St. John's Law Review

Volume 53
Number 1 *Volume 53, Fall 1978, Number 1*

Article 15

Federal Venue Restrictions for Suits Against National Banks Held Inapplicable to Third-Party Claims

Anne A. Dillon

Federal venue restrictions for suits against national banks held inapplicable to third-party claims

Under federal law, a national bank may be sued in a state court in the county or city in which it is located.[296] Although the language of the applicable venue statute appears to be permissive, in *Mercantile National Bank v. Langdeau,*[297] the United States Supreme Court held that "national banks may be sued *only* in those state courts in the county where the banks are located."[298] Recently, however, in *Lazarow, Rettig & Sundel v. Castle Capital*

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in the litigation of disputes. New York State Labor Relations Bd. v. Holland Laundry, Inc., 294 N.Y. 480, 493-94, 63 N.E.2d 68, 74 (1945); *see* Weiner v. Greyhound Bus Lines, Inc., 55 App. Div. 2d 189, 191, 389 N.Y.S.2d 884, 886 (2d Dep't 1976). Such finality is considered essential for securing the rights and obligations of the parties and in preventing harrassing and vexatious relitigation of controversies. VESTAL, *supra* note 269, at V-7 to 10; *see* von Moschzisker, *Res Judicata,* 38 YALE L.J. 299, 299-300 (1929); 65 HARV. L. REV. 818, 820 (1952). Furthermore, finality of adjudications promotes consideration of judicial economy and the integrity of determinations made by courts of competent jurisdiction. VESTAL, *supra* note 269, at V-10 to 12; *see* D. SIEGEL, *supra* note 267, § 442; von Moschzisker, *supra* at 300-01. Due to these considerations, "recent years have seen a marked expansion by the courts of the doctrine of res judicata." H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 451 (5th ed. 1976).

[296] The venue provision of the National Bank Act provides in pertinent part that "[s]uits . . . against any . . . [national bank] . . . may be had in any . . . State . . . court in the county or city in which said [national bank] is located." 12 U.S.C. § 94 (1976). Until recently, the meaning of the term "located" as used in § 94 had been uncertain. New York courts held that, for purposes of § 94, a bank is "located" and therefore could be sued, only in that county in which its principal office is situated. *E.g.,* Thomas v. Atlanta Nat'l Bank, 58 App. Div. 2d 1001, 396 N.Y.S.2d 946 (4th Dep't 1977) (mem.); Gregor J. Schaefer Sons, Inc. v. Watson, 26 App. Div. 2d 659, 272 N.Y.S.2d 790 (2d Dep't 1966); Stephen-Leedom Carpet Co. v. Republic Nat'l Bank of Dallas, 25 App. Div. 2d 645, 268 N.Y.S.2d 377 (1st Dep't 1966) (mem.). Courts in other jurisdictions, however, held that a national bank is "located" in any county in which it operates a branch office. *E.g.,* Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co., N.A., 281 N.C. 525, 189 S.E.2d 266 (1972); Holson v. Gosnell, 264 S.C. 619, 216 S.E.2d 539 (1975), *cert. denied,* 423 U.S. 1048 (1976). The issue was resolved in Citizens & S. Nat'l Bank v. Bougas, 434 U.S. 35, 45 (1977), wherein the United States Supreme Court adopted the latter position. For a critical discussion of the *Citizens* decision, see Steinberg, Citizens & Southern National Bank v. Bougas—*Achieving Justice Under the Venue Provisions of the National Bank Act,* 12 GA. L. REV. 161, 170-73 (1978).

[297] 371 U.S. 555 (1963).

