New York State Law Digest

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

Editor: DAVID D. SIEGEL

New York State Bar Association, One Elk Street, Albany, New York

No. 653 May 2014

MAJOR POINT MADE ON FORUM NON CONVENIENS DOCTRINE

CPLR 327(a) Not Absolute; In Some Situations Court Can Make Forum Non Conveniens Dismissal on Its Own Motion

In terms the statute, CPLR 327(a), purports to be absolute. It says that a dismissal for inconvenient forum may be made only on the motion of a party. This led to the holding of the Court of Appeals in its 1988 *VSL Corp.* decision, on which we did a brief note in Digest 337 captioned "Court Can't Dismiss on Conveniens Ground Sua Sponte; Motion by Party Required". There seemed to be no more to say on the subject than that.

Simple as that, perhaps, but not ideal, because more than a few cases have come before the New York courts that had no right to engage the New York court system at all. Such cases had to be kept and tried because no party moved to dismiss, as the statute, and *VSL*'s construction of it, insisted on.

If the parties wanted the case here, though they were domiciled and resident elsewhere and the subject matter of the dispute had no significant New York element at all, here it stayed. The statute is unambiguous that it takes a motion by a party to invoke the conveniens doctrine; a court can't do it on its own. A court would occasionally try to, on the ground that the New York court system might otherwise be imposed on unduly merely because the lawyers on both sides wanted the case in a New York court even if the case had no significant local contacts at all. But the Court of Appeals appeared to put an end to that possibility with its *VSL* construction. The appellate division had dismissed the action on its own motion in *VSL*. The Court of Appeals in a brief but unanimous memorandum opinion reinstated it, saying

> [t]he Appellate Division acted outside of its authority in *sua sponte* dismissing the complaint on forum non conveniens grounds. Under CPLR 327(a) a court may stay or dismiss an action in whole or in part on forum non conveniens grounds only upon the motion of a party; a court does not have the authority to invoke the doctrine on its own motion.

In its recent decision in *Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Brothers Co.,* 2014 WL 1356220 (April 8, 2014), the Court finds a way, after all, to let the court move for a forum non conveniens dismissal on its own. In a unanimous opinion written by Judge Smith, the Court reverses the appellate division -- which had, true to the rigid *VSL* case, denied a dismissal -- and does the dismissing itself.

Not without due homage to *VSL*, of course. This it pays in the form of finding a number of distinctions between the facts of *VSL* and those in *Mashreqbank*. Homage was due *VSL* as a matter of professional courtesy and precedent -- good judicial manners, one might say -- but reading between the lines of *Mashreqbank* one may find a deep-rooted wish that the statute be relaxed. A good idea. Especially when, as in *Mashreqbank,* significant New York contacts were truly lacking.

One might think that if New York contacts were lacking on a conveniens test, the same want of contacts would mean that jurisdiction itself was lacking. Alas, as students of New York practice know, that is not so. The contacts differ, and a case within the jurisdiction of the New York courts -- in respect of both subject matter and personal jurisdiction -- may nonetheless be bereft of reasons why New York should be bothered entertaining it. (See Siegel, New York Practice 5th Ed. § 28.)

Mashreqbank is a good illustration of this, and, indeed, it becomes the case that brings some reason back to the realm.

P in *Mashreqbank* was a Dubai bank located in the United Arab Emirates. It contracted with D, a Saudi Arabian partnership, to swap U.S. dollars for Saudi riyals, the money to be wired to D's account at the Bank of America in New York. That was essentially the only New York contact with the case. It seems clear that if any party to the action had moved to dismiss it on forum non conveniens grounds, the case would have been sent packing quick. But there's the rub. The defendant did not make the motion, and *VSL* stood there shaking its finger at the Court of Appeals, warning that it could not dismiss the case on its own motion.

With all due indulgence of protocol, and, we may even add, the niceties, *Mashreqbank* turns the finger away and extracts from the record a set of reasons justifying a court-initiated dismissal. (The trial court had so dismissed, but a divided appellate division reinstated the case with a long curtsy to *VSL*.) Now the Court of Appeals in effect tells the *VSL* case that it has ruled this roost too long; the Court dismisses the action sua sponte (and unanimously).

There were other relevant factors in the case, such as an impleader by D of other Saudis and of a Bahrain bank. The case also included fraud allegations. None of these were factors that might support New York's keeping the case. The Court says that

> [w]e see no reason to read CPLR 327(a) as prohibiting a forum non conveniens dismissal where only the formality of a document labeled "notice of motion" was lacking.

In a juxtaposition with the facts of *VSL*, the Court finds that there was a risk of unfairness if there had been a dismissal in *VSL*, but that there would be "no similar risk of unfairness" here in *Mashreqbank*.

