New York State Law Digest

EDITOR: DAVID L. FERSTENDIG

No. 715 June 2020

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

NYSBA

CASE DEVELOPMENTS

Majority of Court of Appeals Holds Candidates' Belated Filing of Cover Sheet and Certificate of Acceptance Is Fatal Defect

Refuses to Find COVID-19 Pandemic Unprecedented Circumstances Justify Exception

Matter of Seawright v. Board of Elections in the City of New York, 2020 N.Y. Slip Op. 02993 (May 21, 2020), involves the appeals of two Appellate Division decisions that appear to be in conflict. They both ask whether a candidate's belated filing of a particular document or two was excusable or a fatal defect.

In the wake of the coronavirus pandemic, the legislature shortened the statutory deadlines for filing designating petitions and certificates of acceptance for the upcoming elections. A certificate of acceptance is required where the candidate is nominated for a public office by a party in which he or she is not enrolled as a member. In addition, a cover sheet must be filed where the petition contains ten or more sheets in one volume or consists of more than one volume. In one of the underlying cases (*Seawright*), the candidate failed to timely file a cover sheet for her designating petition and a certificate accepting a designation. In the other (*Hawatmeh*), the candidate failed to file the certificate in a timely fashion. In *Seawright*, the First Department affirmed the grant of the petitions to validate, finding that the belated filings were not a fatal defect, relying on the "unprecedented circumstance of a statewide health emergency." Conversely, in *Hawatmeh*, the Third Department affirmed the dismissal of the petition, ruling that it had no discretion to excuse the belated filing.

A majority of the Court of Appeals (via a per curiam opinion) affirmed the order in *Hawatmeh* and reversed the *Seawright* order. The Court emphasized that it has repeatedly held that the failure to file required papers in connection with a designating petition, including the cover sheet or certificate of acceptance, is an inexcusable "fatal defect"; the relevant Election Law provisions relating to filing are mandatory, leaving no room for judicially created exceptions; stringent enforcement "reduces the likelihood of unequal enforcement"; the strict Election Law provisions have never been "abandoned," notwithstanding the fact that the Election Law has been amended over time; and, thus, notwithstanding the COVID-19 pandemic's "uniquely challenging circumstances," it was constrained by the Election Law's express directive.

The majority also pointed to the executive orders issued during the pandemic expressly suspending or modifying legislative directives, none of which relieved candidates of the consequences of belated filings. Addressing the dissent, the majority insisted that timely filing would not have caused Seawright to expose others to the virus or forced the candidate to break "mandatory quarantine" because (i) Seawright was not the only person associated with the campaign who could have filed the required cover sheet; (ii) she could have used a remote notary pursuant to an executive order permitting notarization via "audio-video technology" (which this writer used during his recent house-closing!); and (iii) the certificate could have been mailed rather than hand-delivered.

In a dissent, Judge Rivera stated that she would have affirmed the Appellate Division order in *Seawright* because there was no evidence of fraud or prejudice and the candidate acted in accordance with governmental guidance intended to protect the public. She asserted that prior conflicting law and administrative convenience applicable in "normal times" "must give way to public health needs and the paramount right to ballot access." *Id.* at *23.

In a separate dissent, Judge Wilson contended that he had

> two disagreements with our resolution of these cases. First, following our merits examination of these cases, we should have rescinded our grants of leave as improvident. There is no reason to retain these cases to restate law the majority contends is settled so that,

IN THIS ISSUE

> when and if the next pandemic arrives, the lower courts of 2120 will have clear guidance. Second, the majority should have realized that as to these cases, our Election Law must be interpreted in light of the will of the legislature; the new, pandemic-related laws; and, perhaps most importantly, the public health catastrophe facing New York.

Id. at *34.

