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

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CASE LAW DEVELOPMENTS

Court of Appeals Agrees That Nothing in the CPLR Prevents a Pre-Answer Motion to Dismiss a Class Action

But Majority and Dissent Disagree as to Whether the Defendants Carried Their Burden Here

Maddicks v. Big City Props., LLC, 2019 N.Y. Slip Op. 07519 (October 22, 2019), is a class action brought by current and former tenants of multiple apartment buildings located in New York City. The defendants include the manager of the portfolio of buildings and individual corporate owners of various buildings. The plaintiffs allege "a clear pattern and practice of improper and illegal conduct," and "illegality and fraud" aimed at trying to inflate rents over the legal limits. This was allegedly done in four ways: (i) by making false reports that free-market leases were rent-controlled under the J-51 program; (ii) by misrepresenting and inflating the individual apartment improvement costs (IAIs); (iii) by failing repeatedly to register required rental information, thereby making it impossible to determine the proper legal regulated rent; and (iv) by inflating the fair market rent on apartments that were no longer rent-controlled.

The defendants made a pre-answer CPLR 3211 motion to dismiss, arguing that the amended class action complaint failed to state a cause of action under General Business Law (GBL) § 349 and that, as a matter of law, the class allegations failed. The trial court granted the motion, finding that all of the plaintiffs' theories required a fact-specific analysis precluding class certification. A divided Appellate Division modified the order, denying the motion, except as to those allegations related to a GBL § 349 violation.

Where the members of the Court of Appeals agreed was whether there was a "per se" bar to a pre-answer motion to dismiss a class action allegation: there is none. Where the judges disagreed in a 4-3 decision was whether the defendants met their burden on the motion.

CPLR 901 sets forth the five criteria the class must meet: numerosity, commonality, typicality, adequacy of representation, and superiority. The issue here relates to the commonality component, which requires that there be "questions of law or fact common to the class which predominate over any questions affecting only individual members." CPLR 901(a)(2).

The defendants argued that when the class members' damages differ, the class action can only go forward "if the important legal or factual issues involving liability are common to the class"; the class claims here, and particularly those relating to the costs of IAIs, may require separate proof as to each plaintiff; the complaint alleges varying percentage overcharges for inflated IAIs increases; and, thus, the "alleged overcharges are separate wrongs to separate persons that do not form the basis for a class action (citations omitted)." *Id.* at *8.

The majority framed the issue as follows:

> [A]re we to look at the common basis for a damages claim or the degree of damage alleged? On the one hand, if, as defendants suggest, the differences in the specific means of harm is considered — that is, if at this stage the Court contemplates nuances of how those overcharges allegedly were accomplished — then plaintiffs may struggle to satisfy the factual component of CPLR 901 (a) (2). On the other hand, as plaintiffs note, to focus on potential idiosyncrasies within the class claims — distinctions that speak to damages, not to liability — at this juncture would potentially be to reward bad actors who execute a common method to damage in slightly different ways.

Id.

The majority stressed that commonality should not be confused with unanimity; "it is 'predominance, not identity or unanimity,' that is the linchpin of commonality." *Id*. at *10 (citations omitted). The Court here concluded that "the complaint addresses harm effectuated through a variety of approaches but within a common systematic plan." *Id*.

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The majority insisted that it was taking a "moderate" approach, since CPLR 902 already provides a mechanism for "immediate threshold review" of whether the plaintiffs can go forward with the class action. That section requires the plaintiff to move within 60 days after the time to serve responsive pleadings has expired and provides the defendant with an opportunity to obtain a dismissal when the allegations can be vetted at a hearing. In addition, the majority emphasized that dismissal at this juncture would "effectively nullify CPLR 906," which permits the certification of subclasses or the isolation of specific issues; the longstanding principle that individualized proof of damages does not preclude a finding that common questions of law or fact predominate; that the plaintiffs adequately stated their IAI claims; and that the timeliness problem as to certain class members "does not establish that individual issues predominate." *Id.* at *13.

