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EDITOR: DAVID L. FERSTENDIG

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Reporting on Significant Court of Appeals Opinions and Developments in New York Practice

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CASE LAW DEVELOPMENTS

Entered Divorce Judgment Is Not Subject to CPLR 5203 Docketing Requirements

One Ex-Spouse Is Not Considered the Creditor of Another

In answering a certified question from the Second Circuit, the New York Court of Appeals ruled in *Pangea Capital Mgt., LLC v. Lakian*, 2019 N.Y. Slip Op. 05059 (June 25, 2019), that if a spouse does not docket an entered judgment granting the spouse an interest in real property in the county where the property is located, the spouse's interest is *not* subject to attachment by a subsequent judgment creditor that has docketed its judgment and seeks to execute against the property.

Mr. and Mrs. Lakian, now divorced, had, when they were married, purchased a home in Suffolk County for $4.5 million. While title to the property was recorded in Mr. Lakian's name, it was subsequently transferred to a trust in which each spouse had a 50% interest as tenants in common. After Mrs. Lakian filed for divorce and the divorce was finalized, a judgment was entered. The judgment incorporated by reference an agreement that provided that Mrs. Lakian would receive 62.5% of the proceeds of the sale of the Suffolk County home, plus another $75,000.

Before Mrs. Lakian had filed for divorce, a former employer of Mr. Lakian, Pangea Capital Management (Pangea), had brought an action against Mr. Lakian, alleging that he and a co-worker had defrauded the company by diverting funds to themselves. Eventually, the matter was submitted to arbitration, resulting in a $14 million arbitration award, and Pangea sought to enforce the award in federal court. A judgment was then docketed in Suffolk County, after the judgment of divorce had been entered (but not docketed there). The Suffolk County house was sold, and the proceeds, in excess of $5 million, were deposited with the clerk of the court. Pangea sought the entire amount, arguing, among other things, that because it docketed its judgment before Mrs. Lakian had docketed her divorce judgment in Suffolk County, it was entitled to priority over Mrs. Lakian, whose divorce judgment, Pangea alleged, rendered her a judgment creditor (of Mr. Lakian). Mrs. Lakian contended that she was entitled to her 62.5% plus $75,000 of the sale proceeds.

The issues here primarily related to two statutes: CPLR 5203 and Domestic Relations Law § 236(B)(1). CPLR 5203(a) governs priorities among judgment creditors in a judgment debtor's real property. It enunciates the general rule that a judgment creditor's priority is fixed (and a lien created) when the judgment is docketed with the clerk in the county where the real property is situated. Domestic Relations Law § 236(B)(1)(c) provides that marital property is "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held."

The Court noted that marital property did not fall within traditional property concepts; equitable distribution is "based on the premise that a marriage is, among other things, an economic partnership to which both parties contribute as spouse, parent, wage earner or homemaker"; "[m]arital assets are not owned by one spouse or another"; and when a marriage dissolves, the division of marital assets "does not render one ex-spouse the creditor of another." 2019 N.Y. Slip Op. 05059 at *2. Thus, the Court held that CPLR 5203(a) was inapplicable because the spouse's share here was not a transfer of the interest of a judgment debtor to a judgment creditor. Mrs. Lakian was not Mr. Lakian's judgment creditor and was not subject to the docketing requirements.

Apartments Located in Building Receiving RPTL § 421-g Tax Benefits Are Not Subject to Luxury Deregulation

Overwhelming Majority of Court Finds That Language of the Statute Clearly Contemplates the Suspension of Decontrol Provisions During the Benefit Period

In *Kuzmich v. 50 Murray St. Acquisition LLC*, 2019 N.Y. Slip Op. 05057 (June 25, 2019), the defendants had received tax

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benefits under Real Property Tax Law § 421-g (RPTL) in connection with their conversion of buildings from office space to residential use. That statute was enacted in 1995 to provide financial incentives to building owners to convert commercial buildings to residential and mixed-use buildings. The purpose was to reinvigorate lower Manhattan. RPTL § 421-g (6) provides in pertinent part that:

> Notwithstanding the provisions of any local law for the stabilization of rents in multiple dwellings or the emergency tenant protection act of [1974], the rents of each dwelling unit in an eligible multiple dwelling shall be fully subject to control under such local law, unless exempt under such local law from control by reason of the cooperative or condominium status of the dwelling unit, for the entire period for which the eligible multiple dwelling is receiving benefits pursuant to this section, . . . Thereafter, such rents shall continue to be subject to such control, except that such rents that would not have been subject to such control but for this subdivision, shall be decontrolled if the landlord has included in each lease and renewal thereof for such unit for the tenant in residence at the time of such decontrol a notice in at least twelve point type informing such tenant that the unit shall become subject to such decontrol upon the expiration of benefits pursuant to this section.