Judge Wilson maintained that the "substantial compliance" standard applied here; Seawright followed the existing executive orders and substantially complied with the applicable statute; the Third Department misread the statute and, thus, there was not really a "conflict" that the Court of Appeals needed to resolve; and the "immensely unlikely recurrence of such circumstances peaking during an election petitioning period renders these cases not leaveworthy." *Id.* at *40. Judge Wilson concluded:

> What is gained by retaining these cases for merits decisions, reversing *Seawright* and affirming *Hawatmeh*? No fraud is avoided, no prejudice to an opponent is ameliorated, no voter confusion is avoided. No departmental split having any import is resolved. Instead, the majority applies what it calls a strict construction of the Election Law to remove Ms. Seawright from the ballot, eschewing the legislature's command to reject hypertechnical disqualifications of candidates and refusing to take any account of the effects of the pandemic on her, the election or New York City. Yet, to needlessly affirm Ms. Hawatmeh's removal from the ballot, the majority disregards the plain language of the Election Law, which unmistakably deems Ms. Hawatmeh's filing timely. The real losers here are not Ms. Seawright and Ms. Hawatmeh, but the voters, our democracy, and all those who have been struggling to adapt normal practices to abnormal times.

Id. at *57.

Note that in a separate opinion, the Court reversed the First Department in two similar cases in which the cover sheet was not timely filed, denying the petition to validate designating petitions.

Narrow Majority of Court of Appeals Holds That Designating Petition Should Have Been Invalidated Because It Was Permeated by Fraud as a Matter of Law

Dissent Believes Issue Involved Factual Determination Reserved for the Lower Courts

In *Matter of Ferreyra v. Arroyo*, 2020 N.Y. Slip Op. 02994 (May 21, 2020), the Court of Appeals acknowledged that the "bar for establishing fraud is a high one," requiring clear and convincing evidence. However, in this case, a majority found that a designating petition was so "permeated" by fraud that it had to be invalidated.

The issue surrounded the candidacy of the respondent Carmen E. Arroyo for the State Assembly. It was undisputed that 512 out of 944 signatures in the designating petition were backdated to dates prior to the candidate's receipt of the blank petition pages. In addition, 14 of the 28 subscribing witnesses swore that the signatures were done before the blank pages were available.

In reversing the Appellate Division order, a majority of the Court of Appeals (also via a per curiam opinion) ruled that "the lower courts should have concluded that this is one of those rare instances in which the designating petition is so 'permeated' by fraud 'as a whole as to call for its invalidation' (citations omitted)." *Id.* at *2.

The dissent by Judge Stein, joined by Chief Judge DiFiore and Judge Feinman, criticized the majority for applying an "amorphous standard." It maintained that the majority improperly found that designating petitions were permeated with fraud as a matter of law; in fact, whether fraud and irregularities permeated the petition was a question of fact to be determined by the factfinder; where, as here, the Court "is presented with affirmed findings of fact, our review is limited to whether the record contains support for those findings (citations omitted)" (*Id*. at *3); and every factfinder involved to resolve the issue here – the referee, the trial court and the Appellate Division – found in the respondent's favor, and

> were not persuaded, to a clear and convincing degree, that respondent either participated in the fraud or that the irregularities rose to a sufficient level to infect the remainder of the designating petition. Inasmuch as the record here is comprised almost entirely of documentary evidence and there was no direct evidence indicating that the defect was the result of fraudulent intent, as opposed to inadvertent human error, a rational factfinder may reasonably decline to draw such an inference. Nor is there any specter of fraud surrounding the more than 240 valid signatures on other pages of the designating petition as it is conceded that those pages did not suffer from a similar irregularity. In my view, 'we cannot hold on this record that [an] inference [of fraud] was compelled as a matter of law', and the majority impermissibly usurps the role of the factfinder and exceeds the jurisdiction of this Court to reach the contrary conclusion (citations omitted).

Id. at *3–4.

Unanimous Court of Appeals Rules That a Claimant Has No Right to Observe a Co-Claimant's General Municipal Law § 50-h's Oral Examination Over the Municipality's Objection

Concurrence Notes That CPLR Deposition Rules Are Not Relevant in Interpreting GML § 50-h

General Municipal Law (GML) § 50-e requires that in any tort action against a public corporation, a pre-action notice of claim must be filed. In addition, GML § 50-h(1) provides that the municipality or governmental entity can demand an examination upon oral questions of the claimant relating to the subject incident and injuries or damages alleged. The section also permits a physical examination of the claimant by a physician. Because the resolution of the issues here rest on the statutory language, the pertinent provisions are set forth below:

> Wherever a notice of claim is filed against a city . . . the city . . . shall have the right to demand an examination of the claimant relative to the occurrence and extent of the injuries or damages for which claim is made, which examination shall be upon oral questions . . .

