

New York State Law Digest



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

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RULE-MAKING POWER OF OFFICE OF COURT ADMINISTRATION IS CONTESTED

OCA's Recently Adopted "Affirmation" Rule Held Invalid

On October 20, 2010, Chief Judge Lippman announced the promulgation of the "affirmation" rule applicable in actions to foreclose mortgages on residential properties. The rule requires that the plaintiff's papers include an affirmation by the plaintiff's lawyer attesting to the papers' integrity. There have since been several cases on the rule. One of them, *Citibank, N.A. v. Murillo*, 30 Misc.3d 934, 915 N.Y.S.2d 461 (Sup.Ct., Kings County), shows what many would consider a draconian consequence for violating the rule: a dismissal of the action "with prejudice". (*With prejudice?*)

That case came down on January 7, 2011. Even more recently, on Feb. 28, 2011, comes *LaSalle Bank v. Pace*, 2011 WL 723555 (Whelan, J.), from the supreme court in Suffolk County, not only refusing to apply the affirmation rule, but holding that its very promulgation is beyond the powers of its promulgator: the Office of Court Administration, i.e., the chief judge and his appointee, the chief administrative judge.

In *LaSalle*, the mortgagee (plaintiff P) moved for summary judgment. The mortgagor (defendant D) resisted it, relying on the ground that the motion did not include the required affirmation. The court held the reliance misplaced. It then reviewed D's defenses and counterclaims on the merits, found them baseless, granted P's motion for judgment, and appointed a referee to conduct the foreclosure.

After considering at length the constitutional and statutory provisions relating to court administration, the court in *LaSalle* concluded that

Since [the] rule making authority cannot significantly affect the legal relationship between litigating parties, the imposition of additional matters [like the affirmation requirement involved here] that impair statutory remedies or enlarge or abridge rights conferred by statute are not the proper subjects of rules promulgated by court administrators.

As we see it, the issue boils down to whether this affirmation rule can fairly be considered an “administrative” matter. The court in *LaSalle* thinks not; the Office of Court Administration obviously thinks otherwise.

The court says the effect of the affirmation rule is to “impair the statutory remedy of foreclosure”, seeing evidence of this “in the recent, vast reduction in case filings and the resounding halt in the prosecution of foreclosure actions pending in this court that immediately followed” adoption of the rule. (Of course the “halt” is only temporary, pending correction in each case through belated submission of a lawyer’s affirmation.)

Incessant complaints by foreclosure defendants and their representatives about the condition of the proof offered in behalf of foreclosing mortgagees is what led to the rule. The mortgage realm has been the scene in recent years of numerous assignments, and with the economic turndown that made it impossible for many homeowners to pay their mortgages, foreclosures piled up and the offices of the foreclosure attorneys, whether independent or in-house, often couldn’t, or in any event didn’t, submit the proper paperwork. There was often evidence of attestations of ownership (of the mortgage) made by those without the requisite knowledge, and sometimes even the suggestion of perjury as those without knowledge swore to things they didn’t know.

The rule was designed to relieve this chaotic scene by securing in each case the affirmation of a lawyer who, before affirming, would have to go through the papers and make sure things were in order, including, especially, checking out the ownership links that connected the foreclosing plaintiff with the original mortgagee.

The immediate question here is whether, considering the circumstances, the requirement of the affirmation is a reasonable exercise of administrative power in the operation of the courts. The *LaSalle* case says it’s not; that it’s an impermissible exercise of a legislative power. Those on the other side say in response that the power to make rules is itself a species of legislative power, and that if either the constitution or the legislature, or a combination of them, confers the rule-making power on the courts’ administrators, they are in essence directing a sharing of this “legislative” power with those administrators.

That boils the issue down further. Does this particular rule-making exercise cross the line beyond which the sharing stops? The *LaSalle* court thinks so. The Office of Court Administration does not. We’ll have to await appellate court input on that.

