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A Landlord By Any Other Name

In *137 Broadway Assocs. v. 602 W. 137th Deli Corp.*, a landlord commenced a declaratory judgment action against its tenant's insurance company seeking a declaration from the Court that the insurance company has an obligation to defend and indemnify the landlord in an underlying "slip and fall" action concerning the leased premises. Although a landlord was named as an additional insured under the policy, it was the wrong landlord.

Parties may seek a "declaratory judgment" after a legal controversy has arisen but before any damages have occurred or any laws have been violated. A declaratory judgment differs from other judicial rulings in that it does not require that any action be taken. Instead, the court, after analyzing the controversy, simply issues an opinion declaring the rights and obligations of each of the parties involved. The only caveat is that there must be an actual, rather than hypothetical, controversy that falls within a court's jurisdiction.

In this case, the tenant had moved into the landlord's building and, as often the case, renewed the same liability insurance coverage that it had as a tenant in its prior location. Upon renewal, the new address of the covered premises was updated, but the old landlord's name, as additional insured, was not changed. When the new landlord was sued in a negligence action concerning a fall in the leased premises, the insurance company denied coverage because the new landlord was not properly named as the additional insured–only the old one. The new landlord asked the Court to exercise its equitable powers and reform the insurance policy based on the doctrine of "mutual mistake."

In New York, courts routinely recognize that a mutual mistake occurs only when a signed writing does not accurately express the agreement intended by the parties. To rebut the heavy presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties, a proponent of reformation must show in no uncertain terms, not only

that a mistake or fraud exists, but exactly what was really agreed upon between the parties. This is particularly true where the negotiations were conducted by sophisticated, counseled people. However, the doctrine of mutual mistake generally may not be invoked by a party to avoid the consequences of its own negligence or own unilateral mistake. In this case, the insurance company argued that the only mistake that occurred was unilateral mistake on the part of the tenant, and that the tenant's unilateral mistake in listing its prior landlord as the additional insured precluded its current landlord from receiving coverage.

The Court rejected this argument because it failed "to recognize a long line of cases holding that '[t]he name of the insured stated in the policy is not the sole factor to be considered in determining who was the intended insured.' When the intent to cover a risk is clear and one party innocently, mistakenly, and unilaterally lists a nonentity as the additional insured, New York courts have held that it is appropriate to regard that mistake as a mutual mistake and to honor the intent of the contract rather than uphold the erroneous drafting."

The Court ruled that on "this record, the clear intent of the policy was to insure risks associated" with the new landlord's ownership of the premises (premises which were correctly identified in the policy). The Court expressed that "there was never a time when [the old landlord] could have benefitted from the Policy as they were not, and have never been, the owner, manager, or lessor of" the new premises. It held that the undisputed evidence shows that the mistake in naming the old landlord was "innocent, and was based on [the tenant's] prior landlord-tenant relationship." Thus, the unnamed landlord got the coverage that was intended by the policy.

Practice Doesn't Always Make Perfect For Employers

A recent New York State Court of Appeals decision applied the test for establishing a "binding past practice under the Taylor Law." In *Chenango Forks Cent. Sch. Dist. v. N.Y.S. Public Emp't Relations Bd.*, 2013 WL 2435066 (2013), the plaintiff school district commenced an Article 78 proceeding, seeking review of a PERB decision finding that it violated the Taylor Law when it unilaterally discontinued the reimbursement of Medicare Part B premiums.

The Public Employees Fair Employment Act, commonly known as the Taylor Law, is a New York State statute named after the labor researcher George W. Taylor, which authorizes a governor-appointed State Public Employment Relations Board ("PERB") to resolve contract disputes for public employees, while limiting their right to strike.

In 2003, the Chenango Forks Central School District (the "District") circulated a memorandum announcing the termination of its longstanding practice of reimbursing

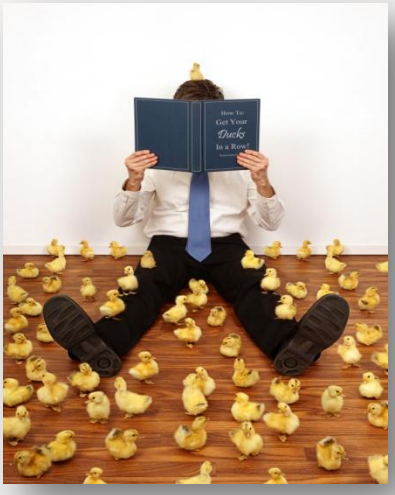
Medicare Part B premiums for retirees 65 years of age or older, due to costs. The Union objected, and filed a contractual grievance, alleging that the District's actions violated the current collective bargaining agreement. However, the arbitrator concluded that no such payments were required by the contract, and, thus, denied the grievance.

