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EDITOR: DAVID L. FERSTENDIG

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

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CASE LAW DEVELOPMENTS

Unanimous Court of Appeals Affirms Annulment of Permits

But Remits Matter to Determine the Extent of Respondent's Prior Nonconforming Use

Environmental Conservation Law (ECL) § 23-2703(3) bars the Department of Environmental Conservation (DEC) from considering an application for a mine in a county "with a population of one million or more which draw their primary source of drinking water for a majority of county residents from a designated sole source aquifer, if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined." The issue in *Matter of Town of Southampton v. New York State Dept. of Envt'l Conservation,* 2023 N.Y. Slip Op. 00689 (Feb. 9, 2023), concerned whether ECL § 23-2703(3) prevents the DEC from processing *all* applications for permits to mine in covered counties, including applications for renewal and modification. Significantly, it was undisputed that (i) the petitioner here has a local law prohibiting mining in the Town of Southampton (Town); and (ii) Suffolk County, where the relevant mine is located, is an area with a population of over one million that draws its primary drinking water from a sole source aquifer.

The respondent Sand Land Corporation (Sand Land) is the owner of and operates a sand and gravel mine situated on a 50-acre parcel of property in the Town of Southampton, in Suffolk County. The mine has been operating continuously since the 1960s, when the zoning code permitted mining with a required permit. In 1972, the Town rezoned the area where the parcel is located to a residential district where mining is prohibited. In 1981, Sand Land's predecessor in interest obtained a Mined Land Reclamation Permit (MLRP) from the DEC. The permit was renewed in 1985 and in 1998, when it was transferred it to Sand Land. It authorized mining on 31.5 acres to a depth of 160 feet above mean sea level (amsl). In 2011 and 2016, Sand Land sought and obtained from the Town certificates of occupancy, stating that the site's use as a sand mine was a prior nonconforming use.

In 2014, Sand Land applied to the DEC to modify the permit by expanding the mine both horizontally and, more critically, vertically by 40 feet, considering its location above the sole source aquifer. After years of administrative proceedings that denied the proposed expansion, the DEC entered into discussions with Sand Land, resulting in the DEC's grant of permission for the vertical expansion and an additional three-acre horizontal expansion.

The petitioners, the Town, several civic and environmental organizations, and neighboring landowners commenced this CPLR article 78 proceeding seeking to annul the DEC's amended negative declaration, issuance of a renewal permit, and the settlement agreement. It also sought to enjoin the DEC from processing Sand Land's modification application.

The trial court denied the petition and dismissed the proceeding, finding no violation of ECL § 23-2703(3). A majority of the Appellate Division modified, holding that "the act of issuing the permits here, in contravention of ECL 23-2703 (3), was arbitrary and capricious."

A unanimous Court of Appeals modified the Appellate Division order, agreeing that the permits should be annulled, but disagreeing on the reasons for its determination:

> We hold that DEC may process renewal and modification applications when such applications seek to mine land that falls within the scope of an undisputed prior nonconforming use. The applications at issue implicate some prior nonconforming uses that are undisputed and others that are disputed but not yet resolved. Because prior nonconforming use was not taken into account by either DEC or the courts below, we modify and remit for further proceedings.

Id. at *1.

IN THIS ISSUE

The Court noted that the "plain language" of ECL § 23-2703(3) demonstrates an intent that it applies both to applications for new mining permits as well as modification and renewal applications. The section's language merely refers to an "application," with no indication that it was limited to new mines. Moreover, the term "permit" is defined elsewhere in the ECL to include a renewal or modification.

In addition, the Court looked for support in the statute's limited applicability and the circumstances of its enactment. ECL § 23-2703(3), by its terms, is limited "to counties with a population of one million or more that draw their primary source of drinking water from a designated sole source aquifer." Thus, the legislative purpose was to protect the drinking water in the applicable counties, which are limited to Nassau and Suffolk, "two of the state's largest and most densely populated counties" which "have the lowest quality drinking water." *Id.* at *10.

The Court pointed out that there were local laws back in 1972 that prohibited new mines in these counties. Thus, when ECL § 23-2703(3) was enacted, new mines were already prohibited. As a result, the addition of subdivision (3) was intended to include the *expansion* of existing mines.