The plaintiffs are tenants of rented apartments in the defendants' buildings. They alleged that their apartments should be protected as rent-stabilized and not subject to luxury deregulation, which permits owners to eliminate rent-stabilization protection for high rent accommodations when they are vacated or are occupied by a high-income household when the rent exceeds a statutory threshold. The defendants countered that the apartments were exempt from rent regulation pursuant to the luxury deregulation provisions, which were added to the Rent Stabilization Law (RSL), Administrative Code of the City of New York 26-504.1 et seq., as part of the Rent Regulation Reform Act of 1993.

Two separate trial judges denied defendants' summary judgment motions, while granting plaintiffs' cross-motions, declaring that the apartments were subject to rent stabilization. The Appellate Division reversed.

An overwhelming majority of the New York Court of Appeals reversed. It relied upon the express language of RPTL § 421-g(6), concluding that the "notwithstanding" clause established the legislature's intent that any "'local law for the stabilization of rents' that would exempt the unit from 'control under such local law' does not apply to buildings receiving RPTL 421-g benefits, with the sole exception being for cooperatives and condominiums." *Id*. at *3. The Court rejected the defendants' and dissent's argument that the "notwithstanding" clause was intended to import the entire RSL into RPTL § 421-g(6), because (i) had the legislature intended such a result, it could have expressly stated so, and (ii) such an interpretation would "render superfluous" the notwithstanding clause and the cooperatives and condominiums exception.

The majority maintained that the language of the statute contemplated that the decontrol provision would be suspended during the benefit period, "further reaffirming what is unmistakably conveyed in the notwithstanding clause. If defendants were correct that such units were already subject to decontrol under the RSL during the receipt of RPTL 421-g benefits, there would be no need to provide a mechanism to preserve the ability to implement decontrol after those benefits terminate." *Id*. at *4. It rejected the defendants' reliance on the luxury deregulation provisions and the fact that RPTL § 421-g was not inserted as an additional exception in RSL § 26-504.2:

> Because section 421-g itself excepted from luxury deregulation buildings receiving its benefits, the legislature did not also need to amend the RSL. The language of RPTL 421-g (6) made the legislature's intent clear. We decline defendants' invitation to construe the legislature's silence in one statutory scheme to override its clear intent, as plainly expressed, in another (citations omitted).

Id.

Note that this area of the law has been significantly impacted by the recent passage of the "Housing Stability and Tenant Protection Act of 2019," including its repeal of provisions regarding high rent and high income deregulation.

Majority of Court Holds That Tax Appeals Tribunal Rationally Concluded That Information Services Receipts Were Not Excluded from Taxation

To Exclude or Not to Exclude, That Is the Question

Matter of Wegmans Food Mkts., Inc. v. Tax Appeals Trib. of the State of N.Y., 2019 N.Y. Slip Op. 05184 (June 27, 2019), concerns the interpretation of Tax Law § 1105(c)(1). That section imposes a sales tax on the purchase of certain information services but excludes "the furnishing of information which is *personal or individual in nature* and which is not or may not be substantially incorporated in reports furnished to other persons" (emphasis added).

The petitioner, Wegmans, a regional supermarket chain, operates retail locations throughout New York. As part of its business operations and its pricing strategy, Wegmans monitors its competitors' retail prices. It retained RetailData, LLC (RTD) to perform competitive price audits (CPAs). Wegmans determined which competitors, their locations and the products RTD was to analyze. RTD would then collect the data by scanning prices from store shelves at the specified locations and prepare and deliver to Wegmans a report in the requested format. The CPAs and reports were kept confidential.

In 2011, the New York State Department of Taxation and Finance audited Wegmans' sales and use tax liability for the period of June 2007 through February 2010. The audit determined that the purchase of CPAs from RTD, and the reports, constituted the purchase of taxable information services under Tax Law § 1105(c)(1). The Department issued a notice of determination, assessing an additional sales tax of $227,270.01.

