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

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SUBPOENA SEEKING DISCLOSURE FROM NONPARTY

Court Describes Distinct Obligations of Parties

CPLR 3101(a)(4) provides that seeking to depose a nonparty requires a showing of "the circumstances or reasons such disclosure is sought or required". No such requirement obtains when the disclosure is sought from a party, where only the omnipresent requirement of relevancy is imposed. After the recent decision by the New York Court of Appeals in *Kapon v. Koch*, 2014 WL 1315590 (April 3, 2014), this distinction may have been abolished and CPLR 3101(a)(4) left with perhaps no function at all. That's in any event the hope of those who advocate the paralleling of New York practice with federal practice, where no such distinction between party and nonparty discovery exists. Assume that a party issues the subpoena (call that party Issuer) and has it served on the nonparty from whom testimony is sought (whom we'll call SP, for subpoenaed person).

One would think that in this fundamental procedure the obligations of the two sides would have been made clear by this time. Not so in New York. The statute in point is CPLR 3101(a)(4). The CPLR, with that section included, became law in 1963, but in the CPLR's more than half century of life the respective roles of Issuer and SP have yet to be understood with any confidence. Controversy continues. (See Siegel, New York Practice 5th Ed. § 345.)

The device used to bring the matter before the court is often, as it was in Kapon, a special proceeding brought by the SP to quash the subpoena. However it gets to court, the real issue is who has what burden to show what.

As we'll see, the Issuer does not need preliminary court leave before issuing a subpoena to the nonparty. At the outset, the statute did require a preliminary order, but an amendment along the way dropped it. That was in 1984.

There were a number of cases addressed to the statute after that, but instead of producing a clarification, they produced a conflict, which the Court in Kapon takes note of. As evolved to the present moment, it's a conflict between the First and Fourth departments on one side and the Second and Third departments on the other.

Kapon arose out of a California fraud action brought by one Koch, a wine collector, against one Kurniawan for selling him 149 bottles of counterfeit wine. The wine was allegedly sold through auctions and private sales by X and Y, whom in our context we're calling SP -- the subpoenaed nonparties from whom disclosure is sought in New York for use in the California action.

Subpoena service was made on SP in New York pursuant to CPLR 3119, known as the Uniform Interstate Depositions and Discovery Act. CPLR 3119 adopts a facilitated procedure for those seeking the aid of the New York courts to secure disclosure for use in a litigation pending in a sister-state or federal court.

The procedure, implemented by subpoenas, was properly followed in *Kapon*, in which a special proceeding brought by SP against the Issuer in New York to quash the New York subpoenas centered on the who-has-to-show-what matter.

The basic requirement for any pretrial disclosure under the CPLR is that the matter sought be "material and necessary in the prosecution or defense of an action", a fancy phrase that has been construed to mean nothing more than "relevant". (See Siegel, id., § 344.) It applies to disclosure from a nonparty as well as a party.

The additional requirement imposed by CPLR 3101(a)(4), to include a "notice" with the nonparty subpoena, "is the only meaningful distinction" between the two, the Court acknowledges in *Kapon* in an opinion by Judge Pigott, which goes on to explain the reason for CPLR 3101(a)(4)'s additional "notice":

> Because a nonparty is likely to be less cognizant of the issues in pending litigation than a party, section 3101(a)(4)'s notice provision mandates that the nonparty is apprised of the "circumstances or reasons" as to why the party seeks or requires the disclosure.

The "notice", in other words, just has to tell the SP that there's an action pending, perhaps with a brief description of what the action is for and a statement like "this subpoena is being served on you to find out what you know about the subject matter of that action".

In the past, different interpretations of what the "notice" requires has often impeded efforts to get usable information from nonparties, who may be the sole source of the particular information sought. When there's a choice of forum available in the case, in fact, New York's disclosure restrictions were frequently the reason for a party's opting for the federal forum when a New York court would have been the alternative. And that's true not only of plaintiffs who have the initial choice of forum but also of defendants deciding whether to remove a state case (when federal grounds exist to supply that option).

As the Court sees it, the basic post-1984 departmental conflict is solely on the question of whether the Issuer must show "that the disclosure sought cannot be obtained from sources other than the nonparty". It was the position of the Second and Third

departments that the issuer did have to show that. The First and Fourth hold to the contrary: that the issuer need only show relevance -- the practical definition of "material and necessary" -- but need not show that the matter sought can't be obtained from other sources.

