FOCUS: COMMERCIAL LITIGATION

Trials in the Commercial Parts: The Judges Speak Out

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Commercial litigation is complex and expensive—which clients know only too well. Most cases are settled prior to trial, but usually not until after extensive and costly discovery or, if everything falls into place, a decision on a motion for summary judgment motion that may end the carnage. But sometimes, and not as often as with other areas of practice, commercial matters go to trial to be resolved at a bench trial or with the help of a jury.

Every litigator approaches a case with the understanding that, short of settlement or summary dismissal, only a verdict will settle the parties' differences. Hopefully counsel for each of the parties has planted that seed in their client's minds long before they must be the bearer of bad news that they must begin preparation for trial and the client must cancel that vacation to Portugal. But what of trying in a commercial part? What actions decided on by counsel or taken by the court will streamline the proceedings? How does your assigned judge handle trials? What evidentiary pitfalls must you be ready for so that you can ensure that every piece of relevant and convincing evidence is found to be admissible? Conversely, have you done everything you can to prevent evidence which you have determined to be irrelevant, lacking foundation for admission or outright overly prejudicial from being offered by the other side and admitted for consideration by the fact finder?

To get a better gauge on trial and evidentiary issues, this writer went to the source, speaking with numerous judges serving in the Commercial Parts in Suffolk, Nassau, New York, Queens and Kings Counties to get their views on trials conducted in their parts and discuss the trial process and evidentiary issues that arise in the matters tried before them. The jurists were kind enough to give their views and offer some insights into their approach at trial

The commercial litigation bar will be happy to hear that the judges who participated in these discussions all found that the commercial litigators appearing before them were well prepared and often were able to reach agreements resolving evidentiary disputes. That is not to say, however, that it is always seamless. But, for the most part, the attention to details and preparation long before the opening statements are made has served these attorneys well and made the judge's job far easier.

On the pre-trial front, preparation is made consequentially more consistent and predictable because of Section 202.70 of the Uniform Rules for the Supreme Court and the County Court which sets forth the Rules of the Commercial Division of the Supreme Court. Rules 25, 26, 27, 28, 29, 30(c)(d), 31, 32, 32-a, and 33 focus on trial preparation and rules for conducting the proceeding. The judges stressed the importance of compliance with these rules but two particular ones stood out: Rules 27 and 28.

Generally, the judges noted the importance of not only identifying exhibits for discussion as per Rule 28, which addresses the process of pre-marking exhibits, but also carefully *evaluating* them well before identification, because the failure to do so could result in unnecessary motions in limine as outlined in Rule 27. According to the judges consulted, consideration of all aspects of the particular exhibits in terms of their relevance and what the practitioner must do to ensure their admission should be determined prior to, and discussed at, the pre-marking of exhibits. It is at this time that—hopefully—a consensus can be reached, thus avoiding expensive in limine practice.[1] But the requirement that in limine motions be filed at least ten days prior to trial does not mean that there will never be an evidentiary dispute at trial. As such disputes will occur often enough, a lawyer's keen familiarity regarding the rules of evidence will not only lead that attorney to prevail in an evidence dispute, but will give the court confidence when addressing other evidence issues that this attorney can be trusted and, in a way, is a reliable resource for the court when evaluating such matters.

One such issue was of particular note in the matter of *Riconda v. Liberty Insurance Underwriters, Inc*. ("Liberty Case"). The history of the proceeding and the underlying facts were complicated, but the evidentiary issue encountered is worthy to acknowledge. In this case where the defendant sought to set aside the verdict rendered or for a new trial, significantly the plaintiff had commenced an earlier partially related lawsuit against another party.

In the verified complaint in that action, the plaintiff alleged certain "facts" but took a position in the Liberty Case at trial directly contrary to the allegations in the prior lawsuit. Defendant objected—preserving its rights. And when the time came for defendant to flesh out its argument, the court set aside the verdict invoking the doctrine of judicial estoppel, stating that "[i]t is a well settled principle of law in our state that a party who assumes a certain position in a legal proceeding may not thereafter, simply because his interests have changed, assume a contrary position."[2] This is but one instance where an evidentiary issue was of supreme importance to the outcome of the matter.

As for the evidentiary issues that come up and are resolved at the in limine level, for the most part, many of the judges stressed 100% mastery of the business records exception to hearsay. Indeed, while most commercial practitioners were reported to be well at ease introducing business records, there were instances where that was not the case. Thus, a reminder is warranted.

The requirements to establish the exception to the hearsay rule is mandated in CPLR 4518 and in case law, to wit: (i) the records must be made in the regular course of business; (ii) the records must be the product of routine recording, such that, the records must be made routinely and on a repetitive basis by people acting in the regular course of their work; (iii) the records must have been made at the time of the acts or occurrences described therein or within a reasonable time thereafter; and (iv) the records must be made by a person who has personal knowledge of the acts or occurrences described and is under a business duty to report them.

