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Right to a Jury Trial

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which the defendant relied upon to urge an automatic reversal.⁷⁵ However, the court rejected defendant's contentions as being without merit, and declined to follow the second department.⁷⁶

The *Toliver* court's holding carves out a sensible exception to the first department's previously inflexible rule, as set forth in *Silver*, concerning the absence of a trial judge during courtroom proceedings.⁷⁷ Consequently, when a judge impermissibly absents himself from the courtroom, the first department no longer adheres to a rule requiring automatic reversal.⁷⁸ The court's ruling is in line with federal case law from the Third Circuit, as well as the laws of other states, such as Texas.⁷⁹ These jurisdictions, and now the first department, hold that the absence of the trial judge is not a per se grounds for reversal, that proper grounds for reversal require that the absence must not be de minimis and the defendant must have suffered harm or prejudice.⁸⁰

SECOND DEPARTMENT

Department of Housing Preservation and Development of the
City of New York v. Deka Realty Corp.⁸¹
(decided January 9, 1995)

On appeal, landlord Deka Realty Corp. claimed that, based on the magnitude of contempt fines and civil penalties imposed

judicial authority and is per se reversible error, regardless of the consent of the parties).

74. 178 A.D.2d 619, 577 N.Y.S.2d 493, 494 (2d Dep't 1991) (holding that "[a] Judge's absence from the courtroom during the reading back of testimony, with or without consent, is improper; it does not comport with the judge's supervisory role, or with the established expectations and convictions that underlie the Judge's function") (citations omitted).

75. *Toliver*, 212 A.D.2d at 347, 629 N.Y.S.2d at 747.

76. *Id.* at 350, 629 N.Y.S.2d at 749.

77. *See infra* notes 83, 94.

78. *See supra* notes 45-48.

79. *See supra* notes 61-69.

80. *Id.*

81. 208 A.D.2d 37, 620 N.Y.S.2d 837 (2d Dep't 1995).

against it in a nonjury trial (\$6.7 million in criminal and civil contempt penalties and \$272,000 in civil fines), it was denied its constitutional right to a jury trial under the Federal⁸² and New York State⁸³ Constitutions.⁸⁴ Additionally, Deka claimed that it had not waived its right to a jury trial by failing to demand one.⁸⁵ Deka argued that the written waiver requirement of article I, section 2 of the New York State Constitution⁸⁶ had not rendered its waiver ineffective.⁸⁷ The Appellate Division, Second Department held that (1) Deka did not have a right to a jury trial on the issue of the civil and criminal contempt penalties, as the criminal contempt penalties were not sufficiently “serious” so as to invoke constitutional protection and the civil contempt penalties and civil fines were not shown to be punitive in nature; and (2) the requirement of a written waiver of the right to a jury trial under article I, section 2 of the New York Constitution was not applicable given that the action was not a “criminal proceeding.”⁸⁸

82. U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed” *Id.*

83. N.Y. CONST. art. I, § 2. This section of the New York State Constitution provides in pertinent part:

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver.

Id.

84. *Id.* at 40, 620 N.Y.S.2d at 839.

85. *Deka*, 203 A.D.2d at 51, 620 N.Y.S.2d at 846.

86. N.Y. CONST. art. I, § 2.

87. *Deka*, 203 A.D.2d at 51, 620 N.Y.S.2d at 846.

88. *Id.* The court also considered the following issues:

Deka had been cited for a number of housing code violations by the Department of Housing Preservation and Development of the City of New York (hereinafter HPD).⁸⁹ A nonjury trial ensued in which Deka was deemed to be in civil and criminal contempt.⁹⁰ A total of \$3,372,250 in criminal contempt fines, \$3,372,250 in civil contempt fines and \$272,645 in civil penalties were assessed against it.⁹¹ On appeal to the appellate term, the criminal contempt fines were reduced to \$1,000, the findings of civil contempt, fines, and civil penalties were vacated, and the case was remanded for a jury trial.⁹² HPD appealed to the

[W]hether civil contempt fines, assessed for a landlord's failure to remedy certain housing code violations on its premises, should properly be distributed to the [Department of Housing] or to those tenants aggrieved by the existing violations[,] and whether contempt fines may be assessed, pursuant to a consent decree, based on a multiplication of individual housing code violations times the maximum statutory fine

Id. at 39-40, 620 N.Y.S.2d at 839. As to the issue of whether the civil contempt penalties were properly assessed, the court held that the question was "properly remitted to the Civil Court by the Appellate Term for a hearing on the issue of actual damages suffered by the tenants." *Id.* at 45, 620 N.Y.S.2d at 842.