The rule-making power conferred on the court system is no small thing. It accounts, for example, for all the Uniform Rules that fill two McKinney’s soft-covered books, each more than an inch thick and recompiled annually. Playing the devil’s advocate, we might juxtapose the affirmation rule with each of the innumerable subjects addressed in those rules and then ask whether the affirmation rule emerges as all that much of an outlier. The rule seems no more a trespass on legislative prerogative than many parts of (for example) the many-parted Uniform Rule 202.5, which in supreme and county court governs “Papers Filed in Court”.

And what about the “halt in the prosecution of foreclosure actions” that the *LaSalle* court says the affirmation rule has brought about? Would it be better to leave the issue of the propriety of the papers in each case to individual motion by each individual defendant? Would hundreds or perhaps thousands of motions do better than one rule that clears the decks of all the cases for the brief time it takes each plaintiff’s lawyer to reexamine the papers in each case, fill in what’s missing, and then “affirm” that all is now well? Doesn’t that make for a smoother running of the courts than requiring each judge in each case to go through *unaffirmed* papers and do the weeding out that the rule just wants the plaintiff’s lawyer to undertake to spare the courts the burden?

An irresistible analogy occurs to us here. Back in the 1960s, the situation commonly referred to as “sewer service” reached epidemic proportions. (Ironically, it has recently reached that level again. See Siegel’s Practice Review 208:1.) It led to the 1973 enactment of a provision – now subdivision (c) of CPLR 5015 – that authorized an en masse vacatur of fraudulently secured default judgments, not on application by each victimized defendant, but with a single proceeding by an administrative judge. (See Siegel, New York Practice 4th Ed. §§ 71, 293.) The practice avoided a huge number of individual motions, essentially an administrative accomplishment, and in fact, before the legislature got around to codifying the practice, it was done without any legislation at all.

The affirmation rule at issue here seems to us even less intrusive into legislative powers. It merely requires plaintiffs’ attorneys to review papers in advance of court submission so as to assure that if a defendant does default, the default will not be undone for paper defects avoidable by requiring an attorney’s affirmation that the papers are in order. The requirement is designed, not to dispose of each case on its merits, but to aid the court in considering its merits – an attainment almost classically categorizable as “administrative” and the kind of effort one would expect from those charged with running the courts.

COURT OF APPEALS DECISIONS

DENIAL OF SECURITY CLEARANCE

Denial of Clearance – Required for Work at Pre-School Center – to Woman With Exemplary Record After Serving Three Years in Prison for Robbery, Is Found Arbitrary

In its 1999 *Arrocha* decision (Digest 474), the Court of Appeals reviewed § 752 of the Correction Law, which makes it unlawful to deny employment to an individual based on a prior criminal conviction. The statute’s purpose is to remove barriers to that person’s re-integration into society after having fully repaid her debt to society. But the statute has exceptions, one of which would allow refusal of the clearance if the relationship that the conviction bears to the position sought poses an “unreasonable risk”. Section 753(1) of the same law then enumerates eight factors for the board to consider in assessing the risk.

The list is set out again (it was set out in *Arrocha*) in the Court’s recent decision in *Acosta v. New York City Dep’t of Education*, N.Y.3d, N.Y.S.2d, 2011 WL 1045456 (March 24, 2011; 5-2 decision), involving a woman (the petitioner) who at 17

committed first degree robbery, was convicted, served a three-year sentence for it, and, in 1996, was paroled. After that she earned a degree and her conduct in various employments was exemplary. But then, three months after she took part-time work with a city's not-for-profit learning center, she was interviewed by the education department for a security clearance – needed in the job – and was denied it, losing her employment.

Section 753(1)(g) requires among other things that the city consider all of the documentation submitted in the individual's defense. In an opinion by Chief Judge Lippman, the Court finds the department remiss on that score, failing to consider letters from past employers, claimed by the department to be missing from the record but in fact part of it and quite favorable to petitioner. The department's decision is therefore overturned as arbitrary and the case sent back for further proceedings.

