that practitioners

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[5] *See* N.Y. Bill Jacket, 2007 S.B. 3563, 230th Leg. Reg. Sess. (2007), ch. 529, at 5 (stating that the purpose of the legislation is to grant the court discretion to "correct or ignore" commencement errors that are not prejudicial against the opposing party).

[6] *See id.* The legislature referenced its prior "policy goal of eliminating the dismissal of cases because of nonprejudicial defects in such commencement" but also noted that recent court decisions clearly showed that "further statutory revision [was] in order to fully foreclose" such dismissals. *Id.*

[7] Prior to the 2007 amendment to CPLR 2001, Mendon Ponds Neighborhood Ass'n v. Dehm and its progeny held that commencement time defects impacted the court's subject matter jurisdiction such that it was not within the court's discretion to correct the error under CPLR 2001. *See* Mendon Ponds Neighborhood Ass'n v. Dehm, 98 N.Y.2d 745, 747, 781 N.E.2d 883, 884, 751 N.Y.S.2d 819, 820 (2002); *see also* Miller v. Waters, 51 A.D.3d 113, 117, 853 N.Y.S.2d 183, 186 (App. Div. 3d Dep't 2008) ("[I]t is clear from the legislative history that the statute was not intended to allow courts to create subject matter jurisdiction where it does not exist."). In *Mendon Ponds*, the attorney for petitioner in an Article 78 proceeding filed the action with the Chief Clerk of the Monroe Supreme and County Courts instead of the county clerk. *Mendon Ponds*, 98 N.Y.2d at 746, 781 N.E.2d at 883, 751 N.Y.S.2d at 819. The Court of Appeals held that the failure to file with the proper clerk was deemed to divest the court of subject matter jurisdiction and that such a defect was not waivable, leading to the dismissal of the action. *Id.* at 747, 781 N.E.2d at 884, 751 N.Y.S.2d at 820.

[8] *See* N.Y. Bill Jacket, 2007 S.B. 3563, 230th Leg. Reg. Sess. (2007), ch. 529, at 5 (referencing cases dismissed on such technicalities); *see also Miller*, 51 A.D.3d at 116, 853 N.Y.S.2d at 185 (stating that prior to the 2007 amendment, failure to follow certain procedures were viewed by the courts as jurisdictional defects that demanded a dismissal of the case).

[9] *See generally* N.Y. Bill Jacket, 2007 S.B. 3563, 230th Leg. Reg. Sess. (2007), ch. 529, at 5 (asserting that the number of cases dismissed on nonprejudicial technicalities demonstrates the need to amend CPLR 2001).

[10] *See Miller*, 51 A.D.3d at 118, 853 N.Y.S.2d at 187 (holding that the trial court lacked authority to correct the pertinent *Mendon Ponds* defect, and thus should have dismissed the petition).

understand the scenarios in which the Forgiveness Statute does not apply.[11] In order to fully understand when CPLR 2001 will forgive a commencement time error, a basic understanding of the statutes governing the commencement process is important.

II. NO NEED FOR FORGIVENESS—PROPERLY FOLLOWING THE STATUTORY ROADMAP WHEN COMMENCING AN ACTION.

CPLR 2001 as amended now mandates the correction of any nonprejudicial errors that may occur during the commencement of an action.[12] Despite this statutory language of forgiveness, it is still critical that a plaintiff commencing an action undertake the correct steps when filing their initial papers, whether it is a summons and complaint, a summons with notice, or a petition, since mistakes in the filing process may be deemed jurisdictional in nature and subject the case to dismissal.[13] In order to properly commence an action one must first be familiar with the directives set out in CPLR 304[14] and CPLR 2102.[15] In addition to properly commencing an

[11] Outside the context of commencement filing errors, after the 2007 amendment courts have generously invoked the Forgiveness Statute to forgive numerous types of mistakes. *See* Siedlecki v. Doscher, 33 Misc. 3d 18, 20, 931 N.Y.S.2d 203, 205 (App. Term 2011) (permitting the belated filing of the proof of service in a summary holdover proceeding); Am. Express Travel Related Servs. Co. v. Zalmen Reiss & Assocs., Inc., No. 1820/11, 2011 WL 1844067, at *4 (N.Y Sup. Ct. Kings County May 17, 2011) (allowing an out-of-state affidavit in support of a cross-motion to be corrected nunc pro tunc); Pike Co. v. Cnty. of Albany, 75 A.D.3d 983, 986, 905 N.Y.S.2d 371, 373–74 (App. Div. 3d Dep't 2010) (granting the timely filing of a third-party complaint in the wrong county after an order was entered changing the venue to a different county).

[12] N.Y. C.P.L.R. 2001 (McKinney 2011) (stating that if a party makes an error that does not prejudice a party's "substantial right," then the court shall disregard the error).

[13] *See Miller*, 51 A.D.3d at 118, 853 N.Y.S.2d at 186–87 (determining that the amended CPLR 2001 is still not meant to forgive jurisdictional errors).

[14] C.P.L.R. 304.

(a) An action is commenced by filing a summons and complaint or summons with notice in accordance with rule twenty-one hundred two of this chapter. A special proceeding is commenced by filing a petition in accordance with rule twenty-one hundred two of this chapter. Where a court finds that circumstances prevent immediate filing, the signing of an order requiring the subsequent filing at a specific time and date not later than five days thereafter shall commence the action.

(b) Notwithstanding any other provision of law, such filing may be accomplished by facsimile transmission or electronic means, as defined in subdivision (f) of rule twenty-one hundred three of this chapter, where and in the manner authorized by the chief administrator of the courts by rule.