[298] *Id.* at 561 (emphasis added). The Supreme Court has recognized only two exceptions to the general rule precluding suits against national banks in forums other than those in counties in which the bank is "located." In Casey v. Adams, 102 U.S. 66, 67 (1880), the Court held that purely "local" actions may be brought in counties other than those specified in § 94. In addition, the Court has stated that the venue privilege may be waived by a failure to assert it, Charlotte Nat'l Bank v. Morgan, 132 U.S. 141, 145 (1889), or by conduct which could be construed as consent to be sued, National Bank of N. America v. Associates of Obstetrics and Female Surgery, Inc., 425 U.S. 460 (1976) (per curiam). Conduct sufficient to constitute consent appears to be limited to on-going business activity within the jurisdiction, including qualifying to do business or appointing an agent to receive service of process in a foreign district. *Id.* at 462 (Rehnquist, J., concurring).

Corporation,[299] the Appellate Division, First Department, held that, where a third-party action is brought in good faith, a suit may be maintained against a national bank in the state courts of a county other than the county in which the bank is located.[300]

Lazarow, Rettig & Sundel, a New York law firm, purchased a $635,000 interest in an Oklahoma limited partnership on behalf of its clients.[301] As an inducement to the sale, the sellers undertook to obtain an $800,000 loan from Fidelity Bank, N.A. (Fidelity), which is located in Oklahoma.[302] The sellers also promised to buy back the partnership interest if the loan was not obtained.[303] Castle Capital Corporation (Castle), acting as middleman, guaranteed the buy-back obligation.[304] When the deal ultimately collapsed,[305] the law firm brought a breach of contract action against Castle for the return of the purchase price.[306] Castle thereupon impleaded[307] several

[299] 63 App. Div. 2d 277, 407 N.Y.S.2d 490 (1st Dep't 1978).

[300] *Id.* at 283-84, 407 N.Y.S.2d at 493-94.

[301] *Id.* at 282, 407 N.Y.S.2d at 492. These clients sought to benefit from oil tax shelters. *Id.*

[302] *Id.*, 407 N.Y.S.2d at 493. Securing a loan was essential if the transaction was to generate the anticipated tax shelter benefits for the purchasers.

[303] *Id.* at 282-83, 407 N.Y.S.2d at 493.

[304] *Id.* at 283, 407 N.Y.S.2d at 493.

[305] There was some dispute concerning whether the sellers actually had arranged the loan and, if so, whether it qualified for favorable tax treatment. *Id.* at 282, 407 N.Y.S.2d at 493.

[306] *Id.* at 283, 407 N.Y.S.2d at 492-93.

[307] Impleader is authorized by CPLR 1007 (1976), which provides, in pertinent part, that a "defendant may proceed against a person not a party who is or may be liable to him for all or part of the plaintiff's claim against him." Until recently, it was assumed that the impleader claim must either be for the same cause of action or rest upon the same ground as the main claim. *E.g.*, Fladerer v. Needleman, 30 App. Div. 2d 371, 292 N.Y.S.2d 277 (3d Dep't 1968); Ellenberg v. Sydharv Realty Corp., 41 Misc. 2d 1078, 247 N.Y.S.2d 226 (Sup. Ct. Kings County 1964); *accord*, CPLR 1007, commentary at 35 (1976); 2 WK&M ¶ 1007.05, at 10-1117.

In *Fladerer*, a party who had contracted to purchase certain real property brought an action for breach of contract to convey marketable title when he learned that the seller's title was defective. 30 App. Div. 2d at 372-73, 292 N.Y.S.2d at 278. The defendant seller then impleaded the attorney who represented her when she purchased the property, alleging that the attorney was negligent in failing to discover the defect. *Id.* The court dismissed the third party claim, reasoning that the seller's liability to the plaintiff for breach of contract did not arise from the attorney's negligence, but rather from the existence of the title defect. *Id.* at 374-75, 292 N.Y.S.2d at 279-80.

