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

Editor: DAVID D. SIEGEL

New York State Bar Association, One Elk Street, Albany, New York
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OMISSION OF AFFIDAVIT OF MERIT ON MOTION FOR DEFAULT JUDGMENT IS NOT JURISDICTIONAL DEFECT; COURT CAN EXCUSE IT

In its 2003 *Woodson* decision (Digest 522), the Court of Appeals left open a question that has long divided the appellate divisions. It arises under subdivision (f) of CPLR 3215.

CPLR 3215(f) prescribes the proof needed for entry of a default judgment against a defendant, requiring among other things that the plaintiff include an affidavit of merit in the application: in the language of the statute, "proof of the facts constituting the claim". In disposing of other matters under the statute, the Court in *Woodson* left open whether failure to include such proof renders the judgment a "nullity".

It answers that open question now in *Manhattan Telecommunications Corp. v. H & A Locksmith, Inc.*, ... N.Y.3d ...., ... N.Y.S.2d ..... 2013 WL 2338405 (May 30, 2013). The judgment is not a nullity.

"[N]ot every defect in a default judgment requires ... a court to set it aside", says the Court; depending on the nature of the defect, vacatur of the judgment may be sought under subdivision (a)(1) of CPLR 5015, which permits vacatur for an "excusable default".

As the Court sees it, the proper question is whether the defect is

> so fundamental that it deprived the court of power to enter the judgment, rendering the judgment a nullity whether [the] default was excusable or not.

The defect of not including proof of the claim among the papers is not of so "fundamental" a nature, the Court holds in *Manhattan* in an opinion by Judge Smith; it does not go to the court's "jurisdiction". The Court remands the case for the appellate division to consider whether the default was excusable, freed now of the notion that excusing the default is beyond its powers.

The conflict on this issue among the lower courts has been going on for some time. A note on the subject appears in Siegel's Practice Review (SPR 180:2), including citation of the First Department's 2006 decision in *Natradeze v. Rubin*, 33 A.D.3d 535, 822 N.Y.S.2d 541, and the Second Department's decision the same year in *Araujo v. Aviles*, 33 A.D.3d 830, 824 N.Y.S.2d 317. *Natradeze* held the judgment a "nullity" and vacated it even though the defendant did not challenge the plaintiff's papers until the case was on appeal (the defendant having appealed the order denying the motion to vacate).

Araujo went the other way, holding that the omission of the merits showing does not void the judgment, i.e., render it a nullity. It remains valid until vacated, held *Araujo*; if the default is excused, the court can accept belated proof of the merits and thereby preserve the judgment.

The Court of Appeals in *Manhattan*, taking note of both cases among others, in essence adopts the *Araujo* view. It remits the case to the appellate division to consider whether to excuse the default and vacate the judgment.

The Court emphatically holds that the defect did not go to "jurisdiction". One might ask which category of jurisdiction the Court was referring to: personal jurisdiction or subject matter jurisdiction? The latter is considered the more sensitive of the two: the tradition of the caselaw is that subject matter jurisdiction may not be conferred on a court by mere consent and that the lack of it creates an unwaivable defect. (See Siegel, New York Practice 5th Ed. § 8.)

The Court in *Manhattan* does not tarry with the distinction. By citing one of its key prior decisions on subject matter jurisdiction, *Lacks v. Lacks*, 41 N.Y.2d 71, 390 N.Y.S.2d 875, a 1976 opinion by Chief Judge Breitel, the Court indicates that whichever jurisdictional niche the defect in *Manhattan* might be assigned to, it is not so "fundamental" that its presence renders the judgment a "nullity". Citing *Lacks*, the Court says that the word "jurisdiction" is often "loosely used". Then, further subquoting from *Lacks*, it adds that

> in applying the principle "that a judgment rendered without subject matter jurisdiction is void, and that the defect may be raised at any time and may not be waived", it is necessary to understand the word in its strict, narrow sense. So understood, it refers to objections that are "fundamental to the power of adjudication of a court".

