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

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SUBSTITUTE JUDGE'S POWERS

NEW JUDGE CAN DECIDE MOTION ORALLY ARGUED BEFORE PRIOR JUDGE IF TRANSCRIPT OF PRIOR ARGUMENT IS AVAILABLE AND ONLY ISSUES OF LAW EXIST

People v. Hampton, ... N.Y.3d ...., ... N.Y.S.2d ...., 2013 WL 2393749 (June 4, 2013), is a criminal action (a murder prosecution) that had gone all through a trial before Judge A and a verdict of conviction when, after an article about the case appeared in a local newspaper, Judge A got a call from someone advising him that the victim of the murder "was the nephew of a good friend" of his. The judge advised the attorneys of this promptly and then concluded that this posed a conflict that required him to recuse himself. He did, and referred all further proceedings in the case to the substitute judge, Judge B.

Defense counsel had meanwhile made motions for dismissal, and for a setting aside of the verdict for lack of evidence. These were the applications Judge B was called upon to decide. He did, denying them. The defendant of course objected.

The question was whether Judge B could do this, in view of § 21 of the Judiciary Law, which provides that a trial-level judge

> shall not decide or take part in the decision of a question, which was argued orally in the court, when he was not present and sitting therein as a judge.

In an opinion by Judge Read, the Court of Appeals finds no violation of this statute in Judge B's actions, and affirms the conviction. It holds that the second judge's rulings are permissible "so long as a transcript or recording of the prior argument is available for review", and, quoting from its own 1997 decision in *People v. Thompson*, 90 N.Y.2d 615, 665 N.Y.S.2d 21, as long as

> the substitute indicates on the record the requisite familiarity with the proceedings and no undue prejudice occurs to the defendant or the People.

Judge B so indicated on the record, and the Court sees no "undue prejudice" under this standard.

The issue concerned the identification of the defendant by several witnesses, and all facts were decided by the jury, including issues of credibility. There was nothing for the new judge to decide but legal issues, with no invasion of the jury's province.

An issue apparently arose about the court's power to set aside the verdict as contrary to the weight of the evidence, to which the Court responds that this was not germane in this case because a setting aside of a verdict on that ground is reserved exclusively to the appellate division. It cited for that proposition its 1984 decision in *People v. Carter*, 63 N.Y.2d 530, 483 N.Y.S.2d 654, where the Court was considering the "weight" issue – as it is doing here – in a criminal case.

The rule is of course otherwise in civil actions, where the "weight" power is explicitly conferred by CPLR 4404(a) and belongs to both trial and appellate courts. (See Siegel, New York Practice 5th Ed. § 406.) (Section § 21 of the Judiciary Law, the statute on the powers of substitute judges that the Court was considering here in *Hampton*, applies in civil as well as criminal cases.)

OTHER DECISIONS

PRIORITY DISPUTES IN FORECLOSURE

Lender's Failure to File Building Loan Contract Subordinates, to Later Mechanics' Liens, Its Claim to Foreclosure Proceeds

Simplifying the extensive details treated by the Court of Appeals in *Altshuler Shaham Provident Funds, Ltd. v. GML Tower, LLC*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2013 WL 2475863 (June 11, 2013; 5-1 decision), we see an action to foreclose a mortgage on a Syracuse building – part of what was once the Hotel Syracuse – and a dispute over who should have priority in the proceeds of the sale after the foreclosure. The part relevant to the dispute here was a $10 million loan made by the plaintiff to the redeveloper of the premises.

In an opinion by Judge Read, the Court finds this contract to be a building loan contract under § 22 of the Lien Law, which subjects the lender to the loss of priority if it fails, as this lender did, to file the contract in the county clerk's office. The purpose of the filing requirement is to give notice to all, especially those planning to furnish labor or materials on the project, about the finances of the property owner.

The Court ends up concluding that the lender's failure to file in this case lost it priority in $4.5 million of the $10 million. There the mechanics' lienors come first. (The case also involved a contest among the lienors for priority *inter se*, but we address here only the lender's role and rights.)

Section 22 of the Lien Law is clear that if the building loan contract is not filed as prescribed

> the interest of each party to such contract in the real property affected thereby is subject to the lien and claim of a person who shall thereafter file a notice of lien.

The plaintiff here failed to effect the needed filings as well as the modifications contained in later amendments.

