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

Editor: DAVID D. SIEGEL

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STATUTE OF LIMITATIONS IN ARBITRATION TIMELINESS OF COUNTERCLAIM IN ARBITRATION IS FOR ARBITRATOR TO DECIDE

And so the whole Court of Appeals agrees in *N.J.R. Associates v. Tausend*, 19 N.Y.3d 597, 950 N.Y.S.2d 320 (June 27, 2012). The whole Court acknowledges that under the Federal Arbitration Act it's the arbitrator who decides statute of limitations issues, while under New York law the court does. Hence the issue in the *NJR* case was whether the federal or New York arbitration act governed. The majority, in an opinion by Judge Graffeo, finds that it made no difference in *NJR*, because, even if the New York act were held applicable, the timeliness issue would go to the arbitrator for the reason that under CPLR 7503(b), New York law preserves it for the court only at the behest of a party who did not participate in the arbitration. In *NJR* the party raising the timeliness issue did participate.

The facts of *NJR* involve a dispute about a trust set up by grandma. The main assets of the trust were two New York City buildings. Under the trust, grandma's son (father F) and his two children, Nicole and Jeffrey, were income beneficiaries. F then formed the NJR partnership – the petitioner in this Article 78 proceeding – to acquire the properties.

The agreement included an arbitration clause and a New York choice of law clause. F and the children had shares in NJR, but F's was the largest. A dispute arose between F and daughter Nicole when he refused to furnish data she requested, and now they were off to the litigation/arbitration races.

First Nicole brought an Article 78 proceeding against NJR to obtain discovery. NJR responded with a demand for arbitration. Nicole tried to stay that arbitration but the attempt failed and the arbitration continued. Then she appeared in the arbitration and asserted counterclaims against NJR. Now it was NJR's turn to bring a proceeding to stay the arbitration of the counterclaims – based on untimeliness – posing the issue that presents this case.

The stay is denied and the arbitration directed to proceed. The timeliness issue is for the arbitrator under either the federal or state act, the majority says, making it unnecessary for the Court to decide which act applies. If the federal act is applicable, as it would be if the transaction at issue is one "involving commerce" under 9 U.S.C. § 2, the arbitrator must decide timeliness for that reason alone.

That was an important point made by the Court in its 2005 *Diamond* case (Digest 545), a major New York decision giving broad scope to the word "involving" in the federal statute.

And even if the disputed transaction did not fall into the realm of interstate commerce so as to invoke the federal act, and the New York act were to govern – presumably to give the timeliness question to the court – NJR would have forfeited that right by having "participated" in the arbitration in violation of CPLR 7503(b).

NJR had also tried to reach New York law for the issue by citing the New York choice of law clause in the agreement, but for the reason just recited, NJR loses again. Even if the clause were applied to lead to the application of New York law, the governing point on the New York law would have been CPLR 7503(b), barring NJR's proceeding to stay because a stay may be sought only by one "who has not participated in the arbitration".

While the majority does not see any need to select between the federal and New York acts for the reasons noted, Judge Smith, in a concurrence, does. He agrees with the result because he finds only the FAA applicable. He also notes that there were two arbitrations arising out of the dispute here, one by NJR against Nicole and another by Nicole against NJR.

In finding the FAA applicable, calling for the arbitrator to decide the timeliness question, Judge Smith in his concurrence could have stopped there. But he appears to have been intrigued by the interplay of arbitration and litigation in this curious situation involving one arbitration but two court proceedings trying to stay different parts of it. He remarks that if the counterclaims, instead of being interposed by Nicole within the arbitration that NJR commenced, were the subject of an "independent" arbitration, then NJR, if all it had done was apply to stay the arbitration, could not be seen as having "participated" in it. These are interesting observations on the New York side of things, which show once again how the interweaving (or in any event the interplay) of litigation and arbitration can so often be trusted to muddle the decisional process.

On that score, one of many illustrations appears in the lead note in SPR 168:1, showing the confirmation of an award in an arbitration governed by the federal act being sought in a state court – and quite correctly – but using only state procedures.

Comparison and contrast of parts of the federal and New York arbitration acts (Title 9 in the U.S.C. and Article 75 in the CPLR) appear in Siegel, New York Practice 5th

Ed. § 607, stressing how, when the two acts differ on any matter, a key issue to resolve at the outset is which act applies. On that choice, the Court's 2005 *Diamond* case plays a key role.

OTHER DECISIONS

PRIVATE v. PUBLIC ROAD

"Private Road Cannot Become Public Street" If Not Maintained and Repaired by Village

That's almost a verbatim quote from the opening of the Court of Appeals opinion in *Marchand v. New York State Department of Environmental Conservation*, 19 N.Y.3d 616, 950 N.Y.S.2d 496 (June 27, 2012).