(c) For purposes of this section, and for purposes of section two hundred three of this chapter and section three hundred six-a of this article, filing shall mean the delivery of the summons with notice, summons and complaint or petition to the clerk of the court in the county in which the action or special proceeding is brought or any other person designated by the clerk of the court for that purpose. At the time of filing, the filed papers shall be date stamped by the clerk of the court who shall file them and maintain

action, the plaintiff must also serve a defendant pursuant to Article 3 of the CPLR, which covers jurisdiction.[16]

Beginning with CPLR 304, the plaintiff must file a summons and complaint, summons with notice, or a petition in accordance with CPLR 2102.[17] In addition to filing with a clerk in the courthouse, a plaintiff can also file an action by "facsimile transmission" or through "electronic means."[18] Once filed, the papers are date stamped by the clerk of court and assigned an index number.[19] The statute further requires that a fee shall be paid or "[s]uch filing shall not be accepted."[20] In addition to knowing what to file, the plaintiff also needs to know where to file and with whom.[21] Looking

a record of the date of the filing and who shall return forthwith a date stamped copy, together with an index number, to the filing party, except where filing is by electronic means. Such filing shall not be accepted unless any fee required as specified in section eight thousand eighteen of this chapter has been paid. Where filing is by electronic means, any fee required shall be paid in the time and manner authorized by the chief administrator of the court by rule.

(d) Where filing is by facsimile transmission, the clerk of the court need only return a date stamped copy of the first page of the papers initiating the lawsuit, together with the index number.

(e) Where filing is by electronic means, the clerk shall, in accordance with rules promulgated by the chief administrator, forthwith notify the filing party of the index number and the date and time of filing.

(f) A confirmation record produced by the filing party's facsimile machine or computer and an affidavit of filing by the filing party, shall be prima facie evidence that the filing party transmitted documents consistent with the date, time and place appearing on the confirmation record.

[15] C.P.L.R. 2102.

(a) Except where otherwise prescribed by law or order of court, papers required to be filed shall be filed with the clerk of the court in which the action is triable. In an action or proceeding in supreme or county court and in a proceeding not brought in a court, papers required to be filed shall be filed with the clerk of the county in which the proceeding is brought.

(b) A paper filed in accordance with the rules of the chief administrator or any local rule or practice established by the court shall be deemed filed. Where such rules or practice allow for the filing of a paper other than at the office of the clerk of the court, such paper shall be transmitted to the clerk of the court.

(c) A clerk shall not refuse to accept for filing any paper presented for that purpose except where specifically directed to do so by statute or rules promulgated by the chief administrator of the courts, or order of the court.

[16] *See* Stanley Agency, Inc. v. Behind the Bench, Inc., No. 7661/08, 2009 WL 975790, at *4–6 (Sup. Ct. Kings County Apr. 13, 2009) for a thorough discussion on service of process under certain statutory provisions in the CPLR. In deciding a motion to dismiss for lack of personal jurisdiction the court analyzes CPLR section 312-a, service on a corporation via first class mail, CPLR section 311(a), personal service on a corporation, and CPLR section 308(2), personal service on a natural person. *Id.* at *5–8.

[17] C.P.L.R. 304(a).

[18] *Id.* § 304(b).

[19] *Id.* § 304(c).

[20] *Id.*

[21] For an interesting discussion on the identity of the clerk of court, see DAVID D. SIEGEL,

to CPLR 2102, the plaintiff is directed to file "with the clerk of the court in which the action is triable."[22] Once the clerk of the court is located, the plaintiff is deemed to have properly filed the papers as long as they are filed in "accordance with the rules of the chief administrator or any local rule or practice established by the court."[23] CPLR section 2102 further states that "[a] clerk shall not refuse to accept for filing any paper presented for that purpose . . . ."[24]

Read together, CPLR sections 304 and 2102 seem to provide a simple road map for a plaintiff to follow when filing an action. The steps are simple—prior to the expiration of the statute of limitations, the plaintiff simply takes the commencement papers to a "clerk" in the courthouse and pays the requisite filing fee, thereby commencing the action.[25] Subsequent to filing the initial papers, the plaintiff must then obtain jurisdiction over the defendant.[26] CPLR sections 301 and 302 outline the basis for obtaining jurisdiction,[27] while service is addressed in CPLR sections 307

NEW YORK PRACTICE § 63, at 94–96 (4th ed. 2005). Professor Siegel correctly warns that despite section 304(c) being amended to clarify who the clerk of court is and requiring initiatory papers to be filed with that clerk "or any other person designated by the clerk of the court for that purpose," a plaintiff ought to be sure she has found the proper clerk in the courthouse while at the same time being fully familiar with any rule of the Chief Administrator and other local rules and practices followed in the particular county because the clerk can no longer refuse to accept papers presented for filing, except in certain instances, which are highlighted in Uniform Rule 202.5(d). *Id.* § 63, at 95. The same section also has a helpful discussion on the amendments to CPLR 304 and CPLR 2102, pointing out that such amendments were intended to simply the filing process. *Id.* For further discussion see, Professor Siegel's "Three Cheers for the Meddlesome Clerk: Intrusive Acts Can Save the Plaintiff's Case at Commencement Time," wherein he points out "how beneficial it might have been for the plaintiff or petitioner if the clerk had been less receptive to the papers tendered, and more critical, or even cantankerous," especially when filing initial papers in a special proceeding or when the statute of limitations is running out. David D. Siegel, *Three Cheers for the Meddlesome Clerk: Intrusive Acts Can Save the Plaintiff's Case at Commencement Time (Part 2—Concluded)*, 90 SIEGEL'S PRAC. REV. 1 (Dec. 1999); *see also* David D. Siegel, *Three Cheers for the Meddlesome Clerk: Intrusive Acts Can Save the Plaintiff's Case at Commencement Time (Part 1)*, 89 SIEGEL'S PRAC. REV. 1 (Nov. 1999) (discussing the clerk's tendency, at this time, to inspect and reject papers at filing).

[22] C.P.L.R. 2102(a).

[23] *Id.* § 2102(b).

[24] *Id.* § 2102(c); *see also* Gehring v. Goodman, 25 Misc. 3d 802, 804, 884 N.Y.S.2d 646, 647–48 (Sup. Ct. N.Y. County 2009) (holding that there is neither a statute nor rule which directs the county clerk to refuse to accept a "copy" of the document as opposed to an original for filing); Johnson v. Ciarpelli, 71 A.D.3d 1482, 1483, 896 N.Y.S.2d 752, 752 (App. Div. 4th Dep't 2010) (holding that the county clerk is authorized to accept for filing a summons and complaint, while also having the authority to assign an index number to the case being filed).