The Court of Appeals adopts this latter stance, rejecting the additional requirement imposed by the Second and Third departments. The Court quotes language about disclosure used in its 1988 *Anheuser-Busch* decision (Digest 341) and even earlier cases:

> An application to quash a subpoena should be granted [o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is `utterly irrelevant to any proper inquiry'.

On the issue of whether the subpoena in *Kapon* satisfied the "notice" requirement, the Court holds that it did, observing that the subpoena had even included copies of the pleadings used in the underlying California action, which detailed the relationship between the seller of the wine and the agencies through which the sales were made. The Court added in a footnote, however, that while including copies of the pleadings may help to give the required CPLR 3101(a)(4) "notice", it is not indispensable. The requisite notice can be supplied in other ways, such as -- if we may suggest -- in direct language used in the subpoena itself or in a separate accompanying paper that the server has included as a "notice".

Is *Kapon* now the last word? This troublesome realm suggests that while it's the latest, it may not be the last. What constitutes "notice", with or without the inclusion of the pleadings in the underlying action, may continue to be a battleground. Unfortunately, we think. It would be better if bench and bar could view *Kapon* as clearing the New York decks of all differences between disclosure from parties and nonparties, leaving any needed adjustment in a given case to the court's sui generis protective order powers under CPLR 3103.

OTHER DECISIONS

STATUTE OF LIMITATIONS

Jud.L. § 487 Suit against Lawyer for Misconduct Gets 6 Years under CPLR 213(1); Not Restricted to the 3 years of 214(2)

Section § 487 of the Judiciary Law says that any attorney who, "with intent", attempts to deceive "the court or any party", is liable to the victim for treble damages. The question of what statute of limitations to apply to such an action came before the Court of Appeals in *Melcher v. Greenberg Traurig, LLP*, 2014 WL 1280587 (April 1, 2014).

The question boiled down to whether the claim is governed by CPLR 214(2), which prescribes 3 years for a liability based on a statute. D argued that it did, and that this action, brought beyond the 3 years, was barred. P countered, however, that this was not a statute-based claim, but rather a common law cause of action, and that it was therefore governed by subdivision 1 of CPLR 213, which prescribes a 6-year statute of limitations for "an action for which no limitation is specifically prescribed" by any other law.

The bottom line is that the 6 years of CPLR 213(1) is found applicable, and the plaintiff's suit is timely.

It took a reversal by the Court of Appeals to reach this result; the lower courts had gone the other way. The difficulty that produced these differences of opinion lay in tracing the origins of the cause of action on which plaintiff brought suit. The liability was first imposed by what the Court describes as "the first Statute of Westminster" in 1275. If analysis stopped there, the *Melcher* claim would qualify as a statute-based one, CPLR 214(2) would govern it, and the claim would be barred.

But analysis doesn't stop there, rules the Court in an opinion by Judge Read. Though originally statute-based, the cause of action was part of the whole batch of English law that became New York law when the state first became an English colony. The Court explains that this whole body of law then qualified, not as statutory law, but as inherited English common law.

The Court cites in support of that conclusion its 2009 *Amalfitano* decision (Digest 591), in which it also dealt with § 487 of the Judiciary Law.

As based on common law, the claim does not fit under CPLR 214(2), the statutory-claim category, and since it fits no other category "specifically prescribed by law", it gets picked up by CPLR 213(1), sometimes referred to as the "residual" or "catch-all" provision, from which the quoted phrase comes. (See Siegel, New York Practice 5th Ed. § 36.)

Result: The claim gets the 6 years of CPLR 213(1) and is timely.

LABOR LAW 240(1)

Divided Court Holds "Compression Coupling" Is Not "Safety Device" Covered by Scaffold Law

The device is designed to hold two pieces of pipe together by inserting the ends of them into a common sleeve and then tightening the sleeve. A so-called "pencil box" -- through which wires from a basement source connect to wires on each floor of a building -- had to be removed to enable holes to be drilled in the floor for the installation of more pipe. All this was part of an overhaul of an office building.

The plaintiff, an electrician working on the project, removed the pencil box by separating it from the pipe that had supported it both above and below. This left a piece of pipe dangling as the plaintiff was drilling on the floor below. The dangling pipe fell on and injured the plaintiff.

