To Be Argued By:
Misha Tseytlin
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New York Supreme Court

APPELLATE DIVISION — SECOND DEPARTMENT

Docket No.
2024-04378

ORAL CLARKE, ROMANCE REED, GRACE PEREZ, PETER RAMON, ERNEST TIRADO, and DOROTHY FLOURNOY,

Plaintiffs-Respondents,

against

TOWN OF NEWBURGH and
TOWN BOARD OF THE TOWN OF NEWBURGH,

Defendants-Appellants.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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INTRODUCTION

Plaintiffs and the Attorney General take the position that even when a political subdivision adopts a NYVRA resolution that uses precisely the same language as the NYVRA itself—that is, "affirm[s] . . . the political subdivision's intention to enact and implement a remedy for a potential [NYVRA] violation," sets forth "specific steps" for "facilitat[ing] approval and implementation of such a remedy," and provides a "schedule for enacting and implementing such a remedy," N.Y. Elec. Law § 17-206(7)(b)—that is somehow insufficient to take advantage of the NYVRA's 90-day safe-harbor provision. Even putting aside the textual failings of that reading, Plaintiffs and the Attorney General advance the implausible notion that, when confronted with a barebones NYVRA notification letter broadly alleging a NYVRA violation, this State's small municipalities must find and retain an expert, have that expert evaluate the municipality's electoral system, decide definitively whether there may be a NYVRA violation, determine how any violation will be remedied, and select a specific remedy, all in less than 50 days. If a small town does not meet that deadline—which many will not—it must, according to Plaintiffs and the Attorney General, defend against a lawsuit where it potentially owes the other side attorneys' fees and expert costs. Further, Plaintiffs contend that even if a party violates the safe harbor by filing a premature lawsuit, like Plaintiffs did here, a political subdivision must *still* move forward with the steps and schedule set forth in

its NYVRA resolution while at the same time defending against the lawsuit (while paying its own lawyers and under threat of paying the other side's lawyers too), with no consequences at all for the plaintiffs who filed suit too soon.

The NYVRA does not treat this State's municipalities, including small towns like Newburgh, in such a shoddy, unreasonable manner. The NYVRA provides a careful balance: prospective plaintiffs have access to a uniquely powerful litigation tool, including the right to collect attorneys' and experts' fees if they win, while municipalities get a reasonable safe harbor from litigation in which to investigate and facilitate a remedy for an alleged NYVRA violation. Plaintiffs' and the Attorney General's contrary reading of the NYVRA's safe-harbor provisions cannot be squared with the statutory text or purpose. Nor does Defendants' interpretation of Section 17-206(7)(b) result in any undue delay: indeed, the plaintiffs in a separate NYVRA proceeding involving the Town of Mount Pleasant—referenced by both Plaintiffs and the Attorney General here—honored Mount Pleasant's statutory safe-harbor right in light of a very similar NYVRA resolution, and those parties are now even further ahead in their NYVRA litigation than the parties in this case. That Plaintiffs here, represented by the same counsel as the plaintiffs in the Mount Pleasant case, decided to wait longer than the Mount Pleasant plaintiffs to send an essentially content-free NYVRA notification letter to the Town of Newburgh is no

basis for rewriting the NYVRA to create an impossible situation for the many small municipalities in this State.

ARGUMENT

I. The Town Board's Resolution Is A Valid NYVRA Resolution, And Plaintiffs' Premature Lawsuit Violates The 90-Day Safe Harbor

A. As Defendants explained in their Opening Brief, the Town Board adopted a Resolution on March 15, 2024, which triggered the NYVRA's 90-day safe-harbor period and consequently prohibited Plaintiffs from filing this lawsuit until June 13, 2023. Opening Br. of Defs.-Appellants at 15–16 ("Br."). Using the same words that appear in Section 17-206(7), the Resolution expressly "affirm[ed]" that the Town Board "intends to . . . enact . . . and implement remedies for any *potential* violation of the NYVRA." (R.85 (emphasis added)); *compare with* N.Y. Elec. Law § 17-206(7)(b)(i). The Resolution then set forth the "specific steps" that the Town Board would take to comply with the NYVRA, N.Y. Elec. Law § 17-206(7)(b)(ii), requiring the Town Board to investigate the legality of the at-large election system and, if necessary, propose ways to remedy any violation, solicit public input on the proposal, amend the proposal to reflect that public input, and seek the State's approval of the final proposed remedy, (R.85–86). Finally, the Resolution sets forth a specific "schedule for enacting and implementing" a remedy, N.Y. Elec. Law § 17-206(7)(b)(iii)—requiring the Town Board to prepare a proposed remedy within 10

days of determining that there may be a violation; hold public hearings within 30 days thereafter; and submit the proposal to the State for final approval within 90 days of the date on which the Resolution was issued. (R.86). That is all the NYVRA requires to trigger the 90-day safe harbor. *See* Br.15–19, 20–27.

B. Plaintiffs and the Attorney General contend that the Resolution was insufficient because it "does not commit the Town to enact and implement a remedy," *but see infra* Section I.B.1, "it does not identify specific steps that the Town will take to implement a remedy," *but see infra* Section I.B.2, and it does not provide a schedule for doing so," *but see infra* Section I.B.3. Br. For Pls.-Respondents at 25 ("Resp.Br."); *see also* Resp.Br.28–45; Br. For Off. Of The Att'y Gen. As Amicus Curiae at 10–24 ("Amicus Br."). Plaintiffs and the Attorney General misunderstand what the NYVRA requires, and their position would render the NYVRA utterly unreasonable and the 90-day safe harbor largely meaningless.

1. *Affirmation of intent*. Plaintiffs offer a variety of theories as to why the Resolution failed to "affirm[ ]" the Town Board's "intention to enact and implement a remedy for a potential violation of" the NYVRA, N.Y. Elec. Law § 17-206(7)(b), but each is misguided.

Plaintiffs contend that the Resolution is invalid because it makes the Town Board's affirmation of intent conditional upon the outcome of the Town Board's investigation, Resp.Br.29–31, but this argument misunderstands the meaning and

import of the statutory phrase "a *potential* violation," N.Y. Elec. Law § 17-206(7)(b)(i) (emphasis added). As Defendants have explained, "potential" means "possible if the necessary conditions exist." *Potential*, Black's Law Dictionary (11th ed. 2019). Therefore, the NYVRA requires a political subdivision to affirm its intent only if the "conditions exist" to require such a remedy, *id.*—and, of course, a remedy is only required if the at-large election system is *actually* unlawful. By requiring a political subdivision to affirm an intent to remedy a "*potential* violation," the NYVRA clearly contemplates and affords political subdivisions the latitude to investigate potential claims before blindly committing to remedying a problem that may not exist. N.Y. Elec. Law § 17-206(7)(b)(i) (emphasis added).

Despite this text-based conclusion, the Attorney General contends that the phrase "potential violation" in the NYVRA "merely indicates that, in the presuit posture of the safe harbor, no court has yet made a finding of an NYVRA violation." Amicus Br.15. That effectively rewrites the statute as requiring an affirmation of intent to resolve "a judicially undetermined" violation. *See Golub Corp. v. N.Y. State Tax Appeals Tribunal*, 984 N.Y.S.2d 454, 456 (3d Dep't 2014) (a court cannot "rewrite an unambiguous provision of a statute by ignoring explicit language, no matter how equitable such a result may appear"). Had the Legislature intended merely to reference the untested nature of a prospective plaintiff's allegations, it could have drafted Section 17-206(7)(b)(i) to require a political subdivision to affirm

its intent "to enact and implement a remedy for *the alleged* violation" of the NYVRA. It did not do so. Instead, the Legislature used the term "potential," which, as explained, expressly contemplates the possibility that a political subdivision may decide there is no NYVRA violation after passing a NYVRA resolution. Br.20–21.

Plaintiffs take a different approach, arguing that Defendants' interpretation "ignores the fact that the word 'potential' precedes and describes the word 'violation' rather than the word 'remedy.'" Resp.Br.32. But the NYVRA requires simply that a resolution affirm the political subdivision's "intention to enact and implement a remedy for a potential violation of the [NYVRA]," NY. Elec. Law § 17-206(7)(b), and the Resolution here does exactly that, in the same exact words as the stature itself uses. The Resolution confirms that the Town Board "intends to proactively review the Town's current at-large election system . . . and implement remedies for any potential violation of the NYVRA that may exist," and "affirms that the Town intends to enact and implement the appropriate remed[ies]" if "the Town Board concludes that there may be a violation of the NYVRA." (R.85–86). This affirmation of intent is sufficient to trigger the NYVRA here precisely because it requires the Town Board to remedy a "potential violation," (R.85)—that is, the Resolution requires the Town Board to remedy a violation if such a violation may *actually* exist, Br.20–21.

Although Plaintiffs and the Attorney General contend that "[i]f the resolution were a contract, it would be unenforceable" as illusory, Resp.Br.30–31; *see* Amicus Br.13–14, that is a non sequitur. An "illusory promise" is one that gives the promisor an "unlimited right to decide later the nature or extent of [its] performance." *Chiapparelli v. Baker, Kellogg & Co.*, 252 N.Y. 192, 200 (1929); *see* 1 Williston on Contracts § 4:34 (4th ed.) (an illusory promise "make[s] the performance entirely optional with the promisor whatever may happen, or whatever course of conduct in respects the promisor may pursue"). The Resolution here does no such thing. Rather, the Resolution *requires* the Town Board to investigate Plaintiffs' allegations and, if it determines there may be a NYVRA violation, to develop and facilitate a remedy that complies with the statute. (*See* R.85–86). The Resolution does not purport to give the Town Board any "unlimited right" to avoid facilitating a remedy, even if the Town Board determines that such a remedy is necessary, and so is not "illusory." *See Chiapparelli*, 252 N.Y. at 200.[1] And to the extent that any prospective plaintiff believes that a political subdivision is failing to follow through on the "specific steps" and "schedule" set forth in its NYVRA resolution, NY. Elec.

[1] The Attorney General's citation to *People v. Alexander*, 2003 WL 21169075 (Poughkeepsie City Ct. May 12, 2003), is irrelevant. *See* Amicus Br.13–14. In *Alexander*, the court interpreted N.Y. Crim. Proc. Law § 710.30, which requires that a prosecutor give a criminal defendant advanced notice when the prosecutor "intends to offer . . . at trial" certain evidence or testimony. 2003 WL 21169075, at *1–5 (citation omitted). The court held that such notice is not required where evidence is used merely for impeachment purposes. *Id.* at *4–5.

Law § 17-206(7)(b), that plaintiff could bring a legal action to compel performance of the mandatory duty, *see* N.Y. CPLR § 7803; *Baum v. Town Bd. of Town of Sand Lake*, 470 N.Y.S.2d 912, 913–14 (3d Dep't 1983).

Plaintiffs' appeal to contract law is inapt for the additional reason that the *only* circumstance in which a political subdivision is statutorily required to enter into any "agreement" with a prospective plaintiff is if the political subdivision needs additional time beyond the initial 90-day safe harbor. N.Y. Elec. Law § 17-206(7)(d). In such cases, the political subdivision and prospective plaintiff may agree to extend the safe-harbor period "for an additional ninety days," so long as the agreement "include[s] a requirement that either the political subdivision shall enact and implement remedy . . . or the political subdivision shall pass a NYVRA proposal." *Id.* This is the sole instance in which a political subdivision must pre-commit to remedying the alleged NYVRA violation. *See id.* In other words, to extend the safe-harbor period an additional 90 days, a political subdivision "shall"—i.e., *must*—commit to adopting a remedy, which is not the case for the initial 90-day safe-harbor period. Although Defendants explained in their Opening Brief that Section 17-206(7)(d) provides strong textual evidence demonstrating that an initial NYVRA resolution need not pre-commit a political subdivision to remedying an alleged NYVRA violation, *see* Br.21–22, Plaintiffs do not address Section 17-206(7)(d) at all, and so concede this point.

While the Attorney General does address Section 17-206(7)(d), her effort to reconcile this provision with Plaintiffs' interpretation of Section 17-206(7)(b) backfires. *See* Amicus Br.16–17. The Attorney General contends that a NYVRA resolution must "commit[ ]" a political subdivision to remedying an alleged NYVRA violation. Amicus Br.15; *see* Resp.Br.30. But the word "commit" does not appear in the statute, and the *only* provision of Section 17-206 that would commit a political subdivision to enacting a remedy is Section 17-206(7)(d), which "require[s] that either the political subdivision *shall enact* and implement a remedy that complies with this title or . . . *shall pass* a NYVRA proposal and submit it to the civil rights bureau." N.Y. Elec. Law § 17-206(7)(d) (emphases added). Although the Attorney General contends that Section 17-206(7)(d) is "merely [an] exten[sion]" of Section 17-206(7)(b), Amicus Br.17, that provision imposes a different requirement found nowhere in Section 17-206(7)(b): the political subdivision must actually commit to enacting and implementing a remedy. *Compare* N.Y. Elec. Law § 17-206(7)(b), *with id.* § 17-206(7)(d). That Section 17-206(7)(b) does not use the same language of commitment as Section 17-206(7)(d) demonstrates that a political subdivision does not need to pre-commit to remedying an alleged NYVRA violation to take advantage of the initial 90-day safe harbor—as evidenced by the Attorney General's own authority. *See* Amicus Br.12 (quoting *Commonwealth of N. Mariana I. v. Canadian Imperial Bank of Com.*, 21 N.Y.3d 55, 60 (2013), for the proposition that "the failure

of the legislature to include a term in a statute is a significant indication that its exclusion was intentional").

Plaintiffs and the Attorney General also erroneously assert—without statutory support—that the "preliminary investigation into the merits of allegations raised in a notification letter must be carried out during the initial 50 days," because otherwise, the statute's "distinction between the initial 50-day waiting period" under Section 17-206(7)(a) and "the 90-day safe harbor period" under Section 17-206(7)(b) "would be meaningless." Resp.Br.36; *accord* Amicus Br.23. Again, Plaintiffs and the Attorney General misunderstand the statutory scheme. The 50-day waiting period and 90-day safe harbor do not "serve the same purpose," Amicus Br.23; rather, the 50-day waiting period provides a political subdivision time to decide whether to enact a NYVRA resolution at all, whereas the 90-day safe harbor provides the political subdivision time to investigate whether there may be a NYVRA violation and enact any necessary remedy (or seek a 90-day extension, wherein the municipality commits to adopting a specific remedy), *see* N.Y. Elec. Law § 17-206(7)(a)–(b). By requiring a political subdivision to enact a NYVRA resolution at the 50-day mark, the NYVRA renders the political subdivision accountable for its conduct during the 90-day safe-harbor period. A NYVRA resolution has legal effect, and, as noted, to the extent a political subdivision is failing to follow through on the "specific steps" and "schedule" set forth in its

NYVRA resolution, N.Y. Elec. Law § 17-206(7)(b), a prospective plaintiff could sue to compel performance, *see* N.Y. CPLR § 7803; *Baum*, 470 N.Y.S.2d at 913–14.

In any event, the NYVRA contains no language requiring a political subdivision to conduct an investigation into a prospective plaintiff's allegations during the initial 50-day period, let alone complete that investigation prior to enacting a NYVRA resolution. *See* N.Y. Elec. Law § 17-206(7)(a). Rather, the only action that a political subdivision must take during the initial 50-day period is to pass a NYVRA resolution (that is, assuming the political subdivision wishes to take advantage of the 90-day safe harbor). *Id.* § 17-206(7)(b). So, while Plaintiffs argue that "[b]ecause the word 'investigate' is excluded from NYVRA's safe harbor provision, this Court must assume that the legislature intended to exclude it," Resp.Br.36 (citation omitted), the term "investigate" *also* does not appear in Section 17-206(7)'s 50-day waiting period provision. *See* N.Y. Elec. Law § 17-206(7)(a)–(b). Accordingly, to the extent that the 50-day waiting period "allow[s] a political subdivision to investigate the allegations," Resp.Br.35 (quoting R.185), the 90-day period must also allow the political subdivision to investigate, so long as the political subdivision "affirm[s]" its "intention to enact and implement a remedy" if its investigation reveals that there may be a violation, *see* N.Y. Elec. Law § 17-206(7)(b).

Plaintiffs have no persuasive rebuttal to the unreasonable burden that their interpretation of Section 17-206(7)(b) would place on small municipalities like the Town here. *See* Resp.Br.39. Requiring political subdivisions to pre-commit to changing their election systems before determining whether such action may *actually* be necessary would force a political subdivision to *immediately* engage experts to evaluate the propriety of the election system, determine whether the election system violates the NYVRA, decide whether to remedy such violation, evaluate the universe of potential remedies, pick one, and adopt a NYVRA resolution—all in less than fifty days after receiving a NYVRA notification letter. N.Y. Elec. Law § 17-206(7)(b) (giving political subdivisions 50 days to pass a NYVRA Resolution before prospective plaintiffs can file suit). Plaintiffs' assertion that it is "[]realistic for a political subdivision to commit to implementing a remedy within 50 days" because "political subdivisions have been on notice of the requirements of the NYVRA since its enactment in June 2022" and "presumably have attorneys and experts they can rely on to do any analysis required," Resp.Br.39, is sadly out of touch with the reality of how many small municipalities organize their affairs. This argument also misrepresents the complexity of the NYVRA analysis, especially where prospective plaintiffs can deliver skeletal notification letters, like the one in this case, which fail to include the types of information that a political subdivision must have at its disposal to investigate and, if necessary, remedy such

claims. The practical realities of responding to a NYVRA notification letter confirm that committing to a precise course of action without first determining whether such action may be necessary is not what the Legislature mandated when it enacted the NYVRA.

The availability of Section 17-206(7)(d)'s extension provision undermines Plaintiffs' argument that, if "50 days is an unreasonable time in which to investigate NYVRA allegations and commit to taking remedial measures, the Town cannot possibly claim that it would have been able to do those things and then also enact and implement a remedy during the 90-day safe harbor period." Resp.Br.40. Section 17-206(7)(d) ensures that a political subdivision can have additional time to enact a remedy when 90 days is insufficient, so long as the political subdivision commits to enacting a remedy or passing a NYVRA proposal. By contrast, there is no statutorily available extension of the 50-day waiting period. *See* N.Y. Elec. Law § 17-206(7)(a)–(b). Accordingly, if Plaintiffs were correct that a political subdivision must complete its investigation into a prospective plaintiff's allegations in under 50 days, and the political subdivision is unable to do so (including, perhaps, because a prospective plaintiff has failed to include any specific facts or evidence in its NYVRA notification letter, as Plaintiffs did here), it would simply be out of luck. The far better reading is that a political subdivision may investigate an alleged NYVRA violation during the 90-day safe-harbor period.

While the Attorney General contends that a political subdivision cannot affirm its intention to enact and implement a remedy without first "specify[ing] a particular remedy that the political subdivision intends to enact and implement," Amicus Br.12, Section 17-206(7)(b) does not mandate that a political subdivision identify any "specific" remedy, *see* N.Y. Elec. Law § 17-206(7)(b). As Defendants have explained, Section 17-206(7)(b) merely requires a political subdivision to "affirm[ ]" its "intention to enact and implement a remedy for a potential violation" and set forth the "specific steps" and "schedule" for facilitating "such a remedy." *Id.* A political subdivision can do each of these things in a NYVRA resolution without pre-committing to any specific remedy. *See* Br.25–26. The Attorney General's reliance on Section 17-206(7)(c)—which provides that a political subdivision that either "lacks the authority" or "fails to enact or implement a remedy identified in a NYVRA resolution" may submit a proposed remedy to the Attorney General—is inapt. Amicus Br.12. That provision, like Section 17-206(7)(b), nowhere mandates that a NYVRA resolution identify any "specific" remedy. *See* N.Y. Elec. Law § 17-206(7)(c). Rather, Section 17-206(7)(c) merely comes into play when a political subdivision lacks authority or fails to implement a remedy after determining that there may be a NYVRA violation. *See id.*

Plaintiffs and the Attorney General claim that interpreting Section 17-206(7)(b) to require a political subdivision to make "a firm commitment to enact an

actual remedy" is necessary to prevent elections from being held under unlawful conditions. *See* Resp.Br.32–33; *see also* Resp.Br.37. But the NYVRA recognizes that political subdivisions must have the tools, as well as the time, to investigate alleged violations, and therefore balances the need for exigency with the statutory safe-harbor period. Only when the need for exigency is overriding—i.e., if "the first day for designating petitions for a political subdivision's next regular election to select members of its governing board has begun or is scheduled to begin within thirty days," or if the "political subdivision is scheduled to conduct any election within one hundred twenty days," N.Y. Elec. Law § 17-206(7)(f)—may a plaintiff file suit without heeding the safe-harbor period.

Both Plaintiffs and the Attorney General attempt to rely on a NYVRA proceeding that is not before this Court to support their interpretation of Section 17-206(7)(b), but their citation to this proceeding backfires. *See* Resp.Br.34; Amicus Br.20–21 (citing *Serratto v. Town of Mount Pleasant*, Index No. 55442/2024, NYSCEF No.3 (Westchester Cnty. Sup. Ct. Jan. 9, 2024)). The plaintiffs there—represented by the same counsel as Plaintiffs here—did not prematurely file a NYVRA lawsuit during the Town of Mount Pleasant's 90-day safe-harbor period, and instead waited, as is required, for that 90-day safe harbor to expire. *See* Amicus Br.21. That NYVRA litigation is now farther along than these proceedings, with summary judgment briefing due to be completed by the end of September,

Stipulation, *Serratto*, Index No. 55442/2024, NYSCEF No.55 (Westchester Cnty. Sup. Ct. Aug. 5, 2024), well in advance of the nomination process for candidates for town office, which is scheduled to begin in or around February 2025, Compl. ¶ 161, *Serratto*, Index No. 55442/2024, NYSCEF No.1 (Westchester Cnty. Sup. Ct. Jan 1, 2024).[2] The Mount Pleasant NYVRA litigation demonstrates that Plaintiffs' and the Attorney General's appeals to the "time-sensitive" nature of NYVRA litigation are misplaced in the context of the dispute here: in light of the statute's expedited review procedures, N.Y. Elec. Law § 17-216, as well as its safety-valve provision allowing plaintiffs to bring suit in certain circumstances regardless of the safe harbor, *id.* § 17-206(7)(f), there is ample time to comply with the NYVRA's 90-day safe-harbor provision and still bring a lawsuit in advance of an election, if necessary.

Plaintiffs contend that their unreasonable interpretation of the NYVRA is appropriate because the statute "already treats political subdivisions more favorably than almost all litigants," Resp.Br.38, but that is utterly false. In fact, contrary to the ordinary rule that parties bear their own litigation costs, *see Baker v. Health Mgmt. Sys., Inc.*, 98 N.Y.2d 80, 88 (2002), the NYVRA imposes an atypical fee-shifting provision, allowing the "prevailing plaintiff" to recover "reasonable attorneys'

[2] The Attorney General speculates that the Town of Mount Pleasant passed a NYVRA resolution merely "to obtain delay," Amicus Br.20, but cites nothing to support this allegation, nor has any court suggested that Mount Pleasant's current electoral system is unlawful.

fee[s]," as well as "litigation expenses including, but not limited to, expert witness fees and expenses," N.Y. Elec. Law § 17-218. This burdensome fee-shifting provision is precisely why it makes good sense to interpret Section 17-206(7)(b) as allowing a political subdivision to investigate a prospective plaintiff's allegations during the 90-day safe-harbor period and determine whether there may be a NYVRA violation before facing a lawsuit. If this Court were to accept Plaintiffs' and the Attorney General's contrary reading, small municipalities like the Town of Newburgh would be put in the position of needing to either pre-commit to a remedy prior to having sufficient time to investigate an alleged NYVRA violation, or face the potential for statutory fee-shifting if the town cannot commit to a specific remedy in under 50 days.

2. *Specific Steps*. Plaintiffs claim the NYVRA fails to identify the "specific steps" it will take to implement a remedy "[f]or substantially the same reasons" as it argued with respect to the first prong. Resp.Br.40–42. But this argument fails "for substantially the same reasons" articulated immediately above. Indeed, the Resolution plainly satisfies this statutory requirement by setting forth the "specific steps" that the Town Board "shall" take to "facilitate approval and implementation" of a NYVRA remedy—one of which is to determine whether a NYVRA violation may even exist. N.Y. Elec. Law. § 17-206(7)(b)(ii); (R.85–86). "Facilitate," in this context, means "to assist in bringing about (a particular end or result)." *Facilitate*,

Oxford English Dictionary Online (Dec. 2022).[3] Thus, a political subdivision cannot "facilitate" or "bring[ ] about" a remedy without first determining whether such remedy may actually be required. *Id.* And if such remedy may be required, the Resolution here sets forth "specific steps," N.Y. Elec. Law. § 17-206(7)(b)(ii), to "bring[ ]" that remedy "about," *Facilitate*, Oxford English Dictionary Online, *supra*—specifically, the Town Board must prepare a NYVRA proposal, solicit public feedback on the proposal, amend the proposal to reflect that feedback, approve it, and submit it to the State for final approval. (R.85–86). These specific steps are clearly not "empty platitudes," as Plaintiffs claim. Resp.Br.41. Contrary to Plaintiffs' suggestion, Resp.Br.41, the NYVRA requires nothing more than this; it does not dictate what the "specific steps" must entail nor speak to the level of detail that must be included, N.Y. Elec. Law. § 17-206(7)(b)(ii).

3. *Schedule*. Finally, Plaintiffs claim that the Resolution's schedule is insufficient because the timing it sets forth "would not come close to allowing the Town to implement a remedy within" the 90-day safe-harbor period. Resp.Br.42–45. Specifically, Plaintiffs assert that it would be impossible to both "investigate and implement a remedy in 90 days," Resp.Br.45, particularly if the remedy is redistricting, Resp.Br.43–44. Again, the NYVRA requires only that a Resolution

[3] Available at https://www.oed.com/dictionary/facilitate_v?tab=meaning_and_use#4935269 (subscription required) (all websites last visited Aug. 6, 2024).

contain "a schedule for enacting and implementing . . . a remedy" for a "potential violation" of the NYVRA, N.Y. Elec. Law. § 17-206(7)(b)(i), (iii), and the Resolution does exactly that by providing specific deadlines for each step of the remedial process and requiring that the entire process be completed within 90 days of the Resolution's passage, (R.86). The NYVRA nowhere requires a specific deadline for the "findings and evaluations" component, Resp.Br.42, but rather calls only for a schedule governing the "enact[ment] and implement[ation]" of a remedy after the deliberative period has concluded, N.Y. Elec. Law § 17-206(7)(b)(iii). The Resolution provides exactly that.

Plaintiffs' speculative assertion that the Resolution's schedule is "unreasonable," Resp.Br.44, is immaterial to the interpretation of Section 17-206(7)(b). As explained above, even if Plaintiffs were correct that the Town Board could not as a factual matter complete its investigation and approve a NYVRA proposal during the initial 90-day safe harbor, the NYVRA anticipates just such a circumstance. *Supra* pp.8–10, 13–14. In recognition that some of the remedies contemplated in the NYVRA, such as preparing a revised districting plan, may take longer than others to investigate and implement, Section 17-206(7)(d) provides for an additional 90-day safe-harbor period, so long as the political subdivision "enter[s] into an agreement with the prospective plaintiff" that "include[s] a requirement" that the political subdivision will either "enact and implement a remedy" or "pass a

NYVRA proposal and submit it to the civil rights bureau." N.Y. Elec. Law § 17-206(7)(d). Even if the Town Board concludes following its investigation that a more time-intensive remedy like a revised districting plan is necessary, Plaintiffs do not suggest that the expanded time period contemplated in Section 206(7)(d) would be insufficient to approve a NYVRA proposal premised on such a remedy.

II. Plaintiffs Failed To Allege Any Facts Suggesting That The Resolution Was Not Duly Adopted At A Properly Called Town Board Meeting

Plaintiffs assert that the Resolution was invalid regardless of whether it complied with the NYVRA because it was not "duly adopted at a properly called Town Board meeting," Resp.Br.21, but that argument provides no basis for affirming the Supreme Court's denial of Defendants' motion to dismiss.

Plaintiffs failed to allege sufficient facts to support their bare legal conclusion that the Resolution "was not duly adopted" (R.56), and so cannot rely upon this assertion to avoid dismissal, *see Caniglia v. Chi. Trib.-N.Y. News Syndicate, Inc.*, 612 N.Y.S.2d 146, 147 (1st Dep't 1994) ("allegations consisting of bare legal conclusions . . . are not entitled to . . . consideration"). As Defendants explained below, the relevant law in this context is Chapter 27 of the Town of Newburgh Municipal Code, which governs procedures related to calling special meetings. *See*

Town of Newburgh Mun. Code § 27-3 (1998).[4] Pursuant to Chapter 27, the Supervisor of the Town Board can call a "[s]pecial meeting[ ], limited to one action item . . . by causing a written notice, specifying the time and place thereof, to be served upon each member of the Board personally at least one hour prior to the meeting," among other methods not relevant here. *Id.* § 27-3. And so, to allege that the Resolution was not duly adopted, Plaintiffs needed to allege facts—not just "bare legal assertions"—suggesting that the Supervisor of the Town Board did not serve written notice on all Town Board members at least one hour prior to the special meeting at issue, in accordance with Chapter 27. *See Isnady v. Walden Pres., L.P.*, 173 N.Y.S.3d 586, 588 (2d Dep't 2022). The Complaint does not contain *any* such factual allegations (*see* R.45–78), and so fails to plead that the Resolution was not duly adopted, *see Isnady*, 173 N.Y.S.3d at 588.

Plaintiffs incorrectly contend that Defendants needed to "submit[ ] evidence that the town supervisor provided written notice of the special meeting to the Town

[4] Available at https://ecode360.com/9609548#9609548. It is unclear whether Plaintiffs are continuing to rely upon Town Law § 62(2), which states that a town supervisor may "call a special meeting of the town board by giving at least two days' notice in writing to members of the board of the time when and the place where the meeting is to be held." N.Y. Town Law § 62(2). As Defendants explained below, the Town, consistent with its Home Rule power, superseded and amended Town Law § 62 to enact Chapter 27 of the Municipal Code, which is thus the only relevant law in this context. In any event, Plaintiffs' complaint does not contain any factual allegations suggesting that the Supervisor failed to provide Town Board members at least two days' notice under Town Law § 62(2), and so could not survive dismissal even if Town Law § 62(2) were relevant here (which it is not).

Board members." Resp.23–24. Defendants had no such burden, including because legislative act[s]" of a town board are "presumptively valid." *Town of Hempstead v. Lynne*, 222 N.Y.S.2d 526, 529 (Nassau Cnty. Sup. Ct. 1961). Rather, it was Plaintiffs' burden to "state facts" tending to show a violation of law and to rebut this presumption. *See Cockburn v. City of New York*, 10 N.Y.S.3d 630, 633 (2d Dep't 2015). Plaintiffs' "[m]ere conclusory statements of law, which are unsupported by allegations of fact, may not be utilized to supply material facts by inference," *DeMarco v. Nassau Cnty.*, 238 N.Y.S.2d 537, 538 (2d Dep't 1963) (citation omitted), or to rebut the presumption of validity of Town Board actions.

III. The Town Board's Suspension Of The March 2024 Resolution Does Not Render This Appeal "Academic"

Plaintiffs are also wrong to argue that Defendants' suspension of the March 2024 Resolution—which was only done in direct response to Plaintiffs' violation of the Town's 90-day safe-harbor right—renders this appeal "academic" because it "effectively . . . eliminated any chance there might have been of implementing a remedy within the 90-day safe harbor period." Resp.Br.18–22. This Court should reject Plaintiffs' argument, which would render the NYVRA's 90-day safe harbor meaningless.

As Defendants have explained, Br.15–20, the Town Board's adoption of the March 2024 Resolution automatically triggered the NYVRA's 90-day safe harbor, during which period the Town Board should have been shielded from litigation

related to the claimed violations. It is Plaintiffs who unlawfully interrupted the safe harbor by filing this lawsuit, unlike what their own counsel did with Mount Pleasant. Rather than allow Plaintiffs to nullify its statutory safe-harbor right, on April 8, 2024, the Town Board adopted a second resolution reiterating its intent to remedy a potential NYVRA violation, but suspending the Town Board's schedule for implementing such remedy pending a judicial determination as to the validity of the March 2024 Resolution. *See* Resolution of the Town Board of the Town of Newburgh Pertaining to New York State Election Law 17-206 and Commencement of Litigation at 3 (Apr. 8, 2024) (the "April Resolution").[5] Consistent with the April Resolution, Defendants have explained that, in the event this Court agrees that the March 2024 Resolution is a valid NYVRA resolution, they are entitled to a full 90-day safe-harbor period—uninterrupted by NYVRA litigation—in which to carry out the steps and schedule set forth in the March 2024 Resolution. Whether Defendants are entitled to that safe harbor is a live controversy requiring this Court's resolution.

Plaintiffs' contrary position would destroy the statutory safe-harbor provision. Ignoring the fact that it was *their* lawsuit that forced Defendants to scramble to preserve their statutory safe-harbor right, Plaintiffs ask this Court to dismiss

[5] Available at https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.townofnewburgh.org%2Fuppages%2F04082024%2520town%2520board%2520meeting.docx&wdOrigin=BROWSELINK.

Defendants' appeal as moot because the original 90-day safe-harbor period has now passed. Resp.Br.19. That reasoning would render the statutory safe harbor utterly meaningless—as Plaintiffs themselves acknowledge. Indeed, Plaintiffs argue that the Town Board should have simply "moved forward with [its] investigation" of Plaintiffs' NYVRA allegations while at the same time defending against Plaintiffs' premature NYVRA action. *See* Resp.Br.20. If this Court were to accept Plaintiffs' position, there would be nothing to stop potential NYVRA litigants from filing premature lawsuits every single time and so mooting a municipality's ability to take advantage of the NYVRA's safe-harbor provisions. As Defendants have explained, this Court should reject such an absurd reading of the NYVRA's safe-harbor provisions. *See* Br.19–20; *Branford House, Inc. v. Michetti*, 81 N.Y.2d 681, 687 (1993) (courts must avoid a "construction rendering statutory language superfluous").

Confusingly, Plaintiffs contend that the April Resolution "establishes that the March resolution was a sham and that appellants' sole goal was to delay the imposition of any remedy until after the beginning of the 2025 election cycle," Resp.Br.20, but it was *Plaintiffs* who delayed the Town Board's investigation and implementation of any remedy by filing this premature lawsuit. The Town Board was moving forward with the "steps" and "schedule," N.Y. Elec. Law § 17-206(7)(b), set forth in the Resolution until Plaintiffs filed this lawsuit, at which point

the Town needed to focus its limited resources on getting this premature lawsuit dismissed so it could go back to the work outlined in the Resolution. Had Plaintiffs not filed this NYVRA lawsuit prematurely, the 90-day statutory safe-harbor period would have expired on June 13, 2024, well before the start of the 2025 election cycle. It was Plaintiffs—using the same counsel as in the Mount Pleasant litigation—who delivered a NYVRA notification letter to Defendants with next-to-no factual detail and then, unlike the Mount Pleasant plaintiffs, violated the statutory safe harbor for some inexplicable (and still unexplained) reason.

Plaintiffs' remaining arguments are similarly meritless. According to Plaintiffs, Defendants should have asked the trial court "to stay their obligation to answer or otherwise respond to the complaint" while the Town Board moved forward with the schedule set forth in the March 2024 Resolution. Resp.Br.20. But Defendants were under no obligation to apply for such relief, which Plaintiffs surely would have opposed in any event, pointing to the statutory preference for expedited litigation in the NYVRA. N.Y. Elec. Law § 17-216. And while Plaintiffs worry, without basis, that it would have been futile for them to wait until after the safe-harbor period to file this lawsuit, Resp.Br.20, the NYVRA gives Plaintiffs no option but to wait until the end of the 90-day safe harbor to bring suit, *see* N.Y. Elec. Law § 17-206(7)(b). As noted, to the extent a prospective plaintiff believes a political subdivision is not following through on the steps set forth in a NYVRA resolution,

it can bring a legal action on that basis. *Supra* pp.7–8. A prospective plaintiff may not, however, pursue a NYVRA lawsuit during the 90-day safe-harbor period.

CONCLUSION

This Court should reverse the Supreme Court and remand for dismissal of Plaintiffs' lawsuit.

Dated: August 7, 2024

Respectfully submitted,

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98 N.Y.2d 80
Court of Appeals of New York.

Thomas BAKER, on Behalf of Himself and All Others Similarly Situated, et al., Plaintiffs,
v.
HEALTH MANAGEMENT SYSTEMS, INC., et al., Respondents.
Phillip Siegel, Appellant.

52
|
April 25, 2002.

Synopsis
Following stipulation dismissing corporate officer from underlying securities fraud action, officer sought indemnification from corporation for his costs and attorney fees. The United States District Court for the Southern District of New York, Richard M. Berman, J., 82 F.Supp.2d 227, granted application for indemnification, but denied application for attorney fees and costs in bringing application for indemnification. Officer appealed. The Court of Appeals, 264 F.3d 144, certified question about officer's entitlement to attorney fees. The Court of Appeals, Levine, J., held that officer was not entitled to indemnification from corporation for attorney fees he incurred in making motion for indemnification of his fees and expenses.

Question answered.

Kaye, C.J., filed dissenting opinion in which Ciparick and Graffeo, JJ., joined.

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***82 OPINION OF THE COURT**

LEVINE, J.

Appellant Phillip Siegel was the Chief Financial Officer of respondent Health Management Systems, Inc. (HMS). In that capacity, he was joined as a party defendant in several securities fraud class actions brought in the United States District Court, Southern District of New York, against HMS and various officers and directors. Although all claims against ***742 **1100** Siegel were ultimately dismissed by stipulation, HMS refused Siegel's request for reimbursement of his attorneys' fees and expenses. Siegel subsequently moved in the District Court for indemnification from HMS, including reimbursement

for legal expenses that he incurred in making his motion for indemnification. He based his claim in part on the director/officer indemnification provisions of the New York Business Corporation Law. The court denied Siegel's application only insofar as he sought such "fees on fees." On appeal, the United States Court of Appeals for the Second Circuit certified the following question to us:

> "Where a corporate officer is 'successful' in the defense of an underlying action, within the meaning of New York Business Corporation Law § 723(a), where the corporation unsuccessfully contests the duty to indemnify and contests with partial success the amount of indemnification, and where there is no bad faith on the part of the corporation * * * does the phrase 'attorneys' fees actually and necessarily incurred as a result of such action or proceeding,' as used in New York Business Corporation Law § 722(a), provide for recovery of reasonable fees incurred by a corporate officer in making an application for fees before a court (as authorized by New York Business Corporation Law § 724(a))?" (264 F.3d 144, 154.)

We accepted certification (96 N.Y.2d 931, 733 N.Y.S.2d 366, 759 N.E.2d 365) and now answer the question in the negative.

***83** Plaintiffs alleged in the securities fraud class actions that defendants disseminated false and misleading statements designed to inflate the price of HMS stock. Certain unique facts set Siegel's position in the litigation apart from the other individual defendants. Namely, Siegel joined HMS *after* the beginning date of the class period when the misconduct allegedly occurred and, unlike other defendants, he actually purchased (rather than sold) shares of HMS stock during the relevant period. Accordingly, Siegel hired separate counsel.

The actions were consolidated and plaintiffs ultimately entered into a stipulation of dismissal with prejudice as to all claims against Siegel. The action continued against the other defendants and was eventually settled for $4 million. HMS denied Siegel's written request for indemnification, asserting that the legal fees sought were not necessarily incurred by Siegel because he did not require separate counsel.

In November 1998, Siegel moved, pursuant to Business Corporation Law § 724 and HMS's bylaws, for indemnification of his legal fees, claiming $84,784.37 in attorneys' fees and costs. The District Court referred Siegel's motion to United States Magistrate Judge James C. Francis. During oral argument on the motion, HMS conceded that Siegel was entitled to more than the $5,000 cap set by HMS for indemnification of its corporate officers for individual representation. The Magistrate Judge thereafter issued a report and recommendation, concluding that Siegel's position in the underlying litigation warranted separate representation, but rejecting Siegel's argument that he should recover the fees and costs he had incurred in attempting to secure indemnification. Relying on this Court's decision in *Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487, 549 N.Y.S.2d 365, 548 N.E.2d 903 [1989], the Magistrate Judge reasoned that an award of fees on fees could not "be reconciled with the general rule in New York that attorneys' fees may not be awarded unless there is specific statutory or contractual authorization." (82 F.Supp.2d 227, 236.) He therefore recommended *****743 **1101** that $17,147.64 of the requested amount be disallowed on the ground that those fees and costs were incurred in seeking indemnification.

