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Commercial Division Judges Help Shape Procedure and Law

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This column will review important current topics in the Long Island litigation landscape, with emphasis on the trial-level courts. In this issue, we hear personally from the justices holding down the fort in an important forum for commercial litigators, Long Island's commercial divisions, and review the inner workings of those parts.

In recognition of its role as "one of the major centers in the world for business, finance, the professions, publishing, and many other enterprises,"¹ New York in November 1995 launched a Commercial Division of the Supreme Court in the counties of New York and Monroe. After accolades from the business and commercial litigation community, commercial divisions were added in Erie, Nassau and Westchester counties in 1999 and in Albany, Kings and Suffolk counties in 2002.

In Nassau County, two experienced judges preside over the Commercial Division. Justice Leonard B. Austin has been at the helm of the Commercial Division since October 2000. In his 20 years of private practice before his election to the Supreme Court in 1998, Justice Austin focused primarily on complex commercial litigation, matrimonial and family law, personal injury and real estate matters.² Justice Ira B. Warshawsky assumed the duties of the other Nassau County Commercial Part on Oct. 7, 2002. He has

had over 30 years experience in the courts, including as an assistant district attorney, a judicial law secretary, a district court judge and, since 1997, a Supreme Court justice.³

Suffolk County's entree into the Commercial Division was inaugurated on Oct. 2, 2002, with the designation of Justice Elizabeth Hazlitt Emerson. Before being elected to the Supreme Court, Justice Emerson was a partner at Sherman & Sterling, where she represented domestic and foreign commercial banks, investment banks and corporations in acquisition financings, leveraged buyouts, restructurings, project finance and public offerings.⁴

Adopting Procedures

Consistent with the mission of the Commercial Division to facilitate the timely and efficient resolution of complex business disputes, each of the justices of Long Island's commercial parts takes an early, active role in case management. Long Island's commercial divisions have adopted similar Part Rules governing pretrial and trial procedures, which closely resemble the rules a practitioner would expect to see from a federal district court judge, where personal judicial involvement in all phases of a case is the norm.⁶

In adopting procedures for Suffolk, Justice Emerson believes it is important to maintain consistency with Nassau's Commercial Division. Although she currently maintains a full non-

commercial civil caseload as well as all of the Commercial Division assignments, Justice Emerson notes that she is making a concerted effort to conference cases early on to address and resolve issues from the outset. Justice Emerson reports favorable results in the early returns, observing that thorough conferencing of complex business disputes can and have led to innovative solutions, where the typical monetary recovery does not quite fit the bill, such as settlements achieved through business apologies, gift certificates and the like.

Provisional Remedies

One fertile area of litigation that the Commercial Division has dramatically reformed is the manner in which provisional remedies, such as temporary restraining orders and preliminary injunctions, are addressed. Prior to the existence of the commercial divisions, out-of-state practitioners had been heard to lament how easily a temporary restraining order could be obtained in New York, without any notice to the adversary. However, the rules in both of Long Island's commercial divisions specifically provide: "Absent extraordinary circumstances, the court will not issue a temporary restraining order unless the applicant has given notice to the opposing parties sufficient to permit them an opportunity, if so inclined, to appear and contest the application."⁷

While every case will be assessed on its own facts and circumstances, Justices Warshawsky and Austin note that

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"extraordinary circumstances" justifying an ex-parte TRO are principally limited to those situations where the harm sought to be avoided by the TRO is more likely to occur if notice is given prior to the issuance of the order, such as where assets of a closely held business are about to be secreted or converted.

All three justices of Long Island's commercial divisions have observed that requiring the parties to appear in court to address whether a temporary restraining order will be issued often leads to resolving all or some of the issues or to a stipulated form of interim relief.

