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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 Splits on Whether New York Court Has Long-Arm Jurisdiction Over Ohio Firearm Merchant

Majority Holds That Defendant Lacked Minimum Contacts with State

In *Williams v. Beemiller, Inc.*, 2019 N.Y. Slip Op. 03656 (May 9, 2019), the Court of Appeals was asked whether a New York court could exercise personal jurisdiction over an Ohio seller of firearms, who sold a gun in Ohio that was transported to New York and used in a shooting there. A deeply divided Court held that it could not. Apart from the holding itself, the decision is a useful primer in analyzing long-arm jurisdiction issues.

The majority opinion begins by reviewing the essential jurisdiction-related facts in the case: that the defendant was a federal firearm licensee, authorized to sell handguns exclusively in Ohio to Ohio residents, which he did primarily at gun shows in Ohio; that he had no website, retail store or business telephone listing, and did no advertising, except for a sign he posted at his booth at gun shows; that he sold handguns to a Mr. Bostic and his associates at various Ohio gun shows after doing the necessary inquiries and background check; and that Bostic brought the guns to New York and illegally resold one to a Buffalo gang member, who used it in a shooting, injuring the plaintiff.

The majority then reviewed the basic law, that is, that the exercise of personal jurisdiction is appropriate (i) where permissible under CPLR 302, the long-arm statute, and (ii) where the exercise of jurisdiction comports with due process, requiring a showing that the defendant non-domiciliary has "minimum contacts" with the state and that the maintenance of the action "does not offend traditional notions of fair play and substantial justice." The majority did not address whether the long-arm statute reached the defendant, instead focusing exclusively on the constitutional question. A key element of the minimum contacts analysis is a showing that the defendant "purposefully availed" himself of "the privilege of conducting activities within the forum state." Significantly, "'the mere likelihood that a product will find its way into the forum' cannot establish the requisite connection between defendant and the forum 'such that [defendant] should reasonably anticipate being haled into court there'" (citation omitted). *Id.* at *2. The defendant's relationship with the forum state must arise out of the defendant's contacts and not "contacts between the plaintiff (or third parties) and the forum state." *Id.* (citing to *Walden v. Fiore*, 571 U.S. 277, 284 (2014)).

The majority rejected the argument that minimum contacts were established merely because the guns sold by the defendant in Ohio eventually reached New York or that he had a reasonable expectation that that would occur because Bostic had advised that he "wouldn't mind having a shop in Buffalo." The Court distinguished its earlier seminal decision in *LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210 (2000) (another jurisdictional primer) because there the defendant advertised nationally and "initiated a business relationship with a New York-based distributor in order to sell products in New York." In contrast, in this case, there was no purposeful action:

> Brown was not a member of the criminal gun trafficking conspiracy and had no distribution agreement with Bostic and his associates, who purchased guns in separate transactions. Brown offered uncontradicted evidence that Bostic, who resided in a neighboring Ohio town, represented to Brown that he had applied for an FFL—a license that would, once acquired, permit him (like Brown) to sell handguns only in Ohio to Ohio residents. Despite Bostic's stated aspiration to open a gun shop in Buffalo, the record is devoid of evidence supporting plaintiffs' theory that, merely by selling handguns to Bostic, Brown intended to serve the New York market. Even if Bostic indicated that there was a chance that he may—at some undefined point in the future—transport the firearms to New York, Brown cannot be said to have "forged [constitutionally sufficient] ties with New York" as there is no evidence that

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> he "took purposeful action, motivated by the entirely understandable wish to sell [his] products here" such that he availed himself "of the privilege of conducting activities within" New York (citations omitted).

Williams, 2019 N.Y. Slip Op. 03656 at *2-3.

In a concurrence (joined by Judge Garcia), Judge Feinman found that the defendant's connection with New York was insufficient in the first instance to establish personal jurisdiction under CPLR 302(a)(3)(i). It provides for jurisdiction over a non-domiciliary where the defendant commits a tort outside of New York causing injury in New York and "[r]egularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, . . ."