The District Court adopted and incorporated the Magistrate Judge's report and recommendation in its entirety. The court also rejected Siegel's argument that he was entitled to reimbursement for these fees and costs due to alleged bad faith on the part of HMS in denying him indemnification.

On Siegel's appeal, the Second Circuit agreed with the District Court that Siegel's claim for attorneys' fees based on ***84** the bad faith of HMS was not valid and determined that an open question exists regarding whether "fees on fees" are authorized by Business Corporation Law §§ 722–724. The court therefore certified the present question to us and we conclude that the statute does not independently provide for the recovery of fees incurred by a corporate officer in obtaining indemnification.

Section 722 (a) of the Business Corporation Law permits a corporation to indemnify officers and directors made parties defendant in non-derivative actions (such as the underlying litigation here), by virtue of their capacity as such, for both liability and litigation costs. That provision states, in pertinent part,

> "[a] corporation may indemnify any person made, or threatened to be made, a party to an action or proceeding (other than one by or in the right of the corporation to procure a judgment in its favor), whether civil or criminal * * * by reason of the fact that [the person] * * * was a director or officer of the corporation * * * against judgments, fines, amounts paid in settlement and reasonable expenses, *including attorneys' fees actually and necessarily incurred as a result of such action or proceeding,* or any appeal therein, if such director or officer acted, in good faith, for a purpose * * * believed to be in *

* * the best interests of the corporation" (emphasis added).[1]

Section 723(a) mandates indemnification of a person who has been successful in the defense of a civil or criminal action or proceeding of the type described in section 722. Section 724(a) provides that a court shall award indemnification "to the extent authorized" by sections 722 and 723(a).

Siegel argues that Business Corporation Law article 7 is a remedial statute with the purpose of shifting all costs and personal liability away from a corporate official sued in that capacity and, thus, should be construed expansively. Siegel reads the phrase "as a result of" in section 722(a) as implying ***85** a "but for" test, asserting that the provision entitles him to reimbursement of all fees that he would not have spent had he not been made a party to the underlying suit. He argues that but for the underlying action, he would not have incurred the litigation costs for which he sought indemnification. Hence, Siegel maintains that he is entitled to recover all fees spent in connection with the motion for indemnification.

We disagree. Were we to accept Siegel's argument, the statutory right to indemnification would apply even to fees and expenses having the most attenuated link to the underlying action. The literal language of the statute, when taken as a *****744 **1102** whole, does not support such a construction.

In limiting recovery to only those expenses that are "*actually and necessarily* incurred *as a result* of such action or proceeding" (emphasis added), section 722(a) quite clearly in our view requires a reasonably substantial nexus between the expenditures and the underlying suit. In actuality, the attorneys' fees arising in connection with this motion were caused by HMS's refusal to indemnify Siegel following his dismissal from the underlying litigation. It stretches language beyond the outer limits of meaning to claim that those fees on fees were necessarily incurred by reason of the joinder of Siegel in the securities fraud suits.

Our rejection of an expansive "but for" test to require payment of legal fees incurred to enforce statutory indemnification rights is supported by the legislative history of Business Corporation Law article 7. Each major piece of legislation passed regarding indemnification of officers and directors by their corporations was enacted for a specific, limited purpose. The first legislative treatment of the subject, in the 1940s, authorized indemnification of expenses incurred "*in connection with the defense of* " an action commenced against individuals in their capacity as directors, officers or employees (*see* L. 1945, ch. 869, § 4, adding General Corporation Law § 64 [emphasis added]). As this Court explained in *Matter of Schwarz v. General Aniline & Film Corp.*, 305 N.Y. 395, 400, 113 N.E.2d 533 [1953], *abrogated by* L. 1961, ch. 855, the early legislation was enacted specifically to overrule the holding of *New York Dock Co. v. McCollum*, 173 Misc. 106, 16 N.Y.S.2d 844 [Sup.Ct., Onondaga County, 1939, Crouch, R.]) that, at common law, even vindicated directors were not entitled to indemnification in derivative suits. *Schwarz* stated: "Obviously, the Legislature was talking about the financial difficulties that had befallen certain corporate directors, officers and agents when they were sued, individually, in stockholders' suits, and had to pay their own lawyers" (305 N.Y. at 401, 113 N.E.2d 533).

***86** In 1961, the Legislature enacted a general revision of the Business Corporation Law, including former section 723(a), the predecessor of current section 722(a). Former section 723(a) was the first specific provision directed at the indemnification of officers and directors sued in those capacities in actions and proceedings other than derivative suits. It set forth the same operative language at issue here: directors and officers could be indemnified "against judgments, fines, amounts paid in settlement and reasonable expenses, including *attorneys' fees actually and necessarily incurred as a result of such action or proceeding* " (L. 1961, ch. 855 [emphasis added]). Focusing on suits complaining of the acts of officials taken on behalf of their corporate principals, the new provision was intended expressly "to codify the common law principle that directors or officers are indemnifiable by the corporation for expenses incurred and amounts paid in actions or proceedings, other than derivative actions" (Joint Legis. Comm. to Study Revision of Corporation Laws, Revised Supp. to Fifth Interim Report to 1961 Session of N.Y. State Legislature, 1961 N.Y. Legis. Doc. No. 12, at 54).

As explained by Professor Samuel Hoffman, who served as a drafting consultant to the New York Joint Legislative Committee to Study Revision of Corporation Laws, the objective was to codify and apply indemnification principles under the law of agency in the context of suits against corporate officials based on their conduct undertaken "in the good faith belief that [they were] acting properly in the *****745 **1103** best interests of the corporation" (Hoffman, *The Status of Shareholders and Directors Under New York's Business Corporation Law: A Comparative View,* 11 Buff. L. Rev. 496, 570–572, 574 [1962]). He cited to "the often enormous expenses of litigation incurred (and judgments or fines suffered) in

the *defense* of such suits and, in a sense, *in defense and vindication of corporate policy* " (*id.* at 574 [emphasis added]). Hoffman further explained that his approach was heavily influenced by Professor Bishop's article, *Current Status of Corporate Directors' Right to Indemnification* (69 Harv. L. Rev. 1057, 1065–1066 [1956]), which had pointed out the shortcomings of the prior New York statutes, for not adopting indemnification under common-law rules of agency. Nowhere in any of the legislative history of the 1961 enactment is there any indication of an intent to go beyond the common-law agency rule on indemnity, under which an agent's attorneys' fees incurred in enforcement of indemnification rights are not recoverable.

Siegel also relies upon the limiting language of current section 722(c)—which authorizes indemnification only "in connection ***87** with the defense" of *derivative* actions brought by or on behalf of the corporation against officers and directors—to argue that the broader language of section 722(a) at issue here was intended to cover fees on fees. Again, the legislative history belies this argument. The distinction on which Siegel relies first appeared in the 1961 legislation. The more expansive language employed with respect to indemnification of litigation expenses and liability in non-derivative actions was expressly intended to cover expenses incurred in settling claims even prior to the commencement of a suit. The Joint Legislative Committee to Study Revision of Corporation Laws explained: "In contrast with indemnification in derivative actions (see, § 722 and paragraph (f) of § 725), indemnification is permissible under this section for expenses incurred and amounts paid in settling threatened as well as pending non-derivative actions or proceedings" (1961 N.Y. Legis. Doc. No. 12, at 54; *see also* Hoffman, *supra* at 579–581).

The indemnification provisions were revisited subsequently at various times, but always leaving unchanged the operative language at issue here. Of particular note is that in 1986 and 1987, the Legislature amended these provisions in ways especially favorable to officers and directors. Thus, in 1986, article 7 was extended to permit reimbursement where the party was "successful" as opposed to "wholly successful" and to render the statutory remedies non-exclusive (L. 1986, ch. 513). In 1987, the Legislature amended Business Corporation Law § 402(b) to authorize corporations, in some circumstances, to insulate directors from personal liability in derivative suits or otherwise (L. 1987, ch. 367, § 1). The legislative history of these amendments specifically indicates that the business corporation statutes of several states were examined for possible incorporation of their provisions. Significantly, the Model Business Corporation Act, which was also under review, and the statutes of two of the states considered—Indiana (Ind Code Ann § 23–1–37–11) and California (Cal Corp Code § 317[a])—contained express provisions authorizing recovery of fees incurred to enforce indemnification rights (*see* Bill Jacket, L. 1987, ch. 367, at 16; Governor's Program Bill, Bill Jacket, L. 1986, ch. 513, at 11–12). The Legislature, however, did not add those provisions.

In short, the statutory language of section 722(a) and the legislative history contain nothing indicating that the Legislature intended to provide coverage for fees *****746 **1104** on fees. Moreover, even if, as Siegel urges, the "incurred as a result of" language of section 722(a) could arguably support an implied right of ***88** indemnification for fees on fees, the "American Rule" jurisprudence of this Court and the Supreme Court of the United States would militate against adoption of that interpretation. The American Rule provides that "attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Hooper Assoc. v. AGS Computers,* 74 N.Y.2d 487, 491, 549 N.Y.S.2d 365, 548 N.E.2d 903, *supra*). In *Chapel v. Mitchell,* we characterized the American Rule as "an implicit legislative judgment regarding the allocation of legal fees" (84 N.Y.2d 345, 349, 618 N.Y.S.2d 626, 642 N.E.2d 1082 [1994]). Under the American Rule as applied to statutory entitlement to attorneys' fees, the Supreme Court has held that "we follow 'a general practice of not awarding fees to a prevailing party absent *explicit* statutory authority' " (*Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources,* 532 U.S. 598, 602, 121 S.Ct. 1835, 149 L.Ed.2d 855 [2001] [quoted case omitted] [emphasis added]). This Court has adhered to the same position specifically in the context of a statutory claim for corporate indemnification of legal fees, holding that, to the extent the indemnification statutes "chang[e] the common-law rule that each party pays his own lawyer, [they are] to be construed strictly" (*Diamond v. Diamond,* 307 N.Y. 263, 267, 120 N.E.2d 819 [1954]).

Finally, we observe that our holding does not leave corporate officers and directors remediless; Business Corporation Law § 721 expressly provides that article 7 is not an exclusive remedy and, thus, corporations remain free to provide indemnification of fees on fees in bylaws, employment contracts or through insurance.

***89** For all of the foregoing reasons, the certified question should be answered in the negative.[2]

Chief Judge KAYE (dissenting).

We would answer the certified question in the affirmative.

Section 722 (a) of the Business Corporation Law is clear, simple and forthright. Together with section 723(a), it mandates indemnification for reasonable expenses actually and necessarily incurred as a result of an action against a director of a corporation. The plainly stated limitations on what expenses the corporation must pay the director are that they be "reasonable," and "actually and necessarily incurred as a result of [the underlying] ***747 **1105 action." (§ 722[a].) In our view, the unequivocal words of the statute include fees reasonably and necessarily incurred by directors in enforcing their statutory right to be free of personal expense in successfully defending their corporate action.

Here, several class action suits—ultimately consolidated into one—were filed in early 1997 against the corporation and certain officers and directors, including appellant, charging respondents with disseminating false and misleading statements to inflate the price of the stock. Appellant, who joined the corporation three months *after* the alleged wrongdoing and actually *purchased* shares during the class period, through his own counsel, in August 1998 succeeded in having the complaint dismissed as to him. As to the remaining defendants, the suit continued for approximately three more years, when it was ultimately settled for over $4 million. No one disputes that the remaining individuals were fully indemnified by the corporation.

In the years following appellant's dismissal, costly litigation battles ensued between him and the corporation as he attempted to recover his fees and expenses. The corporation at first denied, and disputed, the payment of fees to his counsel, then conceded that $5,000 should be enough, and sought reference of the case to a Magistrate, where discovery disputes continued over a full year. At that point the corporation noted that it would "not claim that it was not 'necessary' for individual defendants to retain counsel," and acknowledged that appellant was "probably" entitled to more than $5,000 for his counsel fees. The Magistrate, on October 25, 1999, determined ***90** both that separate representation was warranted, and that the claimed fees were reasonable.

In adopting the Magistrate's Report and Recommendation for $60,959.50 (not $5,000) in fees, and disallowing $17,147.64 in enforcement fees, the District Court rejected appellant's argument that he should recover enforcement fees based on the corporation's bad faith in denying his application for indemnification, though it observed that the question of whether the corporation's actions amounted to bad faith was "regrettably a very close call." (82 F Supp 2d 227, 231.) The court also noted the "illogic" of denying enforcement fees—a difficulty it felt should not be remedied by a federal court construing New York State law. (*Id.*)

These facts stand as an example of what will be considered the absence of bad faith on the part of companies denying reimbursement and forcing litigation to recover it. They also demonstrate that denying enforcement fees where reasonable and necessary is a significant impairment of the legislative mandate for indemnification. Defendant companies, behaving like respondent company did here, gain considerable leverage in keeping individual directors in the fold of a common defense, on pain of paying their own legal expenses if they seek to assert meritorious separate defenses.

We believe the New York State Legislature did not require such a disquieting, unsatisfactory result, but permitted recovery of reasonable enforcement fees where enforcement action becomes necessary. That has certainly been the assumption for the past 30–plus years since *Professional Ins. Co. of N.Y. v. Barry*, 60 Misc.2d 424, 303 N.Y.S.2d 556, *affd.* 32 A.D.2d 898, 302 N.Y.S.2d 722 [1st Dept.1969], now no longer to be relied on (*see also Sierra Rutile Ltd. v. Katz,* 1997 WL 431119, 1997 U.S. Dist LEXIS 11018 [S.D.N.Y., July 31, 1997]).

The majority is rightly concerned that indemnification rights not cover expenses far removed from the underlying litigation. So was the New York State Legislature ***748 **1106** when it explicitly limited indemnification to "*reasonable* expenses * * * actually and *necessarily* incurred" (Business Corporation Law § 722[a]; emphasis added). Expenses "having the most attenuated link" (majority op at 85, 745 N.Y.S.2d at 743, 772 N.E.2d at 1101) to the underlying action obviously fail the statutory test. Nor—as the factual recitation shows—does it stretch the language "beyond the outer limits of meaning to claim

that those fees on fees were necessarily incurred by reason of the joinder of Siegel in the securities fraud suits" (majority ***91** op at 85, 745 N.Y.S.2d at 744, 772 N.E.2d at 1102). No one other than appellant's counsel sought to have him individually dismissed from a lawsuit that was baseless as to him but continued on for three years, until it was settled.

Regrettably, there is no really decisive legislative history—neither side can point to any. That the indemnification provisions were revised several times, always leaving unchanged the operative language at issue here, is itself inconclusive. As we read the statute, it was unnecessary to revise the statute to include enforcement fees—they are already permitted within the existing language. Nor does the "American rule" requiring parties to bear their own attorneys' fees offer the answer, because here the right to indemnification is provided by statute, not contract (*see Hooper Assoc. v. AGS Computers,* 74 N.Y.2d 487, 549 N.Y.S.2d 365, 548 N.E.2d 903 [1989]).

Perhaps most importantly, there is a good reason why these fees should be reimbursable, as we believe the Legislature provided. The majority's conclusion puts a finger on the scale in favor of a corporation and its controlling directors in cases where an individual director, or minority group of directors, may have a legitimate independent legal position at odds with what the corporation would wish to portray as a common defense. Here, had appellant joined the other defendants, he could have been indemnified for all of the expenses of the underlying action when the case was settled years later. Because he was exonerated at the outset—having successfully asserted his own meritorious defense—he is now saddled with the considerable costs of enforcing his right of indemnification.

That result is inconsistent with the language and purpose of the statute. And it is particularly unfortunate in today's corporate climate, when "it is crucial to secure the continued service of competent and experienced people in senior corporate positions and to assure that they will be able to exercise business judgment without fear of personal liability so long as they fulfill the basic duties of honesty, care and good faith" (Governor's Mem. approving L. 1986, ch. 513, 1986 McKinney's Session Laws of N.Y., at 3171).

Given this unfortunate result, and absent legislative clarification, we certainly join the majority's concluding observation that directors would do well to provide for such indemnification in bylaws, employment contracts and insurance, if they can. Otherwise, individuals would be well advised to decline board service which, as this case shows, may be personally expensive.

***92** Judges SMITH, WESLEY and ROSENBLATT concur with Judge LEVINE; Chief Judge KAYE dissents and votes to answer the certified question in the affirmative in a separate opinion in which Judges CIPARICK and GRAFFEO concur.

Following certification of a question by the United States Court of Appeals for the Second Circuit and acceptance of the question by this Court pursuant to section *****749 **1107** 500.17 of the Rules of the Court of Appeals (22 NYCRR 500.17), and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified question answered in the negative.

All Citations

98 N.Y.2d 80, 772 N.E.2d 1099, 745 N.Y.S.2d 741, 2002 N.Y. Slip Op. 03196

Footnotes

1 In the context of derivative actions, section 722(c) provides that a corporation may indemnify officers and directors who acted in good faith and in the best interests of the corporation "against amounts paid in settlement and reasonable expenses, including attorneys' fees, actually and necessarily incurred by [them] *in connection with the defense or settlement of such action* " (emphasis added).

[2] To the extent that *Professional Ins. Co. of N.Y. v. Barry*, 60 Misc.2d 424, 303 N.Y.S.2d 556, *affd.* 32 A.D.2d 898, 302 N.Y.S.2d 722 [1969] conflicts with our holding here, that case is not to be followed.

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98 A.D.2d 918
Supreme Court, Appellate Division, Third Department, New York.

In the Matter of Joseph T. BAUM, Respondent,
v.
TOWN BOARD OF the TOWN OF SAND LAKE et al., Appellants.

Dec. 29, 1983.

Synopsis
Proceeding in nature of mandamus was brought to compel town board to establish salary for confidential secretary to town supervisor. The Supreme Court, Special Term, Rensselaer County, Pennock, J., granted the application, and appeal was taken. The Supreme Court, Appellate Division, held that: (1) secretary's action to compel establishment of his salary was appropriate case for mandamus; (2) secretary was not required to make demand upon town board to establish salary before commencing the proceeding where demand would have resulted in refusal to perform, and (3) individual town board members, as opposed to the town board as a whole, could not be compelled to act by mandamus.

Modified and affirmed.

Attorneys and Law Firms

****913** Franklin K. Breselor, Town Atty., Averill Park, for appellants.

Joseph T. Baum, West Sand Lake, pro per.

Before MAHONEY, P.J., and SWEENEY, MAIN, MIKOLL and YESAWICH, JJ.

Opinion

MEMORANDUM DECISION.

***918** Appeal from a judgment of the Supreme Court at Special Term, entered February 7, 1983 in Rensselaer County, which granted petitioner's application, in a proceeding ***919** pursuant to CPLR article 78, to compel respondents to establish a salary for petitioner in his capacity as Confidential Secretary to the Supervisor of the Town of Sand Lake.

On January 6, 1982, Supervisor Kelley of the Town of Sand Lake in Rensselaer County appointed petitioner to be his confidential secretary. Under section 29 (subd. 15) of the Town Law, respondent Town Board of the Town of Sand Lake was required to fix a reasonable compensation for petitioner's services. The town board, at four successive meetings from February through May, 1982, failed to take action on proposed resolutions to fix petitioner's salary. The instant CPLR article 78 proceeding to compel the town board to establish petitioner's salary was then commenced against the town board and the individual board members.

Special Term denied respondents' motion to dismiss the petition on the grounds of lack of jurisdiction over the subject matter and failure to state a cause of action. Special Term apparently converted the motion to one for summary judgment and its judgment ****914** directed the town board to "perform its duty pursuant to Town Law § 29(15)". This appeal by respondents ensued.

Where a "petitioner has a clear legal right he is entitled to enforce" (*Matter of Sullivan v. Siebert,* 70 A.D.2d 975, 417

N.Y.S.2d 129), where the duty to fix compensation is clearly mandated by statute (Town Law, § 29, subd. 15), and where the town board, whose duty it is to act in furtherance of that right, refuses to meet its responsibilities, a writ of mandamus is a proper remedy (see *Matter of Posner v. Levitt,* 37 A.D.2d 331, 325 N.Y.S.2d 519; see, also, *Court Officers' Benevolent Assn. of Nassau County v. Evans,* 112 Misc.2d 236, 239, 446 N.Y.S.2d 881). In the instant case, the Town Law specifically provides that a person designated as confidential secretary by the supervisor "shall receive a reasonable compensation for his services, to be fixed by the town board * * * " (Town Law, § 29, subd. 15). Thus, this appears to be an appropriate case for mandamus.

Respondents' contention that this proceeding is premature because petitioner failed to make a demand upon the town board to establish his salary is not persuasive. Here, it is clear that a demand, if made, would have resulted in a refusal to perform. In such circumstances, the failure to make the demand is not a bar to commencement of a proceeding in the nature of mandamus (see *People ex rel. Hotchkiss v. Smith,* 152 App.Div. 514, 517, 137 N.Y.S. 387, mod. on other grounds 206 N.Y. 231, 99 N.E. 568; *Matter of Meyer v. Commissioner of Public Safety of City of Yonkers,* 39 Misc.2d 608, 612, 241 N.Y.S.2d 233; cf. *Matter of Remedy for Infinite Unconcern for Mentally & Physically Handicapped* [*TRIUMPH*] *v. O'Shea,* 77 A.D.2d 363, 434 N.Y.S.2d 723, app.dsmd. 54 N.Y.2d 681).

The failure of Special Term to serve notice to the parties before converting the motion to dismiss into one for summary judgment (CPLR 3211, subd. [c]) does not constitute reversible error since "the determination on the merits involved only a question of law which was argued by the parties on the motion and respondents have at no time identified or demonstrated the existence of any material factual issues" (*O'Hara v. Del Bello,* 47 N.Y.2d 363, 366, 418 N.Y.S.2d 334, 391 N.E.2d 1311, modfg. 62 A.D.2d 1034, 404 N.Y.S.2d 34). Respondents have made only a conclusory assertion that petitioner has not performed his duties as confidential secretary. This is insufficient to raise a triable issue of fact which would preclude an award of summary judgment (*Freedman v. Chemical Constr. Corp.,* 43 N.Y.2d 260, 264, 401 N.Y.S.2d 176, 372 N.E.2d 12).

Finally, respondents' contention that the petition should have been dismissed as against the three named individual town board members, Angelo Patti, Joseph Warren and Kenneth Martin, is correct. Although mandamus lies to compel the town board as a whole to act, it is inappropriate to direct any three individual town board members to act in a specific way. Courts should not meddle in the internal affairs of a legislative body. The judgment should, therefore, be modified by reversing so much thereof as denied respondents' motion to dismiss as against respondents Patti, Warren and Martin individually, and, as so modified, be affirmed.

Judgment modified, on the law, with costs to petitioner against the Town Board of the Town of Sand Lake, by reversing so much thereof as denied ***920** respondents' motion to dismiss the petition against respondents Angelo Patti, Joseph Warren and Kenneth Martin, and, as so modified, affirmed.

All Citations

98 A.D.2d 918, 470 N.Y.S.2d 912

81 N.Y.2d 681
Court of Appeals of New York.

In the Matter of BRANFORD HOUSE, INC., et al., Appellants,
v.
Felice MICHETTI, as Commissioner of Housing Preservation and Development of the City of New York, et al., Respondents.

Oct. 12, 1993.

Synopsis
Article 78 proceeding was brought to vacate determination that limited-profit housing company had to pay surplus prior to dissolving and "going private." The Supreme Court, New York County, Moskowitz, J., dismissed, and appeal was taken. The Supreme Court, Appellate Division, 187 A.D.2d 380, 590 N.Y.S.2d 198,affirmed, and further review was sought. The Court of Appeals, Hancock, J., held that: (1) company failed to establish that inclusion of term "state" in statutory exception from surplus requirement was inadvertent and that exception also applied to its city-aided project, and (2) company's long-term mortgage debt was not to be considered in calculating surplus to be repaid.

Affirmed.

Attorneys and Law Firms

***682 **11** Szold & Brandwen, P.C., New York City (Alan G. Blumberg, Eric J. Weisberg and Robert I. Goodman, of counsel), for appellants.

***683** O. Peter Sherwood, Corp. Counsel, New York City (Timothy J. O'Shaughnessy and Kristin M. Helmers, of counsel), for respondents.

*****291 *684 **12 OPINION OF THE COURT**

HANCOCK, Judge.

This proceeding involves a limited-profit (or Mitchell–Lama) housing company, which voluntarily dissolved by prepaying its subsidized mortgage in order to remove the housing project from City regulation and "go private". The parties dispute the application and interpretation of Private Housing Finance Law § 35. Section 35 provides that, except for projects aided by a State loan, upon dissolution, any surplus in the housing company's treasury, after accounting for various expenses, obligations and the housing company's profit, must be paid to the municipality that granted the housing company a tax exemption.

Petitioners raise two arguments. First, despite the limiting language in section 35(3) indicating that only projects aided by a *State* loan are exempt from the surplus requirement, they contend that their project, which was aided by a non-State loan, is exempt from the surplus requirement because the limiting word "state" was accidentally inserted into section 35 when it was

recodified in 1961. Second, petitioners argue that, even if they are not exempt from the surplus requirement, section 35 should be construed so as to permit them to deduct the prepayment of their mortgage debt in calculating their surplus, thereby eliminating any surplus they might have been required to repay. For the reasons that follow, we reject petitioners' contentions.

I.

In 1963, petitioner Branford House, Inc. (Branford), now dissolved, became a limited-profit housing company under article II of the Private Housing Finance Law. As such, it received a 50–year, low-interest loan from the New York City Board of Estimate and a 30–year exemption from local and municipal taxes for a 159–unit apartment building to be constructed in the Bronx to provide low-rental housing for middle income families. In exchange for the receipt of these financial advantages, Branford promised to remain a limited-profit housing company in the Mitchell–Lama program for a minimum of 20 years before filing for dissolution. In 1989, ***685** after being notified of Branford's intention to dissolve, respondent New York City Department of Housing Preservation and Development informed Branford that it was required to pay a surplus of $377,074 pursuant to section 35(3).[1] Branford prepaid its mortgage balance of $2,471,095.74 due to the City and conveyed the property to petitioner New Branford, Inc. Petitioners also paid the surplus to respondents under protest. They then commenced this proceeding.

Supreme Court concluded that petitioners owed the surplus. The Appellate Division unanimously affirmed, and rejected petitioners' claim that the word "state" had been inadvertently inserted into section 35(3). The Court also concluded that there was no merit to petitioners' position that the mortgage should be considered when calculating the surplus (187 A.D.2d 380, 382, 590 N.Y.S.2d 198). We granted petitioners leave to appeal and now affirm.

II.

We first address petitioners' contention that it is exempt from application of the surplus requirement because the word "state" was inadvertently inserted into Private Housing Finance Law § 35(3). That section exempts from the surplus requirement those housing companies that were "aided by a *state* loan made after" May 1, 1959 (emphasis added).[2] Branford's project *****292 **13** was aided by a loan, made after May 1, 1959, by the City, not the State. Thus, the City's loan to Branford does not fall within the express language of the statutory exemption from the surplus requirement. Petitioners argue, however, that the insertion of the limiting word "state" before the ***686** word "loan" in the 1961 recodification of the Limited–Profit Housing Companies Law was an inadvertent clerical error, and that section 35(3) should be applied as if the clerical error had not been made. If the statute is read without the limiting word "state", inasmuch as the project was aided by "a loan" made after May 1, 1959, it would be exempt from the surplus requirement.

Generally, a court may not assume the existence of legislative error and change the plain language of a statute to make it conform to an alleged intent. However, a court may apply a statute by disregarding a clerical error in legislation so as to make the corrected statute conform to the Legislature's true intent, if it is established unquestionably that (1) the true legislative intent is contrary to the statutory language, and (2) the mistake is due to inadvertence or clerical error (McKinney's Cons.Laws of N.Y., Book 1, Statutes § 362; *see, People ex rel. French v. Lyke,* 159 N.Y. 149, 152–153, 53 N.E. 802; *McKee Land & Improvement Co. v. Williams,* 63 App.Div. 553, 561, 71 N.Y.S. 1141, *affd.* 173 N.Y. 630, 66 N.E. 1112; *Matter of Deuel,* 116 App.Div. 512, 514–515, 101 N.Y.S. 1037; *People ex rel. Fitch v. Lord,* 9 App.Div. 458, 41 N.Y.S. 343).

We first hold that petitioners have failed to meet their burden of establishing without question that the Legislature in the 1961 recodification of section 35(3) did not intend to restrict the scope of the exemption from the surplus requirement to projects aided by a State loan. On the contrary, the legislative history of section 35(3) supports equally the conclusion that limiting the

surplus exemption to State-aided projects was a considered decision of the 1961 Legislature. Indeed, the Legislature in 1959 so limited the surplus exemption. Although in 1960 it expanded the exemption to projects aided by any loan, in 1961 it again limited the exemption to State-aided projects, just as it had done in 1959.[3] Petitioners do not offer any persuasive reason why the Legislature's 1961 amendment should be considered any less deliberate than the ones in 1959 and 1960. Petitioners argue that because the insertion ***687** of the word "state" in 1961 was a substantive change contrary to the 1961 legislative history's statements that the recodification was intended to be without substantive change, the 1961 amendment should not be given effect. But, such a general statement of legislative intent is not sufficient to meet petitioners' heavy burden of establishing that the Legislature's intended meaning was contrary to the plain language of a statute, especially where that language has been left unchanged by the Legislature for over 30 years.

We also conclude that petitioners have failed to establish that the insertion of the word "state" in the 1961 amendment was a clerical error. The claimed error is not the typical mistake in drafting—i.e., a typographical error, misspelling or a transposition ****14** of *****293** letters or numerals. Rather, the purported error is in the inclusion of a substantive word in the statute. Nothing has been shown about the circumstances surrounding the incorporation of this word that would suggest that it was due to a clerical error in drafting or printing (*cf., People ex rel. French v. Lyke,* 159 N.Y. 149, 152–153, 53 N.E. 802, *supra* [omission of the word "or"]; *McKee Land & Improvement Co. v. Williams,* 63 App.Div. 553, 71 N.Y.S. 1141, *affd.* 173 N.Y. 630, 66 N.E. 1112,*supra* [reference to chapter 744 rather than chapter 774]). The parties agree that no documentary evidence exists that accounts for the alleged mistake, and petitioners' attempt to explain it is wholly speculative. Furthermore, the inclusion of the word "state" in section 35(3) does not create any anomaly in the statute or result in a statutory scheme that is not entirely reasonable (*cf., Matter of Deuel,* 116 App.Div. 512, 514–515, 101 N.Y.S. 1037, *supra; People ex rel. Fitch v. Lord,* 9 App.Div. 458, 41 N.Y.S. 343, *supra*). On the contrary, without the inclusion of the limiting word "state", the exemption would apply to all loans made after May 1, 1959 regardless of source, and thus, in effect, eliminate the surplus requirement. A court should certainly not attribute such a far-reaching result to an alleged clerical error without stronger evidence than petitioners have provided.

III.

Given our conclusion that the surplus requirement of Private Housing Finance Law § 35(3) applied to Branford, we now address petitioners' alternative argument that Branford's mortgage debt should have been included as part of "indebtedness" under section 35(3) and, thus, should have been deducted in making the surplus calculation. The parties agree that if Branford's mortgage debt is so deducted, no surplus exists. Section 35(2), provides, in pertinent part, that a limited-profit housing company may voluntarily dissolve upon ***688** payment in full of its mortgage debt.[4] Section 35(3) further states that before such dissolution, "payment shall be made of all current operating expenses, taxes, indebtedness and all accrued interest thereon and the par value of and accrued dividends on the outstanding stock of such company." After making such payments, any surplus remaining in the treasury of the housing company shall be paid to the municipality which granted the company a tax exemption.

Petitioners' claim that its mortgage debt should have been deducted in making the surplus calculation is not persuasive. Read sequentially so as to give section 35 "a sensible and practical over-all construction" (*Matter of Long v. Adirondack Park Agency,* 76 N.Y.2d 416, 420, 559 N.Y.S.2d 941, 559 N.E.2d 635), subdivision (2) first requires, for a housing company to be eligible for voluntary dissolution, that the mortgage be paid, and subdivision (3) thereafter provides that the surplus be calculated based upon, in part, the payment of any current indebtedness. Petitioners' contention that the mortgage debt referred to in subdivision (2) is merely one component of the indebtedness referred to in subdivision (3) fails to recognize the different purposes of the two subdivisions. Subdivision (2) establishes the basic criteria which must be met for a housing company to qualify for voluntary dissolution. Subdivision (3) addresses the distinct requirement of calculating any surplus to be paid to the municipality after dissolution and conveyance of the project. If the unpaid mortgage of subdivision (2) constituted "indebtedness" under subdivision (3), as petitioners assert, the requirement of subdivision (3) that all indebtedness be paid before dissolution would render subdivision (2) superfluous to the extent that it requires the unpaid mortgage to be paid before dissolution. A construction ****15** rendering statutory language superfluous is to *****294** be avoided (*see, Sanders v. Winship,* 57 N.Y.2d 391, 396, 456 N.Y.S.2d 720, 442 N.E.2d 1231; McKinney's Cons.Laws of

N.Y., Book 1, Statutes § 98).

Moreover, petitioners' interpretation of section 35 would subvert the carefully balanced bargain between the investors and the governmental entities created by the statutory scheme of the Private Housing Finance Law: i.e., the investors agree to a 6% per year limit on the profit they may earn and to be subject to rent regulation while operating as a limited-profit housing company in return for receiving long-term, low-interest government loans and real estate tax exemptions. Typically after 20 years of providing low-rental housing, the company may "go private" pursuant to section 35 by paying off its mortgage debt and dissolving as a limited-profit ***689** housing company. It then may "cash in" its equity in the property by selling, leasing or renting it and thereby realize whatever profit the market will provide (*see, Matter of Columbus Park Corp. v. Department of Hous. Preservation & Dev.,* 80 N.Y.2d 19, 23–24, 586 N.Y.S.2d 554, 598 N.E.2d 702).

In accordance with the statutory scheme, section 35(2) offsets a housing company's long-term mortgage debt against its equity in the property and section 35(3) separately offsets the housing company's operating expenses, including "indebtedness", against its rental income, with any surplus beyond the 6% profit limit to go to the municipality that granted the tax exemption.[5] By claiming that the mortgage debt referred to in section 35(2) is part of the surplus calculation in section 35(3), petitioners are, in effect, seeking to use any surplus achieved as a limited-profit housing company to pay off the mortgage debt, thereby increasing the investors' equity in the property. Because surplus represents operating profits beyond the 6% limit, if investors were allowed to retain the surplus in the form of increased equity, they would be exceeding the 6% limit on profits. This would be contrary to the statute's purpose (*see, Matter of Long v. Adirondack Park Agency,* 76 N.Y.2d 416, 420, 559 N.Y.S.2d 941, 559 N.E.2d 635 *supra*).

In sum, in view of the language, structure and purpose of section 35 of the Private Housing Finance Law, we conclude that a limited-profit housing company's long-term mortgage debt is not to be considered in calculating the surplus to be repaid under section 35(3).

The order of the Appellate Division should be affirmed, with costs.

KAYE, C.J., and SIMONS, TITONE, BELLACOSA and LEVINE, JJ., concur.

SMITH, J., taking no part.

Order affirmed, with costs.

All Citations

81 N.Y.2d 681, 623 N.E.2d 11, 603 N.Y.S.2d 290

Footnotes

1 The City later recomputed the amount as $337,191, and later it was reduced to $298,107.

2 Section 35(3) states: "Upon such dissolution, title to the project may be conveyed in fee to the owner or owners of its capital stock or to any corporation designated by it or them for the purpose, or the company may be reconstituted pursuant to appropriate laws relating to the formation and conduct of corporations, provided, however, that *prior to any such dissolution and conveyance or reconstitution, payment shall be made of all current operating expenses, taxes, indebtedness and all accrued interest thereon and the par value of and accrued dividends on the outstanding stock of such company.* If after making such payments, and after conveyance of the project, a surplus remains in the treasury of the company, *such surplus, except in the case of a project aided by a state loan made after May first, nineteen hundred fifty-nine, shall upon dissolution, be paid into the general fund of the municipality* which granted tax exemption. After such dissolution and conveyance, or such reconstitution, the provisions of this article shall become and be inapplicable to any such project and its owner or owners and any tax exemption granted with respect to

such project pursuant to section thirty-three hereof shall cease and terminate" (emphasis added).

[3] Section 35's predecessor originally did not exempt any projects from the surplus requirement (L.1956, ch. 877, § 22). In 1959 the Legislature created an exemption to the surplus requirement and that exemption was limited to projects aided by a State loan (L.1959, ch. 675, § 3). Then in 1960 the Legislature expanded the exemption from the surplus requirement to projects aided by "a loan" (L.1960, ch. 669, § 4). In 1961, the Legislature recodified the subject statute as Private Housing Finance Law § 35, providing that the exemption from the surplus requirement applied only to "a project aided by a state loan made after" May 1, 1959 (L.1961, ch. 803).

[4] Section 35(2) provides: "A company aided by a loan made after May first, nineteen hundred fifty-nine, may voluntarily be dissolved, without the consent of the commissioner or of the supervising agency, as the case may be, not less than twenty years after the occupancy date upon the payment in full of the remaining balance of principal and interest due and unpaid upon the mortgage or mortgages and of any and all expenses incurred in effecting such voluntary dissolution."

[5] Section 35(3), by providing that the par value of, and all accumulated dividends on, the company's stock be paid before any remaining surplus is paid to the municipality, tries to insure that the investors receive both their original investment and 6% per year profit upon dissolution. In other words, the housing company's operating profit goes to insuring that the investors receive their original investment, plus 6% per year on that investment, before it goes to the municipality as surplus (*see,* Private Housing Finance Law § 24[1]; § 27[2]; § 28[1]).

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204 A.D.2d 233
Supreme Court, Appellate Division, First Department, New York.

Paul J. CANIGLIA, et al., Plaintiffs–Appellants,
v.
CHICAGO TRIBUNE–NEW YORK NEWS SYNDICATE INC., etc., et al.,
Defendants–Respondents,
and
Daily Newspaper Distributing Corp., Defendant.

May 26, 1994.

Synopsis
Action was brought alleging breach of contract and fraud. The Supreme Court, New York County, Cohen, J., granted defendants' motion to dismiss. Plaintiffs appealed. The Supreme Court, Appellate Division, held that: (1) Supreme Court properly dismissed, without leave to replead, cause of action purporting to set forth cause of action for breach of contract, and (2) cause of action for fraud did not arise where only fraud alleged merely related to contracting parties' alleged intent to breach contractual obligation.

Affirmed.

****146** Before SULLIVAN, J.P., and ROSENBERGER, ELLERIN and KUPFERMAN, JJ.

Opinion

MEMORANDUM DECISION.

***233** Order, Supreme Court, New York County (Beverly Cohen, J.), entered April 15, 1993, which granted the defendants' motion pursuant to CPLR 3211(a)(7) and 3016(b) to dismiss, with prejudice, the first and second causes of action of the plaintiffs' complaint, unanimously affirmed, without costs.

On a motion addressed to the sufficiency of a complaint pursuant to ****147** CPLR 3211(a)(7), the facts pleaded are presumed to be true and are accorded every favorable inference. However, allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted ***234** by documentary evidence are not entitled to such consideration (*see, Mark Hampton, Inc. v. Bergreen,* 173 A.D.2d 220, 570 N.Y.S.2d 799).

The IAS court properly dismissed, without leave to replead, the plaintiffs' first cause of action, purporting to set forth a cause of action for breach of contract, as too indefinite, and therefore, unenforceable, for plaintiffs' failure to allege, in nonconclusory language, as required, the essential terms of the parties' purported personal services contract, including those specific provisions of the contract upon which liability is predicated (*Chrysler Capital Corp. v. Hilltop Egg Farms,* 129 A.D.2d 927, 928, 514 N.Y.S.2d 1002), whether the alleged agreement was, in fact, written or oral (*Bomser v. Moyle,* 89 A.D.2d 202, 205, 455 N.Y.S.2d 12), and the rate of compensation (*Cooper Sq. Realty v. A.R.S. Mgt.,* 181 A.D.2d 551, 581 N.Y.S.2d 50).

