State of New York
Court of Appeals

KATHLEEN HENRY,

Plaintiff-Respondent,

-against-

NEW JERSEY TRANSIT CORPORATION, RENAUD PIERRELOUIS,

Defendants-Appellants,

-and-

CHEN NAKAR,

Defendant.

AMICUS BRIEF
IN SUPPORT OF KATHLEEN HENRY

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Appellate Division, First Department Docket No. 2020-00380
Supreme Court, New York County, Index No. 156496/15

TABLE OF CONTENTS

	Page
Preliminary Statement	1
Facts Pertaining To *Fetahu v. NJTC*	3
POINT I	
INTERSTATE SOVEREIGN IMMUNITY IS NOT A MATTER OF TRUE SUBJECT MATTER JURISDICTION	8
POINT II	
THE AFOREMENTIONED FOOTNOTE 1 IS ADDITIONALLY SIGNIFICANT	10
POINT III	
THE LITIGATION CONDUCT OF NJTC MUST BE DEEMED TO CONSTITUTE A CLEAR AND UNEQUIVOCAL WAIVER OF ANY AND ALL OBJECTIONS TO THE JURISDICTION OF NEW YORK	11
POINT 1V	
NEW YORK VEHICLE & TRAFFIC LAW SECTION 253 REQUIRES A FINDING OF WAIVER AS WELL	14

POINT V

NJTC CANNOT PROPERLY BE DEEMED
AN ARM OF THE STATE OF NEW JERSEY 17

Conclusion 18

TABLE OF AUTHORITIES

	Page
CASES	
Belfand v. New Jersey Transit Corporation 196 AD3d 60	2, 10
Cerreta v. New Jersey Transit Corporation 267 AD2d 128	14
Fetahu v. New Jersey Transit Corporation 197 AD3d 1065	1, 2, 3
Franchise Tax Board of California v. Hyatt 538 US 488, 123 S Ct 1683	13
Franchise Tax Board of California v. Hyatt 578 US 171, 136 S Ct 1277	13-14
Franchise Tax Board of California v. Hyatt 139 S Ct 1485	7, 8, 9, 10, 12, 13
Henry v. New Jersey Transit Corporation 195 AD3d 444	2, 3
Leighton v. Roper 300 NY 434	16

Page

CASES

Matter of Hook v. Snyder
193 AD3d 588 — 8

Matter of Nemes v. Tutino
173 AD3d 16 — 8

Nevada v. Hall
440 US 410, 99 S Ct 1182 — 4, 12, 13

Shushereba v. Ames
255 NY 490 — 16

STATUTES

CPLR 301 — 16

CPLR 302 — 16

Vehicle & Traffic Law
Section 253 — 14, 15, 16, 17

COURT OF APPEALS
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Defendant.

New York Court of Appeals Docket No. New York Court of 2021-00138

----------x

BRIEF FOR *AMICUS CURIAE* VALBONA FETAHU IN SUPPORT OF PLAINTIFF-RESPONDENT

PRELIMINARY STATEMENT

This brief is respectfully submitted by Valbona Fetahu (hereinafter denominated "Fetahu," without italics, when referred to as an individual,) the plaintiff in the case of *Fetahu v. New Jersey Transit Corp.* (hereinafter NJTC,) bearing New York County Index No.158294/2013.

Upon appeal therein, the Appellate Division, First Department, at 197 AD3d 1065, as it had done in both *Henry v. NJTC*, 195 AD3d 444 and *Belfand v. NJTC*, 196 AD3d 60, affirmed the motion Court's denial of NJTC's applications to dismiss based principally upon interstate sovereign immunity.

We respectfully submit that NJTC is in essence claiming a non-existent right of *intra*-litigation forum shopping, contending it is free to sit back and assess its chances of success throughout a litigation and then, at any time during the course of the litigation NJTC is unhappy with how it feels the case is progressing, have the case dismissed. Even more egregious, NJTC apparently claims it is free to seek the dismissal after the Statute of Limitations has expired in New Jersey.

It is also obvious that NJTC additionally seeks *inter*-litigation advantage because it will without question attempt to utilize any successful result it obtains in *Henry* as a sword with which to attack and reverse the determination in *Fetahu*.