The Court rejected Sand Land's argument that applying the statute to modification or renewal applications would be constitutionally infirm because it would infringe on the property rights of owners of lands having a prior nonconforming use. The Court acknowledged that where there is a nonconforming use of real property when a restrictive zoning ordinance is enacted, it is constitutionally protected and will be permitted to continue, despite an ordinance's contrary provisions. However, it noted that ECL § 23-2703(3) does not prohibit mining in any particular location; in fact, it "implicitly contemplates that a mining applicant may have prior non-conforming use rights and requires DEC to defer to local town zoning laws when reviewing applications for mining permits." *Id.* at *13. The Court emphasized that this reading of the statute comported with the facts in this case after the statute's enactment, including the Town grant of certificates of occupancy stating that the site was a prior nonconforming use and the numerous renewal permits granted to Sand Land (and to other Long Island mines).

Significantly, the Court rejected Sand Land's argument that mine owners have a constitutional right to mine in their area to *any depth* whatsoever, limited only by the DEC's safety regulations:

> Never have we stated that owners' vested rights are unlimited with regard to either the breadth or the depth of a mine. Instead, we have inquired into the extent to which the mine owner demonstrated an intention to mine the relevant portions of the property, regardless of the direction of the expansion in question.

Id. at *15.

Thus, the Court concluded that (1) the statute only protects against further expansion of the mine beyond the permissible nonconforming use; and (2) the dispositive questions were "whether Sand Land manifested an intent to mine the additional acres and the expanded depth it sought in its permit applications, and the extent to which the Town recognized Sand Land's use of the parcel." *Id.* at *16.

Because of the decisions below, however, this precise issue – that is, the extent of Sand Land's prior nonconforming use – had never been decided. Thus, while the Court agreed that the permits needed to be annulled, it remitted the case to the trial court to remand to the DEC to

> first ascertain from the Town, in a manner consistent with this opinion, whether Sand Land's proposed use is within the scope of any prior non-conforming use. Ultimately, ECL 23-2703 (3) will bar DEC from processing any application that seeks to mine beyond the scope of prior nonconforming use. Should Sand Land disagree with the determination of the scope of its prior nonconforming use, it can litigate that issue in the proper forum for resolving local zoning disputes (citation omitted).

Id. at *17–18.

Tax Foreclosure Proceeding Is In Rem Action Against Taxable Real Property, Not In Personam Action Against an Individual

Court of Appeals Resolves Conflict

In the September 2021 edition of the *Law Digest*, we referred to the Fourth Department decision in *Hetelekides v. County of Ontario*, 193 A.D.3d 1414 (4th Dep't 2021), ruling that a tax foreclosure proceeding is not a nullity from its inception, where the action is "commenced against" a deceased person. Critical to its decision, and what placed it at odds with the Second Department, was its determination that a tax foreclosure proceeding is an in rem and not an in personam proceeding. The Court of Appeals has now ruled, affirming the Appellate Division decision, expressly rejecting the Second Department's reasoning. 2023 N.Y. Slip Op. 00803 (Feb. 14, 2023).

The Court rejected the plaintiff's claim that the tax foreclosure proceeding was a nullity. It noted that the plaintiff's position here reflected a misunderstanding of "the difference between in rem and in personam jurisdiction, and a conflation of those differences with respect to notice requirements." Significantly, an in rem action proceeds against specific property, the court obtains jurisdiction over the property (the "res"), and the objective "is to have the court define the rights therein of various and conflicting claimants." In contrast, an in personam action is brought against a person (not property) to determine personal rights and obligations. The Court noted that it has recognized that a foreclosure action is "'is in the nature of a proceeding in rem to appropriate the land' (citation omitted)." *Id.* at *11.

The Court rejected plaintiff's reliance on the Second Department decision in *Matter of Foreclosure of Tax Liens,* 165 A.D.3d 1112 (2d Dep't 2018), and the contention that decisions of the U.S. Supreme Court and this Court have dissolved the distinction between in rem and in personam actions:

> That argument is meritless as it proceeds from a misunderstanding of fundamental legal principles regarding jurisdiction and notice. First, the assumption that a civil

> action or proceeding must be brought against a person is ahistorical and contrary to established law. Both this Court and the Supreme Court have continued to recognize the "usefulness of distinctions between actions in rem and those in personam in many branches of law." Of course, a dead person cannot be sued but, as long understood, an action in rem, like the tax foreclosure proceeding here, is not an action against a person, but rather the subject property on which the tax was charged and due. Put another way, the County did not sue the owner of the property; it merely took steps to notify the owner and others with a potential interest in the property so that they could protect their interests if they so chose (citations omitted).

Id. at *12–13.