Using similar reasoning, the lower court in *Lazarow* found that, since Castle's breach of contract with the plaintiff did not arise from the fraud and conspiracy allegedly perpetrated by the third-party defendants, but rather from Castle's refusal to comply with its buy-back guarantee, the third-party complaint could not be maintained. 63 App. Div. 2d at 287, 407 N.Y.S.2d at 495-96. The appellate division, however, reversed, concluding that the "best test" of the viability of a third-party claim is "simply whether the third party defendant may be liable to the third party plaintiff for damages for which the latter may be liable to plaintiff." *Id.*, 407 N.Y.S.2d at 496 (citing Norman Co. v. County of Nassau, 63 Misc. 2d 965, 969-70, 314 N.Y.S.2d 44, 50 (Sup. Ct. Nassau County 1970)).

parties, including Fidelity,[308] which were charged with fraud and conspiracy.[309] The Supreme Court, New York County, dismissed the third-party complaint against Fidelity, holding that venue could properly be laid only in a state court in a county where Fidelity, a national bank, was "located."[310]

It appears that the departments within the appellate division are still in conflict as to the applicability of the *"Norman* test." The first and second departments appear to adhere to the more liberal *Norman* approach. *See, e.g.*, Lazarow, Rettig & Sundel v. Castle Capital Corp., 63 App. Div. 2d 277, 407 N.Y.S.2d 490 (1st Dep't 1978); Holloway v. Brooklyn Union Gas Co., 50 App. Div. 2d 603, 375 N.Y.S.2d 396 (2d Dep't 1975). The third and fourth departments, on the other hand, continue to require that the third party claim rest on the same theory as that of the main action. *See, e.g.*, Fladerer v. Needleman, 30 App. Div. 2d 371, 292 N.Y.S.2d 277 (3d Dep't 1968); Cleveland v. Farber, 46 App. Div. 2d 733, 361 N.Y.S.2d 99 (4th Dep't 1974). Professor Siegel labels this latter approach as "rigid." D. SIEGEL, N.Y. PRACTICE § 159, at 201 (1978).

[308] 63 App. Div. 2d at 283, 407 N.Y.S.2d at 493. Castle also sought recovery from the sellers, whose performance it had guaranteed, and from employees of Fidelity and an accounting firm which, it was claimed, had conspired in the preparation and distribution of false documents. *Id.* at 285, 407 N.Y.S.2d at 494-95. These documents allegedly were misleading in that they stated that other purchasers interested in the same type of investment had successfully obtained the loans from Fidelity, when, in fact, the loans were not suitable for the purposes desired by Lazarow's clients. *Id.* 407 N.Y.S.2d at 495.

[309] *Id.* at 283, 407 N.Y.S.2d at 493. In addition to impleading the third-party defendants in the New York action, *see* note 308 *supra,* Castle commenced a separate suit against them in Oklahoma, presumably to protect itself in the event that its impleader complaint was dismissed on procedural grounds. 63 App. Div. 2d at 283, 407 N.Y.S.2d at 493. By initiating suit immediately in Oklahoma, Castle apparently hoped to avoid being shut out of court by that state's 2-year statute of limitations. *Id.* at 287, 407 N.Y.S.2d at 496. Castle then moved in the Oklahoma court for a stay of the proceedings, probably because it feared that an early adjudication in the Oklahoma courts would have a res judicata effect and thereby bar the New York claim. Unable to obtain the stay in Oklahoma, however, Castle moved in New York for an injunction restraining the third party defendants from proceeding in the Oklahoma suit. *Id.* Having obtained jurisdiction over those parties by virtue of CPLR 302 (1972), the New York supreme court assumed that its authority over the nonresidents permitted it to enjoin them from so proceeding. 63 App. Div. 2d at 287, 407 N.Y.S.2d at 496. The court reasoned that the requested injunction would be issued not against the Oklahoma courts, but rather against the persons of the third party defendants. *Id.* at 287-88, 407 N.Y.S.2d at 496.

