

# New York Law Journal



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VOLUME 240—NO. 85

THURSDAY, OCTOBER 30, 2008

## COMMERCIAL DIVISION UPDATE

BY GEORGE BUNDY SMITH AND THOMAS J. HALL

### *TRO Applications When the Courthouse Is Closed*

On a Saturday afternoon in early October, attorneys for Citigroup drove to Cornwall, Conn., seeking a temporary restraining order from Commercial Division Justice Charles E. Ramos at his home. After discussing the case with the Citigroup attorneys, and hearing by phone from lawyers for defendants Wachovia and Wells Fargo, Justice Ramos issued a temporary restraining order (TRO) tolling, pending a further hearing several days later, the expiration of an exclusivity agreement between Citigroup and Wachovia.<sup>1</sup>

The next day, Sunday, Wachovia and Wells Fargo appealed and moved to vacate the TRO. In a brief opinion, Justice James M. McGuire of the Appellate Division, First Department, vacated the TRO, noting that “substantial questions have been raised regarding the authority of Justice Ramos to have issued the order while physically located outside the State of New York.”<sup>2</sup>

The events surrounding this case brought a spotlight to the vulnerabilities the Commercial Division has in processing emergency applications when the courthouse is closed. In response, days later Chief Administrative Judge Ann Pfau issued a “Protocol for Emergency Applications.” Justice Pfau’s memorandum announcing the protocol predicted that the current economic situation will likely “foster additional emergency applications.”

We address below the protocol adopted by the Office of Court Administration as well as certain procedural issues that come into play when seeking emergency relief when the courthouse is closed.

#### The New Protocol

Chief Administrative Judge Pfau’s Protocol for Emergency Applications, issued on Oct. 10, 2008, notes that, in the past, attorneys have been “left to search on their own for a judge who will entertain” an application during the evenings, weekends and holidays when the courthouse is closed. This contrasts with the practice in the U.S.

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District Court for the Southern District of New York, which assigns a judge to Part 1 to handle emergency matters.<sup>3</sup> In case of an emergency outside of regular business hours, it is recognized that a phone message left with the chambers of the Part 1 judge, whose name is posted on the court’s Web site, will usually result in a prompt reply.

The protocol establishes an emergency phone number and e-mail address (800-430-8457, [emergency@nycourts.gov](mailto:emergency@nycourts.gov)) for an attorney to contact in the event of a need for a TRO when the courthouse is closed. Such inquiry will be received by the Court’s Division of Technology staff, which will convey the essential information to the administrative judge (or backup in the event the administrative judge is not available) who will make arrangements to have a judge hear the application. The protocol further notes that, in the event the judge hearing the emergency application wants to arrange for a multiparty conference call, the Division of Technology can make appropriate arrangements. However, the protocol does not address all of the procedural complications that arise from emergency TRO applications outside of business hours.

#### Signing Orders Out of State

A threshold issue is whether a state judge must be physically present in New York to enter a valid and enforceable TRO. The New York State Constitution provides that “[a] justice of the supreme court may perform the duties of office or hold court in any county....”<sup>4</sup> Statutory authorities track this language.<sup>5</sup> Indeed, CPLR §2212(b) provides that ex parte motions without notice may be made to a justice out of court “in any county in the state.” Whether these provisions absolutely preclude a judge from engaging in any judicial act whatsoever outside the state is not entirely clear on their face. Case law addressing these provisions

has focused on the authorization thereunder for Supreme Court justices to be temporarily assigned to other counties.<sup>6</sup>

While New York courts have considered whether New York judges can conduct hearings outside of New York, they have not had much occasion to consider whether judges can sign orders outside the state. In *People v. Craig*, the Supreme Court, Bronx County held that the court’s examination of a potentially unavailable witness located in a different state would exceed the court’s authority.<sup>7</sup>