The Union then sought relief in a different forum, this time from PERB. After a hearing, the Administrative Law Judge ("ALJ") concluded that the School District had violated Civil Service Law § 209-a(1). She found that there existed "a past practice of providing a benefit — *i.e.,* the promise to reimburse current employees' post-retirement Medicare Part B premiums — which is a mandatory subject of bargaining. PERB applied the test for determining whether a binding past practice exists, established in *County of Nassau*, 24 PERB 3029 (1991). There, PERB stated that a past practice is binding when the "practice was *unequivocal* and was *continued uninterrupted* for a period of time sufficient under the circumstances to create a *reasonable expectation* among the affected [bargaining] unit employees that the [practice] would continue" (emphasis added).

The ALJ found that the practice was *unequivocal*, because the level of expenditure — about $500,000 between 1988 and 2003 — and extensive documentation in the District's records demonstrated the District's knowledge of the practice. Further, after additional testimony, the ALJ found that the witnesses for the Union sufficiently explained their knowledge of the District's practice, thereby demonstrating the requisite "reasonable expectation," or "reliance," on the continuation of the practice.

The District commenced an Article 78 proceeding seeking review of the ALJ's findings; however, the court found the District's arguments unpersuasive and without merit, and affirmed the ALJ's determination.

If It Looks Like A Duck . . .



In a case in which almost every college student can relate to, the United States District Court for the Southern District of New York held that Fox Searchlight Pictures, among other companies, improperly classified plaintiffs as "unpaid interns," rather than employees covered by the Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL").

These federal and State laws were created to establish the standard work week, minimum wage, guaranteed "time-and-a-half" for overtime in certain jobs, and to prohibit oppressive child-labor, among other things.

In *Glatt v. Fox Searchlight Pictures Inc.*, 2013 WL 2495140, 11 CV 6784(WHP) (S.D.N.Y. 2013), plaintiffs argued that they were employees under the FLSA

and NYLL and therefore entitled to wages, among other things. In determining whether an employee is covered by the FLSA and NYLL, the Court explained that there are two tests. First is a "*formal* control test" set forth in *Carter v. Dutchess Cmty. College*, 735 F.2d 8 (2d Cir. 1984). This test looks to whether the alleged employer:

> *(1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.*

Carter, at 12.

The second test, set forth in *Zheng v. Liberty Apparel Co.*, 335 F.3d 61 (2d Cir. 2003), is the "*functional* control test." This tests looks at:

> *(1) whether the [putative employer's] premises and equipment were used for the plaintiffs' work; (2) whether the [subcontractors] had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to [the putative employer's] process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the [alleged employer] or [its] agents supervised plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for the [alleged employer].*

Glatt at *5.

The *Glatt* Court held these two tests dictate that, at a minimum, Fox Searchlight was a "joint employer" of plaintiffs. The employers exercised a great deal of formal and functional control, "[a]nd, in the end, it is all about control." *Glatt*, at *9.

The next question was whether the interns fell under the "trainee" exception established in *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947). In *Walling*, the Supreme Court determined that "trainees were not covered under the FLSA." The Court held that the FLSA "cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction. . . . The [FLSA] was not intended to penalize [employers] for providing, free of charge, the same kind of instruction [as a vocational school] at a place and in a manner which would most greatly benefit the trainees." *Walling*, at 152-53. The Second Circuit had never analyzed the "trainee exception" prior to *Glatt*, but it utilized a Department of Labor "Fact Sheet," which enumerated six criteria for determining whether an internship may be unpaid. Those factors are:

> *1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;*
> *2. The internship experience is for the benefit of the intern;*

> *3. The intern does not displace regular employees, but works under close supervision of existing staff;*
> *4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;*
> *5. The intern is not necessarily entitled to a job at the conclusion of the internship; and*
> *6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.*

Glatt, at *11.

The Court held that, when looking at these six factors, it is clear that the plaintiffs were improperly classified as unpaid interns; they were actually "employees" covered by the FLSA and NYLL. Plaintiffs did not receive any formal training or education during the internships, and did not acquire any new skills. Undoubtedly, plaintiffs did receive some benefits from their internships, namely, resume listings and job references, "but those benefits were incidental to working in the office like any other employee, and were not the results of internships intentionally structured to benefit them." *Id.* at *12. "On the other hand, Searchlight received the benefits of their unpaid work, which otherwise would have required paid employees." The employees' duties were mainly administrative, such as filing, drafting cover letters, taking out trash, assembling furniture, answering phones, and making deliveries. Importantly, even though the plaintiffs understood at the commencement of their employment that they were not to be paid, "the FLSA does not allow employees to waive their entitlement to wages." *Id.* at 13.

As a result, the Court concluded that the plaintiffs were improperly classified as unpaid interns.