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Due Process Supreme Court Appellate Division Third Department

complaint.[270] Further, in granting partial summary judgment to defendants on their counterclaims, the court directed plaintiff to comply with the statute's reporting requirements.[271] Finally, plaintiff's cross-motion for summary judgment on its claims and for dismissal of defendants' counterclaims was denied.[272]

SUPREME COURT, APPELLATE DIVISION

THIRD DEPARTMENT

Moghimzadeh v. College of Saint Rose[273] (decided February 6, 1997)

Plaintiff, Mahmood Moghimzadeh, was terminated from his employment as a tenured professor at defendant College of Saint Rose, a private college, and alleged that he was deprived of his Federal[274] and State[275] constitutional guarantees of procedural due process.[276] The Appellate Division, Third Department, affirmed the order of the Supreme Court, Albany County which dismissed the plaintiff's complaint for failure to state a cause of action and held that the plaintiff did not have a valid due process claim absent an indication that the defendant's action of dismissal constituted "meaningful State participation."[277]

The plaintiff argued that, although the defendant college is a private entity, it is subject to regulation and inspection by the

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270. *Id.*

271. *Id.*

272. *Id.*

273. 653 N.Y.S.2d 198 (3d Dep't 1997).

274. U.S. CONST. amend. XIV, § 1. Section one provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . . " *Id.*

275. N.Y. CONST. art. I, § 6. Section six provides in pertinent part: "[N]o person shall be deprived of life, liberty, or property, without due process of law . . . . " *Id.*

276. *Moghimzadeh*, 653 N.Y.S.2d at 198.

277. *Id.* at 199.

State of New York and by the Board of Regents.[278] This, he argued, was sufficient to constitute the 'meaningful' state action necessary to grant him the right to due process in the college's disciplinary proceedings.[279] The Appellate Division, Third Department promptly rejected this claim and proceeded to explore the issue of what must be shown in order to constitute 'meaningful' state participation.[280]

In order to show the state involvement necessary to invoke the constitutional right of due process, the complaining party must show more than "mere State regulation" of the challenged private entity.[281] The United States Supreme Court reviewed this same issue in the case of *Jackson v. Metropolitan Edison Co.*[282] In *Jackson*, the petitioner brought suit against a privately owned and

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278. *Id.* *See* N.Y. EDUC. LAW § 214 (McKinney 1988). Section 214 provides in pertinent part: "The institutions of the university shall include all secondary and higher educational institutions which are now or may hereafter be incorporated in this state . . . . The regents may exclude from such membership any institution failing to comply with law or with any rule of the university." *Id.* *See also* N.Y. EDUC. LAW § 202 (McKinney 1988). Section 202 provides in pertinent part: "The University of the State of New York shall be governed and all its corporate powers exercised by a board of regents . . . ." *Id.* *See also* N.Y. EDUC. LAW § 215 (McKinney 1988). Section 215 provides in pertinent part:

> The regents, or the commissioner of education, or their representatives, may visit, examine into and inspect, any institution in the university and any school or institution under the educational supervision of the state, and may require, as ofted as desired, duly verified reports therefrom giving such information and in such form as the regents or the commissioner of education shall prescribe. For refusal or continued neglect on the part of any institution in the university to make any report required, or for violation of any law or any rule of the university, the regents may suspend the charter or any of the rights and privileges of such institution.

Id.

279. *Moghimzadeh*, 653 N.Y.S.2d at 199.

280. *Id.*

281. *Id.* This principle allowed for the prompt rejection of the plaintiff's assertion that because defendant was regulated pursuant to the Education Law and the Board of Regents, the State therein became sufficiently involved with defendant private entity. *Id.*

282. 419 U.S. 345 (1974).

operated utility corporation for damages and injunctive relief under 42 U.S.C. § 1983.[283] The Petitioner alleged that under Pennsylvania State law,[284] she was entitled to "reasonably continuous electrical service,"[285] and that the termination of same for alleged delinquency,[286] constituted "state action," which deprived her of property without notice or a hearing, and as such, violated the Fourteenth Amendment's guarantee of due process.[287] The petitioner argued that 'state action' was present in many forms: respondent being a private utility company, was subject to extensive state regulation,[288] enjoyed a 'monopoly status' in the State of Pennsylvania,[289] and furthermore, performs a 'public function' by providing an essential public

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283. *Id.* at 345. 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress . . . .

Id.

284. *Id.* at 348 n.2. *See* PA. STAT. ANN., Tit. 66, § 1171 (1959). This section provides in pertinent part: "Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities . . . . Such service also shall be reasonably continuous and without unreasonable interruptions or delay . . . . " *Id.*

285. *Jackson*, 491 U.S. at 347-48.

286. *Id.* at 348. Metropolitan was allowed to terminate utility service based on delinquency under a provision in its general tariff which is filed with the Pennsylvania Public Utility Commission. The Commission, in turn, allows Metropolitan to provide utility service to a vast service area within the state while being subject to 'extensive regulation.' *Id.* at 346. This 'extensive regulation' was essentially the gravamen of petitioner's allegation of the 'state action' that violated her right to due process of law. *Id.* at 348. It is worth noting that the Court did not find that Metropolitan was even required to file that particular provision in its tariff or that the Commission was even empowered to reject it. *Id.* at 355.

287. *Id.* at 347-48.

288. *Id.* at 350.

289. *Id.* at 351.

service which is required by the State "to be supplied on a reasonably continuous basis."[290]

The Supreme Court rejected each argument and stated that, just because a business is subject to regulation by the state, that alone is not enough to transform its action into one of the State for Fourteenth Amendment purposes.[291] Rather, the appropriate inquiry should be whether there is a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[292] The Court found an insufficient nexus between the monopoly status of the heavily regulated private utility company and the challenged action.[293]

The Court did not find any evidence that Pennsylvania granted respondent a monopoly, and even if there were, that fact would not be determinative of "state action."[294] Furthermore, with respect to the argument that the respondent performed a 'public function' by providing an essential service required by the State, the Court stated that validity would only attach if Metropolitan was exercising some power given to it by the State "which is traditionally associated with sovereignty, such as eminent domain . . . . "[295] The Court found that the obligation to furnish service belonged to the regulation utilities, not on the State.[296] Furthermore, because a provision of Metropolitan's tariff stated that it had the right to terminate service, and this tariff was filed with the Commission, this was insufficient to constitute "state action."[297] Mere approval of such a request in Metropolitan's

290. *Id.* at 352.
291. *Id.* at 350.
292. *Id.* at 351.
293. *Id.* at 352.
294. *Id.* at 351-52.
295. *Id.* at 353.
296. *Id.* "[T]he supplying of utility service is not traditionally the exclusive prerogative of the State . . . . " *Id.*
297. *Id.* at 354-55. Metropolitan filed a general tariff (a certificate of public convenience) with the Public Utility Commission which contained a provision which allowed for termination of service due to nonpayment. *Id.* at 354. The Commission never held any hearings with regard to this provision of the tariff. *Id.* The plaintiff contended that the appearance of that provision in

tariff was unsatisfactory because it had not been shown that the Commission "put its own weight on the side of the proposed practice by ordering it . . . [and that therefore] . . . d[id] not transmute [the] practice initiated by the utility and approved by the commission into 'state action.'"[298] Thus, petitioner was unsuccessful.

The New York State Court of Appeals has recognized that the Due Process Clause of the State Constitution "provides a basis to apply a more flexible State involvement requirement."[299] In reaching this conclusion, the court of appeals, in *Sharrock v. Dell Buick-Cadillac,*[300] contrasted the language of the Due Process

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the tariff constituted "state action" since it could be inferred that the Commission 'has specifically authorized and approved' the termination practice. *Id.* at 348, 354. However, there was no indication that the Commission *required* the provision in the tariff, nor was it clear whether the Commission would have even had the power to disapprove of it. *Id.* at 355.

298. *Id.* at 357 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974)).

