MondayMonday

Say, It's Only A Paper Moon

August 26, 2013

In honor of National Palsgraf Day (August 24th) we ask this question: What does Mrs. Palsgraf's 1924 ride on the Long Island Railroad have in common with Sacco and Vanzetti?

Last Friday was the anniversary of the death in the electric chair of Sacco and Vanzetti, two self-proclaimed anarchists of Italian descent who were defendants in a murder trial which reached legendary proportions following their conviction in 1921. Great men and women came to the defense of the two men, from Felix Frankfurter to Dorothy Parker. We don't argue the case here, but leave that to the men's defenders, who still do not rest.

It's the bottom line we see. Sacco and Vanzetti were convicted because they were filthy, anarchist, Italians. And, in the "Red scare" world of 1921, Italians meant trouble. After all, wasn't Mrs. Palsgraf's injury blamed on Italians as well?

It was. The Times reported that the explosion at the East New York LIRR station was the result of fireworks being carried by three men, who fled with the station crowd when the explosives ignited.

Capt. Gegan of the Bomb Squad said they were "probably Italians, who were bound for an Italian celebration . . . Where fireworks and bombs play an important role." An expert, no doubt.

Easy targets make bad law, as every attorney knows, leading to shortcuts to justice which lead even good men astray. Or maybe the moral is: Don't drop the fireworks and take the cannolis anyway.

There are statutes whose existence is truly chimerical; imaginary and unreal. Such a section is GML 50-e(5). It *seems* to provide for a motion to serve a late notice of claim. But if you'd read the cases, you'd learn that authority for <u>making</u> the motion is far from the reality of getting it granted.

So, we look at the errors in *Grasso v. Nassau County*, 2013 NY Slip Op 05674 (2d Dep't, 8/21/13) with the weathered eye of one who understands that even if everything had been done that the statute demands, it still probably would not have produced any different result.

First, the good news: Though the application was brought as a cross-motion to defendant's motion to dismiss, that's okay. A special proceeding was not required. What was required, however, was a copy of the proposed notice of claim, per GML 50-e(7). Absent that proposed notice, the application should have been denied out of hand.

But even overlooking that deficit, plaintiff would have fared no better. Unsubstantiated law office failure by prior counsel was not a reasonable excuse for failure to serve timely notice on defendant fire department. Nor was there any proof that the fire department had received "actual knowledge" or the "essential facts" of "plaintiffs' claims of medical malpractice and wrongful death against the Fire Department." There was no showing that any accident report or medical record "sufficed to convey to the Fire Department actual knowledge of the essential facts constituting the claims against it." Finally, plaintiffs failed to show that the more than one year delay since the date of the accident would not "substantially prejudice the Fire Department in maintaining its defense on the merits."

So children, justice is done. The unicorn of GML 50-e(5) is safe back in its Augean stable. Playing on the side of the angels is hard. "It's *supposed* to be hard. If it wasn't hard, everyone would do it."