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

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TURNOVER ORDERS IN JUDGMENT ENFORCEMENT

Garnishee Can't Be Compelled To Turn Over Property of Debtor Held Not by Itself, but by Subsidiary

That's how the Court of Appeals construes the phrase "possession or custody" in CPLR 5225(b), the well-known delivery (or "turnover") provision so frequently invoked by judgment creditors seeking to get at the judgment debtor's property through a garnishee. The garnishee must be subject to New York's personal jurisdiction and the property pursued must be in the actual "possession or custody" of the garnishee. It doesn't work if the property is in the custody of a mere subsidiary of the garnishee, rules the Court in *Commonwealth of Northern Mariana Islands v. Canadian Imperial Bank of Commerce*, ... N.Y.3d ...., ... N.Y.S.2d .... 2013 WL 1798585 (April 30, 2013). The answer comes in response to questions of New York law certified by the Second Circuit.

It would be different, the Court says, if "control" were also part of the quoted phrase. In that instance a showing that the garnishee had "control" of the subsidiary as a practical matter would enable the court to direct the garnishee to require its subsidiary to turn over in New York property it holds elsewhere.

"Control" was in fact part of the language of the predecessor statute, the Court points out, which was § 796 of the old Civil Practice Act. When the CPLR was adopted in 1963 and CPLR 5225(b) replaced § 796, the "control" was dropped. The Court finds its elimination intentional. "Accordingly", it concludes in an opinion by Judge Rivera,

> we interpret the omission of "control" from § 5225(b) as an indication that "possession or custody" requires actual possession.

The property here, incidentally, consisted of accounts held by the subsidiary in the judgment debtor's name.

The Court explains that when the legislature intended to include mere "control" in similar situations, it did so explicitly, citing as a prime example CPLR 3111 in dealing with deponents. CPLR 3111 provides for the discovery of "books, papers and other things in the possession, custody or control" of the deponent, which enables the court to make the deponent produce papers and things it holds outside the state.

> We are led to the conclusion [writes the Court] that the Legislature considered "control" and "custody" to refer to distinct concepts.

The Court's precedent that required the most effort to distinguish in *Mariana* is its 2009 *Koehler* decision (Digest 595), in which it held that a court with jurisdiction of a garnishee can make it deliver the debtor's property from outside the state to inside the state if the garnishee controls it. But *Koehler,* says the Court,

> does not interpret the meaning of the phrase "possession or custody," and is only significant in holding that personal jurisdiction is the linchpin of authority under § 5225(b).

In that and like cases, the Court points out, "the garnishee was directed to deliver assets already within its possession". The Court finds no case supporting the creditor's attempt in *Mariana*

> to broadly construe *Koehler* and require that a garnishee be compelled to direct another entity, which is not subject to this state's personal jurisdiction, to deliver assets held in a foreign jurisdiction.

In Digest 636 just this past December we did a lead note on the Court's 2012 *Licci* decision, in which a foreign bank's use of a correspondent New York bank for money transfers that aid foreign terrorist acts was held to support New York longarm jurisdiction, and over the foreign bank itself. Since the Court in *Mariana* makes much of New York's lack of jurisdiction of the Canadian bank that held the assets being pursued, could any plausible basis for New York jurisdiction of the bank be found by analogy to *Koehler*?

In *Koehler*, the foreign bank used a New York bank as its agent and ended up subject to New York jurisdiction. In *Mariana*, the Canadian bank performed no New York act of its own, but was a subsidiary of a New York bank which apparently could have made it act (to turn over the property) if the New York statute – CPLR 5225(b) – had only included the word "control".

If "control" is added to the statute in an amendment, would that by itself turn the trick on facts like *Mariana*'s? Or would the case then face a constitutional (due process) barrier? Constitutional considerations are not treated in *Mariana*, and any address to them by the Second Circuit would in any event have been made to abide the state court's disposition of the state law issues, which could – as they in fact here do – make unnecessary any consideration of constitutional issues.

The Court in *Mariana* doesn't get into the underlying purpose of a turnover statute like CPLR 5225(b), disposing of the case entirely on the omission of the word "control" from the statute.

