New York State Law Digest

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

No. 624 December 2011

WHEN MAY CLERK ENTER DEFAULT JUDGMENT WHEN NOT ALL CLAIMS ASSERTED ARE FOR "SUM CERTAIN"?

EXTENSIVE TREATMENT BY APPELLATE DIVISION

Destined to become a leading case on the application of subdivision (a) of the default judgment statute, CPLR 3215, is *Stephan B. Gleich & Associates v. Gritsipis*, 87 A.D.3d 216, 927 N.Y.S.2d 349 (2d Dep't, June 21, 2011).

When the defendant has not appeared in the action and the case is thus ripe for a default judgment, subdivision (a) allows the clerk to enter the judgment, i.e., it doesn't have to be submitted to a judge. But the statute allows this only when the claim is for money, and seeks only a "sum certain". If it's an equitable claim, the statute doesn't apply and the default must be sought from a judge. Same conclusion, if, though for money, the claim is not for a "sum certain".

What does it take for a claim to qualify as one for a "sum certain"? The Court of Appeals said in *Reynolds Securities, Inc. v. Underwriters Bank & Trust Co.*, 44 N.Y.2d 568, 406 N.Y.S.2d 743 (1978), that the clerk default is available only on such clear-cut claims as those on a judgment or on an instrument for the payment of money only. Commenting that this means "only the most liquidated and undisputable of claims", *Gritsipis* now meets the issue of what to do when there are several claims asserted and only some of them fall under the "sum certain" category. The court concludes that this will usually bar the clerk from entering the default judgment and require submission of the matter to a judge.

The basic claims in *Gritsipis* were by a law firm suing for its fees. The firm used the summons-and-notice device of CPLR 305(b) to commence the action, the notice stating that the causes of action were for "fees for legal services and disbursements rendered, unjust enrichment and upon an account stated". None of these were "sum certain" claims, the court finds in an opinion by Justice Dillon. The claim for legal services is essentially one in quantum meruit, which requires a trial of the issue of how much the services are worth, a matter which can't be laid summarily to rest by the clerk and which therefore requires the attention of the court. The court finds the same to be true after examining the elements of proof needed to support an unjust enrichment claim:

> Quantum meruit and unjust enrichment theories are equitable in nature, and are appropriate only if there is no valid and enforceable contract between the parties covering the dispute at issue.

There was no explicit contract between the parties in this case, whatever the nature of the damages claimed, and in any event nothing to support a sum certain.

The claim on an "account stated" might qualify as one for a "sum certain", the court shows, depending on the background dealings between the parties, but even if it did in this case, it could not undo the disqualification – for CPLR 3215(a) treatment – of the other claims. Hence not all of the claims could pass the "sum certain" test, and so the default application had to go before the court. For that reason the default judgment had to be vacated.

But now a "secondary issue" is addressed by the court, the issue of

> whether vacating the clerk's judgment also requires the vacatur of the underlying finding that the defendant was in default or, alternatively, whether upon vacatur, the underlying default finding remains intact.

If it remains intact, the finding of liability that it implies remains intact, too, and leaves only the issue of damages in need of a trial. The court answered this question by resort to the requirements of CPLR 5015(a)(1), which governs the motion to vacate a default. The motion requires the usual showing of an excuse for the default and an affidavit showing a meritorious position on the merits. The lower court had found in an earlier round in these proceedings that the defendant failed in that showing, which the court now deems the law of the case.

The result is that liability must be deemed established and only damages need be tried. The case is remanded for that purpose.

There's yet another dimension to the court's treatment. It points out that the "sum certain" claim need not always have to get vacated when the contaminating claims are (the non-"sum certain" claims). The court sees in CPLR 3217 the possibility of plaintiff's using a voluntary discontinuance to preserve the eligible claim while withdrawing the others. This requires some further background.

When a party's responding time expires without an appearance, the party is in default and need not be served with further papers. If a new or additional claim is being asserted against a party who has not appeared, however, even if that party is long in default, it must not only be served on him, but must be served in the same manner as a summons. See CPLR 3012(a). What about the converse: the situation in which the plaintiff is not seeking to add a claim, but to withdraw one? Need the papers announcing the withdrawal of the claim be served in the same manner as a summons?