[25] *See* C.P.L.R. 2102, 304.

[26] *See id.* §§ 301–302.

[27] *Id.*

through 316.[28] In the broadest sense, service of process is accomplished by properly serving a summons with a complaint or notice upon the defendant within or without the state.

It certainly benefits the practitioner to be familiar with the statutory provisions discussed above. A defendant can raise an objection to an error made by the plaintiff at either the commencement stage or when serving process and may seek to have the case dismissed on jurisdictional grounds. As a plaintiff, one can either avoid missteps at this critical juncture or in the event such an error does occur, move pursuant to CPLR 2001 to have the case reinstated for resolution on the merits. Despite this apparently simple filing process and a generous forgiveness statute, the case law will show that numerous valid causes of action still somehow manage to fall into a *Mendon Ponds* trap at the commencement stage, resulting in a dismissal on jurisdictional grounds.

III. PRE-FORGIVENESS—THE BACKGROUND OF THE 2007 AMENDMENT TO CPLR 2001.

In 2007, after a series of Court of Appeals cases resulting in outright dismissals of otherwise meritorious causes of action, the New York State Legislature amended CPLR section 2001.[29] The stated purpose was "to amend the civil practice law and rules, in relation to the correction of harmless errors in the commencement

[28] N.Y. C.P.L.R. 307–16 (McKinney 2010).

[29] N.Y. C.P.L.R. 2001 (McKinney 2011). In addition, the case law cited a review of the Sponsor's Memo, which essentially adopted a section of the New York State Advisory Committee on Civil Practice's 2007 Report "Giving the Court Discretion to Correct or Ignore Harmless Errors in the Commencement of an Action (CPLR 2001)" as a worthwhile exercise. *See, e.g.*, Giaquinto v. Long Island Rubbish Removal E. Corp., 32 Misc. 3d 262, 264, 921 N.Y.S.2d 520, 522 (Sup. Ct. Suffolk County 2011); REPORT OF THE ADVISORY COMMITTEE ON CIVIL PRACTICE TO THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NEW YORK 24–26 (2007), http://www.nycourts.gov/ip/judiciaryslegislative/CivilPractice_07.pdf. The Sponsor saw a need to revise CPLR 2001 in order "to harmonize it with the underlying purpose of chapter 216 of the Laws of 1992." N.Y. Bill Jacket, 2007 S.B. 3563, 230th Leg. Reg. Sess. (2007), ch. 529, at 5. In 1992 the legislature, in an attempt to raise revenue, required the payment of a filing fee for an index number before an action could proceed. *Id.* This process of filing was known as "commencement by filing." *Id.* In order to "further [a] policy goal of eliminating the dismissal of cases because of non-prejudicial defects" in the commencement process, additional changes were made to the CPLR. *Id.* When looking at three cases cited in the sponsor's memorandum, identified and discussed more fully below, the sponsor determined "that further statutory revision [was] in order to fully foreclose dismissal of actions for technical, non-prejudicial defects." *Id.* The sponsor also found it "important to emphasize that this measure would not excuse a complete failure to file within the statute of limitations. [Further], in order to properly commence an action, a plaintiff or petitioner would still have to actually file a summons and complaint or a petition. A bare summons . . . would not constitute a filing." *Id.*

of an action."[30] The legislative history reveals that such defects must be "harmless errors in the commencement of an action."[31]

Prior to the amendment of CPLR section 2001, all types of commencement errors were deemed jurisdictional defects and dismissed outright.[32] Still, notwithstanding its charitable language and the intent of the legislature, CPLR section 2001, as currently interpreted through case law, is not able to cure each and every mistake, omission, defect, and irregularity at any stage of the litigation.[33] This is especially true of certain mistakes made in the filing process at the commencement of an action as well as when serving process, both of which will be discussed in Part IV.

Specifically, the amendment was offered in response to three cases which held that defects in both the commencement of an action or the payment of an index number fee will result in the outright dismissal of the action so long as a timely objection is made. *Harris v. Niagara Falls Board of Education*,[34] *Gershel v. Porr*,[35] and *Fry v. Village of Tarrytown*[36]—each of these cases cited in the Sponsors' Memorandum[37]—involved special proceedings where an application was made to the court *prior* to commencing an action and the plaintiff or petitioner had already paid a fee, had an index number assigned by the court, and a return date calendared.[38]

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[30] N.Y. Bill Jacket, 2007 S.B. 3563, 230th Leg. Reg. Sess. (2007), ch. 529, at 5.

[31] *Id.*

[32] David D. Siegel, *Amendment Enables Non-Prejudicial Errors at the Commencement of Actions to be Corrected, Overruling Line of Rigid Cases*, 188 SIEGEL'S PRAC. REV. 1 (Aug. 2007).

> There have been many dismissals in New York because of innocent and totally unprejudicial mistakes made at the commencement of an action or proceeding. . . .
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> . . . The difficulty is that [CPLR 2001] was held to be inapplicable to mistakes made at the very commencement of the action, because at that point they were deemed "jurisdictional" defects, barring—according to the cases—mere correction under CPLR 2001, and necessitating dismissal.

Id.

The three cases that Professor Siegel is referring to—*Harris v. Niagara Falls Board of Education*, *Gershel v. Porr*, and *Fry v. Village of Tarrytown*—are discussed below in the analysis of the case law leading up to the 2007 amendment. Harris v. Niagara Falls Bd. of Educ., 6 N.Y.3d 155, 844 N.E.2d 753, 811 N.Y.S.2d 299 (2006); Gershel v. Porr, 89 N.Y.2d 327, 675 N.E.2d 836, 653 N.Y.S.2d 82 (1996); Fry v. Vill. of Tarrytown, 89 N.Y.2d 714, 680 N.E.2d 578, 658 N.Y.S.2d 205 (1997)

[33] Siegel, *supra* note 33, at 1.

