SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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KATHLEEN HENRY,

Plaintiff-Respondent,

-against-

NEW JERSEY TRANSIT CORPORATION, RENAUD PIERRELOUIS,

Defendants-Appellants,

CHEN NAKAR,

Defendant.

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Index No. 156496/2015
Case No. 2020-00380

AFFIRMATION IN OPPOSITION

Brian J. Isaac, an attorney duly licensed to practice law in the State of New York, hereby affirms, under the penalties, the truth of the following statements:

I am a member of the law firm of Pollack Pollack Isaac & DeCicco, LLP, special and appellate counsel to Marder, Nass & Weiner, PLLC, attorneys for the plaintiff-respondent Kathleen Henry (the "plaintiff") in the above-captioned matter. I am fully familiar with the facts and circumstances of this case based upon the review of the file maintained by my office and my handling of this appeal which resulted in an affirmance of the trial court's order declining to set aside the jury's past and future pain and suffering award in any respects.

This Court, in its prior decision dated June 3, 2021, also held, correctly, that defendant New Jersey Transit Corporation ("New Jersey Transit") waived its sovereign immunity defense because it "did not place plaintiff or the court on notice of the defense by asserting it in its responsive pleadings, during pretrial litigation, at trial or in its post-trial motion." In fact, New Jersey Transit, and the other defendants, Renaud Pierrelouis and Chen Nakar (the "defendants"), raised the issue of sovereign immunity for the first time *on appeal*.

This Court, citing to Belfand v. Petosa, 2021 NY App. Div. LEXIS 3633 [1st Dept. June 3, 2021], held that New Jersey Transit waived the defense of sovereign immunity as a matter of law. As this Court pointedly noted in its terse decision and order, the defense, predicated on the United States Supreme Court's decision in Franchise Tax Bd. v. Hyatt, 139 Sup. Ct. 1485 [2019], was "available at the time New Jersey Transit served its answer." As such, citing Belfand, this Court held that New Jersey Transit's "litigation conduct induced substantial reliance on that conduct by plaintiff and our court, and is inescapably a clear declaration to have our courts entertain this action."

New Jersey Transit's current motion, which posits that this Court should grant leave to appeal to the Court of Appeals because the relevant legal issues have a "constitutional magnitude" (Pillarella Aff., p. 2, ¶6), misses the major point of both the decision in this case and in Belfand, which is that New Jersey Transit, by its conduct, consented to litigate the case in the New York state courts and thus waived any sovereign immunity defense that was otherwise available to it. This Court's holding in Henry and Belfand do not raise "novel" issues (Pillarella Aff., p. 3). In fact, the Petosa decision makes clear that this Court based its decision on basic waiver principles that New Jersey Transit cannot dispute factually or legally.

While New Jersey Transit points out that a state agency can raise a defense of sovereign immunity for the first time on appeal even after the conclusion of a trial (Pillarella Aff., pp. 3-4, ¶7), this doctrine of law is irrelevant to the prior holdings of this Court in this case and in Belfand. In fact, New Jersey Transit offers no excuse for its decision to litigate this case through trial despite having knowledge of the Hyatt decision, only raising the issue of sovereign immunity for the first time on appeal.

New Jersey Transit's claim that it is inconsistent for this Court to find that it was generally immune from suit on the one hand, but that it waived such immunity is wrong on the facts, wrong on the law, and wrong as a matter of procedure. Municipalities, of course, can waive even perfect liability defenses by their conduct. For example, in Martin v. Cohoes, 37 NY2d 162 [1975], there was a city ordinance that required "prior written notice of the defect." "Actual notice, no matter how explicit, and even if conceded, did not suffice" (id. at 164). Defendant elected to try the case on an ordinary negligence theory and lost at trial. On appeal, the Appellate Division dismissed the case based on the prior written notice statute. The Court of Appeals, however, reversed stating (37 NY2d at 165): "Parties to a civil litigation, in the absence of a strong countervailing public policy, may consent, formally or by their conduct, to the law to be applied (cits). The case before us was tried from the very beginning on the theory of actual notice, with the acquiescence, if not indeed at the affirmative request of the City. We find no countervailing public policy here."