Following CPLR 5225 in McKinney's are the notes of the Advisory Committee that drafted the CPLR. Whatever the omission of the word "control" from a statute in other contexts may indicate, one may question the broad impact assigned to it on the *Mariana* facts. This subject can well do with some legislative attention.

OTHER DECISIONS

PARTNERSHIP DISSOLUTION

Unilateral Dissolution of Oral Partnership Agreement Is Allowed Because Court Finds "No Definite Term or Particular Undertaking" Specified

The quoted language comes from § 62(1)(b) of the Partnership Law. Citing the statute in *Gelman v. Buehler*, 20 N.Y.3d 534, ... N.Y.S.2d .... (March 26, 2013), the Court of Appeals allows dissolution of the partnership because the complaint shows no "definite term" (referring to a time limit) nor any "particular undertaking" contemplated by it.

The agreement was between P and D, business school graduates who orally formed the partnership in 2007. D withdrew from the partnership when P later refused D's demand for majority ownership of it. P then brought this breach of contract action against D, claiming that such unilateral renunciation was not permissible. D moved to dismiss the action. There being no written partnership agreement before it, the Court relies on the allegations of the complaint for the facts and, giving P – as usual on a motion to dismiss – the benefit of all doubt, finds that P has failed to state a claim and dismisses the action.

As the complaint has it, the two-person agreement was to get $600,000 from investors to establish a "search fund" to identify a business "with growth potential" and then to raise additional money to buy the business, manage it, and sell it at a profit, a potential event they denominated a "liquidity event".

In an opinion by Judge Graffeo the Court cannot find in the agreement – even crediting its language as described in the complaint – any "definite term", a phrase it finds applicable to temporal duration; it sees no "identifiable termination date" that could be said to fix a "term".

On the alternative element – the need to identify a "particular undertaking" as the object of the partnership and show that it has not yet been achieved – the Court reviews the precedents and finds most of them equally unsuccessful in meeting the statute. The Court does cite as a positive example the situation it finds in *St. Lawrence Factory Stores v. Ogdensburg Bridge & Port Auth.*, 202 A.D.2d 844, 609 N.Y.S.2d 370 (3d Dep't 1994), where the partnership's purpose was "the development and construction of a retail factory outlet center on an identified parcel of real property". "Nothing in *Gelman*'s complaint", the Court says, "approaches such precision".

Hence the agreement was "dissolvable at will" and P has no claim against D for unilaterally dissolving it.

ISSUE PRECLUSION

Claimant's "Alford" Plea of Guilty in Criminal Proceeding Can't Be Preclusive of Later Workers' Comp Claim Because Court Hadn't Clarified Plea's Factual Basis

An "*Alford*" plea of guilty – after *North Carolina v. Alford*, 400 U.S. 25 (1970) – is defined by the New York Court of Appeals as one in which the accused pleads guilty on defense counsel's recommendation because of the "risks involved in going to trial". It constitutes no "admission of [any] wrongdoing". It's primarily the product of the criminal realm, but we report it here because it puts in an important – and equally futile – appearance in a civil context.

Here claimant C, injured on the job while working for E, applied for and got workers' compensation, which he then received for several years. He had been asked at the hearing whether he had any employment outside of his job with E. He said he didn't, which was apparently a lie and generated a criminal prosecution containing a slew of charges, including insurance fraud and grand larceny among others.

"Ultimately", as the Court of Appeals describes it in *Howard v. Stature Electric, Inc.*, 20 N.Y.3d 522, ... N.Y.S.2d .... (March 21, 2013), C pleaded guilty to only one charge in satisfaction of all of them, and specified it was an "*Alford* plea".

The plea ends up doing quite a nice job for him. In a later workers' compensation hearing in which E's carrier "sought to preclude claimant" from recovering "further benefits based upon the guilty plea", the appellate division denied the estoppel, holding that when C entered the plea "he made no factual admissions and the transcript of the plea proceedings lacked any discussion of the factual basis for the charge". The Court of Appeals agrees; it finds the

> plea colloquy preceding claimant's insurance fraud conviction [predicated on the plea] included no reference to the facts underlying the conviction, so it is impossible to conclude that the conviction was based upon the same circumstances alleged to be fraudulent in the workers' compensation proceeding.

