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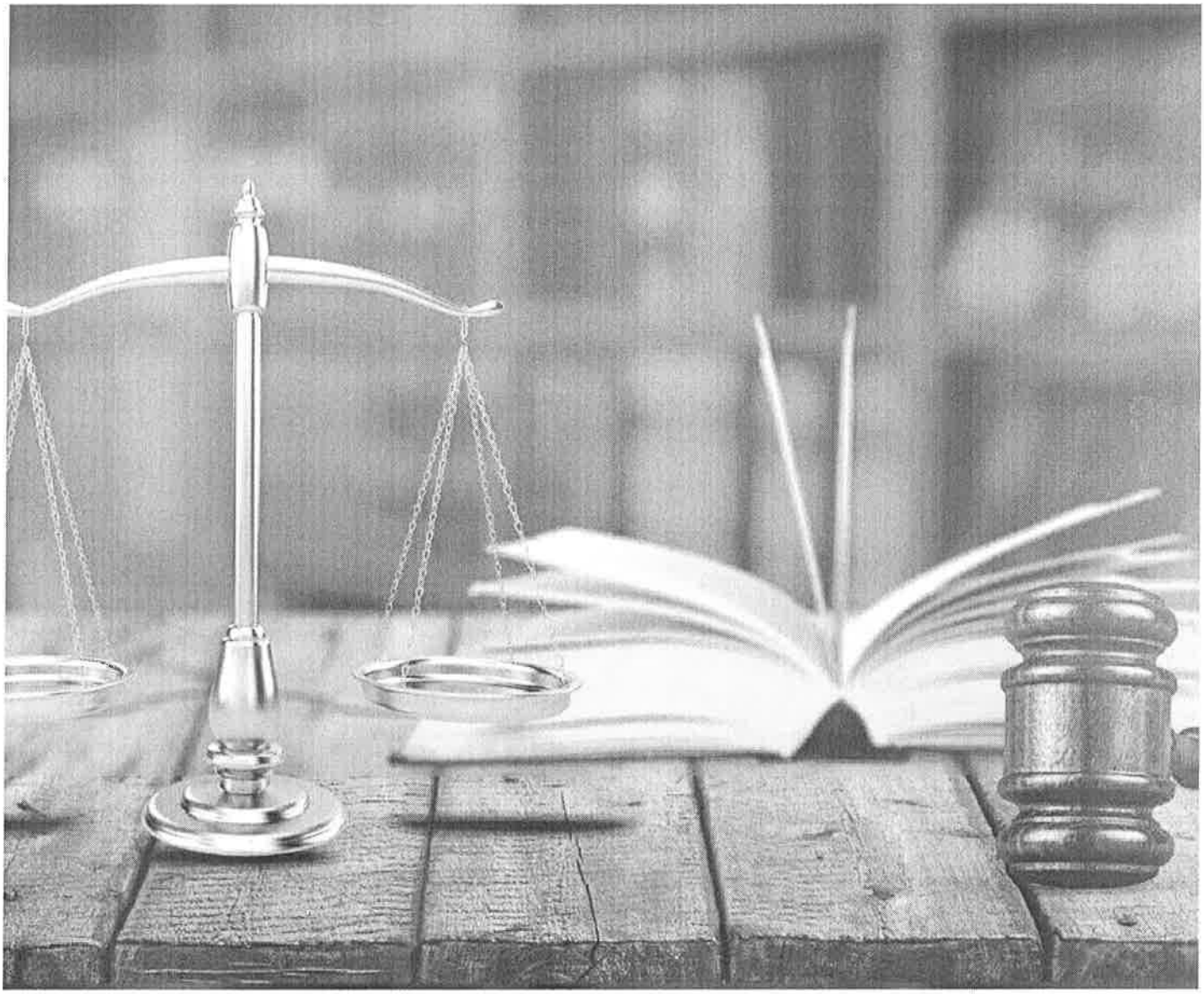
Parallel Trials, Different Theories and Judgments, Finality and Appealability

The specter of finality continues to haunt the hallowed halls of appealability at all appellate levels.