An attempt to interpose New York banking interests as a key element is made short shrift of:

> Our State's interest in the integrity of its banks is indeed compelling, but it is not significantly threatened every time one foreign national, effecting what is alleged to be a fraudulent transaction, moves dollars through a bank in New York.

The Court also points out that as a matter of choice of law, New York law would not be the governing law on the substantive issues in the case.

In a final summarizing of the facts of *Mashreqbank* as they reflect on the conveniens issue, the Court observes that

> [n]o party is a New York resident; no relevant conduct apart from the execution of fund transfers occurred in New York; no party has identified any important New York witnesses or New York documents; New York law does not apply; no property related to the dispute is located in New York;

and there are no other circumstances present to justify a New York involvement.

Hence this departure from the rigid and arbitrary construction of CPLR 327(a) that reached its zenith in the *VSL* decision.

Where did this arbitrary bar of judicial initiative originate? Most likely from legislators indulgent of business interests and willing to let the parties themselves, if all are content with New York's jurisdiction, force the case on New York. This can in fact be confirmed by juxtaposing a 1984 amendment that added a subdivision (b) to CPLR 327. CPLR 327(b) refers to the simultaneously adopted General Obligations Law § 5-1402, which provides that in a commercial transaction involving "not less than one million dollars" and in which the parties have stipulated in their contract to both a choice of New York law substantively and the jurisdiction of the New York courts exclusively, the conveniens doctrine is superseded and the New York courts must entertain the case.

Thus, under CPLR 327(b), a situation is carved out in which the parties, with a stipulation, can indeed force the courts to entertain the case. Bigness is the key with CPLR 327(b), and New York City's wish to encourage local business interests was clearly the motivation. CPLR 327(a) has no such carve-out, however; its language is general and recognizes no exception. Hence any getting around CPLR 327(a) requires a careful effort. With the *Mashreqbank* case, the Court finds a state of facts that makes that effort worthwhile, and it produces, through the decisional route, a de facto abandonment of the rigidities of the *VSL* construction.

OTHER DECISIONS

INDOOR MOLD EXPOSURE

Mere "Association" Between Mold Environment and P's Condition Does Not Establish "Causal" Connection; Hence Ds -- Owner and Landlord of Premises -- Get Summary Judgment

P apartment dweller sued the building owners for injuries and damages she said were the result of a prolonged mold condition. The case turned on whether P had put in sufficient proof to show at least prima facie that the mold was the cause of her injuries.

The case became another battlefield between experts, in which P's expert was found by the Court of Appeals to have failed to offer adequate proof of possible causation, and hence failed to switch the burden of proof over to the defendants to come forward with proof to refute causation. P's burden not having been discharged, Ds are found entitled to summary judgment dismissing P's claim. *Cornell v. 360 West 51st Street Realty, LLC,* 2014 WL 1237483 (March 27, 2014; 4-2 decision).

The majority, in an opinion by Judge Read, stresses that while P's expert established a possible "association" between the mold and P's injuries, mere "association" does not qualify as causation, and the failure to show the causal connection bars P's claim.

The two-judge dissent, written by Judge Pigott, disagrees. It finds the causation element a matter of fact and would leave the issue to a jury.

Quickly coming to mind in a case like this is the so-called "*Frye*" rule, after the decision by the federal Court of Appeals for the D.C. Circuit in 1923 in *Frye v. U.S.*, 293 F. 1013. As quoted by the Court of Appeals in its 2006 Parker decision (Digest 562), *Frye* holds that

> while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

The battle here in *Cornell* is on that field.

Both sides introduced what were apparently tomes of authority, and an argument arose about the area of time they were applicable to. The majority admonishes that

> a *Frye* ruling on lack of general causation hinges on the scientific literature in the record before the trial court.

The literature may of course expand afterwards, but on the present record, says the Court, P did not demonstrate a "cause-and-effect relationship", which by itself entitles Ds' side to a summary judgment of dismissal.

The Court also discusses in *Cornell* what it describes as "differential diagnosis", which it finds to be

> a generally accepted methodology by which a physician considers the known possible causes of a patient's symptoms, [and] then, by utilizing diagnostic tests, eliminates causes from the list until the most likely cause remains.

This is a kind of ruling-in and ruling-out process, but the Court says that the record in *Cornell* does not supply a proper foundation for such a "differential diagnosis".

GENERAL VERSUS SPECIAL DAMAGES

Closely Divided Court Holds Lost Profits from Distribution Agreement Are "General", Not "Consequential", Damages, and Are Hence Recoverable

Biotronik A.G. v. Conor Medsystems Ireland, Ltd., 2014 WL 1237514 (March 27, 2014; 4-3 decision), involves an agreement between P, a distributor of medical devices, and D, the maker of a coronary stent called CoStar, whereby P would become the exclusive distributor of CoStar in certain geographical areas. Trouble developed about getting government approval for CoStar, and D took it off the market. P found this unjustifiable, claimed loss of profits as damages, and sued for them. Did the contract allow such damages?

