New York State Law Digest

REPORTING IMPORTANT OPINIONS OF THE COURT OF APPEALS
AND IN SPECIAL SITUATIONS OF OTHER COURTS

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WHERE H IN MARITAL SETTLEMENT AGREES TO STATED SUM FOR W, AND PART OF HIS FUNDS ARE IN MADOFF ACCOUNT, LATER LOSS IS HIS; HE CAN'T GET REFORMATION

It may well be that in making the settlement, in which H gave W (among other things) more than $6 million, H relied in some measure on his account with Madoff and the huge sums he was making on it. All that was in 2004, when Madoff and his Ponzi scheme were making as yet undiscovered history. The H/W settlement agreement, which came after that, in August 2006, was "incorporated, but not merged" in the parties' final divorce judgment. At that point Madoff was still flying high.

In December 2008, he fell to earth quickly, he was imprisoned for eternity, and numerous of his investors panicked. Some of them were already ahead of the game when the Madoff estate's trustee went after them, but for others, not so lucky, their losses were great. Many sad stories were covered in the newspapers.

One open question was whether a person claiming to have relied on Madoff-invested funds in making a money gift to a spouse as part of the marital settlement could get the agreement reformed because of the later-revealed Madoff mischief.

Having by now wandered through several courts, the issue finally reaches the Court of Appeals in *Simkin v. Blank*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2012 WL 1080295 (April 3, 2012). The context is an action by H against W to reform the agreement based on "mutual mistake". Reviewing its own and other courts' mutual mistake cases, the Court sees no mutual mistake on these facts and denies reformation. In an opinion by Judge Graffeo, it dismisses the complaint.

Some lower court decisions upholding a reformation are cited, all by way of contrasting the *Simkin* case. In one, for example, a settlement provision that allowed W to buy health insurance through H's plan was set aside when it was found that no such coverage was available. That was cited as a legitimate example of what qualifies as a "mutual mistake".

More in point here in *Simkin* is another case in which W was denied reformation when a piece of H's property increased in value because the city, after the settlement, adopted a rezoning plan.

The Court sees that kind of case as the dispositive one, because the claimed loss in *Simkin* is more akin to a marital asset that unexpectedly loses value after dissolution of a marriage; the asset had value at the time of the settlement but the purported value did not remain consistent.

The Court points to the converse situation by putting the question whether

> [v]iewed from a different perspective, had the Madoff account or other asset retained by [H] substantially increased in worth after the divorce, should [W] be able to claim entitlement to a portion of the enhanced value? The answer is obviously no. Consequently, we find this case analogous to ... Appellate Division precedents denying a spouse's attempt to reopen a settlement agreement based on post-divorce changes in asset valuation.

The Court indicates that the result might be otherwise if the agreement itself provided for a "50-50" division of a "stated number of stock shares", or used words to that effect, but this agreement provided nothing of the kind and "does not [even] mention the Madoff account". It provides for the $6+ million for W "in satisfaction of [her] support and marital property rights", and in return W released "various claims and inheritance rights".

Subquoting from an earlier decision, the Court explains that

> [t]he premise underlying the doctrine of mutual mistake is that "the agreement as expressed, in some material respect, does not represent the meeting of the minds of the parties".

The Court comments that this is the first occasion it has had to address the mutual mistake issue "in the context of marital settlement agreements". It finds in it no unique factor that would enable it to escape the requirements of the "mutual mistake" rule.

OTHER DECISIONS

EXCAVATOR'S ABSOLUTE LIABILITY

City Code Provision Is Held to Impose Absolute Liability on Excavator for Damaging Adjoining Building

In its 2001 *Elliott* decision (Digest 496), the Court of Appeals held that the violation of a local law, even if it plays a role in causing a person damages, is not the "negligence per se", much less the basis for "absolute liability", that the violation of a state statute can be. Hence the Court in *Elliot* reversed a judgment that was rendered for a plaintiff who fell out of a public school's bleacher stand that had no side rails despite a city code provision mandating them.

The Court there did acknowledge, however, that certain sections of a municipality's local code that "have their origin in State law ... might be entitled to [the] statutory treatment" and hence to the advantages it may offer a plaintiff in establishing liability. Citing that acknowledgment, the Court now, in *Yenem Corp. v. 281 Broadway Holdings*, 18 N.Y.3d 481, ... N.Y.S.2d .... (Feb. 14, 2012), finds a provision of New York City's Administrative Code concerning an excavator's

liabilities to have so direct an origin in state law that it, too, must be held to impose absolute liability when violated.