The dissent, written by Judge Smith, sees this as the Court's impermissibly substituting its own judgment for the department's.

WHICH POLICY COVERS?

If Policy Recites That It Serves Only as Excess Insurer If Another Policy Covers, Latter Has Primary Obligation to Defend

And the obligation to defend extends to all of the claims – the whole action brought against the insured by the injured claimant – as soon as it appears that any one of the asserted claims requires the insurer to defend. That point was established by the Court of Appeals in its 2002 *Massena* decision (Digest 514), among others, and it's one of the dispositive points in the declaratory actions involving two insurers in *Fieldston Property Owners Ass'n v. Hermitage Ins. Co.*, 16 N.Y.3d 257, N.Y.S.2d (Feb. 24, 2011).

The underlying suit against the insured, D, a property owner, was by P, a nearby property owner claiming false statements by D about P's right to access its property from public streets. D had two policies in force, one for commercial liability exposure and the other covering acts by its directors. Both were arguably applicable to this case during their coverage periods. The issue was, which one had the primary duty to defend P's action?

Both sides conceded the "possibility" that at least one of the claims made against the insured was covered by both policies, which left the ultimate resolution of the who-defends issue to the policies' respective application clauses.

Reading the applicability clause in each, the Court holds that the commercial policy had the obligation to defend. Its relevant clause said its coverage was primary "unless any of the [insured's] other insurance is also primary", in which case it would share costs. The relevant clause in the directors' policy (the "other" policy here) included a provision stating that if the insured had "any other valid policy(ies)" that applied, then it – the directors' policy – would serve only as an "excess" insurer, covering the insured only for sums beyond what the other primary policies supplied.

"In resolving insurance disputes", says the Court in an opinion by Judge Ciparick,

we first look to the language of the applicable policies. If the plain language of the policy is determinative, we cannot rewrite the agreement by disregarding that language.

The “plain language” in this case, concludes the Court, favors the directors’ policy, meaning that the primary burden of defense is on the commercial policy.

Why wasn’t the commercial policy phrased in like terms? We’ve seen similar insurance collisions in the Digest over the years, prompting us to visualize what the drafting section of an insurance company looks like. (What comes to mind is a windowless room with an elderly man at a small table, dipping a quill into an inkwell.)

EMERGENCY VEHICLE’S PRIVILEGES

Officer on Emergency Mission May Rely on “Reckless Disregard” Standard for Insulation from Civil Liability Only While Exercising One of the Specific Privileges Conferred on Emergency Driving by Statute; Else Ordinary Negligence Applies

As we noted in treating the 1994 *Saarinen* decision (Digest 422), § 1104 of the Vehicle and Traffic Law allows the driver of an emergency vehicle a number of liberties, including speeding, but it doesn’t relieve the driver “from the consequences of his reckless disregard for the safety of others”. The Court of Appeals in that case held that only a showing of “reckless disregard” can subject an emergency vehicle to civil liability for harm caused by the vehicle. And returning to the subject in its 1997 *Szczerbiak* decision (Digest 456), the Court found an officer’s failure to use siren and lights immediately on maneuvering to respond to an emergency can’t by itself be held to be “reckless disregard”.

The standard, in subdivision (e) of § 1104, comes in the form of an admonition that the “foregoing provisions” of § 1104 don’t relieve emergency vehicle drivers from the consequences of conduct that amounts to “reckless disregard”. One of those earlier provisions is subdivision (b), which allows an “authorized emergency vehicle” certain privileges, including passing red lights, speeding, and ignoring one-way directions.

