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

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CASE LAW DEVELOPMENTS

Split Court of Appeals Rules Defendants Did Not Demonstrate Effectiveness of 1997 Release as a Matter of Law

Dissent Complains That Majority Effectively Renders All Releases Executed by Seamen Unenforceable

In *Matter of New York City Asbestos Litig.*, 2019 N.Y. Slip Op. 01259 (February 21, 2019), Mr. South (together with hundreds of other plaintiffs) had previously sued Texaco (together with 115 other defendants), back in 1997, in the District Court in Ohio. He alleged then that he had sustained injuries as a result of his 1950s exposure to asbestos when he was a merchant marine working on ships owned by Texaco. Shortly after Texaco was served, a settlement was reached, in which Mr. South claims to have received $1,750. A judgment of dismissal with prejudice was entered, and Mr. South executed a release, giving up the right to bring an action "for any new or different diagnosis that may be made about Claimant's condition as a result of exposure to any product." At that time, Mr. South was suffering from a nonmalignant pulmonary disease.

Almost 20 years later, Mr. and Mrs. South brought this action against Chevron (as successor by merger to Texaco) and other defendants, seeking damages again for an asbestos-related disease, including mesothelioma, among others, for his shipboard exposure. The three causes of action asserted were under the Jones Act, 46 U.S.C. § 30104, federal admiralty and maritime law, and for loss of consortium. Mr. South subsequently passed away, and his estate was substituted for him.

Relying on the 1997 release, Chevron moved for summary judgment. The trial court denied the motion, and the Appellate Division affirmed. The initial issue was who bore the burden of proof on the release issue under admiralty law and Section 5 of FELA (45 U.S.C. § 55), which is incorporated into the Jones Act. Chevron conceded that under the United States Supreme Court's decision in *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942), the burden is not on the plaintiff to show its invalidity, but on the defendant to prove the validity of the release. Moreover, *Garrett* set forth a heightened standard under admiralty law:

> "the burden is upon one who sets up a seaman's release to show [1] that it was executed freely, without deception or coercion"; [2] "it was made by the seaman with full understanding of his rights"; [3] "[t]he adequacy of the consideration"; and [4] "the nature of the medical and [5] legal advice available to the seaman at the time of signing the release are relevant to an appraisal of this understanding" (citation omitted).

New York City Asbestos Litig, 2019 N.Y. Slip Op. 01259 at *3.

The majority here noted that, because of this heavy burden, summary judgment is frequently not appropriate. It concluded that Chevron had not met its burden of demonstrating the absence of any material question of fact. It emphasized that the 1997 release did not "unambiguously extinguish a future claim for mesothelioma." In fact, it did not mention mesothelioma. Moreover, the Court was not troubled that the release expressly applied to "any new or different diagnosis that may be made about Claimant's condition as a result of exposure to any product," because "'claimant's condition' may cabin the 'new or different diagnosis' to ones that related to his nonmalignant asbestos-related pulmonary disease—the 'condition' both parties agree was the only one he suffered at the time." *Id.* at *5.

The majority was also not bothered (as the dissent was) by the 1997 complaint's reference to mesothelioma, among a larger laundry list of diseases and cancers that Mr. South was allegedly suffering from at the time of the release. It was not disputed that Mr. South was not in fact suffering from most of the listed diseases; and the qualifying phrase "either singularly or in combination thereof," could reflect that he did not know his precise condition when he signed the release. Moreover, the absence of a reference to "mesothelioma" in the release could support the argument that it was

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deliberately omitted. Stated differently, had Texaco wanted the release to apply to any subsequent mesothelioma claims, it could have included it.

With respect to the factors set forth in *Garrett*, the majority noted that the record was "silent or ambiguous" on most of them (for example, whether Mr. South fully understood his rights, the adequacy of consideration, and the nature of the medical advice). In addition, although Mr. South was represented by counsel, which ordinarily weighs in favor of finding the release to be valid, the trial court here had noted that, "the competence of Mr. South's 1997 counsel in connection with its mass representation of maritime asbestos plaintiffs had been consistently questioned," but not "fleshed out in the record." *Id*. at *6.

The Court concluded that the record was "insufficient to demonstrate the effectiveness of the 1997 release as a matter of law." It did acknowledge that "it is possible that additional evidence could be developed that would validate the release and extinguish plaintiffs' claims." *Id*.

