MALPRACTICE, CO-OP EVICTION AND FOREIGN JUDGMENT ENFORCEMENT

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The Court of Appeals last month upheld the dismissal of negligence claims against doctors who had advised plaintiff she did not need treatment as a result of her exposure to their patient who had meningitis, finding no duty of care running from the physicians to the plaintiff. The Court separately held that "the business judgment standard governs a cooperative's decision to terminate a tenancy in accordance with the terms of the parties' agreement." And in another case, the Court enforced English default judgments entered for failure to comply with *Mareva* injunctions. Before we discuss these opinions, however, we note a procedural development in a matter currently pending before the Court.

Supplemental Oral Argument – A First

In what appears to be a "first," in *Saratoga Chamber of Commerce v. Pataki*, the Court requested that the parties appear to "provide supplemental argument" and, at their option, make additional written submissions with respect to a specific issue raised in the reply brief of the defendants-appellants. While post-argument submissions are not unusual in appellate practice generally, such is not the case for oral argument. This development is a tribute to the Court's openness to avail itself of additional oral advocacy where it may be helpful in reaching its decision.

The case, which has already made two trips to the Appellate Division, Third Department, raises the thorny issue of whether the Governor had the power, without legislative concurrence, to execute agreements with the St. Regis Mohawk Tribe that permitted certain gambling activities on the Tribe's reservation. The motion court granted summary judgment to the plaintiff and the Appellate Division unanimously affirmed. A decision by the Court is anticipated soon.

Doctors' Duty of Care to Non-Patients

In the face of the alleged misconduct of two physicians toward a non-patient, the Court in *McNulty v. The City of New York*, held that the plaintiff who came to the aid of a patient with meningitis and who herself later contracted the disease from exposure, had no negligence claim against the physicians because the plaintiff was owed no duty of care. Judge George Bundy

Smith's opinion for the Court, concurred in by Chief Judge Judith S. Kaye in a separate opinion, reversed the determination of a divided panel of the Appellate Division, First Department. The decision again shows the Court's unwillingness, for sound policy reasons, to expand the boundaries of tort liability in the face of grievous injury and facts that, if proven, would amount to "deplorable conduct" by the doctors.

McNulty received a telephone call on Christmas Eve that her friend was extremely ill. Responding to the call, McNulty found that her friend was disoriented and unresponsive, and had been vomiting. McNulty called 911 and while waiting for an ambulance cleaned and dressed her friend. She followed the friend to the hospital and stayed with her for a time in the emergency room. McNulty claimed that while in the emergency room she was advised by the treating physician that her friend had meningitis and needed to be in isolation. While arrangements were being made to transfer the patient to another hospital in order to be placed in the care of her own physician, McNulty asked the emergency room doctor whether the form of meningitis involved was contagious and whether she needed to be treated because of her close contact with the patient. The doctor allegedly "shook his head."

McNulty followed her friend to Einstein Hospital where the patient was placed under the treatment of Dr. Shimm. Explaining her close contact with her friend, McNulty asked Dr. Shimm whether she needed treatment; according to plaintiff, he answered that she did not. On Christmas Day, while visiting her friend at Einstein, McNulty asked a third physician, Dr. Tanowitz, whether she required treatment because of her close contact with the patient. He also allegedly answered no. All of the doctors involved either denied speaking to McNulty or had no recollection of having done so.

Several days later McNulty awoke feeling very ill. She called Dr. Shimm, and was told that her friend's type of meningitis was contagious and to get to a hospital. McNulty had contracted the same type of meningitis as her friend, which left her with permanent injury. McNulty sued the hospitals and all of the doctors involved. When the matter reached the Court of Appeals, only Drs. Shimm and Tanowitz remained in the case.

At the heart of the Court's decision to dismiss the complaint against the doctors was its unwillingness to find the existence of any duty of care owed to McNulty by the doctors because McNulty's injury did not result from the doctors' performance of the duty of care owed to the patient and because no "special relationship" existed between McNulty and the doctors.

The Court distinguished its decision in *Tenuto v. Lederle Labs*, 90 N.Y.2d 606 (1997). There the Court held that a doctor owed a duty of care to non-patients, the parents of an infant who had received a vaccination for polio. The finding of duty was based upon a special relationship with the doctor due to the parents' reliance on the doctor as the primary caregiver of the infant, and the doctor's "comprehensive services," including giving advice to parents.

While *McNulty* preserves for courts as a legal issue the question of whether a duty is owed by an alleged tortfeasor, the decision, coupled with the Court's decision in *Tenudo*,

portends further efforts by non-patient plaintiffs to squeeze within the "special relationship" exception. *McNulty* is also a case that lawyers and other professionals providing services or advice should be aware of, so that care may be taken to limit exposure to malpractice claims from those with whom no professional relationship is intended to be created.

Co-op Board Eviction Subject to Business Judgment Rule

In *40 West 67th Street Corp. v. Pullman,* the Court unanimously held that judicial review of a residential co-op board's determination to evict a tenant because his conduct was "objectionable," was subject to the business judgment rule. This was an extension of the Court's decision in *Levandusky v. One Fifth Ave. Corp.*, 75 N.Y.2d 530 (1990), in which the Court first applied the business judgment rule to a co-op board's decision, there to issue a stop-work order against renovations being undertaken by tenants in violation of their lease.

