New York State Law Digest

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

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BIG CASE ABOUT FOREIGN GUNSELLERS DECIDES NOTHING BUT NARROW JURISDICTIONAL POINT:

Losing on Jurisdictional Motion Bars D from Contesting Jurisdiction Again After Default

Once D's motion to dismiss for lack of personal jurisdiction is denied – rightly or not – D must stay in and defend on the merits; D can't seek to raise the jurisdictional point yet again, such as with a motion to vacate the resulting default judgment. That's a major point made by the Second Circuit in its recent decision in *City of New York v. Mickalis Pawn Shop*, LLC, ... F.3d ...., 2011 WL 1663427 (May 4, 2011), on federal procedure. New York practice would reach the same conclusion.

The remedy for the disappointed D, like it or not, is to stay on and defend on the merits, and, if the defense fails, to appeal the resulting judgment and raise, as part of it, the correctness of the prior jurisdictional disposition. Under 28 U.S.C. §§ 1291 and 1292, federal practice bars separate appeal of a nonfinal order, like this one denying a motion to dismiss for lack of jurisdiction.

Under CPLR 5501(a)(1), New York would also allow that review as part of an appeal from a final judgment. But, in contrast to federal practice, New York allows the alternative of a separate and immediate appeal from the jurisdictional disposition (see CPLR 5701) and thus spares D the burden of defending the case on the merits just to preserve the jurisdictional point for appellate review.

That burden must be undertaken in federal practice, however, as witness the *Mickalis* case, which involved New York City's attempt to subject two southern gunsellers to New York longarm jurisdiction under CPLR 302(a). The sellers got stuck with New York jurisdiction, but get off the hook anyway because the injunction entered against them after the default – which had its own special path to appellate review under 28 U.S.C. § 1292(a)(1) – is found to be overbroad under Rule 65(d) of the Federal Rules of Civil Procedure.

Another alternative was for the gunsellers not to appear at all in New York, i.e., to suffer a default straightaway, which would then have entitled them, when sued on the resulting default judgment in their home states, to plead lack of New York jurisdiction. (See

Siegel, New York Practice 5th Ed. § 455.) The nonappearance in New York would have left the jurisdictional issue open and the defendants would almost certainly prevail on the point back in their home states.

The circuit in *Mickalis* avoided the controversial issue of New York's longarm jurisdiction because it deemed the matter foreclosed – and jurisdiction conceded – by the defendants' appearance and submission. Had the defendants stayed in and continued litigating the merits, they perhaps knew they were likely to lose on the merits before the district judge who had the case (Judge Weinstein of the Eastern District), but then just as likely to prevail on appeal to the circuit, which is wary of Judge Weinstein's liberal attitude (and missionary zeal) on the subject of longarm jurisdiction.

This is controversial business, with two major components. The first is whether sister-state gunsellers can be subjected to the jurisdiction of other states, to which the guns are taken and then cause injury. The second is whether, assuming jurisdiction, they can then be measured for substantive liability by the law of those states instead of by their own state's presumably more indulgent law. Many were hoping to see both issues met head on in *Mickalis*, but as the issues were structured by a majority of the Second Circuit, neither was resolved.

Any holding on either point by any circuit court of appeals in the federal system or by any state court would of course be tentative at best, all to abide what the U.S. Supreme Court has to say on this sensitive subject.

Judge Sack wrote the majority opinion of the court in *Mickalis*, reaching neither the longarm jurisdictional issue nor the merits; for the majority the injunction issue sufficed for a reversal. Judge Wesley, however, concurring in result, does reach the jurisdictional question. He finds jurisdiction lacking – and without having to reach and resolve any issues of federal constitutionality. He finds New York law alone sufficient to reject jurisdiction, applying the state's longarm statute, CPLR 302(a), which applies in federal actions, too. More particularly, he finds unmet the requirements of CPLR 302(a)(3)(ii), the statute that predicates jurisdiction on a tortious act occurring outside the state that causes injury within. (See Siegel, New York Practice 5th Ed. § 88.)

We noted earlier that the defendants' not appearing at all in the action in New York would have left the whole issue of New York's jurisdiction to the assessment of the courts in the defendants' home states, and suggested that those courts would almost certainly have found the New York longarm effort to be an overreaching. Easy for us to say, of course, from our padded armchair. But it's quite a gamble for any defendant to step out of the New York action without defending on the merits. The substantive default could be in the millions. Then all would depend on whether the defendants' home state courts, gauging New York jurisdiction, would find it absent. If it so finds, the defendants' bet pays off. But if it doesn't, and New York is found to have had jurisdiction, the default sticks and gone is the defendants' chance to defend the suit on the merits, or at least to mitigate damages.