Wegmans filed a petition in the Division of Tax Appeals challenging the determination, arguing that the services that RTD performed qualified as an exempt information service which is "personal and individual in nature." After a hearing, the Administrative Law Judge (ALJ) denied the petition and sustained the determination. The respondent Tax Ap-

peals Tribunal affirmed the ALJ's determination. Wegmans brought this Article 78 proceeding seeking to annul the Tribunal's determination. The Appellate Division granted the petition.

A majority of the Court of Appeals reversed, relying on its prior decision in *Matter of Mobile Oil Corp. v. Finance Admin. of City of N.Y.*, 58 N.Y.2d 95 (1983), where the Court concluded that "[i]n the case of statutory exclusions, the presumption is in favor of the taxing power." *Id*. at 99. The Court here in *Wegmans* noted that generally a statute that levies a tax is construed in favor of a citizen and "most strongly" against the government. However, where the matter "is subject to the taxing statute," but the issue is whether a statutory exclusion *or* exception applies, the presumption flips to be in favor of the taxing power. The majority maintained that contrary to Wegmans' argument, in applying these rules of construction the Court *has* treated exceptions, exclusions and deductions similarly, adopting "a functional analysis that affords a singular and workable rule for construing exemptions, exclusions, and deductions, each of which operate to negate the taxpayer's obligation to pay the otherwise applicable tax." *Wegmans*, 2019 N.Y. Slip Op. 05184 at *3.

Applying these principles to Tax Law § 1105(c)(1) and to the facts here, the Court noted that Wegmans had conceded that the information services RTD provided fell within the general taxing provisions of the statute. Thus, the issue was whether the information services were excluded from the sales tax. The Court concluded that the Tribunal's determination that they were not excluded, was rational. The majority found that nothing about the information that RTD compiled or the reports were "personal or individual in nature," because, as the Tribunal rationally concluded, "it was collected from prices on supermarket shelves, which are publicly available, widely-accessible, and not confidential" and RTD's customization of that information "into a report format did not render the furnished information personal or individual in nature (citations omitted)." *Id*.

In a concurrence, Judge Stein took issue with the majority's apparent adoption of a "new rule" in New York in which "the taxpayer always loses." The concurrence maintained that in *Matter of Grace v. New York State Tax Commn*., 37 N.Y.2d 193 (1975), the Court distinguished between exemptions and exclusions, even though it never used the word "exclusion." Judge Stein asserted that the majority here "simply denies" this distinction and has "effectively" overruled *Grace*, overlooking the fact "that the precedent upon which the Court relied in *Grace* for the proposition that a statute levying a tax must be interpreted in favor of the *taxpayer* involves *exclusions*" (emphasis added). *Wegmans*, 2019 N.Y. Slip Op. 05184 at *4.

Nevertheless, the concurrence agreed with the majority's reversal because it found that even if an ambiguity in the exclusion here was construed against the government, Wegmans failed to establish that the Tribunal's interpretation was unreasonable.

In dissent, Judge Wilson opined that "neither the Tax Appeals Tribunal, nor any appellate court—including the majority in this case—has attempted to determine with the usual tools of statutory interpretation what the legislature meant by the words 'personal or individual' in Tax Law § 1105(c)(1), the tax exclusion now before us." *Id*. at *6. Judge Wilson asserted that the majority's focus on the non-confidential nature of the information collected was misplaced, because the statute does not speak of confidentiality or the public availability of the information. The dissenting judge found that the text of the "personal or individual" exclusion was ambiguous. However, he argued that the legislative history made clear that the meaning of the exclusion was to distinguish generic information services from customized ones. The dissent concluded that "[e]ach CPA was tailored to Wegmans' precise requirements; the data generated was preserved solely for Wegmans' use and by its nature was not a standardized product that could be sold to others." *Id*. at *15.

Majority of Fourth Department Rules That on Appeal from Final Judgment It Could Review an Order Rendered on an Oral Application

Dissent Asserts That Orders on Oral Motions Are Simply Not Reviewable on Appeal Under CPLR 5501(a)(1)

CPLR 5501(a)(1) provides that an appeal from a final judgment brings up for review "any non-final judgment or order which necessarily affects the final judgment." One of the areas of concern for practitioners has been whether a particular order "necessarily affects" the final judgment. In *Siegmund Strauss, Inc. v. East 149th Realty Corp*., 20 N.Y.3d 37 (2012), the Court of Appeals held that a non-final order dismissing defendants' counterclaims and third-party complaint necessarily affected the final judgment, "because Supreme Court's dismissal of the counterclaims and third-party claim necessarily removed that legal issue from the case (i.e., there was no further opportunity during the litigation to raise the question decided by the prior non-final order), that order necessarily affected the final judgment." *Id*. at 43. A practitioner should consider an immediate appeal from a non-final order, however, if there could be an issue as to whether that order necessarily affects the final judgment.