Pullman in part involved the interplay between the business judgment rule and RPAPL § 711(1), which provides that a holdover proceeding may not be maintained "unless the landlord shall by competent evidence establish to the satisfaction of the court that the tenant is objectionable." There had been substantial friction between the *Pullman* plaintiff/evicted tenant and the building's co-op board and other tenants. The plaintiff's lease provided for termination if two-thirds of the co-ops' shareholders voted the tenant's "objectionable conduct" rendered continued tenancy "undesirable."

The Appellate Division, First Department had held in a 3-2 split decision that, despite the language of RPAPL § 711(1), "*Levandusky* explicitly precludes judicial inquiry into the lawful actions take by a co-op Board of Directors." *Pullman,* 742 N.Y.S.2d 264, 269 (2000) (Justice Angela J. Mazzarelli). The majority opinion went on to state that, even if the court did not apply the business judgment rule and it examined the plaintiff's conduct, the court would have found ample record evidence that plaintiff's conduct was, in fact, objectionable. Thus, the Supreme Court below should have granted the co-op's motion for summary judgment.

The dissenting opinion by Justice David B. Saxe, however, viewed the trial court's denial of summary judgment as correct, reasoning that the *Levandusky* rule was inapplicable and could not overrule the RPAPL (which it deemed applicable to ejectment proceedings such as *Pullman,* as well as to the holdover proceedings specifically referenced in the statute). In addition, in the dissent's view, there existed fact issues as to whether the co-op had demonstrated the tenant's conduct was, in fact, objectionable. The decision was appealed as of right.

The Court of Appeals, in its decision by Judge Albert M. Rosenblatt, affirmed the Appellate Division, but took a somewhat different approach to the RPAPL issue. The statute was not irrelevant to the ejectment proceedings against the tenant, the Court held. However, the business judgment rule overlay the determination of whether the tenant was objectionable. The co-op's stated finding that the tenant was objectionable should have been deferred to by the trial court as competent evidence that the statute's standard had been satisfied. In other words,

in such circumstances a co-op board's determination normally should itself be an adequate basis for a trial court to find competent record evidence that the tenant is objectionable.

To trigger further judicial review, the Court stated, the tenant would have had to make a showing that the board (1) acted outside the scope of its authority, (2) did not "legitimately further" the co-op's corporate purpose, or (3) acted in bad faith. Because none of these requirements was met, no evidence beyond the co-op's finding was necessary to uphold the eviction.

Foreign Default Judgment Enforced

In an opinion by Judge Susan Phillips Read, the Court upheld the lower courts' recognition of judgments entered by the English High Court of Justice despite two constitutional challenges, in *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*

The underlying action accused defendants of defrauding plaintiffs into making an investment. Plaintiffs *ex parte* obtained leave to sue the objecting defendants pursuant to an English procedure that allows non-residents to be added as "necessary or proper" parties to an action when at least one other defendant is a domiciliary of England. Defendants unsuccessfully challenged the assertion of jurisdiction over them in the English court solely on the basis that the "anchor" defendant was not a domiciliary.

The English court also granted *ex parte* applications of plaintiffs for orders freezing defendants' assets during the pendency of the action (a "*Mareva* injunction")[i] and directing the defendants to provide documents and other information. Defendants did not comply, and default judgments were entered against them (as some of the English orders had warned defendants could be a consequence of failing to comply).

Plaintiffs sought to have those judgments entered by the Supreme Court, New York County, pursuant to CPLR Art. 53. Justice Ira Gammerman of that court entered the judgments and was affirmed in doing so by a unanimous panel of the Appellate Division, First Department, in a lengthy opinion by Justice David B. Saxe. Because they had raised constitutional issues, defendants had an appeal as of right to the Court of Appeals.

The Court's unanimous decision (Chief Judge Judith S. Kaye taking no part) recalled New York's long history as a "generous forum" in which to enforce foreign money judgments. It also recounted the statutory provision that foreign judgments are considered conclusive unless at least one of two criteria are met. These are that the foreign system "does not provide impartial tribunals or procedures compatible with the requirements of due process," or that the foreign court did not have jurisdiction over the defendant.

Defendants claimed that both CLPR Art. 53 criteria were met here. They asserted that *Mareva* injunctions, which allow unsecured creditors to freeze a defendant's assets pre-judgment, are not permitted in New York and are unconstitutional. The Court of Appeals has

"expressed concern" regarding such injunctions, but did not decided in *CIBC Mellon Trust* whether they violate due process. Rather than consider whether one device of the English court system that was utilized in the foreign proceeding violates due process, the Court held, its job was to determine whether the foreign system "as a whole" is incompatible with our due process notions. The "overall" fairness of England's court systems being "beyond dispute," the Court found, defendants' challenge to the English judgments based upon the *Mareva* injunctions failed.

The jurisdiction-based objection fared no better. On appeal to the High Court, defendants – without preserving their jurisdiction objection -- had argued the merits of both the underlying conspiracy claim against them and the reasonableness of their failure to obey the lower court orders that led to the default judgments. Such voluntary appearance abrogated defendants' argument that the English judgments were unenforceable for lack of personal jurisdiction, the Court held.

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[i] See Mareva Compania Naviera S.A. v. International Bulkcarriers S.A., 2 Lloyd's Rep. 509 (1975).