By **Elliott Scheinberg** | May 12, 2022



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Rod Serling, lit cigarette in hand, standing behind the rich-red leather seats of the First Department that await each new day's complement of judicial robes: "Submitted for your consideration: You're travelling through another dimension titled *Shah v. 20 E. 64th St.*, 198 A.D.3d 23 (1st Dept. 2021), where property damage of a "garden variety" is anchored to a byzantine "unorthodox procedural path charted by" wondrous legal minds, pursuant to which the parties agreed to a trifurcated trial to be conducted in two phases wherein plaintiffs' claims are litigated under two different legal theories, tort and breach of contract: a jury to decide damages in tort, and a judge, in a parallel nonjury trial, to determine damages under breach of contract. A jury waiver clause in plaintiffs' contract with 20 East prevents the jury from hearing plaintiffs' breach of contract claims. Not surprisingly, two scathingly conflicting judgments emerge to do battle. Only the nonjury judgment is entered pursuant to court order. You've just crossed over into the dimension of procedural nightmare and madness in the finality and appealability zone."

Parties may chart their own procedural courses which a court is bound to follow. Hovering over this case like a menacing alien spacecraft in a sci-fi film is settled law that: (1) "Where all parties to a litigation choose to do so, they may to a large extent chart their own procedural course through the courts," *Stevenson v. News Syndicate Co.*, 302 NY 81, 87 (1950); and (2) "Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only bind them but which the courts are bound to enforce. They may stipulate away statutory, and even constitutional rights," *Matter of Mallory*, 278 NY 429, 433 (1938)." However, once so stipulated parties must bear the consequences. Parenthetically, "parties to a civil litigation, in the absence of a strong countervailing public policy, may [even] consent, formally or by their conduct, to the law to be applied, e.g., *Brady v. Nally*, 151 N.Y. 258, 264 ..." *Martin v. City of Cohoes*, 37 N.Y.2d 162, 165-66 (1975).

'Shah', the facts. The damages to plaintiffs' landmarked Italian renaissance mansion occurred as the result of excavation and underpinning work by plaintiffs' neighbor, 20 East 64th Street LLC, during the renovation of the neighbor's mansion and the construction of a sub-basement for a bowling alley.

20 East contracted with defendant Tri-Star Construction Corp. to act as construction manager on its mansion renovation. Tri-Star subcontracted with defendant Urban Foundation/Engineering, LLC to perform the excavation and underpinning work. In 2014, 20 East approached plaintiffs for temporary access to their mansion. Shah and 20 East entered into an agreement granting 20 East license to access. The Access Agreement contained a jury waiver clause. In November 2014, damage was discovered to plaintiffs' home.

Procedural background. In June 2015, plaintiffs commenced an action against 20 East for property damage. Plaintiffs' amended complaint asserted causes of action against 20 East, Tri-Star, and Urban for strict liability under Administrative Code of City of NY §3309.4, negligence, and nuisance. In addition to punitive damages, plaintiffs asserted a breach of contract cause of action and a contractual indemnification cause of action against 20 East. Finally, plaintiffs asserted a trespass cause of action against 20 East and Tri-Star. Defendants' answer asserted cross-claims against each other for common-law and contractual indemnification.

In 2017, Supreme Court (Lynn Kotler, J.) ruled on the parties' numerous summary judgment motions (the indemnification decision), granting plaintiffs summary judgment on liability as against 20 East and Urban in connection with plaintiffs' statutory strict liability claim (but denied the motion as to Tri-Star). Supreme Court also granted plaintiffs summary judgment on their contractual indemnification claim against 20 East conditioned on a finding of a breach of contract. The court found that questions of fact existed as to Tri-Star's and Urban's negligence and 20 East's vicarious negligence. The court dismissed the nuisance and trespass causes of action. In addition, the court granted 20 East summary judgment against Urban on its cross-claim for conditional contractual indemnification and against Tri-Star and Urban on its cross-claims for conditional common-law indemnification.

"In granting plaintiffs conditional contractual indemnification, Supreme Court rejected 20 East's argument that the indemnification provision in the Access Agreement applied only to protect plaintiffs against claims by third parties and not for harm that plaintiffs suffered at the hands of 20 East. The court reasoned that the Access Agreement would support an attorneys' fee award because it provided that plaintiffs were entitled to recover damages, including reasonable attorneys' fees, incurred as the result of 20 East's breach of any of its obligations under the Access Agreement" [at 28-29].