In terms of financial transactions, acts or occurrences are recorded by one person or company and then transmitted to or incorporated into another company's records. Importantly, "it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted."[3] However, a custodian of records, while familiar with the record keeping practices of a party, may not be enough.

While a custodian may have personal knowledge of how records were maintained and that it was the party's standard business practice to record and maintain all records within the party's systems, the custodian may not be able to confirm that he had personal knowledge of the acts, events or conditions which were recorded in the business records. Thus, relying on someone else's recordation of the acts, events or conditions leaves the door open to properly question whether that third person was under a business duty with respect to any recorded acts, events or conditions.[4] Accordingly, while it may seem axiomatic, as the very foundation of the commercial part cases invariably rely on business records of all sorts, success or failure may hinge on the practitioner's knowledge of the exception through and through.

Another evidentiary issue that has come up in the trial of commercial matters is the parol evidence rule. Generally, it is clear that if the four corners of writing in question show no ambiguity, there is no room for court to search for unstated intent by resorting to extrinsic evidence. However, there are some exceptions. For example, ill-written contractual merger clauses will not preclude the use of parol evidence to establish a fraudulent inducement claim.[5]

As there are many commercial matters that allege not only breach of contract but also fraud claims, where a complaint states a cause of action for fraud, the parol evidence rule is not a bar to showing fraud either in the inducement or in the execution "despite an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made."[6] However, without an accompanying claim based in fraud, practitioners are left to their litigation and argument skills to convince the court of an ambiguity in the written words of the contract.

Some other points made in conversations with the judges are notable. A judge conveyed that lawyers before him sometimes make certain statements in front of the jurors that can result in a curative instruction being required as their statements were inconsistent with the evidence presented. This essentially negates what the lawyer was trying to accomplish and calls into question his/her credibility—which is not good to say the least.

Another point—it is a certainty that eventually all commercial trial parts will be "smart courtrooms." The technology streamlines the trial and immerses the jury into the case that could not be done by simply publishing an exhibit to the jury with each one looking at the document for seconds. The watchword for practitioners in terms of their use

of the new technology is practice, practice, practice. There is nothing more embarrassing than having to fumble with the technology, testing the patience of the bench and the jury.

Finally, it is always recommended to the litigant to observe how the court tries a case prior to the litigant appearing before that judge for trial. Judges are very different with how they conduct trials. Some have expressed a proactive approach in terms of achieving justice, which may include sustaining an objection to a question that was never objected to by opposing counsel. For other jurists, they feel their duty is not to advocate as that is the attorney's job. As one judge put it "obedience is the essence of law" and each player in the courtroom has their role and duty. If each performs that duty in a manner consistent with the law and their respective ethical obligations, justice will be done.

In sum, Commercial Part judges probably expect the same thing from the attorneys trying a case before them that all other judges in other parts do . . . but . . . maybe . . .a little bit more.

1. It should be noted that several judges emphasized the importance of disclosing documents before trial or that practitioner runs the risk of preclusion. The emphasis was particularly on civility and overall fairness while recognizing the need for zealous advocacy.
2. *Riconda Liberty Mutual Underwriters, Inc.*, Index No 3655/2012 (Sup. Ct. Suffolk County Sep. 7, 2018), *aff'd* 187 A.D.3d 1081, 131 N.Y.S.3d 170 (2d Dep't 2020).
3. See *RDM Capital Funding, LLC v. Shoegod 313 LLC*, 83 Misc.3d 1272, 215 N.Y.S.2d 302 (Sup. Ct. Kings County 2024); (In this case, the court found that an email ostensibly from the plaintiff to the defendant confirming that a wire transfer had been sent was not a business record capable of satisfying the exception. As the court put it, "[t]o authenticate the wiring of money, there needs to be authentication of evidence of such from the financial institution which wired the money—not the entity upon whose behalf the money was wired. Thus, as "[t]he key to admissibility of the record is that it carries the indicia of reliability ordinarily associated with business records" the court found that nothing in the record confirmed in a manner consistent with the business record exception to the hearsay rule that an actual wire transfer took place.
4. *Seamless Capital Group, Inc. v. Bryan A. Anthonys Design LLC.*, 84 Misc. 3d 1236, 220 N.Y.S.2d 922 (Sup. Ct. Kings Co. 2024).
5. *IBM v. GlobalFoundries U.S. Inc.*, 204 A.D.3d 441, 167 N.Y.S.3d 13 (1st Dep't 2022) citing *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 184 N.Y.S.2d 599 (1959).
6. *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 321, 184 N.Y.S.2d 599 (1959).

