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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 Divides on Whether Directed Verdict Should Have Been Granted on Issue of Ownership of Dam in Negligence and Wrongful Death Action

Was Ownership Issue Established as a Matter of Law?

In *Suzanne P. v. Joint Bd. of Directors of Erie-Wyoming County Soil Conservation Dist.,* 2024 N.Y. Slip Op. 00159 (Jan. 16, 2024), the plaintiff brought a negligence and wrongful death action arising out of the drowning death of her teenage son. The boy was swimming with his friends near an area with low-head dams on Buffalo Creek in Erie County when he was pulled underwater by an undertow-like phenomenon linked to the dams known as "hydraulic boil." This phenomenon caused drowning injuries resulting in death. Even though there had been several such drownings near the dams, no signs were posted in the area warning of the dangers. The plaintiff asserted that the defendants failed to warn of the danger posed by the hydraulic boil condition.

The dams were built in the mid-20th century as part of a stream bank stabilization project, which was funded by the federal government. They were designed, constructed, and installed by a federal agency, the National Resources Conservation Service (the NRCS). The dam here is situated in Erie County (the County). However, the broader federal project runs through the property of Erie County Soil & Water Conservation District and the Wyoming County Soil & Water Conservation District (the Districts), which are resource conservation agencies. They were created to carry out flood prevention measures within their areas.

The remaining defendant at trial in this case, the Joint Board, was created by New York State in 1949 to be the local "sponsor" of the federal project. In 1959 and 1984 the Joint Board and the NRCS entered into operation and maintenance agreements when the dams needed reconstruction. The agreements mandated that the Joint Board obtain "permanent easements" from landowners allowing for the construction and operation of the dams and that the Joint Board had continuing obligations to inspect and maintain the dams. Significantly, for our purposes here, the 1984 agreement provided that "[t]itle to real property shall vest in the [Joint Board]," and "[r]eal property means land, including land improvement, structures, and appurtenances thereto, excluding movable machinery and equipment."

The trial was limited to the issue of whether the Joint Board owned the dams when the accident occurred (providing the basis for a negligence claim). Plaintiff pointed to the 1984 agreement with the NRCS, arguing that it established that the Joint Board acquired ownership of the dam. However, the Erie District field manager, who was the only witness at trial and who had participated in Joint Board meetings and dam inspections for over two decades, testified that he did not believe that the Joint Board owned the dams; the Joint Board does not own any property; its inspection and maintenance duties are minimal; and it was required to obtain the NRCS's permission prior to making any alterations or improvements to the dams.

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Both parties moved for directed verdicts at the close of evidence, and the trial judge reserved decision. After the jury found in favor of the Joint Board, the judge granted the plaintiff's motion, holding that, as a matter of law, the Joint Board had acquired ownership of the dams in the 1984 agreement. On appeal, the Appellate Division reversed, denying plaintiff's motion for a directed verdict and granting the Joint Board's motion. In doing so, the court ruled that there was "no rational process by which the jury could reach a finding that defendant owned the subject dam" at the time of the accident. The Appellate Division concluded that the NRCS could not have transferred ownership of the dams in the 1984 agreement to the Joint Board in the 1984 agreement "because the dams are 'permanently affixed to land underlying Buffalo creek' and thus 'constitute fixtures,' ownership of which runs with the land (citations omitted)." *Id*. at *5–6.

A narrow majority of the Court of Appeals disagreed. The issue was whether the evidence at trial supported a directed verdict for *either* party on the dam ownership issue. The Court explained that a directed verdict is appropriate only where there is no rational process by which the jury could find in favor of the opposing party, and the court is required to view the evidence in the light most favorable to the opposing party. Here, the majority found that neither party had met the burden of eliminating triable issues of fact:

> Contrary to the Appellate Division's conclusion, the evidence that the dams are firmly affixed to the creek bed is insufficient to establish as a matter of law that ownership of the dams runs with the land; the intent of the NRCS and landowners must also be considered. Neither party introduced evidence sufficient to eliminate triable issues of fact regarding such intent. Nor did plaintiff establish that the provisions of the 1984 agreement transferring title to "real property" unambiguously encompass the dams. Because there was a rational process by which a jury could find in favor of either plaintiff or the Joint Board on the ownership issue, neither party was entitled to a directed verdict (citations omitted).

Id. at *6–7.

Thus, the Court remanded the case to the trial court for reinstatement of the jury verdict.