A closely divided Court of Appeals in its recent decision in *Kabir v. County of Monroe*, 16 N.Y.3d 217, N.Y.S.2d (Feb. 17, 2011; 4-3 decision), can’t agree on whether the “reckless disregard” override applies to all conduct of the driver on an emergency mission, or only conduct that violates one of the specific privileges enumerated in subdivision (b). The latter is the conclusion of the majority in *Kabir* (opinion by Judge Read); the dissenters (in an opinion by Judge Graffeo) would insist on a “reckless disregard” showing before *any* conduct of the emergency driver will lead to liability, whether the conduct is explicitly privileged under earlier § 1104 subdivisions or not.

In *Kabir* the emergency driver was responding to a stolen vehicle report when he received a superseding instruction to respond to a burglary. He looked down at his terminal for a moment to get his bearings and in the course of doing so rear-ended the

plaintiff's car in front of him. When now suing for damages, did the plaintiff have to show that the driver's act amounted to "reckless disregard" as a condition to liability?

The majority says no. An ordinary negligence showing suffices. Subdivision (e) requires the "reckless disregard" showing only when the driver has violated one of the specific privileges enumerated in subdivision (b), and the driver's act in this case did not fall under any of the things listed. Ergo, ordinary negligence suffices and "reckless disregard" need not be shown.

The dissent sees the majority holding as "unworkable" in that it makes the liability standard "fluctuate" in an emergency depending on whether, "at a particular moment", an officer is (e.g.) speeding or passing a red light:

Is the jury to parse through the different acts of a driver that might have contributed to the accident, applying the reckless disregard standard to the conduct privileged under section 1104(b) and the ordinary negligence standard to the remainder?

The gist of the dissent's position appears to be that once the emergency nature of the mission is established, all conduct of the emergency driver must be deemed privileged unless and until "reckless disregard" is shown.

FORUM NON CONVENIENS

Instead of Retaining Case Because Time to Sue in Texas Has Expired, Court Orders Dismissal on Condition That D Waive Timeliness Defense in Texas Action

The forum non conveniens doctrine, presently embodied in CPLR 327(a), is designed to spare the New York courts the burden of entertaining a case which – while within the court's jurisdiction – has no significant New York contacts. (See Siegel, New York Practice 4th Ed. § 28.)

Under the statute, the court may (1) keep the action, (2) dismiss it outright, or (3) dismiss it with conditions attached – all depending on the particular facts. In a recent case before the Court of Appeals, in which it was clearly Texas that had the predominant contacts and should have been the chosen forum, the Court settles on the third option, which is often the favorite course on a forum non conveniens motion: the conditional dismissal. *Patriot Exploration, LLC v. Thompson & Knight, LLP*, 16 N.Y.3d 762, N.Y.S.2d (Feb. 17, 2011; memorandum opinion).

The main issue was the statute of limitations. It was apparent that if commenced now in Texas, the action could be barred. Reversing the lower courts, which had denied the defendant's motion to dismiss and retained the action in New York, the Court of Appeals orders it dismissed with the condition that the defendant not plead the statute of limitations in the Texas action (which was apparently already commenced).

The case was for malpractice against Texas lawyers representing Alaskan clients whose principal places of business were in Connecticut. The transaction involved Texas companies and Texas land and mainly Texas witnesses. The Court does not go into why the plaintiffs chose a New York forum. We may guess that they wanted to avoid the Texas courts for fear they would favor the Texas lawyers, a motivation with which the lower courts apparently had some sympathy. The Court of Appeals obviously does not commiserate to the same degree, but a molecule of compassion can be discerned in the fact that the Court does not order an outright dismissal; it does impose the condition, which at least enables the case to proceed in Texas.

Pardon us for asking, but what happens if the defendants violate the condition, do plead the statute of limitations in Texas, and the court there upholds the defense and dismisses for untimeliness? Not a likely prospect, but there has indeed been the likes of it in the caselaw. See, for example, *Cesar v. United Technology of New York*, 148 Misc.2d 918, 562 N.Y.S.2d 903 (Sup.Ct., N.Y. County, 1990), the subject of the lead note in Digest 380.

Such doing by the Texas court would of course be an offense to New York. (Could this mean war?)

