New York State Law Digest

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

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No. 625 January 2012

IN CLOSE DECISION, THREE-JUDGE DISSENT TELLS PLAINTIFFS HOW TO AVOID NEGLECT-TO-PROSECUTE DISMISSALS WHEN THEY CLAIM DELAY WAS CAUSED BY DEFENDANT

A 4-3 decision by the Court of Appeals in *Cadichon v. Facelle*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2011 WL 5827989 (Nov. 21, 2011), brings to the fore once again the problem of delayed prosecution of actions, notably tort actions. *Cadichon* was one, a medical malpractice action – actually two by the same plaintiff, consolidated into one – against several physicians and institutions.

The action covered several years and entailed several pretrial conference orders, all centering on the parties' discovery obligations. The step that occasions the division in the Court is a stipulation, "executed by the trial court and the parties" on May 3, 2007. It directed counsel for plaintiff to file the note of issue on or before December 27, 2007, and stated that the court "demands, pursuant to CPLR 3216" that failure to comply within 90 days "will serve as a basis for the court, on its own motion, to dismiss" the action.

In an opinion by Judge Pigott, the majority finds in that language an assurance to the plaintiff that no dismissal would occur unless the court made a follow-up motion to dismiss, pointing out that the 90-day demand procedure that CPLR 3216 provides for as a condition to a dismissal for neglect to prosecute applies to the court as well as to the defendant – the product of a pro-plaintiff amendment made in CPLR 3216 years ago. Neither may move for a CPLR 3216 dismissal without first giving the 90-day notice.

The dissent, written by Judge Graffeo, details the facts and would not let the plaintiff hide behind the language of the court's order. Plaintiff's lawyer said that on a number of occasions he spoke about accelerating discovery to someone (unidentified) in the office of one of the physicians, but got no return calls. The dissent notes that that appears to be all the plaintiff did to speed up discovery, and finds it inadequate. Finding the burden of moving the litigation forward to lie chiefly with the plaintiff, the party who brought it, the dissent enumerates the steps the plaintiff might have taken in these circumstances to

manifest the showing of diligence needed to convince the court that she's aware of her burden and was properly assuming it. Some of the steps the plaintiff might have taken, notes the dissent, are these:

If in need for any decent reason of more time to meet the pending discovery requirement, she could have sought an extension of time, from the court if necessary. If a given opponent was claimed to be responsible for the delayed discovery, the plaintiff could have moved to compel discovery, or sought a preclusion order under CPLR 3216. In light of these options, courts cannot lightly condone inactivity in the case,

> particularly where [as here] trial judges have made repeated attempts to spur the parties to complete discovery.

The dissent also points out how the majority opinion undermines the series of recent decisions by the Court calling attention to delays and how they undermine the system. It cites a number of these, including *Kihl* (1999, Digest 480) on delayed discovery, *Brill* (2004, Digest 534) on delayed summary judgment motions, and *Gibbs* (2010, Digest 613) on ignoring conditional disclosure orders. And we pointed out in our lead note in Digest 539, based on the Court's 2004 *Miceli* decision, that judicial demands for strict adherence to time limits in litigation had now reached the "routine stage", i.e., the point at which the Court disposes of a case with a mere unsigned memorandum because it finds the subject no longer in need of judicial guidance.

The dissent's point is that the majority opinion is a turn away from that path and in effect a return to forgiving delays routinely. The dissent quotes from the *Gibbs* case that this "breeds disrespect for the dictates" of the CPLR "and a culture in which cases can linger for years without resolution". The dissent says it reaches its conclusion after due consideration of "the difficulties and practice pressures experienced" by trial lawyers, but that "merely ignoring court-ordered deadlines" is not the answer; the answer is in the steps the dissent enumerated for keeping the defendant on track when it is the defendant who, the plaintiff says, is impeding the case's progress.

Both majority and dissent point out that the 2008 amendment of CPLR 205(a), which requires a court dismissing for want of prosecution to detail in its opinion not just an instance of delay but a "general pattern" of it, was not applicable to this case. If it were, it would seem not necessarily to change the result, but would have required the "general delay" enumeration in the court's opinion. The factors cited by the dissent suggest that the trial justice in this case would have been able to do that handily.

