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

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## CASE LAW DEVELOPMENTS

### Majority of Court of Appeals Holds That a Foreign Corporation's Business Registration Does Not Constitute Consent to General Jurisdiction

#### Court Rests Conclusion on New York Law and Thus Does Not Address Federal Due Process Issues

In *Aybar v. Aybar*, 2021 N.Y. Slip Op. 05393 (October 7, 2021), the Court of Appeals resolved the issue as to whether a foreign corporation's compliance with New York's business registration statutes constitutes consent to general jurisdiction. A majority of the Court answered "no" to that question, but it appears that this may not be the end of it, or in the words of Yogi Berra: "It ain't over till it's over."

To set the scene: In *Daimler AG v. Bauman*, 571 U.S. 117 (2014), and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), the United States Supreme Court dramatically changed the criteria necessary to apply general jurisdiction to a defendant. Significantly, the Court divested itself of the prior "doing business" standard applicable to corporations, instead opting for an "at home" analysis. A domestic corporation or a corporation whose principal place of business is in the forum state meets the standard. An "exceptional case" is also possible, but magicians and deep-sea divers have found it difficult to locate one of those.

What we are concerned with in *Aybar* is whether a foreign corporation's seeking authorization to do business in New York by complying with the registration statutes and designating a local agent for service of process in New York subjects that corporation to general (all purpose) jurisdiction. That would appear not to pass muster under the new "at home" standard, but the issue arose as to whether it would constitute acceptable consent jurisdiction. Three Departments of the Appellate Division held that it did not, and a majority of the Court of Appeals here affirmed the Second Department, holding that the registration process constituted consent to in-state *service*, not to general jurisdiction.

The majority rested its position solely on New York law. First, it noted that the relevant Business Corporation Law provisions do not expressly condition the corporation's right to do business on consent to general jurisdiction. In addition, it insisted that its prior pronouncement in *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432 (1916) was very narrow and did not decide the issue here. Instead, it "was limited to the effect of service of process to which a foreign corporation consented; we did not determine that a foreign corporation consented to general jurisdiction by registering to do business and designating an agent for service of process." *Aybar,* 2021 N.Y. Slip Op. 05393, at *7. The majority explained that, when *Bagdon* was decided, *Pennoyer v. Neff's* "territorial approach" to jurisdiction prevailed:

> We examined this effect-of-service question through the lens of the then-applicable jurisdiction principles and in light of the fact that the defendant's presence in New York was not in dispute. Indeed, the defendant conceded that it was doing business in New York, had registered to do business here, and had consented to service under the then-governing General Corporation Law by designating an in-state agent to accept service. We ultimately held that the effect of the in-state service on the defendant's designated agent was to provide New York courts with what we would now term "general jurisdiction" or, as Judge Cardozo described it in the parlance of the time, the defendant was "subject to the rule that transitory causes of action are enforceable wherever the defendant may be found." That is, the Court determined that jurisdiction existed not because the corporation "consented" to it, but because then existing Supreme Court precedent established, consistent with *Pennoyer v Neff's* territorial approach, that in-state service on a foreign corporation present in the state afforded general jurisdiction (citations omitted).

*Id*. at *9–10.

The Court asserted that the *Bagdon* decision has been misinterpreted and that it only held that, where the defendant's presence in New York was not disputed, its appoint-

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ment of a local agent for service of process had the effect of conferring general jurisdiction. The Court explained that *Bagdon* was decided well before the seminal decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and the adoption of long-arm jurisdiction over a defendant not situated in the state:

> In *Bagdon*, the defendant's consent to service of process had the effect of conferring general jurisdiction because, at that time, in-state service of process on a designated agent of a foreign corporation that was doing business in New York was itself sufficient to permit the exercise of general jurisdiction over the defendant. Thus, there was no need to rely on a consent to jurisdiction rationale in *Bagdon*, and our decision did not include any such analysis. We have never conflated statutory consent to service with consent to general jurisdiction, and the fact remains that, under existing New York law, a foreign corporation does not consent to general jurisdiction in this state merely by complying with the Business Corporation Law's registration provisions.

*Id*. at *17.

The majority made it clear that, since its conclusion was based on New York law, it was not opining on federal due process issues. It did not address proposed New York legislation passed by both houses, but yet to be signed by the governor, expressly stating that registration constitutes consent to general jurisdiction. (We will deal with this issue below.)

The dissent argued that *Bagdon* did *confirm* that such business registration constituted consent to general jurisdiction. In fact, subsequent courts and scholars who have read it that way are correct, not the majority here. 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." *Id*. at *34. Moreover, to the extent that *Daimler* and *Goodyear* contracted general jurisdiction, those holdings did not implicate consent jurisdiction.

