

MINUTES OF THE January 31, 2014 NYSBA CPLR COMMITTEE MEETING
Held at the New York Hilton Hotel, 1335 Avenue of the Americas, New York, New York

In Attendance:

Paul Aloe, Esq., Thomas C. Bivona, Esq., James N. Blair, Esq., Raymond A. Bragar, Esq., Paul Cohen, Esq., Steven Critelli, Esq., Brendan Cyr, Esq., David L. Ferstendig, Esq., Daniel S. Finger, Esq., Sharon Stern Gerstman, Esq., David B. Hamm, Esq., Helene Hechtkopf, Esq., Souren Israelyan, Esq., Ken Jewell, Esq. (Secretary), Rob Knapp, Esq. (Chair), Bonnie Mohr, Esq., James E. Pelzer, Esq., Dan Schiavetta, Esq., Joe Schmit, Esq., Herbert Ross, Esq., Tom Wiegand, Esq.; Barbara Beauchamp (guest, part of meeting only), Sherry Levin Wallach, Esq. (guest, part of meeting only)

The meeting was called to order by the Chair, Rob Knapp at 12:15 p.m.

Agenda:

- I. Barbara Beauchamp's presentation to demonstrate NYSBA's new website.
 - A. Barbara: use Google Chrome for website. Questions from Paul Aloe and Rob Knapp about searchability of drafts and bills that the Committee maintains. Barbara says they will be searchable, provided they are in PDF text format. Paul Aloe: Committee needs easy on-line access to its reports and legislative proposals. Documents need to be uploaded from various sources, including Rob Knapp's own server. Hyperlinks can be uploaded. There is a daily digest and thread, but members need to log onto the website and sign up. CPLR Community is private and not searchable by outsiders, and has EU level of security. Contact BBeauchamp@NYSBA.ORG or webmaster with questions.
 - B. Discussion of need to commit up to ten thousand dollars to get Committee's archives and business onto the website.
 - C. Ray Bragar moves to ask NYSBA Finance Committee to put CPLR Committee's work on line; motion unanimously approved.
- II. Approval of Minutes: On motion to approve the minutes, which motion was seconded, the minutes of the October 4, 2013 meeting were unanimously approved with two changes, namely, the addition of Paul Cohen's name to the attendance list as he was present at said meeting, and the deletion of Joe Schmit's name as he was not present.
- III. Notice of Pendency Legislation Proposal (CPLR Article 65).
 - A. Jim Blair summarized this proposal, which was drafted mostly by Tom Curtis and with which Jim did not personally agree. Tom's proposal would among other things expand the definition of real property as to which a notice of pendency

could be filed to include stock in a corporation that owns real estate as well as cooperative apartments, and would allow refiling of a *lis pendens* even if the summons were not served within thirty days as required under present law. Jim noted that the Curtis proposal would not mitigate harsh nature of the notice of pendency, or require any showing of merit in order to use it.

- B. Various members expressed doubts about the Tom Curtis proposal pointing out that the 2002 revisions to Article 65 proposed by the Commercial and Federal Litigation Section were approved by the Executive Committee, are still the official position of the Association, and are better conceived and drafted than the Tom Curtis proposal; that the issues at stake are beyond our Committee's expertise and better suited for consideration by the Real Property Committee; that re-writing all of Article 65 of the CPLR is unnecessary and in any event too big a job for our Committee; and that the chances of getting any complete rewrite enacted into law are slim.
- C. Jim Pelzer moved that the Committee adopt Tom Curtis' Article 65 proposal. The motion failed unanimously.

