New York Law Journal

Third Department Decision Addresses Justiciability and Ripeness

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By **Elliott Scheinberg** | August 09, 2019

Hollandale Apartments & Health Club v. Bonesteel, 173 A.D.3d 55 (3d Dep't 2019), presents an infrequently encountered instance where the Appellate Division sua sponte determined that plaintiff's claims in its declaratory judgment action were

neither justiciable nor reviewable, while holding defendant's counterclaims, which were grounded in the same statutes as plaintiff's claims, reviewable.

Background

Justiciability, CPLR 3001, a declaratory judgment requires a justiciable, ripe, genuine and nonacademic controversy: CPLR 3001 allows "a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a *justiciable* controversy whether or not further relief is or could be claimed."

Watson v. Aetna Cas. & Sur. Co., 246 A.D.2d 57 (2d Dep't 1998), held:

> A declaratory judgment action "requires an actual controversy between genuine disputants with a stake in the outcome [and may not be used as a] vehicle for an advisory opinion." In addition to be[ing] genuine or ripe, the declaratory judgment may be used only for a "justiciable" controversy. If the court has jurisdiction over the subject matter, and if the dispute is genuine, and not academic, "the dispute will be deemed 'justiciable' and CPLR 3001 will in that regard be satisfied."

"Ripeness [] pertain[s] to subject matter jurisdiction which may be raised at any time, including sua sponte." *Agoglia v. Benepe*, 84 A.D.3d 1072 (2d Dep't 2011).

In *New York State Inspection, Sec. and Law Enf't Employees, Dist. Council 82, AFSCME, AFL-CIO v. Cuomo*, 64 N.Y.2d 233 (1984) (hereafter *AFSCME*) the Court of Appeals characterized justiciability as "perhaps the most significant and least comprehended limitation upon the judicial power":

> The doctrine of justiciability, [was] developed to identify appropriate occasions for the exercise of judicial authority ... Justiciability is the generic term of art which encompasses discrete, subsidiary concepts including, inter alia, political questions, ripeness and advisory opinions. At the heart of the justification for the doctrine of justiciability lies the jurisprudential canon that the power of the judicial branch may only be exercised in a manner consistent with the "judicial function" ... upon the proper presentation of matters of a "Judiciary Nature."

"[N]onjusticiability, whether by reason of political question or nonripeness, implicates the subject matter jurisdiction of the court ..." *AFSCME*, at 241 n.3; *333 Cherry v. N.*

Resorts, 66 A.D.3d 1176, n. 3 (3d Dep't 2009).

Amended Complaints. An amended pleading takes the place of the original pleading, rendering an appeal from an order based on the prior pleading academic. *100 Hudson Tenants v. Laber*, 98 A.D.2d 692 (1st Dep't 1983). *Guibor v. Manhattan Eye, Ear & Throat Hosp.*, 56 A.D.2d 359 (1st Dep't 1977), aff'd, 46 N.Y.2d 736 (1978).

However, the Appellate Division in *Wimbledon Fin. Master Fund, Limited. v. Weston Capital Mgt.*, 160 A.D.3d 596 (1st Dep't 2018) took judicial notice of the second amended complaint and defendants' motion to dismiss the various causes of action in the second amended complaint:

> "[o]rdinarily [the second amended pleading] takes the place of the amended complaint, [and] render[s] the instant appeal from the order based on the first amended complaint academic ... However, the parties [] charted their own course by proceeding as if the instant appeal [wa]s not rendered moot, and we address all but the arguments pertaining to the since-repleaded breach of fiduciary duty and aiding and abetting breach of fiduciary duty causes of action (citing *Cullen v. Naples*, 31 N.Y.2d 818 [1972] ("The parties to a lawsuit are free to chart their own course at the trial ... and may fashion the basis upon which a particular controversy will be resolved.")

Unique to *Guibor* was the fact that although only the amended complaint was before the Appellate Division, both pleadings were virtually identical except for certain non-factual allegations in the amended complaint referring to the Public Health Law. The plaintiff argued that service of his amended complaint rendered the appeal moot:

> Under the circumstances, the parties charted their own, somewhat peculiar, procedural course creating the basis on which their dispute will be resolved" (citing *Cullen v. Naples*, 31 N.Y.2d 818 (1972) ...) and "the appeal [wa]s not moot merely by virtue of plaintiff's service, on the return date of defendants' original motion to dismiss the first complaint, of a substantially identical amended complaint where, in addition, the parties have addressed themselves to the sufficiency of the amended pleading both here and at Special Term ... and the original order to which renewal was addressed recited the court's consideration of the amended pleading.

Harm contingent upon events beyond the control of the parties which may not occur is nonjusticiable, speculative and abstract. Under the doctrine of ripeness, "[w]here the harm sought to be enjoined is contingent upon events which may not come to pass, [a] claim to enjoin the purported hazard is nonjusticiable as wholly speculative and abstract." *Allard v. Allard*, 145 A.D.3d 1254 (3d Dep't 2016).

The separation agreement in *Allard* provided that plaintiff was "entitled to [] ownership of the marital residence." However, "[w]hen and if the house is sold," the parties would equally share the profit from the sale. Defendant transferred title to plaintiff. Plaintiff obtained additional loans, significantly increasing the balance of the mortgages.

Defendant filed a postjudgment motion alleging that plaintiff breached the agreement as the additional loans encumbered his contingent interest in the property. Defendant sought an immediate sale or an immediate pay off of the mortgages.