The dissent asserted that the majority failed to identify questions of law or fact common to the class, "predominant or otherwise"; granting the motion in the CPLR 3211(a) stage prevents courts and litigants from incurring needless costs; and there was no "common flaw" with respect to the cause of the harm and no common defect alleged that produced disparate harms:

> The allegation is only that the plaintiffs have been harmed — by paying inflated rents — but the cause of that harm is not a "common flaw." Rather, it is different for at least four different classes of plaintiffs. For some plaintiffs, there are allegations of violations of the J-51 tax program. For most, there are not. For some, there are allegations of insufficient Individual Apartment Improvements ("IAIs") to justify any imposed rent increases. For others, there are not. For some, there are allegations of inadequate registration. For others, there are not. For some, there are allegations that defendants inflated fair market rents on previously rent-controlled apartments. For others, there are not (citations omitted).

Id. at *17–18.

The dissent maintained that according to the majority, commonality could be satisfied by allegations of "'a common method to damage in slightly different ways,' although the method itself is never articulated. That is not only incorrect, but inaccurate in describing the theories of harm upon which the plaintiffs rely." *Id*. at *19. The dissent cautioned that "[h]olding that such generalized and immaterial facts may serve as potential predicates for class certification risks turning the commonality and predominance requirements into a nullity." *Id*. at ___.

Similarly unavailing to the dissent was the majority's trivializing questions that needed to be answered for each of the plaintiffs' claims. In fact, the dissent maintained that the "particularized 'idiosyncrasies' will determine both damages *and* liability." The dissent expressed the fear that the majority's decision could hinder the courts' power to prevent abuse in the class action context. It complained that if the class allegations here were sufficient, even the "most inadequate of class allegations" can survive a motion to dismiss, inviting class actions that could never be certified, "knowing that they can force opposing parties to bear the costs of class discovery and certification proceedings." *Id*. at *20.

Out-of-Possession Owner Liable for Injuries Suffered on Sidewalk Adjacent to Property

Real Property Owner Has Non-Delegable Duty to Maintain City Sidewalk

In *Xiang Fu He v. Troon Management, Inc.*, 2019 N.Y. Slip Op. 07643 (October 24, 2019), the plaintiff sustained personal injuries after a slip-and-fall on ice that had accumulated on the sidewalk abutting property owned by the defendants. The plaintiff was employed by a non-party lessee of the building on the property, and the sidewalk was owned by the City.

As relevant here, § 7-210 of the Administrative Code of the City of New York provides that an owner of real property abutting a sidewalk has a duty to maintain the sidewalk in a reasonably safe condition. In addition, the owner, "shall be liable for any injury to property or personal injury . . . proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include . . . the negligent failure to remove snow, ice, dirt or other material from the sidewalk."

The defendants moved for summary judgment, arguing that out-of-possession landowners are not liable for personal injuries caused by alleged negligent sidewalk maintenance and, under the terms of the lease, the lessee had agreed to maintain the sidewalks. In essence, they maintained that when the lessee agrees to keep the premises in good condition, "an out-of-possession landowner retains liability only for structural defects inside the premises, whereas the lessee assumes liability for transient conditions, including those arising from sidewalk maintenance." *Id.* at *3. The trial court denied the motion, but the Appellate Division unanimously reversed.

The Court of Appeals granted leave to appeal and unanimously reversed the Appellate Division order. The Court noted that § 7-210 of the Administrative Code supplanted the common law, shifting liability for sidewalk defect-related injuries from the City to the abutting property owners. This non-delegable duty subjected the defendants to potential liability for their failure to keep the sidewalks clear of snow and ice on the abutting sidewalks.

The Court rejected the defendants' argument that, in essence, the Court extend the out-of-possession landowner rule, which does not impose liability on the owner where it contracts out the responsibility to maintain its property, to the duty to maintain City-owned premises. The Court pointed out that the text of the statute – "the clearest indicator of legislative intent" – was clear and unambiguous. Section 7-210 states its applicability to every "owner of real property abutting any sidewalk," offering no exception for out-of-possession owners. Significantly, the same statute expressly excludes certain owner-occupied properties, establishing that "if the City Council meant to exclude a class of owners, it knew how to do so." *Id*. at *5.

Because the Court concluded that the statutory language was unambiguous, resorting to legislative history was unnecessary. Nevertheless, the Court maintained that that history was equally supportive of the Court's conclusion. The Court stressed that the landowner's duty under § 7-210 was an affirmative non-delegable obligation, which

> incentivizes owners to make decisions that optimize the safety and proper care of sidewalks, reducing harm to third parties and litigation costs. This interpretation of the Code not only is mandated by the language and supported by the legislative history, but also promotes the City Council's intent to place the duty squarely on the shoulders of those in the best position to maintain sidewalks in a reasonably safe condition and to insure against loss. Otherwise, if owners may delegate this responsibility and attendant liability, then they have no incentive to ensure that the delegatee is competent and properly insured.