The Court concludes, as did *Lacks*, that lack of jurisdiction should not be used merely to signify "that elements of a cause of action are absent".

Hence, with whatever "jurisdiction" label it carries, the *Manhattan* case now travels back to the appellate division for an application of the discretionary factors applicable under CPLR 5015(a)(1), with a view to the vacatur of the judgment if the plaintiff can furnish the needed proof of the claim and can excuse the default.

* * *

Examples of defects of subject matter jurisdiction are rare in New York practice, in contrast with the federal courts. Readers might find helpful an aside on this contrast.

All the federal courts sitting in the states are courts of limited jurisdiction. (This excludes the District of Columbia and the territories.) Federal practice has no court of "general" jurisdiction in any state, such as the supreme court is in New York practice. Hence issues of subject matter jurisdiction, seen on a regular basis in federal practice, are relatively infrequent in the New York courts. Sometimes one has to press for a good example of a defect of subject matter jurisdiction in the New York system. A good example would be an attempt by a town or village court to entertain a matrimonial action and try to divorce the parties. (See Siegel, New York Practice 5th Ed. §§ 8 and 611.)

The kind of defect met in *Manhattan* is worlds away from anything like that clear-cut example. Hence the difficulty met by the Court of Appeals there, and its avoidance of any prolonged discussion of "subject matter jurisdiction". Lawyers looking for lessons on the topic will find the federal courts the better school.

OTHER DECISIONS

ACKNOWLEDGING PRENUPTIAL AGREEMENT

Rigid Construction of Acknowledgment Requirement Results in Summary Judgment Invalidating Prenuptial Agreement

If ever a person – including a lawyer – feels inclined to assume that an aggregate of proof showing the signing and acknowledgment of an agreement can overcome a defect in the acknowledgment itself, the recent decision of the Court of Appeals in *Galetta v. Galetta*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2013 WL

2338421 (May 30, 2013), should cancel the assumption and prompt the most scrupulous attention to every minute detail of the acknowledgment process.

The failure of that attention to what some might see as a minor or at least a curable omission in *Galetta* brought a woman (wife W) a summary judgment against her husband (H), voiding the prenuptial agreement and with it all of the individual property protections the agreement aimed at.

The statute most prominently involved in *Galetta* is § 236B(3) of the Domestic Relations Law, which upholds a prenuptial agreement if it's

> in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded.

This invites application of the deed-acknowledging procedure of § 291 of the Real Property Law. In an opinion by Judge Graffeo, the Court says it will "focus on that methodology", and does it ever!

The acknowledgment formalities were carried out with respect to W's signature, including the "boilerplate" recitation by the notary that "before me came [W] to me known and known to me to be the person described in and who executed the foregoing instrument". But the phrase "to me known and known to me" was "inexplicably omitted" from the acknowledgment as to H's signature, and therein lay the woes that led to the forfeiture of whatever protections H assumed he had secured.

The Court relies heavily on its 1997 *Matisoff* decision (Digest 451), which also held that the failure of a proper formal acknowledgment voided a nuptial agreement even though both parties admitted their signatures and intentions. *Galetta* is more of the same, but in even more detail.

The Court rejects any attempt to dismiss these execution requirements as mere formalities that should be readily curable after the fact with appropriate evidence. It follows the *Matisoff* case on this point, too, pointing to reasons that transcend formalisms. In addition to establishing the identity of the signer involved, for example, the procedure "imposes on the signer a measure of deliberation in the act of executing the document" and, in the realm of the nuptial agreement, it

> underscores the weighty personal choices to relinquish significant property or inheritance rights, or to resolve important issues concerning child custody, education and care.

The Court cites other Real Property Law provisions designed to assure that the notary either knows or has evidence that the signer is in fact the person "described in and who executed" the instrument (RPL § 303).

