New York Law Journal

Outside Counsel

New York State Class Actions 2014: CPLR 901(b) Clarified—Again

By Thomas A. Dickerson and Leonard B. Austin , New York Law Journal

December 22, 2014

In *Borden v. 400 East 55th Street*[1] the Court of Appeals has revisited[2] CPLR 901(b) to clarify that its prohibitions are limited to a narrow class of statutory causes of actions requiring mandatory penalties.

CPLR 901(b), which is unique amongst class action rules whether state[3] or federal, provides, in relevant part, that "an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action" unless authorized by the statute creating the penalty. In 1975, as the Legislature, at the urging of the Court of Appeals,[4] was about to enact CPLR Article 9, CPLR 901(b) was engrafted onto an otherwise modern class action statute equal to or better than Federal Rule 23.[5] This was done under the treble damages provision of the Donnelly Act, General Business Law (GBL) 340. The Empire State Chamber of Commerce requested enactment of 901(b) ("Penalties and class actions simply do not mix.").[6]

Defining the Scope

Subsequently, in *Sperry v. Crompton Corp*.[7] the Court of Appeals, after analyzing the legislative histories of CPLR Article 9 and GBL 340, concluded that treble damages available in GBL 340 are not recoverable in class actions. The court stated, "[r]ead together, we conclude that Donnelly Act threefold damages should be regarded as a penalty insofar as class actions are concerned."

Uncertainty remained, however, as to whether CPLR 901(b)'s prohibitions should be applied to a host of other penalty provision statutes seeking to protect, inter alia, tenants,[8] employees[9] and consumers.[10]

Keeping Hope Alive

The Court of Appeals has continued to take a role in encouraging the use of CPLR Article 9.[11] Starting in 2012 with *Koch v. Acker, Merrall & Condit Co.*,[12] a wine fraud case, the court expanded the use of General Business Law (GBL) §350 (false advertising) by declaring that reliance is not an element of this statutory cause of action. This important decision made GBL 350 as available in consumer class actions as is GBL §349 (deceptive and misleading business practices).[13] And in *Corsello v. Verizon, New York*,[14] an inverse condemnation class action, the Court of Appeals stated that the case "seems on its face well-suited to class action treatment" because "it would be reasonable in infer that the case will be dominated by class-wide issues—whether Verizon's practice is lawful, and if not what the remedy should be" and that expert testimony could be used to "support an inference" of typicality.

Tenant Class Actions

Two years later in *Borden v. 400 East 55th Street*[15] the Court of Appeals took another step forward in giving much needed guidance on the proper implementation of CPLR Article 9 by clarifying the circumstances under which class plaintiffs, particularly, tenants, may waive a statutory penalty pursuant to CPLR 901(b). Several tenant class actions have been brought[16] (three of which are addressed in *Borden*) following the Court of Appeals decision in *Roberts v. Tishman Speyer Properties*,[17] seeking compensatory damages in the form of rent overcharges on the grounds that "their units were decontrolled in contravention of Rent Stabilization Law (RSL) §26-516(a) because their landlords accept(ed) tax benefits pursuant to New York City's J-51 tax abatement program…To qualify for the J-51 program exemption, landlords must relinquish their rights under the decontrol provisions of the RSL while they benefit from the exemption."[18]

RSL 26-516(a) states, in part, that any landlord "found…to have collected an overcharge above the rent authorized…shall be liable to the tenant for a penalty equal to three times the amount of the overcharge" but if the landlord's actions were "not willful" then the penalty would be "the amount of overcharge plus interest." As noted by the Court of Appeals, all plaintiffs initially sought RSL treble damages but waived them through attorney affirmation. "[T]he question arises whether these claims can properly be brought as class actions" in light of the provisions of CPLR 901(b).

The court relied on the legislative history of CPLR 901(b), which states that a "statutory class action for actual damages would still be permissible…if the members of a class who would be entitled to a penalty sue only for their actual damages"] and the liberal intent of CPLR 901 (b). The court said: "Citing this Court's decision in *Moore v. Metropolitan Life Ins. Co.* in which we commended the legislature for its 'comprehensive proposal to provide a broadened scope and more liberal procedure for class actions,' the legislature intended for CPLR 901(b) to be interpreted liberally, and be a stark contrast from the former statute 'which fail[ed] to accommodate pressing needs for an effective, flexible and balanced group remedy.'"

