New York State Law Digest

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

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## CPLR 3213 MOTION/ACTION

## IF DEFECT IN P'S INITIAL CPLR 3213 MOTION PAPERS CAN BE CURED BY SUPPLEMENTING THE PAPERS, DISMISSAL IS PRECLUDED

But so is a grant of the motion if the papers are defective in some respect, which was the case in *Sea Trade Maritime Corp. v. Coutsodontis*, 109 A.D.3d 415, 970 N.Y.S.2d 759 (1st Dep't, Aug. 13, 2013). The trial court's grant of judgment to the plaintiff was error and is reversed by the appellate division, but not to the extent of dismissing the action. If the plaintiff can still make out a case with supplementary papers, the court under CPLR 3213 must give the plaintiff an opportunity to furnish those papers.

These lessons on CPLR 3213 make the case worthy of a lead treatment here in the New York State Law Digest, where a little room has opened up while we await the next batch of decisions from the Court of Appeals.

CPLR 3213 is a procedural boon for plaintiffs, but only where the plaintiff's claim is based (1) on an instrument for the payment of money only, or (2) on an already rendered judgment. The boon is that the plaintiff need not pursue the claim through the ordinary channel of a plenary action, with all of its procedural demands (starting with the usual service of a summons and complaint). Instead of a complaint accompanying the summons, the plaintiff under CPLR 3213 can include a set of summary judgment motion papers, setting a return day in those papers for hearing and disposition just as the plaintiff might do on a motion for summary judgment made after the joinder of issue in a conventional action. But instead of merely having the defendant answer the complaint at any time within a stated period following service, the motion papers require the defendant to appear and argue its position on the specific return day set by the plaintiff.

CPLR 3213 supplies only the skeletal instruction needed to make the device workable. (See Siegel, New York Practice 5th Ed. § 288 et seq.) If the plaintiff's papers adequately show a good claim that falls into either of the two permissible categories, and the defendant can't effectively refute the claim on the return day (so

as to require a denial of the summary judgment motion), the plaintiff marches off with a valid New York judgment and can proceed right to enforcement.

Because the procedure of CPLR 3213 is so much more convenient and less costly that an ordinary action, many plaintiffs have jumped at CPLR 3213 perhaps too enthusiastically, by purporting to bring a claim satisfactory to one or the other of the CPLR 3213 categories when the claim can't be fit under either.
This has been so mainly when the plaintiff is relying on the instrument for the payment of money category. The plaintiff waves a paper at the court and insists it's an instrument for the payment of money only, when it's nothing of the sort. While even a non-negotiable instrument may qualify, many of the other papers tried by plaintiffs over the years have not. (See Siegel. id., § 289.)

In the other category – a claim based on an already rendered judgment – there has been less controversy, but some. One factor that reduces the dispute here is that if the judgment on which the New York action is based was rendered in a sister state – or any other court whose judgments fall under the federal constitution's Full Faith and Credit clause – and the plaintiff wants to convert it into a New York judgment, the plaintiff need not rely on CPLR 3213 at all: a full faith and credit judgment falls under the still more facile procedure of Article 54 of the CPLR.

Article 54 prescribes some authentication steps, which are usually easy enough for the plaintiff to meet, and for the plaintiff who meets them Article 54 dispenses with an adversary proceeding altogether: it enables the out-of-state judgment to be converted into a New York judgment through a simple filing procedure. See CPLR 5402.

Judgments not entitled to full faith and credit, which means, for example, the judgment of a foreign nation's tribunal, are not entitled to such summary registration procedures. These are the ones for which the "judgment" side of CPLR 3213 was enacted: judgments that can't be allowed Article 54 treatment but that nevertheless deserve at least some facilitation short of a plenary action and all of its trappings. The legislature grants them at least the compromise convenience of a CPLR 3213 ride into court.

This "judgment" category of CPLR 3213 doesn't generate controversy as frequently as the "instrument" category, but it does have some thorns, as the *Sea Trade* case illustrates.

*Sea Trade* was an action to enforce a Spanish court's "award" of damages against a defendant who had improperly tried to "arrest" the plaintiff's ship in Spain. (That, incidentally, is what has been tried several times around the world by certain bond creditors of Argentina, whom Argentina, in an ongoing stream of publicity, has continued to frustrate.)

The issue in *Sea Trade* was whether or not the Spanish "award" qualified as a "judgment" within the meaning of CPLR 3213.

While Article 54 of the CPLR was not applicable, Article 53 of the CPLR was. It applies to foreign country judgments, and while it doesn't supply a red carpet registration device like that of Article 54, it does require recognition for foreign country judgments that are "final, conclusive and enforceable where rendered". See CPLR 5302. CPLR 3213 offers such judgments what we might describe as at least a pink carpet invitation.