Parties may "fashion the basis upon which a particular controversy will be resolved" (Cullen v. Naples, 31 NY2d 818, 820 [1972]). Because parties have the power to make the law of their own case (Travelers Ins. Co. v. General Acci., Fire & Life Assurance Corp., 28 NY2d 458 [1971]; In re Petition of New York, L. & W. R. Co., 98 NY 447, 453 [1885]) their decisions in civil litigation to try the case in a certain fashion will be enforced even where the stipulation abrogates statutory or constitutional rights (Mitchell v. New York Hospital, 61 NY2d 208, 214 [1984]).

In this regard, this Court has held that a party can be precluded from asserting an otherwise potentially valid defense based on "unexcused delay" where the plaintiff is prejudiced by having to "expend significant time and expense in preparing for trial under the belief that (defendant would not assert such a defense)", especially where plaintiff's preparation and approach to the case

"may have been altered if plaintiff was aware of defendant's (intent to assert such a defense)" (Bradford v. Chowdhury, 183 AD3d 431, 432 [1st Dept. 2020]). This Court in Belfand specifically endorsed this paradigm.

Substantively, while the U.S. Constitution bars non-consenting states from being sued in state court without their consent, sovereign immunity can be waived by a "voluntary invoking" of a trial court's "jurisdiction" (Belfand, supra, citing, College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 US 666, 675-676 [1999]) or by a state's litigation conduct (Lapides v. Bd. of Regents, 535 US 613, 618 [2002]). Indeed, the Supreme Court has expressly held that while sovereign immunity is jurisdictional in nature (FDIC v. Meyer, 510 US 471, 475 [1994]), it can be waived by express or unambiguous actions (Edelman v. Jordan, 415 US 651 [1974]). And, while an "inference" of consent is insufficient (Florida Dep't of Health & Rehabilitative Services v. Florida Nursing Home Ass'n, 450 US 147 [1981]), here New Jersey Transit litigated this case from the inception of the litigation without ever objecting to the jurisdiction of the State Supreme Court; indeed, it only belatedly objected to the exercise of that jurisdiction on appeal, not even raising the issue of sovereign immunity in its post-trial motion papers.

In this case, no significant constitutional issue is involved at all. Indeed, the issue of waiver in these circumstances involves the type of mixed question of law and fact which may actually be *beyond* the power of the Court of Appeals to review. See generally, In re Von Bulow, 63 NY2d 221 [1984]. Plaintiff submits that this Court did not "abuse its discretion" in failing to hold that New Jersey Transit's sovereign immunity defense was effectively waived. See, Brady v. Ottaway Newspapers, Inc., 63 NY2d 1031 [1984].

In the end, defendants' assertion that the issue here is leaveworthy is indicted by its own litigation conduct.

WHEREFORE, for the foregoing reasons, it is respectfully requested that the within application be in all respects denied, and that this Court issue any other, further or different relief it deems just, proper and equitable.

Dated: New York, New York
July 13, 2021

Brian J. Isaac, Esq.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
SS.:
COUNTY OF NEW YORK)

Danielle Henderson being duly sworn, deposes and says:

I am over 18 years of age, I am not a party to the action, and I reside in Kings County in the State of New York. I served a true copy of the annexed ***Affirmation in Opposition*** on July 13, 2021 via NYSCEF, addressed to the last known address of the addressee as indicated below:

Dean L. Pillarella, Esq.
McGivney, Kluger, Clark & Intoccia, PC
80 Broad Street, 23rd Floor
New York, New York 10004

Danielle Henderson

Danielle Henderson

Sworn to before me this
13th day of July 2021

NOTARY PUBLIC

BRIAN J. ISAAC
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 021S4920550
Qualified in Nassau County
Commission Expires April 2, 2022

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AFFIRMATION IN OPPOSITION

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To:
Attorney(s) for

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contention contained in the annexed document are not frivolous.

Dated: *July 13, 2021* *Signature*: _____
Print Signer's Name: _____