The dissent, written by Judge Garcia, complained that the majority had rendered all releases signed by seamen unenforceable and made New York a "venue for seaman plaintiffs who no longer wish to abide by the terms of their valid settlements." *Id*. at *12. It noted that it was conceded that the "comprehensive" release was executed freely, without deception or coercion; that Mr. South "carefully read" the release, signing it before a notary, with a full understanding of his rights; that there was nothing inherently unfair about the $1,750 settlement; that he was represented by an admiralty law firm; and that he had received a firm medical diagnosis and was aware of a number of potential medical risks associated with asbestos exposure, as illustrated by the complaint.

The dissent complained that the majority's attribution of significance to the release's failure to mention mesothelioma means that the "majority now requires settling parties to exhaustively catalog all conceivable, asbestos-related diseases—even those the plaintiff has specifically acknowledged—in order to release them. Not only does this undermine the parties' clear intent, it essentially precludes maritime plaintiffs from settling unknown or unforeseen claims." *Id*. at *10.

Majority Holds That a "Stairway" Was the Functional Equivalent of a "Sidewalk," Thus Requiring the Service of Written Notice

Dissent Believes a Sidewalk Does Not Mean a Stairway and There Are No Sidewalks to Heaven

When suing municipalities or governmental entities, practitioners need to be aware of written notice requirements. *Hinton v. Village of Pulaski*, 2019 N.Y. Slip Op. 01261 (February 21, 2019), concerned Village Law § 6-628, which requires that prior written notice must be provided to the Village in a personal injury action arising out of a defect in "any street, highway, bridge, culvert, *sidewalk* or crosswalk" (emphasis added). Here, the plaintiff alleged that he was injured when he lost his footing and fell while descending an exterior *stairway* leading from a municipal parking lot to a public road. The plaintiff did not provide written notice of the alleged defect to the Village before he commenced this action. The trial court granted the Village's summary judgment motion and the Appellate Division affirmed. The issue here was whether the "sidewalk" mentioned in the notice provision includes the stairway here.

A majority of the Court cited to its prior decision in *Woodson v. City of New York*, 93 N.Y.2d 936, 937–38 (1999), which held that a stairway can be classified as a sidewalk under a prior notice statute if it "functionally fulfills the same purpose that a standard sidewalk would serve on flat topography, except that it is vertical instead of horizontal." Thus, the majority here in *Hinton* concluded that "[a]s the identical question has been long since resolved by this Court, the present case involves the application of settled precedent—not statutory interpretation . . . We see no compelling reason to overrule our longstanding precedent." *Hinton*, 2019 N.Y. Slip Op. 01261 at *2. It found that the courts below properly applied *Woodson* in holding that the plaintiff was required to show that the Village received prior written notice, because the stairway here "functionally fulfills the same purpose" as a standard sidewalk.

The dissent, written by Judge Wilson (and joined by Judge Fahey), criticized the majority for "rewriting" the Village Law, which specifically did not include "stairways" in its list of municipal passageways and maintained that the functional equivalence test "spawned" by the "terse" *Woodson* decision, resulting in the majority's "erroneous doctrine," permits a court to rewrite a statute to include something not contained in it. It asserted that "[n]one of the six words in Village Law § 6-628 deals with stairways unless viewed in the abstract, and if the legislature wanted to describe village infrastructure more abstractly it surely knew how to do so." *Id*. at *4. Having concluded that the legislative language was clear, the dissent noted that, while there was no need to examine extrinsic evidence, it provided no basis for a functional equivalence test or to broaden the meaning of the word "sidewalk." Moreover, prior notice laws, which are "intensely controversial and carefully limited," never "reached stairways."

The dissent posited that the Court's decision in *Woodson* meant something different from what was proposed by the majority, focusing instead on the injury potential:

> The majority—having extended *Woodson* well beyond its limited holding—ignores this discussion of what the functional equivalence test in *Woodson* meant and instead declares (without analysis) that only overruling *Woodson* would justify a different outcome in this case. The *stare decisis* reach of *Woodson* covers stairs integrated with a connected sidewalk, possessing the same injury potential as a sidewalk, but not other stairs. Expanding *Woodson*, without any articulated justification or analysis, is not "the application of settled precedent" (majority op at 3) but the creation of a new doctrine that all stairs are sidewalks, or perhaps that some are, with no rule as to how to sort them beyond a mantra ("functional equivalent") that raises more questions in its bare form than it answers.