> and may include a physical examination of the claimant by a duly qualified physician. If the party to be examined desires, he or she is entitled to have such examination in the presence of his or her own personal physician and such relative or other person as he or she may elect. GML § 50-h(1).
>
> In any examination required pursuant to the provisions of this section the claimant shall have the right to be represented by counsel. GML § 50-h(3).
>
> Where a demand for examination has been served . . . no action shall be commenced against the city . . . against which the claim is made unless the claimant has duly complied with such demand for examination. GML § 50-h(5).

Colon v. Martin, 2020 N.Y. Slip Op. 02681 (May 7, 2020), involved an auto accident in which a vehicle owned and operated by the plaintiff, William Colon, was rear-ended by a truck owned by the defendants New York City Department of Environmental Protection and City of New York. A second plaintiff, Ramona Cordero, alleges she was a passenger in Colon's vehicle. Both plaintiffs were represented by the same counsel and served a joint notice of claim.

The defendants served separate notices of a GML § 50-h hearing, seeking an examination under oath of the plaintiffs. Their counsel would not permit the hearing to go forward, however, unless the defendants agreed to permit each plaintiff to be present while the other testified. The defendants rejected the demand, no agreement could be reached, and the hearings never occurred.

Plaintiffs commenced this action and moved for summary judgment on liability, and the defendants cross-moved for summary judgment based on plaintiffs' refusal to go forward with the pre-action GML § 50-h hearings. Significantly, the plaintiffs did not seek alternatively to be given an opportunity to submit to separate hearings. The trial court granted defendants' cross-motion dismissing the action, and the Appellate Division affirmed.

A unanimous Court of Appeals affirmed. The Court noted that the GML § 50-h hearing permits the municipality or governmental entity to investigate the claim "while information is readily available, with a view towards settlement (citation omitted)." *Id.* at *7. Analyzing the statutory language, it referred to several statutory construction principles. One being "[t]he 'maxim expressio unius est exclusio alterius,'" which "applies 'in the construction of the statutes, so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.'" *Id.* at *4. The second, referred to as the "last antecedent rule of statutory construction" provides that "relative and qualifying words or clauses in a statute are to be applied to the words or phrases immediately preceding, and are not to be construed as extending to others more remote." *Id.* at *5.

Plaintiffs argued that the reference in GML § 50-h(1) to a "personal physician" or "such relative or other person" being present permitted a co-claimant as an "other person" to be present at the oral examination of the claimant. The Court disagreed, stating that under the "last antecedent rule," the entitlement to being such a person present referred to the *physical* examination, not to the "more remote" discussion of the examination upon oral examination.

The Court pointed to the legislative history as confirming its interpretation. When originally enacted in 1958, the provision permitting the presence of a personal physician was limited to the situation where "the party to be examined is a female." When the statute was amended in 1976 to make it gender neutral, the Law Revision Commission's memorandum advised that the 1976 amendment was intended

> "[t]o extend to male claimants . . . the right to have their own physician and relative present at physical examinations called for by the municipality. . . . If legal safeguards inhere in having one's own physician present at a *physical examination* bearing on liability, there is no discernible reason for limiting that right to women only" (citations omitted) (emphasis added).

Id. at *8.

Thus, the legislature intended that the physical and oral examinations were to be dealt with differently.

The Court further held that under the expressio unius maxim, GML § 50-h expressly permitted claimant's *attorney* to be present at *both* the physical and oral examination, but only permitted a "personal physician and such relative or other persons as he or she may elect" at the physical examination. Thus, the legislature intended to permit a municipality "to exclude persons not listed in the statute from attending those examinations." *Colon*, 2020 N.Y. Slip Op. 02681 at *10. The Court acknowledged that it was not holding that a claimant could not observe a co-claimant's 50-h hearing if the municipality did *no*t object.

In a concurrence, Judge Fahey asserted that as a condition of the waiver of sovereign immunity, the legislature "has created certain protections for municipalities . . . that do not apply to private tort defendants," including GML § 50-h, and the statutory language supports the legislative intent not to permit claimants to have any person other than his or her attorney present at the hearing. Judge Fahey concluded that the CPLR deposition provisions were not pertinent to interpreting GML § 50-h, because the relevant CPLR provisions applied to depositions *after* an action has been conducted, not to GML § 50-h hearings, which take place prior to the commencement of an action.