The Marchands, husband and wife, owned the property. The case involved a dirt path through it that the public had been walking and driving on for at least 10 years – the adverse possession period – but the dispute was between the Marchands and the village and posed only the formal question of ownership.

While the village performed various functions on the road, like plowing and sanding in winter and maintaining water mains and fire hydrants, the Court says that's not enough to establish ownership under Village Law § 6-626. Section 6-626 says that

[a]ll lands within the village ... used by the public ... for ten years ... shall be a street with the same force and effect as if it had been duly laid out ... as such[,]

but the Court, in an opinion by Judge Smith, says caselaw requires more than that. Citing its 1890 opinion in *Speir v. Town of New Utrecht*, 121 N.Y. 420, it says that also needed is a showing that the village "kept it in repair" or took it "in charge". The village did not do those things here; to the extent that the road was being maintained or repaired, the Marchands were doing it.

Hence the village never assumed the full control of the road required by statute and caselaw before it becomes a "public" road, and in what boils down to an action to quiet title brought by the Marchands against the village, the Marchands prevail.

And that's all the Court deems it necessary to say in the case.

It would be interesting to speculate what the rights of the public would be if the case did decide that ownership lay with the village, or, indeed, if the property were sold to some third person by the present owners. It was found as a fact in the *Marchand* case that the path – which incidentally came to be known as the "Travelled Way" – had been "used by the public" for more than 10 years. The plaintiffs did not challenge that finding in *Marchand*, addressing only the supervening issue of outright ownership. Would those uses of the path by the public, having continued beyond the prescriptive period of 10 years, be deemed to "vest" in the public as

such, so as to survive regardless of the succession of ownership, whether to the village in a litigation like this or to some third person buying the property in a bona fide sale? Would the uses become, in other words, like an easement accruing to the public in general?

We're just speculating. These issues were not before the Court in *Marchand*, or in any event didn't make their way into the opinion.

EXCESS INSURER'S EXPOSURE

Court Sifts Excess Insurer's Obligations to Various Parties in Dispute Involving the 2008 Tower Crane Collapse in Manhattan

The crane, being used in the construction of a high-rise building, was one of those high-rise things itself, going way up in the air and then being topped by a fixed jib or moveable boom – horizontal projections that from a distance make it look as if there's no way the thing can remain standing. And this one didn't. It collapsed and killed seven and injured dozens.

Joy Contractors, Inc. operated the crane. Others along a possible line of liability were its lessor; the owners/developers of the building; and of course the contractors involved in the project.

Joy's insurance was at the heart of the dispute in *Admiral Ins. Co. v. Joy Contractors, Inc.*, 19 N.Y.3d 448, 948 N.Y.S.2d 862 (June 12, 2012). Joy had a basic insurer, Lincoln, with a policy limit of \$1 million per occurrence – in no way sufficient to cover the parade of claims to be expected in a case like this – and an excess insurer (the plaintiff Admiral) which had a limit of \$9 million per event. Even that was unlikely to suffice for all expected claims. It was a "follow-form" excess policy, meaning among other things that a breach of the underlying policy such as would let off the basic insurer would free the excess insurer as well.

The present suit was by Admiral, interposing numerous claims and various issues, alongside, of course, a request for a declaratory judgment setting it free of anything Admiral could conjure as a potential source of exposure.

In a detailed review of the facts in an opinion by Judge Read, the Court treats several separate topics of dispute.

One concerned a clause in the policy excluding coverage for "residential construction activities", but if the structure was a "mixed-use" building, the policy did cover. There was a dispute over whether it was, posing issues of fact that precluded summary judgment. One point of law emerging from the case concerned an appellate division finding that an expert's opinion had to be based on personal knowledge of the facts. This was error, holds the Court, citing the long understood proposition that "[a]n expert may instead ground his opinion on facts in evidence".

Another disputed point involved Joy's alleged false statements, based on which the plaintiff sought rescission of the contract or at least a reformation of it.

Here the Court had to confront probably its thorniest issue: the extent to which Joy's misrepresentations (if found to be such) would affect parties named as "additional" insureds under the policy. On this matter the Court had to distinguish between the plaintiff's demands for rescission, as asked for in one clause of the plaintiff's complaint, and reformation, as requested in another.

The rescission was granted by the lower courts with respect to all parties but Joy. But that was error, as the Court structures the issue, because it would leave the excess policy to be enforced by other parties even if the underlying policy were to be rescinded. By definition, however, "additional" insureds can exist only in addition to *something* [the Court's emphasis], and that something would have to be the basic underlying policy referring to them as "additional". Hence the rescission granted with respect to some but not all parties in this case was error.