[310] 63 App. Div. 2d at 283, 407 N.Y.S.2d at 493. Inasmuch as the distribution of the allegedly misleading documents was Fidelity's only activity in New York, it does not appear that any of the judicially created exceptions to the mandatory venue rule of § 94 are applicable to the facts in *Lazarow. See* note 298 *supra.*

[311] In addition to upholding the third-party action against Fidelity, the appellate division found that the lower court had abused its discretion in granting Castle's request for an injunction to prevent the third-party defendants from proceeding in the independent action brought against them by Castle in Oklahoma. 63 App. Div. 2d at 288, 407 N.Y.S.2d at 496-97; *see* note 309 *supra.* Although a New York court, by virtue of the personal jurisdiction it has over New York domiciliaries, may enjoin them from proceeding in a foreign action, it generally will not exercise this authority unless "extreme and extraordinary" circumstances exist. E.B. Latham & Co. v. Mayflower Indus., 278 App. Div. 90, 94-95, 103 N.Y.S.2d 279, 282-83 (1st Dep't 1951); Paramount Pictures, Inc. v. Blumenthal, 256 App. Div. 756, 758, 11 N.Y.S.2d 768, 771 (1st Dep't 1939). Applying this principle in *Lazarow,* the appellate division

In reversing the lower court's decision,[311] the first department concluded that New York venue was proper in a third-party action against a national bank located in another state, provided the action was brought "in good faith."[312] Justice Birns, who authored the unanimous opinion,[313] declined to follow the view that the restrictive federal venue provisions are applicable to third-party suits against a national bank.[314] Instead, the *Lazarow* court adopted the reasoning of those federal district courts[315] which have concluded that "[t]he fact that [the third-party plaintiff] is a defendant, and therefore had no choice in the venue of the action, means that the control over that choice which Congress attempted to exert in the National Bank Act is not applicable."[316] Noting the possible constraint imposed upon it by the *Mercantile* decision, the court found that decision to

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concluded that the state's long-arm statute, CPLR 302, should not be construed so broadly as to permit a New York court to enjoin pursuit of a foreign proceeding where the foreign jurisdiction's highest court has refused to stay the action. 63 App. Div. 2d at 288, 407 N.Y.S.2d at 496-97. *E.B. Latham* and *Paramount Pictures* were decided before the enactment of CPLR 302. Nevertheless, the important policy considerations of reciprocal "courtesy" and "mutual respect," for a foreign jurisdiction's ruling, Russian Socialist Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 258, 139 N.E. 259, 260 (1923), would seem equally applicable to the situation in *Lazarow*. Thus, it would appear that New York courts are precluded from indirectly overriding the decision of a foreign court, despite the availability of "long arm" jurisdiction over a non-resident defendant.

[312] 63 App. Div. 2d at 284, 407 N.Y.S.2d at 493-94. Although the suit concerned property located in Oklahoma, the contracts of sale were executed in New York and the suit arose out of this transaction. Based on Castle's showing of purposeful concerted activity in which all the defendants allegedly participated, the *Lazarow* court determined that it had obtained personal jurisdiction over the defendants by virtue of CPLR 302. 63 App. Div. 2d at 285-86, 407 N.Y.S.2d at 494-95.

[313] The panel consisted of Justices Kupferman, Birns, Evans, Sullivan and Murphy, P.J.

[314] 63 App. Div. 2d at 284, 407 N.Y.S.2d at 494 (citing Southeast Guar. Trust Co. v. Rodman & Renshaw, Inc., 358 F. Supp. 1001 (N.D. Ill. 1973); Swiss Israel Trade Bank v. Mobley, 319 F. Supp. 374 (S.D. Ga. 1970)). The *Swiss Israel* court held that § 94 of the National Bank Act, *see* note 296 *supra*, is applicable to third-party suits, since such suits are "just as much of an action against a national bank as a suit brought directly against [the bank]." 319 F. Supp. at 375. Moreover, the court reasoned, "Rule 14 of the Federal Rules of Civil Procedure [permitting impleader] cannot undo what Congress specially provided as to suits against national banks," since "the rule-making authority must yield to the legislative power." *Id.; cf.* Radzanower v. Touche Ross & Co., 426 U.S. 148, 152-53 (1976) (venue provision of 12 U.S.C. § 94 is controlling over venue provision of Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1976)).