[34] *Harris*, 6 N.Y.3d 155, 844 N.E.2d 753, 811 N.Y.S.2d 299.

[35] *Gershel*, 89 N.Y.2d 327, 675 N.E.2d 836, 653 N.Y.S.2d 82.

[36] *Fry*, 89 N.Y.2d 714, 680 N.E.2d 578, 658 N.Y.S.2d 205.

[37] N.Y. Bill Jacket, 2007 S.B. 3563, 230th Leg. Reg. Sess. (2007), ch. 529, at 5.

[38] *See Harris*, 6 N.Y.3d at 157, 844 N.E.2d at 754, 811 N.Y.S.2d at 300; *Gershel*, 89 N.Y.2d at 331, 675 N.E.2d at 839, 653 N.Y.S.2d at 85; *Fry*, 89 N.Y.2d at 716, 680 N.E.2d at 579, 658 N.Y.S.2d at 206.

In *Harris*, the Court of Appeals upheld the Appellate Division's dismissal of the action because the plaintiff failed to comply with the commencement-by-filing system when he used the index number from his prior special proceeding.[39] Notably, the Court of Appeals confirmed "that a defect in compliance with the commencement-by-filing system does not deprive a court of subject matter jurisdiction and, accordingly, is waived absent a timely objection by the responding party."[40] Since the defendant in *Harris* timely objected to the plaintiff's defective filing, the "action was subject to dismissal."[41]

In *Gershel v. Porr*, the issue on appeal was whether the petitioner had satisfied the requirements of New York's commencement-by-filing system governing a special proceeding.[42] In *Gershel*, the petitioner withdrew an order to show cause he had originally filed and then attempted to commence his action using the same index number by serving a notice of petition without filing a new set of papers or paying another filing fee.[43] The petitioner's failure to obtain a new index number and start again doomed the case despite the fact that the respondent was not prejudiced.[44] The Court of Appeals held that the "petitioner never properly commenced the special proceeding and the attempted service was a nullity."[45] Manifestly, the Court of Appeals held fast to the "statutorily prescribed sequence," which must be followed when commencing a special proceeding, and further insisted, "that the papers served must conform . . . to the papers filed."[46]

Finally, in *Fry v. Village of Tarrytown*, the petitioner had failed to comply with the CPLR.[47] After paying the filing fee, he filed only the unexecuted order to show cause and petition with the clerk of the court, never filing a signed copy of the order.[48] Interestingly enough, the filing procedure followed in *Fry* was in accordance with

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[39] *Harris*, 6 N.Y.3d at 159, 844 N.E.2d at 755, 811 N.Y.S.2d at 301.

[40] *Id.* at 158, 844 N.E.2d at 755, 811 N.Y.S.2d at 301 (citing *Fry*, 89 N.Y.2d at 720–22, 680 N.E.2d at 581–83, 658 N.Y.S.2d at 208–10).

[41] *Harris*, 6 N.Y.3d at 159, 844 N.E.2d at 755, 811 N.Y.S.2d at 301.

[42] *Gershel*, 89 N.Y.2d at 328, 675 N.E.2d at 837, 653 N.Y.S.2d at 83.

[43] *Id.* at 331, 675 N.E.2d at 839, 653 N.Y.S.2d at 85.

[44] *See id.* at 332, 675 N.E.2d at 839, 653 N.Y.S.2d at 85.

[45] *Id.* at 329, 675 N.E.2d at 837, 653 N.Y.S.2d at 83.

[46] *Id.* at 332, 675 N.E.2d at 839, 653 N.Y.S.2d at 85.

[47] Fry v. Vill. of Tarrytown, 89 N.Y.2d 714, 716, 680 N.E.2d 578, 579, 658 N.Y.S.2d 205, 206 (1997).

[48] *Id.*

the court's own practices.[49] The Court of Appeals determined that the trial court had improperly dismissed the proceeding sua sponte because the respondents had waived any objection to the defective filing by appearing in the proceeding and litigating its merits without raising an objection.[50] Presumably, had the respondents objected to this filing, dismissal would have been proper even though the petitioner filed the documents correctly.

The sponsor specifically noted that the amendment was not "intend[ed] to overrule the Court of Appeals' precedent in *Parker v. Mack*."[51] In *Parker*, the plaintiff served only a summons and the court held that "[n]o action is commenced by the service of [the] summons alone which neither contains nor has attached to it . . . the nature of the action."[52] Further the sponsors stated that the purpose of the measure was "to clarify that a mistake in the method of filing, AS OPPOSED TO A MISTAKE IN WHAT IS FILED, is a mistake subject to correction in the court's discretion."[53] Interestingly enough, the Court of Appeals' infamous *Mendon Ponds* case is not among those mentioned along with the trio of cases above, and as such was not directly overruled by the 2007 amendment.

IV. THE NEED FOR FORGIVENESS—BEWARE OF THE LINGERING EFFECT OF A *MENDON PONDS* DEFECT.

Despite the 2007 amendment to CPLR section 2001, *Mendon Ponds* defects continue to trap the unwary practitioner. The holding in *Mendon Ponds* limiting CPLR section 2001's largesse was specifically reinforced in *Miller*.[54] In *Miller*, the plaintiff failed to file with the proper clerk and did not pay the filing fee.[55] Interestingly, the defendant in *Miller* "acquiesced to these deficiencies by failing to object or move for dismissal on these grounds in his answer and by fully participating in the litigation on the merits" for over two years.[56] However, the court held that the

[49] *See* Brief of Petitioner-Appellant at 4–5, Fry v. Vill. of Tarrytown, 89 N.Y.2d 714 (1997) (No. 94-05585).

[50] *Fry*, 89 N.Y.2d at 722, 680 N.E.2d at 582–83, 658 N.Y.S.2d at 209–10.

[51] N.Y. Bill Jacket, 2007 S.B. 3563, 230th Leg. Reg. Sess. (2007), ch. 529, at 6.