A VISIT FROM THE OCCULT: THE RULE AGAINST PERPETUITIES
An Edict from the Latest Conclave: The Rule Does Not Apply to Options to Renew Leases

The rule against perpetuities, a benefaction presently embodied in § 9-1.1(b) of the Estates, Powers and Trusts Law, reads that

No estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved.

The period of gestation referred to is presumably that of homo sapiens. No argument appears to have arisen on that point, which can't be said of anything else connected with the rule.

Now, some several hundred years after the secret mediations (or whatever) that gave birth to the rule's forebears, understanding of the rule is widespread – but in blocs, with each bloc understanding it differently. Three blocs form in the Court of Appeals in its recent decision in *Bleecker Street Tenants Corp. v. Bleecker Jones LLC*, 16 N.Y.3d 272, N.Y.S.2d (Feb. 24, 2011): a majority opinion (by Judge Jones), a concurring opinion (by Judge Read), and a dissenting opinion (by Judge Graffeo). Division of that kind is homage to this ancient and impenetrable rule, a rule that more than any other engenders audible prayer in Future Interests classes in law school: that the bell will ring soon.

In its 1986 decision in *Metropolitan Transp. Auth. v. Bruken Realty Corp.* (Digest 318), the Court of Appeals held that a “reasonableness” standard instead of a rigid perpetuities

rule governs preemptive rights in commercial transactions. A decade later, however, in its 1996 *Symphony Space* decision (Digest 442), the Court distinguished a preemptive right, which merely gives its holder a right of first refusal should the owner decide to sell, from an outright option, which gives its holder the power to compel the owner to sell. An option, said the Court, is itself a restriction on the owner's power of alienation and hence subject to the rule against perpetuities. It found in *Symphony Space* – which involved an option – that the rule against perpetuities was violated and that the option could therefore not be invoked.

The option in *Symphony Space* was in a contract whereby S sold the property to B with an option for S to buy it back at a stated (and low) price at any time during a specified period. The period was found to exceed the period allowed by the perpetuities rule, and the option was consequently declared void.

Comes now the *Bleecker* case, also involving an option, but this one contained in a lease of the property rather than in a contract for its sale, and that, holds the majority in *Bleecker*, is a distinction with a difference. The Court concludes that “the rule against perpetuities does not apply to options to renew leases”.

The property is a six-story walkup on Bleecker Street in Greenwich Village. Owner P leased the first floor commercial space to D. The lease was for an initial period of 14 years but “with nine consecutive options to renew for a 10-year period”. The lease also contained several categories of notice requirement and a provision that if no notices were given, D “shall remain in possession as a month-to-month tenant”. The initial 14 years expired in 1997, with no notices ever having been given. D therefore became a month-to-month tenant and remained such for 10 years more until this action by P in 2007, which sought to void the lease renewal option on the basis of the perpetuities rule.

Both sides moved for summary judgment, D getting it from the trial court, P getting it from the reversing appellate division, but D ending up with it from the reversing Court of Appeals, a progression of discord offering further homage to the expectations engendered by the rule against perpetuities.

The majority say that “an option to renew, like a purchase option appurtenant to a lease, furthers the policy goals of the rule against remote vesting” (on the post office placard that would be followed by “a/k/a/ the rule against perpetuities”). One such policy is “encouraging the efficient use of the property”. Protecting the option to renew from being voided by the perpetuities rule will implement such a policy, say the majority.

The concurrence and dissent of course see things differently. For lack of space we can't tell you why. Readers are of course free to peruse the opinions and reach their own conclusions, provided they take no longer than twenty-one years after one or more lives in being at the time of the perusal.

Lawyers in the case have another option. They can retire to a table at Rocco's Italian Pastry Shop a few feet away at 243 Bleecker Street and discuss whether, in retrospect,

medicine might not have been the more congenial discipline. (They might also reminisce about the eccentrics at law school who pretended to understand the rule.)