The Court finds, however, that the subordination penalty of § 22 "logically applies only to funds loaned to pay for improvements", and that, of the loan sum involved here, $5.5 million was not used for improvements, but rather "to pay off the existing purchase-money mortgage". The transaction in that aspect closed and was duly filed "before any contractor began work on the project", the Court finds, and "before any monies were advanced for construction". As to the $5.5 million, therefore, it concludes that subordination does not apply.

Judge Graffeo dissents only on the last point. She would hold the lender's interest in the $5.5 million also subordinate to the other liens. She concludes that

> [a]lthough this appears to wipe out any recovery for the lender, the Legislature adopted this statutory penalty to dissuade lenders from engaging in the very conduct that occurred here.

To Judge Graffeo, the rule adopted by the majority is "antithetical" to the aim of the statute. The Legislature, she says, made

> a considered decision that as between the lender, who could have protected its investment in full merely by timely recording its documents, and the contractors, laborers and material suppliers, who were inappropriately kept in the dark, it is the lender who should bear the loss.

The broad lesson of the case on the financial front is of course to lenders who advance funds for what may possibly qualify as a "building loan contract": they must carry out the filing obligations of the Lien Law to the letter. Because of the interplay of time elements in this case – themselves confusing – the lender ended up with at least half a loaf, and the dissent would have denied it even that.

There's a shorter but safer lesson in the case on a narrower issue. The majority at several points uses the word "tranche", which we've never seen before – in or out of Court of Appeals opinions. It sent us to the dictionary. The up-to-date Webster's Unabridged on the Internet defines "tranche" as "an issue of bonds derived from a pooling of like obligations (as securitized mortgage debt) that is differentiated from other issues especially by maturity or rate of return".

Without a mass of additional verbiage to give it context, however, we think "tranche" can only confuse a mortgage setting. The word is more likely to conjure up other scenes, like a western spread with lots of sheep and cattle; or a World War I fighting dugout; or what a hypnotist can put you into. (Or maybe the name of a deadly spider a child is trying to pronounce.)

HOME RULE LAW

In State Law/Local Law Competition, State Law Is Not Unreasonable Merely Because It Does Not Treat All Parts of State Alike

The competition comes about under the Home Rule section of the state constitution, Art.IX, § 2(b)(2), which requires the state to keep hands off matters of exclusively local concern unless the state is asked to intervene pursuant to a request by the locality under the procedures outlined in that section. Such a request is known as a Home Rule message.

Courts sometimes have a tough job resolving cases with Home Rule issues, which can require a court to act as a referee in what amounts to a political turf-protection battle between state and local authorities.

The Home Rule section allows the state to act on affairs of local government only through a "general" law, i.e., one applicable everywhere. The state also can do so by a "special" law, but only if the proper request has been made by the municipality involved. It's an exception, but an exception to that exception exists when the special law serves a substantial state concern, as the Court observed in its 2001 *Patrolmen's Benevolent Association (PBA II)* decision (Digest 508), involving a collective bargaining dispute.

The Court faces a similar issue in *Empire State Chapter of Associated Builders and Contractors, Inc. v. Smith*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2013 WL 2435070 (June 6, 2013), concerning bidding on public construction contracts. The so-called "Wicks Law" of 1912, codified in several statutes, required bidders to meet certain specification requirements in three separate contracting categories – plumbing, electric, and ventilation – but it also included a monetary threshold below which a case would be free of regulation.

This threshold was uniform until amendments hiked the amounts – disuniformly – in 2008 legislation. The hike in New York City was to $3 million, in its surrounding counties to $1.5 million, and elsewhere to $500,000. Plaintiffs claimed this to be a violation of the Home Rule law in that it favored contractors on New York City projects, who, because of the higher threshold, would face less regulation than upstaters.

In an opinion by Judge Smith, the Court rejects the plaintiffs' argument. The matter of bidding on public contracts, involved here, is clearly "a matter of substantial State concern" and not

> the sort of State meddling in purely local affairs that the Home Rule section was enacted to prohibit.

Citing an earlier *PBA* case (*PBA I*, decided in 1996), the plaintiffs argued that the courts must examine the "reasonableness" of regulatory statutes that draw lines between different parts of the state. Rejecting the argument, the Court responds that the *PBA* case

> did not use "reasonable relationship" in [that] sense; [the] case is not an invitation to subject every geographical disparity in statewide legislation to a freestanding reasonableness analysis[,]

and the Court finds none mandated in the *Empire* case.