[52] Parker v. Mack, 61 N.Y.2d 114, 115, 460 N.E.2d 1316, 1316, 472 N.Y.S.2d 882, 882 (1984).

[53] N.Y. Bill Jacket, 2007 S.B. 3563, 230th Leg. Reg. Sess. (2007), ch. 529, at 6 (capitals in original).

[54] Miller v. Waters, 51 A.D.3d 113, 116, 853 N.Y.S.2d 183, 185 (App. Div. 3d Dep't 2008).

[55] *Id.* at 115, 853 N.Y.S.2d at 184.

[56] *Id.* at 115, 853 N.Y.S.2d at 184–85.

failure to properly file the initial papers with the county clerk was "a nonwaivable jurisdictional defect rendering the proceeding a nullity."[57] The court noted that, while the language of the statute was broad and forgiving, it must nevertheless adhere to the "precedent establishing that a *Mendon Ponds* defect impacts the court's subject matter jurisdiction."[58] In strictly adhering to this precedent, the court held that a *Mendon Ponds* defect is not the type of error that falls within the court's discretion to correct under CPLR section 2001.[59]

Since the Forgiveness Statute was amended, courts have continued to dismiss cases where mistakes in the filing process and service on the defendant are deemed to contain "nonwaivable jurisdictional defects."[60] For example, in *Reyes-Peralta v. Ngernak*,[61] plaintiff's action was dismissed for failure to file a summons and complaint or summons with notice after purchasing an index number.[62] Plaintiff served the unfiled pleading and defendants appeared in the action by timely serving an answer.[63] Defendants then moved to dismiss the action under CPLR section 3211(a)(2) based upon the lack of subject matter jurisdiction.[64] In support of the motion, the defendants "presented prima facie proof that no summons with notice or summons and complaint was ever filed in this case."[65] Ultimately, the court held that a "*nonfiling*, as opposed to defects in the filing process . . . remains a nonwaivable jurisdictional defect."[66]

In *Weisman v. Cohen*,[67] the plaintiff's action was dismissed for the failure to file a summons with notice or summons and complaint prior to service on the defendant.[68] In *Weisman*, the plaintiff served the defendant with a summons, but as of the date of service had never actually filed a summons with notice or a verified complaint

[57] *Id.* at 116, 853 N.Y.S.2d at 185 (citations omitted).
[58] *Id.* at 117, 853 N.Y.S.2d at 186.
[59] *Id.*
[60] *Id.* at 116, 853 N.Y.S.2d at 185 (citations omitted).
[61] Reyes-Peralta v. Ngernak, 30 Misc. 3d 168, 909 N.Y.S.2d 901 (Sup. Ct. Nassau County 2010).
[62] *Id.* at 174, 909 N.Y.S.2d at 905.
[63] *Id.* at 172, 909 N.Y.S.2d at 904.
[64] *See id.* at 169, 909 N.Y.S.2d at 902.
[65] *Id.* at 170, 909 N.Y.S.2d at 903.
[66] *Id.* at 171, 909 N.Y.S.2d at 904 (emphasis added).
[67] Weisman v. Cohen, No. 04-2062, 2010 WL 3036995 (Sup. Ct. Ulster County Feb. 23, 2010).
[68] *Id.* at *1–2.

with the county clerk.[69] In addition, the summons that was served did not meet the basic requirements for a summons with notice because it failed to give the requisite notice of the nature of the proceeding or the relief being sought.[70] The court also noted "that the nature of the alleged defect compels a finding that it is jurisdictional and not within the [c]ourt's discretion to disregard" under CPLR section 2001.[71]

Finally, in *Giaquinto v. Long Island Rubbish Removal Eastern Corp.*,[72] the plaintiff's motion for summary judgment in lieu of a complaint was dismissed for lack of jurisdiction.[73] The court definitively concluded that "[i]t is the filing and service of the summons with notice or the summons and accompanying pleading or motion that invokes the court's jurisdiction . . . ."[74] Again, the court made clear that a defect in filing may be waived if a party "appears and litigates on the merits."[75] However, a "*nonfiling* of the papers necessary to institute the action is a nonwaivable, jurisdictional defect rendering the action or proceeding a nullity."[76] In addition, the court stressed that, "since the jurisdictional defect relates to commencement of the action and not to service of process, the defendant had no obligation to move pursuant to CPLR 3211(e)."[77]

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[69] *Id.* at *1.

[70] *Id.*

[71] *Id.* (citing N.Y. C.P.L.R. 304 (McKinney 2011); C.P.L.R. 2001).

[72] Giaquinto v. Long Island Rubbish Removal E. Corp., 32 Misc. 3d 262, 921 N.Y.S.2d 520 (Sup. Ct. Suffolk County 2011).

[73] *Id.* at 263–64, 921 N.Y.S.2d at 521–22.

[74] *Id.* at 263, 921 N.Y.S.2d at 521.

[75] *Id.*

[76] *Id.* (citing Miller v. Waters, 51 A.D.3d 113, 853 N.Y.S.2d 183 (App. Div. 3d Dep't 2008); Sangiacomo v. City of Albany, 302 A.D.2d 769, 754 N.Y.S.2d 769 (App. Div. 3d Dep't 2003)).