Id. at *6.

In sum, the dissent concluded that the word "sidewalk" did *not* mean a "stairway."

CPLR 203(f) Cannot Save Untimely Filed Claims

Court Rules There Was No Valid Preexisting Action to Which They Could Relate Back

CPLR 203(f) embodies the relation-back doctrine and provides that a claim in an amended pleading is deemed interposed at the time the claims in the original pleading were interposed, so long as the original pleading gave notice of the transactions or occurrences to be proved in the amended complaint. For the doctrine to apply, however, the original action must be a valid one. In the seminal case of *Goldberg v. Camp Mikan-Recro*, 42 N.Y.2d 1029 (1977), a father of a dead child improperly commenced a wrongful death action in his own name, before a personal representative had been appointed (thus lacking the capacity to sue). As a result, when the father was then appointed as the personal representative after the statute of limitations had expired and sought to amend the complaint to reflect his appointment, the Court of Appeals ruled that there was no valid preexisting action to which it could relate back.

More recently, in *U.S. Bank Nat'l Assn. v. DLJ Mtge. Capital, Inc.*, 2019 N.Y. Slip Op. 01168 (February 19, 2019), the Court was presented with a similar problem. In *U.S. Bank*, the defendant was a seller and sponsor of several residential mortgage-backed securities (RMBS) trusts. Each was governed by a separate pooling and servicing agreement (PSA) containing various representations and warranties about the general underwriting practices and quality of the individual loans. The PSAs also included mandatory remedial provisions and prohibited certificate holders from suing, except in limited circumstances. Within six years of the execution of the PSAs, a certificate holder filed a summons with notice alleging violations of the representations and warranties of the trusts. Following the running of the statute of limitations, and pursuant to the sole remedy provisions in the PSA, the Trustee advised the defendant of the alleged breaches and made a demand that defendant cure or repurchase the non-compliant loans. The Trustee then filed a consolidated complaint (in essence, substituting the Trustee as the plaintiff).

The defendant moved to dismiss, arguing that the action was untimely because the Trustee did not comply with the sole remedy provision within the limitation period and the Trustee could not rely on the prior action because the certificate holder did not have standing to bring the action under the PSAs. The trial court granted the motion, and the Appellate Division affirmed. The Court of Appeals affirmed. Citing to *Goldberg*, the Court reiterated that CPLR 203(f) can only apply where there is a valid preexisting action. Here, there was no such valid action, because the certificate holder lacked standing to bring it, and the "Trustee's contention that it may use the relation-back doctrine of CPLR 203 (f) to cure the certificate holder's lack of a right to sue, and that it may therefore avoid any problem with the identity of the plaintiff upon re-filing pursuant to CPLR 205 (a), is without merit." *Id.* at *1.

Lack of Preservation . . . Again

In the March 2019 edition of the *Digest*, we discussed the need to preserve all issues on appeal. Unfortunately, we saw this problem again in *U.S. Bank*. When the Appellate Division affirmed the trial court order, in addition to addressing the relation-back issue, it ruled that the Trustee could *not* rely on CPLR 205(a), the six-month provision, because the Trustee was not a "plaintiff" permitted to file under CPLR 205(a). 141 A.D.3d 431, 433 (1st Dep't 2016).

However, the Court of Appeals would not even address this issue, concluding that the Trustee had failed to preserve it:

> The Trustee made no mention of CPLR 205 (a), and did not argue before Supreme Court that it should be considered the same "plaintiff" as the certificate holder for purposes of CPLR 205 (a). As such, the Trustee failed to respond to DLJ's argument that if the court agreed that the claim was not timely filed the Trustee could not refile and invoke the savings clause of CPLR 205(a). However, because this argument by its terms sought to persuade Supreme Court to dismiss the complaint with prejudice, the Trustee was required to respond and present its view of CPLR 205 (a) to the nisi prius court to preserve the argument on appeal to us. Having failed to do so, we cannot consider whether CPLR 205 (a) applies to the facts of this case.
>
> *Id.*

As a result, the Court expressed no opinion as to the Appellate Division's conclusion on the applicability of CPLR 205(a) and more specifically whether the Trustee was a "plaintiff" under the statute. For a discussion of this issue, see below.