The dissent (in part) argued that the trial court was correct in granting plaintiff's motion for a directed verdict on the issue of the Joint Board's ownership of the dam:

> Given the unambiguous provision in the 1984 operation and maintenance agreement—by which the National Resources Conservation Service (NRCS), a federal agency, conveyed the dam to the Joint Board—there was no rational process by which the jury could reach a finding that the Joint Board did not own the dam at the time of the decedent's accident. Consequently, plaintiff was entitled to a judgment as a matter of law that the Joint Board owned the dam.

Id. at *9.

The dissent maintained that by submitting the 1984 agreement, the plaintiff both established a prima facie case of ownership and proved ownership by a preponderance of the evidence. Thus, the jury could not have rationally concluded in favor of the Joint Board. The dissent found the field manager's testimony to be "purely speculative." "Gaston, a layperson who was not involved in the drafting of the 1984 agreement, testified that he did not 'believe' the Joint Board owns the dam, but he undercut that testimony by candidly admitting that he did not know who owns it." *Id.* at *13–14.

What's Next After Governor's Most Recent Veto of Consent by Registration Statute?

Override of Veto? Another Proposed Amendment? A Ruling on the Dormant Commerce Clause by the United States Supreme Court?

As we reported back in the August 2023 edition of the *Law Digest*, the United States Supreme Court in *Mallory v. Norfolk Southern Railway*, 143 S. Ct. 2028 (2023), in a 5-4 decision, upheld consent by registration to general jurisdiction in an action brought in Pennsylvania. In doing so, it rejected a due process challenge. However, in a separate concurring opinion by Justice Alito, he suggested that a dormant Commerce Clause challenge might have legs.

The New York State legislature again passed an amendment attempting to replicate the Pennsylvania statute in *Mallory*, but the governor yet again vetoed it. The proposed amendment provided that a foreign corporation's application for authority to do business in New York constituted consent to general jurisdiction in New York for all actions against the corporation.

Thus, we are left with the existing statute. As we previously reported, that statute was addressed by the Court of Appeals in *Aybar v. Aybar,* 37 N.Y.3d 274 (2021). A majority of the New York State Court of Appeals held there that compliance with the relevant Business Corporation Law registration provisions did not constitute consent to general jurisdiction. The majority rested its position solely on New York law, noting that the relevant Business Corporation Law provisions do not expressly condition the corporation's right to do business on consent to general jurisdiction.

The dissent in *Aybar* argued that the Court's decision in *Bagdon v. Philadelphia & Reading Coal & Iron Co*., 217 N.Y. 432 (1916), previously confirmed that such business registration constituted consent to general jurisdiction. The dissent emphasized that "the legislative intent to render foreign corporations subject to jurisdiction in our courts by virtue of registering to do business here is unquestionable." *See* David L. Ferstendig, *Majority of Court of Appeals Holds That a Foreign Corporation's Business Registration Does Not Constitute Consent to General Jurisdiction*, 732 N.Y.S.L.D. 1–2 (2021).

So, for the moment, in New York a foreign corporation authorized to do business in New York is *not* subject to general jurisdiction. However, in the words of Yogi Berra, "it ain't over 'til it's over."

The New York State Legislature could try to override the governor's veto. (Do they have the votes, and are they willing to use their political capital here?) It could draft and pass yet another amendment. (In view of the Governor's vetoes, it is not clear that new language would make a difference.) The

question is whether all of this should wait until the *Mallory* case, after remand, perhaps winds its way back to the Supreme Court. We may then see how the Supreme Court rules on the dormant Commerce Clause challenge.

Order to Show Cause in Connection With the Commencement of an Article 78 Proceeding Cannot Permit Service on Individuals Not Authorized by Statute

Strict Compliance With Service Statute Required

In *Matter of Buenos Hill, Inc. v. City of Saratoga Springs,* 2024 N.Y. Slip Op. 00111 (3d Dep't Jan. 11, 2024), the petitioners owned property in the City of Saratoga Springs, Saratoga County. They applied to the planning board for a special use permit, which ultimately was denied. The petitioners commenced this Article 78 proceeding via order to show cause.

One of the issues related to service. Specifically, with respect to service on the City of Saratoga, the court noted that service upon a city under CPLR 311(a)(3) must be effected by personal delivery upon "the mayor, comptroller, treasurer, counsel or clerk." Here it was undisputed that service was not attempted on any of those listed individuals. Instead, service was made on the city clerk's office's alleged employee. The court found such service to be defective. Apart from the fact that the individual claimed that she had never worked for the city clerk or held herself out as being an employee, service on an employee of the city clerk or an employee of an individual set forth in the statute is ineffective "'because the statute requires personal delivery to a listed representative of the [city] and does not provide for substituted service' (citations omitted)." Moreover, "'it is irrelevant that the [city] may have actually received the documents, because notice received by means other than those authorized by statute does not bring a [respondent] within the jurisdiction of the court' (citations omitted)." *Id.* at *4–5.