89. *Id.* at 40, 620 N.Y.S.2d at 839. The parties had entered into a consent decree after HPD initiated an action to compel Deka to cure its deficiencies. *Id.* When Deka did not comply with a subsequent order which extended the dates by which the repairs were required to be made, HPD sought to have civil penalties assessed and punishment imposed in the form of civil and criminal contempt fines. *Id.* The consent decree provided that Deka would "make the necessary repairs by certain dates," and in return HPD would relinquish its rights to seek penalties for the prior violations. *Id.* The decree further provided that "each housing code violation which Deka was required to cure would be treated as the subject of a separate order of the court." *Id.*

90. *Id.* As stipulated by the consent decree, "fines were imposed for each day that each violation went uncorrected" *Id.*

91. *Id.*

92. *Id.* The appellate term, citing a United States Supreme Court decision, emphasized that "civil contempt fines must be remedial [and not punitive] in nature." *Id.* at 43, 620 N.Y.S.2d at 841 (citing *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911)). The appellate term further noted that "[t]he award should be formulated not to punish an offender, but solely to compensate or indemnify private complainants." *Id.* (citing *State v. Unique Ideas*, 44 N.Y.2d 345, 349, 376 N.E.2d 1301, 1304, 405 N.Y.S.2d 656, 658

appellate division on the issue of the appellate term's reduction of contempt fines and civil penalties.

The first constitutional issue addressed by the appellate division was whether *Deka* had a right to a trial by jury, given that the contempt fines assessed against it were allegedly severe in nature.⁹³ The court began its reasoning with the "well established" proposition that "a jury trial must be made available upon demand in all serious criminal contempt cases . . . however, [that right] is not applicable to those criminal contempts classified as petty offenses."⁹⁴ The imposition of fines for criminal contempt, unaccompanied by imprisonment, may

(1978)). As to the question of whether the criminal contempt fines were properly assessed, the court held that HPD's calculation was improper because it bore "no legitimate relationship to the underlying statutory aim," which is to "vindicat[e] the court's authority." *Id.* at 45, 620 N.Y.S.2d at 842.

93. *Id.* at 46, 620 N.Y.S.2d at 842-43 (stating the general rule that "[t]he Sixth Amendment to the United States Constitution and Article I, section 2 of the New York Constitution guarantee the right to trial by jury in criminal prosecutions") (citing *Duncan v. Louisiana*, 391 U.S. 145 (1968)).

94. *Id.* at 46, 620 N.Y.S.2d at 843 (citing *Bloom v. Illinois*, 391 U.S. 194 (1968)). The court noted that the initial test to distinguish petty from serious offenses was whether the defendant faced six months or more in jail. *Id.* at 46, 620 N.Y.S.2d at 843 (citing *Codispotti v. Pennsylvania*, 418 U.S. 506, 512 (1974)); *Baldwin v. New York*, 399 U.S. 66 (1970); *Frank v. United States*, 395 U.S. 147, 149-50 (1969)). However, the court noted that in a subsequent case, the United States Supreme Court "suggested that the determination [of whether an offense was to be considered serious or petty] depended on the magnitude of the deprivation under the circumstances of the case." *Id.* at 47, 620 N.Y.S.2d at 843 (citing *Muniz v. Hoffman*, 422 U.S. 454 (1975)). *Blanton v. City of North Las Vegas* resolved the question of whether a charge of contempt may be considered serious even if no jail time is imposed. 489 U.S. 538, 539 (1989). The *Deka* court noted that the United States Supreme Court's holding in *Blanton* established that "the right to a jury trial did not depend solely on the length of any jail sentence imposed, but rather included a consideration of the seriousness of other punishments attached to the offense." *Deka*, 208 A.D.2d at 47, 620 N.Y.S.2d at 837. The *Deka* court further noted that the United States Supreme Court held in *International Union, United Mine Workers of Am. v. Bagwell*, 114 S. Ct. 2552 (1994), that incarceration for a given period is not the only test of whether a criminal contempt charge is sufficiently serious to engender a constitutional right to a trial by jury. *Deka*, 208 A.D.2d at 47, 620 N.Y.S.2d at 837.

evoke the Sixth Amendment right⁹⁵ to trial by jury if (1) the fines are serious,⁹⁶ and (2) a jury trial is demanded.⁹⁷

The *Deka* court considered two factors in determining whether a monetary sanction may give rise to a right to trial by jury:⁹⁸

Firstly, it must be determined whether the sanction sought to be imposed is of a civil or criminal nature. Civil contempts engender no right to a jury trial The second consideration . . . is whether the amount of the fine rises to a level where it is considered to be a serious sanction. The right to trial by jury applies only to serious criminal sanctions; thus courts may still impose noncompensatory petty fines for contempts without conducting a jury trial.⁹⁹

As to the first consideration, *Deka* argued that even though some of the contempt penalties were characterized as “civil” by HUD, they in fact were punitive in nature, thus invoking a constitutional right to a jury trial.¹⁰⁰ The court rejected this argument, stating that “[t]here has been no showing by *Deka* of any civil penalty provision that has been held to be sufficiently criminal in nature so as to invoke the protections of the Sixth Amendment.”¹⁰¹

95. U.S. CONST. amend. VI.

96. See *Bagwell*, 114 S. Ct. at 2554.

97. *Id.*

98. See *Deka*, 208 A.D.2d at 47-49, 620 N.Y.S.2d at 843-45.

99. *Id.* at 47-48, 620 N.Y.S.2d at 843-44 (citing *Taylor v. Hayes*, 418 U.S. 488, 495 (1974)). The *Deka* court explained that in determining whether a fine is civil or criminal in nature, “[i]t is the substance of the proceeding and the character of the relief that is critical and controlling.” *Id.* at 48, 620 N.Y.S.2d at 844.