Majority of Court of Appeals Reverses Lower Courts' Grant of Dismissal on Jurisdictional Grounds

Finds Defendant Subject to Specific Jurisdiction Under CPLR 302(a)(1)

In *State of New York v. Vayu, Inc.*, 2023 N.Y. Slip Op. 00801 (Feb. 14, 2023), the Court of Appeals was dealing with CPLR 302(a)(1), which provides, in relevant part, that "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state." CPLR 302 is New York's long arm statute dealing with specific jurisdiction, and a key element is that the cause of action arise out of the in-state activity. Here, defendant Vayu, Inc. is a Delaware corporation headquartered in Michigan that designs and manufactures unmanned aerial vehicles (UAVs). It sold two UAVs to the State University of New York at Stony Brook (SUNY) to deliver to SUNY Stony Brook's Global Health Institute in Madagascar. When there was a dispute concerning the UAVs' operability, plaintiff State of New York brought this action on behalf of SUNY, for breach of contract, among other claims. Vayu moved to dismiss the complaint for lack of personal jurisdiction, the trial court granted defendant's motion, and a divided Appellate Division affirmed.

A majority of the Court of Appeals reversed. It reviewed the criteria to consider on such a motion, including to assess whether the defendant's activities in the state are purposeful, defined as "volitional acts by which the non-domiciliary avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Significantly, the "quality" of the defendant's contacts must be evaluated.

Here, the relevant jurisdictional facts, as characterized by the majority, were that in 2013, defendant's chief executive officer contacted a visiting research professor not yet affiliated with SUNY Stony Brook (Dr. Peter Small) about using UAVs to carry medical supplies and specimens. After the professor began working at SUNY in 2015, he contacted the CEO "seeking a business relationship between [Vayu] and SUNY" to develop the use of UAVs. From 2015 through 2017, the CEO communicated with the professor and other SUNY representatives through telephone calls to SUNY phone numbers, emails to SUNY email addresses, and then through a face-to-face meeting in New York. These discussions referenced the development of UAVs to be sold to SUNY *and* broader partnership opportunities. The defendant and SUNY worked together to submit a grant application to the United States Agency for International Development (USAID), in which the defendant described SUNY as a "partner" and identified the professor as a key member of "its team." The application proposed a two-year budget, with SUNY receiving approximately $85,000 per year for costs in an effort to supply 10 UAVs to Madagascar. USAID approved the grant proposal.

SUNY purchased two UAVs from the defendant for $25,000 each, defendant forwarded an invoice to SUNY at a New York post office address, and defendant accepted a New York wire payment from SUNY. The invoice attached a note from the defendant stating "[w]e can discuss down the line whether [Small] would like these shipped to NY, or on [SUNY Stony Brook's] behalf to Madagascar." After the drones were shipped from Michigan directly to Madagascar, problems arose with the two UAVs' operation, and defendant's employees and SUNY representatives tried to resolve the issues by telephone and email. In addition, the CEO met with the professor in New York and agreed to move forward on terms set forth in emails. The parties also discussed "an ongoing business relationship and future opportunities." In November 2017, SUNY returned the two UAVs to the defendant in Michigan, but the defendant failed to replace them or provide a refund.

Based on this record, a majority of the Court found that the defendant engaged purposefully in business activities within the meaning of CPLR 302(a)(1), by "projecting itself" into New York via calls and emails over a two-year period resulting in the sale of two UAVs. These communications established that "Vayu purposefully sought to establish a substantial ongoing business relationship with SUNY Stony Brook." *Id.* at *5. The Court also characterized the New York meeting as "significant."

Responding to the lower courts' conclusions, the Court of Appeals insisted that the communications did not relate merely to a sale of two drones but also to a continuing business relationship, and that this was not a situation "where plaintiff responded to a 'passive website[],' but rather involved an active dialogue between principals based on earlier personal contact." Reacting to the trial court's characterization of the defendant's contacts as "predominantly responsive in nature," the Court countered that while "defendant's initiation of contact with New York is a relevant factor in the purposeful availment analysis, it is not determinative." *Id.* at *7.

The Court of Appeals also disputed the Appellate Division conclusion that the New York visit by the CEO concerned the completed purchase of the UAVs, "rather than seeking additional business from SUNY Stony Brook or other entities in New York." In fact, the meeting was part of a "far reaching and long-standing relationship." *Id.* at *9.

In addition, the Court concluded that there was the required nexus because "[p]laintiff's claims are based on the sale of the two UAVs, and Vayu's contacts in New York were directly related to efforts to resolve the dispute over operability of the

purchased UAVs." *Id.* at *9–10. Finally, the majority found that the due process requirements had been met:

> Vayu sought, negotiated, and then entered a contractual relationship with a New York State entity. Vayu furthered that relationship through numerous telephonic and email communications with SUNY Stony Brook and continued negotiations over terms of the deal when Vayu's CEO visited New York and met with Small in 2017. Vayu's 2016 grant application to USAID, describing SUNY Stony Brook as a "partner" and projecting a two-year budget for SUNY Stony Brook's costs related to delivery of an additional 10 UAVs, further demonstrates Vayu's understanding of this relationship with SUNY Stony Brook as ongoing and connected to New York. In these circumstances, Vayu should reasonably have anticipated being haled into court here (citation omitted).