Another problem was that the order to show cause appeared to authorize service on individuals not set forth in CPLR 311, when it allowed "personal service upon the offices of the City of Saratoga Springs City Clerk or City Attorney." The court found this to be improper, emphasizing that New York state courts "'have consistently required strict compliance with the statutory procedures for the institution of claims against the State and its governmental subdivisions, and where the Legislature has designated a particular public officer for the receipt of service of process, the courts are without authority to substitute another' (citations omitted)." *Id.* at *5.

Similarly, the order to show cause improperly permitted service on the respondent individuals by serving the offices of the city clerk or city attorney:

> With certain exceptions not applicable here (see e.g. CPLR 307 [2]; 309, 310, 311, 312-a), a natural person must be served by the methods prescribed in CPLR 308. Court-ordered service upon an individual by other means requires a showing that the ordinary methods are impracticable (see CPLR 308 [5]), which petitioners did not even allege, let alone demonstrate. "[W]ithout such a showing, fundamentally, a court is without power to direct expedient service" (citations omitted).

Id. at *6.

Second Department Joins First Department in Holding That Repeal of Civil Rights Law § 50-a Applies to Records Created *Before* the Repeal Date

Concurs That the Legislature Did Not Limit Disclosure to Records Generated After Repeal Date

In the November 2023 edition of the *Law Digest*, we discussed the decision in *Matter of NYP Holdings, Inc. v New York City Police Dept.*, 220 A.D.3d 487 (1st Dep't 2023). There, the First Department ruled that the June 12, 2020 repeal of Civil Rights Law § 50-a (relating to the disclosure of law enforcement personnel records) applied retroactively to records created before the repeal date. More recently, the Second Department agreed.

In *Matter of Newsday, LLC v. Nassau County Police Dep't*, 2023 N.Y. Slip Op. 06050 (2d Dep't Nov. 22, 2023), the petitioner made FOIL requests in July 2020. The court stated that

> [t]o the extent that the NCPD contends that the Legislature intended to exclude from disclosure any law enforcement disciplinary records that were created prior to June 12, 2020, it has offered no support for this proposition. By their nature, FOIL requests seek records that were generated prior to the request date. In amending the Public Officers Law to provide for the disclosure of records relating to law enforcement disciplinary proceedings, the Legislature did not limit disclosure under FOIL to records generated after June 12, 2020, and we will not impose such a limitation ourselves (citations omitted).

Id. at *9–10.

Primary Assumption of Risk Doctrine Inapplicable to Incident in Hookah Bar

Plaintiff Not Engaged in Sporting Activity in Sports Arena

In the June 2023 edition of the *Law Digest*, we referred to the Court of Appeals decision in *Grady v. Chenango Val. Cent. Sch. Dist.*, 40 N.Y.3d 89 (2023). There, the Court discussed the applicability of the primary assumption of risk doctrine in the context of two cases on appeal. We explained that notwithstanding the adoption of comparative fault in 1975, a form of primary assumption of risk doctrine has been retained in very limited circumstances, specifically with respect to athletic and recreative activities, based on a premise that "[o]ne who takes part in . . . a sport, accepts the dangers that inhere in it so far as they are obvious and necessary." Judge Rivera believed, however, that it was time to abandon the doctrine.

More recently, in *Gilliard v. Manhattan Nuvo LLC*, 2024 N.Y. Slip Op. 00269 (1st Dep't Jan. 23, 2024), the First Department addressed the doctrine in a different factual situation. The plaintiff alleged that she sustained personal injuries when, during a birthday party she was attending at the defendant's hookah lounge, a hookah placed on a table in front of her containing a bowl with burning coals was knocked over by dancing patrons, causing the coals to fall on her.

The First Department agreed with the trial court that the assumption of risk doctrine did *not* apply to the facts of this case, refusing to equate a hookah lounge with a sports venue or to conclude that the plaintiff took part in a sporting activity:

> Although attending a birthday party may be viewed as a recreational activity, the activities at the facility did not possess the "beneficial aspects of sports" that courts have found as justification for the continued applicability of the doctrine. Defendant's duty to plaintiff was to maintain its facility in a reasonably safe condition in view of all the circumstances (citation omitted).