GENERAL PRACTICE

ARBITRATION AND "PUBLIC POLICY"

To Allow Arbitration of "No-Layoff" Clause in Bargaining Agreement, Clause Must Be "Explicit, Unambiguous and Comprehensive", and This One Wasn't, Holds Court

A bare majority of the Court, that is; in another close decision, the minority goes the other way.

All seven judges in *Matter of Arbitration [Involving] Johnson City Professional Firefighters*, 18 N.Y.3d 32, ... N.Y.S.2d .... (Nov.17, 2011; 4-3 decision), citing several 1976 decisions of the Court, agree that a dispute over a job security clause in a collective bargaining agreement (CBA) may be subjected to arbitration only if the clause is "explicit, unambiguous and comprehensive". Both sides quote that language, but then disagree on its application. The clause at bar fails the test, holds the majority, barring the arbitration. The minority says it passes the test and would have allowed the arbitration to proceed.

The CBA here was between the village of Johnson City and its firefighters' union. The clause relevant to the dispute between them says the village "shall not lay-off any member of the bargaining unit during the term of this contract" (which covered a five-year period starting in 2006). It then prescribes a grievance procedure, culminating in arbitration before the Public Employment Relations Board (PERB).

Citing "budgetary necessity", the village terminated a number of positions in village government, including six firefighter positions. Their union then pursued the grievance procedure, resulting in the union bringing an arbitration to enjoin the firings and the village bringing a proceeding to stay the arbitration. The village prevails.

"Not all job security clauses are valid and enforceable", holds the majority, nor are they "valid and enforceable under all circumstances". Public policy is always a hovering issue. The majority in *Johnson City* says the Court has long held that a purported job security provision will not be held to violate public policy, but only if, among other things, the provision is "explicit".

This one is not, concludes the majority in an opinion by Judge Pigott, pointing out, as an example, that "layoff" is not defined in the CBA. This makes it open to "different and reasonable interpretations", and "[i]ndeed", says the Court, the parties in this case disagree as to what constitutes a permanent or non-permanent "layoff", and whether abolition of the position constitutes a "layoff" at all. To the majority, this "underscores" the ambiguity of the clause.

The dissent, in an opinion by Judge Ciparick, not only disagrees with that interpretation, but finds the majority position an undermining of the arbitral process; it, departs, says the dissent,

> from this Court's commitment to the furtherance of arbitration as a preferred means of resolving public sector labor disputes ... [and] threatens to undermine confidence in the collective bargaining process.

All of the foregoing was addressed by both sides to the basic viability of such a "no-layoff" clause. The majority, having found the clause invalid in this case, had no

occasion to go further. The dissent, having found the clause valid, then considered the distinct issue of "whether the parties agreed to arbitrate the instant dispute" under the clause. Concluding that they did, the dissent would have affirmed the appellate division.

Under the majority holding, of course, the appellate division is reversed and the arbitration stayed.

LANDLORD'S CONTINUED LIABILITY

County That Gives Company "Complete Charge" of Recycling Facility Isn't Freed of Liability to Injured Company Employee If County Maintains Some Control Over Property

And whether it maintained sufficient control in this case is a question of fact, says a four-judge majority of the Court of Appeals in *Gronski v. County of Monroe,* .... N.Y.3d ...., ... N.Y.S.2d ...., 2011 WL 5570768 (Nov. 17, 2011; 4-3 decision).

The three dissenters see no issue of fact. They would uphold the lower courts' grant of summary judgment to the county, making a majority for the county among all the judges hearing the case at all levels – except for the majority of four in the Court of Appeals. Alas, that's the one that calls the shot. Hence no summary judgment for the county, but a remand for a trial.

The majority opinion is written by Judge Ciparick; the dissent by Judge Pigott.

The agreement between the county and the company (Metro Waste) recited in terms that the company "shall have complete charge of and responsibility" for the recycling facility and for all its equipment and personnel, and "shall perform its work in accordance with its own methods ... subject to limited review authority of the County". That reservation, plus the retention of "the right of access" to the facility in order to determine "compliance", are heavily relied on by the majority to show that a measure of control was retained by the County, sufficient in any event to require a jury to decide whether the retained control sufficed to support liability.