"This type of property damage action would ordinarily [have] present[ed] only garden-variety issues," said the Appellate Division, "however, this litigation presents a host of unusual problems stemming from the parties' agreement to a trifurcated trial ... What ensued created the unusual issues that we confront here [at 26]:

(1) Phase I encompassed two distinct trials: a jury would determine the amount of damages, if any, in connection with plaintiffs' strict liability tort claims against 20 East and Urban, and the amount of damages, if any, in connection with plaintiffs' negligence claims against 20 East, Urban, and Tri-Star;

(2) Additionally, a judge would determine both liability and damages in connection with plaintiffs' breach of contract claims against 20 East; and

(3) In Phase II, a second jury trial would address defendants' liability on plaintiffs' negligence claims and, to the extent still pursued by plaintiffs, Tri-Star's liability on plaintiffs' strict liability claim. The parties also agreed that the jury would address defendants' cross-claims for indemnification and, if permitted by the court, punitive damages.

- The stipulated order further provided that Tri-Star was permitted to participate in the jury trial on damages in Phase I even though liability against it had not been established. However, neither Tri-Star nor Urban was permitted to participate in the nonjury trial.

Colloquy during a conference regarding the trifurcation. The Appellate Division rejected 20 East's contention that the parties did not fully grasp or forecast that different damages would be awarded by the judge and the jury as Supreme Court had raised the issue at a pretrial conference on Nov. 16, 2018 [n.12]. During that conference, 20 East's counsel stated in relevant part:

- **Counsel:** "I would agree that your Honor's decision would be independent. You can, of course, empanel an advisory jury, ask the jury interrogatories, you know, that may be overlapping with the tort claim and perhaps that, you know, their view of the evidence will inform your decision. I do think it's ultimately your decision."

- **Supreme Court:** "But just the repair cost issue as an example ... the jury and I don't have to come back the same way."

• **Supreme Court:** After hearing 20 East's counsel's comment, the court continued,

"If anybody has any different views in the pretrial memo, let me know, but as I see it, you know, essentially the plaintiffs get the highest of the two. You can appeal either or both. And the cross-claim component is obviously complicated for the second trial because if you have a higher judgment against the contracting party, then on the tort claim I don't know."

"[I]f there's a different number on the two claims it's going to raise some interesting questions in terms of, you know, you have to now subdivide the indemnification under the contract claim versus the indemnification just comparing the tort claims. But we get to think about that for the next trial. But I just wanted to make sure we were on the same page, that you don't necessarily get the same result even on the same question in terms of how much is it going to cost to repair the Shahs' house. You might get a different answer from me than the jury."

The jury trial, verdict not entered. The jury trial on damages commenced on Dec. 10, 2018. On December 18, the jury returned a verdict against 20 East, Tri-Star and Urban, awarding plaintiffs $5 million for repair costs and $500,000 for alternative living expenses, which award was minimally modified following defendants' post-trial motion for a new trial or a reduction in damages. *Judgment was not, however, entered.*

The nonjury trial, award entered. On Dec. 19, 2018, one day after the jury verdict, the nonjury contract action commenced and lasted one day during which time "plaintiffs relied upon the same damages evidence they presented during the jury trial" [at 30]. In the nonjury decision, entered March 12, 2019, Supreme Court found, among other things, that 20 East had breached its contract with plaintiffs and that the evidence "largely overlapped" the evidence presented during the jury trial. The contract judgment against 20 East, totaling $12,299,175.50, consisted of $6,255,007 in repair costs, $1,152,000 for alternative living expenses, $3,040,931.50 in statutory interest, and $1,850,000 in costs and attorney fees through April 30, 2019, was entered on June 13, 2019.

Thereafter, the court (Cohen, J.) denied 20 East's CPLR-4404(a)-post-trial motion, entered May 10, 2019, to set aside the nonjury trial decision as inconsistent with the jury verdict and for the court to render a new decision in the nonjury trial, adopting the jury verdict figures on damages. Supreme Court explained that the second and separate damages award for repair costs and alternative living expenses were proper because, inter alia, it assessed those damages in the context of a breach of contract claim rather than a tort claim [at 31], and because "the parties had stipulated that it would decide liability and damages on plaintiffs' breach of contract claims and make a decision independent of the jury's" [at 31]. The First Department wholly rejected Supreme Court's reasoning "that its and the jury's different damages assessments can be explained by the different legal standards applicable to breach of contract and tort" [at 39].