Second Department Again Applies CPLR 205(a) Where Plaintiffs in First and Second Actions Were Different

Dissenting Judge in *Eitani* Case Explains Why This Case Is Different

As you may recall, CPLR 205(a) provides that if an action is timely commenced and is terminated in a manner other than prescribed by the statute, the plaintiff can commence a second action upon the same transactions or occurrences or series of transactions or occurrences within six months after termination of the first action. Generally, only the plaintiff in the original action is entitled to the benefits of CPLR 205(a). *See Reliance Ins. Co. v. Polyvision Corp.*, 9 N.Y.3d 52, 57–58 (2007).

In the April, 2017 edition of the *Digest*, however, we discussed *Wells Fargo Bank, N.A. v. Eitani*, 148 A.D.3d 193 (2d Dep't 2017), where a majority of the Second Department held that CPLR 205(a) applied, even though the plaintiffs in the first and second actions were different, because both plaintiffs sought to enforce the very same right.

More recently, in *Goodman v. Skanska USA Civ., Inc.*, 169 A.D.3d 1010 (2d Dep't 2019), the Second Department was confronted again with different plaintiffs. Prior to timely commencing a 2013 personal injury action, the plaintiff-debtor had filed a Chapter 7 bankruptcy petition and had failed to include the personal injury claim in his filing or reveal the action during the bankruptcy proceeding. After the plaintiff was granted a discharge in bankruptcy, the defendants moved to dismiss on the ground that the debtor lacked the capacity to sue because he had not included the claim in his bankruptcy filing as an asset. The motions were granted.

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The Bankruptcy Court then reopened the bankruptcy proceeding, and an action was commenced in the name of the Trustee of the bankruptcy estate of the debtor within six months of the termination of the first action. The defendants moved to dismiss on the ground, among others, that the three-year statute of limitations had expired. The Second Department held that CPLR 205(a) was satisfied even though the 2013 action was dismissed based on the debtor's lack of capacity to sue, because

> [t]he extension provisions of CPLR 205(a) are available to a plaintiff who seeks to recommence an action, notwithstanding that the prior action upon which the plaintiff relies was "invalid" in the sense that it contained a fatal defect (citation omitted).

Id. at 1012.

The court then noted that, notwithstanding the general rule that the plaintiffs be the same in both actions, there can be "circumstances where the plaintiff in the new action is seeking to enforce 'the rights of the plaintiff in the original action.'" *Id*. (citing to *Reliance Ins. Co. Polyvision Corp.*). The court concluded that that was the case here:

> As the debtor's successor-in-interest, the plaintiff has the capacity to commence this action to recover damages for the debtor's alleged personal injuries. Consequently, the plaintiff is not seeking to enforce any rights separate and independent from those asserted by the debtor in the prior. Accordingly, we agree with the Supreme Court's determination that the plaintiff is entitled to the savings provision of CPLR 205(a) (citation omitted).

Id.

In a concurrence by Judge Leventhal, who dissented in the *Eitani* decision referred to above, he explained why that case was distinguishable from *Goodman.* In *Eitani*, Judge Leventhal believed that CPLR 205(a) did not apply because the plaintiff in the second action, Wells Fargo, was not the plaintiff, Argent, in the first action "in a different capacity," and Wells Fargo was not seeking to vindicate Argent's rights in the new action. In contrast, here in *Goodman*, the debtor's claim

> is the same, and the subsequent claimant, the bankruptcy trustee, is acting as the representative of the named plaintiff in the prior action. Indeed, once the debtor petitioned for relief under Chapter 7 of the Bankruptcy Code, all his legal or equitable interests in property at the time, including his personal injury cause of action, became the property of the bankruptcy estate, and only the bankruptcy trustee had standing to commence that personal injury action. Consequently, although the debtor is not the bankruptcy trustee, only the bankruptcy trustee could seek redress for the injury the debtor allegedly sustained. In other words, in this case, unlike in *Eitani*, the identity of the entity on whose behalf redress was sought has remained the same (citations omitted).

Id. at 1014.

As reflected in the above two cases, an important distinction concerning the applicability of CPLR 203(f) or CPLR 205(a) is how the courts view an invalid or defective first action. CPLR 203(f) requires a "valid pre-existing action to which [an] amendment can relate back," while CPLR 205(a) "specifically contemplates a prior defective action subject to dismissal." *See Carrick v. Central Gen. Hosp.*, 51 N.Y.2d 242, 249 (1980).

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