The concurrence noted that each prong of CPLR 302(a)(3)(i) requires "some ongoing activity" in New York. Thus, it concluded that to meet the requirement that the nonresident derive revenue from New York, it must also be shown that the nonresident intended that result, which did not occur here:

> Brown never contracted to provide services within New York, nor advertised or solicited business in New York, nor sent representatives or agents into New York, nor enticed New York residents or firearm distributors to come to Ohio to purchase firearms from him. To be sure, Bostic's illicit gun trafficking from Ohio and subsequent sales in New York constitute a regular course of conduct within New York, such that Bostic could be said to have derived substantial revenue from this State. However, his nebulous remarks to Brown, that he was "planning on possibly opening" or "wouldn't mind having" a store in New York at some unspecified point in the future, are not enough to attribute this regular course of conduct to Brown (citations omitted).

Id. at *4.

Moreover, jurisdiction was similarly lacking under CPLR 302(a)(3)(ii), which requires that the defendant expects "or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." The critical factor in the opening clause is a showing, not made here, of a "discernible effort" by the defendant "to directly or indirectly serve the New York market." *Id*. Furthermore, the second clause, the interstate revenue provision, was not met since defendant's business was "decidedly local," having sold only 9 out of 525 firearms to out-of-state residents, representing less than 2% of his total sales, in the year the relevant firearm sales were made here.

In a dissent by Judge Fahey (joined by Judges Rivera and Wilson), he emphasized that the defendant knew that Bostic intended to open a store in Buffalo (and indeed did sell guns there); the defendant thought it significant to advise an ATF agent that Bostic intended to sell guns in Buffalo; the concurring judges conflated the "substantial revenue" and "regular course of conduct in New York" analyses under CPLR 302(a)(3)(i); the defendant's sales of guns to Bostic intended for sale in New York satisfied both prongs of CPLR 302(a)(3)(ii); the defendant knowingly derived substantial revenue from goods used in the state under the proportion or quantity tests; the defendant knew the guns would likely end up in New York; and the defendant's business could not "be characterized as local," since gun shows invariably attract out-of-state buyers.

The dissent insisted that the defendant's actions met the minimum contacts standard in that he intended to and did serve the New York market, and thus, availed himself of the New York market, when he sold a large number of firearms to Bostic and his associates with the knowledge that those weapons were bound for the New York market. Moreover, the dissent maintained that the assertion of personal jurisdiction here comported with fair play and substantial justice. The dissent concluded that the majority's "approach shields gun traffickers and their suppliers from civil liability in New York." *Id*. at *9.

Split Court of Appeals Rules That Commercial Tenants Can Waive the Right to Commence a Declaratory Judgment Action

Dissent Fears That the Majority's Decision Will Spell the End of the *Yellowstone* Injunction for Commercial Tenants

In New York, a *Yellowstone* injunction is an important tool for a tenant to maintain the status quo and stay the running of a cure period when a landlord seeks to terminate the lease based on the tenant's alleged violation of the lease. This permits the tenant to seek a declaration as to its rights before the landlord can terminate the lease, without risking eviction.

In *159 MP Corp. v. Redbridge Bedford, LLC*, 2019 N.Y. Slip Op. 03526 (May 7, 2019), the issue was whether a commercial tenant can agree in a written lease to waive its right to seek declaratory relief as to the terms of the lease. In another split opinion (4-3), a majority of the Court of Appeals held that "under the circumstances of this case," the waiver was enforceable. The relevant waiver provision contained in a 36-paragraph rider to the lease "replete with handwritten additions and deletions" read as follows:

> Tenant waives its right to bring a declaratory judgment action with respect to any provision of this Lease or with respect to any notice sent pursuant to the provisions of this Lease . . . [I]t is the intention of the parties hereto that their disputes be adjudicated via summary proceedings.

After receiving the defendant-landlord's notice of default with a 15-day cure provision, the plaintiffs brought this action for declaratory and injunctive relief and to recover damages. Plaintiffs moved by order to show cause for a *Yellowstone* injunction. The defendant answered and cross-moved for summary judgment, asserting that the action and the *Yellowstone* relief sought were barred by the waiver provision.