Perhaps not. Adding a claim is detrimental to the defendant, but withdrawing one is presumably to the defendant's benefit and thus may be done, arguably, without notice to the defendant. If the plaintiff were trying to effect a formal discontinuance of the claim satisfactory to the terms of CPLR 3217, and by the procedure of mere notice, CPLR 3217(a) would allow it, but only if done within a very short time frame.

That time limit had long since expired in *Gritsipis*, which recognizes this but hints that the time limit might not be applicable. "In any event," it says

> assuming the time requirements [of CPLR 3217] are met, a plaintiff's affidavit of facts, submitted in support of the entry of the clerk's judgment, can include an expressed voluntary discontinuance of all causes of action except [the one] seeking a sum certain.

The plaintiff didn't try that in this case, so whether such a procedure would work must await some future case. The court's bottom line here is that the judgment, okay on liability, is "infirm" on damages and needs remanding for an assessment of them.

COURT OF APPEALS DECISIONS

FIVE-DAY MAIL-EXTENSION PERIOD

Five-Day Extension for Responding to Mailed Paper Applies Even When Party Is Not Technically "Responding"

The Court of Appeals divides on the construction to be given CPLR 2103(b)(2), the statute with the well known five-day extension for responding to a mailed paper when the mailed paper requires a response within a stated period. It has been the bar's general understanding that the extension is designed exclusively for the use of the party who has to take a step responsive to that paper; that the aim is to compensate for the time mail delivery takes so as to give the recipient an extra five days to prepare the response. The trouble is that while that's the general understanding, it's not the language of the statute, which reads that

> where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period ....

There's no specific "response" language in it, which leads the Court of Appeals to conclude that the extension is available even to a party who served the paper that started the applicable time period. A case like that is not frequent, i.e., a situation in which the party who served the paper – not the party required to respond to it – is the one who wants the time extension, but an example of it is in CPLR 511(b), concerning a change of venue in a supreme court action. CPLR 511(b) posed the problem in *Simon v. Usher*, 17 N.Y.3d 625, ... N.Y.S.2d .... (Oct. 20, 2011; 6-1 decision).

Venue in *Simon* was laid by P in Bronx County. D maintained that the Bronx was improper – not the residence of any party, etc. – and wanted to change the venue to Westchester, the proper county. CPLR 511(b) applies in that situation. It sets up a special procedure in which D serves on P a written demand that venue be changed to the county D specifies as proper. (See Siegel, New York Practice 5th Ed. § 123.) Within five days after service of the demand, P must serve on D either a written consent agreeing to the change, or an affidavit showing either that the county chosen by P is proper or that the one to which D seeks transfer is not. If P takes the latter step and D still wants the change, D must move for it "within fifteen days after service of the demand", i.e., the demand that D itself served.

That's the issue in *Simon*. Does that 15 days become 20 under CPLR 2103(b)(2)? If it does, D's motion in *Simon* was timely; if it does not, D's motion is too late and the case stays where it is. In an opinion by Judge Jones the Court holds that it does, that the 15 did become 20, that the motion to change was timely, and that the change to Westchester was therefore proper. It doesn't matter that D was not "responding" to its own demand, says the Court, because the statute

> contains no language restricting its application to instances where a party is responding to papers served by an adversary.

Judge Pigott's dissent cites the caselaw on the statute, which clearly restricts the five-day gift to the party who must respond to the served paper. The dissent points out that that was the legislature's understanding as well, manifest in its 1999 amendment of CPLR 5513(d), applicable in appellate practice, where it starts the appeal time from the service of the notice of entry of the appealed paper. When the winner serves the notice of entry, the loser (the would-be appellant) clearly gets the CPLR 2103(b)(2) five-day extension of the 30-day appeal time allowed by CPLR 5513(a). But suppose the loser serves the notice of entry, which the loser is allowed to do. Does the loser thereby extend its own appeal time by the five days? The loser does, says CPLR 5513(d), but it took the 1999 amendment to clarify that it does.

The dissent's point is that the legislature offered that clarification only in the appeals area, making no "corresponding clarifications" in other areas – like the venue arena of CPLR 511(b).

SEATBELT REQUIREMENTS

Federal Requirement for Driver's Seatbelt on Buses Doesn't Preempt State Law Requiring Seatbelts for Passengers, Too

There's no explicit New York state law imposing such a seat-belt requirement, but under an ordinary common law standard a jury could find the failure to install passenger seatbelts on a particular bus to be a source of liability. In this case the jury did, and its verdict in this respect is upheld. *Doomes v. Best Transit Corp.*, 17 N.Y.3d 594, ... N.Y.S.2d .... (Oct. 18, 2011; 6-1 decision).