Plaintiffs' second cause of action for purported fraud constitutes a mere restatement of their breach of contract claim (*Kamyr, Inc. v. Combustion Eng'g,* 198 A.D.2d 44, 603 N.Y.S.2d 451, 452) and failed to contain the essential elements of the alleged fraud, i.e., representation of a material fact, falsity, knowledge, intent to deceive, reliance and damages, with the

requisite particularity pursuant to CPLR 3016(b) (*Bank Leumi Trust Co. v. D'Evori Intl.,* 163 A.D.2d 26, 31–32, 558 N.Y.S.2d 909). It is well settled that a cause of action for fraud does not arise, where, as here, the only fraud alleged merely relates to a contracting party's alleged intent to breach a contractual obligation (*Comtomark, Inc. v. Satellite Communications Network.,* 116 A.D.2d 499, 500, 497 N.Y.S.2d 371).

All Citations

204 A.D.2d 233, 612 N.Y.S.2d 146

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252 N.Y. 192
Court of Appeals of New York.

CHIAPPARELLI
v.
BAKER, KELLOGG & CO., Inc.

Nov. 19, 1929.

Synopsis
Action by Fernando G. Chiapparelli against Baker, Kellogg & Co., Inc. From a judgment (226 App. Div. 866, 234 N. Y. S. 762), affirming judgment for plaintiff, defendant appeals.

Reversed, and complaint dismissed.

****274 *193** Appeal from Supreme Court, Appellate Division, First Department.

Attorneys and Law Firms

Harold H. Corbin and Edward J. Bennett, both of New York City, for appellant.

Samuel C. Steinhardt, and Walter S. Newhouse, both of New York City, for respondent.

Opinion

KELLOGG, J.

The plaintiff, Fernando Chiapparelli, was a member of an Italian mission sent to the United States in the year 1915. He represented the Italian government in this country from the year 1915 to the year 1919 and was in charge of the financial department of the mission. His official duties brought him into contact with many important New York banking houses. ***194** In the year 1924 he was employed by the banking house of F. J. Lisman & Co. to procure for them the financing of foreign loans. In the service of that company he was sent to Austria in 1924, where he spent the months of September and October. In Vienna he met a Dr. Rintelen, who was the Governor of Styria, one of the nine provinces of the Republic of Austria. Rintelen was interested in obtaining a loan of $5,000,000 for his province. On his suggestion, Chiapparelli visited Styria. At Graz, the capital of Styria, he procured written data concerning the resources of the province, and obtained from the provincial government options for Lisman & Co. to make to Styria a loan of $4,000,000 or $5,000,000, and take over the bonds of the province at a stated figure. On Chiapparelli's return to New York, Lisman & Co. determined not to take on the loan. Chiapparelli left their service and attempted to interest other banking houses in the loan to Styria. Mr. Owen, of Hornblower, Miller & Garrison, general counsel for the defendant herein, introduced Chiapparelli to two responsible New York houses, but they proved not to be interested in the matter. At this time the Styrian options had long since expired. Nevertheless, Chiapparelli retained confidence in his ability to reinstate himself with the government officers of Styria so that he might have the financing of the loan on favorable terms. He says: 'I could provide the business any time I could find a banking house *heady to do it*.' He told Mr. Owen that, although the Styrian option had expired, 'he felt that his relations with Governor Rintelen were such that he could get it restored if he had a banking house actually *prepared to take the contract*.' In July, 1925, Chiapparelli was introduced to Mr. Bromley, the vice president of the banking ****275** house of Baker, Kellogg & Co., Inc., the defendant herein.

Baker, Kellogg & Co., Inc., had already become interested in Styrian loans. At this time they had ***195** under negotiation a loan of $5,000,000 to a Styrian hydroelectric company, known as 'Stewag,' to be guaranteed by the Styrian government. That the various provinces of the Republic of Austria were sadly in need of financing was commonly known to New York bankers. On June 15th a meeting of bankers, including a representative of the defendant, occurred, at which loans to the various Austrian provinces, including Styria, were discussed. It was recommended at the meeting that all loans to the separate provinces be held in abeyance, pending an arrangement whereby a joint loan to all the provinces might be negotiated. A representative of Baker, Kellogg & Co. had already visited Styria where he had discussed with Governor Rintelen, not only the loan to Stewag, but to the province of Styria itself.

On June 21, 1925, Bromley called upon Chiapparelli to see if he could be of assistance to the defendant in procuring, through his influence with Governor Rintelen, a governmental guaranty of the proposed Stewag loan. Chiapparelli told him that this would be impossible until a loan to the province of Styria itself had been arranged. Of this fact the defendant was already cognizant. Chiapparelli then attempted to interest Bromley in the provincial loan itself. Bromley said that the matter might prove interesting and asked Chiapparelli to bring his data to the office and talk with Mr. Luitweiler, the president of the defendant.

On the 25th day of June Chiapparelli and Luitweiler met in the latter's office. The opening words of their conversation are significant. Chiapparelli spoke to Luitweiler as follows: 'I would not be interested in telling to the Government of Styria about this provincial loan unless I was sure that his [Luitweiler's] house was seriously interested.' Luitweiler then spoke as follows: 'He asked me if I could assist him in securing this loan and support his desire for this loan with the Governor ***196** Rintelen.' Chiapparelli told Luitweiler that he had with him all the data, which he had collected for Lisman & Co., to start the foundation of the business and to find out whether the business would be possible or not. Luitweiler said that 'it would be interesting to send a telegram to the Governor Rintelen; that he would see if I could go there and negotiate for them the deal, if they would decide to do it.' Chiapparelli said: 'What would be my compensation if the business will be arranged?' Luitweiler said: 'How much would you want?' Chiapparelli replied that he would be satisfied if he had 'one per cent. commission on the face value of the loan when it was completed.' To this Luitweiler answered, 'Satisfactory.' Chiapparelli said he would turn over all the papers, in reference to the loan, which he had gathered for Lisman & Co., and, taking them from his brief case, handed them to Luitweiler.

After the conversation had with Luitweiler, the defendant delayed for nearly a month to notify Chiapparelli whether it was or was not interested in the Styrian loan. Chiapparelli, growing impatient at the delay, on July 22, 1925, wrote the defendant as follows: 'Gentlemen: I assume that you are not interested in the loans for the Province of Styria, which was the object of several conferences between your good selves and me the early part of June. As I am leaving for Europe next Saturday, kindly return to me the offical papers and data pertaining to the abovementioned loan, which were left in your office at the request of Mr. J. C. Luitweiler. To avoid delay, I will appreciate it if you will address the papers to me, and deliver same to Mr. Owen's office.' Complying with the request thus made, the defendant at once returned the papers to Chiapparelli which he had left with Luitweiler.

In January or February, 1926, the defendant negotiated a loan of $5,000,000 to the Province of Styria. The plaintiff claimed that he was entitled, under the ***197** terms of an agreement alleged to have been made with the defendant on June 25, 1925, to a commission of 1 per cent. upon the amount loaned, or $50,000. A verdict in his favor for that amount, with $9,000 added for interest, was returned by a jury, and a judgment therefor, entered upon the verdict, has been affirmed by the Appellate Division.

A familiar rule of law has been expressed by Professor Williston in the following terms: 'Since an offer must be a promise a mere expression of intention or general willingness to do something on the happening of a particular event or in return for something to be received does not amount to an offer.' Williston on Contracts, § 26. It is also said by Professor Williston: 'Frequently negotiations for a contract are begun between parties by general expressions of willingness to enter into a bargain upon stated terms and yet the natural construction of the words and conduct of the parties is rather that they are inviting offers, or suggesting the terms of a possible future bargain than making positive offers.' Section 27.

We think that neither Chiapparelli nor Luitweiler, in the conversation of June 25, ****276** 1925, indicated by their words any intention presently to make a bargain either absolute or conditional. Chiapparelli opened the conversation by stating that he would not be interested in talking to the Governor of Styria about the loan unless he was sure that Baker, Kellogg & Co., Inc., represented by Luitweiler, 'was seriously interested.' Luitweiler said that 'he would see if' Chiapparelli 'could go there and negotiate for them the deal, if they would decide to do it.' On cross-examination Chiapparelli said of this conversation: 'I told

Mr. Luitweiler that I had all the papers completed to give him the possibility of starting the loan, and decide to do it or not.' Again, when asked, 'As a matter of fact, Captain, you were told by Mr. Luitweiler, that if they considered ***198** the subject sufficiently interesting to go into it, that they would let you know,' he answered, 'Yes.' Luitweiler says of the conversation with Chiapparelli: 'I asked him at that time whether he desired to take up such matter again. He said: 'No. I do not, until such time as a banking house makes a firm offer for the business.' I should explain by that that the banking house says in advance: 'We will take this loan.' And he said: 'If you, Baker, Kellogg & Company, will say: 'Yes, we will take this loan,' then I will agree to negotiate it for you.'' That Chiapparelli made these statements to Luitweiler is not denied by him. Neither are the statements inconsistent with the testimony of Chiapparelli in reference to the conversation. We think it entirely clear that the negotiations did not pass the invitation stage; that they were wholly tentative; that Chiapparelli never bound himself, even conditionally, to carry on negotiations for a loan with the officers of the Styrian government; that he reserved the right to make a decision until he could sense, from future expression made by Baker, Kellogg & Co., Inc., how deep an interest in the proposed loan was taken by it; that Luitweiler never obligated his company to employ Chiapparelli either absolutely or conditionally; that the matter of the employment of Chiapparelli, as well as the assumption of the Styrian loan, was reserved by him for future consideration by his company.

If we assume, however, that Luitweiler, acting for the defendant, promised a commission to Chiapparelli, on condition that the defendant determined to take on the Styrian loan, even then we cannot perceive that the promise ever emerged from the offer stage to become and remain a binding obligation.

It is suggested that the delivery by Chiapparelli to Luitweiler of the documents, referred to in the conversation between them, was the consideration given by the former for the promise made by the latter, and that ***199** a unilateral contract was thereby formed. The papers delivered consisted of the options granted by the Province of Styria to Lisman & Co., which had expired; various documents containing statistics as to the natural resources of the province, all of which were procurable for the asking at the governmental offices of Styria; a copy of a resolution of the provincial government refusing to guarantee a loan to Stewag; a copy of a letter from Governor Rintelen inviting Chiapparelli to Graz to discuss the foreign loan; and a tourists' guide to Styria showing many picturesque scenes. No information of a personal or confidential nature was contained in the documents. Nothing was shown which might not have been, upon request, made known to the entire world. The documents had value, therefore, not for the purpose of effectuating a loan to Styria, but only for the purpose of enabling a banker, to whom they might be exhibited, promptly to form an impression that he might or might not become interested in giving consideration to the loan. Chiapparelli himself says this. He was asked: 'You feared that they might use them to close this loan themselves?' He answered, 'Oh, no.' Again, he was asked: 'You didn't?' He answered: 'No; these papers would not answer to close the deal. Those papers were given to the bank for an opinion of the loan. They had gotten the opinion already.' In view of the nature of the papers and the purpose of their delivery to Luitweiler, as expressed by Chiapparelli himself, the suggestion made that their delivery to Luitweiler for the defendant constituted a consideration for the promise said to have been made seems entirely vain, and may not be accepted.

We think it clear from the proof that, assuming a present promise was in fact made by the defendant, that promise was offered in exchange either for (1) services to be performed by Chiapparelli in negotiating the loan, or (2) for his contemporaneous promise to perform such services. Thus Chiapparelli stated, as we have noted, ***200** that Luitweiler asked him if he 'could assist him in securing this loan'; 'he would see if I could go there and negotiate for them the deal.' In answer to the question, 'And what is it that you say you were to do?' Chiapparelli said, 'Help them in negotiating this loan in Austria, if they were going to send me there, and get in touch immediately with the Governor of Styria in order to smooth over the difficulties, whatever they were, if there were any at that time.' Again, he said that the defendant was to 'use me as negotiator, if they were going ahead and close the ****277** deal.' Once more, he said that Luitweiler stated that he would 'possibly send me there to negotiate for the firm.' Granted that the consideration for the alleged promise to be furnished by Chiapparelli was either the one or the other of the two alternatives stated, it is self-evident that the consideration, named in the first alternative, never gave rise to a binding promise on the part of the defendant. Chiapparelli, it is conceded, performed no services whatsoever in negotiating the Styrian loan for the defendant. Consequently, no act was done by him in exchange for the alleged promise, and, therefore, no unilateral contract ever arose. It remains to be considered whether a promise by Chiapparelli to perform the services, the second alternative mentioned, constituted a consideration which made binding the alleged promise of the defendant.

Where a promisor retains an unlimited right to decide later the nature or extent of his performance, the promise is too indefinite for legal enforcement. The unlimited choice in effect destroys the promise and makes it merely illusory. Williston on Contracts, § 43. 'If definite enough to be interpreted plainly, but giving the promisor an unlimited option, such a promise

may be assented to by the parties but will not serve as consideration for a counter promise.' Id. We may pass the question whether the alleged promise of the defendant to pay for Chiapparelli's services, made on the express condition ***201** that the defendant might subsequently decide to take on the Styrian loan, involved an unlimited option to become bound to Chiapparelli, or not to become bound, as the promisor might choose, and, therefore, was illusory. Doubtless, if the promise was not withdrawn, and the event occurred, viz., the making of a determination favorable to the loan, the continuing offers of the parties might have ripened into enforceable obligations. However, it may be doubted whether, pending the decision to be made, Chiapparelli's promise to perform the services ever became a binding obligation. The only consideration therefor would have been the defendant's promise to employ Chiapparelli, in case the defendant chose to negotiate for the loan. This was an event, the happening of which was entirely at the defendant's command. In effect, the defendant had said to Chiapparelli: 'I will use your services, and make payments therefor if I choose to use and pay for them.' Assuming that such was the character of the defendant's promise, then the promise of Chiapparelli, being unsupported by a valuable consideration, was a mere offer revocable at will. In any event, it was clearly an implied term of the agreement, if one there was, that the defendant should render its decision within a reasonable time. If it was not so rendered, Chiapparelli was entitled to withdraw from the bargain made. Chiapparelli waited for 30 days. He then wrote the defendant, as we have noted, that he assumed that the defendant was not interested in the Styrian loan, and demanded that it return to him the documents which he had delivered to Luitweiler. The letter manifested an election on Chiapparelli's part to declare that, owing to the unreasonable delay of the defendant, he withdrew his offer to perform the services. The defendant acquiesced in the election and withdrawal by returning the papers to Chiapparelli as requested. Certainly, if Chiapparelli was no longer bound to the defendant by his promise, as we think must be clear, ***202** the defendant was no longer bound to Chiapparelli by its promise. Indeed, if ever there had been a contract, it had thus been abrogated by the acts of both the parties thereto.

For all these reasons we think that the plaintiff failed to establish a cause of action in contract against the defendant.

The judgments should be reversed and the complaint dismissed, with costs in all courts.

CARDOZO, C. J., and POUND, CRANE, LEHMAN, O'BRIEN, and HUBBS, JJ., concur.

Judgments reversed, etc.

All Citations

252 N.Y. 192, 169 N.E. 274

129 A.D.3d 895
Supreme Court, Appellate Division, Second Department, New York.

Dwayne COCKBURN, etc., et al., respondents,
v.
CITY OF NEW YORK, et al., appellants.

2014-00250, 20694/11
|
June 17, 2015.

Synopsis

Background: Plaintiff whose mother died after he transported her to hospital following snowstorm, individually and as executor of her estate, commenced action against New York City and several of its departments to recover damages for wrongful death and loss of services. Defendants filed motion to dismiss complaint. The Supreme Court, Kings County, Landicino, J., denied motion. Defendants appealed.

Holdings: The Supreme Court, Appellate Division, held that:

complaint did not state viable cause of action against defendants based on their alleged negligence in responding to plaintiff's 911 call, and

snow removal was also governmental rather than proprietary function, and plaintiff failed to sufficiently allege existence of special relationship between decedent and defendants as to that function.

Reversed.

Attorneys and Law Firms

****631** Zachary W. Carter, Corporation Counsel, New York, N.Y. (Larry A. Sonnenshein and Ronald E. Sternberg of counsel), for appellants.

Dalli & Marino, LLP (John Dalli and Pollack, Pollack, Isaac & De Cicco, LLP, New York, N.Y. [Brian J. Isaac], of counsel), for respondents.

REINALDO E. RIVERA, J.P., JEFFREY A. COHEN, SYLVIA O. HINDS–RADIX, and BETSY BARROS, JJ.

Opinion

***895** In an action, inter alia, to recover damages for wrongful death, etc., the defendants appeal from an order of the Supreme Court, Kings County (Landicino, J.), dated July 5, 2013, which denied their motion pursuant to CPLR 3211(a)(7) to dismiss the complaint.

ORDERED that the order is reversed, on the law, with costs, and the defendants' motion pursuant to CPLR 3211(a)(7) to dismiss the complaint is granted.

On December 27, 2010, at approximately 7:00 a.m., Jason Cockburn made a telephone call to the 911 emergency number requesting an ambulance shortly after finding his mother Lillie R. Cockburn (hereinafter the decedent) lying on the bathroom floor and assisting her to bed. The 911 operator told him that the call would be sent out, and forwarded it to an emergency medical service (hereinafter EMS) operator. The EMS operator told Jason to monitor the decedent's condition and call back if her condition changed. At ****632** about 2 p.m., Jason drove the decedent to the hospital, where she died a short time later, at approximately 3 p.m. It is undisputed that a recent snowstorm had blanketed the area, blocking streets on the date of the 911 call.

Thereafter, the decedent's son, Dwayne Cockburn, individually and as executor of the decedent's estate, and Jason Cockburn (hereinafter together the plaintiffs), commenced this action, inter alia, to recover damages for wrongful death and loss of services against the defendants City of New York and several of its departments (hereinafter collectively the defendants). The plaintiffs alleged that the defendants were negligent in responding to the 911 call and in failing to prepare for, and respond to, the snowstorm.

The defendants moved to dismiss the complaint pursuant to CPLR 3211(a)(7). The Supreme Court denied the motion.

***896** As a general rule, "a municipality may not be held liable to a person injured by the breach of a duty owed to the general public, such as a duty to provide police protection, fire protection or ambulance services" (*Etienne v. New York City Police Dept.,* 37 A.D.3d 647, 649, 830 N.Y.S.2d 349). When a negligence cause of action is asserted against a municipality, and the municipality's conduct is proprietary in nature, the municipality is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties (*see Applewhite v. Accuhealth, Inc.,* 21 N.Y.3d 420, 425, 972 N.Y.S.2d 169, 995 N.E.2d 131; *Matter of World Trade Ctr. Bombing Litig.,* 17 N.Y.3d 428, 446–447, 933 N.Y.S.2d 164, 957 N.E.2d 733). If it is determined that a municipality was exercising a governmental function, the municipality may not be held liable unless it owed a special duty to the injured party (*see Applewhite v. Accuhealth, Inc.,* 21 N.Y.3d at 426, 972 N.Y.S.2d 169, 995 N.E.2d 131; *Valdez v. City of New York,* 18 N.Y.3d 69, 75, 936 N.Y.S.2d 587, 960 N.E.2d 356; *Kupferstein v. City of New York,* 101 A.D.3d 952, 953, 957 N.Y.S.2d 200). "A 'special duty' is 'a duty to exercise reasonable care toward the plaintiff,' and is 'born of a special relationship between the plaintiff and the governmental entity' " (*Flagstar Bank, FSB v. State of New York,* 114 A.D.3d 138, 143, 978 N.Y.S.2d 266, quoting *Pelaez v. Seide,* 2 N.Y.3d 186, 189, 198–199, 778 N.Y.S.2d 111, 810 N.E.2d 393). Insofar as relevant here, to establish a special relationship against a municipality which was exercising a governmental function, a plaintiff must show: "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (*Cuffy v. City of New York,* 69 N.Y.2d 255, 260, 513 N.Y.S.2d 372, 505 N.E.2d 937; *see Valdez v. City of New York,* 18 N.Y.3d at 80, 936 N.Y.S.2d 587, 960 N.E.2d 356).

Here, the Supreme Court erred in denying that branch of the defendants' motion which was pursuant to CPLR 3211(a)(7) to dismiss the cause of action alleging that the defendants were negligent in responding to the 911 call. On a motion to dismiss pursuant to CPLR 3211(a)(7), the complaint is to be afforded a liberal construction (*see* CPLR 3026). The facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v. Martinez,* 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511; ****633** *Thomas v. LaSalle Bank N.A.,* 79 A.D.3d 1015, 1017, 913 N.Y.S.2d 742).

A municipal emergency response system is a classic governmental, rather than proprietary, function (*see* ***897** *Applewhite v. Accuhealth, Inc.,* 21 N.Y.3d at 430, 972 N.Y.S.2d 169, 995 N.E.2d 131; *see also Valdez v. City of New York,* 18 N.Y.3d at 75, 936 N.Y.S.2d 587, 960 N.E.2d 356). Contrary to the plaintiffs' contentions, the complaint fails to allege any facts tending to show knowledge by the defendants that inaction would lead to harm, or that there was any justifiable reliance on any promise made by the defendants. Accordingly, the complaint fails to state facts from which it could be found that there was a special relationship between the decedent and the defendants and, therefore, the complaint does not state a viable cause of action against the defendants based upon their alleged negligence in responding to the 911 call (*see Estate of Gail Radvin v. City of New York,* 119 A.D.3d 730, 733, 991 N.Y.S.2d 609; *Freeman v. City of New York,* 111 A.D.3d 780, 782, 975 N.Y.S.2d 141; *cf. Applewhite v. Accuhealth, Inc.,* 21 N.Y.3d at 431, 972 N.Y.S.2d 169, 995 N.E.2d 131).

Furthermore, the Supreme Court improperly denied that branch of the defendants' motion which was to dismiss the cause of

action alleging that the defendants failed to prepare for, and respond to, the snowstorm. A municipality is obligated to maintain the streets and highways within its jurisdiction in a reasonably safe condition for travel (*see Lopes v. Rostad,* 45 N.Y.2d 617, 624, 412 N.Y.S.2d 127, 384 N.E.2d 673; *Mazzella v. City of New York,* 72 A.D.3d 755, 899 N.Y.S.2d 291; *Gonzalez v. City of New York,* 148 A.D.2d 668, 539 N.Y.S.2d 418). A municipality will be deemed to have been engaged in a governmental function when its acts are undertaken for the protection and safety of the public pursuant to the general police powers (*see Applewhite v. Accuhealth, Inc.,* 21 N.Y.3d at 425, 972 N.Y.S.2d 169, 995 N.E.2d 131). Under the circumstances presented here, the defendants' snow removal operation on the public streets was a traditionally governmental function, rather than a proprietary function (*see Estate of Gail Radvin v. City of New York,* 119 A.D.3d at 733, 991 N.Y.S.2d 609; *Freeman v. City of New York,* 111 A.D.3d at 782, 975 N.Y.S.2d 141; *cf. Wittorf v. City of New York,* 23 N.Y.3d 473, 991 N.Y.S.2d 578, 15 N.E.3d 333; *McGowan v. State of New York,* 41 A.D.3d 670, 839 N.Y.S.2d 145; *Pappo v. State of New York,* 233 A.D.2d 379, 650 N.Y.S.2d 577; *Zuckerman v. State of New York,* 209 A.D.2d 510, 618 N.Y.S.2d 917). Moreover, the plaintiffs failed to sufficiently allege in their complaint the existence of a special relationship between the decedent and the defendants as to the defendants' snow removal function (*see Estate of Gail Radvin v. City of New York,* 119 A.D.3d at 733, 991 N.Y.S.2d 609; *Freeman v. City of New York,* 111 A.D.3d at 782, 975 N.Y.S.2d 141).

In light of the foregoing, the Supreme Court should have granted the defendants' motion pursuant to CPLR 3211(a)(7) to dismiss the complaint.

All Citations

129 A.D.3d 895, 10 N.Y.S.3d 630, 2015 N.Y. Slip Op. 05146

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21 N.Y.3d 55
Court of Appeals of New York.

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Appellant,
v.
CANADIAN IMPERIAL BANK OF COMMERCE, Respondent,
William H. Millard, Defendant,
The Millard Foundation, Intervenor.

April 30, 2013.

Synopsis

Background: Appeal was taken from order of the United States District Court for the Southern District of New York, Lewis A. Kaplan, J., denying application for turnover order. The United States Court of Appeals for the Second Circuit, 693 F.3d 274, certified questions regarding appropriateness of such an order where assets were in direct possession not of garnishee, but rather of garnishee's subsidiary.

The Court of Appeals, Rivera, J., held that for court to issue post-judgment turnover order against banking entity, that entity itself must have actual, not merely constructive, possession or custody of assets sought, i.e., it was not enough that banking entity's subsidiary might have possession or custody of judgment debtor's assets.

Question answered.

Attorneys and Law Firms

***877** Kobre & Kim LLP, New York City (Michael S. Kim and Melanie L. Oxhorn of counsel), for appellant.

Skadden, Arps, Slate, Meagher & Flom LLP, New York City (Scott D. Musoff, Timothy G. Nelson and Gregory A. Litt of counsel), for respondent.

OPINION OF THE COURT

RIVERA, J.

***57** **115** Two questions certified to us by the United States Court of Appeals for the Second Circuit raise issues as to whether a judgment creditor can obtain a CPLR article 52 turnover order against a bank to garnish assets held by the bank's foreign subsidiary. We hold that for a court to issue a postjudgment turnover order pursuant to CPLR 5225(b) against a banking entity, that entity itself must have actual, not merely constructive, possession or custody of the assets sought. That is, it is not enough *58 that the banking entity's subsidiary might have possession or custody of a judgment debtor's assets.

In 1994, plaintiff, the Commonwealth of the Northern Mariana Islands (the Commonwealth), obtained two separate tax judgments in the United States District Court for the Northern Mariana Islands against William and Patricia Millard (the Millards) for unpaid taxes in the respective amounts of $18,317,980.80 and $18,318,113.41. The Millards, who had previously resided in the Commonwealth since 1987, relocated before the Commonwealth was able to obtain the judgments.[1]

In March and April 2011, the Commonwealth registered the tax judgments in the United States District Court for the Southern District of New York[2] and commenced proceedings as a judgment creditor, pursuant ***878 **116 to Federal Rules of Civil Procedure rule 69(a)(1) and CPLR 5225(b), seeking a turnover order against garnishees holding assets of the Millards. As relevant here, the Commonwealth named Canadian Imperial Bank of Commerce (CIBC), a Canadian bank headquartered in Toronto, with a branch in New York, as a garnishee under the theory that the Millards maintained accounts in subsidiaries of CIBC, namely, CIBC FirstCaribbean International Bank Limited (CFIB) or CFIB's affiliates in the Cayman Islands. According to the Commonwealth, CFIB is a 92% owned-and-controlled direct subsidiary of CIBC.

The Commonwealth moved, by order to show cause, for a turnover order against CIBC and a preliminary injunction, on the ground that "CIBC has the control, power, authority and practical ability to order [CFIB] to turn over funds on deposit in the name of the Millards." In support, the Commonwealth referred to the 92% ownership of CFIB, and other indicia of control, asserting that CIBC imposed a governance structure upon CFIB that "affords the parent company full oversight of the risk and control framework of all [of CFIB's] operations." The Commonwealth further argued that the overlap in significant personnel, and CIBC's oversight of CFIB's compliance with various legal requirements, such as the Sarbanes–Oxley Act, demonstrated CIBC's ability to exert actual, practical control over CFIB's operations. In opposition, CIBC contended that CFIB is a "legally separate and independent entit[y]" and that, *59 absent an information sharing agreement, "CIBC is unable to access accounts or account information held by [CFIB] or its subsidiaries."

The District Court denied the motion and maintained a previously issued restraining order that precluded CIBC from engaging in certain activity related to the Millards' accounts. While the District Court found the Commonwealth's "practical ability to control" argument colorable, it observed that the scope of the phrase "possession or custody," contained in CPLR 5225(b), was an issue suited for this Court's consideration.

Upon appeal, the Second Circuit determined that for the reasons set forth in the District Court's opinion, the resolution of the case turned on unresolved issues of New York law, and certified the following questions to this Court:

> "1. May a court issue a turnover order pursuant to N.Y. C.P.L.R. § 5225(b) to an entity that does not have actual possession or custody of a debtor's assets, but whose subsidiary might have possession or custody of such assets?
> "2. If the answer to the above question is in the affirmative, what factual considerations should a court take into account in determining whether the issuance of such an order is permissible?" (693 F.3d 274, 275 [2d Cir.2012]).

We accepted the certified questions and now answer the first in the negative, and as a consequence refrain from answering the second as academic.[3]

Under CPLR article 52, a special proceeding for a turnover order is the procedural mechanism devised by the legislature to enforce a judgment against an asset of a judgment debtor, held in the **117 ***879 "possession or custody" of a third party. Section 5225(b) provides, in pertinent part:

> "Upon a special proceeding commenced by the judgment creditor, *against a person in possession or custody of money or other personal property in which the judgment debtor has an interest,* or against a *60 person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff."

The Commonwealth contends that the phrase "possession or custody" inherently encompasses the concept of control, and, therefore, section 5225(b) is applicable to garnishees with constructive possession of a judgment debtor's assets. As such, the Commonwealth proposes that an actual, practical control test—i.e., whether the bank could practically order its subsidiary to turn over the assets of the judgment debtor—should be adopted by this Court as the appropriate standard. We find the Commonwealth's interpretation of section 5225(b) unpersuasive for the reasons that follow.

In determining the expanse of section 5225(b) our "starting point" is "the language itself, giving effect to the plain meaning thereof" (*Majewski v. Broadalbin–Perth Cent. School Dist.,* 91 N.Y.2d 577, 583, 673 N.Y.S.2d 966, 696 N.E.2d 978 [1998]). "[W]here the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" (*Patrolmen's Benevolent Assn. of City of N.Y. v. City of New York,* 41 N.Y.2d 205, 208, 391 N.Y.S.2d 544, 359 N.E.2d 1338 [1976], citing *Bender v. Jamaica Hosp.,* 40 N.Y.2d 560, 388 N.Y.S.2d 269, 356 N.E.2d 1228 [1976]). Moreover, "[i]t is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Majewski,* 91 N.Y.2d at 583, 673 N.Y.S.2d 966, 696 N.E.2d 978, citing *Patrolmen's Benevolent Assn.,* 41 N.Y.2d at 208, 391 N.Y.S.2d 544, 359 N.E.2d 1338).

The plain language of section 5225(b) refers only to "possession or custody," excluding any reference to "control." The absence of this word is meaningful and intentional as we have previously observed that the failure of the legislature to include a term in a statute is a significant indication that its exclusion was intended (*see People v. Finnegan,* 85 N.Y.2d 53, 58, 623 N.Y.S.2d 546, 647 N.E.2d 758 [1995] ["We have firmly held that the failure of the Legislature to include a substantive, significant prescription in a statute is a ***61** strong indication that its exclusion was intended"]; *Pajak v. Pajak,* 56 N.Y.2d 394, 397, 452 N.Y.S.2d 381, 437 N.E.2d 1138 [1982] ["The failure of the Legislature to provide that mental illness is a valid defense in an action for divorce based upon the ground of cruel and inhuman treatment must be viewed as a matter of legislative design. Any other construction of the statute would amount to judicial legislation"]; *see also* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 74). Accordingly, we interpret the omission of "control" from section 5225(b) as an indication that "possession or custody" requires actual possession.

*****880 **118** The language of the predecessor statute to section 5225(b) and the legislation enacting the CPLR lend additional support to the view that "possession or custody" does not include constructive possession. Prior to the 1962 legislation enacting the CPLR, the relevant turnover statutes referred to "possession" and "control" and made no mention of custody (*see* Civil Practice Act §§ 793, 796). Civil Practice Act § 796, the predecessor statute to section 5225(b), provided in relevant part that

> "[w]here it appears from the examination or testimony taken in a special proceeding authorized by this article that the judgment debtor has in his possession or under his control money or other personal property belonging to him, or that money or one or more articles of personal property capable of delivery, his right to the possession whereof is not substantially disputed, are in the possession or under the control of another person, the court in its discretion and upon such a notice given to such persons as it deems just, or without notice, may make an order directing the judgment debtor or other person immediately to pay the money or deliver the articles of personal property to a sheriff designated in the order."

Section 5225(b) and other related provisions were enacted to include the "possession or custody" language, thus making a clear distinction between the prior references to "possession" and "control." It is a well settled tenet of statutory construction that "[t]he Legislature, by enacting an amendment of a statute changing the language thereof, is deemed to have intended a material change in the law" (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 193). The exclusion of the word "control" signaled a purposeful legislative modification of the ***62** applicable scope of turnover statutes. The Commonwealth would have us construe section 5225(b) to include that term, but "[a] court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit" because "the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended" (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 74). In other words, we cannot read into the statute that which was specifically omitted by the legislature.

The Commonwealth argues that the legislature simply substituted "custody" as the functional equivalent of "control." However, we read the statute both based on its plain meaning and in context, and it is clear that the legislature did not pen one word anticipating that another would be "read into" the CPLR. When the legislature has sought to encompass the concept of "control" it has done so explicitly, evincing a legislative intent to exclude consideration of "control" from those sections from which it is omitted. For example, CPLR 3111, which concerns the production of discovery materials, provides that "books, papers and other things in the possession, custody or control of the person to be examined" should be produced. CPLR 3119(a)(4)(ii) similarly provides that a subpoena may be used to order a person to produce discovery "in the possession, custody or control of the person" (*see also* CPLR 2701, 3120, 3122–a, 5224). We are led to the conclusion that the legislature considered "control" and "custody" to refer to distinct concepts (*see People v. Elmer,* 19 N.Y.3d 501, 507, 950 N.Y.S.2d 77, 973 N.E.2d 172 [2012] [observing that the legislature is presumed to know the distinction between terms used in legislation]; *Easley v. New York State Thruway Auth.,* 1 N.Y.2d 374, 379, 153 N.Y.S.2d 28, 135 N.E.2d 572 [1956]

["Legislatures are presumed ***881 **119 to know what statutes are on the books and what is intended by constitutional amendments approved by the Legislature itself"]; McKinney's Cons. Laws of N.Y., Book 1, Statutes § 222).

As these sections of the CPLR indicate, in a documentary discovery context, with expansive rules of disclosure, it is reasonable to conclude that the legislature would employ a broader "possession, custody or control" standard. Indeed, various courts have interpreted "possession, custody or control" to allow for discovery from parties that had practical ability to request from, or influence, another party with the desired discovery documents. As such, courts have interpreted "possession, custody or control" to mean constructive possession (*see* ***63** *Bank of New York v. Meridien BIAO Bank Tanzania Ltd.,* 171 F.R.D. 135, 146 [S.D.N.Y.1997] [" '(C)ontrol' does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action"]; *see also In re NASDAQ Market–Makers Antitrust Litig.,* 169 F.R.D. 493, 530 [S.D.N.Y.1996]).

Consequently, because "possession, custody or control" has been construed to encompass constructive possession, then, by contrast, legislative use of the phrase "possession or custody" contemplates actual possession. Notably, sections of the CPLR pertaining to the disposition of property utilize the narrower "possession or custody" standard. For example, CPLR 1320, which concerns the attachment or levy of personal property, is limited to property "in the defendant's possession or custody." CPLR 6214 and 6215 similarly limit the levy of personal property to items within the "possession or custody" of the defendant (*see also* CPLR 1321, 1325, 2701, 5222, 5225, 5232, 5250, 6219). This distinction supports the view that the legislature has applied a higher standard to insure the proper disposition of property (*see* CPLR 5209; *JPMorgan Chase Bank, N.A. v. Motorola, Inc.,* 47 A.D.3d 293, 846 N.Y.S.2d 171 [1st Dept.2007]).

The Commonwealth argues that this distinction is of no moment, speculating that the legislature blindly duplicated the standards of the Federal Rules of Evidence when enacting the CPLR. However, "[w]hen different terms are used in various parts of a statute or rule, it is reasonable to assume that a distinction between them is intended" (*Matter of Albano v. Kirby,* 36 N.Y.2d 526, 530, 369 N.Y.S.2d 655, 330 N.E.2d 615 [1975]). Consequently, the distinction cannot be simply disregarded, and this Court is required to construe the entire CPLR in a manner that harmonizes these variations (*see* McKinney's Cons. Laws of N.Y., Book 1, Statutes §§ 97, 98). In light of these differences, the most reasonable way to interpret these provisions is to conclude that "possession, custody or control" contemplates constructive possession, whereas "possession or custody," by its omission of the term "control," refers to actual possession. Accordingly, a section 5225(b) turnover order cannot be issued against a garnishee lacking actual possession or custody of a judgment debtor's assets or property.

Finally, our decision in *Koehler v. Bank of Bermuda Ltd.,* 12 N.Y.3d 533, 883 N.Y.S.2d 763, 911 N.E.2d 825 (2009) does not require a different reading of ***64** section 5225(b). In that case, we addressed whether, under CPLR article 52, a New York court could order a bank over which it had personal jurisdiction to deliver out-of-state stock certificates to a judgment creditor. The Court noted that unlike prejudgment attachment, which requires jurisdiction ***882 **120** over property, "postjudgment enforcement requires only jurisdiction over persons" (12 N.Y.3d at 537, 883 N.Y.S.2d 763, 911 N.E.2d 825). As such, "CPLR 5225(b) applies when the property is not in the judgment debtor's possession" and "contemplate[s] an order, directed at a defendant who is amenable to the personal jurisdiction of the court, requiring him to pay money or deliver property" (*id.* at 541, 883 N.Y.S.2d 763, 911 N.E.2d 825). Accordingly, "a New York court with personal jurisdiction over a defendant may order him [or her] to turn over out-of-state property regardless of whether the defendant is a judgment debtor or a garnishee" (*id.*).

Notably, *Koehler* does not interpret the meaning of the phrase "possession or custody," and is only significant in holding that personal jurisdiction is the linchpin of authority under section 5225(b) (*see also Hotel 71 Mezz Lender LLC v. Falor,* 14 N.Y.3d 303, 312, 900 N.Y.S.2d 698, 926 N.E.2d 1202 [2010]). Indeed, many cases have held that a turnover order is given effect through a court's exercise of personal jurisdiction over a party. Thus, in *Starbare II Partners v. Sloan,* 216 A.D.2d 238, 629 N.Y.S.2d 23 (1st Dept.1995), albeit a section 5225(a) case, the New York court had the authority to order a judgment debtor to turn over paintings he owned, but stored in New Jersey. In *Miller v. Doniger,* 28 A.D.3d 405, 814 N.Y.S.2d 141 (1st Dept.2006), the judgment debtor, who was in New York, was directed to turn over his out-of-state Wachovia bank accounts to the judgment creditor. Similarly, in *Gryphon Dom. VI, LLC v. APP Intl. Fin. Co., B.V.,* 41 A.D.3d 25, 836 N.Y.S.2d 4 (1st Dept.2007), the Appellate Division observed that "a turnover order merely directs a defendant, over whom the New York court has jurisdiction, to bring its own property into New York" (41 A.D.3d at 31, 836 N.Y.S.2d 4). Thus,

"[h]aving acquired jurisdiction of the person, the court [ ] can compel observance of its decrees by proceedings *in personam* against the owner within the jurisdiction" (*Koehler,* 12 N.Y.3d at 539, 883 N.Y.S.2d 763, 911 N.E.2d 825). However, in these cases, the garnishee was directed to deliver assets already within its possession. No case supports the Commonwealth's attempt to broadly construe *Koehler* and require that a garnishee be compelled to direct another entity, which is not subject to this state's personal jurisdiction, to deliver assets held in a foreign jurisdiction. Such an expansion is inconsistent with the plain language and scope of section 5225(b).

***65** Accordingly, certified question No. 1 should be answered in the negative and certified question No. 2 not answered as academic.

Chief Judge LIPPMAN and Judges GRAFFEO, READ, SMITH and PIGOTT concur.

Following certification of questions by the United States Court of Appeals for the Second Circuit and acceptance of the questions by this Court pursuant to section 500.27 of the Rules of Practice of the New York State Court of Appeals (22 NYCRR 500.27), and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified question No. 1 answered in the negative and certified question No. 2 not answered as academic.

All Citations

21 N.Y.3d 55, 990 N.E.2d 114, 967 N.Y.S.2d 876, 2013 N.Y. Slip Op. 03018

Footnotes

1 In 2010, the Commonwealth learned that the Millards had renounced their United States citizenship and resided in the Cayman Islands.

2 The Commonwealth also registered the judgments in the United States District Court for the Southern District of Florida.