The inevitable question arose about whether the defect can be cured now. Treating a series of cases on point, the Court appears to agree with the weight of appellate division authority, which is

> against permitting the absence of an acknowledgment to be cured after the fact, unless both parties engaged in a mutual "reaffirmation" of the agreement.

That wasn't done here. The Court concludes its treatment of this issue by determining that here in *Galetta*

> we need not definitively resolve the question of whether a cure is possible because, similar to what occurred in *Matisoff*, the proof submitted here was insufficient ... [because in] his affidavit, the notary public did not state that he actually recalled having acknowledged [H's] signature.

* * *

Just about two months before *Galetta* was decided, the Second Department held in *Chicago Title Ins. Co. v. LaPierre*, 104 A.D.3d 720, 961 N.Y.S.2d 237 (2d Dep't, March 13, 2013), that a party may have a claim against a notary whose wrongdoing caused it damages. The facts are quite different, but the question

nevertheless occurred to us whether the notary's omission in *Galetta* could support such a damages claim. (*LaPierre* is treated in a note in SPR 255:2.)

INSURANCE COVERAGE ISSUES

Divided Court Addresses Insurance Disputes Arising Out of Sexual Abuse by Priests Over Extended Period of Time

The Court of Appeals, in *Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, PA.*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2013 WL 1875302 (May 7, 2013), was reduced to five judges because one judge did not participate and one seat had not yet been filled. That left only five, and the best the Court could do was a plurality opinion for three, a concurrence by a fourth, and a partial dissent by the fifth. The result is a weakened guidepost for the future in the thorny area of liability arising out of the sexual misconduct of priests, the liability of the Diocese for the misconduct, the entitlement of Dioceses to indemnification from their insurers, and, perhaps most notably, how to figure the insurers' liabilities when what they are insuring turns out to be multiple acts of wrongdoing over a prolonged period.

The background involved several insurers and boiled down to a question of the indemnification liability of one of them to a Diocese that had settled a case for $2 million. The particular victim had been violated at different times and in different places. The basis for the Diocese's liability was negligent hiring and supervision. The ultimate issue was the extent of one of its insurers' obligation to indemnify it. Several policies had insured for the different years involved. The holding of the Court is that "potential liability should be apportioned among the several insurance policies, pro rata".

The plurality opinion by Judge Rivera, summing up the factual background, finds no basis for treating the events involved as one occurrence "precipitated by a single causal continuum" because

> each incident involved a distinct act of sexual abuse perpetrated in unique locations and interspersed over an extended period of time.

It cites the Court's 1959 decision in *Arthur A. Johnson Corp. v. Indemnity Ins. Co. of N. Am.*, 7 N.Y.2d 222, 196 N.Y.S.2d 678, which, addressing how to define an insurance policy "occurrence" when several events are involved, adopted the "unfortunate event" test. As elaborated in its more recent (2007) *Appalachian* decision (Digest 567), that test was one of three on the *Johnson* list and the one that *Johnson* in fact applied, as the plurality opinion does here. The conclusion adopted is that the approach of

> determining whether there was one unfortunate event or occurrence seems to us to be the most practical ... [and] corresponds most with what the average person anticipates when he [or she] buys insurance and reads the [occurrence] limitation in the policy.

The plurality holds that there is nothing in any of the policies involved suggesting "an intent to aggregate the instances of sexual abuse into a single occurrence". It therefore adopts the appellate division's reasoning, "that the settlement amount should be allocated on a pro rata basis" over the several policy periods at issue in the case.

Judge Smith concurs in result, finding there was "only one occurrence here, not several", but because it took place "continuously over several years, the resulting injury must be allocated on a pro rata basis to each of the years".