On an incidental matter, however, the Court offers at least a small bone to out-of-state contractors, who were among the plaintiffs. Another part of the contested legislation imposes certain "apprenticeship requirements". The Court finds these to discriminate against out-of-state contractors, who were among the plaintiffs, posing a plausible argument of a violation of the Privileges and Immunities and Commerce clauses of the federal constitution. Those clauses "significantly limit the power of states to give preferential treatment to their own citizens". The parts of the complaint alleging such discrimination are sustained as a matter of pleading and allowed to go forward.

"HAIL ACT" FOR CABS SUSTAINED

Laws in 2011 and 2012 That Regulate Both Medallion Cabs and Livery Vehicles, Especially to Assure Handicapped Access, Are Upheld

The basic difference between the two categories is that, within certain geographical areas, the medallion cabs are metered and can respond to street "hails" while the livery cabs can't do street pickups and have to be arranged for in advance. The legislation recognizes a number of problems about this, including the problem of numbers (how many of these vehicles are available?) and geography (where are they available?). As most taxicab riders can attest, "hails" predominate in the commercial areas of Manhattan and at the airports (LaGuardia and Kennedy, both in Queens). Elsewhere in the city hail cabs are virtually unavailable and livery vehicles are relied on. There is also a "fierce" competition for medallions, which are transferable but limited in number, and the price for them has soared over the years. This legislation, from 2011 and 2012, aims to improve things.

The 2011 statute and its 2012 amendment, known as the "HAIL Act", seek to address these matters, most significantly so as to increase substantially the number of vehicles that are handicapped-accessible, notably for wheelchairs.

Legislation years ago delegated to the city council the regulatory power over cabs in New York City. The city does its regulating through its Taxi and Limousine Commission (TLC) and the recent Court of Appeals decision in *Greater New York Taxi Ass'n v. State*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2013 WL 2435073 (June 6, 2013), shows the competition between TLC regulations and state statutes about where regulatory power over these matters lies.

Among other issues implicated is another bout with the Home Rule section of the state constitution – as more thoroughly elaborated in the *Empire* case, just above, decided on the same day.

As held *Empire*, so holds the *Greater New York* case on this issue. In both, the Court cites the influential earlier decision on point on the Home Rule section, Chief Judge Cardozo's concurrence in *Adler v. Deegan*, 251 N.Y. 467 (1929). Addressing the elusive line that the state may not cross without a home rule note of invitation from the local municipality, the Court in *Greater New York* says that just as there are affairs that are exclusively those of the State, there are, citing Cardozo, "some affairs intimately connected with the exercise by the city of its corporate functions, which are city affairs only". The Court acknowledges that a zone exists, however, "where State and city concerns overlap and intermingle".

This case, like *Empire*, is an example of the latter, and so here, too, the legislation is subjected to appropriate inquiry. The Court makes that inquiry and concludes that State interests in neither case are found to be – in the language of the *Empire* case –

> the sort of State meddling in purely local affairs that the Home Rule section was enacted to prohibit.

The state has a legitimate and direct interest in the availability of transportation, especially to the handicapped. Hence the Court finds "that the HAIL Act addresses a matter of substantial State concern ... for the benefit of all New Yorkers, and not merely those residing within the City".

In an opinion by Judge Pigott, the Court considered some arguments of the plaintiffs that it might not otherwise have addressed, because of a "poison pill" provision in the Act, which would have annulled all of it if any part were to be found invalid. But plainly, holds the Court,

> not only does the Act, including its challenged provisions, address substantial State concerns, but [under the cited precedents] it also "bear[s] a reasonable relationship" to those concerns.

SCHOOL'S RETIREMENT BENEFITS

District's Voluntary Continuation of Medical Benefits for Over-65 Retirees, After Statutory Requirement Was Dropped, Is Found to Give Rise to Binding Expectation of Continuance

And teachers and other employees of the district, through their union, could therefore enforce their right to similar coverage.

The dispute arose when the school district, "due to costs", circulated a memo "announcing termination" of the district's long practice of reimbursing Medicare Part B premiums of over-65 retirees. The collective bargaining agreements (CBAs) negotiated after that "said nothing" about such benefits, but the district nevertheless continued them.

Was the union correct in its claim that the district's teachers and employees could rely on that voluntary continuation and insist on the preservation of such benefits?

It was, holds the Court of Appeals in *Chenango Forks Central School District v. New York State Public Employment Relations Board*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2013 WL 2435066 (June 6, 2013).

The Court's decision is the culmination of a series of arbitral and administrative proceedings pursued in the district/union dispute. In an opinion by Judge Read, the Court minutely traces these proceedings and the interplay they produced between the arbitration and the administrative steps. These ended in a decision for the union and that decision led to this Article 78 proceeding by the district to overturn it.

