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

NYSBA

CASE LAW DEVELOPMENTS

New Jersey Transit, a State-Created Entity, Is Not Entitled to Sovereign Immunity Defense

Majority of Court of Appeals Asks Whether Subjecting NJT to Suit in New York Would Offend New Jersey's Sovereign Dignity

In *Franchise Tax Bd. of Cal. v. Hyatt,* 587 U.S. 230 (2019) (*Hyatt III*), the U.S. Supreme Court overruled its earlier decision in *Nevada v. Hall*, 440 U.S. 410 (1979), and held that "States retain their sovereign immunity from private suits brought in the courts of other States." What the Supereme Court did not address in *Hyatt III*, and which is the subject of the New York State Court of Appeals decision in *Colt v. New Jersey Tr. Corp.*, 2024 N.Y. Slip Op. 05867 (Nov. 25, 2024), is whether a New Jersey *state-created entity* could be subject to suit in New York. While six of the seven Court of Appeals judges agreed that the defendants were *not* entitled to invoke a sovereign immunity defense, there were differing approaches.

In 2017, a bus owned and operated by defendant New Jersey Transit Corporation (NJT), and driven by defendant NJT employee Ana Hernandez, struck and injured the plaintiff, a pedestrian who was crossing Dyre Avenue in New York City in the crosswalk with the pedestrian traffic signal in his favor. Plaintiff and his wife, suing derivatively, commenced this action against NJT and Hernandez. Relying on *Hyatt III*, the defendants moved to dismiss in 2020, asserting that NJT was "an arm of the state," entitling them to assert sovereign immunity. The trial court denied the motion, and the Appellate Division affirmed in a split decision.

While a majority of the Court of Appeals affirmed, the justices' analysis differed. The majority opinion written by Judge Singas relied on the framework courts have used in analyzing whether a state-created entity can invoke immunity in federal court (commonly referred to as "Eleventh Amendment immunity"). Thus, Judge Singas stated that the

> relevant inquiry is whether subjecting a state-created entity to suit in New York would offend that State's dignity as a sovereign. We hold that, to answer this question, courts must analyze how the State defines the entity and its functions, its power to direct the entity's conduct, and the effect on the State of a judgment against the entity.

Id. at *1.

In concluding that the first factor (how the State defines the entity and its functions) favored according NJT sovereign immunity, the Court referenced certain conflicting signals, including the fact that even though New Jersey law provides NJT with a separate corporate existence, it also classifies NJT as a department within its Department of Transportation (in New Jersey's Executive Branch); it characterizes NJT as "an instrumentality of the State exercising public and essential governmental functions"; NJT can sue and be sued; while New Jersey law does not permit NJT to assert sovereign immunity in certain federal-law based actions, it does not appear to take a position as to whether NJT is entitled to sovereign immunity in the first instance; some state cases have described NJT as a state agency; and "it is debatable whether operating an intrastate and interstate transportation network is a traditional state governmental function given the myriad other non-state public and private entities that provide similar services (citation omitted)." *Id.* at *15.

With respect to the second factor—whether the State directs the entity's conduct such that the entity acts at the State's behest—the Court concluded it did not weigh heavily in either direction. On the one hand, the Court pointed to NJT's "significant independence from New Jersey's control" and that the NJ government "does not direct the day-to-day operations of NJT." On the other hand, "NJT remains beholden to the State

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in some respects," most notably in the fact that "the Governor maintains the ability to influence its operations through their exercise of appointment and veto powers." *Id.* at *17.

Finally, concerning the effect on the State of a judgment against the entity, the Court concluded that it militated *against* a finding of sovereign immunity. This factor "assesses whether the entity's liability is the State's liability, such that a judgment against the entity would be an affront to the State." Looking at New Jersey state law, "the State has . . . clearly disclaimed any legal liability for judgments against NJT, counseling against treating NJT as an arm of New Jersey. Additionally, defendants have not established that New Jersey would bear ultimate liability for a judgment against NJT." *Id.* at *18.

Thus, the majority concluded that NJT was not an arm of New Jersey and may not invoke sovereign immunity:

> New Jersey's lack of legal liability or ultimate financial responsibility for a judgment in this case outweighs the relatively weak support provided by the other factors. Put simply, allowing this suit to proceed would not be an affront to New Jersey's dignity because a judgment would not be imposed against the State, and the entity that would bear legal liability has a significant degree of autonomy from the State.

Id.

In a concurrence, Judge Halligan rejected the majority's reliance on "dignity," that is, whether subjecting a state-created entity to suit in New York would offend that State's dignity as a sovereign, finding it to be misplaced and as "rais[ing] more questions than it answers." Instead, she agreed that the "'arm of the State' doctrine developed in Eleventh Amendment litigation is a useful reference point," and that NJT was not an arm of the state and cannot invoke sovereign immunity here.