Judge Graffeo disagrees about the application of the "unfortunate event" test and dissents from that part of the plurality opinion. She sees the current case as "a far cry from *Appalachian*" and does not share the plurality's parallel. She says that

> [j]ust as the incident or occasion giving rise to injury or loss in *Appalachian* was the repeated or continuous exposure of an individual plaintiff to asbestos, here the incident or occasion was the repeated or continuous exposure of the child to the same negligently hired and supervised priest.

CITY'S OBLIGATION TO DEFEND TEACHERS

N.Y.C. Teachers Being Sued for Hitting Students Are Entitled to Have City Defend Them

As long as the teacher was acting "in the discharge of his duties within the scope of his employment", the city must pay for the defense. So provides Education Law § 3028, and the hitting in each of these two cases is found to have occurred during the "discharge" of the teachers' duties. *Sagal-Cotler v. Board of Education*, 20 N.Y.3d 671, ... N.Y.S.2d .... (April 25, 2013).

In an opinion by Judge Smith, the Court of Appeals says that

> we do not read the statutory words "discharge of ... duties" to restrict the right to a defense to cases where an employee acted in the proper and lawful discharge of his or her duties. Rather, we conclude that the authors of Education Law § 3028 intended to provide a defense even where an employee's use of corporal punishment violated regulations.

The statute requires the city's defense not only in civil but in criminal actions as well, the Court comments,

> suggesting that the legislature wanted even employees who engaged in highly questionable conduct to be defended at public expense.

Section 3028 is a 1960 enactment. Later adopted legislation applicable to New York City teachers mandate a defense only when the employees' actions do not violate a "rule or regulation of [their] agency" – which the hitting in this case did – but "all parties agree" that the newer statutes don't apply here and that § 3028 does.

The parties argued about the meaning of the "discharge" of duties under the statute, the city arguing that misconduct of the kind involved here could not be said to occur during a proper "discharge" of duties. The Court rejects the argument. "Scope of employment" and "discharge of duties" and like phrases "have long been regarded as interchangeable", the Court explains, citing prior cases making no distinction between the phrases.

If the legislature wanted, under § 3028, to deny a city-supplied defense if the employee acted "in violation of any rule or regulation of his agency", as it did provide in the later statutes, it could have done so. But § 3028, the Court stresses, "contains no such language".

"TRIBOROUGH" DOCTRINE IN PUBLIC EMPLOYMENT SECTOR

Court Is Divided on Whether Expired Collective Bargaining Agreement Was Still in Effect; Retirement Benefits of New Firefighters Affected

The so-called "Triborough" doctrine operative in the public employment sector, as codified in § 209-a of the Civil Service Law, provides that even after a prior collective bargaining agreement (CBA) has expired, its terms continue to govern "until a new agreement is negotiated". A majority of the Court of Appeals finds a "narrow exception" to this rule in *City of Yonkers v. Yonkers Fire Fighters etc.*, 20 N.Y.3d 651, ... N.Y.S.2d .... (April 2, 2013; 4-2 decision).

The statute on point is § 8 of Article 22 of the Retirement and Social Security Law, which provides that nothing

> shall limit the eligibility of any member of an employee organization to join a special retirement plan open to him or her pursuant to a collectively negotiated agreement ... where such agreement is *in effect* on the effective date of this act.

The emphasis on the phrase is the Court's, and the majority finds that as applied to this case the old agreement was not "in effect" at the time.

The union argued that it was. The ultimate issue was whether new firefighters were entitled – like existing ones – to have the city pay for all their retirement benefits, or whether the new ones could be subjected to the city's effort to have them pay 3% of those costs themselves.

The union argued that since no new CBA had been negotiated, the Triborough rule would apply, the terms of the old CBA would govern, and the city could not subject new firefighters to the 3% contribution. When the city disagreed, the union sought arbitration and the city moved for a permanent stay of it.

The stay is granted. In an opinion by Judge Pigott, the Court rules that "the arbitration sought by the Union is barred, as an impermissible negotiation of pension benefits", i.e., that the statutory exception relied on by the Union is inapplicable to this case.