A majority of the Court found that the parties were sophisticated entities that were represented by counsel and had negotiated the underlying agreement at arm's length. The Court also found that the waiver provision was clear and unambiguous. The majority stressed that "[f]reedom of contract is a 'deeply rooted' public policy of this state." It acknowledged that there are circumstances where contract provisions will not be enforced, for example, those that are entered into unknowingly or while under duress or coercion, or under the doctrine of unconscionability, to guard

against "unjust enforcement of onerous contractual terms which one party is able to impose [upon] the other because of a significant disparity in bargaining power" (citation omitted). *Id*. at *4. However, none of these circumstances was alleged to be present here.

The majority rejected plaintiffs' argument that the waiver was void as against public policy. The Court maintained that there was a very limited group of public policy interests that are "sufficiently fundamental to outweigh the public policy favoring freedom of contract." For example, General Obligations Law § 5-321 (GOL) prohibits agreements exempting a lessor for liability from its own negligence. Similarly, tenants cannot waive the benefits of the Rent Stabilization Law or Code (§ 2520.13), and agreements cannot extend the statute of limitations before accrual of a claim (GOL § 17-103). In addition, agreements that involve illegal activity are void.

The majority concluded, however, that the right to commence a declaratory judgment action "does not reflect such a fundamental public policy interest that it may not be waived by counseled, commercial entities in exchange for other benefits or concessions" (such as a rent concession). *Id*. at *5. The Court insisted that the waiver clause did not preclude the plaintiffs' access to the courts, and the inability to seek a *Yellowstone* injunction, which the majority characterized as "not essential to protect property rights in a commercial tenancy," did not render the waiver provision unenforceable. Moreover, the plaintiffs were still free to raise defenses in a summary proceeding.

To the dissent, the majority misunderstood the "freedom of contract" as an individual right, rather than "as a doctrine by which society decides to enforce only those types of agreements that tend to enhance social welfare." *Id.* at *14. The public policy here, requiring the voiding of the waiver provision, the dissent asserted, was the freedom of contract itself: "A contractual provision that forecloses a party from timely knowing its contractual obligations—instead forcing parties to gamble on the contract's meaning—undermines the contract and with it, society's benefit from the freedom of contract." *Id*. at *6.

The dissent posited that, because of the majority's decision, commercial building owners and landlords will, as a matter of course, include in their leases a waiver of declaratory and injunctive relief, resulting in the elimination of the *Yellowstone* injunction. The dissent stressed that declaratory judgment actions promote stability by enabling contracting parties to determine their contractual obligations and rights prior to a breach. Moreover, they afford parties a conclusive determination when contractual responsibilities are disputed or unclear or the terms are ambiguous.

As to the majority's reference to other judicial avenues available to tenants, the dissent pointed out that the tenant's rights were limited to asserting defenses to the alleged default only after the landlord commences a summary eviction proceeding in Civil Court. Since the Civil Court cannot grant injunctive relief, the tenant cannot obtain a *Yellowstone* injunction:

> If Civil Court therefore determines during the summary eviction proceeding that MP is responsible for some or all of the alleged defaults, even if MP has all along been willing and able to cure those defaults, it will be too late: the leases will have terminated. That "all or nothing result" destabilizes contract relationships and neighborhoods, and effectively allows landlords who own buildings in gentrifying areas to terminate commercial leases at any time based on technical or minor violations. In other words, if a waiver of declaratory and *Yellowstone* relief is enforceable, it will be used by landlords as a mechanism to vitiate a lawful contract. That does not preserve the parties' benefit of their bargain, it destroys it (citation omitted).

Id. at *13.

The dissent took exception to the majority's claims that commercial tenants should be able to waive the availability of *Yellowstone* relief (even though some of the residential tenants cannot) based on the apparent assumption that commercial tenants "have a relatively higher level of sophistication and bargaining power than residential tenants." In fact, the dissent argued that, where a contract provision violates public policy, the sophistication of the parties does not render the provision enforceable. Moreover, the level of sophistication and bargaining power of commercial tenants can vary widely and thus, it is simply "not true that all commercial tenants will understand the meaning of a waiver of declaratory relief, or will have the bargaining power to negotiate for removal of such a waiver if they understand it, and we should not assume otherwise." *Id*. at *14.