In that connection, NJTC criticizes the Appellate Division decisions in *Henry*, *Fetahu* and *Belfand* at pp 24-27 of its brief to this Court, and

specifically critiques *Fetahu* at p 26 thereof.

The primary purpose of this brief is to further establish that the determination of the Appellate Division was correct in *Henry*.

Secondarily, we wish to make it clear that the facts in *Fetahu* are sufficiently in accord with those in *Henry* so that an affirmance of *Henry* should establishes that any effort by NJTC to seek relief in this Court upon the same ground once a final judgment is obtained by Fetahu would be fruitless. Such will serve judicial economy and prevent unnecessary expenditures of time and money by Fetahu down the road.

We are fully aware of the competent, excellent and lengthy briefs already filed in this Court by Henry as well as the New York State Trial Lawyers' Association (the latter pending on motion for permission to file same.) We fully agree with the Points made therein, and will not repeat same. Instead, we will present our contentions as simply and succinctly as possible.

FACTS PERTAINING TO *FETAHU V. NJTC*

A. Dates of Interest

March 5, 1979	*Hall* decided
September 11, 2013	Filing of summons and complaint.

November 20, 2013	Filing of NJTC's answer.
April 19, 2016	*Hyatt II* decided.
May 2, 2016	Initial Note of Issue filed in *Fetahu*
May 13, 2019	*Hyatt III* decided (& second Note of Issue filed in *Fetahu*).
December 2, 2019	NJTC's application to dismiss.

B. Underlying Action

Fetahu's Verified Complaint, filed September 11, 2013, alleges she sustained grievous bodily injuries when, on January 5, 2013, a NJTC bus in which she was a lawful passenger came to a sudden and extremely short stop as it was about to enter the Port Authority Bus Terminal in Manhattan (NYSCEF file for *Fetahu*, doc. no. 1.)

C. NJTC's Answer

NJTC's Answer, filed November 20, 2013 (NYSCEF doc. no. 4), did not assert any defense of a lack of subject matter jurisdiction, the absence of personal jurisdiction, or any defense of sovereign immunity - whether upon the basis of comity or upon any "embedded Constitutional right."

It did not allege any other defense based upon comity. It did not seek a dismissal by reason of the Full Faith and Credit Clause.

In short, NJTC gave every indication that it intended to and was fully and completely submitting itself to the jurisdiction of the Courts of the State of New York, to entertain the litigation upon its merits and to its conclusion.

NJTC's Answer asserted seven affirmative defenses, as follows: comparative fault (first affirmative defense); contributory fault of third persons (second affirmative defense); (no third affirmative defense is listed); CPLR Article 6 equitable share (denominated as the fourth affirmative defense); Insurance Law Section 5102 absence of serious injury (fifth affirmative defense); CPLR 4545(c) collateral sources (sixth affirmative defense); seat belt defense (seventh affirmative defense); and failure to mitigate damages (eighth affirmative defense).

Hence, NJTC's Answer invoked the authority of multiple case law precedent and statutory provisions of New York in an effort to avoid liability and/or reduce its exposure in damages.

NJTC has never sought to amend its Answer, and its Answer has never been amended.

D. Activity From NJTC Answer To It Seeking Dismissal

Instead, from the filing of its Answer until NJTC's underlying motion, NJTC at all times vigorously litigated the case on the merits without ever suggesting or even hinting that it did not wish to have the New York Courts proceed with, fully manage and finally determine the litigation upon its substantive merits.

NJTC never objected in any way to the jurisdiction of the New York State Courts. During that entire time - more than six years, NJTC did absolutely nothing to question or challenge jurisdiction in New York. Rather, it fully submitted to jurisdiction in New York and aggressively litigated the case.

More specifically, the NYSCEF Document list for *Fetahu* in the trial Court, to the time of Fetahu's opposition to NJTC's motion to dismiss, consisted of 153 entries, including the pleadings, numerous Court conferences, stipulations, motions and even references to appellate practice (which occurred).

NJTC's intensive litigation of the case included compelling counsel for plaintiff to travel to San Diego, California in January, 2019. to conduct the

deposition of a non-party California entity. (That entity monitored camera systems on NJTC buses and generated reports pertaining to unusual circumstances, including sudden stops.) NJTC was also represented by counsel at that deposition.

