MondayMonday

Three Meaningless Cases

January 11, 2016

With the new year but days' old, the City is already in its first crisis, at least according to the *New York Post* (and who would know better?) Apparently, on the streets of the very city which survived The Bagel Famine of 1951, there are people scooping out the center of their bagels before eating them. The shame is palpable.

There are at least eight million problems in the Naked City and hollowed out bagels isn't one of them. When it comes to bagels, estoppel bars any such complaints. Plain, salt, garlic, poppy and onion are the permissible, traditional varieties of bagel, perhaps sesame and egg too. But a "French Toast" bagel is not, nor are Sunflower Seed, Cinnamon Raisin, Omega-3, Lo-Carb, Sun-Dried Tomato or Prune bagels. Okay, we made the last one up, but you get the point. We didn't complain then; we can't complain now.

Change is what's authentic in New York. Traditions are useful only when they earn. Belly lox is lox; Nova is "smoked salmon". Want Nova? Pay for it. Go ahead; eat crap if you want to. As long as the check clears, what's it to 'ya? There are people who think an Oreo is better than a Milano; people who prefer any mutt coffee in a blue and white paper cup with a picture of the Acropolis on it over a latté from Starbucks. Is one more authentic than the other? Sure, but we won't tell you which one. It's your buck.

We bear a famous family name here in New York, one which brought not only the cream cheese

we know today to the bagel, but whipped cream cheese as well. Since *Temp-Tee*® no longer carries that family name, it's time to confess: We have always preferred *Philadelphia Brand*® bar cream cheese on our bagel. In truth, though, we prefer butter, and you know what kind. We're from New York. It's our damned bagel. Wanna' make something of it?

Choosing which cases to review from week to week can sometimes be difficult. Take last week, for instance. Do we discuss *Dedushaj v. 3175-77 Villa Ave. Housing*, 2016 NY Slip Op 00024 (1st Dep't 1/5/16)? No, for how unusual is it for a defendant to get away with failing to comply with a conditional preclusion order? All defendants did here was ignore the motion court's directive to explain if the documents sought had ever been searched for and whether they had been routinely destroyed. Preclusion, like the court below ordered? Of course not. That would be "disproportionate". Instead AD1 awards plaintiff $5000 as a parting gift, together with its believe that he can surely prove his case anyway, without the documents.

How about *Andino v. Mills*, 2016 NY Slip Op 0004 (1st Dep't 1/5/16)? Nothing special here either. AD1 reviews an award to a plaintiff who suffered permanent brain damage (cognitive impairment), injuries to her knees requiring three surgeries and the need for a future knee replacement as result of a motor vehicle accident. It leaves untouched $600K for past P+S, $2.4M (19 yrs) for future lost earnings, $2.1M for future medicals and $2.5M for future loss of pension. Instead, it reduces the jury's award for future P+S (37 yrs) from $23M down to $2.7M. Why? "Unreasonable." What do juries know?

Instead, we choose *Lewis v. NYCHA*, 2016 NY Slip Op 00040 (1st Dep't 1/7/16). Defendants moved to strike allegations in the supplemental BP alleging a failure to provide a skid/slip-resistant surface on a staircase in violation of listed statutes and regs. Those allegations, says AD1, were not in the notice of claim and are new theories of liability. Plaintiff's 50-h testimony, even if it could be used to amend a theory of liability (it can't), never spoke about the step itself, just the failure to clean up the liquid that Plaintiff slipped on. The coup de grâce? The boilerplate in the NOC itself; the Swiss Army Knife of pleading, had failed.

Plaintiff alleged in the NOC that Defendant was negligent in the "ownership, operation, design, creation, management, maintenance, contracting, subcontracting, supervision, authorization, use and control" of the step. Sound familiar? If so, according to AD1, shame. You should know that you cannot infer from this language that the step was defective or that Defendant's porter was improperly trained. The supplemental BP, therefore, contained "new theories of liability that cannot be fairly implied from the notice of claim, and precluded plaintiff's expert from testifying with regard to them."

Whoever said this was easy?