Id. at *2.

The court added that even if the doctrine applied, a plaintiff is not deemed to have assumed the risks of reckless or intentional acts, or concealed or unreasonable risks:

> Thus, defendant had a duty to plaintiff to ensure that the hookah did not present unusual risks to her as it was not placed on the floor, the "preferable" location according to defendant's owner, and to ensure that there was a sufficient distance between the crowd on the dance floor and the table where the hookah was placed. Further, defendant presented no evidence that plaintiff was aware of the danger that she would be burned by the hot coals if the hookah was knocked over, and she denied knowledge of the risk.

Id. at *3.

Second Department Continues to Hold That a Trial Court Is Not Authorized To Dismiss Action as Abandoned Under Rule 202.27 When Party Fails Timely To Comply With a Court's Directive at a Conference

In Doing So, it Remains in Conflict With the Third Department

In last month's edition of the *Law Digest*, we referred to the conflict in the Appellate Division as to whether a trial court could dismiss a case as abandoned under 22 N.Y.C.R.R. § 202.27, where a party appears at a conference but fails timely to comply with a court's directive at the conference. We discussed the Third Department holding in *Bank of N.Y. Mellon v. Vaiana,* 218 A.D.3d 1094 (3d Dep't 2023), that a trial court is authorized to dismiss the case as abandoned under those circumstances. The court refused to adopt a contrary holding by the Second Department.

A more recent decision issued by the Second Department reflects that the conflict continues. In *U.S. Bank N.A. v. Narain*, 2024 N.Y. Slip Op. 00334 (2d Dep't Jan. 24, 2024), the plaintiff commenced this action against the defendants to foreclose a mortgage on real property. At a status conference the trial court issued an order directing the plaintiff to file "an application seeking an Order of Reference or the next applicable application" by a certain date. The order stated that the failure to do so "may result in the dismissal of this action without prejudice." The trial court subsequently issued an order *sua sponte* dismissing the complaint without prejudice because of plaintiff's failure to comply with the terms of the status conference order.

The Second Department reiterated that a "court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" (citations omitted)." It held that here the

> plaintiff's failure to comply with the directive in the status conference order was not a sufficient ground upon which to direct dismissal of the complaint. "In general, [t]he procedural device of dismissing a complaint for undue delay is a legislative creation, and courts do not possess the inherent power to dismiss an action for general delay where, as here, the statutory preconditions to dismissal under CPLR 3216, which is the statutory provision addressing want of prosecution, have not been met" (citations omitted).

Id. at *4.

Should Motion for Leave To Reargue Be Made Via Order To Show Cause?

That Would Give the Court the Opportunity Clearly To Deny "Leave"

A subsidiary issue in *Narain* was whether the plaintiff was required to move by order to show cause on a CPLR 2221(a) motion. The provision provides that "[a] motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, …." In *Narain,* the motion was to vacate the *sua sponte* dismissal order (among other things) and the court found there to be no requirement to use an order to show cause.

It is true that the statute does not use the magical language associated with a statute *requiring* the use of an order to show cause. *See e.g.*, CPLR 5015(a) ("on motion of any interested person *with such notice as the court may direct*, . . .") (emphasis added). An interesting question, however, is whether a CPLR 2221(a) motion for leave to renew or reargue *should* be made via an order to show cause. Such a motion seeks "leave," which suggests a two-step process. First, the court is to decide whether to grant leave, that is, whether it should consider the motion at all. If the court decides to hear the motion, it can either change its decision or adhere to the original decision. This distinction can be crucial in the context of a motion for leave to reargue. That is because there is no appeal of a denial of a such a motion. There have been numerous reported decisions highlighting the difference between denying leave altogether (thereby making that order unappealable) and granting leave and then adhering to the original decision (an appealable order). *See e.g., Lewis v. Rutkovsky*, 153 A.D.3d 450, 453 (1st Dep't 2017); David L. Ferstendig, *Appeal of Order Denying Leave to Reargue*, 683 N.Y.S.L.D. 3–4 (2017).

The Uniform Rules provide that an order to show cause should only be used where there is a "genuine urgency," a stay is required, or a statute requires it. *See* 22 NYCRR §§ 202.8-d, 202.70(g), Rule 19. Does CPLR 2221(a), which references "leave," require an order to show cause? Regardless, utilizing an order to show cause enables the court at the outset to declare without ambiguity that it is denying leave: it can refuse to sign it.

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