Until document 147 (the underlying application by NJTC to dismiss,) nothing - literally nothing - in the case even hinted at any assertion of a lack of jurisdiction or other objection by NJTC to the case fully proceeding to a conclusion in the New York Court.

For instance, prior to moving to dismiss, and just three weeks before the decision in *Hyatt III* came down - we find that counsel for both parties to the action attended two pre-trial status conferences. Each generated an Order of the Court (via So Ordered stipulations signed by the attorneys for both Fetahu and NJTC,) which Orders are found at NYSCEF doc. nos. 142 and 143.

Each Order provided NJTC with additional discovery.

Then, after an unexplained delay of six plus months after *Hyatt III* was decided, and on what should have been the eve of trial, NJTC suddenly sought dismissal of the *Fetahu* action.

Fetahu has not yet been tried. The case would have been tried and disposed of long ago but for the Covid crisis and adjournments of the trial to await the outcome of the *Fetahu* appeal in the Appellate Division and now of the appeal to this Court in *Henry*.

POINT I

INTERSTATE SOVEREIGN IMMUNITY IS NOT A MATTER OF TRUE SUBJECT MATTER JURISDICTION

Subject matter jurisdiction of course cannot be created by waiver, estoppel, laches or consent, *Matter of Hook v. Snyder*, 193 AD3d 588; *Matter of Nemes v. Tutino*, 173 AD3d 16.

Yet NJTC expressly concedes sovereign immunity may be waived, and that the waiver can occur by reason of litigation conduct:

> "In some cases, an arm-of-state may be deemed by its conduct in a litigation to have waived sovereign immunity." (NJTC initial brief to this Court, p 8).

Footnote 1 of *Hyatt III*, at 139 S Ct 1485, 1492, removes all question as to same in any event, and clearly continues the prior law in that connection.

Justice Thomas there wrote for the majority:

> "We also reject Hyatt's argument that the Board waived its immunity. The Board has raised an immunity-based argument from this suit's inception, though it was initially based on the Full Faith and Credit Clause."

The foregoing quotation is clearly not dicta. The Supreme Court was there addressing Hyatt's contention that the defendant-Board had waived any claim to the absence of jurisdiction.

Moreover, if waiver by litigation conduct is not a viable assertion, then Footnote 1 is superfluous irrelevancy. Instead of writing that the Board's litigation conduct eliminated any claim of waiver, the Court would have instead asserted there can be no waiver or, at the least, that there can be no waiver by litigation conduct.

Such cannot be presumed and is clearly not so.

Needless to say, the Supreme Court acknowledging that sovereign immunity may be given up by consent - which in turn may be manifested by a waiver (including such by litigation conduct), conclusively established sovereign immunity is not truly a matter of subject matter jurisdiction. Instead, it is simply a waivable privilege/defense, which NJTC has done here.

POINT II

THE AFOREMENTIONED FOOTNOTE 1 IS ADDITIONALLY SIGNIFICANT

At the said Footnote 1, the Court noted that the defense of sovereign immunity had not been waived because the Board had asserted the absence of jurisdiction in its Answer, from the very inception of the litigation. Hence, what was significant to the Supreme Court was that the defendant had objected to the forum State proceeding with the case from the beginning.

It did not matter that the objection was based upon the Full Faith and Credit Clause rather than sovereign immunity. What was significant to the Court was that the defendant had evinced its objection to jurisdiction at and from the earliest possible time.

In *Fetahu* (as well as *Henry* and *Belfand*,) the Answers filed by NJTC raised no jurisdictional defenses whatsoever. And NJTC never sought to amend its Answers in any of those litigations.

POINT III

THE LITIGATION CONDUCT OF NJTC MUST BE DEEMED TO CONSTITUTE A CLEAR AND UNEQUIVOCAL WAIVER OF ANY AND ALL OBJECTIONS TO THE JURISDICTION OF NEW YORK

In sum, the failure of NJTC to make any objection in its Answers to the New York Courts proceeding with the involved litigations to their conclusion, NJTC's failure to seek to amend its Answers at any time, its full submission to the jurisdiction of the New York State Courts, and the vigorous litigation of the cases in the New York Courts without seeking a dismissal upon any jurisdictional (or other) ground for more than six years, must be held to be a waiver of any and all jurisdictional objections to New York jurisdiction - whether based upon sovereign immunity or otherwise.