The effort fails. Affirming a divided appellate division upholding the decision for the union, the Court goes through the several possibilities that CPLR 7803 lists for overturning a decision and finds none of them met.

There was no error of law or abuse of discretion in the finding that the voluntary continuation of the district's benefits practice was relied on by the school community, nor anything arbitrary and capricious about it. There was testimony by a substantial number of employees attesting to their understanding that they would be entitled to these over-65 benefits, and the district did not successfully counter that.

There was also a collateral estoppel issue in the case. The union had filed a contract grievance, invoking an arbitration procedure, and, separately, an improper practice charge with the Public Employment Relations Board under the Taylor Law (Civ.Svc.L. § 209-a[1][d]). The arbitrator had found that there had not been the past practice that the school employees claimed, but PERB held that finding "entirely dicta" and not binding on it. This of course freed PERB to go on to find that there was indeed such a practice, and so it found.

The Court of Appeals agrees that the arbitral finding was mere dictum and that PERB was therefore within its powers in ignoring it. In doing so, PERB relied on its prior decisions in Taylor Law cases.

PERB also found that the district would have had "actual or constructive knowledge" of the continued practice through its own financial records. It was the district, after all, that was paying for all this. And to the district's argument that it didn't explicitly agree to the continued benefits, the Court answers that "[a] binding past practice under the Taylor Law ... does not require mutual understanding and agreement".

The case's address to the collateral estoppel skirmish between arbitration panel and administrative board suggests that the decision may play a significant role in future cases.

WITHDRAWAL OF TAX CREDITS

Retroactive Application of Statutes Cancelling Already Relied-On Tax Credits Is Found Unconstitutional

In a 1986 program designed to stimulate private investment and job creation in areas of high poverty and unemployment, the legislature adopted what is now known as the Empire Zones Program Act. It offers tax credits to businesses for – among other things – adding employees. The hope, of course, is to improve economic conditions that would also, ultimately, increase taxes to the state.

Many companies applied for and were granted certification under the program. Some objectionable practices resulted, however, such as "shirt-changing", in which companies reincorporated, or employees were transferred to related companies, to make it appear, falsely, that new jobs were being created. Benefit/cost assessments indicated that the state was losing more in the tax credits it was offering than what it was taking in through taxation of the expected economic activity.

This led to 2009 legislation designed "to rein in abuses" and to decertify companies so as eliminate further tax benefits from those whose performances did not measure up to expectations. That statutory change, and the validity of the retroactivity that the state claimed for it, was before the Court of Appeals in a number of cases, the first of which is named *James Square Associates LP v. Mullen*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2013 WL 2393852 (June 4, 2013; 5-1 opinion). The holding is that the 2009 legislation may not be applied retroactively.

The majority opinion, written by Chief Judge Lippman, is especially interesting in that after examining the issue at length, it rejects the idea that retroactive application would amount to a "taking" of property. Comparing the case before it with a number of others, including federal (and U.S. Supreme Court) decisions, the Court concludes that

> [t]he retroactive tax liability imposed in the present case cannot be characterized as so flagrant as to constitute the confiscation of property under the Takings Clause ... [because plaintiffs here] had no guarantee that they would ever recoup their business investments through the receipt of tax credits.

But the Court nevertheless does find the retroactivity attempted in this case to be an unconstitutional violation under the Due Process clause, citing what it describes as the "multi-factor balancing-of-equities test" referred to in its 1987 *Replan* decision (Digest 337). The test investigates three factors:

1. whether under the circumstances the plaintiff had "forewarning" of a change and hence the reasonableness of relying on the old law;
2. the length of the retroactivity period; and
3. the public purpose cited to justify the retroactivity.

The "focus of the three-pronged test is fairness", the Court concludes in *James*, and an examination of the factors in *James* and its companion cases satisfies the Court that in all of them "the 2009 Amendments

should not be applied retroactively". Retroactive application would simply punish participants "more harshly for behavior that already occurred and that they could not alter".

Judge Smith in dissent sees no constitutional issue, and finds the majority approach introducing unnecessary complications into the required analyses. To the dissent what the majority is saying – and with which the dissent disagrees – is that the difference

> between a retroactive tax statute that is a taking and one that only violates due process is between one that is so "arbitrary" as not to be "an exertion of taxation" at all ... and one that is less arbitrary but still fails the test of "fairness".