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

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STATUTE PRESCRIBING SPECIAL STEPS TO PROTECT EXEMPT INCOME OF DEPOSITORS – CPLR 5222-a – GETS COURT OF APPEALS REVIEW

Bank Must Forward Forms to Debtor but Does Not Face Liability for Failing To Do So

The forms are only one phase of the complicated instructions CPLR 5222-a offers in its attempt to protect exempt monies in the accounts of judgment debtors. The statute, along with some related statutes, constitutes the Exempt Income Protection Act of 2008 (EIPA).

The act recognizes how wholly exempt funds in a debtor's account are often successfully levied on by judgment creditors simply because the bank doesn't know the funds are exempt (like social security income and welfare payments, for example). Often the judgment creditor itself does not know. The frequent result is therefore a full levy of the judgment against the account, with basic living expenses thereby denied the debtor.

With the goal of meeting the problem, the EIPA, implemented mainly through the new CPLR 5222-a, sets up a detailed and complicated procedure for assuring that the bank gets the needed notice so as to lay off the account.

The steps are numerous. The Court of Appeals lists many of them in its first major address to the statute in *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, ... N.Y.S.2d .... (Nov. 21, 2013), a case started in federal district court. It was dismissed there, went up to the Second Circuit, and reached the New York Court of Appeals on certified questions.

The scenario is an effort by a judgment creditor (JC) to effect a restraint against the account of the judgment debtor (JD), so that JD can't withdraw from the account. The CPLR allows this, as usual, through a CPLR 5222 restraining notice served on the bank identifying the account. CPLR 5222-a added a requirement that the notice be accompanied by another notice, this one aimed at the possibility that the account may contain exempt funds.

To the end of determining that, another instruction is that the JC include, for the bank, notices and forms for it to forward to the judgment debtor advising of the possibility that some of the funds may be exempt and telling JD what steps to take in case they are.

At each of the many turns in these procedures are time limits, designed to expedite the steps to the end that JD may protect exempt funds but that JC may not be unnecessarily delayed in access to account money that is not exempt.

The bank in *Cruz* froze JD's account without following the statutory formula and the question was whether JD had a claim against the bank for money damages for doing so.

While the statute enumerates the liabilities of the judgment creditor for violating the CPLR 5222-a prescriptions, the only specific address to the bank's liability is in subdivision (b)(3) of CPLR 5222-a, which recites that the bank shall not be liable for failing to forward to JD the appropriate forms included among those furnished to the bank by JC.

At this point the expressio unius rule appears in the case – expressio unius exclusio alterius est, meaning that that which is affirmative is negative of that which is not affirmed. JD cited the rule, claiming that by negating the bank's liability for one omission, the statute meant to keep other avenues of bank liability open. In an opinion by Judge Graffeo, the Court finds the rule inapplicable.

The rule is "typically used to limit the expansion of a right" – i.e., where a right is specifically conferred by a statute, it negates by inference the conferral of any other right. It starts with a positive, in other words, not with a negative, in contrast to the use JD was trying to make of the rule here. It is not, says the Court, "a basis for recognizing unexpressed rights by negative implication" spelled out from what is itself a negative.

The Court also finds significant that the New York EIPA "explicitly provides that a judgment debtor can recover money damages ... from *judgment creditors*", adding force to the conclusion that it can't against mere garnishees, like the bank in this context.

The New York statute is largely modeled on Connecticut's, prompting the Court to stress, by way of contrast, that the Connecticut statute "explicitly imposes liability on banks".

The Court recognizes some situations under Article 52 of the CPLR in which a bank may face a money damages claim asserted by a bank depositor, but finds these restricted to special proceedings brought on the authority of statutes like CPLR 5239 and 5240, in which a violation is shown to support a contempt proceeding. There the money damages are a punishment being imposed based on contempt of court – again, not an opening to expand a bank's liability on an application of CPLR 5222-a.

The Court deems its holding an appropriate recognition of "the bank's limited role as garnishee".