The court wrote, “[i]t is a universally accepted principle of law that a court may not sit outside the territorial limits of its jurisdiction, for any reason whatsoever, even with (and, a fortiori, without,) the consent of all parties, and any proceeding so conducted is a nullity.”<sup>8</sup> *Craig* involved the prospective examination of a witness out of state, which would involve a public session of court out of state that would result in testimony that could become part of the trial record. Similarly, in *People v. Shepherd*, the Court of Appeals held that a town court could not hold a suppression hearing outside of the town borders.<sup>9</sup> *Shepherd* was decided under the Uniform Court Justice Act, though, which expressly limits local justices to holding court within their municipal borders, with certain exceptions.<sup>10</sup> And *Shepherd* again considered the question of a court session out of the jurisdiction, not the execution of an order.

Perhaps the clearest statement on the issue of signing orders out of state came from the Indiana Supreme Court over a hundred years ago. In *Bayless v. Price*, an Indiana state judge received a motion to enjoin a landowner from obstructing the plaintiff’s easement.<sup>11</sup> From Michigan, the Indiana judge issued a temporary restraining order granting the requested relief. On appeal, the state’s high court held that the judge lacked authority to issue the order while out of state:

This action was unquestionably erroneous. His authority as judge was conferred alone by the constitution and laws of this state. Our laws have no extraterrestrial operation. When the judge passed the boundaries of the state, the power to exercise judicial functions did not follow him. He could not, as judge, sit in chambers in the state of Michigan and issue a valid restraining order.<sup>12</sup>

However, because the final judgment issued a permanent injunction in effect continuing the restraining order, the judge’s action was held to be harmless error.

On the other hand, the California Supreme

Court has held that a judicial opinion is valid even if signed out of state. In *People v. Billa*, the chief justice concurred in the court's unanimous decision by faxing his signature on the opinion from an out-of-state conference.<sup>13</sup> Because the chief justice had taken part in oral arguments in California, and because state regulations provide that the decision of an appellate panel takes effect when filed by the court clerk, the justice's concurrence was held to be valid because the "legally effective judicial act," filing with the clerk, occurred in California.<sup>14</sup> A similar analysis might apply in New York, where orders are required to be entered and filed in the office of the clerk of the court where the action is pending.<sup>15</sup>

While the issue of whether a New York state judge can validly enter an order out of state perhaps is not entirely clear, there are at least, as Justice McGuire put it, "substantial questions" as to the validity thereof. The new protocol anticipates this issue can be avoided in the future by setting in place a system for the appointment of a judge, presumably in state, to hear TRO applications when the courthouse is closed.

## TROs Before Complaint Filed

Another issue raised by emergency applications when the courthouse is closed is whether the summons and complaint need to be filed with the clerk before a TRO can be issued. CPLR §304 provides an action is commenced when the summons and complaint are filed with the clerk of the court.<sup>16</sup>

New York case law does support the proposition that the failure to file the summons and complaint renders the action a nullity.<sup>17</sup> However, CPLR §304 provides a safety valve for obtaining a TRO before the filing: "Where a court finds that circumstances prevent immediate filing, the signing of an order requiring the subsequent filing at a specific time and date not later than five days thereafter shall commence the action." It is critical that counsel seeking a TRO before filing an action include this statutory language in the proposed order to show cause.

In a pair of elections cases, courts have emphasized that this safety valve in CPLR §304 is available only where a true emergency exists. In *Connolly v. Chenot*, a candidate for the county board of a political party filed a suit to dismiss his competitors' designating petitions.<sup>18</sup> The Third Department affirmed a dismissal of the action, holding that an order to show cause granting "leave of the Court to file the within papers and purchase [sic] an RJI and Index number on or before July 27, 2000" provided insufficient language to invoke the CPLR's emergency provision.<sup>19</sup> The court further held that the record showed no evidence that the petitioners had a pressing need to effect service before filing the order with the court clerk.<sup>20</sup> Since the petitioners had, in fact, served the order on the respondents before filing the papers, the action had been properly dismissed.