Id. at *10–11.

The majority insisted that the dissent had misconstrued the nature of the agreement between the parties and wrongly concluded that the defendant's communications with SUNY were only responsive in nature. In fact, the "voluminous contacts" over a two-year period "were ongoing negotiations over the original terms and subsequent modification of a contractual relationship." Similarly, the New York meeting was not merely to "assuage concerns" but to modify the agreement's terms and discuss ongoing collaboration.

The dissent maintained that the majority adopted "an overly broad reading and unconstitutional extension of CPLR 302(a)(1)"; the action is based on a "contract formed outside of New York for products manufactured in Michigan and sent directly to Madagascar"; the defendant's contacts were primarily responsive in nature; the "defendant did not use electronic means to project itself into" New York; defendant's single visit to New York to discuss complaints about the drones was insufficient to establish personal jurisdiction; and the exercise of personal jurisdiction would not comport with the due process requirements.

Unanimous Court Rules That Additional Language in RPAPL 1304 Notice Did Not Violate the Statute

As Long as the Additional Information Is Not False, Misleading, Obfuscatory, or Unrelated, It Does Not Render the Notice Void

RPAPL 1304 requires that, at least 90 days prior to the commencement of a foreclosure action, a lender must give a borrower certain written notice. Subdivision (1) sets forth the specific language that the 90-day notice "shall include," and subdivision (2) specifies how the requisite RPAPL 1304 notice must be sent. In 2009, the statute was amended to include the requirement that the RPAPL 1304 notice is to be sent in "a separate envelope from any other mailing or notice."

In *Bank of Am., N.A. v. Kessler*, 2023 N.Y. Slip Op. 00804 (Feb. 14, 2023), Mr. Kessler obtained a loan secured by a mortgage on his home in 2009, but four years later defaulted on the loan and made no payments thereafter. Following the default, Bank of America sent the RPAPL 1304 notice to Mr. Kessler. The seven-page notice contained all of the statute's required language but, as germane here, also included language not found in section 1304, referencing information for someone in a bankruptcy proceeding or discharged in bankruptcy and for military personnel and service members.

After Bank of America moved for summary judgment against Mr. Kessler, he cross-moved to dismiss, asserting that the inclusion of the additional paragraphs in his notice violated section 1304's "separate envelope" provision. The trial court dismissed the complaint and the Appellate Division affirmed.

A unanimous Court of Appeals reversed. It referenced the statute's requirement that the notice "shall include" certain language, but does not say that only that language may be included. Here the notice contained all of the required language. The Court then addressed the second requirement in the statute that the envelope not contain "any other mailing or notice." The Court rejected the "bright line" rule adopted by the lower courts interpreting the statute's words "any other mailing or notice" as "any additional material or information whatsoever." First, that interpretation would be inconsistent with the phrase "shall include," which "contemplates the addition of something else."

Instead, "other mailing or notice" refers to "other kinds of notices, such as pre-acceleration default notices, notices disclosing interest rate changes to borrowers with adjustable-rate mortgages, monthly mortgage statements, or notices disclosing to the borrower a transfer of the loan servicer (citations omitted)." *Id.* at *8. The Court insisted that

> [a] bright-line rule would also lead to nonsensical results. For example, had Bank of America sent the required statutory language verbatim, but added, "THIS IS EXTREMELY IMPORTANT, PLEASE PAY ATTENTION!", a bright-line rule would require that the notice be deemed void and the foreclosure action dismissed.

Id.

Moreover, even assuming there was an ambiguity in the statute, a bright-line rule would conflict with the legislative purpose, since RPAPL 1304 is a remedial statute to be read broadly to help borrowers avoid foreclosure. "Prohibiting lenders from concisely informing borrowers of additional rights they may have to avoid foreclosure is manifestly at odds with that purpose." *Id.* at *9. In addition, the Court maintained that adopting such a rule prohibiting any additional language in the same envelope could also be at odds with certain federal disclosure requirements.

Thus, the Court held that accurate statements furthering the underlying purpose of the statute to provide information to borrowers that is or may become relevant to avoiding foreclosure – which was precisely the circumstance here – do not constitute "other notice." The language here informed borrowers of additional protections not covered in the statutory notice language and was not false, misleading, obfuscatory, or unrelated.

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