OTHER DECISIONS

REQUIREMENT TO PUBLISH RULES

NYC's "Eligibility Procedure" Imposing "Need" Standard to Get Homeless Services Is Held to Be "Rule" and Can't Be Applied Yet Because Not Properly Promulgated

The law prescribing the promulgation steps is the City Administrative Procedure Act (CAPA); it prescribes notice and hearing procedures for the promulgation of proposed rules by city agencies. The city agency involved here is the Department of Homeless Services (DHS). Without following the CAPA prescription, DHS adopted an Eligibility Procedure (EP) imposing need standards for applicants entitled to invoke the new law.

Among those entitled by CAPA to notice of such a proposed promulgation is the NYC Council. The Council didn't get the required notice and brought this declaratory action to bar implementation of the EP on that ground. The suit succeeds. Implementation is held barred. *Council of the City of New York v. Department of Homeless Services*, 22 N.Y.3d 150, ... N.Y.S.2d .... (Nov. 26, 2013).

The issue was whether the EP constituted a "rule" such as to require the preliminary submissions mandated by the CAPA. The lower courts held that it did, and the Court of Appeals, in an opinion by Judge Graffeo, unanimously affirms.

Despite the unanimity, the opinion manifests that the issue can sometimes be a thorny one. The courts have met it often in the past, in challenges to both local ordinances and administrative promulgations.

In its 1994 *Schwartfigure* decision (Digest 411), for example, a state agency had the policy of recouping overpayments made to a recipient of unemployment insurance benefits by deducting a straight 50% from any later benefits due the recipient, even if the recipient was faultless. This was found to be so arbitrary that it amounted to a "rule", which required pursuit of the formal rulemaking procedures of the State Administrative Procedure Act (SAPA), which were not followed. SAPA is also discussed and compared in *Homeless*.

In a later case, involving regulations under the Public Employee Safety and Health Act, inspectors found safety violations at several of a transit authority's facilities and assessed penalties under guidelines included in the applicable regulations. Because the guidelines had not been formally filed with the secretary of state and published in the State Register, the authority sought to set aside the assessments. That was the Court's 1996 decision in *New York City Transit Auth.* (Digest 440), and there the effort failed when the Court found that the guidelines involved depended on facts unique to each individual case and therefore did not constitute the kind of rule or "policy" that required formal promulgation.

The Court in the present case concludes otherwise of the Department of Homeless Services, which

> did not follow the notice and hearing steps necessary to formally promulgate the Eligibility Procedure, [making] the provision ... unenforceable until compliance is achieved.

WHO MAY MOVE TO VACATE JUDGMENT?

Finding in Favor of Defendant on Governmental Immunity Issue, Resulting in Judgment Dismissing Claim by One Party, Allows Defendant to Seek Vacatur of Judgment That Different Party Had Earlier Won

Both claims, one by Ruiz and one by Nash, arose out of the 1993 Trade Center bombing. (Not the 2001 bombing, note.)

The key issue was whether PA, the defendant Port Authority that owned the center, was protected by governmental immunity. In the action by claimant Ruiz, the Court of Appeals ultimately held that PA was, and dismissed the Ruiz claim. Substantially before that, however, in the action by Nash posing the same immunity issue, Nash had won on the issue below and had entered a judgment against PA, which PA did not seek leave to appeal, as it could have done. Now PA nevertheless sought to vacate the Nash judgment on the basis of the Ruiz judgment, which Nash resisted on the ground that PA's failure at least to try to appeal the Nash judgment made it final and hence not subject to later developments, like the favorable ruling PA won in *Ruiz*.

A 4-2 majority in the Court of Appeals holds that under paragraph 5 of CPLR 5015(a), whether to vacate the Nash judgment lay in the discretion of the supreme court. It remands for an exercise of that discretion. *Nash v. Port Authority of New York and New Jersey*, 2013 WL 6164436 (Nov. 26, 2013; 4-2 decision).