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FOCUS: MATRIMONIAL LAW

New York Equitable Distribution: Monetizing Domestic Violence

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The enactment of the New York "Equitable Distribution Laws" in June 1980 heralded the recognition of marriage as an economic partnership. Early drafts of the legislation explicitly ruled out "marital fault" as a factor for consideration in property distribution; however, the final draft enacted seemingly resolved the legislative dispute over complete extrication of marital fault from judicial consideration with the enactment of a "catch-all factor" in both maintenance and property distribution provisions of the statute, leaving it to discretion of each of the four judicial departments to decide the applicability of marital fault until an amendment enacted in April 2020, effective May 3, 2020.[1]

In 1984, in *Blickstein v. Blickstein*, the Second Department held that marital fault of a party as a factor generally had no place in a just and proper consideration by a court in the equitable distribution of marital assets pursuant to the equitable distribution statute, Domestic Relations Law ("DRL") section 236(B)(5)(d), martial fault being inconsistent with the underlying assumption of marriage as an economic partnership.[2] In that case, the trial court awarded *all* of the marital property to the plaintiff based upon the defendant's misconduct, which consisted solely of his abandonment of the plaintiff—sufficient grounds for plaintiff to obtain a divorce but not for the court to consider in distributing the parties' marital assets. The court opined that such consideration of fault is very difficult to evaluate in the context of marriage and may, in the last analysis, be traceable to the conduct of both parties, citing Schenkman, *1981 Practice Commentary*.[3] Notably, the appellate court in that decision left the door open for exceptions such as "egregious misconduct."

The next year, in *O'Brien v O'Brien*,[4] a Court of Appeals' decision citing *Blickstein* upheld the trial court that refused to entertain fault as a factor under the catch-all provision of the DRL and excluded evidence of the defendant's marital fault. However, the court did opine that though in this instance marital fault is not "a just and proper factor" for consideration pursuant to the catch-all factor of DRL 236(B)(5)(d),[5] it is a factor on rare occasions in cases of egregious spousal misconduct, especially conduct that "shocks the conscience of the court."

For the next few decades, marital fault such as adultery, excessive drinking, verbal harassment and physical abuse, as well as threatening to kill a spouse,[6] did not rise to the level of shocking the court's conscience. The catch-all factor that gave broad discretion in equitable distribution to the court in fashioning a just and fair distribution of marital assets lay dormant and unresponsive to insidious spousal misconduct, domestic violence.

In April 2020, the Legislature changed the landscape of equitable distribution for matrimonial litigants with the amendment to DRL § 236B (5)(d) with factor (14), adding domestic violence as a mandatory factor for consideration by the matrimonial courts in all four departments. A spouse meeting the definition of victim of domestic violence as set forth in Social Services Law § 459-a would no longer bear the onerous burden of proving marital fault sufficient to "shock the conscience" of the court for consideration of his or her spouse's misconduct in determining equitable distribution.

The 2020 amendment, DRL § 236 B (5)(d)(14), provides: a court shall consider

> "…whether either party has committed an act or acts of domestic violence, as described in subdivision one of section four hundred fifty-nine-a of the social services law, against the other party and the nature, extent, duration and impact of such acts or acts…" (emphasis added).

Social Services Law § 459-a defines "victim of domestic violence" as:

> "…any person over the age of sixteen, any married person or any parent accompanied by his or her minor child or children in situations in which such person or person's minor child is a victim of an act which would constitute a violation of the penal law, including, but not limited to acts constituting disorderly conduct, harassment, aggravated harassment, sexual misconduct, forcible touching, sexual abuse, stalking, criminal mischief, menacing, reckless endangerment, kidnapping, assault, attempted assault, attempted murder, criminal obstruction of breathing or blood circulation, strangulation, identity theft, grand larceny or coercion; and (i) and such acts or acts have resulted in actual physical or emotional injury or have created a substantial risk of physical or emotional harm to such person or such person's child; and (ii) such act or acts are alleged to have been committed by a family or household member…"

This amendment gives the court broad discretion to consider "the nature, extent, duration and impact of such acts or acts."[7] Domestic violence is also a factor considered in maintenance awards. However, there the court has less latitude in its determination since a nexus must exist between the acts by one party against the other and the acts must be shown to have inhibited or continued to inhibit a party's earning capacity or ability to obtain meaningful employment. "Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law."[8]

Post-2020 Amendment: Significant Distributions Awarded Spousal Victims of Domestic Violence

The cases where domestic violence has been a considered factor in equitable distribution since the effective date of the amendment demonstrate the recognition by the courts of the impact of domestic violence upon the spouse, emotionally, financially and psychologically, as reflected in the significant increase in distribution awards to the victim. However, the evidentiary matters implicated to prove domestic violence were not addressed by the Legislature in the 2020 amendment. The reported decisions, such as in the case below, provide some guidance where the court in determining equitable distribution relied upon the credibility of the victim, prior findings of domestic violence by the spouse in a custody trial and the court observed a party's behavior during litigation.

In the 2022 case of *J.N. v. T.N.*,[9] the court, in consideration of Factor 14 under DRL § 236B(5)(d), awarded the wife 85% of the marital estate due to domestic violence committed