Of course, not all motions are resolved by consent, even in the commercial parts, where the justices give personal attention to the issues. A review of the recent on-line decisions emanating out of Long Island's commercial divisions indicate a fairly heavy caseload of formal decisions on motions for preliminary injunctions and other provisional remedies.⁸ The decisions generally reflect a careful review of the competing interests, and, in almost all instances, an analysis of the well-established requirements for a preliminary injunction: "likelihood of success on the merits, that irreparable harm or injury will occur if the relief is not granted and that the balancing of the equities favors the party seeking the preliminary injunction."⁹

In a variety of contexts, including traditional restrictive covenants, trade secret enforcement, corporate and partnership disputes as well as non-traditional cases, the commercial divisions have not hesitated to grant provisional relief, at least in part, and to weed out those cases where the necessary elements have not been established.¹⁰ Representative of the analysis of these competing interests are several rulings, including Justice Austin's decision in *Sri Shirdi Sai Baba Samsthan of America, Inc. v. Dattatreyyudu Nori, Subhadra Nori, and Nori Foundation, Inc.*, in which he preliminarily enjoined defendants from: (i) removing from the state or transferring or damaging certain religious articles alleged to be owned by plaintiff; (ii) transferring, selling or mortgaging certain real property; and (iii) using a business name similar to plaintiffs'.

Another decision was by Justice Warshawsky in *Del Global Technologies, Inc., Dynarad Corporation v. Vasilios Milonas, Source-Ray, Inc. Raymond Manez*, in which he granted only a limited aspect of plaintiffs' motion, preliminarily enjoining former employees of plaintiffs from using plaintiffs' confidential information, while allowing those defendants otherwise to continue to operate their

competing business. Also representative was Justice Emerson's decision in *Mark Davis, DVM, d/b/a South Fork Animal Hospital v. Barry C. Browning*, in which she preliminarily enjoined defendant veterinarian from operating a clinic in violation of a restrictive covenant that prohibited defendant from competing with plaintiff on the South Fork of Long Island for a three-year period after his employment.

(1) "The Commercial Division of the State of New York." www.courts.state.ny.us/comdiv-/index.htm, which is the official New York State Web site for the Commercial Division of the Supreme Court of the State of New York.

(2) www.courts.state.ny.us/comdiv/nassaubio-austin.htm.

(3) www.courts.state.ny.us/comdiv/nassaubio-warshawsky1.htm.

(4) www.courts.state.ny.us/comdiv/sufolk_biography_of_Judge.htm.

(5) *Id.*

(6) The rules can be accessed at <http://www.nycourts.gov/comdiv/>.

(7) Rules of the Justices of the Commercial Division, Nassau County, Rule 20; Suffolk County Supreme Court Commercial Division-Part 44, Rules for Attorneys and Self Represented Litigants, Rule 16.

(8) On-line decisions can be searched on the courts' Web site at http://portal.courts.state.ny-us/pls/portal30/CMS_dev.DYN_NDASEARCH.show.

(9) Peter Wittich, Thomas Wittich, Melissa Brown and Tina Hickock, as Shareholders of Bell Oil Terminal Inc., *Suing in the Right of Bell Oil Terminals, Inc. v. Rolf Wittich and Bell Oil Terminal, Inc.*, Index No. 2708-03, Austin, J., June 16, 2003.

(10) See, e.g., Justice Austin: Wittich, et al., as Shareholders of Bell Oil Terminal Inc. v. Wittich, et al., Index No. 2708-03, June 16, 2003 (preliminarily enjoining defendants from transferring, encumbering or otherwise disposing of assets of a corporation in shareholder derivative suit and requiring \$1,000 undertaking); *Dilluvio v. GT Associates, et al.*, Index No. 9714-02, July 8, 2003 (denying defendants' motion to vacate a preliminary injunction issued on consent in a dispute over the ownership of stock, but requiring an undertaking in the amount of \$250,000); *Act Telecom, Inc. v. Cablevision Lightpath, Inc.*, Index No. 13289-02, May 21, 2003 (preliminarily enjoining defendant from discontinuing telephone service, conditioned upon plaintiff paying back all telephone charges and remaining current while also posting an undertaking in the sum of \$2,500); *Sri Shirdi Sai Baba Samsthan of America, Inc. v. Dattatreyyudu Nori, et al.*, Index No. 19788-02, July 8, 2003 (preliminarily enjoining defendants from removing from the state or transferring or damaging certain religious articles alleged to be owned by plaintiff, transferring, selling or mortgaging certain real property and using a business name similar to plaintiffs', among other things, and requiring a \$10,000 undertaking); *Orthopaedic*