CPLR 5015(a)(5) provides that if a judgment is based on some other judgment or order, and the latter is in some way undermined, as by reversal, modification, or vacatur, the dependent judgment can similarly be cancelled or adjusted by motion. The most likely context for this happening is where a sister-state or foreign country judgment has been converted into a New York one, only to be afterwards undone in some way at home.

The disagreements among the judges in *Nash* center on whether the earlier judgment – itself a New York (not a foreign) judgment – should on the present facts enjoy the same status as a final foreign judgment under CPLR 5015(a)(5). There have indeed been situations in which the statute has been used to undo a New York judgment (see Siegel, New York Practice 5th Ed. § 431), but may it be applied on the specific facts of *Nash*?

The majority says yes. It notes that CPLR 5015(a), the statute on vacating judgments, lists five grounds, and finds that under all of them the court's "determination to vacate a judgment is a discretionary one", citing the phrase "may relieve a party" in CPLR 5015(a)'s introductory language. In an opinion by Judge Pigott, the majority finds sufficient elements in *Nash* to permit that discretion, but leaves decision on that matter to the lower courts on remand.

The dissent, written by Judge Graffeo, disputes that. It finds no discretion available on these facts and would invoke the general rule that

> when a party allows its appellate rights to lapse, it forfeits the right to challenge any issue it could have raised on direct appeal.

The dissent distinguishes the 1976 decision in *Lacks v. Lacks*, 41 N.Y.2d 71, 390 N.Y.S.2d 875, as focusing on paragraph 4 of CPLR 5015(a), which is concerned with vacaturs based on lack of subject matter jurisdiction, not some prior judgment.

The dissent sees the issue in this case, where the PA "could have asserted its challenge ... had it timely filed a motion for leave to appeal", as posing "a question of first impression" in its attempt to "circumvent appellate time restrictions". It also sees the majority's allowing the PA to vacate the *Nash* judgment as "the functional equivalent of granting relief to a non-appealing party", another occasional appellate quandary. (On that, see the discussion of the Court's 1983 *Hecht* and 1995 *Sharrow* decisions in Digests 285 and 427.)

Three of the Court's judges were absent from the panel in *Nash*, with Justices Peters (of the Third Department) and Scudder (of the Fourth) recruited to sit on the case. Since the two visitors took different views, the case produced no holding by at least four of the Court's regulars, which might make a difference in how the case is treated down the road.

PAYING RENT IN ADVANCE

Explicit Agreement in Lease to Pay Annual Rent in Advance Obligates Tenant to Pay Rent for Full Year on Due Date and Bars Tenant from Seeking to Terminate Afterwards

The general rule is that landlord L is entitled to rent from tenant T only at the end of the rental period, not the beginning. The parties may alter that by agreement, however, and in *Eujoy Realty Corp. v. Van Wagner Communications, LLC* , 2013 WL 6164508 (Nov. 26, 2013), they did.

Defendant T in *Eujoy* was in the outdoor advertising business. The lease, covering a 15-year period, was for the use of advertising space on L's building. It provided explicitly that on January 1st of each lease year T would pay rent in advance for a full year. The lease also included explicit terms barring any oral modification and providing that if the lease should be terminated "for any reason" (except designated ones not present in the case), L would still not be required to return any part of the year's rent already paid.

There were several issues in *Eujoy*, substantively in the construction of the lease and procedurally, including some nice points of appellate procedure. On one of the procedural points, there was a disagreement generating a two-judge concurring opinion, but on the substantive point at issue, which is the subject of our treatment here, the Court is unanimous.

The main substantive issue concerned the year 2007. It centered on the fact that in early January of 2007 T sent in, as required, a check for the full year's rent ($96,000+), but then "quickly stopped payment", claiming that it wanted to terminate the lease and that the check was sent in error.

In an opinion by Judge Read, the Court says the applicable rule is that

> [w]hen a lease sets a due date for rent, that date is the date on which the tenant's debt accrues ... [and that rent] paid 'in advance' (i.e. at the beginning of the term) is unrecoverable if the lease is terminated before the completion of the term, unless the language of the lease directs otherwise.