[77] *Giaquinto*, 32 Misc. 3d at 263, 921 N.Y.S.2d at 521 (citing *Sangiacomo*, 302 A.D.2d at 772, 754 N.Y.S.2d at 772; David D. Siegel, *Practice Commentaries*, C3211:60, *in* N.Y. C.P.L.R. 3211 (McKinney 2004)); *see* N.Y. C.P.L.R. 3211(e) (McKinney 2011) ("[A]n objection that the summons and complaint . . . was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading."); Horvath v. Progressive Cas. Ins. Co., 24 Misc. 3d 194, 882 N.Y.S.2d 822 (Dist. Ct. Nassau County 2009). In *Horvath*, the parties entered into a stipulation of discontinuance, which, according to the court, "had the effect of discontinuing the action . . . ." *Id.* at 197, 882 N.Y.S.2d at 824. Subsequently, the plaintiff served an amended summons and complaint with the previously discontinued index number. *Id.* Defendant raised certain jurisdictional defenses including the failure to properly obtain an index number. *Id.* at 198, 882 N.Y.S.2d at 825. Three years later the defendant moved to dismiss, asserting that the plaintiff failed to properly commence the second action. *Id.* at 197–98, 882 N.Y.S.2d at 825. While acknowledging that there is no specific rule allowing a defendant to move to dismiss on the "ground of improper commencement or defective commencement in the filing of [an] action," the court still found that "[a]lthough the defendant raised the affirmative defense of lack of personal jurisdiction it [sic] its answer and

In the cases cited above courts have made clear that nonwaivable jurisdictional defects that occur at the commencement of an action are not sins that can be readily forgiven under CPLR section 2001. Because of this, fully understanding how to properly commence an action within the statute of limitations and to appropriately obtain jurisdiction over the defendant is critical when representing a party in an action pending in New York.

V. THE COURT OF APPEALS GIVETH AND TAKETH AWAY—TWO RECENT DECISIONS ANALYZING FORGIVENESS UNDER CPLR 2001.

More recently the Court of Appeals has had two chances to issue opinions on the application of the Forgiveness Statute. In the first case, *Goldenberg v. Westchester County Health Care Corp.*, the plaintiff, as in *Harris*, *Gershel*, and *Fry*, had commenced a special proceeding in supreme court prior to starting an action.[78] In *Goldenberg*, the plaintiff's application to serve a late notice of claim was granted and the supreme court directed service on the municipal-hospital-defendant within twenty days.[79] The plaintiff timely served the notice of claim along with a summons and complaint.[80] Inexplicably both were served without an index number.[81]

The defendant answered and raised defenses based on lack of personal jurisdiction and the statute of limitations.[82] Three weeks after the statute of limitations lapsed the defendant wisely purchased a new index number and moved to dismiss the action as

specifically noted that there were commencement defects, the defendant waived these objections by failing to move to dismiss the complaint based upon those grounds within sixty days after serving its answer." *Id.* at 199, 203. 882 N.Y.S.2d at 826, 829. Strangely enough, the court in *Horvath* reasoned that the filing defects "were technical, non-prejudicial procedural defects that should be disregarded." *Id.* at 202, 882 N.Y.S.2d at 828. Further, the court stated that it "broadly interprets that provision in CPLR 3211(e) to also require the defendant to timely move to dismiss the case based upon a defect in the commencement of an action." *Id.* at 203, 882 N.Y.S.2d at 829; *see also* Connors, *supra* note 2, at S2 (urging practitioners to plead all defects in commencement at the outset, including lack of subject matter jurisdiction defenses). Professor Connors wonders whether "any formal objection is necessary in these circumstances. The complete failure to file any papers likely constituted a defect in subject matter jurisdiction, which is 'a nonwaivable jurisdictional defect' that can be raised at any time." *Id.* (citing Reyes-Peralta v. Ngernak, 30 Misc. 3d 168, 172, 909 N.Y.S.2d 901, 904 (Sup. Ct. Nassau County 2010)).

[78] Goldenberg v. Westchester Cnty. Health Care Corp., 16 N.Y.3d 323, 325, 946 N.E.2d 717, 717, 921 N.Y.S.2d 619, 619 (2011).

[79] *Id.*

[80] *Id.* at 325, 946 N.E.2d at 717–18, 921 N.Y.S.2d at 619–20.

[81] *Id.*

[82] *Id.* at 326, 946 N.E.2d at 718, 921 N.Y.S.2d at 620.

untimely.[83] The supreme court granted the motion dismissing the action, noting that the amendment to CPLR section 2001 "did 'not excuse a complete failure to file within the statute of limitations,' and was meant to address mistakes in the 'method' of filing, not mistakes in 'what' was filed."[84] The Appellate Division affirmed mainly on the ground that the complaint served was substantially different from the proposed complaint that was attached to the application to file a late notice of claim.[85] The Court of Appeals granted leave to appeal and affirmed the dismissal.[86]

As a threshold matter, the Court of Appeals found that the defendant did not waive its objection to Goldenberg's filing error since its jurisdictional objection "was not to improper service, [the defendant] was not . . . required to move to dismiss within 60 days of service of its answer."[87] The court further stated the outcome of the appeal would depend "on whether CPLR 2001, as amended in 2007, vests [s]upreme [c]ourt with discretion to forgive the particular kind of mistake made by Goldenberg."[88] The court concluded that it did not.[89]

In *Goldenberg*, the court also analyzed the bill that amended CPLR 2001 and acknowledged that while the amendment was intended to allow courts to fix or overlook nonprejudicial defects in the filing process in order to prevent the dismissal of otherwise valid causes of actions, the amendment was never intended to allow courts to overlook the "complete failure to file within the statute of limitations."[90] Further, "in order to properly commence an action a plaintiff . . . would still have to actually file a summons and complaint or a petition."[91] The court found that the plaintiff never actually filed a summons and complaint within the statute of limitations and that the trial court cannot disregard such a defect and thus, dismissal was warranted.[92]

In *Ruffin v. Lion Corp.*,[93] the court forgave an error which

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[83] *Id.*

[84] *Id.* at 327, 946 N.E.2d at 718, 921 N.Y.S.2d at 620 (quoting Vincent C. Alexander, *Practice Commentaries*, C304:3, *in* N.Y. C.P.L.R. 304 (McKinney 2010)).

[85] *Goldenberg*, 16 N.Y.3d at 327, 946 N.E.2d at 718, 921 N.Y.S.2d at 620.

[86] *Id.* at 327, 946 N.E.2d at 718–19, 921 N.Y.S.2d at 620.

[87] *Id.* at 327, 946 N.E.2d at 719, 921 N.Y.S.2d at 621 (citing David D. Siegel, N.Y. PRACTICE § 111, at 201 (4th ed. 2005)).