Big bales of paper were stacked at the facility, and sometimes stacked high. One of these, apparently insufficiently secured, came loose and fell on and injured the plaintiff. He sued the county. (We'll assume that his claim against his clearly responsible employer was preempted by workers' compensation coverage, leaving the option of a regular personal injury suit open only against the county.)

The county official, one R, apparently charged with "overseeing" the company's compliance with its agreement, "vacillated" (the Court's word) in testifying about his power and authority to monitor and to report safety hazards, which didn't help the county's case, but nor did it suffice, in the minority's view, to make the case one for a jury.

The dissent says the majority "makes much" of R's testimony that he often saw bales stacked nine feet high but said he didn't know that this was a violation of any standard or regulation of the Occupational Safety and Hazard Administration (OSHA). But that counts more in the county's favor than the plaintiff's, as the dissent sees it: it "underscores" the point that under the agreement the county "was not charged with controlling how [the company] operated the recycling center".

Both sides cite the Court's 1970 per curiam decision in *Ritto v. Goldberg*, 27 N.Y.2d 887, 317 N.Y.S.2d 361, which said that by "leasing a specific room" on the premises to a washing machine company, the landlord "surrendered the right of occupancy of the demised premises to the [company] and reserved no control over the instruments" used by the company in their business. The dissent stresses that aspect of *Ritto*. The majority stresses instead *Ritto*'s qualifying language, which recites that "a long course of conduct of [the landlord's] employees in reporting malfunctions of the machines to the repair service" could be taken (by a jury) as showing intervention in the business by the landlord, which would show some control and hence a basis on which a jury might find liability for an injury caused by one of the machines.

CIVIL SERVICE

Court Holds That Procedural Safeguards Applicable to Public Employee on Involuntary Leave of Absence Apply as Well to Employee Seeking to Return to Work After Voluntary Absence

Section 73 of the Civil Service Law, entitled "Separation for ordinary disability; reinstatement", provides that a governmental employee absent or unable to perform for a year may be terminated. In its 1980 *Economico* decision (Digest 246), the Court of Appeals also held that § 73 does not require a hearing in advance of the termination, at least not when the facts are not in dispute. Then noting that the later case of *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, applying the federal Due Process clause, held that that clause does mandate a pre-termination hearing, the Court of Appeals, in *Prue v. Hunt*, 78 N.Y.2d 364, 575 N.Y.S.2d 806 (Oct. 24, 1991), reconstrued § 73 to require one.

The Court now has another civil service case, this one involving § 72 (in addition to § 73). Section 72 is entitled "Leave for ordinary disability"). In *Sheeran v. New York State Dep't of Transportation*, 18 N.Y.3d 61, ... N.Y.S.2d .... (Nov. 17, 2011; 6-1 decision), voluntary leave was taken by an employee because of illness, who then sought to return to work and submitted the required medical certification. The agency exercised its right to have a state-affiliated physician further review the matter; he did, and concluded that the employee was not fit to return to work, a status that continued for a year. The employee requested a hearing, which was denied. He then brought an Article 78 proceeding to compel the hearing, which was granted. The Court of Appeals holds the grant proper. (In fact there were several petitioners, but we use one as our example.)

One aspect of these statutes is their remedial aim of affording tenured civil service employees "procedural protections prior to involuntary separation from service". That purpose, writes Judge Pigott for the majority,

> applies equally here, where an employee is out on sick leave and then seeks to return to work, but is prohibited based on a finding that he or she is unfit.

In the Court's opinion, any other construction under these circumstances

> would discourage employees from taking voluntary leave, since they would have greater rights if they remained on the job and waited to be involuntarily removed – a result the Legislature surely did not intend.

A dissent by Judge Smith finds an "anomaly" in the case, based on the more summary nature of the hearing offered by § 73 than the one offered § 72, which means that an employee who is fired under § 73 for inability to perform gets "less protection than an employee placed on leave of absence for the same reason under section 72". As the dissent sees it, the majority's decision "magnifies the anomaly" by extending section 72 rights to employees "not removed ... by their employer, but who have removed themselves and are seeking to return".