The ordinance on point in this case provided that when an excavation goes more than 10 feet below curb level, the excavator "shall, at all times and at his or her own expense, preserve and protect from injury any adjoining structures". The 10 feet was exceeded here. The property owner and its excavating people therefore violated the rule when they caused the building next door, at 287 Broadway in Manhattan, to tilt to the south by some nine inches. The building was ordered vacated, and the pizzeria on its ground floor had to be closed.

The defendants' own people corroborated that the excavation was the cause of the tilt and that was a significant factor in the Court's finding the plaintiffs entitled to summary judgment on the issue of the defendants' liability. Overturning the lower courts in an opinion by Judge Ciparick, the Court grants summary judgment to both plaintiffs, the building and the pizzeria.

The case is a study of the origin of the code provision and an exhaustive traceback to state statutes that impose the "absolute liability" consequence when violated.

The court below had considered the "allegedly poor condition" of the building and held that it raised an issue of fact about causation. The Court says that while the building's condition is relevant to the issue of damages, it "does not factor into a proximate cause analysis" under the code provision and hence does not impede summary judgment on liability.

Meanwhile, those passing the building should do so on its north side.

RENT REGULATION

DHCR Can Permanently Deny Rent Increases for Apartments Not Benefitted by Capital Improvements Made in Apartment House

When a landlord of a New York City building that contains rent-regulated apartments undertakes a major capital improvement, it can apply to the state's Division of Housing & Community Renewal (DHCR) for permission to pass on to the tenants appropriate shares of the cost. (The regulated apartments are the ones that require the DHCR application.) But in doing so the DHCR can exempt particular apartments from the increases, and can make the exemption either permanent or conditional, as its judgment dictates. As long as the courts can't find its action arbitrary or capricious – the reversal standard applicable in an Article 78 proceeding – the courts will uphold it.

The Court of Appeals does uphold it in *Terrace Court, LLC v. New York State Division of Housing and Community Renewal*, 18 N.Y.3d 446, ... N.Y.S.2d .... (Feb. 14, 2012).

Five of the regulated apartments were having leak problems, and while the capital improvement work undertaken by the landlord included pointing and masonry work, it apparently did not cure the leaks in those apartments, which continued during the extended period that the landlord's application for the rent increases pended. Instead of just temporarily denying the increases for

the affected apartments until the leaks were fixed, however, the DHCR made its denial permanent.

Citing its 1985 *Charles* decision (Digest 316) in an opinion by Judge Graffeo, the Court of Appeals finds the DHCR's action reasonable, and upholds it. The Court acknowledges that

> administrative agencies are required to follow their own precedent ... and an agency that deviates from [it] must provide an explanation for the modification so that a reviewing court can [quoting *Charles*] "determine whether the agency has changed its prior interpretation ... for valid reasons, or has simply overlooked or ignored its prior decision"

A failure to justify the change will generate a reversal of the agency's action, the Court adds, "even if there is substantial evidence to support the agency's determination". In this case, however, the Court finds that the DHCR's "prior determinations in similar cases were not restricted to temporary suspensions" and hence the agency may not be said to have abandoned this previously established principle.

The record is not clear on what particular ground the agency relied in making the five apartments' exemptions permanent, but the Court apparently sees enough record support for the agency's action to keep it out of the "arbitrary" category.

The unclarity of the record is what prompted Judge Smith to add a few words in a concurrence, stating that what troubles him "is that it is not easy to tell from DHCR's decisions on what basis it is making the choice" between permanent and temporary. He finds the DHCR opinion "particularly unenlightening" but says that "DHCR has a hard job, and courts should not make it harder by nit-picking".

Is a court nit-picking when it requires an administrative record to clarify the basis of its action so that the court may effectively review it?