The contract specifically recited that neither party would be responsible for

> any indirect, special, consequential, incidental, or punitive damage with respect to any claim arising out of this agreement.

Did the loss of profits fall within any of these excluded categories -- which would bar them -- or would they count as "general damages" on which P would be allowed to recover? The majority, in an opinion by Judge Rivera, rules them general damages and allows them. The dissent, with Judge Read writing, finds them falling under the exceptions recited in the contract and would have barred them. The dissent agrees with the appellate division, which had held them barred.

The result is a reversal of the appellate division and a remand to reopen proceedings.

In its 1989 *American List* decision (Digest 367), a unanimous Court of Appeals said that

> [t]he distinction between general and special contract damages is well defined but its application to specific contracts ... is usually more elusive. General damages are those which are the natural and probable consequence of the breach ... while special damages are extraordinary in that they do not so directly flow from the breach.

Probably the whole Court in the present case, *Biotronik,* would subscribe to this generality, but would likely stress the word "elusive" in trying to apply it, as witness the 4-3 division. Hence the bar will be disappointed if it was expecting from the *Biotronik* case some inspiring clarification about how to apply the rule in a given case.

The majority's opinion is 15 pages; the dissent's is 21.

Perhaps the most helpful lesson of the case has to do with whether the damages P is seeking stem from the loss of "collateral" arrangements with others. If they do, they would not be recoverable -- they'd fall within the list of exclusions. To the dissent, that's where they indeed fall.

The majority disagrees. P's damages here "flowed directly from the contract itself" and were not "the result of a separate agreement with a nonparty". But, stresses the majority,

> [t]his distinction does not mean that lost resale profits can never be general damages simply because they involve a third party transaction. Such a bright line rule violates the case-specific approach we have used to distinguish general damages from consequential damages.

Here the majority cites its 1920 decision in *Orester v. Dayton Rubber Mfg. Co.*, 228 N.Y. 134, as a main case on point, and with a resolution that favors the majority's view here. The dissent's reading of *Orester*, however, is that it supports lost profits only "when there is no available market by which to otherwise measure damages", and the dissent sees a market available for measurement on the *Biotronik* facts.

The dissent adds, citing § 2-715(2)(a) of the Uniform Commercial Code, that

> while *Orester's* holding as to the measure or availability of lost profits may still be applicable, modern law now locates these principles firmly under the rubric of consequential damages.

This shows the additional problem met in a case like *Biotronik*: the need to characterize terms, such as those on the list of excluded damages enumerated in the contract. "Consequential" is on the list. The dissent picks it out as covering the case, while the majority finds it -- and the whole list of exclusions -- inapplicable on the *Biotronik* facts.

DISABILITY DISCRIMINATION

After Review of Both City and State Law, Issue of Whether Employer Engaged in "Interactive Process" to Try to Accommodate Disabled Employee Poses Question of Fact That Bars Summary Judgment

This case involves the Human Rights Law (HRL) of both New York City and New York State.

P's work for the New York City Health and Hospitals Corporation (HHC) entailed field work at construction sites and office work as well. The parties disagree about the percentages of each.

P along the way inhaled asbestos particles and was diagnosed with a condition that mandated a change of labors. When advised of this, the employer was obliged under both state and city laws to engage in what the Court of Appeals calls "a good faith interactive process" to try to come up with an accommodation that would keep P working, to the extent feasible and consistent with the employer's needs. Whether the employer honored that obligation is the subject of *Jacobsen v. New York City Health and Hospitals Corp.,* 2014 WL 1237421 (March 27, 2014).

P brought this suit for damages for unlawful discrimination. The employer successfully moved for summary judgment, once again generating an extensive Court of Appeals opinion to determine whether summary judgment was warranted. After an extensive treatment of the respective burdens of proof of the parties, stressing differences between the city and state provisions, the Court alights on that singular phenomenon that leads so often to a terse bottom line: the presence of issues of fact that preclude summary judgment.

It's precluded here, writes Judge Abdus-Salaam for a unanimous Court, because of the presence of several issues of fact. One, of course, is whether D, the summary judgment movant, adequately showed that an accommodation of the kind that might keep P going could not be made. Whether it could was one such issue; and if it could, whether the employer made an adequate effort to accommodate P was another.

Executive Law § 292(21-e) defines "reasonable accommodation" in some detail, with examples of steps the employer might take to oblige a disabled employee. There was much proof offered on both sides with that statute in mind, all of which ultimately led to the Court's discerning issues of fact in the record. A jury, it concludes, is needed to determine whether the employer carried out its duties.