Plaintiff was held not to be under any obligation to sell the home, nor was a sale imminent. Furthermore, the plaintiff stated her intent never to sell. Defendant was, therefore, seeking an opinion regarding "a possible future event that has not yet occurred," and that there was thus no present case or controversy to be adjudicated; it involved "a future contingency that *may someday* result if there is an eventual sale of the residence."

The action, in *Schulz v. Cuomo*, 133 A.D.3d 945 (3d Dep't 2015), an election case, was held "premature and, as a matter of law, may not be maintained [as] the issue presented for adjudication involve[d] ... future event[s] beyond the control of the parties which may never occur":

> While it is true that the next referendum on whether to convene a Constitutional Convention will be placed before the voters at the November 2017 general election, the fact remains that a majority of the electorate may well vote against convening such a convention. Further, even assuming that the electorate votes in favor of the referendum, defendants (and all others similarly situated) may decline to seek to serve as delegates thereto; alternatively, should defendants and those similarly situated opt to run for this position in the November 2018 general

> election, they may not actually be elected as delegates to the convention, which would convene in April 2019. [B]ecause " the harm sought to be enjoined is contingent upon events which may not come to pass, the claim to enjoin the purported hazard is nonjusticiable as wholly speculative and abstract"; hence, defendants' motions to dismiss the complaint were properly granted.

See also *Laity v. State*, 153 A.D.3d 1079 (3d Dep't 2017), appeal dismissed, lv. to appeal denied, 30 N.Y.3d 1009 (2017).

Reviewing ripeness of administrative actions. *Adirondack Council v. Adirondack Park Agency*, 92 A.D.3d 188 (3d Dep't 2012), addresses the criteria for determining "whether an administrative action is ripe for review":

> An appellate court must first consider whether it "is final and whether the controversy may be determined as a 'purely legal' question" ... An action will be deemed final if "a pragmatic evaluation" reveals that "the decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury" ... We must then consider whether "the anticipated harm is insignificant, remote or contingent [;] ... if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party," the matter is not ripe ... That is, if the claimed harm "is contingent upon events which may not come to pass, the claim ... is nonjusticiable as wholly speculative and abstract."

Endurance of an Adirondack Park Agency [APA] review, without more, is not a justiciable injury because the anticipated harm may be prevented by further administrative action—i.e., the APA may grant future variance or subdivision applications, leaving the claim hypothetical. *New York Blue Line Council v. Adirondack Park Agency*, 86 A.D.3d 756 (3d Dep't 2011).

In *Joy v. New York State Dep't of Motor Vehicles*, 133 A.D.3d 1167 (3d Dep't 2015), three petitioners challenged a section of the regulations that requires the issuance of a restricted license and the installation of an ignition interlock device *if* their applications for relicensing are eventually granted (15 N.Y.C.R.R. 136.5[b][3][ii]). Because the Commissioner, in her discretion, had not yet granted their applications, these restrictions had not yet been imposed upon them and "the harm sought to be

enjoined [wa]s contingent upon events which may not come to pass" and, therefore, the claims were "nonjusticiable as speculative and abstract."

'Hollandale'

In *Hollandale*, plaintiff-owner of an apartment complex, prohibited tenants from keeping dogs. Defendant Bonesteel rented an apartment in 2011 under a one-year lease that was renewed for additional one-year terms. In November 2013, Bonesteel's therapist recommended that Bonesteel obtain an emotional support animal. Hollandale refused but offered to allow a bird or cat, or to allow Bonesteel an early termination of his lease.

The Attorney General opened an investigation pursuant to Executive Law §63 whether the denial was discriminatory but made a proposal. Hollandale rejected the proposal and commenced an action seeking declaratory judgment that it did not violate the Fair Housing Act (42 U.S.C. §3601 et seq. (FHA)) and the Human Rights Law (Executive Law art. 15) (HRL).

Bonesteel's lease renewal was reduced to three month terms. Defendant counterclaimed asserting discrimination, under the FHA and the HRL, and retaliation by reduced lease terms. The Attorney General intervened. The court issued a judgment that declared that plaintiff's actions did not violate the FHA and the HRL and dismissed the counterclaims. Only Bonesteel appealed.

So as not to give an advisory opinion on (1) insignificant issues (*Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510 (1986) ("[i]f [an] anticipated harm is insignificant, remote or contingent[,] the controversy is not ripe.")); or (2) "a future event beyond control of the parties which may never occur ... [or is] contingent" (*Cuomo v. Long Is. Light. Co.*, 71 N.Y.2d 349, 354 (1988)), the Appellate Division sua sponte examined the justiciability of Holandale's claims in the declaratory judgment action.

When Hollandale filed the action, it had already denied Bonesteel's request for an exception to its no dog policy. Bonesteel neither renewed his request, violated Hollandale's denial, nor commenced any court action. Whether Bonseteel would eventually do so was an event that might never occur, and whether the outcome of such an action would be adverse to plaintiff remained outside the parties' control.

Bonesteel filed administrative complaints that were not yet final, no enforcement actions had been taken and no agency "ha[d] taken a definitive position that inflict[ed] an actual, concrete [or "impending"] injury" (see *St. Paul*, 67 N.Y.2d at 522).

Hollandale's complaint "merely" asserted that Bonsesteel was not entitled to the exception and asked for an anticipatory determination that its refusal did not violate the FHA or the HRL, in effect, an advisory opinion, and "not [a] judicial function. Thus, the declaratory judgment action was premature and nonjusticiable, and thus dismissed.

Bonseteel's counterclaims were, however, reviewable because they alleged concrete injuries and appellate resolution would have an immediate practical effect on the parties.

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