[88] *Goldenberg*, 16 N.Y.3d at 327, 946 N.E.2d at 719, 921 N.Y.S.2d at 621.

[89] *Id.*

[90] *Id.* at 328, 946 N.E.2d at 719–20, 921 N.Y.S.2d at 621.

[91] *Id.* at 328, 946 N.E.2d at 719, 921 N.Y.S.2d at 621.

[92] *Id.* at 328, 946 N.E.2d at 719–20, 921 N.Y.S.2d at 621.

[93] Ruffin v. Lion Corp., 15 N.Y.3d 578, 940 N.E.2d 909, 915 N.Y.S.2d 204 (2010).

occurred when the plaintiff attempted to serve process upon a defendant in Pennsylvania using a process server who was a Pennsylvania resident.[94] The defendant failed to respond after being served with the summons and complaint.[95] The plaintiff then moved for, and the trial court granted, plaintiff's motion for a default judgment.[96] The defendant never appeared at the inquest and the plaintiff was awarded a judgment.[97] Some two years later the defendant moved to dismiss the action under CPLR section 3211(a)(8) and to vacate the default under CPLR section 5015(a)(4).[98] Defendant cited to CPLR section 313[99] and correctly pointed out that the process server was not a New York resident, nor a sheriff authorized to serve under Pennsylvania law, an attorney, or the equivalent thereof and, as such, service was jurisdictionally defective, warranting dismissal of the action.[100] The trial court found this argument unavailing and reasoned that such a defect "was a mere irregularity."[101] The Appellate Division disagreed and subsequently dismissed the complaint and vacated the default judgment.[102]

The plaintiff ultimately conceded that the process server was not authorized to serve pursuant to CPLR section 313 and sought forgiveness under CPLR section 2001 "argu[ing] that the irregularity in service can and should be disregarded."[103] After granting leave to appeal, the Court of Appeals reversed the Appellate Division, holding that this type of service of process error "constitute[d] an irregularity that courts may disregard under CPLR 2001."[104] The court rejected the Appellate Division's analysis

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[94] *Id.* at 580, 940 N.E.2d at 910, 915 N.Y.S.2d at 205.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] CPLR section 313 provides that:

> A person domiciled in the state or subject to the jurisdiction of the courts of the state under section 301 or 302, or his executor or administrator, may be served with the summons without the state, in the same manner as service is made within the state, by any person authorized to make service within the state who is a resident of the state or by any person authorized to make service by the laws of the state, territory, possession or country in which service is made or by any duly qualified attorney, solicitor, barrister, or equivalent in such jurisdiction.

N.Y. C.P.L.R. 313 (McKinney 2011).

[100] *Ruffin*, 15 N.Y.3d at 580–81, 940 N.E.2d at 910, 915 N.Y.S.2d at 205.

[101] *Id.* at 581, 940 N.E.2d at 910, 915 N.Y.S.2d at 205.

[102] *Id.*

[103] *Id.*

[104] *Id.* at 581–82, 940 N.E.2d at 911, 915 N.Y.S.2d at 206.

"that a CPLR statute defining method of service can in no circumstance be disregarded."[105] The court found that even though a 2007 amendment to CPLR section 2001 was designed to forgive mistakes in the filing process, they saw "no reason why the Legislature would wish to foreclose dismissal of actions . . . in filing, but not service."[106]

The court decided the case after analyzing whether the error in service constituted a "technical infirmity."[107] To do this, the court was "guided by the principal of notice to the defendant" and that such notice "must be 'reasonably calculated . . . to apprise interested parties of the pendency of the action.'"[108] Accordingly, the residence of a process server was a defect that had "no effect on the likelihood of defendant's receipt of actual notice."[109]

VI. FORGIVENESS IN THE FUTURE—COMMENCEMENT TIME ERRORS IN E-FILED CASES.

Whether or not a court can forgive an error under CPLR section

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[105] *Id.* at 582, 940 N.E.2d at 911, 915 N.Y.S.2d at 206.

[106] *Id.* Despite finding that the defect in *Ruffin* was a "technical defect" and could be forgiven under CPLR section 2001, the court also cautioned that "simply mailing the documents to defendant or e-mailing them to defendant's Web address would present more than a technical infirmity, even if defendant actually receives the documents." *Id.* at 583, 940 N.E.2d at 912, 915 N.Y.S.2d at 207. Courts have also held that CPLR section 2001 is only applicable to a "pending action." *See* Dooley v. Woods, No. 2010/7835, 2011 WL 1019556, at *1 (Sup. Ct. Dutchess County Mar. 22, 2011) (holding where plaintiff moved by order to show cause for a preliminary injunction but had not yet served a summons and complaint, that failure to serve a summons and complaint could not be cured under CPLR section 2001 since it was a "jurisdictional defect" and not a "mere irregularity"); MRC Receivables Corp. v. Taylor, 57 A.D.3d 1000, 1001–02, 871 N.Y.S.2d 293, 294 (App. Div. 2d Dep't 2008) (finding that service of the petition was improper and an erroneous address in the affidavit of service was not a correctable mistake under CPLR section 2001 because respondent was deprived of a "substantial right," which includes notice). The court found that it did not have jurisdiction over the respondent despite petitioner's contention that there was actual notice of the proceeding since the respondent had received the petition in the mail. *Id.* at 1001, 871 N.Y.S.2d at 294; *see also* Cortese v. Panzanella, 32 Misc. 3d 507, 509, 926 N.Y.S.2d 274, 275 (Sup. Ct. Cortland County 2011) (holding that there would be no forgiveness under CPLR section 2001 because service did not strictly conform to the statutorily prescribed methods). In *Cortese*, the plaintiff attempted to serve a defendant under CPLR section 308(2) which allows service upon a person of suitable age and discretion at the "defendants actual place of business, dwelling place or usual place of abode" or "his or her last known residence" followed by a mailing to the defendant at the last known residence or place of business. *Id.* at 509–10, 926 N.Y.S.2d at 276 (citing N.Y. C.P.L.R. 308(2) (McKinney 2011)). The court dismissed the action and vacated the default since the plaintiff failed to comply with these strict requirements. *Id.* at 511, 926 N.Y.S.2d at 277.

