TAX

Statutory Residence in NY: The 'Permanent Place of Abode' Test is in Need of Repair

By Lou Vlahos

This is part three of a three-part series.

Say I lived in Burlington, Vermont, and work in Plattsburgh, New York.[1] I commute to work almost every day, just 32 miles each way.[2] Say my spouse is originally from Long Island and her family used to spend their summers in Montauk. She misses the ocean beaches, so we purchase a year-round studio apartment in Montauk — almost 400 miles away from Burlington, but within walking distance of the Atlantic — that we use on long weekends, some holidays, and vacations.


LOU VLAHOS

Most of my wages are earned in N.Y. and, thus, are subject to N.Y. income tax; I get a credit for the tax paid to N.Y. against the income tax I owe to Vermont as a domiciliary of that state.

Imagine my surprise when N.Y. informs me that I am a statutory resident of the state and, therefore, owe N.Y. tax on all of my income, which includes that part of my wages that I earned outside N.Y., my investment portfolio income, and my rental income from a condominium in Stowe, Vermont.[3]

The department explains to me that even though I am not domiciled in N.Y., I am nevertheless subject to income taxation as a resident of the state because I maintain a permanent place of abode in N.Y., one in which I clearly have some residential interest, not-

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COMMERCIAL LITIGATION

Recovery of Counsel Fees & Positive Expenses for Filing an Improper Lis Pendens

By Leo K. Barnes Jr.

It has long been said that "with great power comes great responsibility." The maxim is especially appropriate in connection with the effectuation of a CPLR Article 65 Notice of Pendency. Assuming compliance with the requisite procedures outlined in CPLR 6511 (it is filed with the County Clerk where the property is situated; and the complaint which founds the claim is filed with the Notice of Pendency) and CPLR 6512 (the summons and complaint is served within 30 days of filing the notice of pendency (not the typical 120 day afforded by CPLR 306-b)), the filing serves as an immediate cloud on title, effectively undermining the viability of a property transfer until the *lis pendens* is removed or otherwise resolved. In that regard, CPLR 6501 provides:

> A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property, except in a summary proceeding brought to recover the possession of real property. **The pendency of such an action is constructive notice, from the time of filing of the notice only, to a purchaser from, or incumbrancer against, any defendant named in a notice of pendency indexed in a block index against a block in which property affected is situated or any defendant against whose name a notice of pendency is indexed. A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as a party** [bold added].


LEO K. BARNES JR.

Unlike the other provisional remedies contained within the CPLR (preliminary injunction; temporary restraining order; attachment; and seizure of chattel), Article 65 permits the unilateral, *ex parte* filing of a *lis pendens* against real property *without advance court approval.* But the proverbial "stick" in the "carrot and the stick" metaphor is that if the court ultimately determines that the filing of a *lis pendens* was not effectuated in accordance with the permissible statutory framework, counsel fees, costs and other expenses may be awarded in accordance with a motion to cancel a notice of

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PERSONAL INJURY

Impeachment of Unlicensed Driver

By Paul Devlin

In litigating car-accident cases, I have often heard that the fact that a driver is unlicensed is not admissible to prove negligence at trial. That same fact, however, might be admissible to impeach the driver's credibility, based on the trial judge's discretion. It was not until recently that I had to research and argue the issue for one of my clients in a car-accident case. I share the following for those who have also heard the law as common knowledge amongst tort litigators but have yet to take a closer look at the issue.


PAUL DEVLIN

With respect to negligence, one would think that driving without a license is a clear violation of a statute and should be admissible to prove negligence per se. PJI 2:26 sets forth an instruction that the VTL establishes rules which motorists and pedestrians must obey. The jury is instructed that one party claims the other party violated a section of the VTL. In the case of an unlicensed driver, VTL section 509(1) would theoretically be inserted and read to the jury. The remainder of the instruction would essentially tell the jury that if the proponent has proved the adverse party violated the statute (i.e., drove without a license), such a violation constitutes negligence. The jury is further instructed that they cannot disregard a violation of a statute and substitute some other standard of care. This would be a clear boon for counsel trying a car-accident case against an unlicensed driver. As it turns out, the case law is clear that driving without a license cannot be used as evidence of negligence.