Of course, a holding that supports New York jurisdiction is subject to review in the appellate courts in the defendants' states and then – hopefully! – in the U.S. Supreme Court.

That offers the defendant a chance to place a few more expensive bets. What the defendant will have done in that scenario is placed all his jurisdictional eggs in one basket, betting that it's better than submitting the issue to a judge with a mission – like the district judge in *Mickalis* – and perhaps having inadequately assessed his ardor. (Judge Weinstein's other decisions and his academic writings, as cited by Judge Wesley in his concurrence in *Mickalis*, manifest his fervor on the subject.)

Meanwhile the guns get sold, the borders get crossed, the shots ring out, and we the people get yet another chance to ponder the wonders of our federalism.

OTHER DECISIONS

CONDITIONAL DISMISSAL UNSATISFACTORY

Dismissal for P's Failure to Resume Prosecution Within 90 Days After D's CPLR 3216 Demand Should Have Been Outright, Not Conditional

A 3-2 majority of the appellate division conditioned the dismissal on P's resuming prosecution within 10 days after being served with the order. On review by the Court of Appeals, the decision is reversed and the dismissal ordered without condition, i.e., with no further chance for P to save his case. *Umeze v. Fidelis Care New York*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2011 WL 2222351 (June 9, 2011).

The decision is a brief memorandum citing only the Court's 1997 *Baczkowski* decision (Digest 449), on CPLR 3216, the statute that authorizes dismissal for plaintiff's failure to prosecute the case. There, P neglected his personal injury case for years, until finally D served on P the demand authorized by CPLR 3216, requiring P to file the note of issue within 90 days or face a motion to dismiss for want of prosecution. P did nothing within the 90 days and his case ended up dismissed without conditions. The Court finds the *Umeze* case parallel in that P failed to excuse his default as well as establish a meritorious claim.

The Court's more recent (2010) *Gibbs* decision (Digest 613), addressing the violation of a conditional order, is not cited in *Umeze*, probably because the Court finds that the dismissal in *Umeze* should not have been conditional in the first place. (P never got a chance to violate the condition!)

More factual background is available in the appellate division opinions (76 A.D.3d 873, 908 N.Y.S.2d 186 [1st Dep't 2010]), notably the dissent by Judge Catterson. It notes that the *Umeze* plaintiff was appearing pro se, but nevertheless had years in which to secure counsel and failed to. Says the dissent:

> The liberal construction allowed *pro se* litigants ... does not absolve a plaintiff of his or her duty to actually prosecute the case.

Not mentioned, but perhaps influential, is that the plaintiff in *Umeze* was not just a run-of-the-mill (and presumably helpless) pro se litigant, but a physician. (The suit was against a health management company.)

"SUBSTANTIAL EVIDENCE" TEST

Test Applies to Fireman's Case for Damages, But Court Divides on Whether It Applies to Fire District's Finding Against Fireman or Hearing Officer's Later Finding in His Favor

The fireman (P) claimed a back injury sustained while he was driving a fire truck that hit some kind of hole in the ground, causing his seat to move. He brought suit against the fire district (D) under General Municipal Law § 207-a. Finding pre-existing injury to have been the cause of P's injury, D denied the claim. P then sought a hearing under the collective bargaining agreement. The hearing officer decided for P and awarded the benefits P sought. D then brought this Article 78 proceeding to overturn the award. Whether the determination was supported by substantial evidence was clearly the review standard, both under Article 78 and in this case under § 306(1) of the State Administrative Procedure Act as well (made applicable by the collective bargaining agreement). But there's an interesting twist here.

It appears that there was substantial evidence to support a decision either way. Therefore, if the standard applied to the district's determination, which was against P, P would lose; but if it applied only to the hearing officer's determination, which was in P's favor, P would win. The Court of Appeals divides 4-3 on the issue, the majority holding that it applied to the district's determination, resulting in its upholding, and a loss for P. *Ridge Road Fire Dist. v. Schiano*, 16 N.Y.3d 494, 922 N.Y.S.2d 249 (April 5, 2011).

"It is of no consequence", holds the majority in an opinion by Judge Pigott, "that the record also indicates that there was evidence supporting [P's] contention".

The dissent, written by Chief Judge Lippman, says that the substantial evidence test is applicable only after a full hearing at which each side has had a chance to submit all of its evidence. No such hearing occurred here until the matter went before the hearing officer, whose decision was for P, which D then contested in court in an Article 78 proceeding.

The statutes apply the substantial evidence test only after a full record has been built, explains the dissent, and it wasn't built in this case until the dispute went before the hearing officer. It is therefore that officer's determination, concludes the dissent, to which the test applies. There was no full evidentiary hearing before the district, as P was entitled to, and hence at that stage there wasn't the full record needed to invoke the substantial evidence test.

