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September 2, 2021

John P. Asiello
Chief Clerk and Legal Counsel
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207-1095

Re: Henry (Kathleen) v. NJ Transit Corp
APL-2021-00138

Dear Mr. Asiello:

Please accept this letter memorandum in connection with your August 26, 2021 letter to counsel for defendant-appellant and the undersigned regarding defendants' appeal as of right from the order of the Appellate Division as to whether defendants claim that the appeal is proper because it involves a "constitutional question" that is "directly involved" in the June 3, 2021 Appellate Division order is correct. Plaintiff submits that this Court should dismiss this appeal based upon the governing case law that is adumbrated herein.

It is not infrequent that parties will purportedly appeal to this Court as of right based on the alleged unconstitutionality of a lower court decision. However, this Court very often dismisses those appeals on the ground that an appeal of right does not lie from a "unanimous order of the Appellate Division absent the direct involvement of a substantial constitutional question" pursuant to CPLR §5601(1). See generally, Matter of Claim of Bruce Muller v. Square Deal Machining, Inc., 35 NY3d 1100 [2020]; Matter of Ann Corrigan v. Johnisha Minton, 35 NY3d 1098 [2020]; Davis v. Great Am. E&S Ins. Co., 35 NY3d 1077 [2020]; People ex rel. Smythe v. Miller, 35 NY3d 1056 [2020]. As the above cases make clear, very often the dismissal is made "sua sponte" or on this Court's "own motion."

The First Department's appeal in Henry v. N.J. Tr. Corp., 195 AD3d 444, 445 [1st Dept. 2021] did not involve a constitutional issue of substance. There, the First Department held that 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 responsive pleadings, during pretrial litigation, at trial or in itss post-trial motion." In fact, the defense was raised for the "first time on appeal." Since the defense predated the United States Supreme Court's decision and Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485 [2019] the First Department properly noted that the defense was waivable because it "induced substantial reliance on that conduct by plaintiff and our court."

In Belfand v. Petosa, 196 AD3d 60 [1st Dept. 2021], the First Department, in a full opinion by Justice Oing, specifically held, in accordance with settled United States Supreme Court precedent, that a sovereign immunity defense can be waived where the defendant possessing same voluntarily invokes the court's jurisdiction. See, Lapides v. Bd. of Regents, 535 U.S. 613 [2002]; College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675 [1999].

Accordingly, defendant's assertion that this case is appealable as of right because it involves the direct involvement of a substantial constitutional question is definitionally wrong from both a legal and factual perspective. In point of fact, this Court has held that appeals should be dismissed, even in the face of a claim that the issue is appealable of right, where the underlying constitutional issue that supports the appellant's claim has "not been reached" (Willets v. Murray, 20 NY2d 754, 755 [1967]; Willets v. Schnell, 16 NY2d 686, 876 [1969]).

Here, the constitutional issue regarding New Jersey Transit's amenability to suit was never adjudicated and was not the basis of the First Department's decision. Rather, that decision was predicated upon principles of waiver that have nothing to do with any issue of constitutional law. As made clear in Belfand, supra, New Jersey Transit actually prevailed on the sovereign immunity issue, though it lost, as it did here, on the related waiver issue.

Accordingly, defendant's claim that the Appellate Division's decision is appealable as of right is patently without merit. As noted, as far back as 1918 in Haydorn v. Carroll, 225 NY 84, 87 [1918] "in considering the provision of the Code as permitting as of right appeals where a constitutional question is involved, we must keep in mind the requirement that the construction of the Constitution must be 'directly' involved. The circumstance that it may be involved in some indirect and remote sense is not enough to permit an appeal." This Court in Haydorn cited to People ex rel. Moss v. Board of Sup'rs, 221 NY 367, 369 [1917] where Judge Collins, writing for a unanimous court, noted: "In a certain sense, perhaps, each enforcement of a statute by a court involves its constitutionality or the construction of the Constitution of the state. That sense, however, was not within the legislative mind or intention in enacting the present restriction of our jurisdiction. An appeal, upon the ground asserted herein, must present to us directly and primarily an issue determinable only by our construction of the Constitution of the state or of the United States."