But that doesn't apply to the reformation claim, holds the Court, apparently theorizing that on a reformation claim a court can undo the link that makes rescission possible only if appropriate for all of the linked parties, and then realign parties and obligations accordingly.

INVESTIGATING PUBLIC SCHOOLS

Divided Court Holds That State Division of Human Rights Has Jurisdiction to Investigate Violations by Private But Not by Public Schools

It of course comes across as a curious thing that a state agency whose function is to advance civil rights should be found – through statutory interpretation – to have the power to consider violations by private but not by public schools, but that's the holding of a closely divided Court of Appeals in *North Syracuse Central School District v. New York State Division of Human Rights* (and another case), 19 N.Y.3d 481, 950 N.Y.S.2d 67 (June 12, 2012; 4-3 decision). The Court holds the state division to be without power to investigate the complaints in this case because the entities involved were public school districts.

Executive Law § 296(4), in barring discrimination on bases such as race or color, refers to an "education corporation or association", a phrase not defined in the statute. In reaching for a definition, the majority, in an opinion by Judge Pigott, traces the phrase back to tax statutes in which it was used only in application to private schools. The Court holds that the repetition of the same phrase in Article 15 of the Executive Law – which is the state's human rights law (of which § 296 is part) – therefore requires that the phrase there be given the same scope it had in the Tax Law.

To the dissenters, speaking through Judge Ciparick, so doing "curtails the breadth" of the statute. The majority's interpretation, it says,

is contradicted by a plain reading of the statute, which we have long recognized as the clearest indication of legislative intent[,]

and it also fails to consider the purpose of the statute, which is to assure equal opportunity to all individuals in the state. The dissent also points out, moreover, that the "education corporation or association" phrase, on which the majority relies in borrowing from tax statutes to discern meaning, was not used in all Executive Law statutes in point, citing at least one in which a broader phrase is used: "educational institutions".

The complaints made to the human rights division here, against two school districts, were for failing to take steps to protect African-American teenagers who were racially insulted and bullied, mainly on the school buses. That the districts failed to take needful steps to meet their obligation to protect students – most poignantly in this age of ever increasing sensitivity to bullying – is strongly evidenced by the substantial judgments rendered against the districts in the lower courts, where the judges assumed that the human rights division did have jurisdiction and who therefore went into the merits. The dissent details the ugly conduct exhibited against the students in these cases.

That the majority is itself not happy with the result is evidenced by its reference to the "vicious attacks" on these students, labeling the attacks deplorable and admonishing that the Court's holding "is not to be interpreted as indifference to their plight, since the merits of their underlying discrimination claims are not at issue on these appeals".

The majority even volunteers and delineates other available remedies to which students in a dilemma like this might turn for relief.

The Court of Appeals has jurisdiction to answer certified questions of New York law put to it by (e.g.) federal appellate courts. Wouldn't it be wonderful if the Court itself had a similar declaratory remedy against the legislature to make it speak up about intent when the point is so sensitive and statutory guidance so obtuse?

ASSIGNED COUNSEL IN CRIMINAL CASES

Administrative Judge Can Review Amount of Compensation Awarded Appointed Counsel, But Can't Review Decision to Appoint

The decision to appoint assigned counsel in criminal cases is for a court to make under standing statutes and rules. When the appointment is made, and fees are sought by the assigned counsel after representing the accused, and are awarded by the court, the amount of them is proper to bring before the local administrative judge for review, but that judge cannot, in the course of such review, also determine the propriety of the initial appointment. *Smith v. Tormey*, 19 N.Y.3d 533, N.Y.S.2d (June 12, 2012).

Assigned counsel stepped into this felony case to defend an accused whose own retained counsel sought his expertise. He took the case on before being assigned, but achieved a nunc pro tunc appointment afterwards. Counsel fees were awarded to him, and – on the objection of the county (which has to foot the bill) – the issue was who can review it.

The administrative judge has been given the authority to review it, but whether or not to appoint counsel in the first place is a judicial function for the court, not the administrative judge. If the local authorities would challenge the appointment itself, they must do so in court, holds *Tormey*, through an Article 78 proceeding in the nature of prohibition.

Article 78 of the CPLR displaces three of the so-called "prerogative" writs of the common law: certiorari, mandamus, and prohibition. Each was designed to remedy a different grievance, and "the nature of the alleged grievance [still] determines ... the questions to be determined ... and the relief which the court has power to grant". (See Siegel, New York Practice 5th Ed. § 557 et seq.) Judicial opinions in Article 78 cases often open with a statement that this is an Article 78 proceeding "in the nature of" certiorari, mandamus, or prohibition – whichever it is – thus narrowing for the reader the expected terrain of the inquiry.