If T had any hope of getting the judiciary on its side, the hope was dashed once again by the Court's recognizing T as being a "sophisticated and counseled" entity. (See the note on the

"Plague of Sophistication" in Digest 638.) If T was "dissatisfied" with the arrangement, admonishes the Court, T should have known that "the bargaining table" was the time and the place to say so.

The Court also finds the lease provision against oral modification buttressed by § 15-301(1) of the General Obligations Law, citing the more extensive treatment of that statute in its 1977 decision in *Rose v. Spa Realty Associates,* 42 N.Y.2d 338, 397 N.Y.S.2d 922.

HOTEL TAXES

Fees Collected by Travel Companies for Hotel Rooms They Book for Guests Online Are Taxable by New York City

The argument in this case centered on a local law enacted in 2009, under the terms of which the City is explicitly permitted to tax such companies, which are called "remarketers". The local law was enacted on the authority of a 1970 state statute that allows the legislature to delegate to the city the same power to tax hotel room occupancy that the state itself has.

In 2010 the state law was amended to specifically authorize the city to impose these taxes. The plaintiffs cited this as proof that the city lacked such taxing power before the amendment, which made the main question whether, even without the 2010 amendment, the 1970 state statute could by its own terms support such city taxation – a contention that would make the amendment a superfluous element in this case. We are treating here, of course, only the taxation of remarketers.

To that question a divided Court, in an opinion by Judge Rivera, answers yes. It stresses that the state statute allows the city to tax a "rent *or charge*", and to collect it from the owner of the hotel or from a *"person entitled to be paid the rent or charge"*. (All the emphasis is the Court's.) It sees the charges imposed by the travel companies as embraced by the quoted language. *Expedia, Inc. v. City of New York Dep't of Finance*, 22 N.Y.3d 121, ... N.Y.S.2d .... (Nov.21, 2013; 5-2 decision).

The suit contesting the tax was a declaratory action by the plaintiff companies, the Court commenting that "[o]nline travel companies like the plaintiffs have successfully reshaped the way people book travel", an internet innovation that "revamped" the industry.

The two-judge dissent, written by Judge Pigott, emphasizes the general rule that tax statutes must be given a narrow construction. It sees the majority opinion as a violation of that rule. It's the dissent's view

> that the City exceeded its authority by taxing the fees plaintiffs earned in facilitating hotel room rentals.

In defining "rent", the majority invokes *noscitur a sociis* ("it is known from its associates"), a maxim used to define a word based on other words that it's often identified with. (The Court might instead have used *grege suo ebrius cognoscitur* – "you can tell a man who boozes by the company he chooses".)

RECOMPENSING COMP CARRIER

Workers' Compensation Carrier Who Owes Benefits to Employee Is Entitled to Offset Them Out of Settlement Proceeds of Employee's Federal Civil Rights Action

The claimant, hired as a youth division aid at a state-run juvenile detention center, was assaulted and raped by a male resident of the facility who had been assigned to kitchen duty. The assault and rape, committed in the course of the claimant's employment, produced a workers' compensation recovery for her.

She also brought a federal civil rights action on the same claim. That action was settled by stipulation, and the issue was whether and to what extent the compensation carrier would be entitled to a credit out of the settlement proceeds for either compensatory or punitive damages covered by the worker's compensation award. The Court saw no need in this case to decide the punitive aspect, leaving only the compensatory part to address.

After reviewing the statutes in point, mainly several subdivisions of § 29 of the Workers' Compensation Law, the Court finds of all of the issues in this case resolved by the stipulation itself – the stipulation that settled the federal action. In an opinion by Judge Read, the Court sees the stipulation as a kind of funnel for all of the disputed points. It writes that

> [i]n light of the terms of the settlement in this case, we conclude that the carrier is entitled to offset the full amount of the settlement proceeds.