PROBATIONARY TEACHERS

Finality – and Running of Statute of Limitations – Occurs When Teacher Is Notified of Termination, Regardless of Outcome of Subsequent Internal Review Proceedings

Two cases heard together and decided by the Court of Appeals on February 14, 2012, are found to be virtual carbon copies of the Court's 1988 *Frasier* decision (Digest 345) and are held to be governed by that case. The result in each of the new cases – Article 78 proceedings by former probationary teachers *Kahn* and *Nash* against the *New York City Department of Education* – is a dismissal for untimeliness. 18 N.Y.3d 457, ... N.Y.S.2d ....

In both cases, as governed by *Frasier*, the applicable period is found to be the four months of CPLR 217, which starts when the decision becomes "final and binding". In an opinion by Judge Read, the Court finds that moment to be when Kahn and Nash were respectively notified that their probationary performances were unsatisfactory and their services were being terminated.

Internal review procedures were available in each case, but, also as in *Frasier*, the Court holds that even if pursued – and successful – the review procedure does not postpone the start of the statute of limitations. The lesson to those in similar straits in future is to start the judicial proceeding to review the termination promptly whether or not they plan to exploit the internal review option.

No services are rendered after the termination, the Court points out, and there's no salary payable during that time; hence there's nothing to restore regardless of what the review determines.

Presumably, as we observed in concluding our Digest 345 note, the teacher could still be rehired as a new probationary employee, but would not be entitled to back pay or benefits.

REPUDIATING CONTRACTS

Buyer Is Not Entitled to Damages for Seller's Repudiation of Real Estate Contract Without Showing That It Was Itself "Ready, Willing and Able" to Perform

Buyers (collectively B) sued for damages based on seller S's repudiation of contracts for the sale of real property without clearly establishing that B was itself "ready, willing and able" – a phrase the Court of Appeals uses at several points in its opinion – to fulfill its own obligations. B was therefore not entitled to the summary judgment the lower courts had granted it. Issues of fact needed resolution, and in B's favor, before it could be said that B had satisfied that celebrated trio, which here included among other things that B secure a mortgage commitment within 60 days. Hence the Court modifies the judgment by striking the summary judgment and remanding the case for further proceedings. *Pesa v. Yoma Development Group, Inc.*, 18 N.Y.3d 527, ... N.Y.S.2d .... (Feb. 9, 2012).

Much time had passed – years – before either side did anything in the case after the making of the original contract in March of 2003 (which had set a closing date in July 2003).

In an opinion by Judge Smith, the Court shows a conflict on the "ready, willing and able" issue among the appellate divisions, the Second having held in several cases (including the present one) that such a showing is not required, but the Third and Fourth holding that it is. The Court agrees with the latter two. It also finds support for its position in several of its own early cases.

Who has the burden of proof is the "real question" in a case like this, says the Court:

> Should the buyers be required to show they would and could have performed, or should the seller have the burden of showing they would not or could not? Since the buyers can more readily produce evidence of their own intentions and resources, it is reasonable to put the burden on them.

The Court distinguishes its 1989 *American List* decision (Digest 367), in which the defendant breached the contract early in its 10-year life. The Court held the plaintiff entitled to damages without having to tender further performance or prove its ability to perform in the future. The reason, however, was the nature of the nonrepudiating party's obligation in that case, which was to supply mailing lists to a magazine over a 10-year period. Applying the "ready, willing and

able" requirement there would have imposed the "perhaps impossible burden of showing what its financial condition would have been for many years to come".

Seeing no "comparable burden" falling on B here in *Pesa*, the Court finds operating room for the "ready, willing and able" requirement, and applies it.

PUBLIC EMPLOYEES DISCIPLINE

Discipline of Education Official by City Conflicts Board Is Not Preempted by Disciplinary Powers Conferred by Statute on Education Department

The principal of school A was accused of contacting the principal of school B to secure favored treatment for A's son, a teacher at B who was in some kind of trouble. This was found by New York City's Conflicts of Interest Board to be a violation of its conflicts law – as contained in the city charter – and the board sought to have the city's administrative trials agency impose a $10,000 fine on the principal of school A.

Contending that this purported conferral of power on the board by the city charter was precluded by the exclusivity of state statutes – mainly §§ 3020(1) and 3020-a of the Education Law – the principal brought this Article 78 proceeding seeking to bar the board from proceeding with the trial. Both lower courts granted the relief, the appellate division holding that "the exclusive avenue to discipline a tenured pedagogue is ... § 3020-a".