[315] Jones v. Kreminski, 404 F. Supp. 667 (D. Conn. 1975); Odette v. Shearson, Hammill & Co., 394 F. Supp. 946 (S.D.N.Y. 1975). The third-party defendant in *Odette* was a national bank which had been impleaded under FED. R. CIV. P. 14(a). The court raised the venue question *sua sponte* and held that, where venue is proper in the main action, it is not a valid defense that the third party action would not have been permitted if brought alone. 394 F. Supp. at 951 (citing 3 MOORE'S FEDERAL PRACTICE ¶ 14.28[2]).

[316] 404 F. Supp. at 669; *see* 63 App. Div. 2d at 284, 407 N.Y.S.2d at 494.

be inapplicable to the issues in *Lazarow*, since *Mercantile* "[did] not discuss third-party actions."[317]

The *Lazarow* court's determination that the federal venue provision governing actions against national banks is inapplicable to third-party claims appears to be in direct conflict with both congressional intent[318] and pertinent Supreme Court decisions.[319] In permitting Castle to do as a third-party plaintiff what it could not do as a plaintiff, the first department's decision also appears to diverge from other states' decisions dealing with similar issues.[320] While the

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[317] 63 App. Div. 2d at 284 n.2, 407 N.Y.S.2d at 494 n.2.

[318] In restricting the forums in which suit properly may be brought against a national bank to those districts or counties in which the bank is "established" or "located," it was the intention of Congress to prevent "untoward interruption of a national bank's business." Citizens & S. Nat'l Bank v. Bougas, 434 U.S. 35, 43 (1977) (citations omitted). Enacted as an emergency financial stabilization measure during the Civil War, the original statute was revised in 1864 and was commonly known as the National Bank Act. Hicks, *Banking and Venue: Fitting the Horse and Buggy Statute to a Supersonic Age*, 29 MERCER L. REV. 797, 800 (1978).

[319] *See* Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976); Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963). *Mercantile* involved a conspiracy suit brought in a state court against 145 defendants, two of which were national banks. *Id.* at 556. The *Mercantile* Court held that these banks could not be sued in a state court in a county other than the county in which the banks were located, although the obvious result was that all the defendants could not be gathered together and sued in a single action. *Id.* at 561. Significantly, the Court found that the inconvenience to the plaintiff of having to maintain separate suits against the banks was an "insufficient basis for departing from the command of the federal statute." *Id.* at 563-64 (citations omitted). A similar issue was raised in *Radzanower*, which involved a suit brought pursuant to the Securities Exchange Act of 1934. Enacted after the National Bank Act, this statute contains its own venue provision permitting a defendant to be sued wherever he may be found. 15 U.S.C. § 78aa (1976). Rejecting the plaintiff's contention that the venue provision of the Securities Act constituted an implied repeal of the narrower provision of the National Bank Act, the *Radzanower* Court stated that § 94 had not been "submerged by a later enacted statute covering a more generalized spectrum." 426 U.S. at 153. *See also* National Bank of N. America v. Associates of Obstetrics & Female Surgery, Inc., 425 U.S. 460 (1976) (per curiam).

The language in these decisions indicates the Court's belief that, absent waiver, it was the intention of Congress that only in those courts designated in the statute "could a national bank be sued against its will." 426 U.S. at 152 (citation omitted). This would appear to leave little room for interpretation and renders the validity of the decision in *Lazarow* highly questionable.

[320] Although state courts outside New York apparently have not been confronted with the precise issue presented in *Lazarow*, they have addressed similar questions arising under § 94 of the National Bank Act. For example, in Security First Nat'l Bank v. Tattersall, 311 So. 2d 218 (La. 1975), the court held that the venue provisions of § 94 are applicable in any suit against a national bank, regardless of the procedural posture in which the suit is presented. 311 So. 2d at 222. Similarly, in First Nat'l Bank of Boston v. Avtek, Inc., 134 Vt. 392, 360 A.2d 80 (1976), a Vermont court refused to permit a counterclaim brought against a national bank which was located in another state, although the bank had initiated a foreclosure action in a Vermont state court. Finally, in Drum v. District Court, 169 Mont. 494, 548 P.2d 1377 (1976), the court concluded that § 94 "even prevents joinder in the same action of

restrictive venue statute governing suits against national banks has been criticized heavily,[321] the weight of authority indicates that its mandatory rule may not be diluted by judicially created exceptions such as that suggested in *Lazarow*.[322]