### The Proposed Legislation: This Issue is Far From Being Put to Rest

As noted above, there is currently legislation that has passed both houses and is awaiting the governor's signature. Relevant here is the addition of BCL § 1301 (e), among other provisions, which reads as follows:

(e) A foreign corporation's application for authority to do business in this state, whenever filed, constitutes consent to the jurisdiction of the courts of this state for all actions against such corporation. A surrender of such application shall constitute a withdrawal of consent to jurisdiction.

If this legislation becomes law, it will still be subject to attack on federal due process grounds. One could argue that *Daimler* and *Goodyear* did not impact a consent-type jurisdictional predicate. On the other hand, are all "consents" the same?

A forum selection clause entered into between two parties as part of an overall agreement—even taking into account the sometimes unequal bargaining position of the parties—may not be comparable to the consent *mandated* by the statutes here. In order for a foreign corporation to do business in New York, it *must* file and would thus consent to general jurisdiction under the new proposed law. That is a far cry from what one would describe as typical "consent." The dissent in *Aybar* attempts to deal with this "coercion" argument by stating that a foreign corporation can simply choose not to register, with the only penalty being that the company could not bring suit in New York until it properly registers. (As noted by the dissent, there is also a limited and apparently little used right of the Attorney General to bring suit.)

This brings up another issue. Some foreign corporations are not the mega companies that do business in multiple states. In fact, many are smaller companies. It could be, for example, a New Jersey company that might want to do some business in New York. Should such a company consider declining to file or withdraw its consent as the dissent in *Aybar* discussed? And, if that happens on a massive scale, is New York content with many foreign corporations doing business here without filing?

## Court of Appeals Judges Disagree as to Whether Defendant Established That His Principal Office Was in Westchester

### Majority Holds Defendants Entitled to Change of Venue from Bronx to Westchester County

Generally, CPLR 503(a) provides that venue in a transitory action, as opposed to a real property action or action to recover chattel, is determined by residence, or where "a substantial part of the events or omissions giving rise to the claim occurred." CPLR 503 also deals with the "residence" of non-individuals, such as corporations (503(c)) and unincorporated associations, partnerships, or individually owned businesses (503(d)).

Specifically, what we are interested in here is the residence, for venue purposes, of an individually owned business which is "deemed to be a resident of any county in which it has its principal office, as well as the county in which the . . . individual owner suing or being sued actually resides." CPLR 503(d).

In *Lividini v. Goldstein*, 2021 N.Y. Slip Op. 05618 (October 14, 2021), the plaintiff, a Westchester resident, brought a podiatric malpractice action in Bronx County. She sued defendants Rye Ambulatory Surgery Center and owner/operator Westmed, both situated in Westchester County, and Dr. Goldstein, who was alleged to be Westmed's "agent, servant, and/or employee." While Dr. Goldstein was also a Westchester County resident—wait for it—plaintiff's claim of proper venue in the Bronx was based on the argument that Dr. Goldstein was an "individually owned business" with a "principal office" in the Bronx. It is this latter contention that is the core of the dispute here involving defendants' motion to change venue to Westchester County.

The defendants argued that the Bronx venue was improper and that Dr. Goldstein's true and actual residence and principal office were both located in Westchester County. To support that proposition, defendants submitted an affidavit from Dr. Goldstein averring that he saw patients for 3 ½ days each week at Westmed's Westchester County offices, treating 350 to 400 patients per month and deriving 75% of his income there. The affidavit conceded that he was also employed in a Bronx Hospital supervising podiatric residents two afternoons a week, overseeing the care of approx-

imately 150 patients a month and cared for 20 to 25 patients a month at another Bronx location.

In opposition, the plaintiff pointed to a Bronx mailing address provided by Dr. Goldstein for professional licensing purposes to the New York State Education Department. A narrow majority of the Court of Appeals reversed the Appellate Division order denying the defendants' motion, holding that the defendant's submission through the Goldstein affidavit "averring that he spent substantially less time and cared for substantially fewer patients in the Bronx than in Westchester County supported defendants' assertion that his 'principal office' was in Westchester County—not the Bronx." *Id*. at *3.

The Court found that the address provided by Dr. Goldstein to the licensing authority was not dispositive of where he maintained his "principal office" for the purposes of CPLR 503(d):

> There is no basis in the record to infer that Dr. Goldstein was ever required to identify (or in fact identified) any particular county as the location of his principal office, a designation not contemplated in the relevant professional licensing statutes. While the registration documents confirmed the undisputed fact that Dr. Goldstein also worked in the Bronx, the venue statute does not deem an individually-owned business a resident of every county where it has an office or transacts business. To conclude otherwise would read the phrase "principal office" out of the statute (citations omitted).

*Id*. at *4.