INSURER'S LIQUIDATION

Choice of Law Principles Must Govern Interpretation of Policies in Liquidation Proceedings; New York Internal Law Does Not Automatically Apply

Insurer M was a New York corporation. Because of financial troubles, it consented to insolvency proceedings and the superintendent of insurance was appointed liquidator (L). Proper notices went out to all creditors – M had issued policies to companies in various states – and the claims came rolling in. It was clear that if there had been no insolvency, the interpretation of each policy would have been governed by New York's choice of law rules, which apply what is known by the various names of "grouping of contacts", "interest analysis", "most significant interest", etc. The gist is that the law selected by the court in each case is that of the jurisdiction having the most significant interest in the particular claim being made. New York's own internal law is not automatically applied merely because M is a New York company and the liquidation proceedings are taking place in New York.

While it was clear that this choice of law test would have been the one applied to each claim had there been no insolvency, L argued that it should not apply to a determination of whether to allow the claims in liquidation proceedings; that in liquidation proceedings New York law should apply without a choice of law test.

That position is rejected. In an opinion by Judge Ciparick, the Court of Appeals sees no ground to abandon the choice of law process at the liquidation stage. Article 74 of the Insurance Law covers claims in liquidation. Part of it, § 7433(a), governing the proof and allowance of claims, is cited by the Court, stressing the requirement that L ascertain in each case "that the sum claimed is justly owing from the insurer to the claimant". That, says the Court, means that the test after insolvency is required to be the same as the test before. An individual choice of law determination is thus required for each claim. *Matter of Midland Ins. Co.*, 16 N.Y.3d 536, ... N.Y.S.2d .... (April 5, 2011).

For asset distribution purposes, Insurance Law § 7434 designates nine classes of claimants, and in subdivision (a)(1) bars the establishment of "subclasses" within any class. This is done to assure that within any given "class" all parties must be treated equally – and pro rated if need be – an important point when there's not enough money to pay all claims. It forbids any departure from this standard by trying to establish separate groups within the class, i.e., "subclasses".

An appellate division decision handed down during the course of these prolonged liquidation proceedings – 269 A.D.2d 50, 709 N.Y.S.2d 24 (1st Dep't 2000) – had held that it was all right for L to apply New York law exclusively to claims in liquidation. This was now the law of the case, L argued, and had to govern for that reason. The Court of Appeals says no, including among its grounds that even if the appellate division decision were to serve as the law of the case in further lower court proceedings, it could not bind the Court of Appeals.

The case is remanded for a claim-by-claim determination using the New York choice of law rule (the interest-analysis approach).

EFFECT OF MILITARY SERVICE

If Name of One on Eligible List for Firefighter Is Reached While He's in Military Service, He Goes on "Special" List for Appointment to Be Preserved Till After Service Completed

One of the qualifications for appointment as a city firefighter is a combination of a 4-year high school diploma plus two years of active military duty. Woods, the Article 78 petitioner here, took the civil service exam (it was an open exam) and passed it, but he hadn't yet fulfilled the qualifications. The list he was put on was to expire on May 5, 2008. Meanwhile, he enlisted in the army in April 2006, apparently to satisfy that aspect of the eligibility requirement. Some names on the list he was on were certified on January 18, 2008; all of those individuals were then appointed to the department on January 21, 2008. Woods of course couldn't be, because he was still in service on that date.

He had been notified in April 2007 (during his service) that the department intended to appoint him from the eligible list if he passed certain medical and psychological testing. Advised that he was in the army, the department told him to complete those tests after his discharge.

Section 243(7) of New York's Military Law requires that one in that position – if he so requests within a specified time after discharge – be placed on a "special eligible list" that preserves his "original standing". Woods made that timely request after his discharge but he was refused a place on a special list on the ground that when his name was reached – in January 2008 – he had not yet completed the two years.

He brought an Article 78 proceeding to overturn that determination as arbitrary but lost in the lower courts, which upheld the city: the city's position was that certification was denied because Woods couldn't meet the eligibility requirement at the time, in January of 2008, when appointment was tendered. For placement on the "special eligible list", the city argued, Woods had to be eligible at that time.

The Court of Appeals finds that arbitrary, holding that the city "misconceived" the statutory scheme. The statute says anyone on an eligible list while in military service retains his rights and status on such list, and that if his name is reached on that list while he's in service, his name "shall" be placed on the "special" list the statute refers to.

In an opinion by Judge Pigott, the Court holds that under this provision it is not relevant that Woods did not meet the qualifications at the moment when his name was reached; his name must be deemed to have gone on the special list at that time, as long as so requested after his discharge. Under the Military Law provision, in effect, he must be allowed to complete his service (thus fulfilling that part of the original eligibility requirement) and then, after discharge, be allowed to carry out the additional medical and psychological testing that are part of the post-notification requirements.