What makes the common law a decisive element here – as opposed to finding the need for a state statutory address to the matter in order to gauge preemption – is that the federal law in point is part of a chapter addressed to "motor vehicle safety standard[s]" and in a saving clause its compliance provision recites that the chapter "does not exempt a person from liability at common law". Hence, after noting U.S. Supreme Court cases on the subject, the Court of Appeals concludes, in an opinion by Judge Jones, that

> the presence of the saving clause limits a potentially broad reading of the preemption provision and does not expressly prohibit plaintiffs' seatbelt claims.

The plaintiffs were injured when the bus they were in went off the road and rolled over after the driver fell asleep. The driver's fault is plain enough, but the plaintiffs also sought to impose liability – as contributing to damages – on the owner and manufacturer of the bus for the failure to install belts for passengers.

The dissent, by Judge Pigott, sees in the regulation – by the National Highway Traffic Safety Administration – "a conscious decision that seatbelts in these vehicles were unnecessary for passenger safety given their size and function" and hence that it did not leave the field "unregulated"; that, on the contrary, it preempted the field and left no room for state regulation. The Court's response to the dissent is that the federal laws were not intended "to so greatly envelop" the motor vehicle safety standards in that way.

Hence, especially in view of the "common law" saving clause, the Court finds room to admit state law into the field. On that matter the plaintiffs therefore prevail.

On a second issue, however, the defendants prevail, or in any event those defendants responsible for the design and manufacture of the bus. Here the plaintiffs' claim concerned the "weight balance" of the bus: their contention was that there had been a "negligent modification of the bus' chassis [that] altered the weight balance, steering, and handling of the bus". The Court rejects that argument, finding the plaintiffs evidence on the point to rest on only "speculative weight estimates of passengers, fuel, and luggage, and not empirical data".

The Court also finds the evidence inadequate to show that "the weight distribution" was even a contributory factor in the accident.

The subject buses were obviously of the long distance variety, not the municipal genus that picks up and drops off passengers every few blocks on urban routes.

COMMITTING MENTAL PATIENT

Emergency Room Psychiatrist Can Seek Involuntary Commitment of Patient Without Resorting to "Emergency" Procedure

The "emergency" procedure is in § 9.39 of the Mental Hygiene Law. The commitment of the patient in this case was made pursuant to a different statute, § 9.27. Commitments under both are involuntary but their procedural formulas differ.

Section 9.27 was used in this case, *Rueda v. Charmaine D.*, 17 N.Y.3d 522, ... N.Y.S.2d .... (Oct. 18, 2011). The issue was whether the emergency room psychiatrist at Hospital A, a Dr. Shetty, had standing to use the § 9.27 – the non-emergency – procedure to support the commitment. The Court of Appeals concludes that he had.

Subdivision (b) of § 9.27 enumerates those with the requisite standing. Number 11 on the list is a qualified psychiatrist "either supervising the treatment of or treating" the patient for a mental illness, a category the Court finds comfortably embracing Dr. Shetty. The patient here was brought to Hospital A's emergency room "acutely agitated" and "trying to take her clothes off". She had a history of bipolar disorder and had already had four hospitalizations.

She argued, however, that she could be committed only under § 9.39, which occasioned the Court's main exercise in the case: a comparison of the two statutes. The Court finds § 9.27 sufficiently supportive of the commitment without help from § 9.39. It rejects the patient's argument that only a psychiatrist involved in her "prior treatment" could qualify. In an opinion by Judge Smith, the Court finds that a "broader reading ... will better serve [the statute's] purpose".

And as to its purpose, the Court finds that what the legislature was trying to do with the list is allow standing only to those with "a sincere and legitimate interest in the well-being" of the patient, primarily an effort to exclude those who might be "simply meddling, or acting out of spite". The Court also points out that the statute includes other "safeguards", including the submission of certificates by two other physicians and yet an additional one from "a member of the psychiatric staff of the receiving hospital", in this case the staff of Hospital B, to which the patient was transferred from Hospital A.