Chief Judge Wilson concurred in the result but disagreed with the majority's three-part test and analysis. "Instead, the correct test is whether the function performed by the entity is what would, under customary international law and the common law, be considered a core governmental function to which sovereign immunity would have extended, such as the exercise of police powers within its own borders, the election or appointment of its own officials, or the collection of taxes." *Id.* at *34–35. Here, "[a] state-created entity operating a billion-dollar interstate transportation enterprise is not a sovereign function of any State." *Id.* at *36.

In a lone dissent, Judge Rivera concluded that NJT, as an arm of the state, may invoke sovereign immunity. Judge Rivera agreed with the majority that consideration must be given to whether this action in a New York court against NJT offends New Jersey's sovereign dignity. However, she disagreed

> that the primary consideration is whether New Jersey has disavowed "legal liability or ultimate financial responsibility" for a judgment against NJT (majority op at 16). Instead, sovereign immunity bars private suits against NJT in our courts because New Jersey: (1) regards NJT as an arm of the State; (2) empowers NJT to perform an essential governmental function; and (3) endows NJT with exclusive powers of the State in furtherance of the enabling act's statutory purpose. The latter include eminent domain, police power, and ownership of tax exempt property in the State's name. Notably, New Jersey has consented to private suit against NJT for alleged injurious conduct only in its own state courts. We are without constitutional power to ignore this choice and have no authority to demand that NJT answer for its conduct in New York. Doing so would be an act of superiority over New Jersey, in derogation of interstate sovereign immunity and an affront to New Jersey's dignity as a coequal, independent state.

Id. at *68.

Court of Appeals Holds Defendant Established That There Were Valid Agreements Containing a Forum Selection Clause

Defendant Met Burden of Proof With Sufficient Circumstantial Evidence of Authenticity

In the October 2023 edition of the *Law Digest*, we reported on the decision in *Knight v. New York & Presbyt. Hosp.*, 219 A.D.3d 75 (1st Dep't 2023), in which the First Department ruled that on a motion to change venue, the defendant failed to establish that there were valid agreements containing a forum selection clause. The Court of Appeals has now reversed. 2024 N.Y. Slip Op. 05870 (Nov. 25, 2024).

To recap the facts, the decedent fell and fractured her hip and was treated prior to her death by the defendants, a hospital, a nursing home, and Dewitt, a skilled nursing facility and rehabilitation center. The decedent was a resident at Dewitt. Plaintiff, decedent's son, as administrator of the decedent's estate, brought this personal injury action in New York County based on allegations that the decedent resided, and defendants operated, in that county.

Dewitt moved to change the venue from New York to Nassau County, arguing that the decedent had executed admission agreements with Dewitt containing a Nassau County forum selection clause. Dewitt submitted the admission agreements and the affidavit of its Director of Admissions, Francesca Trimarchi, discussing Dewitt's custom and practice. The affidavit attached what purported to be the decedent's two admission agreements Docusigned by the decedent and the facility's representative, with the decedent's initials on each page. However, the facility did not submit an affidavit from that representative or explain how the Docusign signatures were generated.

The trial court held that Dewitt had sustained its burden to show that the choice of venue provision was applicable and enforceable. A majority of the Appellate Division reversed, finding that Dewitt had not properly authenticated the subject agreement, that is, by a certificate of acknowledgment (CPLR 4538), by a comparison of handwriting (CPLR 4536), or by testimony of a person who witnessed the document signing.

The Court of Appeals reversed, holding that Dewitt had met its burden of proof with sufficient circumstantial evidence of authenticity. The Court focused on Trimarchi's testimony on Dewitt's custom and practice:

> She affirmed that the agreements were kept and maintained in the ordinary course of Dewitt's business and, while Trimarchi had no personal recollection of decedent, she confirmed that "based upon the signature" of

> a Dewitt representative, the representative "was present when [decedent] signed" each agreement. Trimarchi then described the custom and practice of Dewitt representatives during the admission process, which involves the representative meeting "with each resident to review the admission paperwork," and determining whether the resident is "oriented," "responsive and conversing appropriately." If the representative determines that the resident is oriented, the representative reviews "every page of the [a]dmission [a]greement with the resident" and then "personally witnesses the resident execute all signature pages," either by hand or electronically. According to the affidavit, the representative's signature establishes that he or she "reviewed every page of the [agreement] with [decedent]."

2024 N.Y. Slip Op. 05870 at *6–7.

The Court emphasized that the decedent's signature appeared on the last page of each of the agreements and various attachments (with her initials on each page). In addition, bold text appeared in the first paragraph of both agreements stating that "[t]he Resident hereby understand[s] and agree[s] that Admission to the Facility is conditioned upon the review and execution of this Agreement and related documents." *Id.* at *7.