3 On appeal CIBC contends that the Commonwealth incorrectly moved pursuant to CPLR 5225(b) rather than CPLR 5227, arguing that the latter is the applicable section to turnover orders involving bank deposits as the "debt" owed by the bank to the customer. We have no cause to address the applicability of section 5227, and limit our analysis to the issues concerning CPLR 5225(b) presented by the Second Circuit's certification to this Court.

18 A.D.2d 999
Supreme Court, Appellate Division, Second Department, New York.

Edward DeMARCO, Appellant,
v.
The COUNTY OF NASSAU and L. Kingsley Smith, Respondents.

March 4, 1963.

Synopsis
Action was brought against county and judge of District Court of Nassau County for damages for alleged false imprisonment. The Supreme Court, Nassau County, Joseph A. Suozzi, J., entered an order granting the motion of the defendants for judgment on the pleadings, on ground that the complaint failed to set forth a cause of action, and for summary judgment dismissing the complaint on the merits, and denying the plaintiff's cross-motion for summary judgment, and the plaintiff appealed. The Appellate Division held that complaint alleging that one defendant judge committed the plaintiff to the county jail and that the detention of the plaintiff was wholly unlawful and without justification was insufficient to allege a cause of action for false imprisonment.

Order affirmed.

Attorneys and Law Firms

****538** Leland Stuart Beck, Mineola, for appellant.

Bertram Harnett, County Atty., Mineola, for respondents; Louis Schultz, New York City, of counsel.

Before UGHETTA, Acting P. J., and KLEINFELD, BRENNAN, HOPKINS and CHRIST, JJ.

MEMORANDUM BY THE COURT.

***999** In an action to recover damages for false imprisonment, the plaintiff appeals from an order of the Supreme Court, Nassau County, entered July 3, 1962, which granted the defendants' motion, made: (a) pursuant to rule 112 of the Rules of Civil Practice, for judgment on the pleadings on the ground that the complaint fails to set forth a cause of action; and (b) pursuant to rule 113 of the Rules of Civil Practice, for summary judgment dismissing the complaint on the merits; and which denied the plaintiff's cross motion for summary judgment in his favor on the issue of liability, as against the defendant Smith.

Order affirmed, without costs.

The complaint alleges that the defendant Smith was a Judge of the District Court of the County of Nassau; that he committed the plaintiff to the County Jail on September 26, 1961; that on October 23, 1961 a Justice of the Supreme Court of the State of New York sustained a writ of habeas corpus and ordered the plaintiff's release from imprisonment; and that the plaintiff's detention from September 26, 1961 until October 23, 1961 'was wholly unlawful and without justification.'

There are no allegations of fact to support the conclusory allegation that the plaintiff's detention 'was wholly unlawful and without justification' and to show that such detention gave rise to a cause of action for false imprisonment. 'Mere conclusory statements of law, which are unsupported by allegations of fact, may not be utilized to supply material facts by inference'

(Fried v. Sugar, 17 A.D.2d 827, 828, 233 N.Y.S.2d 50). In the light of the rules applicable to a judge's immunity from civil liability, when the conclusory allegation that the plaintiff's detention 'was wholly unlawful and without justification' is considered together with the allegation that the defendant Smith was a Judge of the Court, the complaint fails to state a cause of action (Lange v. Benedict, 73 N.Y. 12). Under the rules applicable to a judge's immunity from civil liability, the defendants' motion for summary judgment ****539** was properly granted (Lange v. Benedict, supra; Bradley v. Fisher, 13 Wall. [80 U.S.] 335, 20 L.Ed. 646; Karelas v. Baldwin, 237 App.Div. 265, 261 N.Y.S. 518).

UGHETTA, Acting P. J., and KLEINFELD, BRENNAN and HOPKINS, JJ., concur.

CHRIST, J., taking no part.

All Citations

18 A.D.2d 999, 238 N.Y.S.2d 537

116 A.D.3d 1261
Supreme Court, Appellate Division, Third Department, New York.

In the Matter of the GOLUB CORPORATION, Petitioner,
v.
NEW YORK STATE TAX APPEALS TRIBUNAL et al., Respondents.

April 17, 2014.

Synopsis
Background: Taxpayer brought article 78 proceeding to review a determination of the Tax Appeals Tribunal, which sustained the reduction of empire zone tax credits against its corporate franchise tax.

The Supreme Court, Appellate Division, Lahtinen, J.P., held that taxpayer, a qualified empire zone enterprise (QEZE), was not entitled to empire zone tax credit against its corporate franchise tax for payment in lieu of taxes (PILOT) amounts it paid directly to local taxing authorities pursuant to a provision of its sublease.

Determination confirmed and petition dismissed.

Attorneys and Law Firms

****455** Hiscock & Barclay, LLP, Syracuse (David G. Burch of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, Albany (Kathleen M. Arnold of counsel), for Commissioner of Taxation and Finance, respondent.

Before: LAHTINEN, J.P., McCARTHY, GARRY and EGAN JR., JJ.

Opinion

LAHTINEN, J.P.

***1261** Proceeding pursuant to CPLR article 78 (initiated in this Court pursuant to Tax Law § 2016) to review a determination of respondent Tax Appeals Tribunal which sustained the reduction of certain tax credits against a corporate franchise tax imposed under Tax Law article 9–A.

Rotterdam Ventures owns the Rotterdam Industrial Park and leases the entire park to its affiliate, FM Ventures, Inc. Petitioner, a qualified empire zone enterprise (hereinafter QEZE) (*see* Tax Law § 15[a]) that operates a supermarket chain, entered into a sublease with FM Ventures regarding 8.22 acres in the industrial park. FM Ventures agreed to construct on such parcel a 152,000 square foot freezer warehouse to be used by petitioner for storage and distribution. As part of the various financial aspects of the project, Rotterdam Ventures' counsel negotiated reportedly on behalf of FM Ventures and petitioner a payment in lieu of taxes (hereinafter PILOT) agreement with the Town of Rotterdam Industrial Development Agency (hereinafter IDA). Significantly, petitioner was not a party to the written PILOT agreement, which was executed by FM Ventures and the IDA in August 2005. Nonetheless, petitioner's amended sublease with FM Ventures obligated it to make the PILOT payments. During the relevant years, petitioner paid the PILOT amounts directly to the pertinent local taxing authorities and thereafter claimed empire zone tax credit against its corporate franchise tax for fiscal years ending in

April 2007 and April 2008.

The Division of Taxation disallowed petitioner's claim for a tax credit. Following a hearing, an Administrative Law Judge (hereinafter ALJ) sustained the Division's disallowance. The ALJ determined that, since petitioner was not a party to the ***1262** August 2005 PILOT agreement, its separate lease obligation with FM Ventures to make such payments did not constitute "eligible real property taxes" (*see* Tax Law former § 15[e]) and, hence, it did not qualify under the language of the statute for an empire zone tax credit (*see* Tax Law § 15[a]). Respondent Tax Appeals Tribunal thereafter upheld the ALJ. This proceeding ensued.

****456** Where, as here, a taxpayer seeks the benefit of a tax credit, the taxpayer bears the burden of establishing that such credit is unambiguously set forth in the statute (*see Matter of Piccolo v. New York State Tax Appeals Trib.,* 108 A.D.3d 107, 112, 964 N.Y.S.2d 697 [2013]; *Matter of We Care Transp. v. Tax Appeals Trib. of State of N.Y.,* 298 A.D.2d 717, 719, 749 N.Y.S.2d 299 [2002]; *see also Matter of Grace v. New York State Tax Commn.,* 37 N.Y.2d 193, 196, 371 N.Y.S.2d 715, 332 N.E.2d 886 [1975]). Tax Law § 15(a) authorizes a tax credit for a taxpayer which is a QEZE, such as petitioner, for "eligible real property taxes." A detailed definition of eligible real property taxes is set forth in Tax Law § 15(e), and such definition has been amended several times by the Legislature since the Empire Zones Program was created in 2000 (*see* L. 2010, ch. 57, § 1, part R, § 13; L. 2005, ch. 161, § 41; L. 2002, ch. 85, § 1, part CC, § 12).

For the tax years in dispute, Tax Law former § 15(e) set forth three types of payments that constituted eligible real property taxes for purposes of an empire zone credit. Two involved payment of taxes; first, by a QEZE that owned the real property and, second, a QEZE that was a lessee of real property. The third applied to petitioner's situation since it addressed PILOT payments by a QEZE. It provided in relevant part: "In addition, the term 'eligible real property taxes' includes [PILOTs] made by the QEZE to the state, a municipal corporation or a public benefit corporation pursuant to *a written agreement entered into between the QEZE and the state, municipal corporation, or public benefit corporation* ". (Tax Law former § 15[e] [emphasis added]).

The pertinent language affirmatively requires in clear terms that, to qualify for the credit under such provision, the PILOT payments must be made pursuant to a written agreement between the QEZE and the appropriate entity. Here, FM Ventures had entered into the August 2005 PILOT agreement with the IDA. Petitioner was not a party to that agreement. Although petitioner's separate agreement with FM Ventures provided that petitioner would make the payments and the various entities may have desired to structure the transactions so that petitioner could receive the empire zone tax credit, unfortunately petitioner's PILOT payments do not qualify for such ***1263** credit under the statutory language. It was petitioner's burden to show that it was clearly entitled to the credit and, in fact, the statute manifestly provides otherwise. We cannot, under long settled principles of statutory interpretation, essentially rewrite an unambiguous provision of a statute by ignoring explicit language, no matter how equitable such a result may appear (*see e.g. Matter of DaimlerChrysler Corp. v. Spitzer,* 7 N.Y.3d 653, 660, 827 N.Y.S.2d 88, 860 N.E.2d 705 [2006] ["(C)ourts should construe unambiguous language to give effect to its plain meaning."]; *Majewski v. Broadalbin–Perth Cent. School Dist.,* 91 N.Y.2d 577, 583, 673 N.Y.S.2d 966, 696 N.E.2d 978 [1998], quoting *Tompkins v. Hunter,* 149 N.Y. 117, 122–123, 43 N.E. 532 [1896] [" 'In construing statutes, it is a well-settled rule that resort must be had to the natural signification of words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning.' "]).

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

McCARTHY, GARRY and EGAN JR., JJ., concur.

All Citations

116 A.D.3d 1261, 984 N.Y.S.2d 454, 2014 N.Y. Slip Op. 02638

End of Document

208 A.D.3d 564
Supreme Court, Appellate Division, Second Department, New York.

Will ISNADY, appellant,
v.
WALDEN PRESERVATION, L.P., etc., et al., respondents.

2018–00268
|
(Index No. 7058/16)
|
Argued—February 10, 2022
|
August 10, 2022

Synopsis
Background: Property owner filed action against adjacent property owner, municipality, and municipal police department seeking damages and declaratory judgment that property owner had easements over adjacent owner's land for ingress and egress and for parking on street previously owned by municipality. The Supreme Court, Orange County, Maria S. Vazquez-Doles, J., granted adjacent owner's motion to dismiss claim for damages and claim seeking judgment declaring property had easement for ingress and egress and concluded adjacent owners were entitled to entry of judgment declaring that property owner did not have an easement for parking. Property owner appealed.

Holdings: The Supreme Court, Appellate Division, held that:

award of damages was not warranted;

property owner did not have easement for parking by express grant; and

property owner did not acquire easement by prescription for parking on street.

Affirmed as modified and remitted with instructions.

Attorneys and Law Firms

****587** Barry D. Haberman, New City, NY, for appellant.

London Fischer LLP, New York, NY (Brian P. McLaughlin, Eric A. Thorsen, and Myra Needleman of counsel), for respondent Walden Preservation, L.P.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, White Plains, NY (Eliza M. Scheibel and Janine A. Mastellone of counsel), for respondents Village of Walden and Village of Walden Police Department.

BETSY BARROS, J.P., JOSEPH J. MALTESE, PAUL WOOTEN, JOSEPH A. ZAYAS, JJ.

DECISION & ORDER

***565** In an action, inter alia, for a judgment declaring that the plaintiff has certain easements over a portion of certain real property owned by the defendant Walden Preservation, L.P., the plaintiff appeals from an order of the Supreme Court, Orange County (Maria S. Vazquez–Doles, J.), dated December 13, 2017. The order, insofar as appealed from, granted the motion of the defendants Village of Walden and Village of Walden Police Department pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against them, and granted those branches of the separate motion of the defendant Walden Preservation, L.P., which were pursuant to CPLR 3211(a) to dismiss so much of the first cause of action, insofar as asserted against it, as sought a judgment declaring that the plaintiff has an easement for parking and to dismiss the third cause of action insofar as asserted against it.

ORDERED that the order is modified, on the law, (1) by deleting the provision thereof granting that branch of the motion of the defendants Village of Walden and Village of Walden Police Department which was pursuant to CPLR 3211(a) to dismiss so much of the complaint insofar as asserted against them as sought a declaratory judgment, and adding a provision thereto deeming that branch of those defendants' motion to be for a declaratory judgment in their favor, and thereupon granting that branch of those defendants' motion, and (2) deleting the provision thereof granting that branch of the motion of the defendant Walden Preservation, L.P., which was pursuant to CPLR 3211(a) to dismiss so much of the first cause of action, insofar as asserted against it, as ****588** sought a judgment declaring that the plaintiff has an easement for parking, and adding a provision thereto deeming that branch of that defendant's motion to be for a declaratory judgment in its favor, and thereupon granting that branch of that defendant's motion; as so modified, the order is affirmed insofar as appealed from, with one bill of costs to the respondents appearing separately and filing separate briefs, and the matter is remitted to the Supreme Court, Orange County, for the entry of a judgment, inter alia, making the appropriate declarations.

The plaintiff owns real property located on West Main Street in Walden (hereinafter the subject property). The defendant Walden Preservation, L.P. (hereinafter Walden Preservation), owns adjacent real property located on Cliff Street, as well as Cliff Street itself. An agency of the defendant Village of Walden transferred Cliff Street to nonparty Walden Housing Associates ***566** pursuant to an indenture dated August 3, 1978 (hereinafter the Indenture). Walden Housing Associates then transferred its interest to Walden Preservation by a deed dated July 16, 2015.

Cliff Street connects West Main Street and Oak Street. Prior to August 3, 1978, Cliff Street was a public street, open to vehicular traffic and parking. The Indenture provided that Cliff Street would be a private street with no thru traffic from Oak Street to West Main Street via Cliff Street and that the roadway entering from Oak Street was to be "two-way and ... a 'fire lane' without parking," while the roadway from West Main Street was to be "one way 'in' and for emergency vehicles only."

On October 17, 2016, the plaintiff commenced this action, inter alia, for a judgment declaring that he has easements for ingress and egress over Cliff Street to access a driveway at the rear of the subject property and for parking on Cliff Street. On December 1, 2016, the defendants Village of Walden and Village of Walden Police Department (hereinafter together the municipal defendants) moved pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against them. On December 22, 2016, Walden Preservation separately moved pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against it. In an order dated December 13, 2017, the Supreme Court, inter alia, granted the municipal defendants' motion and granted those branches of Walden Preservation's motion which were to dismiss so much of the first cause of action, insofar as asserted against it, as sought a judgment declaring that the plaintiff has an easement for parking on Cliff Street and to dismiss the third cause of action, which sought damages, insofar as asserted against it. The court, upon severing so much of the complaint as sought a judgment against Walden Preservation declaring that the plaintiff has easements for ingress and egress over Cliff Street to access his driveway, concluded that the defendants were entitled to the entry of a judgment, inter alia, declaring that the plaintiff does not have an easement, express or prescriptive, for the use of Walden Preservation's property for parking. The plaintiff appeals.

"On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit

within any cognizable legal theory" (*MJK Bldg. Corp. v. Fayland Realty, Inc.,* 181 A.D.3d 860, 861, 122 N.Y.S.3d 67 [internal quotation ***567** marks omitted]). However, "[c]onclusory allegations or bare legal assertions with no factual specificity are not sufficient, and will not survive a motion to dismiss" (****589** *Polite v. Marquis Marriot Hotel,* 195 A.D.3d 965, 967, 146 N.Y.S.3d 524 [internal quotation marks omitted]; *see TMCC, Inc. v Jennifer Convertibles, Inc.,* 176 A.D.3d 1135, 1135, 111 N.Y.S.3d 102). Further, where, as here, " 'evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate' " (*MJK Bldg. Corp. v. Fayland Realty, Inc.,* 181 A.D.3d at 861, 122 N.Y.S.3d 67, quoting *Agai v. Liberty Mut. Agency Corp.,* 118 A.D.3d 830, 832, 988 N.Y.S.2d 644; *see Guggenheimer v. Ginzburg,* 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17).

"[U]pon a motion to dismiss for failure to state a cause of action, a court may reach the merits of a properly pleaded cause of action for a declaratory judgment where no questions of fact are presented [by the controversy]. Under such circumstances, the motion to dismiss the cause of action for failure to state a cause of action should be treated as one seeking a declaration in [the] defendant's favor and treated accordingly" (*Neuman v. City of New York,* 186 A.D.3d 1523, 1525, 130 N.Y.S.3d 504 [citations and internal quotation marks omitted]; *see O'Donnell & Sons, Inc. v. New York State Dept. of Taxation & Fin.,* 193 A.D.3d 1063, 1064–1065, 147 N.Y.S.3d 636).

Applying these principles here, the Supreme Court properly concluded that the defendants were entitled to a judgment declaring that the plaintiff does not have an easement for parking on Cliff Street, properly granted those branches of the municipal defendants' motion which were to dismiss so much of the complaint as sought damages insofar as asserted against it, and properly granted that branch of Walden Preservation's motion which was to dismiss the third cause of action, which sought damages, insofar as asserted against it. "[A] property interest must exist before it may be taken" (*Matter of Gazza v. New York State Dept. of Envtl. Conservation,* 89 N.Y.2d 603, 613, 657 N.Y.S.2d 555, 679 N.E.2d 1035 [internal quotation marks omitted]; *see Monroe Equities, LLC v. State of New York,* 145 A.D.3d 680, 683, 43 N.Y.S.3d 103). Here, the plaintiff's own allegations and the evidentiary materials submitted by the municipal defendants in support of their motion to dismiss resolved, as a matter of law, those parties' ***568** dispute as to the causes of action for an easement for parking and for damages for the alleged impermissible taking of such easement, "such that it can be said that the allegations in the complaint" in that regard "are not facts at all" (*Halo v. Schmidt,* 199 A.D.3d 992, 993, 154 N.Y.S.3d 820).

"To create an easement by express grant there must be a writing containing plain and direct language evincing the grantor's interest to create a right in the nature of an easement" (*Willow Tex, Inc. v. Dimacopoulos,* 68 N.Y.2d 963, 965, 510 N.Y.S.2d 543, 503 N.E.2d 99; *see London Terrace Gardens v. London Terrace Towers Owners, Inc.* 203 A.D.2d 145, 145, 610 N.Y.S.2d 233). Here, the municipal defendants conclusively established that there was no writing containing such "plain and direct" language. "To acquire an easement by prescription, it must be shown that the use was hostile, open and notorious, and continuous and uninterrupted for the prescriptive period of 10 years" (****590** *Ciringione v. Ryan,* 162 A.D.3d 634, 634, 78 N.Y.S.3d 421 [internal quotation marks omitted]). Here, the plaintiff's own allegation in the proposed amended complaint that parking was not prohibited on Cliff Street in the area adjacent to the subject property until the Village adopted a fire lane ordinance in January 2016, negates the element of an adverse use that was continuous for the statutory period of 10 years.

The parties' remaining contentions either need not be considered in light of our determination or are without merit.

Since this is, in part, a declaratory judgment action, we remit the matter to the Supreme Court, Orange County, for the entry of a judgment, inter alia, declaring that the plaintiff does not have an easement for parking on Cliff Street (*see Lanza v. Wagner,* 11 N.Y.2d 317, 334, 229 N.Y.S.2d 380, 183 N.E.2d 670).

BARROS, J.P., MALTESE, WOOTEN and ZAYAS, JJ., concur.

All Citations

208 A.D.3d 564, 173 N.Y.S.3d 586, 2022 N.Y. Slip Op. 04903

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2003 WL 21169075

NOT APPROVED BY REPORTER OF DECISIONS FOR REPORTING IN STATE REPORTS. NOT REPORTED IN N.Y.S.2d.

City Court, City of Poughkeepsie,
Dutchess County.

PEOPLE of the State of New York, Plaintiff,
v.
Bernard M. ALEXANDER, Defendant.

No. 03–28035.
|
May 12, 2003.

Synopsis
Defendant charged with second-degree sexual abuse moved to preclude prosecutor from using his prior statement at trial. The City Court, Dutchess County, McGaw, J., held that prosecution was not precluded from using statement for purposes of impeachment, even though it failed to provide requisite notice.

Motion denied.

Attorneys and Law Firms

Kristine M. Hawlk, Esq., Senior Assistant District Attorney, Poughkeepsie.

Thomas N.N. Angell, Esq., Senior Assistant Public Defender, Poughkeepsie.

DECISION & ORDER

RONALD J. McGAW, Judge.

Introduction

***1** Upon reading and filing the Notice of Omnibus Motion of the defendant dated March 24, 2003, the affirmation of Thomas N.N. Angell, Esq., Senior Assistant Public Defender, filed in support thereof, the affirmation of Kristine M. Hawlk, Esq., Senior Assistant District Attorney, dated April 14, 2003, filed in answer to defendant's Notice of Motion, and the reply affirmation of Mr. Angell received by the Court on April 22, 2003, this Court determines as follows:

Defendant is charged with Sexual Abuse in the 2nd Degree in violation of Penal Law Section 130.60(2). Defendant has

moved for several forms of relief, including preclusion of a statement made by the defendant on the basis that a Huntley notice was not served by the People pursuant to CPL § 710.30. The People do not deny their failure to serve a Huntley notice, but rather assert that they "reserve their right to use the defendant's statement as impeachment material pursuant to *People v. Harris,*" (25 N.Y.2d 175 [1969], *aff'd Harris v. New York,* 401 U.S. 222 [1971]). The Court will address the issue of preclusion first.

Issue of Preclusion

May a statement precluded pursuant to CPL § 710.30 nevertheless be used by the People for purposes of impeachment?

Legal Analysis

I. *Distinguishing People v. Harris*
Defendant asserts that once a statement is precluded pursuant to CPL § 710.30, the statement is precluded for all purposes. In support of this position, the defendant seeks to distinguish *People v. Harris* by citing the lower court case of *People v. Moore,* 159 Misc.2d 501, 605 N.Y.S.2d 623 (Sup.Ct. N.Y. Co.1993).

In *Moore,* as in the instant case, the People failed to provide notice pursuant to CPL § 710.30 regarding a particular statement of the defendant. Prior to trial, however, the People in *Moore* advised the court and defense counsel that, while they did not intend to use the statement as part of their direct case, they reserved the right to use it for purposes of impeachment and as part of their case in rebuttal. Defense counsel opposed the use of the statement for all purposes.

In finding for the defendant, the *Moore* court explained and distinguished the Court of Appeals ruling in *People v. Harris* by examining the legislative history of CPL § 710.30. As stated in *Moore, supra* at 505, 605 N.Y.S.2d 623:

> (T)he legislative history of section 710.30 amply demonstrates an intention on the part of the Legislature to require notice of statements which the People intend to use for purposes of impeachment or as part of their case on rebuttal. The predecessor to section 710.30 was section 813–f of the Code of Criminal Procedure. That section, unlike section 710.30, required notice only "where the people intend to offer a *confession or admission in evidence* " (emphasis added.) In interpreting that provision, the Court of Appeals held that notice was not required when a statement was being offered only to impeach a defendant's credibility and not as substantive evidence of guilt. (*People v. Harris,* 25 N.Y.2d 175 [1969])(footnote omitted.).
>
> ***2** Approximately one year later, the Legislature replaced section 813–f with section 710.30, and changed the language of the statute to require notice of "evidence of a statement made by a defendant to a public servant"—thereby purposefully eliminating the restrictive language which formed the basis of the opinion in *People v. Harris* (*supra*). In order for the court to adopt the People's interpretation of section 710.30, it would be forced to ignore the Legislature's revision in the wake of *People v. Harris,* and read section 710.30 as being identical to section 813–f.

Having thus concluded that *People v. Harris* was not applicable to the revised CPL § 710.30 statute, the *Moore* court held that the People were precluded from using the defendant's statement even to impeach the defendant on cross-examination. The *Moore* court, in making its ruling, realized that numerous decisions had held to the contrary. *Moore* distinguished those cases in a footnote with the following language (*supra* at 507, footnote 5):

> In each of those cases, the People never intended to use the statements in question. It was only after the defendant testified that the prosecution decided that it wished to offer the statement to impeach him. Section 710.30 only requires notice when "the people *intend* to offer" a statement at trial (emphasis added). In the instant case, the People made known, in advance of trial, their specific intention to use the statement for impeachment and as part of their case on rebuttal.

To bolster its conclusion, the court in *Moore* asserted that CPL § 710.30 (as opposed to the older statute it replaced) provided for "a pretrial procedure which is more orderly" than would be true if the People's position were adopted. *Id.* at 505, 605 N.Y.S.2d 623. By having a single hearing to determine absolutely the admissibility of a statement, the court in *Moore* argued that "unnecessary duplicative hearings" would be avoided. *Id.* As stated in *Moore, supra* at 506, 605 N.Y.S.2d 623:

> A statement is "involuntarily made" not only if it is obtained in violation of a defendant's constitutional rights, but also if it is the product of coercion (citation omitted). A statement which is obtained by coercive means may not be used to cross-examine a defendant or as part of the People's case on rebuttal.[1]

Finally, it should be noted that *Moore* concluded by offering "a separate and independent basis for barring the People from using the statement" of the defendant. *Moore, supra* at 507, footnote 6, 605 N.Y.S.2d 623. This separate basis for the *Moore* ruling may account for the fact that *Moore* has never been specifically overruled.

II. *Higher courts have not followed People v. Moore.*

Moore, a lower court decision from 1993, was based on the revised language of CPL § 710.30 which was last amended in 1976. Numerous higher courts since 1976, however, have decided the issue to the contrary.

a. *Court of Appeals cases*

***3** The Court of Appeals has held on at least two occasions that statements inadmissible on a prosecutor's direct case may nevertheless be used for impeachment purposes. In *People v. Michael W. Hults,* 76 N.Y.2d 190, 197–198, 557 N.Y.S.2d 270, 556 N.E.2d 1077 (1990), the state's highest court stated as follows:

> It is true, as defendant argues, that some evidence which is inadmissible as evidence-in-chief is nevertheless admissible on cross-examination. Thus, prior inconsistent statements, which might be inadmissible hearsay if introduced on direct, are admissible for impeachment because placing the inconsistency before the jury serves the truthtesting function of cross-examination which is integral to our adversary system (*see generally,* McCormick, Evidence §§ 34 [3d ed]; Richardson, Evidence §§§§ 501, 502 [Prince 10th ed]). However, a prior statement which is involuntarily made is inherently unreliable and totally lacking in probative value. Such a statement cannot serve this truthtesting function, even if used only for the limited purpose of impeachment. Thus, a statement actually coerced from a defendant is inadmissible for all purposes (*Mincey v. Arizona,* 437 U.S. 385, 399, 98 S.Ct. 2408, 57 L.Ed.2d 290). By contrast, a defendant's statement, voluntarily made but obtained in violation of *Miranda v. Arizona (384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694),* is inadmissible on the prosecution's direct case but may nevertheless be used for impeachment where "the trustworthiness of the evidence satisfies legal standards" (*New York v. Harris,* 401 U.S. 222, 224, 91 S.Ct. 643, 28 L.Ed.2d 1, *affg.* 25 N.Y.2d 175, 303 N.Y.S.2d 71, 250 N.E.2d 349; *see also People v. Washington,* 51 N.Y.2d 214, 433 N.Y.S.2d 745, 413 N.E.2d 1159). While these cases arise in the context of protecting a defendant's right to due process and the privilege against self-incrimination, the rule serves the truthtesting function of cross-examination by permitting a statement, which is trustworthy at least to the extent it is voluntary, to be used for impeachment (*New York v. Harris,* 401 U.S., at 225–226.)

See also People v. Anthony Ricco, 56 N.Y.2d 320, 452 N.Y.S.2d 340, 437 N.E.2d 1097 (1982) ("the exclusionary rule precluded the People from offering [the defendant's] statements ... as evidence-in-chief on the People's own case. But this did not mean that the statement could not serve other evidentiary purposes. As indicated at the outset of this opinion, once the defendant elected to testify, the People could, and indeed here did, resort to it on cross-examination in an effort to impeach his credibility.")

b. Second Department cases

In addition to the Court of Appeals cases cited above, the Second Department has also ruled numerous times that otherwise inadmissible statements may be used for impeachment. Included in this set of cases is a 1995 ruling, significant in that it post-dates the 1993 *Moore* decision and yet cites *People v. Harris* approvingly.

In *People v. Anthony Blacks,* 221 A.D.2d 351, 633 N.Y.S.2d 793 (2nd Dept.1995), the Appellate Court held that "although the defendant's statement was not admissible as evidence-in-chief because it was obtained in violation of the defendant's Miranda rights, it was properly used for impeachment purposes."

***4** Similarly, *People v. Rexford Moshier,* 181 A.D.2d 800, 581 N.Y.S.2d 369 (2nd Dept.1992) held that "It is well settled that statements obtained in violation of the defendant's right to counsel, although not admissible as evidence-in-chief, may be used for impeachment purposes, should the defendant choose to testify. They are admissible as prior inconsistent statements and, as such, may be the subject of both cross-examination of the defendant and rebuttal testimony, after a proper foundation has been laid."

In *People v. John Doe,* 179 A.D.2d 686, 579 N.Y.S.2d 423 (2nd Dept.1992), the court states as follows:

> On appeal, the defendant argues that he was not given timely notice pursuant to CPL 710.30 of his purported oral consent to the search of his apartment.... CPL 710.30 applies only to statements which the prosecution intends to offer on its direct case at trial. (Citations omitted.) Here the prosecutor indicated at the hearing that he did not intend to use the defendant's (statement) at the trial, with the result that the contested statement does not fall within the ambit of CPL 710.30.

In *People v. Nick Masullo,* 158 A.D.2d 548, 551 N.Y.S.2d 317 (2nd Dept.1990), the court held that, "While not admissible on direct examination, the statements made by the defendant to a New York State Police investigator after his right to counsel attached were properly used to impeach his trial testimony."

Finally, in *People v. Ronald Connor,* 157 A.D.2d 739, 740, 550 N.Y.S.2d 34 (2nd Dept.1990), the court held that, "Where, as here, the statement is used only for impeachment purposes on rebuttal and where the defendant's testimony opens the door to its admission, the notice requirement of CPL 710.30 is waived."

III. *The Moore Distinction is Not Well Founded*

As noted above, the *Moore* court at its footnote five distinguished several contrary cases, i.e., cases holding that statements excluded pursuant to CPL § 710.30 could nevertheless be used for impeachment purposes. The *Moore* distinction was based on the notion that CPL § 710.30 should apply to bar any impeachment or rebuttal use of a defendant's statement where the People have specifically expressed that intention prior to trial. If this is true, then the corollary must also be true. That is, *Moore* must also stand for the proposition that where the People choose to remain silent as to their true intentions, their use of a defendant's statement for purposes of impeachment would be preserved. Put another way, the *Moore* distinction means that CPL § 710.30 rewards prosecutorial stealth and punishes prosecutorial honesty and openness. Where the People find themselves barred by CPL § 710.30, they should thereafter remain silent regarding their intention to use a defendant's statements for impeachment purposes. By this interpretation, CPL § 710.30 would serve to compel prosecutors to hide their true intentions regarding impeachment, thereby leaving defendants to guess at the evidence arrayed against them. In the opinion of this Court, CPL § 710.30 was not intended for this purpose. CPL § 710.30 should not be read to reward the hidden intent of a prosecutor any more than it should be read to punish the open expression of his or her belief as to evidentiary rights.

***5** Moreover, the *Moore* distinction leads to another intolerable but inevitable conclusion. If CPL § 710.30 served to bar any and all use of a defendant's voluntary prior inconsistent statements, even for impeachment purposes, then a defendant would be free to give false testimony without fear of punishment. As stated by the U.S. Supreme Court in *Oregon v. Hass,* 420 U.S. 714, 722, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975), and paraphrased by the Court of Appeals in *People v. Anthony Ricco,* 56 N.Y.2d *supra* at 326, "a shield provided by failure to respect the right to counsel is not to be perverted to a license to testify inconsistently, or even perjuriously, free from the risk of confrontation with prior inconsistent utterances."

This Court is in agreement with the reasoning of the U.S. Supreme Court and the New York Court of Appeals on this

important point. Furthermore, it is the opinion of this Court that the *Moore* distinction—precluding the use for impeachment purposes of a 710.30 barred statement where the prosecutor announces his or her intent prior to trial—is essentially a red herring.[2] While a prosecutor may express an "intent" to preserve his or her right to use a defendant's statement for impeachment purposes, no prosecutor can know with any degree of certainty prior to trial whether the opportunity for such use will actually arise or become necessary. Therefore, a prosecutor's pretrial statement of intent[3] to use a defendant's statement for impeachment purposes is really no more than an expression of contingency,[4] at best an illusory promise,[5] vastly different than a prosecutor's stated intent to use a particular statement as evidence-in-chief. The *Moore* distinction, therefore, should not serve as a basis to distinguish those cases that allow the impeachment use of 710.30 barred statements.

Conclusion

Admissibility of a defendant's statement should not rest on the timing of a prosecutor's expression of legal strategy, nor merely "on whether a constitutional right is implicated...." *People v. William Maerling,* 64 N.Y.2d 134, 140, 485 N.Y.S.2d 23, 474 N.E.2d 231 (1984). Rather, "admissibility rests ... on a determination of voluntariness. (Citations omitted.) ... If a statement was voluntary, it may be used to impeach; if it was not, it may not be admitted, even though it may be reliable." *Id.*

THEREFORE, for the reasons set forth above, the defendant's motion to preclude the prosecutor's use of defendant's statements for purposes of impeachment is denied.

Additional Points of Relief

1. Denies the motion for an order granting discovery and inspection in that no dispute has arisen as to these matters.

2. Grants a *Sandoval* hearing to be held immediately before trial, and grants *Ventimiglia* notification pursuant to CPL Section 240.43 to be provided immediately before trial.

3. Grants the motion for *Brady* material, if any. As to the scope of the People's obligation in this regard, the Court makes no comment until such time as a specific dispute arises.

***6** 4. Denies defendant's motion for leave to file additional motions, except upon a showing of good cause.

All parties are directed to appear on May 23, 2003 for further proceedings.

SO ORDERED.

All Citations

Not Reported in N.Y.S.2d, 2003 WL 21169075, 2003 N.Y. Slip Op. 50877(U)

Footnotes

1 No claim of coercion has been made by the instant defendant. Where coercion can be shown to have been used to illegally obtain a defendant's statement, however, it is the opinion of this Court that a blanket preclusion should apply to prevent the use of such statement for all purposes.

2 "Something that distracts attention from the real issue." *Merriam Webster's Collegiate Dictionary, 10th Ed.*

[3] "The word 'intent' is used throughout the Restatement of Torts, 2nd, to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are *substantially certain* to result from it. Sec. 8A." (Emphasis added.) Black's Law Dictionary, 5th Ed. (Definition of "Intent.")

[4] "Quality of being contingent or casual; the possibility of coming to pass; an even which may occur; a possibility; a casualty. A fortuitous event, which comes without design, foresight, or expectation." Black's Law Dictionary, 5th Ed.

[5] "A purported promise that actually promises nothing because it leaves to the speaker the choice of performance or nonperformance.." Black's Law Dictionary, 5th Ed.

32 Misc.2d 312
Supreme Court, Nassau County, New York,
Part III.

TOWN OF HEMPSTEAD, Plaintiff,
v.
Philip LYNNE, Defendant, Eli Wager, Herbert Gesser, Madeline Gesser, Seymour Ellis and Bernice Ellis, Respondent-Intervenors.

Nov. 9, 1961.

Synopsis

Suit by town to enjoin property owner from erecting or using any building on a parcel of land for any purpose other than the use permitted in zoning ordinance. The Supreme Court, William R. Brennan, Jr., J., held that ordinance zoning land for residential purposes only was confiscatory and unconstitutional when owner had expended in excess of $350,000 in acquiring and improving the land, and he had a contract to sell the parcel for use for business purposes for $439,750 and if he was required to use land for residential purposes only he would sustain a loss of over $90,000.

Complaint dismissed and judgment entered for property owner on his counterclaim of unconstitutionality of ordinance.

Attorneys and Law Firms

****528 *313** John A. Morhous, Town Atty., Hempstead, for plaintiff. Robert Stein, Hempstead, of counsel.

Sprague, Stern, Aspland, Dwyer & Tobin, Mineola, for defendant. Henry Root Stern, Jr., Mineola, of counsel.

Eli Wager, Mineola, intervenors, Wager, Gesser and Ellis.

Opinion

WILLIAM R. BRENNAN, Jr., Justice.

On the south side of Hungry Harbor Road in the unincorporated area of the Town of Hempstead known as North Woodmere lies an 11.1 acre parcel of real estate which is the subject of this litigation. This parcel, bounded on the south and on the east by a County recharge basin, on the north by the road and on the west by residences under construction, is what remains of a 40-acre tract of unimproved marshland acquired by the defendant during the last decade. From 1944 until very recently, the entire 40 acres were zoned by the plaintiff Town for business purposes. This tract, in turn, is but a part of a much larger area of some 400 acres, all of which has been developed by the defendant for residences.

Through the years, defendant has, through conveyances to builders and direct action, developed approximately 29 acres ***314** of the 40-acre tract for one-family dwellings, some of which are completed and occupied and others of which are still under construction. The residential character of these developments is protected not by zoning, which remains business, but by restrictive covenants contained in all the deeds affecting the developed areas. During this developmental stage it was the intention of the defendant to erect a shopping center on an undetermined portion of the tract, but the precise location of the proposed center was not determined until June 9, 1960, when the defendant entered into a contract with three developers, Messrs. Levine, Hyman and Schwartz, to sell the subject 11.1-acre parcel to them for use as a shopping center for the sum of $439,750. This contract contemplated the continuance of the business zoning up to the time of closing.

**529 In July of 1960 defendant filed with the Town Building Department an application for a building permit, but before it could issue, extensive soil analyses were required, and defendant, as late as April of 1961, submitted samples and other data to the Department. In June of 1961 it was determined that the premises were safe and suitable for the proposed use, but at this point a series of events occurred, a recital of the chronology of which is essential to decision.

On July 25, 1961, and after all obstacles to construction had apparently been removed or overcome, the Town Board acted upon a petition that certain property owners in the immediate vicinity to the affected tract had presented some fourteen months before, in May of 1960, requesting a rezoning of the 11.1-acre parcel from business to Residence B. The Board adopted a resolution calling for a public hearing on the rezoning proposal, and set August 29, 1961 as the date for the public hearing. The defendant immediately demanded its building permit. The Building Inspector refused. The defendant then invoked the process of this court as petitioner in an Article 78 proceeding in the nature of a mandamus, and on August 16, 1961 Mr. Justice Farley issued an order directing the Building Inspector forthwith to issue the permit. The permit was issued the following day and the defendant immediately proceeded with construction. This construction (though interrupted for a few days because of a temporary restraining order issued in a collateral action instituted by some of the property owners and later vacated) continued up to and including September 8, 1961, at which time the Town Board effectively changed the zoning from business to Residence B.

The plaintiff Town now seeks permanently to enjoin the defendant from erecting or using any building on the affected parcel *315 for any purpose other than that permitted in its Residence B Zone. The defendant counterclaims for a judgment declaring that he has a vested right to use the premises as a shopping center and that the ordinance as amended on September 8, 1961 is unconstitutional as applied to the parcel in question. At the inception of the trial leave was granted to the respondents Wager, Gesser and Ellis (some of the property owners who signed the petition which resulted in the rezoning and who instituted the collateral action above referred to) to intervene as parties respondent in opposition to the counterclaim.

The legislative act of the Town Board in amending the ordinance is presumptively valid (Shepard v. Village of Skaneateles, 300 N.Y. 115, 89 N.E.2d 619) and since there is no proof in the record even tending to show that the amendment bore no relationship to the public health, safety and welfare, or that it resulted in the impairment of the obligations of the contract, the contentions of the defendant in these respects may be dismissed out of hand.