LEASE ASSIGNMENTS

When Property Is Subject to Lease Whose Assignment Requires City Approval, Buyer Takes Risk Approval May Be Denied

The property was on New York City's lower east side. The city sold it in 1981 to S, the sponsor of an urban renewal project, in a contract – called a Land Distribution Agreement (LDA) – that included terms designed to assure that for at least 25 years it would be used to support a supermarket. S fulfilled the commitment, leasing the property to Pathmark Stores, Inc., and then sold the property – now subject to the lease – to P Co. During ensuing years the land grew greatly in value, and P Co. wanted to acquire the lease with the aim of developing the land for what it perceived as its more profitable residential use.

To that end, P Co., while the lease was still within its 25-year supermarket-commitment period, agreed to buy Pathmark's leasehold interest for $87 million, and made a deposit of $6,000,000 with Pathmark. But then values stumbled and P Co. wanted out of the deal. It conceded that economics was its motive, but relied on an alleged breach of the agreement by Pathmark. It wanted its deposit back, which Pathmark refused, resulting in this action by P Co. to recover it.

P Co. loses, as Pathmark's motion for summary judgment is granted and the complaint is dismissed. Pathmark keeps the deposit and P Co. is left to carry out its agreement. *CPS - Operating Co. LLC v. Pathmark Stores, Inc*., 18 N.Y.3d 26, ... N.Y.S.2d .... (Nov. 15, 2011).

The appellate division had labeled the ground on which P Co. based its claim of breach a mere "pretext to avoid its obligations under the agreement". In an opinion by Judge Smith, the Court of Appeals in essence agrees, and here lay the crux of the issue.

The original agreement by which the land was sold by the city to S, and which provided that the property would be used as a supermarket for 25 years, allowed lease or sublease during that time for other purposes, but "only upon obtaining the prior written approval" of the city. Because the 25-year period was still open when the contract was made, P Co. claimed that Pathmark might be barred from consummating its deal; that "the lease could not be assigned before January 2009 [the point of the 25-year termination] without the City's consent".

In an opinion by Judge Smith, the Court finds "a number of flaws in this argument" but alights on "one fatal flaw [as] enough to dispose of the case": Pathmark's warranty in the contract included as "Permitted Exceptions" the terms and conditions of the original 1981 LDA. That adoption-by-reference clarified that the city's denying permission was very much an acknowledged possibility in the P Co./Pathmark contract, creating a risk that P Co., sophisticated in the ways of these property dealings, undertook with open eyes. In that light the mere possibility that the city could deny the needed permission gave P Co. no escape from its contract.

The Court makes this much of a concession to the losing plaintiff: maybe the use of the words "Permitted Exceptions" to describe the risk-shifting involved here is "unusual", but the phrase was used in a "broader sense" in this case, the Court observes. (The point is elaborated in the dissenting opinion by Justice Saxe in the appellate division, which the Court refers to.)

WORKERS' COMPENSATION

Applying Law Applicable When Injury Was Sustained, Resulting in More Extensive Liability for Insurer Than Later Amendment Provided, Is Not Unwarranted Use of Retroactivity

Workers injured on the job are entitled to receive compensation from their employers for wage losses caused by the injury. Employers can secure coverage for this from the State Insurance Fund, from an approved private carrier, or through self-insurance. This case, *Raynor v. Landmark Chrysler*, 18 N.Y.3d 48, ... N.Y.S.2d .... (Nov. 15, 2011), involves the second category, coverage from an approved private insurer.

It also involves the Aggregate Trust Fund (ATF), which insures long-term awards. The carrier is required, after each such award is reduced to present value, to deposit the amount of the reduced award into the ATF.