The dissent, written by Judge Rivera, found that the defendants had not carried their initial burden to affirmatively establish that Bronx County was an improper venue. She concluded that the Goldstein affidavit "failed to identify his principal office from among the several locations where he practices in both counties nor did it reveal that he repeatedly designated a Bronx County hospital as his business address on his medical license registration, much less explain why this location is not his principal office." *Id.* at *5.

Judge Rivera noted that the Court had not ruled as to whether CPLR 503(d) applied to a doctor who registers for a license as an individual practitioner, although lower courts and legal commentators have uniformly applied the statute to individual medical practitioners. Since the defendants had not challenged this interpretation, "we should assume its application" for this appeal. The dissent found that the Goldstein affidavit did not meet the defendants' burden on this motion. First, his reference to a "*principal place* of business" in Westchester cannot be equated with the phrase "principal office" in the statute. In fact, "Dr. Goldstein identified no fewer than six locations where he practices within Bronx and Westchester counties, but he failed to assert which location was his practice's principal office—even while admitting that he practiced at more than one location in Bronx County, including at a hospital supervising residents." *Id*. at *12.

Moreover, even if the defendants carried their burden, the dissent maintained that the plaintiff rebutted the defendants' claim. Judge Rivera insisted that the address provided by Dr. Goldstein for licensing purposes was relevant to the analysis of his principal office for venue purposes:

> Dr. Goldstein failed to submit an affidavit that his publicly available business address on his license to practice medicine in New York State is only a mailing address where he does not otherwise engage in the practice of podiatric medicine sufficient to treat it as his principal office. To the contrary, the registration address is also the location of the Bronx County hospital where Dr. Goldstein supervises residents who attend 150 patients per month at two clinics.

*Id*. at *16.

## The "Pure" CPLR 3211(a)(7) Motion to Dismiss for Failure to State a Cause of Action

### Does the Complaint Adequately Allege Facts Giving Rise to a Cause of Action?

In the past, I have dealt with a CPLR 3211(a)(7) motion in which defendant's extrinsic evidence is/can be considered and whether the plaintiff *has* a cause of action. *See e.g.*, *Does the Plaintiff Fail to State a Cause of Action or Simply Have None?*, 654 N.Y.S.L.D. 4 (2015).

Here, I review your 3211(a)(7) motion directed at the pleadings only, where consideration of defendant's extrinsic evidence is not an issue. What standard applies? What are the guidelines?

- The court is required to "give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference." *Chanko v. American Broadcasting Cos. Inc.*, 27 N.Y.3d 46, 52 (2016).
- The court determines whether the facts alleged "fit within any cognizable legal theory."
- "[T]he question is whether the complaint adequately alleged facts giving rise to a cause of action, 'not whether [it] properly labeled or artfully stated one.'" *Sassi v. Mobile Life Support Servs., Inc.*, 2021 N.Y. Slip Op. 05449 at *4 (October 12, 2021) (citations omitted).

In *Sassi*, the issue was whether the plaintiff adequately pleaded causes of action under Correction Law article 23-A and Executive Law § 296(15). Those provisions are intended to protect individuals convicted of criminal offenses from unlawful discrimination in employment or licensing. Specifically here, the Court was asked whether the plaintiff adequately pled that his former employer (defendant) violated the statutes based on the defendant's denial of plaintiff's application for employment *after* he completed his criminal sentence. Note that when the plaintiff first applied for employment, he advised his employer that he was facing a misdemeanor charge. Plaintiff was convicted during his employment. Ultimately, the Court of Appeals held that the lower courts erred in granting defendant's CPLR 3211(a)(7) motion to dismiss.

The Court noted that that the statutes here did not categorically preclude the consideration of a prospective employee's criminal history and permitted the denial of employment under certain circumstances. What made the facts in this case stand out is that the plaintiff here requested *re-employment* with his pre-incarceration employer, a scenario "the legislative history suggests . . . the legislature may not have considered." *Id.* at *6.

The Court did not find this troubling, instead concluding that "[n]othing in the statutory language, scheme, or legislative history indicates that the legislature intended for article 23-A or Executive Law § 296 (15) to exempt a previous employer from the reach of those statutes. . . . Thus, this case does not

fall outside the scope of the antidiscrimination statutes merely because plaintiff previously worked for Mobile Life." *Id.* at *7.

Moreover, the Court disagreed with the defendant's contention that the plaintiff did not adequately plead a post-conviction "application." The Court maintained that the statutes did not define the term "application," that "the word is reasonably interpreted to refer to a request for employment," and that employment applications can take various forms depending on the industry, and the underlying facts, normal course of conduct and circumstances:

> In this case, plaintiff alleged that he was terminated for job abandonment soon after he was incarcerated. Applying our liberal standard, the complaint further may be read to allege that, after he completed his sentence, he applied for reemployment in the dispatcher position that he previously held, and Mobile Life denied the application solely because of the prior conviction.