**530 The first question to be considered, then, is whether or not the defendant was, on September 8, 1961, possessed of a vested right to the use of the premises as a shopping center. His claim in this regard rests upon three separate but cumulative theories: (1) The expenditure, from August 17 through September 8, 1961, of the sum of $15,600 in the actual construction of one of the buildings of the shopping center, including driving piles, capping piles, erecting footings and foundation wall and cinder block and brick on the top of the wall, pursuant to the valid, unrevoked building permit; (2) the additional expenditures and improvements which could have been made under the permit if it had been timely issued by the Town and if its exercise had not been temporarily restrained; and (3) the expenditure, prior to the issuance of the permit, of the sum of $120,000 by defendant for the widening of Hungry Harbor Road from a 50-foot to an 80-foot artery, which widening, it is argued, was done for the exclusive purpose of accommodating the proposed shopping center at its eastern terminal. The defendant has failed to sustain his burden of proving that the widening of Hungry Harbor Road was accomplished for the exclusive purpose of accommodating the proposed shopping center. Indeed, the testimony of the witnesses Dwyer and Berry indicates, and the court finds, that the widening was equally consistent with residential development. Thus the admitted expenditure of $120,000 attributable to the widening, cannot be considered in determining whether the defendant had a vested right in the use of the 11.1-acre parcel as a shopping center. There is no special connection between the *316 expenditure and the proposed use. See Matter of Golden City Park Corp. v. Board of Standards and Appeals of City of New York, 263 App.Div. 52, 54, 31 N.Y.S.2d 411, 413, aff'd 289 N.Y. 720, 46 N.E.2d 345.

Nor can the defendants here claim the benefit of what they *might* have expended to improve the property as a shopping center *if* the permit were timely issued, *if* they weren's forced to bring the Article 78 proceeding to obtain the permit, and *if* they weren't subsequently restrained from proceeding with construction for a short time by virtue of the process in the collateral action. While such proof indicates that defendant took every legal step available in order to perfect his use, it is of no assistance in calculating the 'dollars and cents' proof of substantial investment. The most such speculations might accomplish is perhaps to tip the scales in favor of vested rights where the other proof is evenly balanced on the substantiality of the investment.

We are therefore left with the expenditure by the defendant of the sum of $15,600 in actual construction of the exterior walls

of one building of the shopping center, and the question is simply whether or not such an expenditure is substantial. If it is, the defendant has a vested, right, if it is not, he has not. People v. Miller, 304 N.Y. 105, 106 N.E.2d 34.
****531** It may be assumed at the outset that the sum of $15,000 is a substantial one. The test of substantiality in this connection, however, cannot be met by the mere isolated, unrelated recitation of a dollar figure. Substantiality is to be determined, rather, by an assessment of the proportion which the expenditure bears to the total expenditure which would be required to complete the proposed improvement. Glenel Realty Corp. v. Worthington, 4 A.D.2d 702, 164 N.Y.S.2d 635. Viewed in this light the defendant's investment is not only insubstantial, but minimal. It is thus concluded that defendant has proven no vested right to the use of the property as a shopping center. The court's personal perusal of the property confirms this conclusion.

The next question presented is the defendant's request that the amended ordinance be declared unconstitutional as confiscatory. In this connection the Town contends that defendant has not exhausted his administrative remedies. The contention is utterly without merit since the size of the instant parcel would appear to make a variance application futile (see Gardner v. Leboeuf, 24 Misc.2d 511, 515, 204 N.Y.S.2d 468, 472), and since the Board of Appeals would have no power in any event to overrule the recent legislative act of the Town Board under the pretext of granting a variance. ***317** Levitt v. Incorporated Village of Sands Point, 6 N.Y.2d 269, 273, 189 N.Y.S.2d 212, 214. The constitutional question is thus squarely presented.

The test to be applied in order to determine whether or not an ordinance works a confiscation upon the owner of a particular plot of land, and is therefore unconstitutional as applied to that parcel, is one of determining whether the restrictions imposed by the ordinance preclude the use of the property for any purpose to which it is reasonably adapted. Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587, 117 A.L.R. 1110. Thus, if the 11.1-acre parcel here is reasonably adaptable to residential use the ordinance must be upheld, and the burden of proving that it is not reasonably adaptable for such use rests upon the assailant, and must be demonstrated beyond a reasonable doubt. Wiggins v. Town of Somers, 4 N.Y.2d 215, 173 N.Y.S.2d 579, 149 N.E.2d 869. The defendant here concedes that the property may be developed for residential use, but maintains that to do so would be to cause him substantial financial loss, a factor which would make such development entirely unreasonable.

In the Arverne case (supra), the court noted: (278 N.Y. p. 232, 15 N.E.2d p. 591)
'We have already pointed out that in the case which we are reviewing, the plaintiff's land cannot at present or in the immediate future be *profitably*[1] or reasonably used without violation ****532** of the restriction. An ordinance which *permanently* so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property.'

In using the word 'profitably' throughout the decision, the court undoubtedly intended that monetary considerations be calculated in determining what is or is not 'reasonable'. Later cases are in accord with this reasoning. Scarsdale Supply Co. v. Village of Scarsdale, Sup., 212 N.Y.S.2d 878 (retrial after Court of Appeals opinion in same case 8 N.Y.2d 325, 206 N.Y.S.2d 773); Opgal v. Burns, 20 Misc.2d 803, 189 N.Y.S.2d 606, aff'd 10 A.D.2d 977, 201 N.Y.S.2d 831, aff'd 9 N.Y.2d 659, 212 N.Y.S.2d 74; Rockdale Construction Corp. v. Inc. Village of Cedarhurst, Sup., 94 N.Y.S.2d 601, aff'd 275 App.Div. 1043, 91 N.Y.S.2d 926, aff'd 301 N.Y. 519, 93 N.E.2d 76.
In determining the reasonableness of such residential development, then, economic feasibility would appear to be one of the vital elements to be considered. It is, of course, true that a property owner is not entitled to the most profitable use of his land, McCabe v. Town of Oyster Bay, 24 Misc.2d 840, 209 N.Y.S.2d 697. It is also true that mere lessening of profits does not render a ***318** zoning ordinance confiscatory, Levitt v. Inc. Village of Sands Point, 6 N.Y.2d 269, 189 N.Y.S.2d 212, 160 N.E.2d 501. Where, however, in addition to loss of most profitable use, and in addition to actual loss of profits under a contract, an owner of property is compelled by an ordinance either to leave the land vacant for the indefinite future, or develop it for the more restricted use at a substantial loss of his actual investment, the land can be said not to be 'reasonably' adapted to the use and the ordinance may be held confiscatory. Matter of Eaton v. Sweeny, 257 N.Y. 176, 177 N.E. 412; Dowsey v. Village of Kensington, 257 N.Y. 221, 177 N.E. 427, 86 A.L.R. 642; Vernon Park Realty v. City of Mount Vernon, 307 N.Y. 493, 121 N.E.2d 517.

To apply such principles to the case at bar, resort must be had to dollars and cents proof, and findings made as to the total investment of the defendant in the land and the market value of the land for residential development.

In 1960 the defendant purchased this plot from a corporation of which he was the principal stockholder for the sum of $177,600. Some ten years before, the corporation had purchased the plot for $44,400, and a question has arisen concerning which of these figures should be used in establishing the base investment. If some evidence had been offered to show that the transfer in 1960 was only a paper transaction or was made in bad faith for the purpose of establishing an artificial value for the property, the lower figure might be considered proper. No such proof was offered, nor, indeed, was any attempt made on cross examination to weaken the effect of the testimony or elicit any details of the transaction. ****533** Taxes were paid on the capital gain realized and there is nothing in the record which indicates that the price paid was at variance with true value. The sum actually paid, then, i. e., $177,600, must be considered as the defendant's investment.

To this figure must be added the following sums: (1) $140,000, cost of 151,000 cubic yards of hydraulic fill to bring the grade to elevation 8 1/2, the minimum grade required by the Town's building code for business development, which was actually expended by defendant between June 1960 and April 1961.

(2) $8,440, cost to defendant of additional soil tests to comply with Town's requirements before the building permit could be issued.

(3) $9,000, cost of engineering and development plans for the proposed shopping center.

(4) $16,300, cost of widening Hungry Harbor Road attributable to the 11.1-acre parcel. (In this connection the court ***319** holds that the widening of the road was of direct benefit not only to this 11.1-acre parcel, but also to 70.4 additional acres representing the total acreage shown on nine maps filed by the defendant with the County Planning Commission on which the widened road was delineated. Thus, $^{11}/_{81}$ sts of the stipulated cost of $120,000 for the road widening is found to be a direct investment in the parcel.)

Considering the initial investment and the foregoing expenditures already incurred, it is found that the defendant's total present investment in the 11.1-acre parcel amounts to $351,340.

Against the investment must be compared the present value of the land as zoned for residential purposes. The court finds that the 11.1-acre parcel will yield 47 plots of 6,000 square feet each. Each plot has a market value of approximately $6,000. Thus, the total market value of the parcel zoned for residential purposes is $282,000. However, in order to bring the property into marketable condition, the entire parcel must be filled with approximately 11,000 cubic yards of additional fill in order to bring the elevation to grade 9, the minimum elevation required for residential construction. The cost of this additional fill, inclusive of incidental survey and engineering plans, is in the vicinity of $22,000, which figure must be deducted from the foregoing valuation to arrive at the true net market value of the 11.1-acre parcel, which is $260,000.

The defendant has thus invested in this 11.1 acre parcel of land a sum in excess of $350,000, exclusive of real estate taxes based upon business-zone assessed valuations which the defendant has paid for ten years, and also exclusive of a claimed loss of plot yield which is found to be too speculative to constitute proof of investment. Against this figure he has a contract to sell the parcel for $439,750, a transaction which would yield an obviously substantial profit. The loss of profits cannot, as has been noted above, be considered in determining constitutionality. ****534** The fact is, however, that the amendment of the ordinance has not only resulted in such loss of profit, but has also left the defendant with a parcel of property which, if developed for the only purpose permitted in the ordinance, will result in a loss of investment of over $90,000. Involved, therefore, is an adjustment between the wants of a community, perfectly or imperfectly expressed through its local legislative body, and the rights of the owner of the property. The owner's right of user here is so limited by the restrictive ordinance that there is in reality an *economic taking* of his property even though he is left with title, possession and a possibility of use for the restricted purpose. The amendment is thus confiscatory ***320** in that it precludes the use of the property for any purpose to which it is reasonably or economically adapted. It is accordingly held unconstitutional.

The plaintiff's complaint is dismissed and judgment may be entered by the defendant on the counterclaim in accordance with this decision. This constitutes the decision of the court pursuant to the provisions of section 440 of the Civil Practice Act.

All Citations

32 Misc.2d 312, 222 N.Y.S.2d 526

Footnotes

1 Emphasis supplied.

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 78. Proceeding Against Body or Officer (Refs & Annos)
McKinney's CPLR § 7803

§ 7803. Questions raised

Effective: September 1, 2003

Currentness

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

5. A proceeding to review the final determination or order of the state review officer pursuant to subdivision three of section forty-four hundred four of the education law shall be brought pursuant to article four of this chapter and such subdivision; provided, however, that the provisions of this article shall not apply to any proceeding commenced on or after the effective date of this subdivision.

Credits

(L.1962, c. 308. Amended L.1962, c. 318, § 26; L.2003, c. 492, § 2, eff. Sept. 1, 2003.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Vincent C. Alexander

2021

C7803:2. The "Arbitrary and Capricious" Standard.

A driver experienced the "quintessence of arbitrary and capricious action" when the DMV revoked his license based on a default traffic conviction that occurred 24 years ago, but which DMV never reported to him because of a data-entry error that, for 23 years, indicated he had a clean driving record. (The driver's last name was Sonders, but a DMV clerk entered the data under the name "Sanders.") *Sonders v. New York State Dep't of Motor Vehicles*, 2020, 187 A.D.3d 1, 4, 129 N.Y.S.3d 411, 413 (1st Dep't). For DMV to punish the driver "for its own admitted errors ... and thereafter [for over 20 years] affirming that he possessed a valid license" was "truly irrational"--indeed, "almost worthy of Kafka." Id. at 3, 129 N.Y.S.3d at 412, quoting *Hall v. New York State Dep't of Motor Vehicles*, 2002, 192 Misc.2d 300, 300-01, 745 N.Y.S.2d 892, 893 (Sup.Ct.Monroe Co.). More's the pity, it is submitted, that the Supreme Court upheld DMV's action, and the driver had to appeal to the Appellate Division to get his license restored.

2019

C7803:1. Issues That May Be Raised in an Article 78 Proceeding, In General.

Abuse of discretion, which is specifically identified in CPLR 7803(3) as a ground for Article 78 review, can apply either to the content of the agency's determination or the procedure the agency followed in reaching the determination. Thus, in *Bursch v. Purchase College of SUNY*, 2019, 33 N.Y.3d 1014, 102 N.Y.S.3d 165, 125 N.E.3d 830, a procedural abuse of discretion by a college disciplinary board resulted in a new hearing for a college student who was expelled after being found guilty of sexually assaulting a fellow student. Two days before his scheduled hearing, the student and his recently retained attorney asked for a three-hour adjournment, from 9:00 AM to 12:00 noon, because the attorney had a previous engagement at 9:00 AM. The college said no, and the hearing proceeded in the absence of the attorney. In a terse memorandum, the Court said the college abused its discretion "as a matter of law by failing to grant the requested adjournment."

The facts are developed in detail in the opinion of the Appellate Division (164 A.D.3d 1324, 85 N.Y.S.3d 157 (2d Dep't, 2018)), which upheld, 3-2, the college's denial of the adjournment because, one, the student himself had caused the timing problem by not sooner executing a privacy release allowing the college to communicate with the attorney and, two, the college had "difficulty" in arranging a convenient hearing time for all of the various witnesses.

The forceful two-judge dissent (164 A.D.3d at 1329-40, 85 N.Y.S.3d at 162-70) stressed the importance of the presence of an attorney when an accused student faces grave consequences (permanent expulsion), especially when a parallel criminal investigation is underway, as it was here. Although administrative agencies have discretion when it comes to such matters as adjourning a hearing, "this discretion will be more narrowly construed where fundamental rights are at issue.... Courts have consistently held that, unless the record establishes the existence of a legitimate countervailing reason, it is an abuse of discretion to deny a request for a

short adjournment to permit an individual to secure the presence of an attorney." 164 A.D.3d at 1335, 85 N.Y.S.3d at 166-67 (internal quotation marks omitted). The college proffered no such countervailing explanation in its conclusory assertion that it was "unable" to grant the adjournment because of "the availability of the people involved in the hearing." All of the witnesses were either employees or students at the same college, all within easy reach, and the requested three-hour delay was both timely and "exceedingly minimal." Even if the assistance of the attorney was not mandated by constitutional due process, the circumstances of the student's potential punishment created a "fundamental right" to have the attorney's assistance at the hearing.

In reversing the Appellate Division majority, it is not clear whether the Court of Appeals agreed with everything the dissenters said, but this observer found their arguments powerful.

C7803:3. The "Substantial Evidence" Test.

In an Article 78 certiorari review of a state college disciplinary hearing, the Court of Appeals took the opportunity to once again state the contours of the substantial evidence standard. *Haug v. State University of New York at Potsdam*, 2018, 32 N.Y.3d 1044, 87 N.Y.S.3d 146, 112 N.E.3d 323. The student petitioner was charged with sexual assault of another student, found guilty after a hearing, and expelled. The evidence against him at the hearing was mostly hearsay (testimony and written notes about the complainant's statements by a campus police officer to whom she reported the incident shortly after it happened, other students, and a school administrator); the complainant herself did not appear at the hearing. In his own testimony, the accused student gave his version of his and the complainant's conduct and her consent, but he also described post-event conduct that reasonably could be interpreted as a consciousness of guilt on his part. The Appellate Division three-judge majority held that substantial evidence was lacking for the school's determination of guilt. The majority essentially re-evaluated the evidence, including the conduct of both participants in the sexual act, stressing the hearsay nature of complainant's statements, and concluded that no reasonable person could find that the complainant had not affirmatively given consent to the sexual activity that occurred. See 149 A.D.3d 1200, 51 N.Y.S.3d 663 (3d Dep't).

The Court of Appeals reversed, holding that the hearsay accounts, coupled with petitioner's testimony, constituted substantial evidence of the unconsented sexual misconduct. The Appellate Division had improperly second-guessed the school by "re-weighing the evidence" and "substituting its own factual findings for those of [the school]." It was within the hearing board's province to "resolve any conflicts in the evidence and make credibility determinations," including finding that the petitioner's testimony was not credible. 32 N.Y.3d at 1046-47, 87 N.Y.S.3d at 149, 112 N.E.3d at 326

The Court made the following observations about the substantial evidence rule. 32 N.Y.3d at 1045-46, 87 N.Y.S.3d at 148-49, 112 N.E.3d at 325-26 (internal citations and quotation marks omitted): First, the standard itself: "[S]ubstantial evidence is such relevant proof as a reasonable mind may accept as adequate to support a conclusion of ultimate fact.... Where substantial evidence exists, the reviewing court may not substitute its judgment for that of the agency, even if the court would have decided the matter differently." Second, it is possible that both sides present substantial evidence on contested issues. Even so, the agency's determination must be sustained. Third, the substantial evidence standard is a "minimal standard"--"less than a preponderance of the evidence"--that "demands only that a given inference is reasonable and plausible, not necessarily the most probable." Courts may not do what the Appellate Division majority did here, which is "to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence." Finally, as to the use of hearsay evidence, it "is admissible as competent evidence in an administrative proceeding, and if sufficiently relevant and probative may constitute substantial evidence even if contradicted by live testimony on credibility grounds."

It is significant--and an important lesson for practitioners--that the petitioner in *Haug* waived potential due process and other procedural errors in the conduct of the hearing by failing to raise them at the disciplinary hearing. My fellow CPLR commentator Thomas F. Gleason has written elsewhere that seeking to invalidate an administrative determination solely for lack of substantial evidence is almost always an uphill battle. Thomas F. Gleason, "The Power of Administrative Agencies and the Peril of Substantial Evidence Review," N.Y.L.J., February 17, 2019, p.3, col.1. See, e.g., *Pena v. New York State Gaming Ass'n*, 2018, 32 N.Y.3d 1122, 91 N.Y.S.3d 783, 116 N.E.3d 74, reversing for the reasons stated by the dissenting opinion in the Appellate Division, 144 A.D.3d 1244, 1247-52, 40 N.Y.S.3d 665, 667-71 (3d Dep't 2016). In contrast, error-of-law review (CPLR 7803(3)), such as that based on unconstitutional or otherwise unlawful procedure, gives a court greater authority over the agency's adjudicative activity, but any such errors must be preserved by objection at the administrative level. See, on remand, *Haug v. State University of New York at Potsdam*, 2018, 166 A.D.3d 1404, 1405, 88 N.Y.S.3d 678, 679 (3d Dep't). See also 2019 Commentaries C7802:1 & C7803:1.

2018

C7803:3. The "Substantial Evidence" Test.

If the burden of proof at an agency hearing is the "clear and convincing evidence" standard, as, for example, at a DMV proceeding for the suspension of a driver's license, the court in an Article 78 challenge must apply the substantial-evidence standard of review through the lens of the elevated burden of proof that applied at the agency level. *Seon v. New York State Dep't of Motor Vehicles*, 2018, 159 A.D.3d 607, 74 N.Y.S.3d 20 (1st Dep't). "[W]hile the appellate standard of review of substantial evidence requires great deference to findings that a hearing officer makes based on the evidence placed before it, it still calls for the reviewing court to ensure that such findings are not made in the absence of evidence that could, again with the proper amount of deference, reasonably be called clear and convincing." Here, the First Department majority found that clear and convincing evidence was lacking for an agency determination that a bus driver's negligent driving was the cause of a pedestrian's death.

2017

C7803:2. The "Arbitrary and Capricious" Standard.

When an agency has made a determination on specified grounds, the reviewing court should not uphold the determination if those grounds are irrational or improper, even if some other ground might support the decision. See main text, p.16. The Third Department invoked this rule in *Tri-Serendipity, LLC v. City of Kingston*, 2016, 145 A.D.3d 1264, 42 N.Y.S.3d 682 (3d Dep't), where a landowner in a residential neighborhood challenged a zoning board's decision to deny its request to renovate a building that had acquired permissible non-conforming use status in 1963. The premises were now being used as a boarding house. The zoning board determined that the property's nonconforming use in 1963 was as a nursing home and therefore the new use as a boarding house could be restricted or eliminated.

In the Article 78 challenge, the Supreme Court rejected the board's finding that the premises were originally used as a nursing home. Rather, the Supreme Court found that it was always a boarding house, but the nature of the boarding had changed to such a degree as to justify elimination of the nonconforming use. The Third Department held that the Supreme Court acted improperly because the court may not "search the record for a rational basis to support [an administrative agency's] determination, substitute its judgment for that of the [agency] or affirm the underlying determination upon a ground not invoked ... in the first instance." 145 A.D.3d at 1266, 42 N.Y.S.3d at 684 (internal quotation marks and citation omitted). Nevertheless, after reviewing the evidence supporting the board's finding that the building was originally a nursing home, the Appellate Division

affirmed the rationality of the board's determination that such use had been discontinued.

C7803:2. The "Substantial Evidence" Test.

In *In re Yoga Vida NYC, Inc*., 2016, 28 N.Y.3d 1013, 41 N.Y.S.3d 456, 64 N.E.3d 276, a majority of the Court of Appeals held that substantial evidence was lacking to support the Unemployment Insurance Appeal Board's determination that certain instructors retained by a yoga school to teach yoga classes were employees rather than independent contractors. For an employer-employee relationship to exist, the hiring organization must either exercise control over the results reached by the worker or must control the means used to achieve the results. Here, there was evidence only of "incidental" control. The Court reached a similar conclusion a few years ago with respect to a car-rental company's imposition of certain "incidental" requirements on a promoter whose services the company engaged. *In re Hertz Corp*., 2004, 2 N.Y.3d 733, 778 N.Y.S.2d 743, 811 N.E.2d 5.

The two-judge dissent in *Yoga Vida* argued that there was enough evidence of control in the record to permit reasonable inferences that met the necessary standard, and that the Court should defer to the Board's drawing of those inferences. Since the evidence reasonably supported a decision either way, the majority was said to have erroneously substituted its judgment for that of the Board.

Yoga Vida demonstrates that the existence, or not, of substantial evidence sometimes can be a close question. The majority seems to have determined that it was simply unreasonable as a matter of law for the Board to have made a finding of an employer-employee relationship on the evidence presented. See also *Home Run KTV Inc. v. New York State Liquor Auth*., 2016, 142 A.D.3d 451, 36 N.Y.S.3d 641 (1st Dep't) (Liquor Authority's determination that licensee knew or should have known of the presence of illegal drugs on the premises was based on "surmise, conjecture, speculation or rumor," rather than substantial evidence) (3-2).

On another aspect of the substantial evidence test--the principle that substantial evidence may consist entirely of hearsay--the court in *Watson v. New York State Justice Center for the Protection of People with Special Needs*, 2017, 152 A.D.3d 1025, 59 N.Y.S.3d 558 (3d Dep't), held that reliable hearsay can constitute substantial evidence by itself, "even where there is contrary sworn testimony." In the instant case, the hearsay, comprised of consistent eyewitness interview statements describing an abuse incident by two individuals, was substantial enough for the agency to have rejected contrary testimony by the accused individuals. See also *Roberts v. New York State Justice Center for the Protection of People with Special Needs*, 2017, 152 A.D.3d 1021, 59 N.Y.S.3d 554 (3d Dep't).

2013

C7803:1. Issues That May Be Raised in an Article 78 Proceeding, In General.

In the penalty review proceeding of *Perez v. Rhea*, 2013, 20 N.Y.3d 399, 960 N.Y.S.2d 727, 984 N.E.2d 925, the Court of Appeals overturned a "shock-the-conscience" determination by the Appellate Division that a tenant in a public housing project could not be evicted. Even though the tenant had lied to the housing authority over a seven-year period about her employment status and income--lies that resulted in her criminal conviction for larceny--the Appellate Division held that eviction was too severe a penalty because of the homelessness to which the tenant, the mother of three youngsters, would be subjected. The Court of Appeals, however, found no basis in the record for a finding that homelessness for the tenant was certain or even likely. The Appellate Division had improperly imported into its analysis an "assumption" that any termination of public housing was a " 'drastic penalty' ... that, by default, is excessive.... Instead, reviewing courts must consider each petition on its own

merit." Id. at 404, 960 N.Y.S.2d at 729-30, 984 N.E.2d at 927-28. As a policy matter, the Court of Appeals held that the threat of eviction from public housing is an important deterrent against false claims of poverty--a deterrent that is proper in light of the scarcity of public housing and the long lines of genuinely poor persons in need of such housing. The possibility that a tenant might be ordered in a criminal proceeding to make restitution to the housing authority, which is what happened in the instant case, "may not serve adequately to discourage" misrepresentation.

In *Kickertz v. New York University*, 2012, 99 A.D.3d 502, 952 N.Y.S.2d 147 (1st Dep't), appeal dismissed, 2013, 20 N.Y.3d 1004, 959 N.Y.S.2d 687, 983 N.E.2d 765, the Appellate Division expressed the view that a student's expulsion from dental school was shocking to the court's conscience where the offense was the first transgression by a student with an otherwise exemplary record, it was a lapse in judgment that lacked premeditation, and the penalty was not in conformity with discipline previously imposed under similar circumstances. See also 2013 Supplementary Practice Commentaries on CPLR 7802, at C7802:1.

C7803:2. The "Arbitrary and Capricious" Standard.

In *Ward v. City of Long Beach*, 2013, 20 N.Y.3d 1042, 962 N.Y.S.2d 587, 985 N.E.2d 898, all of the courts reviewing the matter, including the Court of Appeals, held that a city's denial of work-related disability retirement benefits to an injured fire department officer (Gen.Mun.Law § 207-a) lacked a rational basis and was therefore arbitrary and capricious. At the time he presented his claim to the city, the petitioner had already been found eligible for disability retirement benefits from the state based on the same medical evidence that was presented to the city; and the city's denial of benefits was based only on personal observations by the city's attorney together with hearsay allegations by the petitioner's estranged wife as to which he was given no notice or opportunity to respond.

The 2009 Supplementary Practice Commentary to this section discusses the *Infante* case, in which the Court of Appeals held that a medical agency, specifically the medical examiner's office, could not be impeded in its decision-making by the operation of common law presumptions such as the presumption against suicide. The situation is quite different, however, when the Legislature adopts a statutory presumption applicable to the decision-making of a particular agency. Such was the case in *Bitchatchi v. Board of Trustees of the New York City Police Dep't Pension Fund*, 2012, 20 N.Y.3d 268, 958 N.Y.S.2d 680, 982 N.E.2d 600. This was a consolidated appeal of three proceedings challenging the denial of work-related disability benefits to police officers and their families. Each of the three officers had experienced bad health after working on rescue, recovery and clean-up missions at the World Trade Center site in the immediate aftermath of the 9/11 attacks. The officers were entitled to take advantage of the so-called "World Trade Center" presumption in N.Y.C.Admin. Code § 13-252.1, which makes it conclusive, thereby eliminating the need for medical proof, that adverse health conditions discernible after work at the World Trade Center site were caused by work-related exposure to toxins at the site "unless the contrary be proved by competent medical evidence." (Firefighters, state police, and sanitation workers get the same presumption.) As to each of the officers, the medical board's evidence was insufficient to rebut the presumption largely because the board failed to enter relevant data in the administrative record, rendering its conclusions conjectural. The Court applied the World Trade Center presumption in the robust manner that the Legislature undoubtedly intended for the benefit of 9/11 first responders.

2011

C7803:3. The "Substantial Evidence" Test.

The Court of Appeals recently provided insight into the nature of the substantial evidence standard, defining it once again as "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." *Ridge Road Fire District v. Schiano*, 2011, 16 N.Y.3d 494, 499, 922 N.Y.S.2d 249, 252, 947 N.E.2d 140, 143 (internal citation omitted). The rule "demands only that 'a given inference is reasonable and plausible, not necessarily the most probable.' " Id. (internal citations omitted). Significantly, the court stressed that an administrative decision supported by substantial evidence must be upheld even if there is substantial evidence in opposition. "It is of no consequence that the record ... indicates that there was evidence supporting [the agency opponent's] contention. Quite often there is substantial evidence on both sides." Id. at 500, 922 N.Y.S.2d at 252, 947 N.E.2d at 143.

Both the majority and dissenting judges in the case agreed with the articulation of the substantial evidence standard. The disagreement among the judges concerned the stage of the particular administrative proceedings in which the standard was applicable--a fire district's initial determination that a firefighter was not entitled to certain benefits (as contended by the majority), or only to a hearing officer's later review of the same issue (as contended by the dissent).

2009

C7803:1 Issues That May Be Raised in an Article 78 Proceeding, In General.

The doctrine of administrative res judicata provides that the determination of an administrative tribunal generally should be given binding effect by agencies and courts if the fact-finding process that led to the first determination was substantially similar to that used in a court of law, i.e., a quasi-judicial (trial-type) hearing preserved in a fully developed record. *Ryan v. New York Telephone Co*., 1984, 62 N.Y.2d 494, 499, 478 N.Y.S.2d 823, 825-26, 467 N.E.2d 487, 489-90; *Evans v. Monaghan*, 1954, 306 N.Y. 312, 323-24, 118 N.E.2d 452, 457-58. An agency's improper refusal to give res judicata effect to a prior agency decision that was the product of a quasi-judicial hearing can be challenged in an Article 78 proceeding.

The key question is whether the first proceeding was truly quasi-judicial in nature. It was not in *Jason B. v. Novello*, 2009, 12 N.Y.3d 107, 876 N.Y.S.2d 682, 904 N.E.2d 818. There, a young man was found eligible in 2003 to receive certain disability support services based on the relevant agency's review of the applicant's medical records. No hearing was conducted. Three years later, an interested party requested the agency to reconsider the man's eligibility. Based on a reassessment of the same medical records, the agency terminated his benefits. There was no need for a showing of newly discovered evidence, which is a possible exception to the operation of res judicata (see *Evans v. Monaghan*, supra, 306 N.Y. at 326, 118 N.E.2d at 459), because the original determination was not the product of quasi-judicial fact-finding. Res judicata simply did not apply. The Court stressed that an agency should have the freedom to reconsider prior administrative action "where a nonadjudicative determination was initially made."

C7803:2 The "Arbitrary and Capricious" Standard.

As noted in Commentary C7803:3, main volume at p.19, the rules of evidence do not apply with strictness in quasi-judicial (trial-type) hearings conducted by administrative tribunals. See, e.g., *Tsirelman v. Daines*, 2009, 61 A.D.3d 1128, 1130, 876 N.Y.S.2d 237, 240 (3d Dept.) (medical license revocation proceeding). Even greater informality attends administrative fact-finding that takes place outside the context of trial-type hearings. See *125 Bar Corp. v. State Liquor Auth*., 1969, 24 N.Y.2d 174, 178-79, 299 N.Y.S.2d 194, 198, 247 N.E.2d 157, 159 ("competent common-law evidence" not necessary to sustain denial of license renewal); Commentary C7803:1, main volume at p.10.

It is not surprising, therefore, that the Court of Appeals refused to impose the common law presumption against suicide on a medical examiner's inquiry into the cause of a person's death. *Infante v. Dignan*, 2009, 12 N.Y.3d 336, 879 N.Y.S.2d 824, 907 N.E.2d 702. Here, the medical examiner who conducted an autopsy relied on toxicological findings and the circumstances at the scene of death in making a determination of suicide. In the decision below, a majority of the Appellate Division held that the presumption against suicide precluded such a determination. 55 A.D.3d 1258, 865 N.Y.S.2d 167 (4th Dep't). But the Court of Appeals ruled that the presumption against suicide "has no role to play" either in the medical examiner's decision-making or judicial review thereof. The Court wrote, "If medical examiners were forced to leaven their decision-making with a common-law evidentiary presumption, the medical and scientific quality of their work would be seriously compromised to the detriment of the citizenry." 12 N.Y.3d at 340, 879 N.Y.S.2d at 826-27, 907 N.E.2d at 704-05.

Thus, the sole standard of judicial review in such cases is that of arbitrariness. So long as the evidence considered by the medical examiner raised reasonable inferences of death by either accident or suicide, the court must respect the medical expert's decision. The evidence relied upon by the medical examiner in the instant case contained such conflicting inferences. The Court concluded by citing *Flacke v. Onondaga Landfill Systems, Inc.*, 1987, 69 N.Y.2d 355, 363, 514 N.Y.S.2d 689, 693, 507 N.E.2d 282, 286, which reiterated a policy of judicial deference to the factual evaluations of administrative agencies, especially in matters involving medical and scientific expertise.

PRACTICE COMMENTARIES

by Vincent C. Alexander

C7803:1 Issues That May Be Raised in an Article 78 Proceeding, In General.

C7803:2 The "Arbitrary and Capricious" Standard.

C7803:3 The "Substantial Evidence" Test.

C7803:1 Issues That May Be Raised in an Article 78 Proceeding, In General.

CPLR 7803 specifies "the only questions" that may be raised in an Article 78 proceeding. As discussed in the Practice Commentaries on CPLR 7801, at C7801:1, supra, Article 78 was adopted for the purpose of achieving procedural, not substantive, reform in the law of prerogative writs. Some of these procedural reforms are embodied in the scope of judicial review contained in this section. See N.Y.Adv.Comm. on Prac. & Proc., Second Prelim.Rep., Legis.Doc.No.13, pp.398-99 (1958); N.Y.Adv.Comm. on Prac. & Proc., Fifth Prelim.Rep., Legis.Doc.No.15, pp.750-51 (1961).

The first question in CPLR 7803--"whether the body or officer failed to perform a duty enjoined upon it by law"--corresponds with the writ of mandamus to compel. The scope of this writ and its modern application in an Article 78 proceeding are discussed in Commentary C7801:3, supra, under the subheading of "Mandamus to

Compel."

The second question--"whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction"--restates the writ of prohibition. Commentary C7801:4, supra, describes the present-day contours of this remedy.

By-passing question (3) for the moment, the fourth question--whether substantial evidence, on the entire record, supports a determination based on a hearing at which evidence was taken pursuant to direction by law--covers ground occupied exclusively by certiorari, which is described in Commentary C7801:2, supra. Briefly, certiorari encompasses review of judicial and quasi-judicial determinations of an agency that are made on the basis of statutorily or constitutionally required trial-type hearings in which all of the evidence relied upon by the agency must be contained in a written record of the hearing. Whether the agency's factual determination in such a proceeding is justified depends on whether it is supported by substantial evidence. Much judicial ink has been spilled in analyzing the substantial evidence test, thus warranting treatment of this topic in its own subsection, Commentary C7803:3, below.

To be distinguished from certiorari is mandamus to review, which is discussed in Commentary C7801:3, supra, under the subheading of "Mandamus to Review." Mandamus to review is the category of judicial review of agency determinations that are "administrative," as opposed to judicial or quasi-judicial, in nature. Administrative determinations may properly be made without a trial-type hearing and may be based on "whatever evidence is at hand," regardless of whether it appears in the record of a hearing. *Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educational Services,* 1991, 77 N.Y.2d 753, 757-58, 570 N.Y.S.2d 474, 477, 573 N.E.2d 562, 565.

Having made the distinction between certiorari and mandamus to review, we can now return to question (3) of CPLR 7803. Three of the grounds listed in CPLR 7803(3) for challenging agency action--violation of lawful procedure, error of law and abuse of discretion--may be relevant in both certiorari and mandamus to review.

To determine whether an agency has violated lawful procedure, reference must be made to the statutes, rules and regulations governing the particular agency and its area of regulatory competence. The legality of the procedure will often turn on the nature of the action taken. For example, if the agency took purely "administrative" action, such as denying an application for a license, the agency could have properly relied on ex parte information and need not have conducted an adversarial trial. See, e.g., *125 Bar Corp. v. State Liquor Auth.,* 1969, 24 N.Y.2d 174, 299 N.Y.S.2d 194, 247 N.E.2d 157. Conversely, if the action taken by the agency was of a quasi-judicial nature, such as revoking an existing license, the agency's failure to conduct a trial-type hearing (see, e.g., *Application of Brody's Auto Wreckers, Inc.,* 1961, 31 Misc.2d 466, 220 N.Y.S.2d 936 (Sup.Ct.Bronx Co.)) or to confine itself to evidence in the hearing record (see, e.g., *Mulligan's Night Club & Cafe, Inc. v. Buffalo Common Council,* 1992, 184 A.D.2d 1016, 584 N.Y.S.2d 499 (4th Dep't)) would be grounds for annulment of the determination. Similarly, in a trial-type hearing to impose a penalty, an administrative tribunal's reliance on evidence that was seized by the agency's investigators in violation of the fourth amendment may constitute a procedural violation sufficient to require annulment. See *Finn's Liquor Shop, Inc. v. State Liquor Auth.,* 1969, 24 N.Y.2d 647, 301 N.Y.S.2d 584, 249 N.E.2d 440, certiorari denied 396 U.S. 840, 90 S.Ct. 103, 24 L.Ed.2d 91. But see *Boyd v. Constantine,* 1993, 81 N.Y.2d 189, 597 N.Y.S.2d 605, 613 N.E.2d 511 (exclusionary rule inapplicable where seizure was not made by police officers acting on behalf of the agency).

Courts seldom single out "error of law," by name, as the question for consideration in an Article 78 proceeding. This question is often implicit, however, in the nature of the grievance, such as an allegation that the agency improperly interpreted or applied a statute or regulation. See *New York City Health and Hospitals Corp. v. McBarnette*, 1994, 84 N.Y.2d 194, 205, 616 N.Y.S.2d 1, 6, 639 N.E.2d 740, 745. In this regard, courts will uphold

the interpretation of statutes and regulations by the agencies responsible for their administration if such interpretation is reasonable. See *Howard v. Wyman,* 1971, 28 N.Y.2d 434, 438, 322 N.Y.S.2d 683, 685-86, 271 N.E.2d 528, 529-30; *Marburg v. Cole,* 1941, 286 N.Y. 202, 212, 36 N.E.2d 113, 117.

"Abuse of discretion," another of the specified grounds for review under CPLR 7803(3), arguably is superfluous. See Weintraub, "Statutory Procedures Governing Judicial Review of Administrative Action: From State Writs to Article 78 of the Civil Practice Law and Rules," 38 St. John's L.Rev. 86, 123 (1963) (abuse of discretion is encompassed by arbitrary and capricious test). Historically, abuse of discretion was not included as an independent ground of review in the original version of Article 78 of the Civil Practice Act. If a court overturned an agency's exercise of discretion, the agency was said to have acted arbitrarily and capriciously or unreasonably, and this was a sufficient basis to annul the determination both at common law and under the Civil Practice Act. See, e.g., *People ex rel. Empire City Trotting Club v. State Racing Comm'n,* 1907, 190 N.Y. 31, 82 N.E. 723; *Rochester Colony, Inc. v. Hostetter,* 1963, 19 A.D.2d 250, 241 N.Y.S.2d 210 (4th Dep't).

On the other hand, the measure of an agency's imposition of a punishment--a discretionary determination--originally was held to be unreviewable by the courts. *Barsky v. Board of Regents of University of New York,* 1953, 305 N.Y. 89, 111 N.E.2d 222, affirmed 347 U.S. 442, 74 S.Ct. 650, 98 L.Ed. 829; *Sagos v. O'Connell,* 1950, 301 N.Y. 212, 93 N.E.2d 644. This limitation on judicial review was changed by an amendment to the Civil Practice Act that expressly permitted courts to consider whether an agency had abused its discretion in the measure of punishment, penalty or discipline imposed. Laws of 1955, ch.661. See N.Y.Adv.Comm. on Prac. & Proc., Second Prelim.Rep., Legis.Doc.No.13, pp.398-99 (1958). CPLR 7803(3) goes one step further by making abuse of discretion, standing alone, a ground for review and specifying that the mode or measure of punishment is merely one possible type of such abuse. The purpose of this additional change, according to the Advisory Committee, was to "extend the scope of review to include any abuse of discretion, so that the scope will be no narrower than the scope of review on appeal from a determination of a judge at Special Term." N.Y.Adv.Comm. on Prac. & Proc., Fifth Prelim.Rep., Legis.Doc.No.15, p.751 (1961).

Aside from consideration of administrative sanctions, however, most courts continue to analyze abuses of discretion in traditional terms of whether the agency's action was arbitrary and capricious or lacked a rational basis. See, e.g., *Older v. Board of Educ. of Union Free School District No. 1, Town of Mamaroneck,* 1971, 27 N.Y.2d 333, 318 N.Y.S.2d 129, 266 N.E.2d 812 (board of education's exercise of discretion in assigning students to schools had a rational basis and was not arbitrary and capricious); *Burke's Auto Body, Inc. v. Ameruso,* 1985, 113 A.D.2d 198, 495 N.Y.S.2d 393 (1st Dep't) (agency's exercise of discretion in rejecting all bids lacked a rational basis and was arbitrary).