The court held that "Waiver does not circumvent CPLR 901(b); on the contrary, the drafters not only foresaw but intended to enable plaintiffs to waive penalties to recover through a class action…Where a statute imposes a non-mandatory penalty, plaintiffs may waive the penalty in order to bring the claim as a class action"

Harkening back to its forceful decision in *Moore v. Metropolitan Life Insurance Company*,[19] the Court of Appeals in *Borden* stated:

> From a policy standpoint, permitting plaintiffs to bring these claims as a class accomplishes the purpose of CPLR 901(b)…the State Consumer Protection Board emphasized the importance of class actions: 'The class action device responds to the problem of inadequate information as well as the need for economies of scale' for '…a person contemplating illegal action will not be able to rely on the fact that most people will be unaware of their rights—if even one typical person files a class action, the suit will go forward and the other members of the class will be notified of the action either during the proceedings or after a judgment is rendered in their favor.

Taxing Internet Sales

In *County of Nassau v. Expedia*,[20] Nassau County sought to enforce its Hotel and Motel Tax Law and other similar taxing statutes on behalf of a class of 56 other local governmental agencies. The county alleged that the online sellers collect 3 percent hotel tax from consumers based on retail room rates but remit to the county only the portion of the tax based on defendants' lower 'wholesale' rate." Relying on *Overstock.com v. Dept. of Taxation and Finance*,[21] the trial court granted class certification and found a predominance of common questions concluding that the 'means and manner' of collecting the taxes is sufficiently similar amongst class members.

However, the Appellate Division, Second Department, reversed[22] relying on CPLR 901(b) and rejecting plaintiff's penalty waiver. "The 'waiver' exception to CPLR 901(b) does not apply where a penalty is mandatory and cannot be waived…the plaintiff's Hotel Tax law [requires the recovery of] a 'penalty' of 5% of the amount of the tax allegedly due…the recovery of which in a class action is not specifically authorized in the Hotel Tax law, and the imposition of which cannot be waived."

Banquet Servers Seeking Tips

In *Picard v. Bigsbee Enterprises*,[23] a class of catering hall servers challenged their employer's retention of a "20% Service Personnel Charge" imposed upon all customers. Alleging a violation of Labor Law §196-d ("No employer…shall…retain any part of a gratuity…purported to be a gratuity for an employee"), the trial court accepted plaintiff's waiver of the statutory penalty (Labor Law §198(1-a) and denied defendant's motion to dismiss based on CPLR §901(b). However, the Supreme Court, Albany County, subsequently denied class certification finding that plaintiff had met all the requirements of CPLR 901(a) except numerosity. "[A]ssuming that the proposed class were shown to be sufficiently numerous…the element of superiority would be established").[24]

Paperless Tickets

In *Pires v. Bowery Presents*,[25] plaintiffs alleged that a ticket seller violated Arts and Cultural Law §25.30(1) by using a paperless ticket system which did not give consumers the option of purchasing a ticket which, in accordance with the statute, could be independently transferred. In sustaining the causes of action (with the exception of seeking a permanent injunction) the Supreme Court, New York County, also held that plaintiff could waive the minimum $50 penalty as long as class members had an opportunity to opt out of the proposed class action.

Labor Law Claims

Employees have used the class action device extensively over the years including these cases reported in 2014: *Williams v. Air Serv Corp.*[26] (underpayment of wages; adequacy of representation; certification granted); *Stecko v. RLI Ins. Co.*[27] (failure to pay prevailing wages and supplemental benefits; rejecting "rigorous analysis" in favor of "liberal" interpretation; certification granted); *Moreno v. Future Care Health Services*[28] (home health care workers seek minimum wages, overtime and spread of hours; pre-certification dismissal motion); *Andryeyeva v. New York Health Care*,[29] (home health care workers working 24-hour shifts seek minimum wage, overtime and spread of hours; certification granted); *Cardona v. Maramont Corp*.[30] (workers seek prevailing wages and supplemental benefits for work performed in furtherance of publically financed service contracts; certification granted; partial summary judgment granted; damages of $86.8 million plus 9 percent interest awarded).

ENDNOTES:

1. *Borden v. 400 East 55th Street*, __N.Y.3d__, 2014 WL 6607407 (2014) (majority opinion by Chief Judge Lippman; dissenting opinion by Judge Smith).

2. See *Sperry v. Crompton Corp*., 8 N.Y.3d 204, 210-214 (2007).

3. See Dickerson, "Class Actions: The Law of 50 States," Law Journal Press, section 4.03[6] (2015).

4. *Moore v. Metropolitan Life. Ins. Co*., 33 N.Y.2d 304, 313 (1973)("[The Court] notes, however, that the restrictive interpretation in the past of CPLR 1005…no longer has the viability it may once have had").