IV. Proposed amendment to conform CPLR 4547 to FRE 408.

- A. Vice Chair of the Criminal Justice Section Sherry Levin Wallach appeared to present her Section's objections to our Committee's proposal to update CPLR 4547 to conform to FRE 408, as the latter was amended in 2006 and 2011. (CPLR 4547 was enacted to make the state settlement privilege the same as the federal one, and from 1998 until 2006, CPLR 4547 and FRE 408 were identical.) Sherry maintained that because the Criminal Procedure Law is silent on the question of admissibility of settlement negotiations, the CPLR would control and would make settlement statements admissible in criminal cases. She suggested that CPLR 4547 could be "conformed" to the federal rule with a rule that was worded differently from the federal rule, and said her Section had appointed a subcommittee to draft such a proposal.
- B. Paul Aloe countered that both the Second Circuit and Supreme Court, Onondaga County had found that the present CPLR 4547 does not apply to criminal proceedings. Sharon pointed out that the original purpose of CPLR 4547 was to follow FRE 408 exactly, and that any difference in wording would defeat that purpose. Executive Committee consideration of this proposal has been deferred pending further study. Sherry is to get back to us with her Section's proposal.

V. Legislative Update.

- A. Rob Knapp was in Albany on October 17, 2013 with Ron Kennedy and Kevin Kerwin to meet with legislative counsel about the following bills and proposals:
 - 1. A 808, introduced by Assemblyman Weprin (no Senate "same as") which would amend CPLR 3212(a) to require that any shortening of the

time to move for summary judgment from the usual 120 days after filing of the note of issue, be effected only “by order specific to the case;”

2. S 5416, introduced by Senator DeFrancisco (no Assembly sponsor) which would add to the end of CPLR 3216(b)(3), governing service of 90-day demands to file a note of issue, “Where the demand is served by the court, the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation;”
3. Our proposed overhaul of CPLR 3213, governing motions for summary judgment in lieu of a complaint, which would expand the availability of such motions from judgments and “instruments for the payment of money only,” as at present;
 - a. Notably, no sponsor is available since Senator DeFrancisco is no longer a member of the Senate Judiciary Committee.
 - b. David Hamm and Rob Knapp recommend that each CPLR Committee member provide the names of any Senators or Assembly members with whom such member has any entrée, to try to find new channels through which to get Committee legislation introduced.
 - c. Fears that this bill is anti-consumer may be holding it up, although we added new subsection (e) to make clear that it does not apply to consumer actions or to actions on a home mortgage note.
4. Our proposed amendment to CPLR 4111(e), to make clear that itemization of future damages is no longer required in wrongful death actions, as these are no longer governed by CPLR Articles 50-A or 50-b.
5. This Committee’s proposed amendment to CPLR § 5501(a)(1), to overrule *Pollak v. Moore*, 85 A.D.3d 578 (1st Dept. 2011), and clarify that there is no such thing as a “final order” that must be appealed separately from a final judgment.
 - a. OCA’s CPLR 5501 bill has been introduced in the Legislature while this Committee’s bill has not been. The OCA bill is misunderstood by some to be joint proposal which addresses everyone’s concerns.
 - b. The OCA supports our bill, but wants us to support its bill.
 - c. Paul Aloe advises the Committee that the OCA bill would remove “necessary affects” from CPLR 5501(a)(1), overrule *Matter of Aho*

and potentially permit review of moot rulings on appeal from final judgment;

- d. Our bill and OCA's are different, but are both intended to allow the aggrieved party to wait until final judgment to appeal.
 - e. Rob Knapp proposes our Committee appoint a subcommittee to work with the Committee on the Courts of Appellate Jurisdiction (CCAJ) to present a united NYSBA front to OCA with respect to CPLR 5501(a)(1), and to try to come up with common proposal. Our Committee's proposed CPLR 5501(a)(1) amendment has already been approved by the Executive Committee.
 - f. James Pelzer comments on the potentially drastic effects of removing "necessarily affects" from CPLR 5501 after 167 years, as OCA proposes to do.
 - g. David Hamm comments that he is 'very troubled by the [OCA] proposal'.
 - h. Rob Knapp is to discuss joint approach to OCA with CCAJ chairs.
- 6.) Our proposed amendment to CPLR 3402(a), governing notes of issue, providing that no note of issue may be filed without either: a.) a stipulation of the parties; b.) a court order certifying that discovery is complete or directing the filing of the note of issue with enumerated disclosure outstanding; or c.) a certificate of readiness certifying that all disclosure is complete and that a good-faith effort was made to secure a stipulation from opposing counsel. (This was part of same proposal as CPLR 3216(b)(3) fix, but was not introduced by Senator DeFrancisco.)