With respect to the harshness of penalties and discipline meted out by administrative agencies, the standard for judicial review is as follows: An administrative sanction "must be upheld unless it shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law." *Featherstone v. Franco*, 2000, 95 N.Y.2d 550, 554, 720 N.Y.S.2d 93, 96, 742 N.E.2d 607, 610. In *Featherstone*, the Court of Appeals stressed that the Appellate Division lacks discretionary authority to substitute its judgment for that of the agency under an "interest-of-justice" inquiry. Furthermore, judicial review of the penalty issue must be limited to the evidentiary submissions that were before the administrative agency; consideration may not properly be given to circumstances that may have developed after the agency's final determination, such as subsequent ameliorating conduct by the person who was punished.

A few months after *Featherstone*, the Court again addressed the shock-the-conscience standard in *Kelly v. Safir*, 2001, 96 N.Y.2d 32, 724 N.Y.S.2d 680, 747 N.E.2d 1280. There, the Court said the standard "involves consideration of whether the impact of the penalty on the individual is so severe that it is disproportionate to the misconduct, or the harm to the agency or the public in general." Id. at 38, 724 N.Y.S.2d at 683, 747 N.E.2d at 1283.

The Court made clear that the shock-the-conscience standard requires significant judicial deference: " '[G]reat leeway' must be accorded to the [Police] Commissioner's determinations ... for it is the Commissioner, not the courts, who 'is accountable to the public for the integrity of the Department.' " Id. at 38, 724 N.Y.S.2d at 683, 747 N.E.2d at 1284. See also *Scahill v. Greece Central School District*, 2004, 2 N.Y.3d 754, 778 N.Y.S.2d 771, 811 N.E.2d 33. *Kelly* also made the point that in reviewing a penalty, the court may not properly consider facts outside the administrative record.

The shock-the-conscience standard has its origins in *Pell v. Board of Educ. of Union Free School Dist. No. 1 of the Towns of Scarsdale and Mamaroneck, Westchester County*, 1974, 34 N.Y.2d 222, 233, 356 N.Y.S.2d 833, 841, 313 N.E.2d 321, 327. The *Pell* Court, in turn, relied heavily on the Appellate Division decision in *Stolz v. Board of Regents of the University of the State of New York*, 1957, 4 A.D.2d 361, 165 N.Y.S.2d 179 (3d Dep't), where it was said that an administrative punishment or discipline may be set aside only if it is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." Id. at 364, 165 N.Y.S.2d at 182. The *Stolz* court reasoned that the abuse of discretion standard in the statutory predecessor of CPLR 7803(3) was intended to preclude courts from substituting their judgment on the appropriate measure of punishment for that of the administrative agency. Otherwise, "the power of administration would, to a large extent, be transferred from the administrative agency to the courts." 4 A.D.2d at 364, 165 N.Y.S.2d at 182.

Both *Featherstone* and *Kelly* involved the scope of judicial review in the Appellate Division. It is a fair inference that the same shock-the-conscience standard should also apply to the Supreme Court's review of administrative punishments and penalties. See, e.g., *Zuntag v. City of New York*, 2007, 18 Misc.3d 210, 853 N.Y.S.2d 469 (Sup.Ct.Richmond Co.) (permanent revocation of attorney's visitation rights at jail facilities based on isolated incident of unknowing transfer of contraband tobacco to inmate was held to be "shocking to one's sense of fairness").

As a practical matter, the Supreme Court seldom passes on penalty issues. The question of excessive penalties is most frequently presented in the context of certiorari review of trial-type hearings. In such a case, the agency's fact-findings with respect to the underlying conduct are reviewed in accordance with the substantial evidence test. See Commentary C7803:3, below. Although a certiorari proceeding is commenced in the Supreme Court, the case will be transferred to the Appellate Division for determination of the substantial evidence question. CPLR 7804(g). The only matters that Supreme Court may decide prior to transfer are "objections as could terminate the proceeding," such as CPLR 3211-type defenses. See Practice Commentaries on CPLR 7804, at C7804:8. Petitioner's challenge to a penalty imposed by the agency does not qualify as such an objection. Cf. *Donofrio v. City of Rochester*, 1988, 144 A.D.2d 1027, 534 N.Y.S.2d 630 (4th Dep't), leave to appeal denied, 1989, 73 N.Y.2d 708, 540 N.Y.S.2d 1003, 538 N.E.2d 355. Thus, the penalty issue will be transferred to the Appellate Division where it will be reviewed in the first instance along with the substantial evidence question. See, e.g., *Diefenthaler v. Klein*, 2006, 27 A.D.3d 347, 811 N.Y.S.2d 653 (1st Dep't); *Dewey v. Powley*, 1999, 261 A.D.2d 901, 902, 690 N.Y.S.2d 365, 366 (4th Dep't).

If the reviewing court concludes that the punishment was too harsh, the court may either remand the matter to the agency for a lesser penalty (see, e.g., *Diefenthaler v. Klein*, supra) or specify the appropriate sanction itself (see, e.g., *Mitthauer v. Patterson,* 1960, 8 N.Y.2d 37, 42, 201 N.Y.S.2d 321, 324, 167 N.E.2d 731, 733).

The final question listed in CPLR 7803(3) is whether a determination was arbitrary and capricious. The arbitrary and capricious standard is used to examine fact-finding determinations only in mandamus to review. Like its substantial evidence counterpart in certiorari, the arbitrary and capricious test merits its own subsection, Commentary C7803:2, below.

Subdivision (5) of CPLR 7803 was added to the statute in 2003. This subdivision, together with amendments to Education Law § 4404(3), was intended to bring New York law into compliance with federal regulations regarding the scope of judicial review of determinations regarding children with disabilities. According to the legislative memorandum in support of the amendments, continued federal financing would be forfeited in the absence of such compliance. The relevant federal regulations require that judicial review of these matters be based on the entire administrative record, allow for additional evidence at the request of the parties and be determined on the basis of a preponderance of the evidence. Article 78 proceedings in this context are determined in accordance with the substantial evidence standard and do not provide for the presentation of additional evidence. By taking judicial review of these matters out from under the umbrella of Article 78, it was thought that the desired compliance with federal law could be achieved. Judicial review in this specialized area is now governed by CPLR Article 4, augmented by the procedural specifics set forth in Education Law § 4404(3).

C7803:2 The "Arbitrary and Capricious" Standard.

Whether a determination was arbitrary and capricious is the standard used in mandamus to review, i.e., where the agency was not required to conduct a trial-type hearing. See Practice Commentaries on CPLR 7801, at C7801:3, supra. Although the phrase "arbitrary and capricious" was not used in Article 78 of the Civil Practice Act, this was the standard used by the courts to analyze the legality of administrative determinations. See, e.g., *Marburg v. Cole,* 1941, 286 N.Y. 202, 36 N.E.2d 113. CPLR 7803(3) aligned Article 78 with judicial practice. See Weintraub, "Statutory Procedures Governing Judicial Review of Administrative Action: From State Writs to Article 78 of the Civil Practice Law and Rules," 38 St. John's L.Rev. 86, 123 (1963).

The Court of Appeals explained the nature of the arbitrary and capricious standard in *Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County,* 1974, 34 N.Y.2d 222, 356 N.Y.S.2d 833, 313 N.E.2d 321: "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." Id. at 231, 356 N.Y.S.2d at 839, 313 N.E.2d at 325. The question, said the Court, is whether the determination has a "rational basis." Id. Interestingly, the *Pell* Court observed that rationality is the underlying basis for both the arbitrary and capricious standard and the substantial evidence rule of CPLR 7803(4).

125 Bar Corp. v. State Liquor Auth., 1969, 24 N.Y.2d 174, 299 N.Y.S.2d 194, 247 N.E.2d 157, provides an example of the operation of the arbitrary and capricious standard. Inherent in mandamus to review is the principle that the agency, in making its determination, was authorized to consider ex parte materials generated by an independent investigation or materials that were already in its files. The agency's reliance on such information, however, must be rationally based. Thus, in *125 Bar Corp.,* an agency's refusal to renew a tavern-owner's liquor license was held to be arbitrary and capricious because the agency had relied principally on investigatory reports that were "insufficient, inapplicable, or irrelevant" on their face. The data before the agency simply did not provide a rational basis for its action. The determination was thus annulled and the case was remanded to the agency for appropriate proceedings.

Another aspect of the arbitrary and capricious test is that the reasonableness of the agency's determination must be judged solely on the grounds stated by the agency at the time of its determination. If those grounds are arbitrary and capricious, the court may not uphold the determination even if the agency proffers a proper, alternative ground in the Article 78 proceeding. *Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educational Services,* 1991, 77 N.Y.2d 753, 758, 570 N.Y.S.2d 474, 478, 573 N.E.2d 562, 566. Similarly, the court is not permitted to consider facts or claims that were not presented at the agency level. *Fanelli v. New York City Conciliation and Appeals Bd.*, 1982, 90 A.D.2d 756, 757, 455 N.Y.S.2d 814, 816 (1st Dep't), affirmed for reasons stated below, 1983, 58 N.Y.2d 952, 460 N.Y.S.2d 534, 447 N.E.2d 82. See also *Kelly v. Safir*, 2001, 96 N.Y.2d 32, 39, 724 N.Y.S.2d 680, 684, 747 N.E.2d 1280, 1284 (review of administrative determination is limited to "facts and record adduced before the agency").

Occasionally, however, it may be necessary for the court to take evidence or conduct a hearing for the purpose of ascertaining the facts upon which the agency based its decision. See, e.g., *Pasta Chef, Inc. v. State Liquor Auth.*, 1976, 54 A.D.2d 1112, 389 N.Y.S.2d 72 (4th Dep't), affirmed, 1978, 44 N.Y.2d 766, 406 N.Y.S.2d 36, 377 N.E.2d 480. See generally Practice Commentaries on CPLR 7804, at C7804:9, infra. By definition, mandamus to review involves a situation in which the agency did not conduct a trial-type hearing with a formal record. Thus, factual questions may arise as to exactly what evidence was considered by the agency in making its determination. The rationality of the agency's decision cannot be determined until the evidence relied upon by the agency is made known.

Loose language in judicial opinions sometimes makes it difficult to say whether a particular type of agency determination should be reviewed under the arbitrary and capricious standard or that of substantial evidence. The Appellate Division, Second Department, recently struggled with this problem in the context of challenges to the decisions of municipal land use agencies regarding applications for zoning variances. The court concluded that such matters fall within the Article 78 category of mandamus to review and are therefore to be evaluated under the arbitrary and capricious standard. *Halperin v. City of New Rochelle*, 2005, 24 A.D.3d 768, 769-72, 809 N.Y.S.2d 98, 103-05 (2d Dep't), leave to appeal dismissed, 2006, 6 N.Y.3d 890, 817 N.Y.S.2d 624, 850 N.E.2d 671. The substantial evidence standard of review, which applies to certiorari, is inappropriate for the review of zoning agency decisions, the Appellate Division reasoned, because the public hearings conducted in connection with variance applications are not quasi-judicial in nature. Such hearings do not involve sworn testimony, cross-examination and the making of an evidentiary record within the meaning of CPLR 7803(4). See generally Practice Commentaries on CPLR 7801, at C7801:2, supra, and 7803, at C7803:3, below.

The *Halperin* court was put to the task of reconciling conflicting language in certain opinions in which the Court of Appeals sought to explain how "substantial evidence" was part of the standard of review in zoning variance cases. See *Wilcox v. Zoning Board of Appeals of the City of Yonkers,* 1966, 17 N.Y.2d 249, 255, 270 N.Y.S.2d 569, 572, 217 N.E.2d 633, 635; *Sasso v. Osgood*, 1995, 86 N.Y.2d 374, 384 n.2, 633 N.Y.S.2d 259, 264, 657 N.E.2d 254, 259; *Pecoraro v. Board of Appeals of the Town of Hempstead*, 2004, 2 N.Y.3d 608, 613, 781 N.Y.S.2d 234, 237, 814 N.E.2d 404, 407. The Appellate Division discerned in *Pecoraro*, the most recent of these decisions, a commitment by the Court of Appeals to the arbitrary and capricious standard in order to ensure, as a policy matter, that significant deference be paid to zoning decisions of local officials regarding land use in their communities. 24 A.D.3d at 771, 809 N.Y.S.2d at 104.

Often, the shadowy distinction between the arbitrary and capricious standard and the substantial evidence standard makes no practical difference because the Court of Appeals, as previously noted, has said that rationality is the underlying basis for both standards. *Pell v. Board of Educ. of Union Free School Dist. No. 1*, supra, 34 N.Y.2d at 231, 356 N.Y.S.2d at 839, 313 N.E.2d at 325. The distinction made a difference in *Halperin* because the Supreme Court, mistakenly thinking the variance determination at issue was to be judged under the substantial evidence standard, transferred the case to the Appellate Division for review pursuant to CPLR 7804(g) (question of substantial evidence to be transferred to Appellate Division when Supreme Court's ruling on other objections, if any, does not dispose of case). See Practice Commentaries on CPLR 7804, at C7804:8, infra. The Appellate Division, however, held that the Supreme Court should have retained jurisdiction and addressed the merits because the proceeding was in the nature of mandamus to review, requiring application of the arbitrary and capricious standard.

C7803:3 The "Substantial Evidence" Test.

The substantial evidence test is the exclusive standard for the review of an agency's fact-finding determination in an Article 78 proceeding in the nature of certiorari. CPLR 7803(4). The test was given shape by the Court of Appeals in the 1940 decision of *Stork Restaurant v. Boland,* 282 N.Y. 256, 26 N.E.2d 247:

> A finding is supported by the evidence only when the evidence is so substantial that from it an inference of the existence of the fact found may be drawn reasonably. A mere scintilla of evidence sufficient to justify a suspicion is not sufficient to support a finding upon which legal rights and obligations are based. That requires 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' .... The same test is applied in trials before a court and jury. Evidence which is sufficient to require the court to submit a question of fact to a jury is sufficient to support a finding by the administrative board.

Id. at 273-74, 26 N.E.2d at 255.

Another formulation appears in *300 Gramatan Ave. Associates v. State Div. of Human Rights,* 1978, 45 N.Y.2d 176, 408 N.Y.S.2d 54, 379 N.E.2d 1183, where the Court said, "In final analysis, substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably, probatively and logically.... Put a bit differently, 'the reviewing court should review the whole record to determine whether there is a rational basis in it for the findings of fact supporting the agency's decision.' " Id. at 181-82, 408 N.Y.S.2d at 57, 379 N.E.2d at 1186-87, quoting C. McCormick, *Evidence* 847 (2d ed. 1972).

Yet another variation appears in *People ex rel. Vega v. Smith,* 1985, 66 N.Y.2d 130, 495 N.Y.S.2d 332, 485 N.E.2d 997, where the Court quotes Learned Hand: "While the quantum of evidence that rises to the level of 'substantial' cannot be precisely defined, the inquiry is whether 'in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs.' " Id. at 139, 495 N.Y.S.2d at 337, 485 N.E.2d at 1002, quoting *N.L.R.B. v. Remington Rand,* C.A.N.Y.1938, 94 F.2d 862, 873, certiorari denied 304 U.S. 576, 58 S.Ct. 1046, 82 L.Ed. 1540.

Under the substantial evidence test, the court is not to weigh the evidence, for that would usurp the function of the administrative fact-finder. Thus, courts may not "reject the choice made by [the agency] where the evidence is conflicting and room for choice exists." *Stork Restaurant v. Boland*, supra, 282 N.Y. at 267, 26 N.E.2d at 252. The court, in other words, may not substitute its own view, even if it would have reached a different conclusion. *Sowa v. Looney,* 1968, 23 N.Y.2d 329, 336, 296 N.Y.S.2d 760, 767, 244 N.E.2d 243, 247. Similarly, the credibility of witnesses who testified at the hearing is essentially beyond the scope of judicial review: " '[W]here reasonable men might differ as to whether the testimony of one witness should be accepted or the testimony of another be rejected, where from the evidence either of two conflicting inferences may be drawn, the duty of weighing the evidence and making the choice rests solely upon the [agency].' " *Berenhaus v. Ward,* 1987, 70 N.Y.2d 436, 443-44, 522 N.Y.S.2d 478, 481-82, 517 N.E.2d 193, 196, quoting *Stork Restaurant v. Boland*, supra, 282 N.Y. at 267, 26 N.E.2d at 252. See generally *Café La China v. New York State Liquor Auth.*, 2007, 43 A.D.3d 280, 841 N.Y.S.2d 30 (1st Dep't) (summary of characteristics of substantial evidence standard of review).

The determination of whether substantial evidence supports the agency's conclusion is to be made upon the record as a whole. Thus, "[t]he evidence produced by one party must be considered in connection with the evidence produced by the other parties." *Stork Restaurant v. Boland*, supra, 282 N.Y. at 274, 26 N.E.2d at 255. A corollary of the "whole record" rule is that a decision may be upheld even if evidence was erroneously admitted at the administrative hearing, provided a review of the entire record discloses independent substantial evidence in support of the decision. See, e.g., *Sowa v. Looney,* 1968, 23 N.Y.2d 329, 296 N.Y.S.2d 760, 244 N.E.2d 243 (results of polygraph examination should not have been admitted, but other evidence in the record was sufficient). In a "rare case," however, the admission of improper evidence may taint the proceeding to such an extent that the "fundamentals of a fair hearing" are violated regardless of whatever other evidence is in the record. Id. at 334, 296 N.Y.S.2d at 765, 244 N.E.2d at 246. Cf. *Freymann v. Board of Regents of University of State of New York*, 1984, 102 A.D.2d 912, 477 N.Y.S.2d 494 (3d Dep't), appeal dismissed 64 N.Y.2d 645, 485 N.Y.S.2d 1032, 474 N.E.2d

260 (in proceeding for revocation of license, even if evidence of physician's prior disciplinary "conviction" violated the *Molineux* rule, such error was not so prejudicial as to require annulment). Obviously, if the agency's decision is based entirely on improper evidence, annulment will be the result. See, e.g., *Finn's Liquor Shop, Inc. v. State Liquor Auth.,* 1969, 24 N.Y.2d 647, 301 N.Y.S.2d 584, 249 N.E.2d 440, certiorari denied 396 U.S. 840, 90 S.Ct. 103, 24 L.Ed.2d 91 (decisive evidence seized in violation of the fourth amendment).

A question that often arises in connection with the substantial evidence test is the extent to which the agency may properly rely on hearsay that is introduced at the hearing. It is well settled, of course, that trial-type proceedings of an administrative agency are not governed by the same formal rules of evidence that are operative in the courts. See *Hecht v. Monaghan,* 1954, 307 N.Y. 461, 470, 121 N.E.2d 421, 425; *Sowa v. Looney*, supra, 23 N.Y.2d at 333, 296 N.Y.S.2d at 764, 244 N.E.2d at 245. See also N.Y.State Admin.Proc.Act § 306(1) (in adjudicatory proceedings, agencies generally need not observe formal rules of evidence except rules of privilege); *Berenhaus v. Ward,* 1987, 70 N.Y.2d 436, 522 N.Y.S.2d 478, 517 N.E.2d 193 (rule of criminal procedure that prohibits conviction based solely on uncorroborated testimony of accomplice is inapplicable in police disciplinary hearing). Thus, hearsay is admissible in such proceedings. See, e.g., *Lumsden v. New York City Fire Dep't,* 1987, 134 A.D.2d 595, 522 N.Y.S.2d 4 (2d Dep't); *King v. McMickens,* 1986, 120 A.D.2d 351, 501 N.Y.S.2d 679 (1st Dep't), affirmed sub nom. *Perez v. Ward,* 1987, 69 N.Y.2d 840, 514 N.Y.S.2d 703, 507 N.E.2d 296.

May an agency's determination be based exclusively on hearsay? A 1916 decision of the Court of Appeals answered this question in the negative when it held that "there must be a residuum of legal evidence to support the [determination]." *Carroll v. Knickerbocker Ice Co.,* 1916, 218 N.Y. 435, 440, 113 N.E. 507, 509. In other words, among the data in the hearing record, there had to be some evidence--a "legal residuum" of either non-hearsay evidence or evidence that fell within a hearsay exception--that would be admissible in a court of law. The legal residuum rule, however, was roundly criticized by commentators as an artificial ingredient in a review process that should focus solely on the rationality of the agency's fact-findings in the particular circumstances. See, e.g., Davis, "Hearsay in Administrative Hearings," 32 Geo.Wash.L.Rev. 689, at 689 (1964); Weinstein, "Probative Force of Hearsay," 46 Iowa L.Rev. 331, 347-48 (1961).

The CPLR did not explicitly jettison the legal residuum rule, but the Court of Appeals interpreted the statutory adoption of the substantial evidence test in CPLR 7803(4) as an implicit rejection of the rule. See *300 Gramatan Ave. Associates v. State Div. of Human Rights,* 1978, 45 N.Y.2d 176, 180 n. *, 408 N.Y.S.2d 54, 56, 379 N.E.2d 1183, 1185. Substantial evidence, we are told, is evidence that a reasonable person would rely upon in reaching a conclusion, and relevant and probative hearsay, standing alone, can satisfy this standard. See *People ex rel. Vega v. Smith,* 1985, 66 N.Y.2d 130, 139, 495 N.Y.S.2d 332, 337, 485 N.E.2d 997, 1002. At the hearing, potential unfairness caused by the absence of confrontation of the hearsay declarant can be overcome, in most instances, by the aggrieved party's ability to demand that the declarant be subpoenaed to appear for examination as a hostile witness. See N.Y.State Admin.Proc.Act § 304(2); *Gray v. Adduci,* 1988, 73 N.Y.2d 741, 536 N.Y.S.2d 40, 532 N.E.2d 1268. Thus, it is now well settled that the legal residuum rule is a dead letter in New York in virtually all trial-type agency proceedings. See *Gray v. Adduci*, supra (revocation of driver's license based on arresting officer's written report of driver's refusal to submit to chemical test); *Eagle v. Paterson,* 1982, 57 N.Y.2d 831, 455 N.Y.S.2d 759, 442 N.E.2d 56 (finding of untrustworthy conduct by real estate brokers based on homeowners' written communications to Secretary of State); *People ex rel. Vega v. Smith*, supra (prison discipline based on correction officers' written misbehavior reports); *Hirsch v. Corbisiero,* 1989, 155 A.D.2d 325, 548 N.Y.S.2d 1 (1st Dep't), appeal denied, 1990, 75 N.Y.2d 708, 555 N.Y.S.2d 691, 554 N.E.2d 1279 (suspension of horse racing license on basis of investigating officer's report).

This is not to say, however, that an agency determination based solely on hearsay will always pass the substantial evidence test. In some cases, the quality and reliability of the hearsay may be so poor as to render reliance thereon unreasonable. See, e.g., *In re National Basketball Ass'n,* 1985, 115 A.D.2d 365, 495 N.Y.S.2d 904 (1st Dep't), affirmed 1986, 68 N.Y.2d 644, 505 N.Y.S.2d 63, 496 N.E.2d 222 (conclusory affidavit of physician describing

patient's physical condition was insufficient to establish patient's ability to perform physical duties of professional basketball referee). See also *Hoch v. New York State Dep't of Health*, 2003, 1 A.D.3d 994, 768 N.Y.S.2d 53 (4th Dep't) (substantial evidence lacking where critical issue of student's age was based on uncorroborated hearsay).

In applying the substantial evidence standard, courts must confine their review to the record as it existed at the time of the agency's determination. See *Kelly v. Safir*, 2001, 96 N.Y.2d 32, 39, 724 N.Y.S.2d 680, 684, 747 N.E.2d 1280, 1284 (review of administrative determination is limited to "facts and record adduced before the agency"). See also *Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educational Services*, 1991, 77 N.Y.2d 753, 758, 570 N.Y.S.2d 474, 478, 573 N.E.2d 562, 566 (judicial review of agency determination is limited to grounds stated by agency; if those grounds are inadequate or improper, court may not uphold agency's determination by substituting a proper basis).

LEGISLATIVE STUDIES AND REPORTS

This section is based on part of § 1296 of the civil practice act. The comprehensive discussion of this section in the Second Report states that the first question specified is the same as the first of § 1296; the second combines the second and third stated in § 1296; the third question specified combines the three paragraphs in § 1296 numbered 4, 5 and 5-a. Paragraph 5-a was enacted to overcome the rule stated in the cases of Barsky v. Board of Regents, 305 N.Y. 89, 111 N.E.2d 222, aff'd, 347 U.S. 442 (1953), and Sagos v. O'Connell, 301 N.Y. 212, 93 N.E.2d 644 (1950), which held that the degree of punishment was not reviewable. In the final draft of the third question in this section it was amended to indicate that abuse of discretion may include, but is not limited to, the measure or mode of punishment, and the Revisers comment in the Fifth Report that this change extends the scope of review to include any abuse of discretion, so that the scope will be no narrower than the scope of review on appeal from a determination of a judge at Special Term.

The Second Report further states that the fourth question specified in this section replaces numbered paragraphs 6 and 7 in § 1296 of the civil practice act, as well as the qualifying paragraph preceding those paragraphs. Paragraph 6 is formulated in terms of a lack of competent proof of all the facts necessary to be proved; paragraph 7 speaks of such a preponderance of proof against the existence of a material fact that a jury verdict would be set aside as against the weight of the evidence. These formulations have been severely criticized and their amendment has been proposed. See 1 Benjamin, Administrative Adjudication in New York 335-340 (1942); Communications to N.Y.Temp.Comm'n on the Courts. The statement in this section accords with the amendments suggested and reflects the law as construed by the courts in Miller v. Kling, 291 N.Y. 65, 68-69, 50 N.E.2d 546, 547-48 (1942), and Kilgus v. Board of Estimate of City of New York, 308 N.Y. 620, 626-27, 127 N.E.2d 705, 709 (1955). Similar language may be found in § 9(e) of the Federal Administrative Procedure Act, 5 U.S.C.A. § 1009(e), § 207(f) of the proposed Administrative Code, and § 12(7)(e) of the Model State Administrative Procedure Act. The final draft of question 4 stated the question affirmatively rather than negatively, by changing the word "unsupported" to "supported." The Revisers remark in the Fifth Report that this change is intended to clarify the meaning, and that the language in question 4 more aptly describes the "substantial evidence" test of Stork Restaurant, Inc. v. Boland, 282 N.Y. 256, 26 N.E.2d 247 (1940); Miller v. Kling, 291 N.Y. 65, 50 N.E.2d 546 (1943), and Brennan v. Rubino, 8 N.Y.2d 16, 21, 167 N.E.2d 332, 334 (1960); see generally, Toch, Judicial Review of Administrative Determinations in New York State, 24 Albany L.Rev. 95, 115-19 (1960). This rule is not intended to change, affect or impair in any manner established principles of judicial review which hold the burden of overcoming an administrative determination to be upon the petitioner; as for example, a proceeding by a taxpayer to review a determination of the State Tax Commission under McKinney's Tax Law §§ 199 and 375, where the burden rests upon the taxpayer to show the determination is "clearly erroneous." See, e.g., People ex rel. Kohlman & Co. v. Law, 239 N.Y. 346, 146 N.E. 622 (1925); People ex rel. Hull v. Graves, 289 N.Y. 173, 45 N.E.2d 161 (1942); Young v. Bragalini, 3 N.Y.2d 602, 148 N.E.2d 143 (1958).

Finally, the Revisers explain in the Second Report that paragraph 5-a was added to § 1296 of the civil practice act in 1955, with no express indication of where it was to be placed. N.Y.Laws 1955, c. 661. It seems apparent, however, that it was not intended that paragraph 5-a be qualified by the paragraph preceding paragraphs 6 and 7. This may be inferred from the numbering "5-a" rather than "8" and from the simultaneous amendment of the paragraphs following paragraph 7. The latter

amendment included paragraph 5-a with paragraphs 1 through 5 as describing matters to be decided in the first instance by the Special Term. Ibid.

The last phrase of the qualifying paragraph which was added in 1951 (Laws 1951, c. 663) is discussed in the notes to § 7804 of CPLR.

Official Reports to Legislature for this section:

2nd Report Leg.Doc. (1958) No. 13, p. 398.

5th Report Leg.Doc. (1961) No. 15, p. 750.

6th Report Leg.Doc. (1962) No. 8, p. 671.

Notes of Decisions (5576)

McKinney's CPLR § 7803, NY CPLR § 7803
Current through L.2024, chapters 1 to 213. Some statute sections may be more current, see credits for details.

McKinney's Consolidated Laws of New York Annotated
Election Law (Refs & Annos)
Chapter Seventeen. Of the Consolidated Laws (Refs & Annos)
Article 17. Protecting the Elective Franchise (Refs & Annos)
Title 2. John R. Lewis Voting Rights Act of New York (Refs & Annos)
McKinney's Election Law § 17-206

§ 17-206. Prohibitions on voter disenfranchisement

Effective: July 1, 2023

Currentness

1. Prohibition against voter suppression. (a) No voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy shall be enacted or implemented by any board of elections or political subdivision in a manner that results in a denial or abridgement of the right of members of a protected class to vote.

(b) A violation of paragraph (a) of this subdivision shall be established upon a showing that, based on the totality of the circumstances, members of a protected class have less opportunity than the rest of the electorate to elect candidates of their choice or influence the outcome of elections.

2. Prohibition against vote dilution. (a) No board of elections or political subdivision shall use any method of election, having the effect of impairing the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections, as a result of vote dilution.

(b) A violation of paragraph (a) of this subdivision shall be established upon a showing that a political subdivision:

(i) used an at-large method of election and either: (A) voting patterns of members of the protected class within the political subdivision are racially polarized; or (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired; or

(ii) used a district-based or alternative method of election and that candidates or electoral choices preferred by members of the protected class would usually be defeated, and either: (A) voting patterns of members of the protected class within the political subdivision are racially polarized; or (B) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired; or

(c) For the purposes of demonstrating that a violation of paragraph (a) of this subdivision has occurred, evidence shall be weighed and considered as follows: (i) elections conducted prior to the filing of an action pursuant to this subdivision are more probative than elections conducted after the filing of the action; (ii) evidence concerning elections for members of the governing body of the political subdivision are more probative than evidence concerning other elections; (iii) statistical evidence is more probative than non-statistical evidence; (iv) where there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision, members of each of those protected classes may be combined; (v) evidence concerning the intent on the part of the voters, elected officials, or the political subdivision to discriminate against a protected class is not required; (vi) evidence that voting patterns and election outcomes could be explained by factors other than racially polarized voting, including but not limited to partisanship, shall not be considered; (vii) evidence that sub-groups within a protected class have different voting patterns shall not be considered; (viii) evidence concerning whether members of a protected class are geographically compact or concentrated shall not be considered, but may be a factor in determining an appropriate remedy; and (ix) evidence concerning projected changes in population or demographics shall not be considered, but may be a factor, in determining an appropriate remedy.

3. In determining whether, under the totality of the circumstances, a violation of subdivision one or two of this section has occurred, factors that may be considered shall include, but not be limited to: (a) the history of discrimination in or affecting the political subdivision; (b) the extent to which members of the protected class have been elected to office in the political subdivision; (c) the use of any voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy that may enhance the dilutive effects of the election scheme; (d) denying eligible voters or candidates who are members of the protected class to processes determining which groups of candidates receive access to the ballot, financial support, or other support in a given election; (e) the extent to which members of the protected class contribute to political campaigns at lower rates; (f) the extent to which members of a protected class in the state or political subdivision vote at lower rates than other members of the electorate; (g) the extent to which members of the protected class are disadvantaged in areas including but not limited to education, employment, health, criminal justice, housing, land use, or environmental protection; (h) the extent to which members of the protected class are disadvantaged in other areas which may hinder their ability to participate effectively in the political process; (i) the use of overt or subtle racial appeals in political campaigns; (j) a significant lack of responsiveness on the part of elected officials to the particularized needs of members of the protected class; and (k) whether the political subdivision has a compelling policy justification that is substantiated and supported by evidence for adopting or maintaining the method of election or the voting qualification, prerequisite to voting, law, ordinance, standard, practice, procedure, regulation, or policy. Nothing in this subdivision shall preclude any additional factors from being considered, nor shall any specified number of factors be required in establishing that such a violation has occurred.

4. Standing. Any aggrieved person, organization whose membership includes aggrieved persons or members of a protected class, organization whose mission, in whole or in part, is to ensure voting access and such mission would be hindered by a violation of this section, or the attorney general may file an action against a political subdivision pursuant to this section in the supreme court of the county in which the political subdivision is located.

5. Remedies. (a) Upon a finding of a violation of any provision of this section, the court shall implement appropriate remedies to ensure that voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process, which may include, but shall not be limited to:

(i) a district-based method of election;

(ii) an alternative method of election;

(iii) new or revised districting or redistricting plans;

(iv) elimination of staggered elections so that all members of the governing body are elected on the same date;

(v) reasonably increasing the size of the governing body;

(vi) moving the dates of regular elections to be concurrent with the primary or general election dates for state, county, or city office as established in section eight of article three or section eight of article thirteen of the constitution, unless the budget in such political subdivision is subject to direct voter approval pursuant to part two of article five or article forty-one of the education law;

(vii) transferring authority for conducting the political subdivision's elections to the board of elections for the county in which the political subdivision is located;

(viii) additional voting hours or days;

(ix) additional polling locations;

(x) additional means of voting such as voting by mail;

(xi) ordering of special elections;

(xii) requiring expanded opportunities for voter registration;

(xiii) requiring additional voter education;

(xiv) modifying the election calendar;

(xv) the restoration or addition of persons to registration lists; or

(xvi) retaining jurisdiction for such period of time on a given matter as the court may deem appropriate, during which no redistricting plan shall be enforced unless and until the court finds that such plan does not have the purpose of diluting the right to vote on the basis of protected class membership, or in contravention of the voting guarantees set forth in this title, except that the court's finding shall not bar a subsequent action to enjoin enforcement of such redistricting plan.

(b) The court shall consider proposed remedies by any parties and interested non-parties, but shall not provide deference or priority to a proposed remedy offered by the political subdivision. The court shall have the power to require a political subdivision to implement remedies that are inconsistent with any other provision of law where such inconsistent provision of law would preclude the court from ordering an otherwise appropriate remedy in such matter.

6. Procedures for implementing new or revised districting or redistricting plans. The governing body of a political subdivision with the authority under this title and all applicable state and local laws to enact and implement a new method of election that would replace the political subdivision's at-large method of election with a district-based or alternative method of election, or enact and implement a new districting or redistricting plan, shall undertake each of the steps enumerated in this subdivision, if proposed subsequent to receipt of a NYVRA notification letter, as defined in subdivision seven of this section, or the filing of a claim pursuant to this title or the federal voting rights act.

(a) Before drawing a draft districting or redistricting plan or plans of the proposed boundaries of the districts, the political subdivision shall hold at least two public hearings over a period of no more than thirty days, at which the public is invited to provide input regarding the composition of the districts. Before these hearings, the political subdivision may conduct outreach to the public, including to non-English-speaking communities, to explain the districting or redistricting process and to encourage public participation.

(b) After all draft districting or redistricting plans are drawn, the political subdivision shall publish and make available for release at least one draft districting or redistricting plan and, if members of the governing body of the political subdivision would be elected in their districts at different times to provide for staggered terms of office, the potential sequence of such elections. The political subdivision shall also hold at least two additional hearings over a period of no more than forty-five days, at which the public shall be invited to provide input regarding the content of the draft districting or redistricting plan or plans and the proposed sequence of elections, if applicable. The draft districting or redistricting plan or plans shall be published at least seven days before consideration at a hearing. If the draft districting or redistricting plan or plans are revised at or following a hearing, the revised versions shall be published and made available to the public for at least seven days before being adopted.

(c) In determining the final sequence of the district elections conducted in a political subdivision in which members of the governing body will be elected at different times to provide for staggered terms of office, the governing body shall give special consideration to the purposes of this title, and it shall take into account the preferences expressed by members of the districts.

7. Notification requirement and safe harbor for judicial actions. Before commencing a judicial action against a political

subdivision under this section, a prospective plaintiff shall send by certified mail a written notice to the clerk of the political subdivision, or, if the political subdivision does not have a clerk, the governing body of the political subdivision, against which the action would be brought, asserting that the political subdivision may be in violation of this title. This written notice shall be referred to as a "NYVRA notification letter" in this title. For actions against a school district or any other political subdivision that holds elections governed by the education law, the prospective plaintiff shall also send by certified mail a copy of the NYVRA notification letter to the commissioner of education.

(a) A prospective plaintiff shall not commence a judicial action against a political subdivision under this section within fifty days of sending to the political subdivision a NYVRA notification letter.

(b) Before receiving a NYVRA notification letter, or within fifty days of mailing of a NYVRA notification letter, the governing body of a political subdivision may pass a resolution affirming: (i) the political subdivision's intention to enact and implement a remedy for a potential violation of this title; (ii) specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy; and (iii) a schedule for enacting and implementing such a remedy. Such a resolution shall be referred to as a "NYVRA resolution" in this title. If a political subdivision passes a NYVRA resolution, such political subdivision shall have ninety days after such passage to enact and implement such remedy, during which a prospective plaintiff shall not commence an action to enforce this section against the political subdivision. For actions against a school district, the commissioner of education may order the enactment of a NYVRA resolution pursuant to the commissioner's authority under section three hundred five of the education law.

(c) If the governing body of a political subdivision lacks the authority under this title or applicable state law or local laws to enact or implement a remedy identified in a NYVRA resolution, or fails to enact or implement a remedy identified in a NYVRA resolution, within ninety days after the passage of the NYVRA resolution, or if the political subdivision is a covered entity as defined under section 17-210 of this title, the governing body of the political subdivision shall undertake the steps enumerated in the following provisions:

(i) The governing body of the political subdivision may approve a proposed remedy that complies with this title and submit such a proposed remedy to the civil rights bureau. Such a submission shall be referred to as a "NYVRA proposal" in this title.

(ii) Prior to passing a NYVRA proposal, the political subdivision shall hold at least one public hearing, at which the public shall be invited to provide input regarding the NYVRA proposal. Before this hearing, the political subdivision may conduct outreach to the public, including to non-English-speaking communities, to encourage public participation.

(iii) Within forty-five days of receipt of a NYVRA proposal, the civil rights bureau shall grant or deny approval of the NYVRA proposal.

(iv) The civil rights bureau shall only grant approval to the NYVRA proposal if it concludes that: (A) the political subdivision may be in violation of this title; (B) the NYVRA proposal would remedy any potential violation of this title; (C) the NYVRA proposal is unlikely to violate the constitution or any federal law; (D) the NYVRA proposal would not diminish the ability of protected class members to participate in the political process and to elect their preferred candidates to office; and (E) implementation of the NYVRA proposal is feasible.

(v) If the civil rights bureau grants approval, the NYVRA proposal shall be enacted and implemented immediately, notwithstanding any other provision of law, including any other state or local law.

(vi) If the political subdivision is a covered entity as defined under section 17-210 of this title, the political subdivision shall not be required to obtain preclearance for the NYVRA proposal pursuant to such section upon approval of the NYVRA proposal by the civil rights bureau.

(vii) If the civil rights bureau denies approval, the NYVRA proposal shall not be enacted or implemented. The civil rights bureau shall explain the basis for such denial and may, in its discretion, make recommendations for an alternative remedy for which it would grant approval.

(viii) If the civil rights bureau does not respond, the NYVRA proposal shall not be enacted or implemented.

(d) A political subdivision that has passed a NYVRA resolution may enter into an agreement with the prospective plaintiff providing that such prospective plaintiff shall not commence an action pursuant to this section against the political subdivision for an additional ninety days. Such agreement shall include a requirement that either the political subdivision shall enact and implement a remedy that complies with this title or the political subdivision shall pass a NYVRA proposal and submit it to the civil rights bureau.