Id. at *9.

In sum, the Court concluded that, while an owner can shift the work to a lessee contractually (to maintain the sidewalks, for example), it "cannot shift the duty, nor exposure and liability for injuries caused by negligent maintenance, imposed under section 7-210." *Id*. at *10. Thus, the Court agreed with the trial court that there were triable issues of fact relating to how the accident occurred, requiring denial of the defendants' summary judgment motion.

Second Department Applies CPLR 205(a) to Save Action, Holding That There Was No Finding That the First Action Was Dismissed for Neglect to Prosecute

Court Also Discusses (In)applicability of CPLR 5019(a)

We have dealt with CPLR 205(a) on many occasions in the past. It provides that if an action is timely commenced and is terminated in a manner other than as enumerated in the statute, the plaintiff is authorized to bring a second action upon the same transaction or occurrence or series of transactions or occurrences within six months after termination of the first action (where the statute of limitations has otherwise run).

Sokoloff v. Schor, 176 A.D.3d 120 (2d Dep't 2019), has a very detailed procedural background, but the essential issue relates to whether the "first" action was terminated in a manner excluded by CPLR 205(a). Counsel for plaintiffs, husband and wife, commenced an action for medical malpractice three months *after* the decedent-husband had died (September 30, 2013), a fact apparently unknown to plaintiffs' counsel. After counsel learned of the decedent's death sometime between February 2015 and July 2015, plaintiff administrator (the decedent's spouse) moved in the action to substitute herself as party plaintiff on behalf of the estate. In a subsequent conference, the trial judge remarked that "[t]his lawsuit is a complete nullity." As relevant here, the defendants then moved to dismiss the action for lack of capacity under CPLR 3211(a)(3).

In October 2015, before the trial court had decided the motions in the 2013 action, the plaintiff commenced a second action. The 2013 and 2015 actions were identical except for the decedent being a plaintiff in the 2013 action and the estate being a plaintiff in the 2015 action. Defendants moved to dismiss the 2015 action on prior action pending and statute of limitations grounds. Before the dismissal motions in the 2013 and 2015 actions were decided, the trial court held another conference in the 2013 action in November 2015, describing it again as a "nullity" that needed to be dismissed because the deceased had died prior to its commencement. The court stated it was dismissing the 2013 action; the defendants' attorneys were directed to draft a written order memorializing the court's oral decision; and the court signed an order that day which did not set forth *any* reason for dismissing the 2013 action.

But the plaintiff was not done yet, commencing this third action in 2016. Ultimately, the trial court dismissed (i) this action as time-barred, noting that the 2013 action was dismissed for neglect to prosecute, an express exclusion under CPLR 205(a); and (ii) the 2015 action, on the ground that CPLR 205(a) was unavailable because that action was commenced before the 2013 action had been dismissed.

The Appellate Division heard the appeals of the orders from the various actions and reversed the judgment and reinstated the complaint in this action. Initially, it noted that the trial court erred in characterizing the 2013 action as a nullity. Rather, it was subject to dismissal for lack of capacity, an infirmity that does not preclude the availability of CPLR 205(a). *See Carrick v. Central Gen. Hosp*., 51 N.Y.2d 242, 249 (1980); *George v. Mt. Sinai Hospital*, 47 N.Y.2d 170, 179–80 (1979).

The court noted that the key issue was whether the 2013 action was dismissed for neglect to prosecute, which is an express exclusion under CPLR 205(a). It focused on a 2008 amendment to that statute, imposing an obligation on the court to set forth the specific conduct constituting the neglect. The court stated, however, that the amendment did not address "whether the record of specific neglectful conduct must be set forth only in the actual order of dismissal, or whether a subsequent order in a related action may do so with equal legal force and effect." *Sokoloff*, 176 A.D.3d at 128-129.