With the Court finding that Dewitt carried its burden as to the authenticity of the agreements, the Court concluded the plaintiff had not raised an issue of fact establishing that the venue provisions should not be enforced:

> Plaintiff offered only an affidavit in which he claimed to be "familiar" with decedent's handwriting. Based on a summary of certain perceived inconsistencies in the signatures and initials on the agreements, plaintiff asserted that "whoever the person or people who signed and initialed these pages may have been, it was not my mother." Attached to the affirmation is an undated "exemplar" of what is purportedly decedent's signature, but no effort is made to establish that the exemplar represents decedent's signature at the relevant time. Furthermore, the exemplar is purportedly decedent's handwritten signature, and, as the Appellate Division majority noted, electronic signatures may naturally differ from handwritten ones (219 AD3d at 81).

Id. at *8–9.

The Court of Appeals also criticized the First Department's reliance on CPLR 4539 (b), entitled "Reproductions of original," which applies only to a document that originally existed in hard copy. Here, the admission agreements "'were originally created in electronic form.' That the relevant agreements were signed electronically likewise has no bearing on authenticity, as such signatures are statutorily entitled to 'the same validity and effect as . . . a signature affixed by hand' (citations omitted)." *Id.* at *10.

Determining Timeliness of Service of Motion for Leave to Appeal is Done on a Party-By-Party Basis

Service Via Filing Notice of Entry of Underlying Order on NYSCEF For Trial Court Is Effective to Start 30-Day Clock for Motion for Leave to Appeal to Court of Appeals

As we have stressed in the past, certain deadlines simply cannot be relaxed or ignored. One of those deadlines is the time to appeal. Relevant here is CPLR 5513(b), which discusses the 30-day period to move to appeal:

> The time within which a motion for permission to appeal must be made shall be computed from the date of service by a party upon the party seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry, or, where permission has already been denied by order of the court whose determination is sought to be reviewed, of a copy of such order and written notice of its entry.

In *Ruisech v. Structure Tone Inc.,* 2024 N.Y. Slip Op. 05866 (Nov. 25, 2024), the Court of Appeals dealt with the interplay of that section and electronic filing issues. First, the Court noted a very important point: the timeliness of a motion for leave to appeal must be determined on a party-by-party basis. Thus, each party appealing should make sure that they move in a timely fashion with respect to each other party.

Next, the Court stated that to determine timeliness, service must comply with CPLR 2103. In turn, subsection (b)(7) permits electronic service where authorized by the chief administrator of the courts. That authority is found in the Uniform Rules for Trial Court, 22 N.Y.C.R.R. § 202.5-b, and particularly relevant here, subsection (h)(2), which provides that: "A party shall serve notice of entry of an order or judgment on another party by serving a copy of the order or judgment and written notice of its entry. A party may serve such documents electronically by filing them with the NYSCEF site and thus causing transmission by the site of notification of receipt of the documents, which shall constitute service thereof by the filer."

In *Ruisech*, the Court noted that these rules

> are not limited to service of trial court orders; and they neither prohibit nor render ineffective service of an intermediate appellate court order with notice of its entry by filing on the trial court's NYSCEF docket—as opposed to the NYSCEF docket of the intermediate appellate court (see generally CPLR 2103 [b] [7]; 5513 [b]; 22 NYCRR 202.5-b–202.5-bb). Thus, in an electronic filing case, service via filing on the NYSCEF docket for the trial court is effective to start CPLR 5513 (b)'s 30-day clock.

Id. at *2.

Here, the plaintiffs made their motion for leave to appeal before the Court of Appeals 31 days after the defendant Structure Tone filed on the trial court's NYSCEF docket. Thus, that appeal was untimely. The motions for leave to appeal as to the other defendants, however, were timely.

Is the Failure to File the Initiating Pleadings a *Non-Waivable* Jurisdictional Defect?

Three of Four Appellate Division Departments Appear to Believe So, But a 2011 Court of Appeals Decision Raises Doubts

When commencement by filing was adopted, at least one of the advantages was the ability to stop the clock on the running of the statute of limitations. Rather than having to locate and properly serve a defendant, the relative ease of filing the initiating pleadings with the county clerk was a welcome change. Nevertheless, problems arose. Some problems related

to the failure to pay the index number fee. Others related to the failure to file the initial pleadings with the proper clerk (that is, the county clerk). *See Mendon Ponds Neighborhood Association v. Dehm,* 98 N.Y.2d 745 (2002). The index number problem was, for all intents and purposes, alleviated by a 2007 amendment to CPLR 2001, providing that the court has the discretion to forgive this failure to pay the index number fee and must disregard it if "a substantial right of a party is not prejudiced," contingent on the payment of the proper fee. While counsel has been able, for the most part, to locate the proper clerk, there continue to be instances where the proper pleadings are not filed.