Courts have held that a driver's license relates only to the authority for operation and not the manner thereof, and the absence of a license is not even presumptive evidence of negligence. See *Hanley v. Albano,* 20 A.D.2d 644 (2nd Dept. 1964). The *Hanley* Court cited a Third Department case that set forth the following in-depth reasoning behind its holding. *"Martin v. Herzog* (228 N.Y. 164) is of course the leading case establishing the proposition that a breach of statutory duty may in some cases establish negligence per se. But that case is not analogous to the cases at bar. In the *Herzog* case (citation omitted) the statutory violation was the operation of a vehicle without lights after sunset. The statute violated there had to do with the actual operation of the vehicle, and of course where there has

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EMPLOYMENT

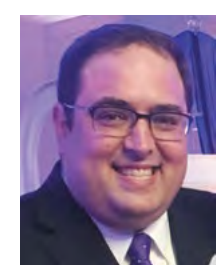
Employers May be Exposed to a Sex Discrimination Lawsuit From…an Alleged Harasser?

By Mordy Yankovich

In this "Me Too" era, it is logical that an employer's reflexive reaction to receiving a complaint of harassment from a female employee is to immediately fire the alleged male harasser. However, while the employer may believe that firing the male employee will protect the employer from a lawsuit by the female employee, such impulsive action without a thorough unbiased investigation may expose the employer to a sex discrimination lawsuit filed by . . . the alleged male perpetrator.

Consider the following recent Second Circuit case: Plaintiff, a female collegiate tennis player, accused her male coach, an employee of Hofstra University, of sexual harassment. *Menaker v. Hofstra University,* 935 F.3d 20 (2d Cir. 2019). Specifically, the plaintiff alleged that her coach would comment on her menstrual cycle, tell players to "dress nice and shave their legs" and "scream obscenities and verbal abuse" at a female tennis player on the opposing team. Plaintiff further alleged that her coach made unspecified advances towards her and when she rejected those advances, the coach threatened her scholarship and position on the team. The coach adamantly denied all of the allegations.

In response to the internal complaint, the university performed a cursory investigation, did not interview the coach's witnesses or consider the coach's rebuttal to the complaint. Rather, the university terminated the coach's employment relying predominantly on the complainant's letter detailing her complaint. Based on these facts, the coach filed a complaint in federal court against the university alleging discrimination on the basis of gender. The essence of the coach's discrimination charge is that the university discriminated against him by assuming that because he is male, and a female made an internal sexual harassment complaint against him, he must be guilty as charged.


MORDY YANKOVICH

While the District Court granted the university's 12(b)(6) motion to dismiss the complaint, the Second Circuit reversed the District Court's decision holding that the coach sufficiently alleged a *prima facie* case of sex discrimination under Title VII. The Second Circuit held that "where a university (a) takes an adverse employment action against an employee, (b) in response

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withstanding that it is almost 400 miles from my job in northern N.Y. and (b) spend more than 183 days in N.Y. during the year.

Would the result have been any different if I lived in eastern Pennsylvania, worked in western N.Y., and had a studio apartment on the East End, over 500 miles away? Under the current interpretation of the statute, nope.

You get the picture. What's wrong with this analysis? Does it make sense?

An alternative?

The beginnings of an answer may be found in the dissent to the Appellate Division's decision in *Gaied,* where the court held for the state. The dissent there explained that the intent of the statutory residence law, as stated in its legislative history, is to tax those individuals who, as a matter of fact, are N.Y. residents.[4]

Before *Gaied,* the court in *Tamagni*[5] considered the constitutionality of two states taxing someone as a resident. The court there referenced the legislative history of the permanent residence test — signed into law in 1922 — stating that the test was enacted to discourage tax evasion by N.Y. residents.

The court explained that at the time the statute was enacted, the Department of Taxation[6] noted in its memorandum in support of the legislation that, "[w]e have several cases of multimillionaires[7] who actually maintain homes in New York and spend 10 months of every year in those homes…but they…claim to be nonresidents."[8] According to the memorandum, the statutory residence test serves the important function of taxing those "who, while really and [for] all intents and purposes [are] residents of the state, have maintained a voting residence elsewhere and insist on paying taxes to us as nonresidents."

Similarly, the Tax Department's memorandum in support of the 1954 amendment to the statute, which established the "more than one hundred eighty-three days" requirement, specifically states that the amendment was necessary to deal with "many cases of avoidance and…evasion" of income tax by N.Y. residents.[9]

Turning again to *Gaied* in the Appellate Division, the dissent continued, "[a] permanent place of abode means a dwelling place of a permanent nature maintained by the taxpayer." Using language that would later be adopted by the Court of Appeals in *Gaied*, and heavily emphasizing the distinction between "permanently maintaining" and "continuing living arrangements at" a particular dwelling place, the dissent asserted that the inquiry should focus on the person's own living arrangements in the purported place of abode, and on whether the taxpayer had a personal residential interest in the place.

