Matter of O'Brien v Spitzer

2003 NY Slip Op 30081(U)

April 17, 2003

Supreme Court, Suffolk County

Docket Number: 1002890/2002

Judge: James M. Catterson

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SHORTFORM ORDER INDEX #28900/02

SUPREME COURT - STATE OF NEW YORK
IAS PART XXXVIII SUFFOLK COUNTY

PRESENT:
Honorable James M. Catterson

R/D: 11-29-02
MOTION NO. 001 MG

X

In the Matter of the Application of
STEPHEN L. O'BRIEN,

Petitioner,

For a Judgment under Article 78 of the Civil Practice Law and Rules annulling the determination to deny defense in a civil rights action,

-against-

ELIOT SPITZER, as Attorney General of the STATE OF NEW YORK,

Respondent.

X

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Upon reading and filing the following papers in this matter: (1) Notice of Motion dated November 4, 2002 and supporting papers by petitioner; (2) Verified Answer dated November 19, 2002 by respondent; (3) Respondent's Memorandum of Law in Support of Verified Answer by respondent; (4) Reply Affirmation received in this Court December 19, 2002 by petitioner; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT, of the foregoing the motion is decided as follows:

ORDERED that the relief sought by petitioner pursuant to C.P.L.R. Article 78 is hereby granted and the Attorney General directed to provide representation for petitioner under Public Officers Law § 17.

ORDERED that the petitioner is directed to serve a copy of this decision and judgment upon the defendant.

In what appears to be a case of first impression, the Court is asked to determine the right of a referee appointed by the Court pursuant to R.P.A.P.L. § 1351(1) to representation by the Attorney General, when the referee is sued in his official capacity. The Attorney General

contends that such referees are independent contractors and accordingly do not enjoy the benefits of Public Officers Law § 17. For the reasons that follow, this Court disagrees and finds that the decision of the Attorney General denying representation has no rational basis.

Section 17(2)(a) of the Public Officers Law provides, inter alia, that, "the state shall provide for the defense of the employee in any civil action or proceeding in any state or federal court arising out of any alleged act or omission which occurred . . . while the employee was acting within the scope of his public employment or duties . . . ." The term "employee" is defined in § 17(1)(a) as inter alia, "any person holding a position by election, appointment or employment in the service of the state . . . ." Although § 17 has been amended many times to add specific categories of "employee," there is no mention in the statute of court appointed referees.

In the present day, the Court has broad powers to appoint referees: "A court may appoint a referee to determine an issue, perform an act, or inquire and report in any case where this power was heretofore exercised and as may be hereafter authorized by law." C.P.L.R. § 4001. This has not always been the case since the founding of the Republic.

The Court of Appeals in the hoary case of Steck v. The Colorado Fuel And Iron Company, 142 N.Y. 236, 238, 37 N.E. 1, __, (1884) (Vann, J.) traced the colonial era precedent for the appointment of referee.

> Under the Dutch rule in the colony of New York actions involving long accounts could be referred to arbitrators or referees, and such a reference was a very common mode of trial during that period. But it was not pleasing to the English colonists, who had received the trial by a jury from their ancestors, a priceless heritage secured by Magna Charta, and hence, some years after the capitulation of the Dutch to the English in 1683, by the Charter of Liberties and Privileges granted by the Duke of York to the inhabitants of New York, it was provided 'that all trials shall be by the verdict of twelve men.'

(See Charter, appendix No. 2, 2 Laws of 1813); see Decker v. Canzoveri, 256 A.D. 68, 70, 9 N.Y.S.2d 210, 213 (3d Dept. 1939).

In the post-Dutch common law courts of the colonies, all actions at law were tried to a jury but for the action of account. The non jury action of account, "was applicable only to a limited class of cases involving the examination and taking of accounts. It was one of the most difficult, dilatory, and expensive actions known to the law, and was very rarely resorted to." Steck, 142 N.Y. at 238, 37 N.E. at ___.[1] To escape this difficulty and thereby get their cases

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[1] The rarity of these actions of account cannot be overstated: "Judge Bronson, writing (160) years ago, said that only two actions of that kind had ever been brought during the history of the State, and no more than a dozen such had been brought in England during the two

before a jury, merchants of the day resorted to suing in "assumpsit, or simple contract, where the accounts and dealings between the parties were directly in issue." Furman v. American Laundry Machinery Co., 142 Misc. 644,646,256 N.Y.S. 249,252 (Sup. Ct. Rensselaer Co. 1931) citing Silmeer v. Redfield, 19 Wend. 21; Dederick's Adm'rs v. Richley, 19 Wend. 108; see Steck, 142 N.Y. at 238, 37 N.E. at ___. This method of avoiding the non jury common law action of account eventually led to the enactment of the first New York statute requiring a reference of certain actions at law to a referee:

> [T]he embarrassments attending the trial of such actions by the jury were such that, December 31, 1768, an act (2 Van Schaick's Laws of New York, 517) was passed, with a preamble as follows: 'Whereas, instead of the ancient action of account, suits are of late, for the sake of holding to bail, and to avoid the wager of law, frequently brought in assumpsit, whereby the business of unraveling long and intricate accounts, most proper for the deliberate examination of auditors, is now cast upon jurors, who at the bar are more disadvantageously circumstanced for such services; and this burden upon jurors is greatly increased since the laws made for permitting discounts in support of a plea of payment, so that by the change of the law and the practice above mentioned, the suits of merchants and others upon long accounts are exposed to erroneous decisions, and jurors perplexed and rendered more liable to attaints; and by the vast time necessarily consumed in such trials, other causes are delayed and the general course of justice greatly obstructed. Be it, therefore, enacted, etc., that whenever it shall appear probable in any cause depending in the Supreme Court of Judicature of this colony (other than such as shall be brought by or against executors or administrators) that the trial of the same will require the examination of a long account, either on one side or the other, the said court is hereby authorized, with or without the consent of parties, to refer such cause by rule, to be made at discretion, to referees. * * * and if the report or award of the referees, or of the major part of them, shall be confirmed by the said court, and any sum be thereby found for the plaintiff, judgment shall be entered for the same . . . .

Streck, 142 N.Y. at 239, 37 N.E. at ___; 4 Colonial Laws, P. 1040 (hereinafter referred to as the "Act of 1768"); see Malone, 172 N.Y. at 272, 64 N.E. at __; Irving; v. Irving, 90 Hun. 422, 35 N.Y.S. 744 (1st Dept. 1895). The Act of 1768 clearly granted the Supreme Court the power to appoint a referee to act in the court's place in performance of its official duties. As demonstrated below, the Court of Chancery traditionally possessed such power prior to the Act of 1768.

The adoption of the State Constitution in 1777 included that "trial by jury in all cases in which it has heretofore been used in the colony of New York shall be established and remain

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centuries then preceding." Malone v. Sts. Peter and Paul's Church. Brooklyn, 172 N.Y. 269, 283-284, 64 N.E. 961, __ (1902) citing McMurray v Rawson, 3 Hill 59, 62 (1842).

inviolate forever."[2] The Act of 1768 continued in force until 1771. Steck, 142 N.Y. at 240; Malone, 172 N.Y. at 272; see Snell v. Niagra Paper Mills, 193 N.Y. 433, 86 N.E. 433 (1908). It was revived by the General Assembly and remained effective until 1780. Id. The Act lapsed and was again renewed in 1788. Id. Therefore, the enactment of the State Constitution in 1777 did not alter the power of the Supreme Court and Court of Chancery to appoint a referee in limited circumstances. Indeed, this power can be traced through the successive codes for practice and procedures to the present day C.P.L.R.

The Constitution of 1777 also recognized the existence of both the Supreme Court and the Court of Chancery as established by the English authority in the colonies. (Const. of 1777, §§ 33-37, 41.) Both courts were originally created by statute of the colonial legislature and renewed up until the war of independence through royal ordinance. Steinway v. Steinway, 159 N.Y. 250,256-257 (1899) (Vann, J.); Decker, 256 A.D. 68, 9 N.Y.S.2d 210. The Constitution of 1821 contained similar provisions setting forth the jurisdiction of both courts. The Constitution of 1846, "abolished the Court of Chancery and enacted that there should 'be a supreme court having general jurisdiction in law and equity.' " Id. at 257 citing Const. of 1846, Art. 6 and section 8 of Art. 14. "The distinction between actions in law and suits in equity was abolished and a single form of civil action authorized." In Re Starr, 245 A.D. 5, __, 280 N.Y.S. 753,758 (2d Dept. 1935). As demonstrated below, this consolidation of the Supreme Court and the Court of Chancery had the consequence of greatly enlarging the power of the Supreme Court to appoint referees.

Section 4001 of the C.P.L.R. is a consolidation of several provisions of the prior Civil Practice Act (hereinafter referred to as the "CPA", sections 80,464-467 and 785). See Generally 1958 report of the Temporary Commission of the Courts, 1958 at § 14.1. In this consolidation, the Legislature implicitly recognized that the demise of the Court of Chancery a century before significantly altered the method and practice of the use of court appointed referees in the Supreme court.