Tri-Star's motion to dismiss plaintiffs' appeal as being taken from a non-final judgment. The Phase II jury trial, held in July 2019, returned a verdict finding Tri-Star and Urban negligent, apportioning 60% of the liability to Tri-Star and 40% to Urban.

In June 2020, Tri-Star filed a motion to dismiss plaintiffs' appeal as improperly taken from a non-final judgment, "alternatively, Tri-Star sought to stay the appeal until a final judgment was entered or to obtain permission to file a respondent's brief and supplemental appendix. In July 2020, Urban cross-moved for similar relief and sought to consolidate all appeals arising from the trifurcated action. On Aug. 13, 2020, [the Appellate Division] granted the motions to the extent of permitting Tri-Star and Urban to file respondents' briefs and a supplemental appendix without prejudice to raising the issues of appealability in their briefs" [at 31-32].

Finality, interlocutory judgment. The specter of finality continues to haunt the hallowed halls of appealability at all appellate levels. In an incisive analysis by Hon. Peter Moulton, the First Department held that the contract judgment was a final judgment, pursuant to CPLR 5501(a), the appeal from which "[brought] up for review the orders that [were], along with the judgment, the subject of plaintiffs' appeal and 20 East's cross appeals," and that necessarily affected the final judgment [at 32].

Shah referenced *Burke v. Crosson*, 85 N.Y.2d 10, 15 (1995), wherein the Court of Appeals, in its own struggle with defining "finality," conceded: "The concept of finality is a complex one that cannot be exhaustively defined in a single phrase, sentence, or writing" [at 15]. See E. Scheinberg, *Finality and Implied Severance, Interlocutory Orders, Final Orders (https://www.law.com/newyorklawjournal/2020/02/11/finality-and-implied-severance-interlocutory-orders-final-orders/)*, NYLJ, Feb. 12, 2020. The First Department noted that its conclusion that the nonjury contract-judgment constituted a final judgment "started with the definition of a judgment" [at 32]:

"A judgment is the determination of the rights of the parties in an action or special proceeding and may be either interlocutory or final" (CPLR 5011; also CPLR 105 [k] ["The word 'judgment' means a final or interlocutory judgment"]). "[A] fair working definition of the concept can be stated as follows: a 'final' order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters" (*Burke*, 85 N.Y.2d at 15 ...).

The Appellate Division distinguished a final judgment from an interlocutory judgment: "An interlocutory judgment is an intermediate or incomplete judgment, where the rights of the parties are settled but something remains to be done. As when there is an accounting to be had, a question of damages to be ascertained, or a reference required to determine the amount of rent due for use and occupation [sic]" (*Cambridge Val. Natl. Bank v. Lynch*, 76 NY 514, 516 (1879)), which may occur "in a bifurcated personal injury action to permit the immediate appeal of a liability finding prior to the determination of damages (Siegel, NY Prac. §410 at 694 [4th ed. 2005])" [at 33].

Implied severance. The First Department agreed with defendants that the exceptions to finality of implied severance did not apply: "[I]mplied severance applies only where the judgment resolves causes of action that 'do not arise out of the same transaction or

continuum of facts or out of the same legal relationship as the unresolved causes of action (*Burke*, 85 N.Y.2d at 16, 623 N.Y.S.2d 524 ...)" [at 33]. In *Shah,* the breach of contract claims arose out of the same continuum of facts and rules and regulations as did the tort claims.

Express severance. Tri-Star took the position that express severance "did not apply because the nonjury trial decision 'ordered and adjudged' that judgment shall be entered for a sum certain *but did not include the language of express severance*" [at 34]. The First Department cited: (1) CPLR 5012, that "The court, having ordered a severance, may direct judgment upon a part of a cause of action or upon one or more causes of action as to one or more parties"]; and (2) CPLR 603, that "In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others." The First Department offered three reasons for rejecting Tri-Star's contention:

(1) "*It is evident from the decision that Supreme Court intended that the judgment be final, not interlocutory, when it 'Ordered and Adjudged that judgment shall be entered*' against 20 East for the various claims]" [at 34]. Supreme Court "dispose[d] of all of the causes of action between the parties in the action or proceeding and le[ft] nothing for further judicial action apart from mere ministerial matters" (*Burke*, 85 N.Y.2d at 15 ...)" because it resolved *liability and damages*;