In an opinion by Judge Pigott, the Court says that identicalness of the issue is one of two prerequisites to the estoppel. The other is a showing that the one against whom it's invoked "had a full and fair opportunity to contest it" in the prior proceeding.

The case is apparently remitted for further proceedings to address and resolve those matters.

The Court says that "*Alford* pleas are – and should be – rare". Considering the lost time and effort generated by the plea in this case, it would do the practice better if they were eliminated altogether.

PUNITIVE DAMAGES

Act Done Deliberately Does Not, Merely Because Actionable, Necessarily Support Punitive Damages

In its memorandum opinion in *Dupree v. Giugliano*, 20 N.Y.3d 921, 958 N.Y.S.2d 312 (Nov. 29, 2012), citing and quoting from its earlier (1993) *Prozeralik* decision (Digest 411), the Court of Appeals said that for an award of punitive damages there must be

> aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton.

It didn't add up to that in *Dupree*, and it doesn't add up to that in the still more recent *Marinaccio v. Town of Clarence*, 20 N.Y.3d 506, ... N.Y.S.2d .... (March 21, 2013), in which the Court overturns an award of punitive damages that had been made below.

P and D had adjoining parcels in *Marinaccio*. D was converting his into a residential subdivision, submitting a plan to the town and apparently securing all required authorization. The plan required water from the west side of D's parcel to flow into a storm sewer and then into a ditch to create a "mitigation pond" on the northeast of it. Turns out, however, that the ditch was actually on P's land, not D's, and was used without permission. P claimed his land consequently became flooded, and a mosquito and frog breeding ground, about which, says the Court, P was "phobic".

P called these things to D's attention, but D merely responded that the flooding was not his problem. The town tried to clean out the ditch – and remedy the problem – but, according to D, all of the town's efforts were refused by an "enraged" P. The town then discontinued all such efforts.

On that showing, the trial court and a divided appellate division allowed punitive damages, but the Court of Appeals says the record still didn't reach that level. The mere fact that all of D's conduct was undertaken deliberately here – this was no mere negligence case – does not do the needed job. Deliberate it was, but not undertaken with "malice or gross indifference", holds the Court in an opinion by Chief Judge Lippman.

The compensatory aspects of the verdict – which are upheld – were substantial: $1,313,600 against the town and $328,400 against D. The punitive award was only against D, and for $250,000. In fact, the whole case had been settled except for that punitive element, which thus became the sole subject of the appeal.

The Court has no praise for the conduct of D or the town; their dealings with P and his property "were not ideal", it remarks. But at the same time it comments that both "have been held liable for compensatory damages for their transgressions". The Court appears also to be influenced by the fact that these awards were not nominal.

BREACH OF REAL ESTATE CONTRACT

Court Keeps Rule on Measure of Seller's Damages When Buyer Breaches Its Contract to Buy the Property

It holds in *White v. Farrell*, 20 N.Y.3d 487, ... N.Y.S.2d .... (March 21, 2013), that

> the measure of damages is the difference, if any, between the contract price and the fair market value of the property at the time of the breach.

What that value is, however, is an issue of fact, holds the Court of Appeals.

The rule on the measure is one of first impression in the Court, but the appellate divisions have met it often and have adopted the quoted rule. The sticky issue is what that value is at breach time. The Court's opinion in *White*, by Judge Read, is largely a review of those cases and the standards they apply in resolving the issue. The Court goes over the elements that call for treatment by the trier of the facts.

The Court rejects an invitation to adopt a different rule, finding this another instance in which the general rule has been long followed as a matter of practice and should be preserved so that all can continue to rely on it. The Court also took that position in its 1986 *Maxton* decision (Digest 324) involving another issue arising when a real property contract is breached by the buyer. (*Maxton* held that a defaulting buyer forfeits its down payment and the Court refused to depart from that rule, also largely relied on in the real estate industry.)