When Congress enacted the venue provision, it was cognizant of the inconvenience caused a national bank by its being forced to defend in a foreign forum.[323] Since the statute was passed with this in mind, the interest of national banks must have been deemed to outweigh the interest a plaintiff has in bringing a consolidated action. Thus it would appear that, until Congress acts to amend this section, state courts should dismiss third-party actions brought against national banks not "located" in the county in which suit is brought.[324]

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national banks located in different states or districts who were sued for damages based on a civil conspiracy to defraud." 169 Mont. at 499, 548 P.2d at 1382 (citations omitted); *cf.* Metropolitan Dade County v. Kelly, 348 So. 2d 49, 50 (Fla. Dist. Ct. App. 1977) (third party complaint against county dismissed for improper venue under statute permitting suits against state subdivisions only where headquarters located).

[321] *See, e.g.*, Staley v. Homeland, Inc., 368 F. Supp. 1344, 1345 (E.D.N.C. 1974) (mem.); Chaffee v. Glens Falls Nat'l Bank & Trust Co., 204 Misc. 181, 123 N.Y.S.2d 635 (Sup. Ct. N.Y. County 1953). The *Chaffee* court stated:

> The inconvenience and the interruptions of banking business thus discussed in 1889, have today been mitigated, if not, in fact, minimized, by present modes of rapid transportation and communication and by mechanical and electronic accounting systems and photostatic and microfilming processes, . . . and the present . . . liberalization of the rules respecting documentary evidence have further eased the burden incident to litigation in which banks may be involved. Thus the supposed objective of the statute has been in large part attained through other means.

Id. at 183-84, 123 N.Y.S.2d at 638. Similarly, the American Law Institute has flatly stated that § 94 "is impossible to defend" and has recommended repeal of this section, since "[t]here is no obvious reason why a national bank acquires a unique and restrictive venue rule, and cannot be treated as is any other corporation for purposes of venue." ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 412-13 (1969); *accord*, Radzanower v. Touche Ross & Co., 426 U.S. 148, 161-62 (1976) (Stevens, J., dissenting). *See generally* Hicks, *supra* note 318, at 800-01; Steinberg, *supra* note 4, at 178-79. Professor Steinberg argues that the application of § 94 today "confers a privileged status to national banks at the expense of individual citizens." Steinberg, *supra* note 4, at 179 (footnotes omitted). *See also* Swiss Israel Trade Bank v. Mobley, 319 F. Supp. 374, 375 (S.D. Ga. 1970) (quoting Klein v. Bower, 421 F.2d 338 (2d Cir. 1970)).

[322] *See* notes 298, 318-320 *supra*.

[323] Citizens & S. Nat'l Bank v. Bougas, 434 U.S. 35, 44 (1977); First Nat'l Bank of Charlotte v. Morgan, 132 U.S. 141, 144 (1889).

[324] *Accord*, Swiss Israel Trade Bank v. Mobley, 319 F. Supp. 374 (S.D. Ga. 1970). In *Swiss Israel*, the court, while noting the inconvenience § 94 imposes on litigants, stated that the "remedy for the situation must be provided by Congress." 319 F. Supp. at 375 (quoting Klein v. Bower, 421 F.2d 338 (2d Cir. 1970)). It should be noted that, despite the criticisms leveled at § 94, Congress did not repeal the venue provision when it reexamined the National Bank Act in an attempt to eliminate "certain [national banking] laws which ha[d] become obsolete." Radzanower v. Touche Ross & Co., 426 U.S. 148, 158 n.16 (1976).