299. Moghimzadeh v. College of Saint Rose, 653 N.Y.S.2d 198, 199 (1997) (citing Sharrock v. Dell Buick-Cadillac, 45 N.Y.2d 152, 160, 379 N.E.2d 1169, 1174, 408 N.Y.S.2d 39, 44 (1978)). In *Sharrock*, the plaintiff brought an action for damages, declaratory and injunctive relief, alleging that her federal and state due process rights were violated by the sale provisions of the Lien Law because they authorized sale of her automobile without giving her an opportunity to be heard. *Id.*, 45 N.Y.2d at 157, 379 N.E.2d at 1172, 408 N.Y.S.2d at 42. Plaintiff's automobile was brought to the dealership by her husband to be repaired, and at the time it was ready to be picked up, the plaintiff's husband was hospitalized and unable to pick up the car and pay the bill. *Id.* at 156, 379 N.E.2d at 1171, 408 N.Y.S.2d at 41. Two months later, plaintiff received a "Notice of Lien and Sale" from the dealership which informed her that a possessory lien against the car had been imposed for nonpayment of the repairs and storage charges. *Id.* at 156-57, 379 N.E.2d at 1171, 408 N.Y.S.2d at 41-42. Two months thereafter, plaintiff's car was sold at an auction for less than half of its resale value. *Id.* at 157, 379 N.E.2d at 1171-72, 408 N.Y.S.2d at 42. The Special Term denied plaintiff's motion for summary judgment finding that issues of fact were in dispute. *Id.* at 157, 379 N.E.2d at 1172, 408 N.Y.S.2d at 42. The appellate division reversed and granted summary judgment holding that the sections of the Lien Law challenged by the plaintiff were unconstitutional. *Id.* The court of appeals affirmed. *Id.*

300. 45 N.Y.2d 152, 160, 379 N.E.2d 1169, 1174, 408 N.Y.S.2d 39, 44 (1978).

Clause of the Fourteenth Amendment (which prohibits a State from depriving a person of life, liberty, and property), with the New York State Constitutional Due Process provision and noted that "[c]onspicuously absent from the State Constitution is any language requiring State action before an individual may find refuge in its protections."[301] However, the court was careful to note that the recognition does not assert that the Due Process Clause of the State Constitution eliminates the requirement of state participation in the challenged activity, but rather, it is just 'more flexible' than the State involvement requirement the Supreme Court uses with respect to the Federal Due Process provision.[302]

The *Sharrock* court set forth factors that must be considered in the aggregate to determine whether a State has reached the threshold of being 'significantly involved' in the authorized private activity to constitute 'state action' and therefore require the application of the Fourteenth Amendment's Due Process protection.[303] These factors include:

> [T]he source of authority for the private action; whether the State is so entwined with the regulation of the private conduct as to constitute State activity; whether there is meaningful State participation in the activity; and whether there has been a delegation of what has traditionally been a State function to a private person.[304]

The *Sharrock* court found that New York State had been 'significantly involved' and had "so entwined itself into the debtor-creditor relationship as to constitute sufficient and meaningful State participation which triggers the protections

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301. *Id.* at 160, 379 N.E.2d at 1173, 408 N.Y.S.2d at 44.

302. *Id.* at 160, 379 N.E.2d at 1173-74, 408 N.Y.S.2d at 44.

303. *Id.* at 158, 379 N.E.2d at 1172, 408 N.Y.S.2d at 42-43. The court noted that "satisfaction of one of the [factors] may not necessarily be determinative to a finding of State action," because the necessary test is "significant state involvement." *Id.* at 158, 379 N.E.2d at 1172, 408 N.Y.S.2d at 43.

304. *Id.*

afforded by our Constitution."[305] The demise of the aforementioned pertinent provisions of New York's Lien Laws was due to New York's refusal to merely follow the common law, which provided that the state could merely *acknowledge* the garageman's right to possession of the vehicle, but instead, New York had "*authorized* enforcement of the lien by means of [an] ex parte sale of the vehicle without first affording its owner an opportunity to be heard."[306] The court found that the aforementioned sale provisions of New York's Lien Law violated the Due Process Clause of the New York State Constitution, in that they failed to provide the vehicle's owner with an opportunity to be heard "prior to [a] permanent deprivation of a significant property interest."[307] The court of appeals afforded the plaintiff greater protection under the New York State Constitution than under the Federal Constitution because of the finality of the sale.[308]