Quoting from *Maxton*, the Court says in *White* that adherence to tradition is "particularly apt in cases involving the legal effect of contractual relations". Forfeiture of the down payment was only one of the incidents treated in *White*, in which seller S and buyer B agreed, on June 12, 2005, to the sales price of $1.725 million for property on a popular upstate lake. B paid S a $25,000 deposit. Issues then arose about water and septic field – or so B claimed – and B backed out.

Perhaps more often than not, S in that case will just keep the deposit and sell the property to another, but that popular course becomes unpopular when the market declines and S has to sell for substantially less than the contract price, which is apparently what occurred in *White* – no surprise in light of recent economic conditions. About a month after the contract date, B elected to terminate, citing among other things the need for a retaining wall for the water problem. S labeled that "nothing more than a fabricated reason to cancel the contract".

B sued in June 2006 to recover the down payment of $25,000, S thereupon counterclaiming for damages for breach of contract. While that action was pending, S sold the property to another for $1,376,550, and then sought as damages the $348,450 difference between that and the B/S contract price of $1.725 million. The trial court held that it was B who breached the contract, but it also held that the market price at the time of the breach was the same as the contract price, so that S suffered no actual damages. The appellate division affirmed and the Court of Appeals granted leave to appeal.

The Court reviews the factors that need consideration in assessing market value at breach time, which include the condition of the property at that time and the cost of curing any legitimate objections B may have had about drainage, and considering also whether S "made sufficient efforts to mitigate (i.e., to resell at a reasonable price after [B's] default)". The Court remands the case for trial to consider those and related issues.

A two-judge opinion written by Judge Pigott concurs in result, also holding in favor of S, but it would not follow the majority rule, which it finds insufficiently protective of a non-breaching seller in respect of the incidental costs of a buyer's breach. Under the majority's rule, says the concurrence, "it is the innocent sellers, and not the breaching buyers, who must bear the cost of the buyers' breach". The concurrence describes those costs and would adopt the rule of the Uniform Land Transactions Act (ULTA), which it finds more protective of "the nonbreaching seller", placing any risk involved on "the breaching buyer".

The majority shows little enthusiasm for ULTA, which it describes as "something of a flop ... never adopted by any state" and in fact ultimately withdrawn by the same national conference that recommended it.

RESIDENCY REQUIREMENTS

Violations of Valid Residency Requirements by City School District Employees Bring Dismissal of Two and Possibly Also a Third

We put the third down as a mere "possible" because it still remains to be determined whether the board's finding that she did not meet the residency requirements was arbitrary and capricious under CPLR 7803(3). (Her case is remanded for that test.) The finding of the nonresidence of the other two employees passes the test and produces a judicial upholding of their administrative dismissal.

All three brought Article 78 proceedings to overturn their firings.

The municipality involved was Niagara Falls and its Board of Education. The city requires its teachers to reside at all times in the city, and gives them a period in which to move to the city if they don't reside there when first hired. Each of the three cases involved apparently evasive efforts by the employee to make it appear that residence was within the city when it actually was not.

The city conducted surveillance as to each of the three. The Court's opinion in *Beck-Nichols v. Bianco*, 20 N.Y.3d 540, ... N.Y.S.2d .... (Feb. 19, 2013), recites the surveillance steps in detail, giving the impression of a series of Inspector Clouseaus tiptoeing in and out of Niagara Falls to trace the comings and goings of the three employees, one a computer operator, one a teacher, and one a school counselor. But trace them the town did, and it was apparent in each case – subject, as noted, to the Article 78 review in the third one – that the local address given was not really the residence at all; that in each case the real residence was beyond the city. (In one case, for example, the wife claimed a city residence while her husband lived outside the city and it was shown that she left and returned to his home regularly.)

The surveillers conducted visits to all the sites involved, both by day and night, corroborating in each case a pattern of travels that left easy room for the city to conclude that it was being taken.

In an opinion by Judge Read, the Court finds the city's residence requirement well within its legislative powers.