Woods prevails. The department's determination is annulled and the case remanded for further proceedings to implement the decision. *Woods v. New York City Dep't of Citywide Administrative Services*, 16 N.Y.3d 505, 922 N.Y.S.2d 873 (April 5, 2011).

LABOR LAW 241(6)

Safety Regulation Applying to "Backhoes" Is Construed to Include Front-End Loaders So as to Impose Non-Delegable Duty on Owners Who Violate It

Back to school on § 241(6) of the Labor Law, a frequent occupant of our pages.

The Court of Appeals has described the statute as requiring property owners to comply with any "specific" safety regulation the Industrial Code contains for workplace operations. If the regulation is specific enough, it imposes a non-delegable duty on the owner (and makes the presumably deep pocket of the owner accessible, if needed, to an injured worker.) The main point of dispute in most cases on the subject is whether the regulation at issue is sufficiently "specific" to invoke the statute; violation of a mere "general" safety requirement won't do. The inevitable result has been a frequent dispute, in attempted § 241(6) cases, about whether the applicable regulation has the requisite specificity.

A recent decision of the Court, *St. Louis v. Town of North Elba*, 16 N.Y.3d 411, ... N.Y.S.2d .... (March 31, 2011), is perhaps typical of the genre. The Court divides 4-3 on the point, the majority finding the violated regulation specific enough, the dissent saying no. The plaintiff prevails.

The scene was a construction site at the Lake Placid ski complex. A drainage pipeline was being built. At the time of the accident that injured one of the workers (P), the pipe had been lifted by a bucket attached to a front-end loader in order to get it high enough into the air to facilitate the welding of its underside. In the course of that procedure, the jaws of the bucket opened and released the pipe, which fell on P. While chains were ordinarily used to secure loads in the bucket, there was in this case neither a chain nor any other safety device to guard against the pipe's falling should there be a malfunction.

The regulation at issue was in the part of the Industrial Code governing "Power-Operated Equipment", one of whose subdivisions governed "power shovels and backhoes" and required the use of "wire rope" able to sustain at least four times any expected load. In an opinion by Chief Judge Lippman, the Court construes "shovels and backhoes" to include the front-end loader involved here.

The dissent, written by Judge Smith, sees the needed specificity lacking. It asks how the defendants "could ... possibly have known", from reading the regulation and its reference to "power shovels and backhoes", that it would also be applied to front-end loaders. The majority respond that such loaders are "undeniably" the kind of "power-operated heavy equipment" aimed at by this segment of the regulations.

Because of frequent disagreements about the nature of liability in Labor Law cases, we repeat what seems to us a good lesson for property owners undertaking construction projects: if at all possible, secure insurance to cover all potential liability, or require the contractors to, with the owner explicitly included among the named insureds.

CITY'S LIABILITY

City Pays Damages for Police Department's Retaliatory Steps Taken Against Officials for Protesting Anti-Gay Acts of Higher Officials

Two officials, A and C, in the Youth Services Section (YSS) of the city's police department were the complainants here. A was the section's commander; C was its operations coordinator. When S, serving in a different command, applied for transfer to the YSS, A interviewed him and was favorably impressed. When a position afterwards opened in a YSS program in which police officers teach school kids about the dangers of drugs, A recommended to her superior, one Hall, that S get the position. Hall interviewed S "aggressively", questioning S about his relationship with another male officer, to whom S had lent money, and "loudly" accusing them of being "more than just friends".

Refusing to give S the job, Hall told A "that there was something not right" about S, some kind of "fucked up shit". The Court takes the unusual step of quoting the epithet, doubtless as a quick insight into the speaker's character and quality.

There were some conflicts in the testimony about whether and to what extent A and C protested this rejection of S, but the careers of both took a downward turn afterwards and they ended up in less desirable spots than they had. In an opinion by Judge Smith, the Court of Appeals sees enough in the record on which a jury could conclude that A and C did protest what they deemed Hall's prejudice, and that they were retaliated against for it. The damages award against the city is sustained. *Albunio v. City of New York*, 16 N.Y.3d 472, 922 N.Y.S.2d 244 (March 31, 2011).

The anti-discrimination provision applied here is § 8-107(7) of the city's Administrative Code, making it unlawful "to retaliate or discriminate in any manner" against a person for having "opposed any practice forbidden under this chapter". The forbidden practice was recited in § 8-107(1)(a) of the Code, barring discrimination on the basis of a person's perceived sexual orientation. Yet another key Code provision that played a major role is § 8-130, which requires these civil rights provisions to be "construed liberally ... regardless" of the construction given "comparably-worded" provisions in federal or state laws.