A divided Court of Appeals finds this error and reverses in *Rosenblum v. New York City Conflicts of Interest Board*, 18 N.Y.3d 422, ... N.Y.S.2d .... (Feb. 9, 2012; 5-2 decision).

The dissent by Judge Smith agrees with the appellate division, reading the Education Law as allowing no discipline of a tenured person except in accordance with its own prescription. The dissent sees as the only question in the case whether the fine amounts to a "discipline" under the statutes; it thinks it does and thus finds it in conflict with the statutes and beyond the board's powers. The board in this case had imposed a fine on the principal. The dissent would erase it.

The majority, in an opinion by Judge Read, sees no such exclusivity and thus upholds the board's power to impose the fine. The Education Law aimed its exclusivity provisions – including the imposition of a fine, among other penalties – at the city's Department of Education (DOE), holds the Court; but "[i]t does not follow ... that [the board] may not fine a DOE employee for violating the Conflicts of Interest Law". The latter is

> a separate statutory scheme designed to protect governmental integrity, not to safeguard a tenured pedagogue from arbitrary action by DOE that might adversely affect the terms and conditions of his employment.

While the board may suggest that the DOE suspend or remove the person – i.e., impose more stringent punishment – the board itself can do no more than levy a fine. As long as the board does no more than that, it is of no moment that the DOE is authorized to do more, and for the same piece of wrongdoing.

The Court notes that in many cases it's more "efficient and cost-effective" to allow the board this power, especially when it appears that a fine may be the most suitable penalty for the offense, implying that that's what the legislature had in mind in allowing the partial overlap. (The statutory proceedings, the Court shows, have proved much more time-consuming and hence inefficient.)

The dissent says that the legislature may have made an unwise choice in setting up these provisions, but that that's only for the legislature to correct.

FUTURE WRONGFUL DEATH DAMAGES

Court Allows Lower Rate of Discount Going Back from Verdict But Then Higher Rate of Interest Going Forward to Verdict, Giving Plaintiff a Windfall and Readers a Headache

EPTL §5-4.3, the wrongful death statute, gives each person "fair and just compensation for the pecuniary injuries" suffered by that person because of the decedent's death. This means that among that person's damages will be a segment covering the future financial benefit that the person could have expected had the decedent lived to the usual life expectancy. If those damages are awarded in a lump sum with no discount, the dependent would be getting money now that would otherwise not be received until various times in the future, which, if not adjusted, would amount to a windfall. To avoid that, the adjustment is needed to determine what smaller amount, awarded now and reasonably invested, would produce the lump sum of damages expected over the future course. That present amount is deemed the "discounted" sum.

The Court of Appeals in its 1992 *Milbrandt* decision (Digest 386) dealt with two key issues in this area. The first concerned interest on the portion of an award that covers future (post-verdict) losses; the second, interest on the pre-verdict portion of damages (the period between the decedent's death and the verdict).

Readers might profitably re-read *Milbrandt* before negotiating the Court's more recent decision in *Toledo v. Iglesia Ni Christo*, 18 N.Y.3d 363, 939 N.Y.S.2d 282 (Jan. 10, 2010; 5-2 decision), also a wrongful death case dealing with such issues, but with an apparently faulty record that generates a strong dissent.

The lower courts in *Toledo* had discounted the (jury-found) future wrongful death damages "back to the date of the decedent's death", the date as of which interest runs under the wrongful death statute. That presumably produced the figure that signifies what that item of damages would be worth at the time of death. But because it would not yet have been paid, interest would then have to be added from the time of death to the time of the verdict.

The lower courts did both things, but in discounting back they used a 4.33% figure, while in adding interest going forward they used the 9% litigation rate of CPLR 5004. This made for a difference on the bottom line that of course benefitted the plaintiff – being taken back at a cost of 4.33% but then being carried forward at almost twice that rate.

The defendant objected to this, which the Court responds to this way in an opinion by Judge Ciparick:

> That the difference between the discount rate and the statutory interest rate provides a benefit to plaintiff is an issue for the legislature and not one for judicial determination.

The dissent, written by Judge Smith, finds that what the plaintiff did here was add the 9% interest to the date-of-verdict value (which "already included interest", says the dissent) instead of to the date-of-death amount, which in essence gave plaintiff "more than 13% on his date-of-death value". The dissent says that "[t]he discount rate and the interest rate should be identical", so that whatever the sum by which the going-back discount reduces the award is restored in the interest that's then applied going forward.