NJTC contends it may raise sovereign immunity as a defense at any time. Assuming for purposes of argument that such proposition is correct, the defense will not and cannot be successful if it has already been waived by litigation conduct.

Needless to say, whether sovereign immunity is deemed subject to comity or is a right subject to the assertion of the defendant State, it must be raised to be effective. In either event, if it never raised it has been waived.

But merely asserting the defense is never dispositive. In that connection, when the defense is raised and what has occurred prior to that point in the litigation will be key determinative elements in deciding whether there has been a waiver.

The defense was available long prior to *Hall*, which was decided in 1979. It was available from the *Hall* decision expressly as a matter of comity to be determined by the forum State, and NJTC explicitly concedes such. Neither *Hall* nor *Hyatt* affected the existence of sovereign immunity itself.

NJTC's only excuse for not raising sovereign immunity as a defense in its Answer or thereafter for more than six years is that NJTC allegedly came to its own entirely subjective conclusion it was "extremely unlikely," (NJTC initial brief to this Court, at p 2), or "highly unlikely" (ibid, pp 2, 26) that an application to dismiss based upon such defense would be granted

. That, of course, is no excuse at all. Not for failing to assert sovereign immunity as a matter of comity or otherwise, or for failing to raise any other jurisdictional defense to the actions, not for failing to raise any objection to the cases proceeding in New York to their conclusion, and not for vigorously litigating the cases in New York without any protest for more than six years.

For instance, the defendant in *Hyatt* raised a jurisdictional objection from the earliest possible time in that lawsuit, which was commenced on January 6, 1998 (see *Hyatt I*, 538 US 488, 491) - subsequent to *Hall* and years prior to any of the NJTC litigations involved here.

Even if comity could somehow be deemed an adequate excuse for failing to object in any way, the *Hyatt II* Court made it abundantly clear that *Hall* was hanging by the slimmest of threads, repeatedly expressly stating the Court was evenly split (4-4) on whether *Hall* should be reversed (see 578 US 171, at pp 173, 176,) a circumstance noted by Justice Thomas in *Hyatt III* (see 139 S Ct 1485, at p 1491).

Even NJTC's attorney acknowledged that in his affirmation in support of NJTC's underlying motion to dismiss in *Fetahu*:

> "[The Supreme Court] also suggested it may be willing to overturn *Nevada v. Hall*." (NYSCEF doc. no. 148, at p 3, par 11)

Given that *Hall* was hanging by its fingernails, NJTC clearly had no excuse or reason but to be proactive if it in fact did not want to proceed in New York. Once again, it has no excuse for failing to assert an objection to jurisdiction.

Hyatt II was decided on April 19, 2016. Yet NJTC continued to fully litigate *Fetahu* in New York for more than the next three and a half years without the slightest objection or any request for a dismissal.

Yet again, it could not be clearer than that NJTC waived sovereign immunity and any and all other jurisdiction based defenses.

POINT 1V

NEW YORK VEHICLE & TRAFFIC LAW SECTION 253 REQUIRES A FINDING OF WAIVER AS WELL

Fetahu respectfully contends that to allow NJTC to walk away from Section 253 and escape all liability would be nothing less than an endorsement of fraud upon the State of New York, the citizens of the State of New York, and all those who use the roadways and streets of the State of New York.

In addition, NJTC is barred from any such escape by the doctrines of both waiver and estoppel applicable to its newly minted effort to defy VTL Section 253 - after consenting to suits against it in New York for many years; see, for instance, *Cerreta v. NJTC*, 267 AD2d 128.

Each day, every day, NJTC sends numerous vehicles, operated by its employees, into New York State in pursuit of its commercial operation to make money. And it is undeniable that such activities have, over the years, provided NJTC with a good deal of revenue.

Likewise, it is undeniable that such activities in New York by NJTC have resulted in serious injury and death. Now NJTC seeks to avoid all responsibility and liability for any injury or death resulting from its negligent (or even intentional) conduct in New York.

It cannot properly do so.

VTL Section 253(1) mandates that non-residents using or operating vehicles in New York, or the use or operation in New York in the business of a non-resident, etc., constitutes the appointment of the New York Secretary of State as the agent for service of process in any case arising out of an accident or collision in which the non-resident is involved. The appointment is deemed non-revocable and is binding upon his executor or administrator.