(e) If, pursuant to a process commenced by a NYVRA notification letter, a political subdivision enacts or implements a remedy or the civil rights bureau grants approval to a NYVRA proposal, a prospective plaintiff who sent the NYVRA notification letter may, within thirty days of the enactment or implementation of the remedy or approval of the NYVRA proposal, demand reimbursement for the cost of the work product generated to support the NYVRA notification letter. A prospective plaintiff shall make the demand in writing and shall substantiate the demand with financial documentation, such as a detailed invoice for demography services or for the analysis of voting patterns in the political subdivision. A political subdivision may request additional documentation if the provided documentation is insufficient to corroborate the claimed costs. A political subdivision shall reimburse a prospective plaintiff for reasonable costs claimed, or in an amount to which the parties mutually agree. The cumulative amount of reimbursements to all prospective plaintiffs, except for actions brought by the attorney general, shall not exceed forty-three thousand dollars, as adjusted annually to the consumer price index for all urban consumers, United States city average, as published by the United States department of labor. To the extent a prospective plaintiff who sent the NYVRA notification letter and a political subdivision are unable to come to a mutual agreement, either party may file a declaratory judgment action to obtain a clarification of rights.

(f) Notwithstanding the provisions of this subdivision, in the event that the first day for designating petitions for a political subdivision’s next regular election to select members of its governing board has begun or is scheduled to begin within thirty days, or in the event that a political subdivision is scheduled to conduct any election within one hundred twenty days, a plaintiff alleging any violation of this title may commence a judicial action against a political subdivision under this section, provided that the relief sought by such a plaintiff includes preliminary relief for that election. Prior to or concurrent with commencing such a judicial action, any such plaintiff shall also submit a NYVRA notification letter to the political subdivision. In the event that a judicial action commenced under this provision is withdrawn or dismissed for mootness

because the political subdivision has enacted or implemented a remedy or the civil rights bureau has granted approval of a NYVRA proposal pursuant to a process commenced by a NYVRA notification letter, any such plaintiff may only demand reimbursement pursuant to this subdivision.

8. Coalition claims permitted. Members of different protected classes may file an action jointly pursuant to this title in the event that they demonstrate that the combined voting preferences of the multiple protected classes are polarized against the rest of the electorate.

Credits

(Added L.2022, c. 226, § 4, eff. July 1, 2023.)

McKinney's Election Law § 17-206, NY ELEC § 17-206
Current through L.2024, chapters 1 to 213. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated
Election Law (Refs & Annos)
Chapter Seventeen. Of the Consolidated Laws (Refs & Annos)
Article 17. Protecting the Elective Franchise (Refs & Annos)
Title 2. John R. Lewis Voting Rights Act of New York (Refs & Annos)
McKinney's Election Law § 17-216

§ 17-216. Expedited judicial proceedings and preliminary relief

Effective: July 1, 2023

Currentness

Because of the frequency of elections, the severe consequences and irreparable harm of holding elections under unlawful conditions, and the expenditure to defend potentially unlawful conditions that benefit incumbent officials, actions brought pursuant to this title shall be subject to expedited pretrial and trial proceedings and receive an automatic calendar preference. In any action alleging a violation of this section in which a plaintiff party seeks preliminary relief with respect to an upcoming election, the court shall grant relief if it determines that: (a) plaintiffs are more likely than not to succeed on the merits; and (b) it is possible to implement an appropriate remedy that would resolve the alleged violation in the upcoming election.

Credits

(Added L.2022, c. 226, § 4, eff. July 1, 2023.)

McKinney's Election Law § 17-216, NY ELEC § 17-216
Current through L.2024, chapters 1 to 213. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated
Election Law (Refs & Annos)
Chapter Seventeen. Of the Consolidated Laws (Refs & Annos)
Article 17. Protecting the Elective Franchise (Refs & Annos)
Title 2. John R. Lewis Voting Rights Act of New York (Refs & Annos)
McKinney's Election Law § 17-218

§ 17-218. Attorneys' fees

Effective: July 1, 2023

Currentness

In any action to enforce any provision of this title, the court shall allow the prevailing plaintiff party, other than the state or political subdivision thereof, a reasonable attorneys' fee, litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs. A plaintiff will be deemed to have prevailed when, as a result of litigation, the defendant party yields much or all of the relief sought in the suit. Prevailing defendant parties shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.

Credits

(Added L.2022, c. 226, § 4, eff. July 1, 2023.)

McKinney's Election Law § 17-218, NY ELEC § 17-218
Current through L.2024, chapters 1 to 213. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Town Law (Refs & Annos)
Chapter 62. Of the Consolidated Laws (Refs & Annos)
Article 4. Town Boards

McKinney's Town Law § 62

§ 62. Meetings of town board

Currentness

1. The town board of every town shall meet on or before the twentieth day of January in each year for the purpose of making the annual accounting by town officers and employees as required by section one hundred twenty-three of this chapter. The requirement for the annual accounting shall not apply to a town having a town comptroller, nor to a town which, prior to the twentieth day of January, shall have engaged the services of a certified public accountant or public accountant to make an annual audit to be completed within sixty days after the close of the town's fiscal year.

2. The town board of every town of the first class shall hold at least one meeting in each month. The supervisor of any town may, and upon written request of two members of the board shall within ten days, call a special meeting of the town board by giving at least two days notice in writing to members of the board of the time when and the place where the meeting is to be held. All meetings of the town board shall be held within the town at such place as the town board shall determine by resolution, except that where provision is made by law for joint meetings of two or more town boards such joint meetings may be held in any of the towns to be represented thereat.

Credits

(L.1932, c. 634. Amended L.1936, c. 435; L.1940, c. 374, § 11; L.1941, c. 601, § 7; L.1946, c. 171; L.1950, c. 66; L.1952, c. 403; L.1954, c. 168; L.1960, c. 621, § 1; L.1973, c. 358, § 1.)

Notes of Decisions (20)

McKinney's Town Law § 62, NY TOWN § 62
Current through L.2024, chapters 1 to 213. Some statute sections may be more current, see credits for details.

End of Document

§ 27-3. Special meeting procedure established.

Special meetings, limited to one action item, of the Town Board of the Town of Newburgh may be called by the Supervisor, by causing a written notice, specifying the time and place thereof, to be served upon each member of the Board personally at least one hour prior to the meeting; or by leaving a notice at his residence or place of business with some person of suitable age and discretion at least 24 hours before the time of the meeting or by mailing such notice to the residences of the members of the Board at least 72 hours before such meeting.

1 Williston on Contracts § 4:34 (4th ed.)

Williston on Contracts | May 2024 Update

Chapter 4. Offers

§ 4:34. Offers indefinite when giving promisors unlimited options

Correlation Table

West's Key Number Digest

- West's Key Number Digest, **Contracts** **16**, **16.5**
- West's Key Number Digest, **Sales** **732** to **735**

Legal Encyclopedias

- **Am. Jur. 2d, Contracts §§ 53**, **187**

Treatises and Practice Aids

- **Frisch, Lawrence's Anderson on the Uniform Commercial Code §§ 1-309:1, 1-309:4 to 1-309:21, 2-311 to 2-311:17 (3d ed.)**
- **Hawkland Uniform Commercial Code Series § 2-311:2**

One of the most common types of promise that is too indefinite for legal enforcement is the promise where the promisor retains an unlimited right to decide later the nature or extent of the promisor's performance. [1] Words of promise which by their terms make the performance entirely optional with the promisor whatever may happen, or whatever course of conduct in respects the promisor may pursue, do not constitute a promise but form only an illusory promise. [2] This unlimited choice in effect destroys the promise and makes it illusory. [3] Often, however, the imposition of a good faith or reasonable standard by which the promisor's performance is to be measured will prevent the promise, though it otherwise appears to reserve to the promisor absolute discretion from being, in fact, illusory. [4] For example, the Uniform Commercial Code permits parties to a sale of goods

transaction enormous latitude in their relationship and allows them to reserve to themselves numerous powers, all of which vest in them significant discretion, but all of which are bridled by the obligation to act in good-faith reasonably.[5] The common-law cases typically divide along much the same lines: an offer pursuant to which the promisor retains an option exercisable in his sole discretion will be held illusory unless the court can determine that his discretion is bridled by a good faith or other standard.

Thus, for example, an agreement to pay such wages as the employer desires is invalid,[6] although an agreement to pay such wages as the employer considers "right and proper" has been held not too indefinite[7] because performance of such a promise does not leave the employer free to do as the employer may choose but, rather, obligates the employer to make a good-faith, honest estimate of what is reasonable and proper.[8] Likewise, a promise by the grantee of land to pay a specified portion of the price when the grantee shall elect to do so standing alone might be deemed illusory, but coupled with a promise to pay interest in the interim at a specified or legal rate, the promise has been upheld.[9]

A promise that the promisor would favorably consider an application has been held too indefinite because the promisor may keep the promise and yet freely exercise such choice as the promisor wishes,[10] and is illusory,[11] but the promise is not illusory when it might be read to impose at least an obligation to consider the application in good faith or in accordance with criteria specified elsewhere.[12] A promise to employ another to do such work as the employer may assign to the individual, from time to time, "such service to continue as long as the employee's work is satisfactory to the employer," is too indefinite.[13] That same promise, however, might be sufficiently definite if the work or duties were specified or the employee had performed so that the only indefiniteness was the result of the employer's need to be satisfied.[14]

A promise to do or not do something "so long as it pleased the promisor (or words to like effect)"[15] is illusory and hence unenforceable, as is an indefinite promise to leave by will a share or a child's part of the testator's fortune[16] or a similarly vague promise that one would "be noticed" in the testator's will.[17] A promise to give an undefined increase in salary or an undefined interest in the profits of a business would also be illusory and unenforceable.[18] However, a promise to pay for the negotiation of "a satisfactory lease"[19] or to renew a contract if the promisee performed as the promisor might "reasonably expect"[20] have been upheld because the promisor's obligation is dependent upon good faith or reasonableness. Likewise, a promise to deliver as many items as the promisor could[21] or to convey a specified sized lot out of a greater lot "averaging in value and quality with the whole"[22] should be upheld; if the promise may not otherwise be made definite, it can at a minimum be interpreted to permit the promisor to select that acreage which is to be conveyed,[23] and although specific performance might not be available, because of lack of definiteness, arguably damages are appropriate.[24] It should also be observed that a promise is not too indefinite because it reserves to the promisor the right to choose which of two or more performances he will render,[25] so long as each performance imposes an obligation or at least one of the performances would impose an obligation and there is or appears to be a substantial possibility that events may eliminate the other choices.[26]

The damages to which the promisee would be entitled in case of breach of such a promise would be based on the least valuable of the alternative performances.[27] It is only where the option reserved to the promisor is unlimited that the promise becomes illusory and incapable of forming part of a legal obligation. A promise to give any one of a thousand specified things as the promisor may choose, although it cannot be enforced specifically, is not too indefinite to have a clear meaning, and the promisee's damages would be the value of the least valuable of the 1,000 things.[28] The same is true of a promise to perform whenever within a specified time period the promisor may choose.[29] However, a promise to give anything whatever a promisor may choose, or to do or give something whenever the promisor pleases, is illusory because such promises could be satisfied by giving something so infinitely near nothing or by performance so infinitely postponed as to have no calculable value.[30]

For the same reason, if one party to an agreement reserves an unqualified right to cancel the bargain, no legal rights can arise from it while it remains executory.[31] However, if the party may only cancel upon dissatisfaction,[32] for good cause shown,[33] in the exercise of the judgment of the promisor as a fiduciary for others,[34] upon the giving of reasonable notice,[35] or upon any other condition not within the promisor's control,[36] the promise is nevertheless enforceable.

This same analysis leads to the conclusion that a condition of subsequent approval by the promisor in the promisor's sole discretion gives rise to no obligation. [37] Thus, an order taken by a traveling sales representative will not immediately create a contract if confirmation by the sales person's principal is expressly or impliedly made a term or condition of the agreement. [38] A contract also will not arise from an offer or agreement which by its terms is "subject to alterations" or "subject to change." [39] However, the mere fact that an offer or agreement is subject to events not within the promisor's control or to the exercise of his or her good-faith discretion will not render the agreement illusory. Thus, although it has been held that a contract for the sale of timber from the Arctic Circle, which was subject to the seller making necessary chartering arrangements, gave the promisor-seller the option to ship or not, [40] the modern rule would probably be to the contrary. [41] Certainly, an agreement to do or not to do something, subject to "unforeseen circumstances" should be enforced, [42] as would be a contract "subject to strikes, fires, transportation, business conditions and other extraneous causes which render performance commercially impracticable." [43] In these latter cases, the promisor's obligation, although not absolute, is not subject to determination upon the promisor's sole whim, and the promise is not therefore too indefinite to be enforced.

The difficulty with illusory promises may be twofold: indefiniteness and insufficiency of consideration. Even if the promise may be interpreted to be sufficiently definite to give it a plain meaning, avoiding the first difficulty, the promise may still not serve as consideration. [44]

CUMULATIVE SUPPLEMENT

Cases:

"[A] condition of subsequent approval by the promisor in the promisor's sole discretion gives rise to no obligation." Jamieson v. Town of Fort Myers Beach, 352 So. 3d 1260 (Fla. 2d DCA 2022) (quoting text).

"[A] contract is illusory * * * when by its terms the promisor retains an unlimited right to determine the nature or extent of his performance; the unlimited right, in effect, destroys his promise and thus makes it merely illusory. State v. Johnson, 2023-Ohio-2282, 219 N.E.3d 1068 (Ohio Ct. App. 7th Dist. Belmont County 2023) (citing text).

[END OF SUPPLEMENT]

Footnotes

1 Restatement Second, Contracts § 34, comment b; Restatement Second, Contracts § 77, illustration 1.

U.S.—Spaulding v. Wells Fargo Bank, N.A., 714 F.3d 769 (4th Cir. 2013) (citing Williston); Pittman v. Experian Information Solutions, Inc., 901 F.3d 619 (6th Cir. 2018) (citing Williston); Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547 (7th Cir. 2012) (citing Williston); Modern Controls, Inc. v. Andreadakis, 578 F.2d 1264 (8th Cir. 1978) (the promisor's option between performances must not be wholly unlimited); Avevedo v. CitiMortgage, Inc., 2012 WL 3134222 (N.D. Ill. 2012) (citing Williston); Mills v. United Producers, Inc., 2012 WL 3870220 (E.D. Mich. 2012) (quoting text); Vermillion v. CMH Homes, Inc., 2012 WL 2700392 (S.D. Ohio 2012), subsequent determination, 2012 WL 4857918 (S.D. Ohio 2012) (quoting text); Sadowski v. Dell Computer Corp., 268 F. Supp. 2d 129 (D. Conn. 2003) (quoting Williston); Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 2000 Fed. App. 0154P (6th Cir. 2000) (quoting text; if promisor retains an unlimited right to decide later the nature or extent of his performance, the promise is too indefinite for legal enforcement and thus illusory); Mitchell Novelty Co. v. United Mfg. Co., 94 F. Supp. 612 (N.D. Ill. 1950) (reasonable royalty to be fixed later as

indefinite); Gilson v. Rainin Instrument, LLC, 57 U.C.C. Rep. Serv. 2d 361 (W.D. Wis. 2005) (citing text); Ceredo Mortuary Chapel, Inc. v. U.S., 29 Fed. Cl. 346 (1993) (citing text and stating that "agreements where the promisor retains an unlimited right to decide later the nature or extent of his performance are unenforceable"); In re First Phoenix-Weston, LLC, 575 B.R. 828 (Bankr. W.D. Wis. 2017) (applying Wisconsin law: "[W]hile a promise may constitute sufficient consideration for a return promise …, it is not sufficient if [the promisor's] performance depends solely upon his option or discretion, as where the promisor is free to perform or to withdraw from the agreement at will"); Crawford v. General Contract Corp., 174 F. Supp. 283 (W.D. Ark. 1959) (stating that "Of course a promise which is merely illusory, such as an agreement to buy only what the promisor may choose to buy, falls short of being a consideration for the promisee's undertaking, and neither is bound").

Ga.—Wolf v. Arant, 88 Ga. App. 568, 77 S.E.2d 116 (1953).

Neb.—Valley Boys, Inc. v. American Family Insurance Company, 306 Neb. 928, 947 N.W.2d 856 (2020); Acklie v. Greater Omaha Packing Co., Inc., 306 Neb. 108, 944 N.W.2d 297 (2020) (quoting text).

N.Y.—Chiapparelli v. Baker, Kellogg & Co., 252 N.Y. 192, 169 N.E. 274 (1929) (citing text).

Utah—R.J. Daum Const. Co. v. Child, 122 Utah 194, 247 P.2d 817 (1952).

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Validity of sales contract as affected by provision therein giving buyer power to control price to be paid for goods, 49 A.L.R.2d 508.

2 **U.S.—**Pro Mod Realty, LLC v. U.S. Bank Nat. Ass'n, 2014 DNH 69, 2014 WL 1379341 (D.N.H. 2014) (citing Williston and quoting Restatement Second, Contracts § 90).

Okla.—Group One Realty, Inc. v. Dahr Properties-memorial Springs, LLC, 2017 OK CIV APP 54, 404 P.3d 905 (Div. 2 2017) (quoting text).

3 Restatement Second, Contracts § 34, comment b; Restatement Second, Contracts § 77.

See §§ 4:22 et seq., §§ 6:1 et seq.

U.S.—Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 2000 Fed. App. 0154P (6th Cir. 2000) (quoting text); Manning v. Mercatanti, 898 F. Supp. 2d 850 (D. Md. 2012) (quoting text); Mills v. United Producers, Inc., 2012 WL 3870220 (E.D. Mich. 2012) (quoting text); Vermillion v. CMH Homes, Inc., 2012 WL 2700392 (S.D. Ohio 2012), subsequent determination, 2012 WL 4857918 (S.D. Ohio 2012) (quoting text); U.S. v. Jollimore, 44 F. Supp. 639 (D. Mass. 1942) (reservation of an option to take or not take possession of a res was held to make the offer illusory); Davis v. General Foods Corporation, 21 F. Supp. 445 (S.D. N.Y. 1937).

Ill.—Dwyer v. Graham, 99 Ill. 2d 205, 75 Ill. Dec. 680, 457 N.E.2d 1239 (1983) (citing text; agreement which gave party the use of a plant "so long as he desired" was held to give party an unlimited option and promise was illusory).

Me.—Corthell v. Summit Thread Co., 132 Me. 94, 167 A. 79, 92 A.L.R. 1391 (1933).

Md.—Walther v. Sovereign Bank, 386 Md. 412, 872 A.2d 735 (2005) (quoting text); Walther v. Sovereign Bank, 386 Md. 412, 872 A.2d 735 (2005) (quoting text).

Neb.—Acklie v. Greater Omaha Packing Co., Inc., 306 Neb. 108, 944 N.W.2d 297 (2020) (quoting text).

Pa.—In re Friese's Estate, 336 Pa. 241, 9 A.2d 401, 125 A.L.R. 1016 (1939) (citing text).

Wash.—Metropolitan Park Dist. of Tacoma v. Griffith, 106 Wash. 2d 425, 723 P.2d 1093 (1986); Wharf Restaurant, Inc. v. Port of Seattle, 24 Wash. App. 601, 605 P.2d 334 (Div. 1 1979) (promise to negotiate a future lease, if made, was illusory).

4 Restatement Second, Contracts § 34, comment b; Restatement Second, Contracts § 77, comment d, illustrations 8 to 11.

U.C.C. §§ 1-203, 2-103(1)(b) [Rev]; see, e.g., U.C.C. §§ 1-208, 2-305, 2-306, 2-309, 2-311 [Rev].

U.S.—Three RP Limited Partnership v. Dick's Sporting Goods, Inc., 2019 WL 573413 (E.D. Okla. 2019) (quoting text, and stating that an offer pursuant to which the promisor retains an option exercisable in the promisor's sole discretion will be held illusory unless the court can determine that the discretion is bridled by a good faith or other standard: "[I]f one party to an agreement reserves an unqualified right to cancel the bargain, no legal rights can arise from it while it remains executory. However, if the party may only cancel upon dissatisfaction, for good cause shown, in the exercise of the judgment of the promisor as a fiduciary for others, upon the giving of reasonable notice, or upon any other condition not within the promisor's control, the promise is nevertheless enforceable"); Ceredo Mortuary Chapel, Inc. v. U.S., 29 Fed. Cl. 346 (1993) (citing text and stating that: "[w]hen the promisor retains an option exercisable in his sole discretion [the promise] will be held illusory….").

Ariz.—Horizon Corp. v. Westcor, Inc., 142 Ariz. 129, 688 P.2d 1021 (Ct. App. Div. 2 1984) (satisfaction clause requires exercise of good faith and is thus not illusory).

Cal.—Mattei v. Hopper, 51 Cal. 2d 119, 330 P.2d 625 (1958) (satisfaction clause); California Lettuce Growers v. Union Sugar Co., 45 Cal. 2d 474, 289 P.2d 785, 49 A.L.R.2d 496 (1955) (buyer's power to fix price and duty to accept goods limited by good faith and fair dealing); Jacobs v. Freeman, 104 Cal. App. 3d 177, 163 Cal. Rptr. 680 (5th Dist. 1980) (approval of board of directors, subject to good faith).

Del.—Mobil Oil Corp. v. Wroten, 303 A.2d 698 (Del. Ch. 1973), judgment aff'd, 315 A.2d 728 (Del. 1973) (option conditional on promisor's ability to obtain acceptable licenses and permits, not illusory because promisor had to use reasonableness in what he considered "acceptable" and make a good-faith effort to obtain the permits).

N.C.—Mezzanotte v. Freeland, 20 N.C. App. 11, 200 S.E.2d 410 (1973) (satisfactory financing clause did not make contract illusory because promisor had to exercise his discretion in good faith and in a reasonable manner).

Okla.—Group One Realty, Inc. v. Dahr Properties-memorial Springs, LLC, 2017 OK CIV APP 54, 404 P.3d 905 (Div. 2 2017) (quoting text and stating that a promise discretionary with the promisor is illusory unless the court can determine that the discretion is bridled by a good faith or other standard).

Utah—Peirce v. Peirce, 2000 UT 7, 994 P.2d 193 (Utah 2000) (quoting text as to promises where the promisor retains an unlimited right to decide later the nature or extent of his performance being illusory); Resource Management Co. v. Weston Ranch and Livestock Co., Inc., 706 P.2d 1028 (Utah 1985) (right to terminate contract if in promisor's sole discretion commercial value of the land did not justify further expenditures, not illusory because the promisor has a duty to exercise good faith in making determination, citing text).

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Validity of sales contract as affected by provision therein giving buyer power to control price to be paid for goods, 49 A.L.R.2d 508.

5 U.C.C. § 1-309[Rev].

U.C.C. § 1-208[Rev].

U.C.C. § 2-305[Rev].

U.C.C. § 2-306[Rev].

U.C.C. § 2-309[Rev].

U.C.C. § 2-311[Rev].

U.S.—Sheppard Federal Credit Union v. Palmer, 408 F.2d 1369, 6 U.C.C. Rep. Serv. 30 (5th Cir. 1969) (insecurity clause); Zidell Explorations, Inc. v. Conval Intern., Ltd., 719 F.2d 1465, 37 U.C.C. Rep. Serv. 466 (9th Cir. 1983) (termination of contract); Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429, 19 U.C.C. Rep. Serv. 721 (S.D. Fla. 1975) (requirements contract).

Ill.—Watseka First Nat. Bank v. Ruda, 135 Ill. 2d 140, 142 Ill. Dec. 184, 552 N.E.2d 775, 10 U.C.C. Rep. Serv. 2d 1073 (1990) (insecurity clause; proper standard is subjective good faith bridled by other code provisions that prevent creditor from acting arbitrarily or on mere whim); Illinois Commerce Commission v. Central Illinois Public Service Co., 25 Ill. App. 3d 79, 322 N.E.2d 520 (4th Dist. 1975) (open price terms in requirements contract).

Kan.—Karner v. Willis, 238 Kan. 246, 710 P.2d 21, 42 U.C.C. Rep. Serv. 369 (1985) (insecurity; test is subjective).

N.Y.—Umlas v. Acey Oldsmobile, Inc., 62 Misc. 2d 819, 310 N.Y.S.2d 147 (N.Y. City Civ. Ct. 1970) (retained right to reappraise buyer's used car at time of delivery, required seller to exercise good faith).

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Establishment and Construction of Requirements Contracts Under s 2-306(1) Of Uniform Commercial Code, 94 A.L.R.5th 247.

What constitutes "good faith" under U.C.C. sec. 1-208 dealing with "insecure" or "at will" acceleration clauses, 85 A.L.R.4th 284.

Output contracts under sec. 2-306(1) of Uniform Commercial Code, 30 A.L.R.4th 396.

Construction and application of U.C.C. sec. 2-305 dealing with open price term contracts, 91 A.L.R.3d 1237.

Termination by principal of distributorship contract containing no express provision for termination, 19 A.L.R.3d 196.

6 See § 4:31.

U.K.—Roberts v. Smith, 1859 WL 9950, 157 E.R. 861, (1859) 4 Hurl. & N. 315 (U.K. Ex Ct 1859); Acklie v. Greater Omaha Packing Co., Inc., 306 Neb. 108, 944 N.W.2d 297 (2020) (a promise to pay deferred compensation was fatally indefinite when the conditions relating to payment were not fully determined and were left to the discretion of the promisor as an expectancy interest no greater than a possibility, not a binding contract).

N.Y.—Varney v. Ditmars, 217 N.Y. 223, 111 N.E. 822 (1916) (promise by employer to pay employee "fair share of profits" in addition to his salary gave the employer complete discretion to determine the amount of payment and this left the agreement invalid).

Ohio—Stork v. Troeger, 103 Ohio App. 144, 3 Ohio Op. 2d 207, 144 N.E.2d 675 (3d Dist. Defiance County 1956) (agreement to pay and accept just consideration).

Tex.—Gulf, C. & S.F. Ry. Co. v. Winton, 7 Tex. Civ. App. 57, 26 S.W. 770 (1894), writ refused.

Wash.—Spooner v. Reserve Life Ins. Co., 47 Wash. 2d 454, 287 P.2d 735 (1955) (to pay bonus); Calkins v. Boeing Co., 8 Wash. App. 347, 506 P.2d 329 (Div. 1 1973) (offer to pay for suggestions made by employee with decision in sole discretion of employer).

Wyo.—Day's Stores, Inc. v. Hopkins, 573 P.2d 1366 (Wyo. 1978) (bonus discretionary with board of directors).

7 See § 4:31.

U.S.—Pillois v. Billingsley, 179 F.2d 205 (2d Cir. 1950) (agreement which entitled a party to determine the reasonable value of the other party's services was enforceable).

Cal.—Foster v. Young, 172 Cal. 317, 156 P. 476 (1916).

Mass.—Noble v. Joseph Burnett Co., 208 Mass. 75, 94 N.E. 289 (1911) (agreement to pay "a fair and equitable share of the net profits" formed a valid contract).

Minn.—Butler v. Winona Mill Co., 28 Minn. 205, 9 N.W. 697 (1881).

8 **U.S.—**G.H. McShane Co., Inc. v. McFadden, 414 F. Supp. 720 (W.D. Pa. 1976) (real estate commission agreement which provided that $150,000 in commission would be paid when "sufficient revenues" were available was enforceable; promisor bound to use good faith and reasonable judgment to determine sufficient revenues); Ake v. Chancey, 149 F.2d 310 (C.C.A. 5th Cir. 1945) (same; client could not arbitrarily or capriciously fix fees, but must act reasonably); Hogan v. Wright, 356 F.2d 595 (6th Cir. 1966) (contract for legal fees where lawyer gave the client right to determine acceptable amount of fees to be paid was not illusory because client obligated to exercise good faith).

Conn.—Appeal of Lee, 53 Conn. 363, 2 A. 758 (1886).

Me.—Corthell v. Summit Thread Co., 132 Me. 94, 167 A. 79, 92 A.L.R. 1391 (1933) ("reasonable recognition" given for inventions).

9 **Minn.—**Seigne v. Warren Auto Co., 147 Minn. 142, 179 N.W. 648 (1920).

10 **U.S.—**Pro Mod Realty, LLC v. U.S. Bank Nat. Ass'n, 2014 DNH 69, 2014 WL 1379341 (D.N.H. 2014) (quoting text, and stating that "a promise to 'consider' taking a specified course of action in response to the promisee's request does not commit the promisor to that course of action, nor justify any expectation that the promisor will, in fact, take that course of action").

11 **U.S.—**McGowan v. Homeward Residential, Inc., 500 Fed. Appx. 882 (11th Cir.2012); Pro Mod Realty, LLC v. U.S. Bank Nat. Ass'n, 2014 DNH 69, 2014 WL 1379341 (D.N.H. 2014) (quoting text).

12 **U.S.—**Walston v. Nationwide Credit, Inc., 2019 WL 4139002 (N.D. Ill.2019) (quoting text).

Ill.—Steinberg v. Chicago Medical School, 69 Ill. 2d 320, 13 Ill. Dec. 699, 371 N.E.2d 634 (1977) (application and fee of plaintiff constituted an offer to apply for admission and university's acceptance of application and fee constituted an acceptance to evaluate the offer under criteria established by school in application materials); DeMarco v. University of Health Sciences/Chicago Medical School, 40 Ill. App. 3d 474, 352 N.E.2d 356 (1st Dist. 1976).

13 Restatement Second, Contracts § 34, illustration 4.

See §§ 4:24 to 4:29.

U.S.—E.I. Du Pont De Nemours & Co. v. Claiborne-Reno Co., 64 F.2d 224, 89 A.L.R. 238 (C.C.A. 8th Cir. 1933).

Ga.—Weill v. Brown, 197 Ga. 328, 29 S.E.2d 54 (1944) (contract was indefinite for variety of reasons, including uncertainty of employee's duties); Farr v. Barnes Freight Lines, Inc., 97 Ga. App. 36, 101 S.E.2d 906 (1958) (employee "to do all work required of him"; too indefinite).

Ill.—Vogel v. Pekoc, 157 Ill. 339, 42 N.E. 386 (1895).

Ky.—Goff v. Saxon, 174 Ky. 330, 192 S.W. 24 (1917).

Mass.—Daniels v. Boston & M.R. Co., 184 Mass. 337, 68 N.E. 337 (1903) (employment contract which gave plaintiff employment for "so long as he [employee] should perform the duties of the place in a thorough, honest, and business-like manner").

Miss.—Rape v. Mobile & O.R. Co., 136 Miss. 38, 100 So. 585, 35 A.L.R. 1422 (1924) (a promise to employ "permanently" or "steadily" as long as employee was able and willing to perform created an employment terminable at the will of either party).

Neb.—De Los Santos v. Great Western Sugar Co., 217 Neb. 282, 348 N.W.2d 842 (1984) (agreement between plaintiff, an independent hauling contractor, and defendant beet company for plaintiff to haul "such tonnage of beets as may be loaded by defendant" created indefinite obligations terminable at will and was unenforceable).

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Comment Note.—Validity and duration of contract purporting to be for permanent employment, 60 A.L.R.3d 226.

14 Restatement Second, Contracts § 34, illustrations 3, 4.

U.S.—G.H. McShane Co., Inc. v. McFadden, 414 F. Supp. 720 (W.D. Pa. 1976); Hogan v. Wright, 356 F.2d 595 (6th Cir. 1966) (where the court drew the distinction between wholly executory indefinite agreements and those which, because partly executed, were made sufficiently definite).

Mass.—Carnig v. Carr, 167 Mass. 544, 46 N.E. 117 (1897) (defendant agreed to give plaintiff "permanent employment" as long as defendant had work to give plaintiff and plaintiff's work was satisfactory. The court found this agreement valid and enforceable reasoning that such an agreement should be understood to mean as long as defendant had certain work for plaintiff and plaintiff desired to and was able to perform there would be employment.).

N.Y.—Van Der Veer v. Theile, 185 A.D. 17, 172 N.Y.S. 628 (1st Dep't 1918) (proposal where defendant was to act for the plaintiff accounting firm as a representative in obtaining information as the plaintiff might request and direct from time to time in special matters and if defendant's work was satisfactory the plaintiff firm intended to employ defendant for many years was a month to month working agreement of indefinite duration).

A.L.R. Library
Comment Note.—Validity and duration of contract purporting to be for permanent employment, 60 A.L.R.3d 226.

15 See § 4:23.

U.S.—Meadows v. Radio Industries, 222 F.2d 347 (7th Cir. 1955); Payne v. AHFI/Netherlands, B. V., 522 F. Supp. 18 (N.D. Ill. 1980) ("It is expected that the employee will remain. . . for duration of project which is expected to be approximately two (2) years. . . There are many factors that would cause a shortening or lengthening such as individual performance, economic conditions. . . business plans, etc." held, terminable at will).

Del.—Raisler Sprinkler Co. v. Automatic Sprinkler Co. of America, 36 Del. 57, 171 A. 214 (Super. Ct. 1934) (citing text).

Mass.—Daniels v. Boston & M.R. Co., 184 Mass. 337, 68 N.E. 337 (1903) ("so long as he [employee] should perform the duties of the place in a thorough, honest, and business-like manner," at will).

W. Va.—Lydick v. Baltimore & O. R. Co., 17 W. Va. 427, 1880 WL 4045 (1880).

16 **U.K.—**Fickus, Re, 1899 WL 11740, [1900] Ch. 331 (Ch D 1899); Sylvester's Case, Popham 148 (1620).

Ill.—Woods v. Evans, 113 Ill. 186, 1885 WL 8177 (1885).

Ky.—Sturgeon's Adm'r v. McCorkle, 163 Ky. 8, 173 S.W. 149 (1915) (contra, enforcing agreement).

N.Y.—Healy v. Healy, 55 A.D. 315, 66 N.Y.S. 927 (4th Dep't 1900), aff'd, 166 N.Y. 624, 60 N.E. 1112 (1901) (contra, enforcing agreement).

Wash.—Wasmund v. Wasmund, 145 Wash. 394, 260 P. 259 (1927) (agreement where mother of child agreed to marry a man if he would adopt the child, raise it and make the child "heir to the extent of child's

interest in the property" was held unenforceable because no obligation upon the decedent to leave any particular amount of property to the child).

17 **U.K.—**Moorhouse v. Colvin, 1851 WL 8330, (1851) 15 Beav. 341, 51 E.R. 570 (U.K. Ct. Ch. 1851).

Pa.—In re Friese's Estate, 336 Pa. 241, 9 A.2d 401, 125 A.L.R. 1016 (1939) (citing text); Wall's Appeal, 111 Pa. 460, 5 A. 220 (1886) (promise by uncle to "amply provide for her by will" was unenforceable).

Wis.—Freeman v. Morris, 131 Wis. 216, 109 N.W. 983 (1906) (promise to devise unspecified property for privilege of naming child).

18 **Ga.—**Gray v. Aiken, 205 Ga. 649, 54 S.E.2d 587 (1949) (equitable share of profits too vague).

Mont.—Donovan v. Bull Mountain Trading Co., 60 Mont. 87, 198 P. 436 (1921) ("an extra and reasonable compensation, liberally commensurate with the results obtained" too indefinite).

N.Y.—Von Reitzenstein v. Tomlinson, 249 N.Y. 60, 162 N.E. 584 (1928) ("appropriate percentage" of the profits); Varney v. Ditmars, 217 N.Y. 223, 111 N.E. 822 (1916) ("fair share" of the profits); Greater New York Carpet House v. Herschmann, 258 A.D. 649, 17 N.Y.S.2d 483 (1st Dep't 1940); McDonald v. Acker, Merrall & Condit Co., 192 A.D. 123, 182 N.Y.S. 607 (2d Dep't 1920) ("a liberal and very substantial bonus"); Bluemner v. Garvin, 120 A.D. 29, 104 N.Y.S. 1009 (1st Dep't 1907) ("a fair share of the commissions"); Mackintosh v. Kimball, 101 A.D. 494, 92 N.Y.S. 132 (1st Dep't 1905).

Pa.—Machen v. Budd Wheel Co., 294 Pa. 69, 143 A. 482 (1928) (agreement between employee and employer that if employee turned over his invention to the company his salary would be "increased from time to time in proportion to increased use of the invention" and that he would have an assured future with the company); Butler v. Kemmerer, 218 Pa. 242, 67 A. 332 (1907) (promise to divide profits "on a very liberal basis").

Wis.—Petersen v. Pilgrim Village, 256 Wis. 621, 42 N.W.2d 273, 18 A.L.R.2d 206 (1950) ("a share in the profits of the corporation").

A.L.R. Library
Requisites as to definiteness of agreement to pay employee share of profits, 18 A.L.R.2d 211.

19 **Cal.—**Diamond v. Fay, 23 Cal. App. 566, 138 P. 933 (2d Dist. 1913) (dictum).

Mo.—Mullally v. Greenwood, 127 Mo. 138, 29 S.W. 1001 (1895); Smith v. Stubb, 293 S.W. 496 (Mo. Ct. App. 1927)

Wash.—Warren, McKernan & Evers v. Ivey, 156 Wash. 171, 286 P. 27 (1930) (where lessor was deemed to have unqualified privilege to determine whether lessee was "acceptable" to him over vigorous dissent).

20 **U.S.—**Worthington v. Beeman, 91 F. 232 (C.C.A. 7th Cir. 1899).

Del.—Raisler Sprinkler Co. v. Automatic Sprinkler Co. of America, 36 Del. 57, 171 A. 214 (Super. Ct. 1934) (as to licensor's extension of business to other states).

21 U.C.C. § 2-306[Rev].

Ga.—Harris v. Hine, 232 Ga. 183, 205 S.E.2d 847, 14 U.C.C. Rep. Serv. 1101 (1974) (output contract for sale of all cotton produced on specified acreage).

Ky.—Ayer & Lord Tie Co. v. O.T. O'Bannon & Co., 164 Ky. 34, 174 S.W. 783 (1915).

Mo.—Hudson v. Browning, 264 Mo. 58, 174 S.W. 393 (1915).

N.D.—Merwin v. Ziebarth, 252 N.W.2d 193, 22 U.C.C. Rep. Serv. 582 (N.D. 1977) (promise to sell so many cattle as "'settle' up to the total limit of the contract").

22 **U.S.—**Williams v. Cow Gulch Oil Co., 270 F. 9 (C.C.A. 8th Cir. 1921) (decreeing specific performance of contract to convey to promisee 640 acres out of lands promisor should hold at a certain future time, of same average probable value as the remaining lands then owned by promisor, to be selected by promisor's agent. At the time for performance promisor owned 6,320 acres and the promisee had fully performed).

La.—Salles v. Stafford, Derbes & Roy, 173 La. 361, 137 So. 62 (1931).

Mass.—Knowles v. L.D. Griswold Land Co., 252 Mass. 172, 147 N.E. 560 (1925).

Minn.—Brown v. Munger, 42 Minn. 482, 44 N.W. 519 (1890) (where a promise to convey 320 acres of good tillable land in Dakota within nine miles of a railroad station was held sufficiently definite); Burgon v. Cabanne, 42 Minn. 267, 44 N.W. 118 (1890); Nippolt v. Kammon, 39 Minn. 372, 40 N.W. 266 (1888) (held too indefinite).

23 **Kan.—**Peckham v. Lane, 81 Kan. 489, 106 P. 464 (1910) ("No reason is apparent why a person may not make a valid contract that he will sell to another one of several pieces of real estate of which he is the owner, to be selected by himself").

Minn.—Brockway v. Frost, 40 Minn. 155, 41 N.W. 411 (1889) (where a promise to convey 8 61-100 acres out of a larger tract was held too indefinite. It may be questioned whether this promise should not have been interpreted as an agreement to convey the worst five acres or 8 61-100 acres which the promisor might select. So interpreted the promise, though not capable of specific enforcement, would be sufficiently definite to be construed to create obligations); Nippolt v. Kammon, 39 Minn. 372, 40 N.W. 266 (1888) (where a promise to convey five acres out of lot three, which contained a larger number, was held too indefinite).

N.C.—Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976) (where contract called for 200 acres, more or less of a 250 to 260-acre tract, "to be determined by a new survey furnished by sellers," held valid, and authorities cited therein).

Utah—Calder v. Third Judicial Dist. Court In and For Salt Lake County, 2 Utah 2d 309, 273 P.2d 168, 46 A.L.R.2d 887 (1954) (where buyer was to select).

A.L.R. Library
Sufficiency, under the statute of frauds, of description or designation of land in contract or memorandum of sale which gives right to select the tract to be conveyed, 46 A.L.R.2d 894.

24 Restatement Second, Contracts § 362, comment b.

U.S.—City Stores Co. v. Ammerman, 266 F. Supp. 766 (D. D.C. 1967), judgment aff'd, 394 F.2d 950, 38 A.L.R.3d 1042 (D.C. Cir. 1968) (discussing availability of specific performance as affected by indefiniteness).