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305. *Id.* at 161, 379 N.E.2d at 1174, 408 N.Y.S.2d at 44. The court noted that in New York, "title to an automobile cannot be transferred, and thus a sale cannot be accomplished under the Lien Law, without registration of the vehicle by the Department of Motor Vehicles and its issuance of a certificate of title" (citing Vehicle and Traffic Law, §§ 401, 420, 2104, 2107, 2113-2115, 2117). *Id.* at 159 n.2, 379 N.E.2d at 1173 n.2, 408 N.Y.S.2d at 43 n.2. The garage worker, in order to bring about the involuntary sale, must invoke "[b]oth the power of the sovereign and the participation of public officials . . . ." *Id.* Thus, the court found that the power of the State in utilizing the Lien Law "may be sufficiently analogous to the issuance of a write by a court clerk to support a finding of overt State involvement in the garagemen's sale" *Id.* (citations omitted). However, since the court found that the challenged provisions of the Lien Law were unconstitutional, the question of State action was never decided. *Id.*

306. *Id.* at 161-62, 379 N.E.2d at 1174-75, 408 N.Y.S.2d at 45 (emphasis added).

307. *Id.* at 166, 379 N.E.2d at 1178, 408 N.Y.S.2d at 48.

308. *Id.* at 161-62, 379 N.E.2d at 1174-75, 408 N.Y.S.2d at 45. The court found that:

> [N]ew York has done more than simply furnish its statutory imprimatur to purely private action. Rather, it has entwined itself into the debtor-creditor relationship arising out of otherwise regular consumer transactions. The enactment of substantive provision of law which authorize the creditor to bypass the courts to carry out the foreclosure sale encourages him to adopt this procedure rather than to rely on more

In *Montalvo v. Consolidated Edison,*[309] the appellate division reversed the lower court's finding and held that the denial of the plaintiff's application for residential utility service did not constitute sufficient 'state action' which deprived the plaintiff of her property rights under both the New York State and Federal Constitutions' Due Process Clauses.[310] The court recognized that, to show a deprivation of procedural due process as a result of "state action," there must be a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself."[311] The *Montalvo* court relied on the rationales of *Jackson* and *Sharrock* to hold that the denial of the application for utility services was not a regulation that so entwined the State of New York that the actions of Con Ed could sufficiently be deemed State activity.[312]

The courts have continually recognized that, absent significant state involvement, students enrolled at a private college have no procedural due process rights in disciplinary proceedings.[313]

> cumbersome methods which might comport with constitutional due process guarantees. Indeed, not only does the State encourage adoption of this patently unfair procedure, it insulates the garageman from civil or criminal liability arising out of the sale and requires . . . the Department of Motor Vehicles, to recognize and record the transfer of title . . . enabling the garageman to transfer title to a vehicle he would not otherwise be deemed to own.

Id.

309. 92 A.D.2d 389, 460 N.Y.S.2d 784 (1st Dep't 1983).

310. *Id.* at 390, 460 N.Y.S.2d at 786. The Special Term predicated liability on the theory that Consolidated Edison's [hereinafter "Con. Ed."] acts constituted "State action" for purposes of a due process claim because "Con. Ed. furnishes power as an agent of the State of New York." *Id.* at 393, 460 N.Y.S.2d at 787.

311. *Id.* at 393-94, 460 N.Y.S.2d at 787 (citing Jackson v. Metropolitan Edison Corp., 419 U.S. 345, 351 (1974)).

312. *Id.* at 397, 460 N.Y.S.2d at 789.

313 Moghimzadeh v. College of Saint Rose, 653 N.Y.S.2d 198, 198 (1997) (citing Mu Chapter of Delta Kappa Epsilon v. Colgate Univ., 176 A.D.2d 11, 578 N.Y.S.2d 713 (3d Dep't 1992)). In *Mu Chapter of Delta Kappa Epsilon*, the activities of fraternity were suspended due to a finding by the dean's investigatory committee that petitioner violated anti-hazing policies. *Id.* at 12,

Similarly, the *Moghimzadeh* court found no reason to apply different principles to a tenured professor at a private university.[314] Moreover, in the absence of evidence that the defendant's enforcement of its own internal rules and guidelines constituted state action, the plaintiff in the private arena has no due process claim.[315]