Among the facts collected through the funnel is that the carrier, in this case the self-insured State Insurance Fund, approved the settlement, but with a reservation of rights as to future benefits payable to the claimant. A potential issue there is also found resolved by the stipulation. *Beth V. v. New York State Office of Children & Family Services*, 22 N.Y.3d 80, ... N.Y.S.2d .... (Nov. 19, 2013; 6-1 decision).

Part of the motivation for the law's allowing a compensation carrier any credit at all out of the claimant's tort recovery is to avoid a double recovery for the claimant.

That point generates the dissent by Judge Rivera, who writes that on this record

> it cannot be said with certainty that substantial record evidence supports the [Workers' Compensation] Board's conclusion that the settlement compensated [claimant] for the same injuries compensated by the Workers' Compensation Law.

To the majority, the stipulation covers that point as well.

When a case comes along with many active issues, and a stipulation of settlement between the parties is ultimately found to resolve them all, a chant gains energy among the parishioners. "Blessed be the stipulation ...."

WHEN SHOULD COURT GIVE "MISSING WITNESS" CHARGE?

The "missing witness" rule was designed to help the party who doesn't control the witness – obviously, because if that party did control the witness it could presumably secure the witness's testimony readily enough. If, on the other hand, the missing testimony would be expected to favor the party controlling the witness, the rule does entitle the opposing party to the missing witness charge: else it would amount to a party's buttressing its own cause by failing to call a witness who would ordinarily be expected to support it.

An instructive example of where the missing witness charge should be given is the recent Court of Appeals decision in *Devito v. Feliciano*, 22 N.Y.3d 159, ... N.Y.S.2d .... (Nov. 26, 2013), a vehicle accident case in which P was in a car that was rear-ended by the car of defendant D. P claimed several serious injuries. She was taken by ambulance to a hospital's emergency room and was afterwards examined by several physicians, some of her own hiring and some retained by the defendant.

It appears that she was also hurt in a fall that predated the accident, posing issues of causation: to what extent was it the accident that caused her injuries? She wasn't terribly candid about that; one of her own physicians even said she was "not a good historian", which made all the more significant such corroborative testimony as she might derive, especially about causation, through cross-examination of D's medical experts. This she couldn't do at the trial because D never called them.

It's as to them that the missing witness issue arose, D arguing that what its witnesses would say would merely be "cumulative" of other evidence in the record. By the "other evidence", D was apparently referring to evidence P's own witnesses had given.

Pointing out that the "preconditions" for a missing witness charge apply in both criminal and civil trials, the court lists four of them, one of them the "noncumulative" requirement that preoccupies the Court in *Devito*.

The *Devito* case comes across as an attempt by D to block a road to corroboration that P might find in cross-examining D's witnesses. That's how the Court sees it. It finds in point the Third Department's 1996 decision in *Leahy v. Allen,* 221 A.D.2d 88, 644 N.Y.S.2d 388, from which it quotes:

> "[O]ne person's testimony properly may be considered cumulative of another's only when both individuals are testifying in favor of the same party ... [and to hold] otherwise would lead to an anomalous result. Indeed, if the testimony of a defense physician who had examined a plaintiff and confirmed [such as on cross-examination] the plaintiff's assertion of a serious injury were deemed to be cumulative to the evidence offered by the plaintiff, ... there would never be an occasion to invoke such charge.

In an opinion by Judge Pigott, the Court then declares in its own language that

> an uncalled witness's testimony may properly be considered cumulative ... of testimony or other evidence [only if it favors the] party controlling the uncalled witness.

The plaintiff in its summation in this case did refer to the defendant's failure to call its doctors, prompting the defendant to argue that that by itself injected the "missing witness" point. The Court rejects the argument because, it says,

> a trial counsel's appeal to the jury during summation is not ordinarily a substitute for the appropriate jury charge by the court; [hence] the error here was not cured by the summation.

The defense also urged that even if the refusal of a missing witness charge was error, it was not prejudicial in this case. The Court rebuffs that, too. It says it can't conclude on this record that the error "did not prejudice a substantial right of the plaintiff".

Back goes the case for a new trial.