The court held that the later order could *not* be used to set forth specific conduct constituting neglect in the 2013 action. In doing so, it concluded that CPLR 5019(a), which permits the correction of mistakes, defects and irregularities caused *by the court itself*, cannot be used to correct mistakes in another action under a different index number; permitting such a result could invite courts to "revisit previously determined orders or judgments in other actions and change them in some manner so as to render them less conclusive"; a court can only correct clerical errors under CPLR 5019, not the substantive errors alleged here about the basis for the dismissal of the 2013 action; and absent a description in the November, 2015 order of plaintiff's pattern of delay and neglect to prosecute, CPLR 205(a) was available to the plaintiff. The court highlighted the unfairness of holding otherwise:

> The court's explanation several months later, in the order dated June 6, 2016, in this action, that the dismissal of the complaint in the 2013 action was for neglect to prosecute had the practical and prejudicial effect of retroactively depriving the plaintiff of the right under CPLR 205(a) to proceed with a new action that was previously and otherwise authorized by the statute. There would be an innate unfairness if, after a subsequent action is commenced, the court can be allowed to change the terms of a dismissal of a prior action through a later-created record, and thereby divest a plaintiff of remedies that were properly and previously available by operation of CPLR 205(a).

Id. at 132.

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Defendant Who Serves Answer by Mail Is Not Entitled to Five Extra Days for Motion Seeking Dismissal on Improper Service Grounds

Second Department Finds Legislature Did Not Intend to Extend That Party's Time to Move

Under CPLR 2103(b)(2), where an interlocutory paper is served by regular mail and "where a period of time prescribed by law is measured from the service of a paper," five days are added to the prescribed time if the mailing is done in New York, six days if outside the state but within the United States.

Recently, in *HSBC Bank USA, N.A.. v. Maniatopoulos*, 175 A.D.3d 575 (2d Dep't 2019), the issue related to serving a motion seeking dismissal after including an improper service defense in the answer. CPLR 3211(e) sets forth several key provisions relating to the waiver of defenses. Pertinent here is that service objections must be in the answer or in a pre-answer motion to dismiss. In addition, if the objection is set forth in the answer, the defendant must move for judgment within 60 days of service of the answer.

In *Maniatopoulos*, the defendant served her answer by mail, including the service objection, but did not move until 65 days later. The trial court granted the motion but, upon reargument, vacated the prior order and denied the motion as untimely. The Second Department affirmed. It asserted that the "Legislature did not intend CPLR 2103(b)(2) as a means by which a party could, as a general matter, extend its own time to make a motion. Instead, the Legislature enacted the provision to give the party responding to service by mail the full amount of the 'responding period' provided for the doing of an act." *Id*. at 576.

It distinguished the Court of Appeals decision in *Simon v. Usher*, 17 N.Y.3d 625 (2011), which held that when a demand to change venue under CPLR 511(b) is served by mail, the defendant has 20, rather than 15 days, to move to change venue. Significantly, the procedure applicable only to a change of venue motion based on improper county (as of right), has an additional feature: that is, within five days of service of the demand, the plaintiff can consent to the change of venue or advise via affidavit that the county specified by the defendant is improper or that the county designated by the plaintiff is proper. Thus, the *Simon* decision noted that "[a]lthough the motion papers are not directly responding to papers served by plaintiffs, defendants are effectively responding to plaintiffs' lack of consent to the change of venue. Simply put, defendants' motion papers are not initiatory. . . ." 17 N.Y.3d at 628. Practically speaking, without that five-day extension, defendant's time to move would be contracted to an even shorter period than 15 days. It would first have to "wait for the demand to be delivered, wait five days for the plaintiff to respond, and then make the motion for a change of venue in whatever time was left." *Maniatopoulos*, 175 A.D.3d at 577.

In contrast, the *Maniatopoulos* court noted that the defendant here would always have the statutory period (60 days) to make the dismissal motion, regardless of how the answer was served. In holding that CPLR 2103(b)(2) did not extend the defendant's time and that her motion was thus untimely, the court noted that "[t]here is no delay in the defendant's time to make its motion due to papers being in transit, and there is no necessary intervening event between the defendant's service of its answer and its ability to move under CPLR 3211(e)." *Id*.

While there can be extenuating circumstances, we can always revert back to Professor Siegel's admonition to be diligent in meeting deadlines and to try to leave yourself enough time. If the motion had been served just five days earlier, this decision would have been unnecessary.

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