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578 N.Y.S.2d at 714. Petitioners were denied "the full panoply of due process guarantees" because there was no showing that the State was involved in this private activity. *Id.* at 13-14, 578 N.Y.S.2d at 715. With that finding, the court's inquiry was "limited to whether respondent substantially complied with its published guidelines or rules regarding procedures in a disciplinary proceeding." *Id.* at 14, 578 N.Y.S.2d at 715. According to the student handbook, the respondent "adhered to its own published guidelines" which therefore rendered petitioner's claim fruitless. *Id.* at 14, 578 N.Y.S.2d at 715. *See also* Beilis v. Albany Medical College of Union Univ., 136 A.D.2d 42, 44, 525 N.Y.S.2d 932, 934 (3d Dep't 1988) (holding that "students at public universities are entitled to due process . . . [but] students at private universities cannot invoke such rights unless they meet the threshold requirement of showing that the State somehow involved itself in what would otherwise be deemed [a] private activity"). *See also* Tedeschi v. Wagner College, 49 N.Y.2d 652, 660, 404 N.E.2d 1302, 1306, 427 N.Y.S.2d 760, 764 (1980) (holding that a private university must follow its published guidelines for disciplinary proceedings). Under the college's guidelines in *Tedeschi*, the plaintiff was entitled to a hearing by the Student-Faculty Hearing Board and a review of those findings by the president of the school. *Id.* at 660-61, 404 N.E.2d at 1306-07, 427 N.Y.S.2d at 765.

314. *Moghimzadeh*, 653 N.Y.S.2d at 199. *See also* Klinge v. Ithaca College, 167 Misc.2d 458, 461, 634 N.Y.S.2d 1000, 1002 (Sup. Ct. Tompkins County 1995) (holding that tenured professor at private college who was found guilty by the Dean and Provost of plagiarism was not entitled to any constitutionally protected liberty or property interests because the college is a private institution not a state actor). The plaintiff's rights, the court held, could only be found in the college contract of employment which embodied the personnel manual or handbook. *Id.*

315. *Moghimzadeh*, 653 N.Y.S.2d at 199. *See* Paolucci v. Adult Retardates Ctr., 182 A.D.2d 681, 582 N.Y.S.2d 452, 453 (2d Dep't 1992) (holding that "[n]either oral assurances . . . nor a general provision in an employee manual were sufficient to limit the defendants' right to discharge the plaintiff at any time, for any reason . . . ."). Although the employer was "subject to State and local regulation and funding, its action in discharging the plaintiff did not constitute the requisite 'State action' necessary to invoke due process protections." *Id.*

In conclusion, both Federal and New York law are in accord in their interpretation of the Federal and State constitutional provisions of due process. Both note that in order for "state action" to be present, there must be a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself."[316] As mentioned, mere state regulation of a private entity is not enough to invoke procedural due process protection. Furthermore, although the *language* of the Federal Constitution Due Process Clause differs from its New York counterpart,[317] the *Sharrock* court determined that the only consequence of this difference was that the State Constitution is "more flexible" than the State involvement requirement used by the Supreme Court when interpreting the Fourteenth Amendment. Therefore, an analysis of the *Sharrock* factors, in aggregation, determine whether a state has "significantly involved" itself in the private action so as to merit invocation of the fundamental right of due process of law.

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316. *See* Jackson v. Metropolitan Edison Corp., 419 U.S. 345, 351 (1974); Sharrock v. Dell Buick-Cadillac, 45 N.Y.2d 152, 158, 379 N.E.2d 1169, 1172, 408 N.Y.S.2d 39, 42 (1978). In *Sharrock*, the court recognized that:

> [p]urely private conduct . . . does not rise to the level of constitutional significance absent a significant nexus between the State and the actors or the conduct . . . [t]his nexus has been denominated "State action" and is an essential requisite to any action grounded on violation of equal protection of the laws or a deprivation of due process. . . .

Id. *See also* Montalvo v. Consolidated Edison, 92 A.D.2d 389, 460 N.Y.S.2d 784 (1st Dep't 1983).

317 The Fourteenth Amendment prohibits a *State* from depriving a person of life, liberty, and property while the New York State constitutional Due Process Clause does not mention the word "State."