The areas in which the first two operate – certiorari and mandamus – are reasonably clear, but the third, prohibition, often poses issues about scope and function. (Id. § 559.) Essentially prohibition is designed to bar an administrative body, or even a judge, from exceeding jurisdiction, but since many an aggrieved person has tried to convert a judge's error into a question of the judge's jurisdiction, and brought an Article 78 proceeding on a "prohibition" theory to overturn the judge's decision on that basis, the courts still grapple with prohibition-based Article 78s.

Tormey is another example, the Court falling back on its earlier pronouncements on the subject, notably its 1971 decision in *Lee v. Erie County*, 27 N.Y.2d 432, 318 N.Y.S.2d 705. Quoting *Lee* in an opinion by Judge Jones, the Court says that prohibition is

not merely to restrain an unwarranted assumption of jurisdiction, but also to restrain an inferior court from exceeding its authorized powers in a proceeding over which it has jurisdiction.

When there's a procedural dispute in an Article 78 "prohibition" case, it's usually the issue of what does and what doesn't "exceed" the court's powers. The line is often murky, but here, in any event, the Court holds that an administrative judge properly entertaining review of sums awarded by a court to assigned counsel may not incidentally produce power to review the correctness of the assignment itself.

SOVEREIGN IMMUNITY

Lack of Jurisdiction Over Philippines Bars Court From Adjudicating Right To Property Claimed By Philippines And Others

This was a turn-over proceeding brought in New York under CPLR 5225(b) against Merrill Lynch to make it deliver to the petitioner certain brokerage assets Merrill controlled. The assets were part of the billions of dollars worth that Ferdinand Marcos stole from the Republic of the Philippines during his presidency. It was clear that the assets were the result of his thefts. (His maximum salary during his term of office was calculated to be less than \$400,000, as against his worldwide assets in the billions.) (Much of it amassed, no doubt, to keep wife Imelda in shoes.)

The petitioner who brought the turn-over proceeding was only one of many who, or whose family, were "horrifically brutalized" by the "nefarious" regime, as the Court of Appeals describes it, but the issue of whether any of them can reach the assets in the New York proceeding depended on whether the Republic itself was an indispensable party.

It was, holds the Court, and the lack of jurisdiction over it mandates a dismissal in *Swezey v. Merrill Lynch etc.*, 19 N.Y.3d 543, 950 N.Y.S.2d 293 (June 26, 2012).

This is a rare result because before an outright dismissal is justified, a New York court is required to negotiate the five factors listed in CPLR 1001(b) to see if the case can proceed without the particular party. In most cases it can, but in the present case it can't, holds the Court.

The Court sifts all five factors. We can highlight one of them: the second on the CPLR 1001(b) list, which requires the court to consider the prejudice that might accrue to the existing defendant, or to the unjoined party, if the case is allowed to proceed without it.

The Court here sees such prejudice. Prejudice to the defendant, because if the adjudication is made in favor of one of the existing parties, without the Republic present, and Merrill is required to pay out to that winner, it might face a double liability if and when the Republic, in a later proceeding, makes claim to the same assets. Not having been a party to the earlier proceedings, the Republic could not be bound by them.

That immediately suggests that the Republic can answer its own dilemma merely by waiving its sovereign immunity and submitting to jurisdiction, but the Court rejects that idea for what boils down to an issue of "international comity": it says that the Republic itself, presumably representing all of its people, should be left to decide who among them should be allowed to share in Marcos's assets recovered anywhere. In an opinion by Judge Graffeo citing several high court cases here and abroad that have already addressed some Marcos larcenies, the Court says that

wresting control over these matters from the Philippine judicial system would disrupt international comity and reciprocal diplomatic self-interests. Since only the Republic can decide whether it should submit to New York's jurisdiction, it would be inappropriate to force [it] to litigate in our state court system

In the Court's 2003 *Saratoga* decision (Digest 525), the action was allowed to proceed "in a sovereign's absence", but the Court distinguishes *Saratoga* because the question there was "the fundamental balance of governmental powers under our State Constitution" while here in *Swezey* the issue – "the ownership of investment assets" in a dispute that crosses many international borders – stands "in stark contrast". Hence the Court decides that it should not support "another limited exception" to what the Court describes – now citing the U.S. Supreme Court decision in *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008) – as the "general rule" that

an assertion of immunity by a sovereign entity requires dismissal of an action in which it is a necessary party if the entity's claims are not frivolous and there is a potential for injury to its interests.

However *Saratoga* may have qualified as an exception to that rule – and we may note that *Saratoga* itself was by a divided (4-3) Court – the present case doesn't.

The concerns of the Republic of the Philippines are found paramount here because of its interest in having its own courts adjudicate disputes "over property that may have been stolen from its public treasury and transferred to New York through no fault" of its own.