A.L.R. Library
Specific performance: requisite definiteness of provision in contract for sale or lease of land, that vendor or landlord will subordinate his interest to permit other party to obtain financing, 26 A.L.R.3d 855.
Sufficiency, under the statute of frauds, of description or designation of land in contract or memorandum of sale which gives right to select the tract to be conveyed, 46 A.L.R.2d 894.

25 See § 4:34.

U.K.—Doe v. Bowate (1916) W N (Eng) 185.

U.S.—Wheeler v. New Brunswick & C. R. Co., 115 U.S. 29, 5 S. Ct. 1061, 29 L. Ed. 341 (1885) (contract giving the seller-promisor the option to sell and deliver any quantity between a designated minimum and maximum held sufficiently certain: "An agreement to accept from two to six hundred tons is an agreement to accept any number between the expressed limits, the option being with the seller"); Sylvan Crest Sand & Gravel Co. v. U.S., 150 F.2d 642 (C.C.A. 2d Cir. 1945) (contract obligated government to give delivery instructions or notice of cancellation and notice requirement was sufficient consideration); Pennsylvania Sugar Co v. Czarnikow-Rionda Co, 245 F. 913 (C.C.A. 3d Cir. 1917) (seller's option to

deliver 25 to 30 bags of sugar); Williams v. Cow Gulch Oil Co., 270 F. 9 (C.C.A. 8th Cir. 1921) (contract for sale of land to be selected by third person).

Ariz.—Allen D. Shadron, Inc. v. Cole, 101 Ariz. 122, 416 P.2d 555 (1966), supplemented on reh'g, 101 Ariz. 341, 419 P.2d 520 (1966) (carrying the notion to its limits in upholding a promise which gave the promisor the choice to pay or not, the court requiring that some election must be made); Golder v. Crain, 7 Ariz. App. 207, 437 P.2d 959 (1968) (citing text).

Miss.—Arthur Delapierre Co. v. Chickasaw Lumber Co., 111 Miss. 607, 71 So. 872 (1916).

N.Y.—Spiritusfabriek Astra of Amsterdam, Holland v. Sugar Products Co., 176 A.D. 829, 163 N.Y.S. 516 (1st Dep't 1917), aff'd, 221 N.Y. 581, 116 N.E. 1077 (1917).

26 See cases in the next note.

Restatement Second, Contracts § 77.

U.S.—Sylvan Crest Sand & Gravel Co. v. U.S., 150 F.2d 642 (C.C.A. 2d Cir. 1945); Torncello v. U. S., 231 Ct. Cl. 20, 681 F.2d 756 (1982) (finding contract valid based on obligations imposed on government).

Ariz.—Mattison v. Johnston, 152 Ariz. 109, 730 P.2d 286 (Ct. App. Div. 1 1986) (covenant not to compete, signed by employee following commencement of employment, under circumstances where employment was at will; while any promise of continued employment would be illusory, when employment actually continued, and was terminated by employee, not employer, implied promise of employment was not illusory).

Cal.—Jonas v. Leland, 77 Cal. App. 2d 770, 176 P.2d 764 (1st Dist. 1947) (disapproved of on other grounds by, Ellis v. Mihelis, 60 Cal. 2d 206, 32 Cal. Rptr. 415, 384 P.2d 7 (1963)).

Fla.—Lauren, Inc. v. Marc & Melfa, Inc., 446 So. 2d 1138 (Fla. 3d DCA 1984) (existence of conditions affecting right to terminate prevented right from being absolute and provided consideration).

27 Restatement Second, Contracts § 362.

U.S.—Matter of Community Medical Center, 623 F.2d 864, 29 U.C.C. Rep. Serv. 395 (3d Cir. 1980) (where debtor in bankruptcy proceeding rejected executory contract for data processing, which contract contained a minimum monthly payment amount, damages were properly assessed for the remainder of the term on the minimum, not on the ordinary standard of anticipated lost revenues).

Alaska—Uchitel Co. v. Telephone Co., 646 P.2d 229, 33 U.C.C. Rep. Serv. 1678 (Alaska 1982) (where contract consisted of a lease of phone system with option to purchase, damages upon lessee's breach were to be based on option price, rather than total lease price, despite fact that at time of breach, lessee had not exercised option); McBain v. Pratt, 514 P.2d 823, 65 A.L.R.3d 621 (Alaska 1973) ("Where a promisor has agreed to alternative performances, and there has been a breach of contract, the measure of damages is the value of the least onerous alternative," citing text).

Md.—Zalis v. Walter, 180 Md. 120, 23 A.2d 26 (1941) (where a promisor has breached without having elected an alternative performance, the damage recovery will be "in accordance with the alternative that will result in the smallest recovery").

N.H.—Walker v. Hayes, 100 N.H. 90, 120 A.2d 140 (1956).

Ohio—Ach v. Herman A. Straus, Inc., 67 Ohio App. 452, 21 Ohio Op. 400, 37 N.E.2d 99 (1st Dist. Hamilton County 1941) (unless promisor has chosen an alternative, damages measured by least valuable alternative).

28 Restatement Second, Contracts § 362.

U.S.—Matter of Community Medical Center, 623 F.2d 864, 29 U.C.C. Rep. Serv. 395 (3d Cir. 1980) (lease with option to purchase, held damages measured by option price not lease price); Western Oil & Fuel Co. v. Kemp, 245 F.2d 633 (8th Cir. 1957).

Alaska—Uchitel Co. v. Telephone Co., 646 P.2d 229, 33 U.C.C. Rep. Serv. 1678 (Alaska 1982); McBain v. Pratt, 514 P.2d 823, 65 A.L.R.3d 621 (Alaska 1973).

Cal.—Blank v. Borden, 11 Cal. 3d 963, 115 Cal. Rptr. 31, 524 P.2d 127 (1974) (discussing the concept of alternative performances in the context of a liquidated damage clause, and noting that where the alternatives include performance or payment, as long as the promisor may make a rational and real choice between alternatives, the alternative of payment of money is unlikely to be a penalty since the promisor will choose the least expensive alternative).

Ind.—Irving v. Ort, 128 Ind. App. 225, 146 N.E.2d 107 (1957); W.J. Holliday & Co. v. Highland Iron & Steel Co., 43 Ind. App. 342, 87 N.E. 249 (1909).

Md.—Zalis v. Walter, 180 Md. 120, 23 A.2d 26 (1941).

Mo.—Godwin v. Graham, 360 Mo. 418, 228 S.W.2d 789 (1950).

N.H.—Walker v. Hayes, 100 N.H. 90, 120 A.2d 140 (1956).

Ohio—Ach v. Herman A. Straus, Inc., 67 Ohio App. 452, 21 Ohio Op. 400, 37 N.E.2d 99 (1st Dist. Hamilton County 1941).

29 Restatement Second, Contracts § 77, illustration 7.

See U.C.C. §§ 2-309(1), 2-311(2) [Rev].

U.C.C. §§ 2-309(1), 2-311(2).

U.S.—Dingley v. Oler, 117 U.S. 490, 6 S. Ct. 850, 29 L. Ed. 984 (1886) (the promisors had bound themselves to deliver a specified quantity of ice at such times during the ensuing season as they might elect); Sylvan Crest Sand & Gravel Co. v. U.S., 150 F.2d 642 (C.C.A. 2d Cir. 1945).

Ala.—Troy Fertilizer Co. v. Logan, 96 Ala. 619, 12 So. 712 (1893) (a promise to employ a person from a date not later than a specified future day, the precise day to be fixed by the employer, was held not too indefinite for enforcement).

Conn.—Gurfein v. Werbelovsky, 97 Conn. 703, 118 A. 32 (1922) (defendant sent plaintiff a letter indicating that his order had been accepted for delivery within three months and "You have the option to cancel the above order before shipment;" when the price rose and defendant refused to ship, claiming that the right to cancel made the promise illusory, the court held that, since defendant could cut off plaintiff's option to cancel by shipping, the promise to purchase was not illusory).

30 **U.S.—**W. C. Shepherd Co. v. Royal Indem. Co., 192 F.2d 710 (5th Cir. 1951) (quoting text).

Ala.—Smith v. Chickamauga Cedar Co., 263 Ala. 245, 82 So. 2d 200 (1955) (citing text).

Colo.—Howard v. Beavers, 128 Colo. 541, 264 P.2d 858 (1953) (specific performance).

Me.—Corthell v. Summit Thread Co., 132 Me. 94, 167 A. 79, 92 A.L.R. 1391 (1933).

N.Y.—Chiapparelli v. Baker, Kellogg & Co., 252 N.Y. 192, 169 N.E. 274 (1929).

31 Restatement Second, Contracts § 77, comments a, b.

U.S.—Goltra v. Weeks, 271 U.S. 536, 46 S. Ct. 613, 70 L. Ed. 1074 (1926) (the power given to cancel if the work of an agent or contractor is not satisfactory does not make the promise illusory).

Moon Motor Car Co. of New York v. Moon Motor Car Co., 29 F.2d 3 (C.C.A. 2d Cir. 1928); Davis v. General Foods Corporation, 21 F. Supp. 445 (S.D. N.Y. 1937) (promise by food company to pay promisee for idea solely according to company's discretion held illusory); Chevrolet Motor Co. v. Gladding, 42 F.2d 440 (C.C.A. 4th Cir. 1930); Wessel v. Seminole Phosphate Co., 13 F.2d 999 (C.C.A. 4th Cir. 1926) (an option to cancel on a certain event not dependent upon the will of the promisor is valid); Miami Coca-Cola Bottling Co. v. Orange Crush Co., 296 F. 693 (C.C.A. 5th Cir. 1924); Mills-Morris Co. v. Champion Spark Plug Co., 7 F.2d 38 (C.C.A. 6th Cir. 1925) (on failure to perform to the satisfaction of the other party, the reservation of the right does not prevent the existence of a contract); Interstate Iron & Steel Co. v. Northwestern Bridge & Iron Co., 278 F. 50 (C.C.A. 7th Cir. 1922); Velie Motor Car Co. v. Kopmeier Motor Car Co., 194 F. 324 (C.C.A. 7th Cir. 1912); Willys Motors, Inc. v. Northwest Kaiser-Willys, Inc., 142 F. Supp. 469 (D. Minn. 1956) (statute prohibiting cancellation without just cause); City of Pocatello v. Fidelity & Deposit Co. of Maryland, 267 F. 181 (C.C.A. 9th Cir. 1920); Ellis v. Dodge Bros, 237 F. 860 (N.D. Ga. 1916), rev'd on other grounds, 246 F. 764 (C.C.A. 5th Cir. 1917).

Ala.—Owensboro Wagon Co. v. Benton Mercantile Co., 204 Ala. 415, 85 So. 723 (1920).

Ariz.—Allen D. Shadron, Inc. v. Cole, 101 Ariz. 122, 416 P.2d 555 (1966), supplemented on reh'g, 101 Ariz. 341, 419 P.2d 520 (1966) (finding limitations on right to cancel, citing text).

Ark.—Toledo Computing Scales Co. v. Stephens Bros., 96 Ark. 606, 132 S.W. 926 (1910).

Conn.—Gurfein v. Werbelovsky, 97 Conn. 703, 118 A. 32 (1922) (not illusory when seller can control whether buyer has right to cancel).

Ga.—Bankers' Trust & Audit Co. v. Farmers' & Merchants' Bank, 163 Ga. 352, 136 S.E. 143 (1926); National Sur. Co. v. City of Atlanta, 151 Ga. 123, 106 S.E. 179 (1921); Automobile Battery Co. v. Geraghty & Co., 30 Ga. App. 446, 118 S.E. 412 (1923); Tift v. Shiver & Aultman, 24 Ga. App. 638, 102 S.E. 47 (1919).

Ill.—Dwyer v. Graham, 99 Ill. 2d 205, 75 Ill. Dec. 680, 457 N.E.2d 1239 (1983) (citing text).

Iowa—Black v. Consolidated Independent School Dist. of Thayer, 206 Iowa 1386, 222 N.W. 350 (1928) (where the reservation of the right of the school district board of directors to terminate a contract for transportation of pupils at any time was held a valid and effective part of the contract).

Ky.—Daniel Boone Coal Co. v. Miller, 186 Ky. 561, 217 S.W. 666 (1920).

Mass.—Stabile v. McCarthy, 336 Mass. 399, 145 N.E.2d 821 (1957).

Mich.—Cummer v. Butts, 40 Mich. 322, 1879 WL 6213 (1879) (but contract valid if cancellation permitted only for just cause or in good faith).

N.Y.—Chiapparelli v. Baker, Kellogg & Co., 252 N.Y. 192, 169 N.E. 274 (1929) (citing text).

Okla.—Consolidated Pipe Line Co. v. British American Oil Co., 1933 OK 221, 163 Okla. 171, 21 P.2d 762 (1933) (option to cancel any part of order for which cars not furnished).

Tex.—W.T. Rawleigh Co. v. Gober, 3 S.W.2d 845 (Tex. Civ. App. Waco 1928).

Utah—Resource Management Co. v. Weston Ranch and Livestock Co., Inc., 706 P.2d 1028 (Utah 1985) (unbridled right to terminate would render promise illusory, but when right is conditioned on implied obligation to make good faith determination whether to proceed, it is not unbridled, citing text).

W. Va.—White v. McCullagh, 74 W. Va. 160, 81 S.E. 720 (1914) (where the right of cancellation may not be exercised arbitrarily, but only in the exercise of the judgment of the promisor as a fiduciary for other).

A.L.R. Library

Common-Law Retaliatory Discharge of Employee for Disclosing Unlawful Acts or Other Misconduct of Employer or Fellow Employees, 105 A.L.R.5th 351.

Common-Law Retaliatory Discharge of Employee for Refusing to Perform or Participate in Unlawful or Wrongful Acts, 104 A.L.R.5th 1.

Right to discharge allegedly "at-will" employee as affected by employer's promulgation of employment policies as to discharge, 33 A.L.R.4th 120.

Recovery for discharge from employment in retaliation for filing workers' compensation claim, 32 A.L.R.4th 1221.

Modern status of rule that employer may discharge at-will employee for any reason, 12 A.L.R.4th 544.

Comment Note.—Promise by employer to pay bonus as creating valid and enforceable contract, 43 A.L.R.3d 503.

Requisites as to definiteness of agreement to pay employee share of profits, 18 A.L.R.2d 211.

32 Restatement Second, Contracts § 77, comment c.

U.S.—Goltra v. Weeks, 271 U.S. 536, 46 S. Ct. 613, 70 L. Ed. 1074 (1926) (power given to cancel if the work of an agent or contractor is not satisfactory does not make the promise illusory); Tatum v. Guardian Life Ins. Co., 75 F.2d 476, 98 A.L.R. 341 (C.C.A. 2d Cir. 1935) (satisfaction as to insurability); Thompson-Starrett Co. v. La Belle Iron Works, 17 F.2d 536 (C.C.A. 2d Cir. 1927) (satisfaction in fact); Wessel v. Seminole Phosphate Co., 13 F.2d 999 (C.C.A. 4th Cir. 1926) (an option to cancel in a certain event not dependent upon the will of the promisor is valid); Mills-Morris Co. v. Champion Spark Plug Co., 7 F.2d 38 (C.C.A. 6th Cir. 1925) (reservation of the to cancel on failure of other party to perform to the satisfaction of the first party does not prevent the existence of a contract); Kagel v. First Commonwealth Co., Inc., 409 F. Supp. 1396 (N.D. Cal. 1973), judgment aff'd, 534 F.2d 194 (9th Cir. 1976) (offer subject to "satisfactory equipment appraisal" meant objectively satisfactory).

Cal.—Mattei v. Hopper, 51 Cal. 2d 119, 330 P.2d 625 (1958) (satisfaction clause in real estate contract).

N.H.—Pulsifer v. Walker, 85 N.H. 434, 159 A. 426, 81 A.L.R. 1052 (1932) (provision in lease for renewal).

N.Y.—Wynkoop Hallenbeck Crawford Co. v. Western Union Telegraph Co., 268 N.Y. 108, 196 N.E. 760 (1935) (contract to furnish material at price to be composed of cost of production plus an amount for administrative and overhead charges which is satisfactory to purchaser upheld).

A.L.R. Library

Establishment and Construction of Requirements Contracts Under s 2-306(1) Of Uniform Commercial Code, 94 A.L.R.5th 247.

Output contracts under sec. 2-306(1) of Uniform Commercial Code, 30 A.L.R.4th 396.

Construction and effect of provision in private building and construction contract that work must be done to satisfaction of owner, 44 A.L.R.2d 1114.

Mutuality and enforceability of contract to furnish another with his needs, wants, desires, requirements and the like, of certain commodities, 26 A.L.R.2d 1139.

Construction and effect of contract for sale of commodity to fill buyer's requirements, 26 A.L.R.2d 1099.

33 **U.S.—**Local 205, United Elec., Radio and Mach. Workers of America (UE) v. General Elec. Co., 172 F. Supp. 53 (D. Mass. 1959) ("cause" creates objective standard); Helsby v. St. Paul Hospital & Cas. Co., 195 F. Supp. 385 (D. Minn. 1961), judgment aff'd, 304 F.2d 758 (8th Cir. 1962) (contract of agency, terminable for cause, not illusory); Starin v. U.S., 31 Ct. Cl. 65, 1800 WL 1928 (1896) ("good and sufficient cause").

Cal.—Zurich General Acc. & Liability Ins. Co. v. Kinsler, 12 Cal. 2d 98, 81 P.2d 913 (1938) (overruled on other grounds by, Fracasse v. Brent, 6 Cal. 3d 784, 100 Cal. Rptr. 385, 494 P.2d 9 (1972)) (attorney contingent-fee contract).

Mich.—Monaghan v. Agricultural Fire Ins. Co., 53 Mich. 238, 18 N.W. 797 (1884) ("sufficient cause"); Cummer v. Butts, 40 Mich. 322, 1879 WL 6213 (1879) (where either party was given the right to terminate an agreement "for good cause," the court held that any revocation made in good faith by either party was effectual).

Va.—Quick v. Southern Churchman Co., 171 Va. 403, 199 S.E. 489 (1938) ("just cause").

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Common-Law Retaliatory Discharge of Employee for Disclosing Unlawful Acts or Other Misconduct of Employer or Fellow Employees, 105 A.L.R.5th 351.

Common-Law Retaliatory Discharge of Employee for Refusing to Perform or Participate in Unlawful or Wrongful Acts, 104 A.L.R.5th 1.

Damages recoverable for wrongful discharge of at-will employee, 44 A.L.R.4th 1131.

Right to discharge allegedly "at-will" employee as affected by employer's promulgation of employment policies as to discharge, 33 A.L.R.4th 120.

Recovery for discharge from employment in retaliation for filing workers' compensation claim, 32 A.L.R.4th 1221.

Modern status of rule that employer may discharge at-will employee for any reason, 12 A.L.R.4th 544

Construction and effect of provision in lease that consent to subletting or assignment will not be arbitrarily or unreasonably withheld, 54 A.L.R.3d 679.

Termination by principal of distributorship contract containing no express provision for termination, 19 A.L.R.3d 196.

Discharge or retirement of employee because of age or physical disability as within provision of collective bargaining contract limiting employer's right to discharge employees, 56 A.L.R.2d 991

34 **W. Va.—**White v. McCullagh, 74 W. Va. 160, 81 S.E. 720 (1914) (contract giving syndicate managers authority to terminate syndicate agreement was valid since power of termination was not for benefit of managers, but for benefit of underwriters for whom they are acting as fiduciaries).

35 U.C.C. § 2-309[Rev].

U.S.—Aaron E. Levine & Co., Inc. v. Calkraft Paper Co., 429 F. Supp. 1039 (E.D. Mich. 1976); Rockwell Engineering Co., Inc. v. Automatic Timing & Controls Co., 559 F.2d 460, 22 U.C.C. Rep. Serv. 1141 (7th Cir. 1977) (agency or distributorship); McGinnis Piano & Organ Co. v. Yamaha Intern. Corp., 480 F.2d 474, 12 U.C.C. Rep. Serv. 265 (8th Cir. 1973) (franchise agreement; "Reasonable notice is that period of time necessary to close out the franchise and minimize losses"); Circo v. Spanish Gardens Food Mfg. Co., Inc., 643 F. Supp. 51, 2 U.C.C. Rep. Serv. 2d 839 (W.D. Mo. 1985); Zidell Explorations, Inc. v. Conval Intern., Ltd., 719 F.2d 1465, 37 U.C.C. Rep. Serv. 466 (9th Cir. 1983).

Fla.—Solitron Devices, Inc. v. Veeco Instruments, Inc., 492 So. 2d 1357, 1 U.C.C. Rep. Serv. 2d 1437 (Fla. 4th DCA 1986) (where contract for installation of complex machinery did not specify time of completion, buyer could not unilaterally set unreasonable completion date and then cancel contract when project not completed).

Mass.—Zapatha v. Dairy Mart, Inc., 381 Mass. 284, 408 N.E.2d 1370, 29 U.C.C. Rep. Serv. 1121 (1980) (termination without cause implicitly permitted under U.C.C., so long as reasonable notice given, here, 90 days according to agreement); Teitelbaum v. Hallmark Cards Inc., 25 Mass. App. Ct. 555, 520 N.E.2d 1333, 7 U.C.C. Rep. Serv. 2d 705 (1988).

N.C.—Superior Foods, Inc. v. Harris-Teeter Super Markets, Inc., 288 N.C. 213, 217 S.E.2d 566, 17 U.C.C. Rep. Serv. 970 (1975) (reasonable notice under trade standards).

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Establishment and Construction of Requirements Contracts Under s 2-306(1) Of Uniform Commercial Code, 94 A.L.R.5th 247.

Impracticability of performance of sales contract under U.C.C. sec. 2-615, 55 A.L.R.5th 1.

Output contracts under sec. 2-306(1) of Uniform Commercial Code, 30 A.L.R.4th 396.

Specific performance of sale of goods under U.C.C. sec. 2-716, 26 A.L.R.4th 294.

What constitutes a transaction, a contract for sale, or a sale within the scope of U.C.C. Article 2, 4 A.L.R.4th 85.

Contractual liquidated damages provisions under U.C.C. Article 2, 98 A.L.R.3d 586.
Construction and application of U.C.C. sec. 2-305 dealing with open price term contracts, 91 A.L.R.3d 1237.
Uniform Commercial Code: measure of recovery where buyer repudiates contract for goods to be manufactured to special order, before completion of manufacture, 42 A.L.R.3d 182.
"Unconscionability" as ground for refusing enforcement of contract for sale of goods or agreement collateral thereto, 18 A.L.R.3d 1305.

36 Restatement Second, Contracts §§ 76, 77.

U.C.C. § 2-309(3)[Rev].

U.S.—Wessel v. Seminole Phosphate Co., 13 F.2d 999 (C.C.A. 4th Cir. 1926).

La.—Caddo Parish School Bd. v. Cotton Baking Co., Inc., 342 So. 2d 1196 (La. Ct. App. 2d Cir. 1977) (where school board had right to cancel contract upon two weeks' notice, and offer of proof showed that it was known that purpose of provision was to allow board to take advantage of a prospective federal program).

Pa.—Di Bennedetto v. Di Rocco, 372 Pa. 302, 93 A.2d 474 (1953) (contract for sale of real estate valid where buyer given right to cancel if unable to make settlement as agreed upon, since inability connotes measurable standard, not solely discretionary with buyer).

Utah—Resource Management Co. v. Weston Ranch and Livestock Co., Inc., 706 P.2d 1028 (Utah 1985) (right to terminate based on determination that there is not sufficient likelihood of minerals to justify further expenditures of money, in sole discretion of promisor, not illusory, since termination could occur in good faith and "only on a reasonable belief that the commercial and mineral value of the property would not justify further performance. . .").

Wis.—Long Inv. Co. v. O'Donnel, 3 Wis. 2d 291, 88 N.W.2d 674 (1958) (right to cancel dependent upon decision of city to annex and install sewer).

37 **U.S.—**Pittman v. Experian Information Solutions, Inc., 901 F.3d 619 (6th Cir. 2018) (quoting text); Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547 (7th Cir. 2012) (quoting text); Spaulding v. Wells Fargo Bank, N.A., 714 F.3d 769 (4th Cir. 2013) (quoting text); Avevedo v. CitiMortgage, Inc., 2012 WL 3134222 (N.D. Ill. 2012) (quoting text).

38 **U.S.—**Rodesch v. Kirkpatrick Coal Co., 41 F.2d 518 (C.C.A. 6th Cir. 1930); A. E. Staley Mfg. Co. v. Northern Cooperatives, 168 F.2d 892 (C.C.A. 8th Cir. 1948).

Ala.—Gilmer Bros. Co. v. Wilder Mercantile Co., 205 Ala. 650, 88 So. 854 (1921).

Ark.—Markstein Bros. Millinery Co. v. J.A. White & Co., 151 Ark. 1, 235 S.W. 39 (1921); U. S. Bedding Co. v. Andre, 105 Ark. 111, 150 S.W. 413 (1912); Lee v. Vaughan Seed Store, 101 Ark. 68, 141 S.W. 496 (1911).

Ga.—Cable Co. v. Hancock, 2 Ga. App. 73, 58 S.E. 319 (1907).

Kan.—Bauman v. McManus, 75 Kan. 106, 89 P. 15 (1907).

Mo.—Krohn-Fechheimer Co. v. Palmer, 282 Mo. 82, 221 S.W. 353, 10 A.L.R. 673 (1920); Krohn-Fechheimer Co. v. Palmer, 199 S.W. 763 (Mo. Ct. App. 1917); American Publishing & Engraving Co. v. Walker, 87 Mo. App. 503, 1901 WL 1407 (1901).

N.Y.—Senner & Kaplan Co. v. Gera Mills, 185 A.D. 562, 173 N.Y.S. 265 (1st Dep't 1918).

N.C.—T.C. May Co. v. Menzies Shoe Co., 184 N.C. 150, 113 S.E. 593 (1922).

Okla.—Hart-Parr Co. v. Brockreide, 1920 OK 100, 77 Okla. 277, 188 P. 113 (1920); Bagot v. Inter-Mountain Milling Co., 100 Or. 127, 196 P. 824 (1921).

Pa.—West Penn Power Co. v. Bethlehem Steel Corp., 236 Pa. Super. 413, 348 A.2d 144, 20 U.C.C. Rep. Serv. 847 (1975) (finding standard "acceptance" provision retained vitality under U.C.C.).

S.D.—Thomas Mfg. Co. v. Lyons, 29 S.D. 600, 137 N.W. 340 (1912), aff'd, 31 S.D. 500, 141 N.W. 391 (1913).

Tex.—Waco Mill & Elevator Co. v. Allis-Chalmers Co., 49 Tex. Civ. App. 426, 109 S.W. 224 (1908), writ refused; Diamond Mill Co. v. Adams-Childers Co., 217 S.W. 176 (Tex. Civ. App. Austin 1919).

39 **U.S.—**Lahaina-Maui Corp. v. Tau Tet Hew, 362 F.2d 419 (9th Cir. 1966) ("subordination clause" made clear that further negotiations were required).

Cal.—Gould v. Callan, 127 Cal. App. 2d 1, 273 P.2d 93 (2d Dist. 1954).

La.—Sweeney v. Popeyes Famous Fried Chicken, Inc., 427 So. 2d 464 (La. Ct. App. 5th Cir. 1983), writ denied, 435 So. 2d 449 (La. 1983) (option agreement whereby the plaintiffs were given exclusive right, under the terms of licenses to be issued by defendants, which were subject to change prior to exercise of option).

40 **U.K.—**Hollis Bros & Co Ltd v. White Sea Timber Trust Ltd, 1936 WL 26131, [1936] 3 All E.R. 895, (1936) 56 Ll. L. Rep. 78 (U.K. KBD 1936).

41 Restatement Second, Contracts § 76, comment d, illustration 8.

Ala.—Scott v. Moragues Lumber Co., 202 Ala. 312, 80 So. 394 (1918).

Ariz.—Havasu Heights Ranch and Development Corp. v. State Land Dept. of State of Ariz., 158 Ariz. 552, 764 P.2d 37 (Ct. App. Div. 1 1988), opinion amended on other grounds on reconsideration, 173 Ariz. 159, 840 P.2d 1024 (Ct. App. Div. 1 1988).

Ill.—Charles Hester Enterprises, Inc. v. Illinois Founders Ins. Co., 114 Ill. 2d 278, 102 Ill. Dec. 306, 499 N.E.2d 1319 (1986) (upholding "sleep safe" insurance policy, the premiums for which paid for coverage beyond statutory maximum, when policy covered increase in statutory coverage if and when mandated).

42 Restatement Second, Contracts § 76.

U.K.—Re Brand Estates, [1936] 3 All E.R. 374 (Ch 1936) (a contract for the publication of a builders' guide, success of which was dependent upon the amount of advertising secured, was not rendered illusory by a clause giving the publishers the option not to publish if in their opinion insufficient advertisements were obtained to justify publication, since the publisher's mere expression of that opinion was not conclusive but such words as "reasonable" and "honest" were to be read into the clause as qualifying opinion).

U.S.—Compagnie des Bauxites de Guinee v. Insurance Co. of North America, 724 F.2d 369 (3d Cir. 1983) (adopting Restatement definition of fortuitous event in finding damage caused by unknown defect within the insurance policy language); New England Oil Corporation v. Island Oil Marketing Corporation, 288 F. 961 (C.C.A. 4th Cir. 1923); W.H. Goff Co. v. Lamborn & Co., 281 F. 613 (C.C.A. 5th Cir. 1922); Peck v. Stafford Flour Mills Co., 289 F. 43 (C.C.A. 8th Cir. 1923); Lindsey v. Clossco, 642 F. Supp. 250, 34 Ed. Law Rep. 1033 (D. Ariz. 1986), judgment aff'd, 816 F.2d 479, 38 Ed. Law Rep. 1212 (9th Cir. 1987) (where contract between basketball coach and shoe manufacturer was held to be subject to implied condition of terminibility upon termination of coach).

Ill.—Charles Hester Enterprises, Inc. v. Illinois Founders Ins. Co., 114 Ill. 2d 278, 102 Ill. Dec. 306, 499 N.E.2d 1319 (1986) (upholding "sleep safe" insurance policy, the premiums for which paid for coverage

beyond statutory maximum, when policy covered increase in statutory coverage if and when mandated); Ryan v. Hamilton, 205 Ill. 191, 68 N.E. 781 (1903).

Mass.—Bernstein v. W. B. Mfg. Co., 235 Mass. 425, 126 N.E. 796 (1920).

N.Y.—Liss v. Manuel, 58 Misc. 2d 614, 296 N.Y.S.2d 627 (N.Y. City Civ. Ct. 1968) (contract contingent upon stock market activity held valid).

Pa.—Cambria Sav. and Loan Ass'n v. Gross' Estate, 294 Pa. Super. 351, 439 A.2d 1236 (1982) (where contract was subject to purchaser's ability to obtain insurance, and purchaser was unable to obtain it, held there could be no recovery for work done).

Utah—Resource Management Co. v. Weston Ranch and Livestock Co., Inc., 706 P.2d 1028 (Utah 1985) (right to terminate based on determination that there is not sufficient likelihood of minerals to justify further expenditures of money, in sole discretion of promisor, not illusory, since termination could occur in good faith and "only on a reasonable belief that the commercial and mineral value of the property would not justify further performance." . .).

Wis.—Shadbolt & Boyd Iron Co. v. Topliff, 85 Wis. 513, 55 N.W. 854 (1893).

43 Restatement Second, Contracts § 76, illustration 4.

U.S.—Churchill Line v. Gulf Naval Stores Supply Co., 12 F.2d 131 (E.D. La. 1926); Marrinan Medical Supply v. Ft. Dodge Serum Co., 47 F.2d 458 (C.C.A. 8th Cir. 1931).

Kan.—Amsden Lumber Co. v. Stanton, 132 Kan. 91, 294 P. 853, 74 A.L.R. 990 (1931).

Mass.—Mishara Const. Co., Inc. v. Transit-Mixed Concrete Corp., 365 Mass. 122, 310 N.E.2d 363, 14 U.C.C. Rep. Serv. 556, 70 A.L.R.3d 1259 (1974) (in absence of strike clause, question whether picket line at buyer's site constituted excuse based on impracticability properly submitted to jury).

Mich.—Edgar v. Hewett Grain & Provision Co. of Escanaba, 230 Mich. 168, 202 N.W. 972 (1925).

Neb.—Schmidt v. J.C. Robinson Seed Co., 220 Neb. 344, 370 N.W.2d 103 (1985) (contract where buyer could exclude certain acreage if infected by shattercane, if in reasonable judgment it rendered crop unfit).

Pa.—Cambria Sav. and Loan Ass'n v. Gross' Estate, 294 Pa. Super. 351, 439 A.2d 1236 (1982) (where contract was subject to purchaser's ability to obtain insurance, and purchaser was unable to obtain it, held there could be no recovery for work done).

Wash.—Smith v. Cadillac Motor Car Co., 152 Wash. 131, 277 P. 453 (1929).

44 Restatement Second, Contracts § 34, comment b; Restatement Second, Contracts §§ 76, 77.

See §§ 7:1 et seq.

U.S.—McCaffrey v. B.B. & R. Knight, 282 F. 334 (D.R.I. 1922) (citing text).

Conn.—Gurfein v. Werbelovsky, 97 Conn. 703, 118 A. 32 (1922) (but if there is a duty to perform until notice is given, there is a sufficient consideration).

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← POTENTIAL
Black's Law Dictionary (12th ed. 2024) (Approx. 1 page)

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Black's Law Dictionary (12th ed. 2024), potential

POTENTIAL

Bryan A. Garner, Editor in Chief

Preface to the Twelfth Edition | Guide to the Dictionary | Legal Maxims | Bibliography of Books Cited

potential *adj.* (14c) Capable of coming into being; possible if the necessary conditions exist <things having a potential existence may be the subject of mortgage, assignment, or sale>.

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facilitate

VERB

Factsheet

What does the verb *facilitate* mean?

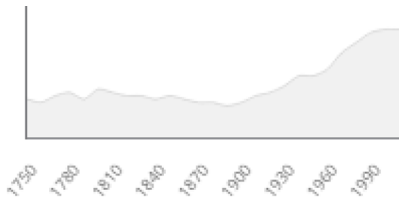
There are **five** meanings listed in OED's entry for the verb *facilitate*, one of which is labelled obsolete. See 'Meaning & use' for definitions, usage, and quotation evidence.

facilitate has developed meanings and uses in subjects including

neurology (1890s) physiology (1890s)

How common is the verb *facilitate*?

About 30 occurrences per million words in modern written English



How is the verb *facilitate* pronounced?

BRITISH ENGLISH

/fəˈsɪlɪteɪt/

fuh-SIL-uh-tayt

U.S. ENGLISH

/fəˈsɪləˌteɪt/

fuh-SIL-uh-tayt

facilitate is probably a borrowing from French, combined with an English element.

Etymons: French *faciliter*, **-ate** *suffix*[3].

◆ ◆ ◆

Etymology

Meaning & use

Pronunciation

Frequency

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At a regular meeting of the Town Board of the Town of Newburgh, held at the Town Hall, 1496 Route 300, in the Town of Newburgh, Orange County, New York on the 8th day of April, 2024 at 7:00 o'clock p.m.

PRESENT:

Gilbert J. Piaquadio, Supervisor

Paul I. Ruggiero, Councilman

Scott M. Manley, Councilman

Anthony R. LoBiondo, Councilman

RESOLUTION OF THE TOWN BOARD OF THE TOWN OF NEWBURGH PERTAINING TO NEW YORK STATE ELECTION LAW 17-206 AND COMMENCEMENT OF LITIGATION

Councilman LoBiondo presented the following resolution which was seconded by Councilman Ruggiero.

WHEREAS, on January 30, 2024, the Town Clerk of the Town of Newburgh received a letter dated and postmarked January 26, 2024 from the law firm Abrams Fensterman LLP on behalf of certain voters in the Town, alleging a violation of the recently enacted John R. Lewis Voting Rights Act of New York, Chapter 226 of the Laws of 2022 of the State of New York (hereinafter referred to as the "NYVRA") and of their intent to commence an action if the Town does not cure the alleged violation; and

WHEREAS, the NYVRA Notification Letter broadly alleges that the voting patterns of members of protected classes within the Town are racially polarized and that under the totality of the circumstances, the ability of members of protected classes to elect candidates of their choice or influence the outcome of Town elections is impaired; and

WHEREAS, while the NYVRA Notification Letter claims a statistical analysis has been performed of election data and demographic patterns in the Town of Newburgh, Abrams Fensterman LLP failed and refused to provide the Town with any data or information tending to support the broad allegations made in the NYVRA Notification Letter; and

WHEREAS, the Town Board, acting in good faith, sought to comply with the NYVRA and adopted a resolution at a special meeting duly held on March 15, 2024 (the "March 15, 2024 NYVRA Resolution") which affirmed the Town of Newburgh's intention to enact and implement a remedy or remedies for a potential violation of the NYVRA, set forth steps the Town of Newburgh would undertake to facilitate approval and implementation of such remedies

and established a schedule for enacting and implementing such remedies; and

WHEREAS, the March 15, 2024 NYVRA Resolution provided, among other things: that an evaluation and findings regarding the current at-large election system employed by the Town for members of the Town Board, with regard to any potential violation of the NYVRA and an evaluation of the potential alternatives to bring the election system into compliance with the NYVRA should a potential violation be determined to exist be reported to the Town Board within thirty (30) days of the date of the March 15, 2024 NYVRA Resolution; and

WHEREAS, the March 15, 2024 NYVRA Resolution also provided, among other things, that a written proposal of remed(ies) that comply with the NYVRA ("NYVRA Proposal") be prepared and presented to the Town Board within ten (10 days) of the Town Board's finding of a potential violation, should a potential violation be determined to exist; and

WHEREAS, the March 15, 2024 NYVRA Resolution also provided, among other things, that the Town Board shall hold at least two (2) public hearing concerning the NYVRA Proposal within thirty (30) days of the presentation of the NYVRA Proposal, should a potential violation be determined to exist; and

WHEREAS, the March 15, 2024 NYVRA Resolution also provided, among other things, that the Town Board shall a submit the NYVRA Proposal to the Civil Rights Bureua of the Office of the New York State Attorney General within ninety (90) days of the adoption of the March 15, 2024 Resolution on March 15, 2024, should a potential violation be determined to exist; and

WHEREAS, because the Town Board's adoption of the March 15, 2024 NYVRA Resolution on March 15, 2024 triggered a 90-day waiting period before any litigation related to the violations alleged in the January 26, 2024 letter could commence;

WHEREAS, on March 27, 2024 the Town of Newburgh was Served with a Summons and Complaint in the case commenced in the Supreme Court of the State of New York, Orange County, of Oral Clark *et al* versus the Town of Newburgh and the Town Board of the Town of Newburgh, Index No. 00240-2024 to enforce the requirements of the NYVRA in the Town of Newburgh (the "NYVRA Litigation"); and

WHEREAS, the commencement of the NYVRA Litigation against the Town notwithstanding the Town Board's good faith adoption of the March 15, 2024 NYVRA Resolution gives rise to issues as to whether the Town should proceed with the schedule set forth in such Resolution for implementing remedies for any potential violation.

NOW, THEREFORE, BE IT RESOLVED by the Town Board of the Town of Newburgh as follows:

Section 1: That the schedule set forth in the March 15, 2024 NYVRA Resolution, including the submission of evaluation and findings regarding the current at-large election system employed by the Town for members of the Town Board, is hereby suspended pending a determination of the Court with regard to the validity of such Resolution.

Section 2: If the Court dismisses the NYVRA litigation due to the adoption of the March 15, 2024 NYVRA Resolution, then the Town will recommence the evaluation of the current at large election system employed by the Town for the election of members of the Town Board.

Section 3. This Resolution shall take effect immediately.

The question of the adoption of the foregoing resolution was duly put to a vote on roll call which resulted as follows:

Elizabeth J. Greene, Councilwoman	voting	ABSENT
Paul I. Ruggiero, Councilman	voting	Aye
Scott M. Manley, Councilman	voting	Aye
Anthony R. LoBiondo, Councilman	voting	Aye
Gilbert J. Piaquadio, Supervisor	voting	Aye

The resolution was thereupon declared duly adopted.

I, Lisa M. Vance Ayers, the duly elected and qualified Town Clerk of the Town of Newburgh, New York, do hereby certify that the following resolution was adopted at a regular meeting of the Town Board duly held April 8, 2024 and is on file and of record and that said resolution has not been altered, amended or revoked and is in full force and effect.

Lisa M. Vance Ayers, Town Clerk
Town of Newburgh