Plaintiff in *Sea Trade* claimed that their Spanish "award" was the equivalent of a qualifying judgment under CPLR 5302. The issue was whether it was. On that, there was, as the court describes it, a "battle" of Spanish law experts.

It was not acceptable, held the appellate division in *Sea Trade*, for the trial court, as a matter of law, to credit the affidavit of the plaintiff's expert "without affording defendant the opportunity to test ... the expert's credentials" at a hearing. Hence the court vacates the plaintiff's judgment, orders a hearing, and allows the

> "supplemental" supporting documents that the plaintiff had submitted, in essence converting the CPLR 3213 proceeding into an ordinary action and letting it go forward as such.

Defendant protested that such a supplementary filing was not permissible, to which the appellate division, refusing to put the statute into a straitjacket, makes this instructive response:

> There is no absolute rule that on a CPLR 3213 motion, a plaintiff cannot supplement its papers in response to a defendant's arguments.

## OTHER DECISIONS

*GPS TRACKING*

**Employer's Attaching GPS Device to Employee's Car Needs No Search Warrant, But Search Must Be Reasonable, and Here Wasn't**

This case was generated by the state's suspicion that one of its employees (E) was submitting false time reports. In looking into that, the state – without a warrant – attached a global positioning system (GPS) device to E's car, tracking all of its movements.

Of the resulting charges made against E, four depended on evidence that the GPS produced. The charges brought dismissal of E by the labor commissioner, an Article 78 proceeding by E to overturn the dismissal, a split appellate division (3-2) upholding the dismissal, and, now, a unanimous reversal of the appellate division by the Court of Appeals in *Cunningham v. New York State Dep't of Labor*, .... N.Y.3d

...., .... N.Y.S.2d ...., 2013 WL 3213347 (June 27, 2013), but with a 4-3 difference of opinion on a key ground: whether the search required a warrant.

In an opinion by Judge Smith, the majority holds that no warrant was required, but reverses, in E's favor, because it holds that the search must nevertheless be reasonable, and this one wasn't. The minority, in an opinion by Judge Abdus-Salaam, holds that a warrant was required and rests its decision on the absence of the warrant.

Both sides hold that the use of the GPS device to track a suspect's movements is "a search subject to constitutional limitations", but disagree on what the constitution requires in these circumstances. They both explore the law on the subject, from both U.S. Supreme Court and New York Court of Appeals cases, and both agree that there is a "workplace exception" to the warrant requirement. The issue boils down to whether the "workplace exception" is confined to the workplace itself or can include items even personal in nature. The majority gives it this wide berth, including as an example a personal letter tacked to an employee bulletin board.

There is no expectation of privacy for such items, says the majority, adding that the "location of a personal car used by the employee during working hours does not seem to us more private" than that. Hence the majority concludes that

> when an employee chooses to use his car during the business day, GPS tracking of the car may be considered a workplace search[,]

which dispenses with a warrant.

The search must nevertheless be reasonable under both the federal and state constitutions, holds the majority, finding that in this case "the State has failed to demonstrate that this search was reasonable" in its scope. It looked into

> much activity with which the State had no legitimate concern – i.e., it tracked petitioner on all evenings, on all weekends and on vacation.

The majority acknowledges that it might be impossible to to exclude "all surveillance of private activity" by a car with a constantly active GPS instrument attached, but "surely it would have been possible to stop short of seven-day, twenty-four hour surveillance" that took place here for a full month.

By taking the position that the state "cannot, without a warrant, place a GPS on a personal, private car to investigate workplace misconduct", the concurring judges are spared the need to determine whether the search here was "reasonable"; to them, it was barred, and the fruits of it excludible, based on the lack of a warrant alone. "A search as intrusive as GPS surveillance", writes the concurrence, "is highly susceptible to abuse without judicial oversight".

*MEDICAL MALPRACTICE*

**Surgeon's Deliberate Decision Not to Search for Lost Guide Wire Is Not Actionable Without Expert Evidence**

The plaintiff in *James v. Wormuth*, .... N.Y.3d ...., .... N.Y.S.2d ...., 2013 WL 3213341 (June 27, 2013), apparently deemed such expert evidence unnecessary on the basis that the case could rest on the res ipsa loquitur doctrine. The Court of Appeals, however, examining the doctrine, finds one of its elements missing.

The Court had previously reviewed the doctrine in its 1997 *Kambat* decision (Digest 449), where it held that the doctrine does apply to a foreign object left inside the patient, but the object in that case – an unusually large pad – had been left in inadvertently. The Court in that case held that to succeed on a res ipsa theory, "a plaintiff need not conclusively eliminate the possibility of all other causes", but need only show that the defendant's negligence was "more likely than not" the cause. The doctrine merely supports an inference, held the Court, and it is for the jury to decide whether or not to draw it.