Haydorn, supra, also makes clear that the "appellant who relies upon this provision as an authority for his appeal assumes the burden of presenting to us a record which establishes that such construction has been not only directly but necessarily involved in the decision in the case." More pertinently, the Haydorn

court also remarked "if the decision was or may have been based upon some other ground *the appeal will not lie* (emphasis ours)."

More recently, in Board of Education v. Wieder, 72 NY2d 174, 182 [1988], this Court, relying on Haydorn, stated "even where a constitutional question may be otherwise involved, an appeal of right does not lie if the decision appealed from was or could have been based upon some ground other than the construction of the Constitution." Here, the Appellate Division's decision *was* based upon defendant's waiver of the right to assert the defense of sovereign immunity.

Accordingly, New Jersey Transit's claim that this case is appealable as of right is plainly incorrect.

Cohen & Karger, in their seminal treatise Powers of the New York Court of Appeals, (Sec. 7.5, at p. 226 [3d. ed. rev. 2005]) specifically noted that although it is not explicitly stated in the statute, in order to "safeguard against abuse of the right to appeal on constitutional questions" the predicate constitutional issue must be "substantial." Otherwise, "creative attorneys" could "manufacture constitutional issues in every case in which they lose in the Appellate Division" (Matter of City of New York v. 2305-07 Third Ave., LLC, 142 AD3d 69, 75 [1st Dept. 2016]).

However, there is even more here. It is ancient precedent that "if a case can be decided on either of two grounds, one involving a constitutional question, the

other a question of statutory construction or general law, the court will decide only the latter" (Ashwander v. TVA, 297 U.S. 288, 347 [1936], Brandeis, J., concurring); People ex Rel. Wetmore v. Board of Supervisors of County of New York, 3 Abb. Dec. 566 [1865]. Otherwise stated, it is "hornbook law that a court will not pass upon a constitutional question if the case can be disposed of in any other way" (People v. Felix, 58 NY2d 156, 161 [1983]). Here, the First Department disposed of this case on a procedural basis. As such, the claimed constitutional underpinnings of defendant's "as of right appeal" actually does not exist.

In the end, as we have hopefully proven, defendant's assertion that this case is appealable as of right does not correctly reflect the law or the facts disclosed by this record. This Court should, on its own motion, dismiss the appeal.

Very truly yours,

Brian J. Isaac, Esq.

cc:

VIA OVERNIGHT MAIL & EMAIL
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CERTIFICATE OF COMPLIANCE

It is hereby certified pursuant to 22 NYCRR §500.13(c) that the foregoing Plaintiff's Jurisdictional Response was prepared on a computer.

A proportionally spaced typeface was used as follows:

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The total number of words in the Plaintiff-Respondent's Jurisdictional Response, inclusive of point headings and footnotes and exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented by subsection (a) of this section; and any addendum containing material required by §500.1(h) is 1,208.

Dated: **September 2, 2021**
New York, New York

Respectfully submitted,

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STATE OF NEW YORK)
COUNTY OF NEW YORK) SS

Dave Jackson, Being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

That on 9/2/2021 deponent caused to be served 1 copy(s) of the within

Jurisdictional Response Letter to the Court of Appeals for the State of New York

upon the attorneys at the address below, and by the following method:

By Overnight Delivery and Email

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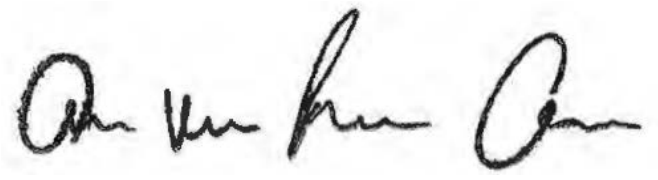

Sworn to me this
Thursday, September 2, 2021

Antoine Victoria Robertson Coston
Notary Public, State of New York
No.01RO6286515
Qualified in Nassau County
Commission Expires on 7/29/2025

Case Name: Henry (Kathleen) v NJ Transit Corp

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