5. See Dickerson, "New York State Class Actions: Make It Work—Fulfill The Promise," 74.2 Albany L.R. 711 (2010) (Make It Work I); Dickerson, Austin and Zucco, "New York State Class Actions: Making It Work—Fulfilling the Promise: Some Recent Positive Developments and Why CPLR 901(b) Should Be Repealed," 77 Albany L.R. 59 (2014)(Make It Work II).

6. Memorandum of Empire State Chamber of Commerce in Opposition to A. 1252-A, Feb. 14, 1975, N.Y. Bill Jacket, 1975 A.B. 1252-B, 198th Leg. Reg. Sess. (1975), ch. 207, at 3. See Make It Work II at fn. 58.

7. *Sperry v. Crompton Corp*., 8 N.Y.3d 204, 210-214 (2007).

8. See penalty provisions in Rent Stabilization Law (*Borden v. 400 East 55th Street*, 105 A.D.3d 630 (1st Dept. 2013); *Gudz v. Jemrock Realty Co.*, 105 A.D.3d 624 (1st Dept. 2013); *Downing v. First Lenox Terrace Associates*, 107 A.D.3d 86 (1st Dept. 2013)).

9. See penalty provisions in Labor Law 200, 198(a-1) and 196-d (*Pesantz v. Boyle Environmental Services*, 251 A.D.2d 11 (1st Dept. 1998); *Krebs v. Canyon Club*, 22 Misc.3d 1125 (N.Y. Sup. 2009), *Picard v. Bigsbee Enterprises*, 40 Misc.3d 1240(A) (Albany Sup. 2013).

10. See penalty provisions in Arts and Cultural Affairs Law 25.30(1) (*Pires v. Bowery Presents*, 44 Misc.3d 704 (N.Y. Sup. 2014) and GBL 349, 350 (*Cox v. Microsoft Corp*., 8 A.D.3d 39 (1st Dept. 2004).

11. See Make It Work I and II.

12. *Koch v. Acker*, *Merrall & Condit Co.*, 18 N.Y.3d 940 (2012).

13. See Dickerson, Chapter 98 Consumer Protection, Haig, Commercial Litigation in New York Courts, Fourth Edition, Thomson Reuters West (2015).

14. *Corsello v. Verizon, New York*, 18 N.Y.3d 777, 781-782 (2012).

15. *Borden v. 400 East 55th Street*, __N.Y.3d__, 2014 WL 6607407 (2014).

16. See e.g., *Dugan v. London Terrace Gardens*, 45 Misc.3d 362, 986 N.Y.S.2d 740 (N.Y. Sup. 2014); *Casey v. Whitehouse Estates*, 36 Misc.3d 1225 (N.Y. Sup. 2012).

17. *Roberts v. Tishman Speyer Properties*, 13 N.Y.3d 270 (2009) (a landlord receiving the benefit of a J-51 tax abatement may not deregulate any apartment in the building pursuant to the luxury decontrol laws).

18. *Borden v. 400 East 55th Street*, __N.Y.3d__, 2014 WL 6607407 (2014).

19. *Moore v. Metropolitan Life. Ins. Co.*, 33 N.Y.2d 304, 313 (1973).

20. *County of Nassau v. Expedia*, 41 Misc.3d 626 (Nassau Sup. 2013).

21. *Overstock.com v. Dept. of Taxation and Finance*, 20 N.Y.3d 586 (2013).

22. *County of Nassau v. Expedia*, 120 A.D.3d 1181 (2d Dept. 2014).

23. *Picard v. Bigsbee Enterprises*, 40 Misc.3d 1240(A) (Albany Sup. 2013).

24. *Picard v. Bigsbee Enterprises*, 44 Misc.3d 1214 (Albany Sup. 2014).

25. *Pires v. Bowery Presents*, 44 Misc.3d 704 (N.Y. Sup. 2014).

26. *Williams v. Air Serv Corp*., 2014 N.Y. App. Div. LEXIS 6736; 2014 NY Slip Op 06768 (1st Dept. 2014).

27. *Stecko v. RLI Ins. Co*. 121 A.D.3d 542 (1st Dept. 2014).

28. *Moreno v. Future Care Health Services*, 43 Misc.3d 1202 (N.Y. Sup. 2014).

29. *Andryeyeva v. New York Health Care*, 994 N.Y.S.2d 278 (N.Y. Sup. 2014).

30. *Cardona v. Maramont Corp*., 2014 WL 4277540 (N.Y. Sup. 2014).