The "reasonable accommodation" phrase appearing in the state provision does not appear in the city provision (contained in the city's Administrative Code), which instead defines "disability" in terms of "impairments". But under both statutes the Court says that "an employee's request for an accommodation is relevant to the determination of whether a reasonable" one could be made. With respect to both claims, says the Court,

> HHC failed to show the lack of any material issue of fact [which the Court found to be HHC's burden] regarding its participation in a good faith interactive process.

Here the Court points especially to the fact that when P asked for a respirator after returning to work after an absence, "HHC denied that request without considering it and instead merely provided plaintiff with a dust mask".

P did become totally disabled later on, which the HHC pointed to as supporting its conclusion that P could not perform

NEW YORK STATE LAW DIGEST
NEW YORK STATE BAR ASSOCIATION
ONE ELK STREET, ALBANY, NEW YORK 12207

PERIODICALS POSTAGE PAID AT ALBANY, N.Y.

POSTMASTER: Send address changes to New York State Bar Asociation, One Elk Street, Albany, New York 12207. The new York State Law Digest (ISSN 0028-7636) is published monthy by the New York State Bar Association, One Elk Street, Albany, New York 12207. PERIODICALS POSTAGE PAID at Albany, New York.

in his former job at all. But that was after HHC had already denied P's request for an accommodation. Meanwhile, the Court stresses, P tried to keep his livelihood going "by persevering in the face of the employer's refusal to accommodate [his] disability". The Court refuses "to interpret the State HRL and the City HRL to reward an employer with summary judgment" on such a record.

The Court also notes that while the rule about burden of proof on summary judgment puts the burden on the movant (here D), and in this case worked in P's favor, at the trial itself the rule will not be so generous to P: at the trial, P will bear the burden of proof on the contested issues.

INSURANCE BROKER'S DUTIES

Showing of "Special" Relationship with Broker Needed When Shortfall in Insurance Is Claimed to Be Result of Broker's Failure to Advise

The Court of Appeals held in its 2006 *Hoffend* decision (Digest 562) that absent a "special" relationship with an insurance broker, obligating the broker to advise about coverage, the insured gets only the coverage it asks for. In reaching that conclusion, *Hoffend* relied in turn on the Court's 1997 *Murphy* decision (Digest 454), an unsuccessful effort to turn an insurance broker into an "excess" insurer for failing to suggest higher coverage.

Now, in *Voss v. Netherlands Ins. Co.*, 22 N.Y.3d 728, ... N.Y.S.2d .... (Feb. 25, 2014; 4-3 decision), another case turning on the "special relationship" issue, the Court divides. Both sides cite the two prior decisions, and both agree that the "special" relationship rule remains in force; they disagree only on the issue of fact of whether the "special relationship" showing was met in this case.

Plaintiff insured ran several businesses and bought her insurance through broker D. Roof leaks damaged some of her property and caused some loss of business. She sued several insurers for property damage and "business interruption" profits (which would have been earned if the closing of the businesses had not been necessitated by the leaks). She included the broker as an additional defendant on the theory that if the insurers were not liable for all of the damage, then the fault was the broker's in not recommending the increased coverage.

Defendant broker moved for summary judgment. In that context it was the broker's burden to show that a special relationship did not exist. In an opinion by Judge Graffeo, the Court holds that the broker failed to make that showing, mandating a denial of the summary judgment motion, which had been granted below.

In the ordinary broker-client setting, the Court explains, the client may prevail "only where it can establish that it made a particular request to the broker and the requested coverage was not procured".

The client did not make such a "particular" request in this case, thereby injecting the "special" relationship issue, and on that, as noted, the broker had the burden of proof. Reversing the broker's summary judgment, the Court remits the case for further proceedings.

The three-judge dissent, written by Judge Smith, finds among other things that even if the broker had promised to consult (as plaintiff insured alleges), the promise was not supported by any distinct consideration. It finds that there had been no consultation in this case between insured and broker on the details of renewal:

> Neither [the broker's] provision of advice [initially] in 2004 nor its expression of willingness to do so [i.e., advise] in the future could create a continuing duty of the kind that [the] *Murphy* [case] makes clear does not ordinarily exist.

There are "sound policy reasons" for this narrow view, the dissent adds:

> Agents are not insurance companies and do not earn premium income. They earn ... relatively modest commissions for bringing insurers and insureds together. It is natural for a client that has suffered a loss not covered by its insurance to blame its insurance agent; and if lawsuits by clients against their agents are welcomed by the courts, the consequence may be to make the agent into a kind of back-up insurer ....

Brokers who would protect themselves fully on this front can include an explicit disclaimer of any advice-giving function. Insureds, especially big ones, who want the advice should explicitly contract for it. (So should little ones, of course, but they're less likely to think about it.)