After reviewing the elements that *Kambat* held necessary for a res ipsa showing, the Court finds the plaintiff failing here in *James* with respect to the second of them: the requirement of a showing that the event was "caused by an agency or instrumentality within the exclusive control of the defendant". The defendant was clearly in control of the operation, but that, says the Court in an opinion by Judge Rivera, does not dispose of "the question of whether he was in exclusive control of the instrumentality [the wire], because several other individuals participated to an extent" in the operation and there was no evidence adduced that the defendant had "exclusive control of the wire". Hence the res ipsa doctrine could not work for the plaintiff.

Unable to rely on the res ipsa doctrine, the plaintiff had to discharge the usual burden of proof to show the negligence of the surgeon. In this case, that required "evidence of the standards of practice", which on these facts required the testimony of experts, and none was submitted. Here the only "expert" who testified was, in a manner of speaking, the defendant himself, and it was his professional judgment to leave the wire in because it was

> riskier to continue, noting that this would extend the period under which the plaintiff was anaesthetized, and require a larger incision in order to find and remove the wire.

Complaining of pain afterwards, the plaintiff returned to the defendant, who performed further surgery and did find and remove the wire with the aid of an x-ray machine called a "C-arm", but that, holds the Court, could not by itself establish that the defendant's initial decision not to remove the wire was negligent. Expert testimony was needed to do that, and the plaintiff did not produce any.

We might add the question whether it was negligence – legal malpractice – for the plaintiff's lawyer not to produce an expert. The issue was not present in *James*.

*WHAT ARE PUBLIC WORKS?*

**Work on City Vessels Like Ferries and Fireboats When In Dry Dock Is "Public", Requiring Pay at Prevailing Local Wages**

The plaintiffs, employees of a dry dock company, worked at its floating dry docks on Staten Island, where repair projects included such things as ferries, fireboats, and garbage barges owned by the city. The plaintiffs sought the wage levels prescribed by Article I, § 17 of the state constitution, which provides that no worker

> in the employ of a contractor ... engaged in ... any public work ... shall ... be paid less than the rate of wages prevailing in ... the locality ... where such public work is to be situated, erected or used.

Labor Law § 220(3)(a) in essence repeats that criterion.

The question in *De La Cruz v. Caddell Dry Dock & Repair Co.*, .... N.Y.3d ...., .... N.Y.S.2d ...., 2013 WL 3213308 (June 27, 2013), was whether the kind of work done by the plaintiffs qualified for these wage entitlements, which required a determination of whether the work they were doing was "public" under these provisions and fell under the "situated, erected or used" phrase.

The defendant argued that the phrase could not include work on boats, as involved here. In an opinion by Judge Pigott, the Court rejects that construction. After analyzing the history and caselaw behind these provisions, the Court finds it clear that the three-word phrase "situated, erected or used"

> was intended to extend beyond structures that are erected, and also include at least some things for which ... "situated" or "used" are more fitting. While a vessel would not be described as being "erected," it would be appropriate to describe it as being "situated" or "used".

It is in any event clear to the Court that the work need not be on something joined to the land. After consulting several dictionaries, the Court makes two main points: that public works "are works paid for by public funds and made for public use", and that

> [a]lthough the illustrative examples given in dictionary entries are frequently fixed structures, it is clear that the notion that a "public work" must be attached to the land is not part of its central meaning.

The Court does find, however, that the work must be "construction-like" labor, citing its 2000 *Brukhman* decision (Digest 484), which held that a minimum wage

measure applicable to employees on public construction contracts could not be invoked by welfare recipients assigned to different work.

The Court adopts a set of three requirements to determine whether a given project enjoys these disputed wage protections:

1. a public agency must be a party to the contract (the city was such a party here)

2. the project must involve "construction-like" labor and be paid for by public funds (both of which were the case here); and

3. the primary result of the work undertaken must be for the benefit of the general public (also found to be the case here).

*INTERPRETER SERVICES*

**Court Did Not Have to Replace State-Employed Interpreter Who Candidly Revealed Connections to Party in Criminal Case**

When issues involving court interpreters arise, it's usually in a criminal case, as illustrated in *People v. Lee*, 21 N.Y.3d 176, 969 N.Y.S.2d 834 (May 30, 2013; 4-2 decision). But the rule in point, § 217.1 of the Uniform Rules, applies to both "civil and criminal cases" – as it announces at its very beginning – and so, in our commitment to civil decisions and recognizing the significance of the interpreter issue, we report the *Lee* case here.

Defendants Lee and Chin were prosecuted for burglary and larceny in stealing several thousand dollars worth of property from the Manhattan apartment of complainants, husband and wife. At the trial the state called the wife, who spoke Cantonese. An interpreter had been arranged for in advance, and at the outset the interpreter advised the court of his relationship with the complainant husband, whom he described as a "friend" and volunteered also that the husband "had introduced the interpreter's father to construction loan officials".