In the seminal work Blake's Chancery (D.T. Blake 1818) (hereinafter referred to as "Blake"), the genesis of the modem use of court appointed referees can be found. Blake described the jurisdiction of the Court of Chancery:

> The original object and intention of instituting this Court was to supply the defects of Common Law, and its jurisdiction extends to all cases, in which the Common Law affords no relief at all, or not that relief which equity and natural justice requires.

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[2] The Constitution of 1777 provided that 'trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever.' Article 41. In the constitution of 1821 the provision was changed so as to read as follows: 'The trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever.' Article 7, § 2. It was continued in this form in the constitution of 1846 and 1894. Malone, 172 N.Y. 1t 273, 64 N.E. at __.

Blake at page 1.

In the Court of Chancery, the Chancellor was appointed to hold offices, "During good behavior" but could not "receive . . . fees or perquisites for any thing done by virtue of the offices." Id. at page 10. This prohibition was overcome, and revenue subsequently collected, through the use of masters.

> The masters are very important officers of the court, and if in appointments nothing was regarded but a due administration of justice, none but men of experience, judgment, and professional learning, would be appointed to these offices, but unfortunately, the masters hold their offices under the council of appointment, and during their pleasure. They are unlimited as to number.
> They are assistants to the chancellor, who refers to them interlocutory orders for stating accounts, computing damages and the like; they also adminster oaths, take affidavits and acknowledgements of deeds, and generally if there be any suit which is not ascertained by the pleadings or depositions in a cause, of which it would be proper for the chancellor to be informed by collateral testimony, he refers it to a master for a report to be made upon such testimony, and such principles as he directs.

Id. at pages 10-11; see 1 R.L. 490 § 11. The evolution of the common law action of account and its progeny created by the Act of 1768 for use in Supreme Court also reached its denouement in the Court of Chancery wherein a master was appointed to resolve all such difficult calculations. Most importantly, the masters were directly responsible for the "sale of all lands sold by a decree of the court, under mortgages, and give deeds for the same." Id. Mortgage foreclosures were specifically contained within the jurisdiction of the Courts of Chancery through the prosecution of the Bill of Foreclosure. Id. at pages 56-57; see generally 'Form of a Bill of Foreclosure' id. at pages 59-67. Within fifty years of the passage of the Act of 1768, the Court of Chancery had the power to delegate a wide variety of functions to masters. This was ultimately extended to the Supreme Court without running afoul of the constitutional requirement of trial by jury.[3]

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[3] This was not without controversy in the Court of Appeals. Judge Vann who wrote the majority opinions in Steinway in 1899 and National Shoe & Leather Bank of the City of New York v. Baker, 148 N.Y. 581, 587, 42 N.E. 1077, __ in 1896, was openly railing against the expansion of compulsory references as an erosion of the constitutional protection of trial by jury in his 1902 dissent in Malone. However, by 1902 the die had been cast concerning the expansion of the courts' powers of appointment. Judge Vann's Malone dissent stands as a high water mark of the strict constructionist view of court references.

Section 80 of the Civil Practice Act derived from the former Code of Civil Procedure § 827, which succeeded practice before the Court of Chancery. Indeed, § 80 makes specific reference to its lineage and the powers of the Court of Chancery:

> Where the court is authorized to approve an undertaking or the sureties thereto, or to make an examination or inquiry, or to appoint an appraiser, receiver or trustee, it may direct a reference to one or more persons designated in the order, either to make the approval, examination, inquiry or appointment, or to report the facts to the court for its action thereupon. Where, according to the practice of the court of chancery on the thirty-first day of December, eighteen hundred and forty-six, a matter was referable to the clerk or to a master in chancery, a court having authority to act thereupon may direct a reference to one or more persons, designated in the order, ***with the powers which were possessed by the clerk or the master in chancery,*** except where it is otherwise specially prescribed by law.

[Emphasis supplied]

Sections 464 through 467 of the former CPA delineated several other forms of the appointment of referees. These sections also incorporated the Chancery referee practice in actions involving both law and equity. Section 466 of the CPA "Compulsory Referees" is identical to its precursor, § 1013 of the Code of Civil Procedure (hereinafter referred to as the "CCP"). In construing § 1013, the First Department in dicta in Kings County Lighting Co. v. Woodbury, 177 A.D. 451,164 N.Y.S. 380 (1st Dept. 1917) recognized that the power to appoint a referee existed in both law and equity. See Camp v. Ingersoll, 86 N.Y. 433 (1881); National Shoe 148 N.Y. at 587, 42 N.E. at __. The powers of a referee appointed under either § 80 or § 466 of the CPA (and inferentially §§ 827 and 1013 of the CCP) were clearly circumscribed by both statute and the order of reference. See e.g., Roslyn Heights Land & Improvement Co. v. Burrowes, 22 A.D. 540, 48 N.Y.S.15 (2d Dept. 1897).