The non-resident thereby submits to suit in the State of New York.

The provisions of that statute are a condition precedent to permitting non-residents to operate motor vehicles in New York. It has repeatedly been

held constitutional, *Leighton v. Roper*, 300 NY 434; *Shushereba v. Ames*, 255 NY 490.

VTL Section 253 is not analogous to CPLR 301 or 302, because its conferral of jurisdiction is limited to a very specific situation (use of New York roads by non-residents) instead of the far broader scope of the aforementioned CPLR provisions.

By operating its vehicles in New York for many years, NJTC has acknowledged the applicability of VTL Section 253 and subjected itself to the provisions thereof. And in so doing, it has represented to New York that it is bound by the terms, limitations and conditions of that statute.

This case, as does *Fetahu*, falls squarely and precisely within the ambit of VTL 253.

If, for example, NJTC prevails upon a claim that VTL Section 253 confers personal but not subject matter jurisdiction, and thus NJTC can assert the absence of subject matter jurisdiction to avoid litigation in New York, then NJTC in essence agreed to and was and is bound by nothing in VTL Section 253.(And it has already been demonstrated that sovereign immunity is not a topic of pure subject matter jurisdiction in any event.)

Sovereign immunity existed as a defense prior to the enactment of Section 253. In agreeing to jurisdiction under Section 253, NJTC must be deemed to have given up any entitlement to assert sovereign immunity (as well as any other jurisdictional defense) by reason of waiver and estoppel.

POINT V

NJTC CANNOT PROPERLY BE DEEMED AN ARM OF THE STATE OF NEW JERSEY

The foregoing discussion in its entirety assumed arguendo and without prejudice that NJTC could properly be deemed an arm of the State of New Jersey and that even as such, it had waived any jurisdictional defense available to it.

We contended, both to the motion Court (NYSCEF doc. no. 154, pp 14-15) and in the *Fetahu* brief to the Appellate Division (pp 7-8) that NJTC could not properly be held to be an arm of the State of New Jersey..

And as established in the *amicus* brief sought to be submitted herein by the New York State Trial Lawyers' Association, NJTC is not in fact an arm of the State of New Jersey.

It indeed does appear that, as argued in that brief, NJTC has been a bit less than forthright in arguing to the contrary.

Thus, at p 10 of its brief, NJTC urges that a "critical factor" in ascertaining whether an entity is in fact an arm of the State is "the likelihood that a judgment entered against an entity will be paid from a state's treasury..."

NJTC thereafter proceeds to completely ignore whether it or the State of New Jersey is responsible for payment of judgments against NJTC for liability for injury due to the negligent operation of NJTC's buses. And that is for good reason. As shown in the Trial Lawyers' Association's proposed brief, the State of New Jersey has absolutely no responsibility to pay any of NJTC's debts!

It is clear, in total, that NJTC cannot properly be deemed an arm of the State of New Jersey at least in cases as here, and thus it is in no event entitled to assert the jurisdictional privileges it claims.

CONCLUSION

The determination of the Appellate Division affirming the denial of NJTC's motion to dismiss herein must be affirmed.

The facts are sufficiently identical in *Henry* and *Fetahu* that an affirmance upon the same grounds would be merited in *Fetahu* if NJTC sought relief from this Court once a final judgment is obtained by Fetahu, and we ask this Court to detail the facts constituting NJTC's waiver with sufficient specificity to make that abundantly clear.

Dated: Jamaica, New York
July 5, 2022

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

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KATHLEEN HENRY v. NEW JERSEY TRANSIT CORPORATION, RENAUD PIERRELOUIS -and- CHEN NAKAR

20-00380

State of New York }
County of Kings }

Jonathan Didia , being duly sworn, deposes and says that he is over the age of 18 years of age, is not a party to the action and is employed by Dick Bailey Service, Inc. That in the above case on Tuesday, September 13, 2022 deponent served 2 copies of the within

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by dispatching the paper to the person(s) by overnight delivery service at the address(es) designated by the person(s) for that purpose, pursuant to CPLR 2103(b)(6).

Jonathan Didia

Sworn to before me
Tuesday, September 13, 2022

WILLIAM BAILEY
Notary Public, State of New York
No. 01BA6311581
Qualified in Richmond County
Commission Expires Sept. 15, 2022

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