It further concerns what the Court of Appeals describes as the "comprehensive reform of the Workers' Compensation Law" enacted on March 13, 2007, especially amendments it made in §15(3)(w) of the law, which prescribes the schedule for awards to be made for permanent partial disabilities, and in § 27(2) of the law, which authorizes the reduction of

the award's future-payment amounts into present-value. The terminology of "scheduled" payments refers to amounts awarded for specifically enumerated losses (as of a hand, arm, eye, etc.). Partial disabilities outside the scheduled categories are referred to simply as "unscheduled".

Claimant Raynor's on-the-job injury, to his lower back, fell into the "unscheduled" category. The accident occurred on December 14, 2004. On June 25, 2008, determining that the injury it produced was in the "permanently partially disabled" category, the WCL judge required the carrier to deposit into the ATF some $197,000, representing the present value of the award.

One of the changes made in the 2007 overhaul was the imposing of a cap on the number of weeks of coverage for which an award could be made. This was a concession to insurers: before the amendment there was no such cap and benefits could be awardable for the claimant's whole life. The award in this case was "uncapped", in essence an application of the law prior to the amendment. This led to a peculiar argument in which the insurer protested that failing to apply the new "capping" provision, and in essence applying the prior "uncapped" one, amounted to a kind of "retroactivity" violation.

The Court of Appeals sees no retroactivity issue in the case and upholds the award. The capping amendment was in WCL §15(3)(w), which applies to "accidents and dates of disablement which occur on or after" the amendment's 2007 enactment. Here "the claimant's injury occurred on December 14, 2004, before the enactment of the 2007 amendments, and thus the award was uncapped".

Citing its 1990 *Forti* case (Digest 371) in an opinion by Judge Ciparick, the Court explains that

> [a] statute is not retroactive ... when made to apply to future transactions merely because such transactions relate to and are founded upon antecedent events.

The statute didn't change the insurer's "preexisting liability" and didn't impose "a wholly unexpected new procedure", the Court remarks; it

> merely changed the time and manner of payments of non-schedule permanent partial disability awards.

FREEDOM OF INFORMATION LAW

Impatient Court Criticizes Agency for Groundlessly Withholding All Data When Only Part of It Was Private

The Court of Appeals has acknowledged that under the FOIL, private information is exempted from disclosure, but explained in its 2007 *Data Tree* decision (Digest 579), among others, that such private matter contained in documents otherwise disclosable under the FOIL can merely be redacted by the agency, and the document furnished as cleansed. As the Court phrased it in *Data Tree*,

> even when a document subject to FOIL contains such private, protected information, agencies may be required to prepare a redacted version with the exempt material removed.

The Court thereupon remitted the case to the trial court to determine (upon an in-camera inspection of a representative sample of the documents, if necessary) whether any of the records contained information exempt from disclosure on the basis of privacy, and whether the information could be redacted.

In the more recent *Schenectady County S.P.C.A. v. Mills*, 18 N.Y.3d 42, ... N.Y.S.2d .... (Oct. 25, 2011), the Court makes no effort to conceal its impatience with the state's Department of Education for necessitating some four years of needless litigation, covering three courts and imposing on a total of 13 judges, to dispose of a FOIL issue that could have been resolved by the department "with a few hours effort, and at negligible cost". Those are the explicit admonitions of the Court of Appeals.

All the petitioner, the S.P.C.A., was seeking was a list of veterinarians licensed by the department in Schenectady County, with their business addresses. In what comes across as an almost silly colloquy over the kinds of addresses it had been furnished, the department, instead of undertaking a redacting, refused the informal FOIL request in its entirety merely because some of the addresses might have been residential (and thus private). This put the petitioner to the burden of a formal request for the information, then an administrative appeal (unsuccessful) when it was refused, then an Article 78 proceeding in the supreme court, then an appellate division appeal, and now this appeal to the Court of Appeals.

In a unanimous opinion written by Judge Smith and addressed to public agencies in general – the government entities the FOIL was primarily aimed at – the Court reminds them that the agency "cannot refuse to produce [a] whole record simply because some of it may be exempt from disclosure". The agency's duty is to review the requested documents and redact the private parts.

This calls to mind the military's salary increase of several years ago, which tended to favor the noncoms. A commentator observed that it was all well and good for the sergeants and corporals, but a nasty blow to the privates.