In contrast, in *Bogardt v. Lite*, the petitioners were required by statute to commence an action to invalidate a political candidate's designating petition by July 27, 2000.<sup>21</sup> The petitioners obtained an order to show cause on July 26, served the respondents on July 27, and filed the papers with the county clerk on July 28.<sup>22</sup> The order included the statutory language that "the signing of this order to show cause shall commence this proceeding provided that, not later than five (5) days hereafter, the order to show cause or a conformed copy thereof is filed with the County Clerk."<sup>23</sup> On these facts, the Supreme Court, Nassau County allowed the action to proceed.<sup>24</sup>

It may be difficult to distinguish between the language of the orders to show cause in these cases, but it seems likely the courts will look for a clear need to commence an action before filing, before they approve orders to show cause under the safety valve provision of CPLR §304.

### • When Is an Application Ex Parte?

In reversing the grant of the TRO, Justice McGuire found that the lower court's TRO was not "the product of a motion made on notice" and thus was reviewable under CPLR §5704(a). CPLR §5704(a) permits a justice of the Appellate Division to vacate or modify without notice to the adversary any order that had been "granted without notice to the adverse party." But was the TRO here granted without notice? The record indicates that telephone notice of the TRO application was given to defense counsel and that defense counsel participated in the hearing before Justice Ramos by telephone.

A TRO application can be brought ex parte or on notice. In *Schulz v. State*, where the respondent was given 10 minutes' notice of petitioner's TRO application,<sup>25</sup> the Third Department considered the difference between the two.<sup>26</sup> The Third Department concluded that the order was effectively an ex parte TRO granted without notice, as the 10-minute warning was "temporarily inadequate to enable respondent to create a record for the purpose of appeal."<sup>27</sup>

The Third Department's focus on the ability to create an appellate record is consistent with the reasoning in *Sholes v. Meagher*, in which the Court of Appeals held the lower court's order made sua sponte was an ex parte order.<sup>28</sup> In *Sholes*, the trial judge sanctioned an attorney who made "disrespectful facial expressions" despite instructions to stop.<sup>29</sup> The Court of Appeals affirmed the dismissal of an appeal brought under CPLR §5701(a)(2), observing that orders sua sponte were not the product of motions on notice as envisioned by CPLR §2211 or §3216.<sup>30</sup>

Conversely, the First Department dismissed a motion brought under §5704(a) after the adverse party had already moved on notice in the issuing court to vacate a TRO.<sup>31</sup> By moving on notice, the respondent had converted an ex parte temporary restraint into "the result of a contested motion based on supporting and opposing papers."<sup>32</sup> Such an order had to be appealed under the provision for formal appeals by right, CPLR §5701(a)(2).

## Conclusion

Not surprisingly, urgent weekend TRO applications can bring to the surface issues that are infrequently encountered. The protocol is a very positive step towards alleviating the difficulties counsel face in seeking emergency relief when the courthouse is closed. Pitfalls remain, however, requiring careful navigation by litigation counsel.



1. Order to Show Cause dated Oct. 4, 2008, *CitiGroup Inc. v. Wachovia Corporation, et al.*, 08-602872 (N.Y. Co.).

2. Order dated Oct. 5, 2008, *CitiGroup Inc. v. Wachovia*

*Corporation, et al.*, 08-602872 (1st Dept.).

3. S.D.N.Y. Rules for the Div. of Bus. Among Dist. Judges 3, available at <http://www1.nysdcourts.gov/rules/rules.pdf>.

4. N.Y. Const. Art. VI, §26(a).

5. N.Y. Judiciary Law §147-a ("[a]ny justice of the supreme court has power to hold a special or trial term of the supreme court in any county for the whole or any portion of the term...."); N.Y. CPLR §2212(b) ("[a] motion in an action in the supreme court that may be made without notice may be made at a motion term or to a justice out of court in any county in the state").