In reaching its decision, the Court of Appeals in *Gaied* concluded that there was no rational basis to interpret "maintains a permanent place of abode" to mean that a taxpayer need not "reside" in a given dwelling, but only maintain it, to qualify as a statutory resident. The court rejected the department's and the Appellate Division's analyses, and made a distinction between having a property interest, as opposed to a residential interest, in a dwelling.

The Court of Appeals explained that the legislative history supported the idea that the law was intended to prevent tax evasion by de facto N.Y. residents. Thus, the permanent place of abode had to actually relate to the taxpayer, and the taxpayer themselves must have a residential interest (as opposed to just a property interest) in the property.

Nowhere, however, did the court discuss any requirement that there be a nexus between the permanent place of abode in which the taxpayer has a personal residential interest and the location(s) within N.Y. at which the taxpayer spends the requisite number of days that cause them to be treated as a resident. In fact, some courts — including the tribunal in the taxpayer's case, above — have rejected such arguments based upon the department's interpretation of the law, which fails to require such a nexus.

For example, in *Barker,*[10] a Connecticut domiciliary who worked in Manhattan every day, as an investment manager, and who owned a vacation home in East Hampton (which they used for less than three weeks in any of the years at issue), was found to be liable for N.Y. income tax on all of their income because they spent over 183 days in N.Y. during the year — working in NYC — and owned a permanent place of abode in N.Y. – approximately 110 miles away from Manhattan. The tribunal rejected the taxpayer's argument that the house was not suitable for use by the taxpayer's family as a permanent home, which it characterized as "subjective," stating that it was "well settled that a dwelling is a permanent place of abode where, as here, the residence is objectively suitable for year-round living and the taxpayer maintains dominion and control over the dwelling. There is no requirement," the tribunal added, "that the [taxpayer] actually dwell in the abode, but simply that he maintain it."

As we just saw, the Court of Appeals in *Gaied* rejected this last statement, that maintenance of a dwelling alone sufficed for purposes of the statutory residence test. Relying on the legislative history, the court held that a taxpayer cannot have a permanent place of abode in N.Y. unless "[he], himself, ha[s] a residential interest in the property." The purpose of the test, the court explained by reference to the legislative history, was to prevent avoidance by people who really live in N.Y. but attempt to be taxed as nonresidents.

Note: Lou Vlahos, a partner at Farrell Fritz, heads the law firm's Tax Practice Group. Lou can be reached at (516) 227-0639 or at lvlahos@farrellfritzcom.

1 Ah, Lake Champlain.
2 About the distance from Jericho, NY (a bedroom community) to Manhattan.
3 Which, ironically, I lease mostly to people from NY. Again, this is my story, so I can take as much license as I need to make a point. Besides, I am told that it's good to dream.
4 *Gaied v. New York State Tax Appeals Tribunal,* 957 N.Y.S. 2d 480.
5 See EN xix.
6 Then known as the Income Tax Bureau.
7 No one talks about millionaires today. Billionaires are now the fashion.
8 Bill Jacket, L. 1922, ch. 425.
9 Memorandum of Dept. of Taxation and Finance, 1954 N.Y. Legis. Ann., at 296.
10 *Matter of Barker,* DTA No. 822324 (N.Y. Tax App. Trib. 2011).

Employment (Continued from page 12)

to allegations of sexual misconduct, (c) following a clearly irregular investigative or adjudicative process, (d) amid criticism for reacting inadequately to allegations of sexual misconduct by members of one sex, these circumstances support a *prima facie* case of sex discrimination." Specifically, in this case, the university failed to follow its sexual harassment policy; did not permit the coach to present his witnesses and did not otherwise consider the coach's evidence. Rather, there was sufficient evidence that the university succumbed to outside pressure to terminate the coach's employment, permitting the case to proceed.

Judge Jose Cabranes articulately summarized the holding as follows: "When universities design and implement policies to ensure the security of their students, they facilitate their sacred mission of educating the next generation. But when they distort and deviate from those policies, fearfully deferring to invidious stereotypes and crediting malicious accusations, they may violate the law."

All employers are susceptible to similar pressures in this political climate. Acting instinctively based on these pressures may lead to exposure. Employers are, thus, best served to adopt a uniform sexual harassment policy and complaint procedure (as required by law) and ensure that such procedure is followed any time a complaint is filed. If the employer concludes, after a thorough and unbiased investigation that sexual harassment occurred, an employer should take appropriate remedial action.

Note: Mordy Yankovich is a senior associate at Lieb at Law, P.C. practicing in the areas of Employment, Real Estate and Corporate law. He can be reached at Mordy@liebatlaw.com.