Arbitration Panel Acted Within Bounds of Broad Authority by Reconsidering "Partial Final Award"

Court of Appeals Finds Parties Did Not Agree to the Issuance of a Partial Determination Constituting a Final Award

In *American Intl. Specialty Lines Ins. Co. v. Allied Capital Corp.*, 2020 N.Y. Slip Op. 02529 (April 30, 2020), there was an underlying settlement of a matter with the government and Ciena Capital and Allied Capital Corp. (the insureds), arising out of their alleged participation in loan origination fraud. The insureds sought the payment of defense costs and indemnification for the settlement from American International Specialty Lines Insurance Company (AISLIC). AISLIC denied coverage and the insureds demanded arbitration.

At the arbitration, the insureds and AISLIC moved for summary disposition of the arbitration proceeding. The ar-

NEW YORK STATE BAR ASSOCIATION
NEW YORK STATE LAW DIGEST
One Elk Street, Albany, New York 12207-1002

NEW YORK STATE LAW DIGEST

bitration panel issued a "Partial Final Award," finding that the federal settlement was not a "covered loss" under the applicable insurance policy, but the insured was entitled to defense costs, the amount of which was to be determined at a separate hearing. Before the hearing, however, the insureds sought reconsideration of the Partial Final Award. The panel then issued a "Corrected Partial Final Award," concluding now that the settlement was a covered loss. It then held a hearing on defense costs and issued a "Final Award," awarding damages for the settlement and defense costs.

AISLIC brought this proceeding seeking to vacate the Corrected Partial Final Award and Final Award. The trial court denied the petition, but the Appellate Division reversed, ruling that the panel acted in excess of its authority by reconsidering the Partial Final Award.

The Court of Appeals unanimously reversed. The primary issue was whether the arbitration panel violated the common law doctrine of functus officio. The doctrine precludes an arbitrator from taking additional actions after issuing a final award. "In other words, under the common law rule, arbitrators relinquish all powers over the parties to the arbitration upon issuance of a final award and, therefore, are precluded from modifying or reconsidering that award (citations omitted)." *Id*. at *8.

The insureds argued that the functus officio rule was no longer valid under New York law because it was based on the since rejected anti-arbitration attitudes. The Court advised that it did not have to address that argument because it concluded that functus officio did not apply here since the "Partial Final Award" was not final. The Court noted that a "final" arbitration award generally resolves the entire arbitration; federal courts have recognized that partial arbitration determinations can be considered final awards "where the parties expressly agree both that certain issues submitted to the arbitrators should be decided in separate partial awards and that such awards will be considered to be final (citations omitted)" (*Id*. at *10); and the Court has not determined whether parties can agree to the issuance of a final award disposing of some, but not all of the issues submitted. However, the Court concluded that it was not required to resolve that issue here because the parties did *not* agree to the issuance of a partial determination constituting a final award:

> Although the insureds' counsel suggested a separate proceeding to determine the amount of Allied Capital's defense costs in the event the panel determined such costs were recoverable, AISLIC never consented to bifurcate the proceeding—remarking at one point that, in its view, "there [was] nothing left on [the defense costs] issue to talk about"—or agreed that any resulting partial decision would be treated as a final award. Notably, neither the parties nor the arbitrators ever discussed or otherwise demonstrated any mutual understanding regarding whether the proposed severance of the calculation of defense costs would result in a final partial award. This case is therefore distinguishable from Trade & Transport, in which the parties specifically agreed to bifurcate the arbitration for the very purpose of obtaining a "decision that was expressly intended to have immediate collateral effects in a judicial proceeding". Absent an express, mutual agreement between the parties to the issuance of a partial and final award, the functus officio doctrine would have no application in this case. Under these circumstances, we reject AISLIC's argument that the arbitration panel exceeded its authority by reconsidering the Partial Final Award (citation omitted).
>
> *Id*. at *12–13.

ISSN 0028-7636 (print) ISSN 2379-1225 (online)