6. See, e.g., *People v. Herrmann*, 149 NY 190, 195, 43 NE 546, 548 (1896) (holding that, under similar provision of earlier constitution, Supreme Court justice could hold a criminal term in the First Department, even though he was a justice from the Second Department); *People v. Deeb*, 284 AD 373, 375, 132 NYS2d 441, 439 (3d Dept 1954) (holding that, under similar provision of former constitution, Supreme Court justice was within his power to hold sentencing hearing in Columbia County but issue memorandum decision and sign settlement order in chambers at Kings County, when he filed the order in Columbia County).

7. 151 Misc2d 442, 446, 581 NYS2d 987, 990 (Bronx Co. 1992).

8. Id. at 444, 581 NYS2d at 989.

9. 68 NY2d 841, 843, 508 NYS2d 173, 174 (1986).

10. N.Y. Uniform Just. Cr. Act §106 (McKinney 2007).

11. 31 NE 88, 88 (Ind. 1892).

12. Id.

13. 79 P.3d 542, 548 (Cal. 2003).

14. Id. at 548. The California Supreme Court's decision overturned two earlier decisions which held to the contrary. *Cothran v. San Jose Water Works*, 375 P.2d 449, 452 (Cal. 1962) (requiring justice to sign opinion while within state); *People v. Ruef*, 114 P. 48, 53 (Cal. 1911) (holding previous order of the court void, when justice signed order and departed state before remaining three members of the four-justice majority signed).

15. CPLR Rule 2220(a).

16. N.Y. CPLR §304(a).

17. N.Y. CPLR §304(c); see *Parker v. Mack*, 61 NY2d 114, 117, 472 NYS2d 882, 883 (1984) (holding that filing a bare summons without complaint or notice did not commence an action).

18. 275 AD2d 583, 583, 712 NYS2d 234, 236, N.Y. Slip Op. 07631 (3d Dept. Aug. 24, 2000).

19. Id. at 584-85, 712 NYS2d at 237.

20. Id. at 585, 712 NYS2d at 237.

21. 186 Misc2d 38, 39, 715 NYS2d 601, 602, N.Y. Slip Op. 20505 (Nassau Co. Aug. 11, 2000).

22. Id. at 39, 715 NYS2d at 602.

23. Id. at 39, 715 NYS2d at 602.

24. Id. at 39-40, 715 NYS2d at 603.

25. 198 A.D.2d 624, 625, 603 NYS2d 632, 634 (3d Dept. 1993).

26. Id. at 626-27, 603 NYS2d at 634-35 (discussing issue even though case was decided on other grounds: "the very nature of an order granting temporary relief is such that the question of its appealability... is likely to recur yet evade review").

27. Id. at 627, 603 NYS2d at 635.

28. 100 NY2d 333, 335, 763 NYS2d 522, 524, 2003 N.Y. Slip Op. 14809 (June 10, 2003).

29. Id. at 334, 763 NYS2d at 523.

30. Id. at 335, 763 NYS2d at 524; cf. *Associates v. Edelman*, 241 AD2d 365, 368, 659 NYS2d 885, 888 (1st Dept. 1997) (dismissing appeal under CPLR §5701(a) of order memorializing telephone directive, as not appealing from decision resulting from motion made on notice); *Everitt v. Health Maintenance Center*, 86 A.D.2d 224, 227, 449 NYS2d 713, 714 (1st Dept. 1982) ("The precalendar conference order is not made on a motion on notice asking for specific relief. It is made simply on a notice of such a conference. Further, as such an order is made without any supporting papers, it is not practicable for an appellate court to review the order [under CPLR §5701(a)].").

31. *Pitkus v. Dudley*, 90 AD2d 700, 700, 455 NYS2d 772, 773 (1st Dept. 1982).

32. Id. at 700, 455 NYS2d at 773.

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