Claiming that this was an elevation-related injury, the plaintiff sued the construction company and the building owner for violation of Labor Law § 240(1), often referred to as the "scaffold law", which applies to elevation-related injuries at construction sites and imposes strict liability on contractors and owners. A majority of the Court of Appeals in *Fabrizi v. 1095 Avenue of the Americas, L.L.C.*, 2014 WL 641523 (Feb. 20, 2014; 4-2 decision), finds the statute inapplicable in this case, denies the plaintiff summary judgment, and grants it to the defendants.

Cases on this statute have proliferated, even in the Court of Appeals, and on the books today stand a number of decisions -- some of them seemingly irreconcilable -- from which judges may pick as new § 240(1) cases come along. The pickings are so varied that there is usually a case or two to support any view of a given fact pattern.

One case cited by both sides in *Fabrizi* -- Judge Pigott in writing for the majority and Chief Judge Lippman in writing the dissent -- is the Court's 2011 *Wilinski* decision (Digest 623). The majority cites it only for its general reference to the absolute liability imposed by § 240(1). The dissent finds more in point the *Wilinski* statement, itself quoted from yet an earlier (2009) decision (*Runner*, Digest 603), that

> the dispositive inquiry ... does not depend upon the precise characterization of the device employed.

Wilinski held that merely because the base of a falling object stands at the "same level" as the injured worker, a recovery is not barred under Labor Law § 240(1). On parallel reasoning, the dissent says that the "crucial" legal issue -- which it would resolve in plaintiff's favor in *Fabrizi* -- is whether

> the task of repositioning the pencil box entailed an elevation-related risk that triggered defendants' duty to supply adequate safety devices.

It requires "little imagination", the dissent adds, to conclude that

> a tool capable of stabilizing the conduit pipe -- whether brace, clamp, coupling, or otherwise -- would be precisely the sort of device contemplated by section 240(1).

Labor Law § 240(1) has not been fundamentally altered despite the long string of cases applying it. It seems to us likely that what the legislature sought to do was impose on all potential § 240(1) defendants the position of insurer, but that there would probably have been too much political resistance to that.

All such would-be defendants -- contractors, owners, lessors, etc. -- should in any event note that keeping insurance in place for coverage of everything that § 240(1) just might apply to is -- it seems to us -- the only sensible (and safe) course.

LABOR LAW 241(6)

Rule Requiring Bracing of "Forms" Applies to Require Bracing for Single Form of Wall Even Before Others Are Erected to Support It

Another Labor Law case. The *Fabrizi* case, above, involved Labor Law § 240(1), whose violation generates absolute liability at construction sites in favor of injured workers. Section 241(6) has a similar mission -- to impose absolute liability -- but this one is operative only when a rule mandates specific steps and the steps are not taken.

In *Morris v. Pavarini Construction*, 2014 WL 6441489 (Feb. 20, 2014; 6-1 decision), such a rule was before the Court. It required bracing for "forms" being prepared for concrete pouring. An earlier phase of the case -- the Court's 2007 *Morris* decision reported in Digest 574 -- found that expert testimony was needed before the issue could

be resolved. It remanded the case for further proceedings.

Those proceedings, including the required expert input, have now been completed and the case is once again before the Court. The Court finds that the expert testimony supports the view that the rule in point did not intend to require bracing only for a completed form, but for individual, and incomplete, form walls as well.

The wall form in *Morris* was for the back wall of a form. The form wall was not braced and fell and injured the plaintiff's hand. Because a single "form wall" is found to be encompassed by the plural "forms" as used in the rule, absolute liability obtains under Labor Law § 241(6) and the plaintiff in *Morris* is awarded summary judgment.

The majority opinion is written by Judge Rivera. Judge Pigott dissents on finding in the expert testimony that the use of the plural "forms" barred application to a single incomplete "form wall".

Wouldn't a free-standing form wall be even more in need of bracing -- against wind and other movements -- than a "completed" one that has connected sister walls to support it?

LICENSE OR LEASE?

City's Allowance of Restaurant in Manhattan's Union Square Park Is Permissible "License", Not Impermissible "Lease"

If it were a lease, it would require legislative approval, which the restaurant operator did not get in *Union Square Park Community Coalition, Inc. v. New York City Department of Parks and Recreation*, 22 N.Y.3d 648, ... N.Y.S.2d .... (Feb. 20, 2014). What it got was a license from the city parks department, and that, holds the Court of Appeals, did not require legislation.