The evolution of court appointed referees from the colonial era, through the elimination of the Court of Chancery, to present C.P.L.R. § 4001 leads inexorably to the conclusion that the court appointed referee holds his or her position by "appointment . . . in the service of the state." There simply is no support in the history of the State for the Attorney General's assertion that referees should be viewed as independent contractors.

Even if this Court were to ignore the preceding two hundred and fifty years of statutes, ordinances, precedent and constitutional enactments, the Attorney General's contention that referees are independent contractors cannot survive any close scrutiny. Initially, it should be noted that even the test employed to determine the character of the master/servant relationship is inapposite. For the reasons set forth above, a court appointed referee is not an employee of the court but rather a form of surrogate; appointed to act in the court's place or perform a particular task to aid the court in the resolution of some aspect of a dispute. See e.g., Jorgensen v. Endicott Trust Company, 100 A.D.2d 647,473, __, N.Y.S.2d 275,276 (3d Dept. 1984) [,'At a foreclosure

proceeding, the actual sale is made by the referee, as an officer of the court, and the contract is basically between the purchaser and the court"]; Tierney v. Home Title Ins. Co. Of New York, 207 N.Y.S. 550,551 (Sup. Ct. Kings Co. 1925) aff'd, 215 A.D. 830,213 N.Y.S. 922 (2d Dept. 1926) ("The duty of a referee in foreclosure was purely ministerial"); Woolf v Leicester Realty Co., 134 A.D. 484, 119 N.Y.S. 288,299 (1st Dept. 1909) ("The referee is purely a ministerial officer and must follow exactly the provisions of the Decree."); Lane v. Chantilly Corp., 251 N.Y. 435,167 N.E. 578 (1929).

Even accepting the Attorney General's contention that a master/servant relationship exists, that analysis nonetheless fails. In Matter of Gordon v. New York Life Insurance Company, 300 N.Y. 652, 90 N.E.2d 898 (1950), the Court of Appeals appeared to hold that a 'relative nature' of the work test should be employed. Modem precedent has further refined the test to be used; "[t]he existence of an employee-employer relationship is based upon evidence that the employer exercises either control over the results produced or over the means used to achieve the results." Patrick Butler General Contractor v. Rocco, 281 A.D.2d 527, __, 722 N.Y.S.2d 66, 68 (2d Dept. 2001); see Willis v. City of New York, 266 A.D.2d 208,679 N.Y.S.2d 311 (2d Dept. 1999); Koren v. Zazo, 262 A.D.2d 287,691 N.Y.S.2d 549 (2d Dept. 1999); see also 12 Cornelia St. Inc. V. Ross, 56 N.Y.2d 895,453 N.Y.S.2d 402 (1982).[4]

A referee, "has no powers except those conferred upon him by the appointment . . . his assignment ends with his decision or the filing of the report." Addazzio v. Kalbfleisch, 148 misc. 335,265 N.Y.S. 710 (Sup. Ct. Nassau Co. 1933). A referee is bound by the terms of the Order of Appointment and, absent prior court approval, cannot even delegate part of his or her official duties. See e.g., Hever v. Deaves, Chanc. R. 1816, 154; Woolf, 134 A.D. at __, 119 N.Y.S. at 289. Finally, the powers of a referee in foreclosure are circumscribed by the judgment in foreclosure. Crisona v. Macaluso, 33 A.D.2d 569,305 N.Y.S.2d 441 (2d Dept. 1969); Termansen v. Matthews, 49 A.D. 163, 63 N.Y.S.115 (1st Dept. 1900). Accepting, arguendo, that a master/servant relationship exists, it is beyond doubt that the court exercises total "control over the results produced." The Order of Reference merely allows the referee the discretion of the scheduling of the sale of the property. Virtually all of the remaining duties of the referee are directly controlled by the Order of Reference. Thus, petitioner cannot be viewed as an independent contractor under the test enunciated in Patrick Butler General Contractor and the cases cited above. Accordingly, petitioner's motion is granted.

ENTER

Date: April 17,2003

James M. Catterson, J.S.C.

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[4]The Attorney General's reliance on fifty year old precedent is inexplicable given the wealth of recent decisions of the Second Department dealing with this issue.

✓ FINAL DISPOSITION

__ NON-FINAL DISPOSITION