*Id*. at *8.

Finally, the Court rejected the defendant's argument that the plaintiff's allegations amounted to a discriminatory termination "and not a post-conviction employment application." Instead, it found plaintiff's allegations to be "adequate":

> To be sure, throughout this litigation plaintiff acknowledged that, upon his incarceration, he could be lawfully terminated by Mobile Life. In a scenario like this, a plaintiff's complaint must allege facts supporting the inference that an application for employment was made and denied—and not merely that there was protest of a termination decision—because these statutes do not preclude an employer from lawfully terminating an employee such as plaintiff who by virtue of his conviction and sentence could not report to work. At this pre-answer stage of the litigation, we conclude only that plaintiff's allegations in that regard were adequate.

*Id*. at *9–10.

## Extreme Dilatory Conduct Results in Denial of CPLR 306-b Motion to Extend the Time to Serve

### Interest of Justice Standard Gives Court Discretion, But Do Not Press Your Luck

CPLR 306-b provides that service must be made within 120 days of commencement, unless the statute of limitations is four months or less. In that case, service must be done "not later than fifteen days after the date on which the applicable statute of limitations expires." Failure to effect service in a timely fashion can result in dismissal of the action, unless the court extends the time "upon good cause shown or in the interest of justice."

With respect to the "good cause shown" standard, reasonable diligence in attempting service is a threshold requirement. The "interest of justice" standard, however, does not require the showing of such diligence as a prerequisite to its application, but is considered one of the factors, among others. They include the expiration of the statute of limitations, the meritorious nature of the action, the length of delay in service, the promptness of the plaintiff's request for the extension, and prejudice to the defendant. *Leader v. Maroney, Ponzini and Spencer*, 97 N.Y.2d 95, 105–06 (2001).

This is a discretionary determination of the trial judge, which will be upheld in the absence of an abuse of discretion. A recent case confirms that one of the key issues courts consider is the plaintiff's dilatory conduct.

In *JPMorgan Chase Bank N.A. v. Kelleher*, 188 A.D.3d 1484 (3d Dep't 2020), plaintiff commenced a mortgage foreclosure action in 2009, but the defendant did not answer or appear. In 2014, the trial court granted plaintiff's motion for a default judgment and an order of reference. More than two additional years later, the plaintiff moved for a judgment of foreclosure and sale, and the defendant cross-moved for dismissal for lack of personal jurisdiction based on improper service of the complaint. After the trial court reserved decision, ordered a traverse hearing, and numerous adjournments of the hearing followed, plaintiff stated that it could not locate its process server and thus could not meet its burden of establishing proper service. In November 2018, plaintiff then moved for a CPLR 306-b extension of time, which motion the trial court denied, instead granting defendant's cross-motion to dismiss.

On appeal, a majority of the Appellate Division affirmed, finding there to be no abuse of discretion. While acknowledging that the statute of limitations' expiration prior to plaintiff's extension motion weighed in favor of granting the motion, plaintiff's "pattern of dilatory conduct throughout the action's pendency over nearly a decade," supported the trial court's denial of the motion:

> Indeed, it took plaintiff roughly three years after commencing the action to file a request for judicial intervention and the case was administratively closed by Supreme Court on at least one occasion. Additionally, despite having been made aware of the service issue in April 2016, plaintiff did not ultimately move for an extension to serve the complaint until November 2018, roughly 2½ years later. Further, as Supreme Court recognized, the mortgage contains a significant error, which raises real concerns as to plaintiff's ability to prevail upon the merits. In our view, Supreme Court weighed the appropriate factors and reasonably concluded that they did not militate in favor of plaintiff (citations omitted).

*Id*. at 1486.

The Court of Appeals affirmed in a very brief opinion, merely stating that the trial court did not abuse its discretion in denying plaintiff's motion. 2021 N.Y. Slip Op. 05451 (October 12, 2021).

It is easy to say, based on this decade long and winding road: that ain't me, I would never do that. However, there have been too many reported cases of unnecessary delay in commencement and service, and lesser infractions are frequently not tolerated. So, it is worthwhile here to reiterate that acting with alacrity never hurt anyone. Commence your action promptly and well within the limitation period. This act alone will save you time and aggravation and avoid your having to wonder whether you committed a forgivable or jurisdictional error. Immediately after commencement, arrange for service. If done early within the 120-day period, most service issues will be mooted. When faced with a defendant's motion to dismiss under CPLR 306-b, the better practice is to cross-move for an extension at the same time that you oppose the motion, in the event that service is found to have been ineffective. Following these simple rules will, in most cases, remove the stress and potential devastating consequences of commencement and service errors.



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