A recent Fourth Department case focused not on the "necessarily affects" issue. Instead, it asked a different question: whether an order entered on an oral application was brought up for review on an appeal from the final judgment. In *Braun v. Cesareo*, 170 A.D.3d 1540 (4th Dep't 2019), the plaintiff did not include a jury demand in the note of issue, and the defendant did not make such a demand within the 15-day period following the service of the note of issue under CPLR 4102(a). One day after that deadline, the parties appeared in court for trial. Following "extensive discussion off the record" in the court's chambers, the judge "determined" that the parties had waived the right to a jury trial. Defendants' counsel raised an objection on the record and made an oral application for leave to file a late jury demand. After extensive argument, the court "adhered to its determination" and denied the application. When the defendants advised that they "could" make a formal motion, the plaintiff objected on the ground that the court had already decided the issue. The trial judge "suggested" that such a motion would be denied. An order was then entered denying "[d]efendants' request to file a demand for trial by jury nunc pro tunc pursuant to CPLR section 4102(e)."

A majority of the Fourth Department held that the order denying defendants' motion seeking to file a late jury demand was reviewable on an appeal from the final judgment.

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One Elk Street, Albany, New York 12207-1002

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Significantly, it was undisputed that the order necessarily affected the final judgment. Instead, the focus and the dispute rested on the meaning of the word "order" in CPLR 5501(a). The majority rejected the dissent's contention that the word "order" included only orders resulting from motions *made upon notice*:

> Courts routinely review orders upon an appeal from a final judgment that would not have been appealable as of right, such as ex parte orders. Indeed, our dissenting colleague has not cited to any case where an order that was not appealable as of right was determined to be unreviewable upon an appeal from the final judgment (citations omitted).

Id. at 1541.

The dissent noted that the defendant never moved on notice to vacate the "order" before the trial court, the denial of which would have been appealable as a matter of right under CPLR 5701(a)(3). In fact, this is the recommended procedure whenever confronted with an order granted without notice. *See Sholes v. Meagher*, 100 N.Y. 2d 333, 335 (2003) (citing Weinstein, Korn & Miller, New York Civil Practice; CPLR ¶ 5701.06 (David L. Ferstendig ed. LexisNexis Matthew Bender 2d Edition)), CPLR 5551 and CPLR 5701(a)(3). The dissent then focused on CPLR article 22 (Stay, Motions, Orders and Mandates), and the sufficiency of the record on appeal, asserting that

> while oral motions are not precluded by the CPLR, it does not mean that they are reviewable on appeal. I submit instead that, when oral motions result in an order, those orders are not appealable as of right, and the parties have consciously made a decision to chart their own course to forego appellate review thereof. Where the legislature has provided a specific means for effectuating motion practice and procuring orders, I am at a loss to explain how we can completely ignore it. I do not make that point to elevate form over substance, but to preserve procedures that the legislature enacted to ensure fairness by giving parties sufficient notice and an opportunity to be heard. Ultimately, those procedures allow for effective appellate review and, by effectively overwriting them, I fear that we undermine the process's fairness. When we review interlocutory pretrial orders based on oral motions after making an ad hoc evaluation of the record's sufficiency, we risk being perceived as having done so arbitrarily or according to a result-oriented analysis.

Id. at 1546-47.

Fourth Department Finds Trial Court Abused Its Discretion in Denying Application for Jury Trial

For those interested in the merits of the appeal, the Fourth Department in *Braun* held that the trial court abused its discretion in denying defendants' application for a jury trial. CPLR 4102(e) permits a court to relieve a party from the effect of a jury waiver "if no undue prejudice to the rights of another party would result." Here, in *Braun*, the majority found that the plaintiff had not established that it was prejudiced by the one-day delay in defendants seeking a jury, because a jury panel was present that day and thus there would have been no trial delay. Moreover, plaintiff's counsel's references to a jury after the note of issue was filed established that they were prepared for a jury trial. Finally, the Appellate Division cautioned that the trial court had applied the wrong legal standard "by requiring defendants to explain why they would be prejudiced by a bench trial. Defendants had no obligation to explain their decision to avail themselves of a constitutional right." *Id*. at 1542.

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