It might seem at this point that standing had been so adequately established under § 9.27 that no investigation of § 9.39 was needed at all. The Court nevertheless examines § 9.39, apparently a gesture to two of the appellate division justices who had agreed with the patient that § 9.39 was the applicable statute. The Court thinks otherwise, finding that § 9.39 is aimed at emergency situations "in which section 9.27's procedures might not be adequate to protect the patient or the public".

On these facts they're adequate, the Court finds. Section 9.39, moreover, can be used only where the illness is likely to bring harm to the patient or the public – that's apparently its "emergency" premise – a requirement not present in § 9.27.

The Court in fact finds the § 9.39 procedures "less elaborate ... than those of section 9.27". It requires, for example, certifications by even fewer physicians.

The two-judge appellate division dissent on the issue is also what brought the case to the Court of Appeals as a matter of right under CPLR 5601(a). Without the double dissent the case would have had to rely on the Court's granting leave to appeal, and the plain adequacy of § 9.27 as it appears in the Court's unanimous analysis suggests that leave would not have been granted in the *Rueda* situation.

MUNICIPAL LIABILITY

Court of Appeals Finds No "Special Duty" Owing by City to Assault Victim Merely Because Police Said It Would Arrest Threatening Boyfriend "Immediately"

The Court's prior cases require a showing of such a "special duty" before liability can attach. And reasonable reliance, the Court adds, is an additional requisite. Whatever reliance the plaintiff victim (P) in this case said she placed on the police assurance – that it would arrest the threatening boyfriend (B) "immediately" (upon receiving her call) – the Court finds it unreasonable as a matter of law, despite a jury's findings that accepted all of the plaintiff's testimony and produced a verdict for her. She had not told the police where B was, the Court points out, and therefore couldn't assume the police could locate him so quickly as to effect an "immediate" arrest. Hence she couldn't assume that he had been taken into custody (enabling her to return safely to her home). Relying heavily on its 1987 *Cuffy* decision (Digest 329), a divided Court therefore rejects the verdict and holds for the city in *Valdez v. City of New York*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2011 WL 4916330 (Oct. 18, 2011; 5-2 decision).

Orders of protection had been issued against B. In violation, B telephoned P and threatened to kill her. That was on a Friday evening. She forthwith took her children to go to her grandmother's and on the way made the call to police resulting in the promise to arrest B. Without having ascertained that the arrest had been made, however, but merely assuming it was, she returned home forthwith and on the next night, Saturday, B showed up and shot and severely injured her (and killed himself).

In an extensive review of a number of cases in this troublesome area of municipal liability – including, in addition to *Cuffy*, the *Mon* decision (1991, Digest 385), *Lauer* (2000, Digest 488), *McLean* (2009, Digest 593), and even the *World Trade Center* case (2011) of last month's Digest No. 623 – the Court distinguishes between governmental duties that are discretionary and those that are ministerial. Discretionary was the category applicable here, in which, before municipal liability can attach, the key element must be shown of "a special duty [owed] to the injured person, in contrast to a general duty owed to the public", language of the *McLean* case quoting from the Court's still earlier (1983) *Garrett* decision (Digest 280).

The Court finds as matter of law that the circumstances of the alleged assurance in this case did not support the "special duty" connection manifest on the facts of some of the earlier cases.

The Court finds the rationale for this limit on municipal liability in an articulation in the *Mon* case, from which it quotes that the rationale reflects

> a value judgment that – despite injury to a member of the public – the broader interest in having government officers ... free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for injury.

The *World Trade Center* decision of Digest 623 last month came into play here in *Valdez* for its pointing out that outright sovereign immunity, even when waived, does not displace the doctrine of "governmental immunity", a distinct doctrine recognized by the courts as a matter of policy, such as when the police function is involved. For the reasons cited (i.e., the special duty and reliance elements) the Court finds the immunity doctrine inapplicable here.

The majority in *Valdez,* with Judge Graffeo writing, finds in Chief Judge Lippman's dissent what it deems the erroneous assumption that the "special duty rule [is] an exception to the governmental ... immunity defense". The Court says it never adopted that view, and doesn't adopt it now.

Judge Lippman sees P as having been "induced" to rely on the police's "voluntary promissory conduct", and would hold that under the Court's prior cases the reliance supports the liability verdict.

The Court also rejects the position of the other dissenting Judge, Judge Jones, who sees the government immunity defense as altogether inapplicable in police protection cases like this.