[107] *Ruffin*, 15 N.Y.3d at 582, 940 N.E.2d at 911, 915 N.Y.S.2d at 206 (citations omitted).

[108] *Id.* (quoting Raschel v. Rish, 69 N.Y.2d 694, 696, 504 N.E.2d 389, 390, 512 N.Y.S.2d 22, 23 (1986)).

[109] *Ruffin*, 15 N.Y.3d at 583, 940 N.E.2d at 912, 915 N.Y.S.2d at 207.

2001 will always depend on the nature of the mistake and when it occurs in the context of the litigation. When analyzing decisions since the 2007 amendment, the law is clear that despite saving many cases from dismissal for technical, nonprejudicial errors—both at the commencement stage and while attempting to serve process—not all mistakes and missteps can be forgiven under CPLR section 2001. In addition to dismissing the action because of a *Mendon Ponds* defect, the *Goldenberg* decision also confirmed that a defendant who properly preserves its objection to lack of personal jurisdiction in the answer does not need to move under CPLR section 3211(e) within sixty days, since such an objection is not to lack of proper service.[110] And in *Ruffin*, the court relying on CPLR section 2001 analyzed certain mistakes that occurred when serving process in order to determine whether such mistakes constitute a "technical infirmity" and thus require dismissal of the action.[111]

Looking to the language in these decisions one can see the court's jurisprudence under CPLR section 2001 evolving to signal a willingness to address commencement time defects not explicitly enumerated in the statute.[112] With the advent of mandatory electronic filing ("e-filing") in commercial cases,[113] courts will certainly have the opportunity to more fully address commencement time errors in e-filed cases. While not specifically rendering a decision under a CPLR section 2001 analysis, the court in *Obstfeld v. Thermo Niton Analyzers LLC*[114] addressed potential commencement time errors raised by a defendant in the context of an e-filed case. In *Obstfeld*, the plaintiffs timely commenced an action by e-filing a summons with notice and properly serving it upon the defendants via the New York Secretary of State.[115] Defendants timely e-filed their demand for the complaint and in response, plaintiffs e-filed their complaint, which was transmitted to the attorneys of record.[116] Defendants moved to dismiss, arguing that plaintiffs had improperly served the complaint since it was

[110] Goldenberg v. Westchester Cnty. Health Care Corp., 16 N.Y.3d 323, 327, 946 N.E.2d 717, 719, 921 N.Y.S.2d 619, 621 (2011).

[111] *Ruffin*, 15 N.Y.3d at 582, 940 N.E.2d at 911, 915 N.Y.S.2d at 206 (citations omitted).

[112] *See supra* notes 78–111 and accompanying text (discussing the application of CPLR section 2001 in the *Goldenberg* and *Ruffin* decisions).

[113] *See* N.Y. COMP. CODES R. & REGS. tit 22, § 202.5-bb(1) (2010).

[114] Obstfeld v. Thermo Nilton Analyzers LLC, No. 500152/2009, 2010 WL 1463039 (Sup. Ct. Kings County Apr. 13, 2010).

[115] *Id.* at *1.

[116] *Id.*

delivered via e-filing.[117] The defendants reasoned that they had not yet appeared in the action and as such, were not subject to service via e-filing.[118]

In denying the motion to dismiss, the court acknowledged that neither a demand for a complaint, nor the consent to e-filing constituted an appearance in the action.[119] However, the court rejected the defendants' argument that they had been "forced to consent" to e-filing under the rules in Kings County, noting that neither the New York court rules nor the local rules of Kings County require parties to consent to e-filing.[120]

Looking at *Obstfeld* one can certainly foresee situations in other e-filed cases when a party relying on CPLR section 2001 will seek forgiveness for nonprejudicial errors similar to the ones discussed throughout the article. Because of these situations, it should come as no surprise that when analyzing commencement time errors in e-filed cases under CPLR section 2001, courts will take into account the current jurisprudence governing *Mendon Ponds* defects. To the extent e-filing has simplified the lawsuit commencement process, it should be clear that even an e-filed case will undoubtedly be subject to dismissal should it contain a *Mendon Ponds* defect.

VII. CONCLUSION

It is clear that the 2007 amendment to CPLR section 2001 still cannot forgive all types of *Mendon Ponds* defects that may occur at the commencement of an action. As such, whether filing an action or contemplating a motion to dismiss, based on a commencement time error, it is incumbent upon every practitioner to fully understand the jurisdictional defects discussed throughout this article. Ultimately, in order to avoid a *Mendon Ponds* type dismissal, or to successfully have a case dismissed because of one, practitioners must carefully consult the current case law, any

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[117] *Id.* at *2.

[118] *Id.*

[119] *Id.*; N.Y. C.P.L.R. 3012(b) (McKinney 2011) ("A demand [for the complaint] under this subdivision does not of itself constitute an appearance in the action."). Section 202.5-b(b)(2)(ii) of the New York Code of Rules and Regulations further states that "[t]he filing of a consent to e-filing hereunder shall not constitute an appearance in the action." N.Y. COMP. CODES R. & REGS. tit 22, § 202.5-b(b)(2)(ii) (2010). However, once a party consents to e-filing, service of all papers "shall" be made upon that party by filing documents electronically. COMP. CODES R. & REGS. tit. 22, § 202.5-b(d)(1). Section 202.5-b(b)(2)(ii) preserves any jurisdictional defenses that may be available to the litigant whose counsel agrees to electronic filing. *See id.* § 202.5-b(b)(b)(2)(ii) (2010).

[120] *Obstfeld*, 2010 WL 1463039, at *2 n.7.

applicable statutes and rules of court, and any local rules or practices governing filing procedures. Going forward, attorneys must continue to recognize that as commencement by e-filing and alternative methods of electronic service become the norm, a *Mendon Ponds* type defect will result in the dismissal of an otherwise valid cause of action on the ground that it is jurisdictionally defective.