The families did not meet socially, however, and the interpreter assured the court that he had "no knowledge of the facts of the case". Defense counsel nevertheless sought to remove the interpreter, pointing out that the interpreter also knew of the complainant husband's "intimidating violent nature".

The trial court rejected the request to disqualify the interpreter, instead stressing his status as a state employee and that he was under oath.

After trial, the defendant was found guilty of the criminal charge.

The appellate division affirmed, finding that court and counsel had "thoroughly questioned the court interpreter about any possibility of bias" and found "no reason to believe that defendant was prejudiced by the use of this interpreter".

A divided Court of Appeals, in an opinion by Judge Pigott, agrees and affirms, holding that the trial court's determination to retain the interpreter was not an abuse of discretion. It was such an abuse to the dissenters, however, speaking through Judge Rivera and stressing the other options the trial court might have turned to in these circumstances.

The standard for a trial court's duty to appoint an interpreter is in Rule 217.1. The appointment is required when the court

> determines that a party ... is unable to understand and communicate in English to the extent that he or she cannot meaningfully participate in the court proceedings.

In citing this standard from Rule 217.1, the Court states that it applies "in all criminal cases", but the rule itself recites that it applies in civil cases, too.

The main point of the dissenting opinion in *Lee* is the presence of doubt about the accuracy of the translation itself. There was no record made of the translation and hence nothing that an appellate court could review to verify the translation's correctness, because, says the dissent, the trial court

> failed to take adequate steps to ensure the accuracy of the interpretation, and to provide a mechanism to preserve the interpretation for review on any subsequent appellate challenge.

To the dissent, the impact of the majority's decision is to establish "an irrebuttable presumption in favor of official court interpreters under oath, regardless of the potentially compromising circumstances". The dissent continues that

> [i]f the fact that the interpreter has taken an oath to faithfully discharge his or her duties is sufficient to overcome a challenge of bias or conflict, then there would never be grounds to remove even the most obviously conflicted interpreter.

Here enough was shown, as the dissent sees it, to secure a substitute interpreter, and the trial court's failure to "even inquire as to the availability of such a substitute" constituted an abuse of discretion and ground for overturning the verdict.

*FIGURING STATE SENATE DISTRICTS*

**Although Required to Base Senate Districts on Population, Senate Has Some Discretion in Choosing Method**

The United States Senate has two senators for each state regardless of population, but state senates have been held constitutionally required to allot senate seats based on population.

Chapter 16 of the Laws of 2012 increased senate seats in New York from 62 to 63, which petitioners said was a violation of Article III, §4, of the state constitution. They brought a proceeding seeking a declaration to that effect, arguing that the legislature must apply one "consistent" measure in calculating senate seats – a calculation necessitated by population shifts between census periods. The attack failed, and the 2012 allotment of senate seats was sustained by a unanimous Court of Appeals in *Cohen v. Cuomo*, 19 N.Y.3d 196, 946 N.Y.S.2d 536 (May 3, 2012).

Unable to follow the federal example and just allot senate seats to counties without regard to population, and of course unable to make divisions that will work out to absolutely precise population equality, the legislature has in the past used two different methods for fixing the number of senate districts. Concerned in this case with four counties in particular, Queens and Nassau on the one hand and Richmond and Suffolk on the other, the Court notes their altered, and sometimes dramatically altered, population shifts over the years since the late 19th Century (whose senate allotments serve as the base for the figurings in this case). The Court has to gauge the acceptability of the legislative steps taken to recognize these population shifts.

Without getting into the detailed arithmetic, which the opinion itself avoids, the Court summarizes the previously used legislative methods as (1) "combining before rounding down" and (2) "rounding down before combining", both being references to population calculations as applied by the legislature's treatment of (1) Richmond and Suffolk and (2) Queens and Nassau.

Using one of the methods noted for both sets of counties would have generated 62 senate districts, while using the other for both would have generated 64. Petitioners complained that the respondents "manipulated the process for political purposes in order to reach a 63-seat Senate".

The Court of Appeals rejects the attack, pointing out, as the petitioners also recognize, that the Court has upheld each of the methods used in the past, and falling back on what the Court has held to be the petitioners' "heavy burden of establishing the unconstitutionality" of such legislation. The petitioners did not discharge that burden in this case.

Rejecting the idea that only one of the two courses can satisfy the constitution, the court cites and quotes from its 1972 decision in *Schneider v. Rockefeller*, 31 N.Y.2d 420, 340 N.Y.S.2d 889. It says that

> [i]nstead of deciding between these procedures, we held that "the Legislature must be accorded some flexibility in working out the opaque intricacies of the constitutional formula for readjusting the size of the Senate".

Whatever the "flexibility" stretch might be found to be in this case, the Court finds the legislature's use of the different yardsticks for the two different sets of counties to be within it.