The license-versus-lease argument was readily answered, but the contestants, a coalition of locals who opposed the project, insisted that even as just a license, the arrangement was an impermissible use of park land. They brought a declaratory action to establish as much, but they don't establish it. Their action is dismissed.

The restaurant, which was to replace a smaller cafe at the site, was subject to a number of requirements imposed by the department, all of which, in the aggregate, point toward just a license, not a lease, as the Court views it. The restaurant was to be open on a seasonal basis -- April to October -- and during the prescribed hours of 7 a.m. to midnight.

The agreement was to run for 15 years, a factor that the plaintiffs also cited as suggesting a lease. But as long as not terminated arbitrarily, it was "terminable at will", and that, plus the fact that the department "retained extensive control over the daily operations" of the restaurant convinces the Court that this was a license arrangement.

The predicate of the plaintiffs' attack was the so-called "public trust doctrine". In a unanimous opinion citing its 2001 *Friends of Van Cortlandt Park* decision (Digest 494), the Court observes that "[u]nder the public trust doctrine, dedicated parkland cannot be converted to a non-park purpose for an extended period of time" without legislative approval.

Much in point is the Court's 1965 decision in *795 Fifth Ave. Corp. v. City of New York*, 15 N.Y.2d 221, 257 N.Y.S.2d 921, in which the Court also rejected a "public trust" claim.

All that the plaintiffs in the present case could show was a "mere difference of opinion" with the department about the best way to use park space, which does not equate with illegality.

In an opinion written by Judge Graffeo, the Court concludes that

> [w]hile we leave open the possibility that a particular restaurant might not serve a park purpose in a future case, ... the restaurant here does not run afoul of the public trust doctrine for lack of a park purpose.

INCOME TAXES

Court Reviews Standards for Determining Whether Person Is "Statutory Resident" and Thus Subject to State and City Taxes

If the person qualifies as a New York "domiciliary", that alone supports imposing full New York State income taxes on him; and if his domicile is in New York City, that supports the city tax as well under the city's Administrative Code. But if there's less than domicile, an alternative basis for the tax must be shown.

The recognized alternative in this case is where the person, though not a domiciliary, qualifies as a "statutory resident" under the terms of the relevant statute: § 605(b)(1)(B) of the New York Tax Law. The person qualifies as a "statutory resident" if he maintains a permanent place of abode in the state and spends in the aggregate more than 183 days of the taxable year in the state.

The petitioner [P] in this Article 78 proceeding brought against the state tax appeals tribunal conceded that his activities satisfied the "more than 183 days" requirement during each of the years at issue. Thus the question was whether P maintained a "permanent place of abode" in New York.

On the record before it, the Court holds that such a permanent place of abode was not established. The holding below to the contrary is therefore reversed and the matter remitted for further proceedings. *Gaied v. New York State Tax Appeals Tribunal*, 22 N.Y.3d 592, ... N.Y.S.2d .... (Feb. 18, 2014).

The factual background more specifically is that P, a New Jersey domiciliary, owned a car shop in Richmond County in New York. He bought a multiple dwelling in Richmond in which he allotted a first-floor apartment to his elderly and dependent parents, renting out the other apartments in the building as investments. He paid the utility bills for his parents' apartment and maintained a telephone for it in his own name, but claimed that he never lived there or kept any clothing or "personal effects" there. He stayed at the apartment "only on occasion ... at his parents' request to attend to their medical needs".

From that fact pattern the tax tribunal concluded that the place did qualify as a permanent place of abode and sustained the tax. The record doesn't suffice for that, holds the Court in an opinion by Judge Pigott.

The Court cites its earlier treatment of the statute's history in its 1998 *Tamagni* decision (Digest 464), in which it held that if a person is a New York resident, the state can use the residency as a basis for taxing all of that person's income, including income from intangible investments -- like interest and dividends -- which may lack a fixed geographical situs. *Tamagni* explained that "the statute is intended to discourage tax evasion by New York residents".

The Court obviously did not perceive such an attempt at tax evasion on this record, at least as developed so far. Whether that proves ultimately to be the case, however, depends on the further proceedings ordered by the Court upon remand.