Majority of Court Holds That There Is No Rental Market Exclusion from *Scarangella* Exception to Manufacturer's Strict Liability

Rental Company Can Balance Benefits and Risks of Product Purchased Without Available Optional Safety Device

In *Scarangella v. Thomas Built Buses, Inc.*, 93 N.Y.2d 655 (1999), the Court of Appeals established an exception to a manufacturer's strict liability for a design defect, where the buyer chooses to purchase the product without an available optional safety device and the injured person alleges that the product is defective due to the absence of the device. In such a situation, the manufacturer would not be strictly liable for a design defect, when

> (1) the buyer is thoroughly knowledgeable regarding the product and its use and is actually aware that the safety feature is available; (2) there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and (3) the buyer is in a position, given the range of uses of the product, to balance the benefits and the risks of not having the safety device in the specifically contemplated circumstances of the buyer's use of the product (citation omitted).

Id. at 661.

The Court ruled that the buyer, not the manufacturer, was in the superior position to conduct the risk-utility assessment of the product without the optional safety device, and the buyer's "well-considered decision" to forgo the device absolved the manufacturer.

Approximately 20 years later, in *Fasolas v. Bobcat of N.Y., Inc.*, 2019 N.Y. Slip Op. 03657 (May 9, 2019), the Court was asked whether the *Scarangella* exception was "categorically unavailable" when the allegedly defective product was sold

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to a buyer (Taylor) that then *rented* (rather than sold) the product to the ultimate consumer (the plaintiff). An overwhelming majority of the Court (6-1) held that the exception was *not* categorically unavailable. It rejected the lower courts' "preoccupation" with the *process* by which the end user obtained the product, via the rental market. The focus, according to the majority, should instead be on the buyer's "knowledge of the product and ability to make a reasoned judgment concerning the utility of the safety feature." *Id.* at *4.

Thus, the fact that Taylor, the buyer here, was a retail rental company, did not establish as a matter of law that it was not in a position to balance the benefits and risks, as required by *Scarangella*:

> Without question, whether the buyer exercises control over the product's use in its capacity as an employer or otherwise is a consideration that is relevant to a determination of the buyer's relative "position" to engage in the proper balancing inquiry—but it is not dispositive. A lessor may be able to appropriately mitigate risk by carefully controlling to whom it rents its products and for what use. In this case, testimony was presented that Taylor rented its products to businesses, contractors, schools and other community institutions, such as the fire department—entities that may have possessed training and expertise in the use of loaders and other construction equipment.

Id.

The majority also rejected the argument that the *Scarangella* exception was categorically unavailable because the buyer here was not at risk of personal harm by using the product without the optional safety device. The Court countered that there was no "risk of personal harm" requirement, and it was not unusual for a buyer to obtain a product to be used by someone else, like an employee, co-worker, partner, family member, or customer. In fact, in *Scarangella*, the purchasing decision was made by the president and CFO of a bus company, not the employees on the ground.

The majority would not presume that a purchaser-rental company would not have an interest in the well-being of its customers. To the contrary, a rental company could be liable for the plaintiff's injuries, as it was here and, as a result, has a pecuniary interest in making sure the products it rents are safe.

In dissent, Judge Rivera maintained that a manufacturer should not be absolved of its liability where the renter did not receive the necessary information to engage in a risk-utility analysis. Here, contrary to the *Scarangella* exception requirement, the evidence did not establish that the end-user here, the renter, was "in the best position to balance the risk and benefits of the product's use without the safety device." *Id*. at *5.

The dissent argued that the *Scarangella* exception only applies "when the party has adequate information about the product and the optional safety device, along with superior knowledge to that of the manufacturer of the circumstances of the particular use. In a case involving the rental market, that party is the renter, not the rental company." *Id.* at *8. The question is: who is in the better position to do the balancing test when the product is purchased—the manufacturer or the buyer? The dissent concluded that "the underlying premise of *Scarangella* does not apply to a rental company like Taylor as it lacks control over the product use and the use environment. Therefore, the narrow exception to a manufacturer's strict liability does not bar a plaintiff's design defect claim based solely on the rental company's knowledge about the product and the optional safety device." *Id*. at *12.

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