VI. CPLR § 2221 and *Biscone*.

- A. New OCA book, which Jim Blair just received yesterday, includes *Biscone* fix as amendment to CPLR 2214. Rob Knapp will circulate to our Committee.

VII. Matrimonial Venue Sub-Committee Update.

- A. Ken Jewell says there is a new proposal circulating in his subcommittee. Both parties to a matrimonial action would have to be notified before any venue transfer by the court. It was agreed that this matter be adjourned to the next Committee meeting as the sub-committee will be meeting to resolve the open issues before then.

VIII. *Daimler v. Bauman* and General Jurisdiction

- A. Sharon Stern Gerstman argues that *Daimler* guts the concept of general jurisdiction as it applies to ‘doing business’ within the State. *International Shoe* contacts analysis has been upended, and such cases will now be premised on specific jurisdiction, unless suit is brought in the defendant corporation’s state of incorporation or principal place of business.
- B. Paul Aloe raises the question of what is left of general jurisdiction after *Daimler*.

IX. OCA Proposed Rules on Redaction of Personal Information

- A. Jim Pelzer has spoken to John McConnell at OCA, who says it is not too late to submit comments on the proposed rules.
- B. These rules would affect every case in State. Sharon opined that any opposition report must not oppose NYSBA policy, and that the Committee must ensure that new report addresses new rule, which should be described as ‘worse’ than initial proposal which NYSBA opposed.
- C. Jim Pelzer states how ‘serious’ an impact the proposed confidentiality rules would have on every case filed in the New York State court system.
- D. Paul Aloe says the new confidentiality rules require redaction of information that is not really confidential.
- E. David Hamm moves to have Rob Knapp send a revised report to David Schraver, for the Association to consider and (if it approves) to pass on to OCA. James Pelzer seconds. Committee unanimously adopts David Hamm’s motion.

X. New Business:

- A. David Hamm asks the Committee to consider a proposal to eliminate the Kings County rule requiring summary judgment motions to be made within 60 days of the note of issue. Rule makes no sense, David contends, when you have to wait 6 to 8 months to get a jury.
 - 1. Sharon says any position the Committee takes must go through NYSBA President.
 - 2. Rob Knapp asks David Hamm to draft a letter to circulate amongst the Committee.
 - 3. Souren Israelyan says any such proposal should also go to the Brooklyn Bar Association for comment. He supports the existing rule, saying that the Kings County Justices are busy.

4. Dan Finger suggests a uniform rule because of the confusion that the county- by-county system now causes. Souren says that a countywide rule is better than having the deadline set by individual order, and that judges would simply start putting the 60-day rule into their PC orders.
5. Paul Aloe and Rob Knapp see 60 day rule as problematic.
6. Dan Finger argues that Kings should use the 120 day rule.
7. Committee votes that David Hamm should draft letter urging repeal of Kings 60-day rule, consistently with position our Committee and EC have already endorsed. All in favor except Souren.

XI. Should CPLR 901(b) be repealed in light of Supreme Court 2010 decision in *Shady Grove*, finding that such statute does not apply to federal class action alleging violation of state law? Prof. Oscar Chase had drawn this issue to Rob Knapp's attention. Justice Thomas Dickerson proposed repeal in an article in the *New York Law Journal*. Committee members disagreed on extent to which CPLR 901(b) can now be circumvented by filing a class action in federal court, or removing it to federal court, under CAFA. Tom Wiegand points out that the Legislature no doubt enacted many statutory penalties on understanding they could not be pursued by class action, pursuant to CPLR 901(b), and that repeal of such statute would upset such expectations. Tom Wiegand moved to table further consideration of this issue by the Committee until the next meeting, so that Oscar Chase can attend. Passed unanimously.

XII. Next Meeting: to be held at noon on May 2, 2014, at a place to be determined.