Significantly, three of the four Appellate Division departments have ruled that the failure to file the initiating pleadings is a *non-waivable* jurisdictional defect. *See e.g., Ghiazza v. Anchorage Mar., Inc*., 210 A.D.3d 1328 (3d Dep't 2022) (failure to file a summons with notice or summons and complaint held to be a nonwaivable, jurisdictional defect, not subject to correction under CPLR 2001, and rendering the action a nullity); *Matter of Heffernan v. New York City Mayor's Off. of Hous. Recovery Operations*, 196 A.D.3d 426 (1st Dep't 2021), *lv denied* 38 N.Y.3d 904 (2022) ("failure to file the papers required to commence a proceeding constitutes a nonwaivable, jurisdictional defect (citation omitted)"; failure not subject to correction under CPLR 2001); *DiSilvio v. Romanelli*, 150 A.D. 3d 1078, 1079 (2d Dep't 2017) ("The failure to file the initial papers necessary to commence an action constitutes a nonwaivable, jurisdictional defect, rendering the action a nullity (citations omitted)").

Conversely, the Fourth Department has held that such a failure is a *waivable* defect in personal jurisdiction. *See Holst v. Liberatore,* 115 A.D.3d 1216 (4th Dep't 2014) ("Plaintiffs' failure to file a summons was a defect in personal jurisdiction, which defendants waived by failing to raise it in their answer or amended answer (citation omitted)").

More recently, in *Matter of K & M Motors, Inc. v. State of New York Dept. of Motor Vehicles,* 2024 N.Y. Slip Op. 05695 (4th Dep't Nov. 15, 2024), the Fourth Department held the filing error, here a failure to file a petition, to be a "defect in personal jurisdiction, which respondents waived by failing to raise it in their answer." Interestingly, the court cited to the Court of Appeals' decision in *Goldenberg v. Westchester County Health Care Corp*., 16 N.Y.3d 323 (2011), as a "*cf.*" There, the plaintiff had served the summons and complaint without filing them. The Court affirmed the dismissal of the action but noted that the defendant did not waive its objection to the filing error, thereby implying that a defect in filing may be waivable. *See Weinstein, Korn & Miller, New York Civil Practice* ¶ 304.04 (David L. Ferstendig, ed. 2024).

Appellate Division Rejects Argument That Order Below Was Not Appealable Because It Was Entered Upon Default

Regardless, Denial of Request for Adjournment Was Subject of Contest and Appealable

CPLR 5511 states that "[a]n aggrieved party or a person substituted for him may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party." *Matter of Betz v. Betz*, 2024 N.Y. Slip Op. 05713 (4th Dep't Nov. 15, 2024) was a Family Court proceeding, in which the petitioner father was awarded sole custody of the subject child. The court had denied the respondent mother's counsel's request for an adjournment and "proceed[ed] by default" after the mother came late to the hearing with respect to the father's modification petition. The child's attorney argued that the Family Court order was not appealable since it was entered upon default. The Fourth Department rejected the argument, holding that the order was not made on default and thus was appealable:

> While the mother was not present in the courtroom at the start of the proceeding, she arrived at a point when the court had not yet addressed the father's modification petition relating to the subject child. The court engaged in a discussion with the mother, the father, and the AFC with respect to a proposed resolution awarding sole custody of the subject child to the father and specifying the mother's access to the subject child. It was only after the mother's counsel represented that the mother would not agree to the proposed resolution that the court ordered the mother out of the courtroom. Moreover, the order appealed from does not reflect that it was made on default, but rather states that the mother appeared personally and by her attorney.

Id. at *2.

In addition, even if the order was on default, the appellate court could address the lower court's denial of the mother's request for an adjournment, since that was contested below.

CPLR 2214(c) and Referencing Previously E-Filed Documents by Docket Number

Court Permits Reference to Documents Filed in *Prior* Proceeding

Electronic filing has eased the way practitioners file papers, reduced or eliminated the issues surrounding possible service problems, and made access to the court file simple and efficient, among other advantages. A 2014 amendment to CPLR 2214(c) provided further ease by permitting a party, in an e-filed case, to refer in motion papers to previously e-filed documents by docket number. Thus, counsel no longer needs to "attach" every document to his or her papers. Generally, this applies to papers previously e-filed in the *same* action.

However, in *Matter of Dubuche v. New York City Tr. Auth*., 230 A.D.3d 1026 (1st Dep't 2024), the Appellate Division ruled that the trial court properly considered electronically filed documents referenced by docket number on the e-filing system from a *prior* proceeding. In addition, the trial court had discretion under CPLR 2001 to consider the same documents petitioner subsequently annexed to his reply papers.

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