The two-judge dissent, written by Chief Judge Lippman, finds in the majority's position not an implementation of the Triborough doctrine, but an ignoring of it. The union here is not seeking "to negotiate the terms of retirement benefits", as if starting from scratch, says the dissent, but only an "arbitration to interpret an existing CBA provision".

Thus the dissent disagrees with the holding that the "in effect" exception was in operation here. It sees a genuine dispute between the parties that is subject to grievance arbitration under the still-applicable terms of the standing CBA, and would allow the arbitration, as sought by the union pursuant to that CBA, to proceed.

* * *

City of Oswego v. Oswego City Firefighters Ass'n, 21 N.Y.3d 880, ... N.Y.S.2d ...., a case handed down by the Court the same day as *Yonkers* (above), poses the same issues, at least as the majority sees it, and in an unsigned memorandum the Court vacates an award made in the arbitration in *Oswego*.

For the same reasons he dissented in *Yonkers*, Chief Judge Lippman again dissents – as would be expected – but in *Oswego* there's an interesting additional factor. In *Oswego*, the case had already gone to arbitration, so when it reached the court an award had already been rendered and the Court was in essence just reviewing it. That posed the usual rules applicable to judicial review of arbitration awards, and those rules allow review on only a narrow set of bases – which don't include review for a mere error of law or fact. (The question of whether the arbitrator was right or wrong is not for the courts. See Siegel, New York Practice 5th Ed. § 602.)

The majority memorandum in *Oswego* doesn't mention this point, but the dissent picks up on it. It sees the key issue in the case as the interpretation of a statute – the one with the "in effect" phrase – and says that the most that can be said of the arbitrator in this case is that he made a "legal error, which is unquestionably not a basis for vacating the award". Hence the dissent would uphold it.

DEFICIENCY JUDGMENTS

To Start 90-Day Period for Seeking Deficiency Judgment, Deed After Foreclosure Sale Must Be Not Merely Delivered to Buyer, But Also Accepted by Him

In this commercial mortgage foreclosure case, the deed was that of a referee after the foreclosure sale. As the attorney for the buyer (the high bidder at the sale) directed, the referee sent the deed to the buyer's

affiliate, but then delays ensued and it became clear that the deed was not being accepted, and was in fact not accepted until more than

> ninety days after the date of the consummation of the sale by the delivery of the proper deed of conveyance to the purchaser.

The quoted language comes from § 1371(2) of the Real Property Actions and Proceedings Law, which gives the foreclosing plaintiff only that 90 days within which to move for a deficiency judgment.

There was a big deficiency in the case, some $426,000, and the only question in the case was whether the plaintiff moved for judgment on it within the limited period. The trial court held the plaintiff did, and granted the deficiency judgment; the appellate division reversed and held the motion too late.

The Court of Appeals holds it to be on time, agreeing with the trial court. *M&T Real Estate Trust v. Doyle*, 20 N.Y.3d 563, 964 N.Y.S.2d 480 (March 26, 2013). Referring to cases in other contexts dealing with "pinpointing the moment title transfers", the Court, in an opinion by Judge Read, sees

> no statutory basis for treating a referee's deed in foreclosure differently from other deeds.

That means in this case, as governed by RPAPL 1371(2), that the transfer took place when the intended grantee accepted the proffered instrument.

On the facts of this case, where the referee took back the original deed he had made and executed a new one, it was the new one which was accepted in behalf of the buyer and hence it was that moment that started the running of the 90- day period for the plaintiff to move for a deficiency judgment. The motion for the deficiency was made within that period and was hence timely.

As a general matter, says the Court, a deed is presumed "delivered and accepted at its date" – apparently as recited on the deed itself – but "this presumption must yield to opposing evidence", which was present in this case in that plaintiff's attorney "twice declined to accept" the referee's original deed; he accepted the new one and then, as required, moved for the deficiency judgment on it within the 90 days following that.