In other words, says the dissent, the two computations should cancel each other out, but here, "for reasons no one has attempted to explain,"

> the discounting was done using an interest rate of roughly 4%, while interest was calculated at the statutory rate of 9%.

Since no one has attempted to explain it, it would be presumptuous of us to undermine that statistic by attempting an explanation ourselves. We'll just keep mum on the subject and hope, as the majority does, that the legislature acts.

Legislation that brings clarity here would qualify for a prize in any kind of national competition.

GETTING LONGARM JURISDICTION FOR INTERNET "DEFAMATION" DIVIDED COURT FINDS NO ADEQUATE BASIS FOR N.Y. JURISDICTION IN VERMONT DEFENDANT'S WEBSITE COMMENTS ABOUT N.Y. SPCA DIRECTOR

The care of collies is what generated this case. Plaintiff P directs a local SPCA in upstate New York, which had taken in a number of abused collies. Defendant D, who lives in Vermont, is president of an association devoted to the care of collies. D heard about the situation and telephoned P several times to offer aid and guidance, which was apparently accepted, and D entered the state twice to provide some materials and aid. Then D made some allegedly defamatory comments about P's operation on his website, and voila, this lawsuit, posing the especially thorny New York issue of extraterritorial jurisdiction of a nondomiciliary defendant in a defamation case. P doesn't secure it in this case, in which a closely divided Court of Appeals rejects P's attempt. *SPCA of Upstate New York, Inc. v. American Working Collie Ass'n*, 18 N.Y.3d 400, ... N.Y.S.2d .... (Feb. 9, 2012; 4-3 decision).

New York's longarm statute – the hyperactive provision that allows New York plaintiffs to subject nondomiciliary defendants to New York jurisdiction in designated cases – has a complex set of designations. Two of them, in paragraphs 2 and 3 of CPLR 302(a), explicitly address tort cases, but both just as explicitly exclude the tort of defamation, an exception designed to recognize that national and international libels and slanders could too easily find their way into New York, impose unduly on its courts, and perhaps undermine as well the right of free speech.

Paragraph 1 of CPLR 302(a), however, which doesn't distinguish among categories of claim, allows longarm jurisdiction when the defendant "transacts any business within the state" and the claim arises out of that business. Perhaps ironically, jurisdiction of a defamation arising out of the defendant's transaction of New York business has been allowed under paragraph 1 – despite the hostility to that category of claim evinced by paragraphs 2 and 3 – but the defamation must be found to arise "from" the New York transaction.

There's the rub, and the *SPCA* case is another example of its abrasiveness in defamation cases.

It all boils down to an analysis of the defendant's New York "business" contacts and whether they suffice – in what seems an inevitably subjective assessment – to support the conclusion that the alleged defamation arises "from" them. Whether fairly described as "subjective" or not, the analyses of the two Court of Appeals contingents in the divided *SPCA* decision boils down to that, with the majority, in an opinion by Chief Judge Lippman, finding that D's New York contacts in *SPCA* fall short of the mark, while the dissent, in an opinion by Judge Pigott, says they meet it (and would sustain the jurisdiction).

The Second Circuit, in its 2007 *Best Van Lines, Inc. v. Walker* decision (see Siegel, New York Practice 5th Ed. § 86), considered the influence of the federal due process clause (which acts as a kind of outer-limits restricter of a state's longarm attempts) in an alleged Internet defamation case and rejected longarm jurisdiction. It was applying CPLR 302(a)(1) in a situation in which an Iowa defendant put a business-damaging statement on his website (a blacklist of moving companies with P's name on it). The court found D lacking the requisite contacts under the New York statute.

The *SPCA* majority reads the *Best* case as supporting its rejection of jurisdiction. The dissent, even construing longarm jurisdiction "more narrowly in defamation cases" (as *Best* instructs), says the *SPCA* facts meet the "transacts any business" standard.

The Court does not conclude that the remarks are not defamatory. They may well be. But in cases like this the merits get a rest while the Court addresses jurisdiction, and if the majority concludes there isn't any, the merits continue to rest until the plaintiff repeats the suit in a state in which jurisdiction of the defendant is available.