(2) "Supreme Court *decided both liability and damages in connection with the breach of contact claims*, no concern exist[ed] that relief within a single cause of action will be impermissibly severed (*Burke*, 85 N.Y.2d at 18 n. 5 ...)" [at 34, n.10]."; and

(3) "[s]everance also comports with the procedural history of the action and the parties' agreement, in the stipulated order, to separate plaintiffs' breach of contract claims from the remainder of the action and have those claims adjudicated by the court" [at 34].

The nonjury decision thus "effect[ed] an express severance *of the remainder of the action* from plaintiffs' fourth cause of action (breach of contract) and fifth cause of action (contractual indemnification), and upon such severance direct[ed] the entry of judgment on those causes of action as against 20 East and the continuation of the remainder of the action" [at 34]. "Moreover, express severance obviate[d] the likely possibility that there will impermissibly be two judgments in this action (CPLR 5012; also *Bennett v. Long Is. Light. Co.*, 262 A.D.2d 437, 438 (2d Dept. 1999) ["without a severance there can be only one judgment entered in a civil action"])."

Party finality doctrine. The First Department further agreed that the exception party finality did not apply: "an order or judgment that disposes of all of the claims ... involving a particular party is final and appealable ... as to that party, even though other claims ... that involve other parties remain pending." In light of plaintiffs' pending tort claims, there was no party finality. Furthermore, plaintiffs' waiver of their right to a judgment on the jury award remedied the problem that plaintiffs would receive a windfall by aggregating the damages awarded by the judge and the jury [at n.9]. It is unclear how this issue escaped the court and the parties at the time of the stipulation.

Defendants' collateral source rule argument rejected. The Appellate Division further rejected defendants' argument regarding the pending collateral source hearing. The rule is "inherently a tort concept with a punitive dimension that does not comport with contract law as contract damages, unlike tort damages, are limited to the economic injury caused by the breach," *Inchaustegui v. 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 115 [2001]. *Shah* noted that "The collateral source hearing was scheduled in connection with 'finalizing judgments arising from the jury verdicts.' The contract judgment [wa]s not a judgment arising from the jury verdicts. Therefore, the resolution of the collateral source hearing [could] not affect the contract judgment" [at 35]. See also *Aretakis v. Cole's Collision*, 165 AD3d 1458, 1460 [3d Dept. 2018].

Supreme Court properly denied 20 East's CPLR-4404(a) motion to set aside the nonjury award, including on U.S. and NYS Constitutional grounds. Supreme Court's refusal to grant 20 East's motion was not error on the ground either that the different damages awards created a host of issues, including whether 20 East can pass the breach of contract damages through to Tri-Star and Urban, or that the parties did not "fully grasp" the issue [n.12], above.

The Appellate Division further handily denied 20 East's application to set aside the nonjury damages award based on their Federal and State Constitutional rights: (1) "the Seventh Amendment of the U.S. Constitution is not applicable to state court cases (*Marko v. Korf*, 166 AD3d 545, 546 [1st Dept. 2018])"; and (2) while article I, section 2 of the New York State Constitution guarantees a jury trial, it also provides that "a jury trial may be waived [] in all civil cases," which right 20 East waived in the access agreement.

Conclusion

The Appellate Division summed up: "While 20 East points to the dangers in litigating the same issue in a split trial, that does not alter the fact that the parties agreed to this procedure in the stipulated order [that the court was bound to follow]". Nor does Supreme Court's failure to 'honor' the jury's verdict run contrary to the court's responsibility to preserve the integrity of the judicial process, given the unorthodox procedural path charted by the parties" [at 41].

"Accordingly, the judgment of the Supreme Court, New York County (Cohen, J.), entered June 13, 2019, awarding damages to plaintiffs and against defendant 20 East 64th Street, LLC, and the appeal therefrom bringing up for review orders, same court and Justice, entered May 10, 2019, March 12, 2019, and Dec. 5, 2018, and order, same court (Lynn Kotler, J.), entered Sept. 27, 2017, should be affirmed. The appeals from underlying orders should be dismissed as subsumed in the appeals from the judgment."

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