Associates of Manhasset, P.C., et al. v. Michael Parisi & Son Construction Company, Inc., Index No. 13309-02, Jan. 24, 2003 (preliminarily enjoining defendant from implementing its on-site parking plan at the real property leased by plaintiffs, requiring a \$50,000 undertaking); Justice Warshawsky: *Honig, Mongioi, Monahan & Sklavos, LLP, et al. v. Honig, et al.*, Index No. 008712-03, Aug. 13, 2003 (denying plaintiffs' motion for preliminary injunction in law partnership dispute, attempting to enjoin former partner from taking certain acts that would allegedly affect the partnership and individual plaintiffs); *Payless Shoesource, Inc. v. Franklin Realty 710, LLC, et al.*, Index No. 005036-03, June 2, 2003 (denying plaintiffs' motion for a preliminary injunction attempting to enjoin defendants "from prohibiting the free flow of traffic between" two parcels of real property at issue); *Town of Hempstead et al. v. Franklin Realty 710, LLC, et al.*, Index No. 004475-03, May 13, 2003 (granting TRO pending a hearing, enjoining defendants from erecting a barrier on certain premises or blocking cross access between parcels at issue and/or interfering with traffic flow from a traffic control device); *Seo Jin America, Inc. v. Farmingdale Cold Storage, Inc.*, Index No. 007518-03, May 23, 2003 (preliminarily restraining defendant from enforcing a warehouseman's lien, conditioned on plaintiff's depositing \$30,000 in escrow account); *RPHS Corporation v. Joseph Affrunti*, Index No. 018550-02, March 7, 2003 (refusing to enjoin defendant from soliciting proprietary traders and customers of the plaintiff or otherwise allegedly violating a restrictive covenant in employment agreement); *Stoll America Knitting Machinery, Inc. v. Creative Knitwear Corporation, et al.*, Index No. 003607-03, May 6, 2003 (enjoining defendant, upon its consent, from "moving, selling, transferring, or permitting to become the subject of a security interest collateral which is the subject of the contracts between the parties"); *Estron Oil Corp. v. Dass Deli & Grocery, Inc. et al.*, Index No. 000834-03, March 11, 2003 (granting only part of motion for preliminary injunction, limited to the extent that defendants are enjoined from transferring ownership or operation of a service station, without reference to any undertaking); *Del Global Technologies, Inc. v. Milonas, et al.*, Index No. 019965-02, March 13, 2003 (granting only limited aspect of plaintiffs' motion for preliminary injunction, enjoining former employees of plaintiffs from using plaintiffs' confidential information, but allowing defendants to continue to operate their competing business, without mention of undertaking); Justice Emerson: *Erin M. Crotty, Commissioner of the New York State Department of Environmental Conservation, et al. v. Lawrence Aviation Industries, Inc. et al.*, Index No. 10241-03, July 16, 2003 (preliminarily enjoining defendants from operating a titanium processing plant); *Mark Davis, DVM, d/b/a South Fork Animal Hospital v. Browning*, Index No. 1611-03, Feb. 27, 2003 (preliminarily enjoining defendant veterinarian from operating a clinic in violation of restrictive covenant prohibiting defendant from competing with plaintiff on the South Fork of Long Island for a three-year period after his employment); *Great South Bay Family Medical Practice, LLP. v. Anthony Donatelli, Jr., M.D., P.C. et al.*, Index No. 26875-02, Jan. 7, 2003 (denying both motion and cross motion for preliminary injunction, refusing to enjoin defendant from soliciting plaintiffs' patients through advertisements and from serving as a school physician and refusing to enjoin plaintiff "from providing false information to patients about [defendant's] whereabouts").