Although the terms are not always identical, by "residence" in contexts like these is usually meant "domicile", and while residence by itself can merely connote a physical place of abode, the intention to make it "home" is what turns mere "residence" into the requisite "domicile". (It's a subjective thing that often poses the kinds of issues of fact met in the present trio of cases.)

The applicable regulation in this case, moreover, contains a specific definition of its own, pointing the same way. It defines "residency" as "an individual's actual principal domicile at which he or she maintains usual personal and household effects". It was argued that the definition was ambiguous. The Court rejects that out of hand; it "may be criticized for redundancy or surplusage", says the Court, "but not ambiguity".

Two of the employees sought hearings related to performance and to discipline, but the Court finds those categories irrelevant. The residency requirement defines eligibility for employment, the Court holds, and is therefore "unrelated to job performance, misconduct or competency". The quoted language comes from the Court's 2004 *Felix* decision (Digest 541), in which the Court held in a like situation that where the evidence establishes that a city employee is not a resident, as required, firing is permissible without a full adversarial hearing concerning performance or misconduct.

RESTRAINT FAILS BECAUSE GARNISHEE OWED DEBTOR NOTHING

Court Recognizes Garnishee's "Prepayment" Deal with Debtor, Leaving Nothing for Creditor To Get At

That was the holding of the appellate division in *Verizon New England Inc. v. Transcom Enhanced Services, Inc.*, 98 A.D.3d 203, 948 N.Y.S.2d 245 (1st Dep't, June 28, 2012), where the court was divided 3-2. Now, on further appeal, the Court of Appeals affirms the appellate division majority – and

unanimously. The above captions, in fact, are essentially the same used in the treatment of the appellate division decision in Issue 247 of Siegel's Practice Review.

Before a judgment creditor (JC) can reach a debt owed to a judgment debtor (JD) by a third party (G, for garnishee), it must be shown that the debt is presently owed by G and does not depend on a contingency that may never occur. In *Verizon*, the property possessed by G and presumably owed by G to JD did not merely depend on a contingency that may never occur; the Court finds that because of the special arrangement JD and G had in their dealings, G owed JD nothing at all at the time of the service of the restraining notice and hence there was nothing for JC to try to get at.

Verizon was JC. It had a Massachusetts judgment against JD for some $58 million and sought to enforce it in New York after duly converting it into a New York judgment. More specifically, JC sought to enforce it out of money ostensibly owed to JD by G under a contract whereby G bought certain internet services from JD. Pursuant to CPLR 5222(b), JC served a restraining notice on G (who was subject to New York jurisdiction) to put a hold on any money owed by G to JD for such services. If G did owe JD any money for such services when JC served the restraining notice on G, the restraint would clearly have applied to the money and JC would have realized something towards its judgment.

There was a big rub in *Verizon*, however, and it rubbed in G's (and hence JD's) favor. The relationship between G and JD had been "strained" for years, leading to an oral re-arrangement whereby G would prepay for JD's services a week in advance of each installment of them, G getting services from JD for only that week. That plan was to continue: G paying, in advance, for only a week's worth of JD's services at a time. Accepting that arrangement, and deeming itself bound by the "affirmed findings" of fact made below, the Court of Appeals in *Verizon* holds that there was nothing for JC's restraining notice to operate on because there was nothing that G owed to JD when it was served with the notice.

The Court distinguishes its 1976 *ABKCO* decision, in which a seemingly contingent interest was subjected to levy because it had the obvious potential for ripening into something of great economic value – the showing of a Beatles film. (See the discussion of the *ABKCO* case in Siegel, New York Practice 5th Ed. § 489, and the Court's return to the topic in its 1987 *Supreme Merchandise* decision, the subject of the Digest's lead note in Issue 337.) The Court finds here in *Verizon* no analogous possibilities at all: under the JD/G arrangement there was nothing at all to which JC could look for enforcement, either now or in the future.

The opinion, in 2013 WL 1829836 (May 2, 2013), was written by Judge Rivera, as was the opinion in our lead note this month, treating the *Mariana* case, which also involved an enforcement of judgments issue. These are apparently Judge Rivera's first writings for the Court in civil cases.