100. *Id.* at 49-50, 620 N.Y.S.2d at 845.

101. *Id.* at 50, 620 N.Y.S.2d at 845. *Deka* had relied on the following cases in its argument: *United States v. Halper*, 490 U.S. 435 (1989); *Hick v. Feiock*, 485 U.S. 624 (1988); *Steve Spindelfabrik Suessen-Schurr “Iceman” Malito v. Thom Ruda Radda Rotor Rooter Schubert Salzer Maschinfabrik Aktiengesellschaft “Rasta” Rademaker*, 903 F.2d 1568 (Fed. Cir. 1990); *Securities Exch. Comm. v. Simpson*, 885 F.2d 390 (7th Cir. 1989); *United States v. Professional Air Traffic Controllers Org.*, 678 F.2d 1 (1st Cir. 1982); and *Douglass v. First Nat’l Realty Corp.*, 543 F.2d 893 (D.C. Cir. 1976). The court, on the other hand, relied on *United States v. J.B. William Co.*, 498 F.2d 414 (2d Cir. 1974), in which civil penalties were not characterized as sufficiently punitive in nature so as to invoke the right to a

Deka argued that the court should adopt the reasoning employed in *United States v. Halper*,¹⁰² where the Supreme Court raised the possibility “that a given civil penalty, if punitive, could engender additional constitutional protections.”¹⁰³ It failed, however, to offer any substantive arguments to show that the penalties assessed against it were punitive in nature¹⁰⁴ and this was the primary reason why the argument was rejected.¹⁰⁵

As to the second consideration of whether the magnitude of the fine constituted a “serious” penalty, the court stated that “[f]ederal circuit courts, in addressing th[e] issue, have found that a broad spectrum of monetary sanctions constitute serious fines.”¹⁰⁶ Whether a fine will be considered serious may depend on the amount of the fine gauged against “the defendant’s ability

jury trial. *Deka*, 208 A.D.2d at 50 n.5, 620 N.Y.S.2d at 845 n.5. The court also rejected Deka’s reliance on *United States v. Halper*, 490 U.S. 435 (1989), by declining to extend that Court’s holding that “imposition of a civil penalty provision under the Federal False Claims Act against a defendant who had been convicted and sentenced in a prior criminal trial constituted a violation of the Double Jeopardy Clause” to apply to the issue of whether civil contempt penalties may invoke a constitutional right to a jury trial. *Deka*, 208 A.D.2d at 50, 620 N.Y.S.2d at 845.

102. 490 U.S. 435 (1989) (holding that a statutory penalty authorizing recovery which bore no “rational relation” to the sum of the Government’s actual loss in an action under the federal civil False Claim Act for Medicare fraud constituted “punishment” in violation of the Double Jeopardy Clause of the United States Constitution).

103. *Deka*, 208 A.D.2d at 50, 620 N.Y.S.2d at 845. The court noted that “in *Tull v. United States* [481 U.S. 41 (1987)], the Supreme Court held that when civil penalties are sought, the Seventh Amendment requires that a demand for a jury trial be granted. The Seventh Amendment, however, has never been held applicable to the States.” *Id.* at 51 n.6, 620 N.Y.S.2d at 846 n.6.

104. *Id.* at 51, 620 N.Y.S.2d at 846.

105. *Id.* at 49, 620 N.Y.S.2d at 844.

106. *Id.* at 48, 620 N.Y.S.2d at 844 (citing *United States v. Professional Air Traffic Controllers Org.*, 678 F.2d 1 (1st Cir. 1982) (holding that a \$5,000 fine imposed on union president entitled him to a jury trial)); *United States v. McAlister*, 630 F.2d 772 (10th Cir. 1980) (holding that an individual facing a \$1,000 fine was entitled to a jury trial); *Douglass v. First Nat’l Realty Corp.*, 543 F.2d 894 (D.C. Cir. 1976)).

to pay.”¹⁰⁷ Since Deka had “failed to introduce into evidence any financial data or other records,”¹⁰⁸ it was not possible for the court to determine whether the criminal contempt fine was serious enough to evoke a constitutional right to a jury trial.¹⁰⁹ Deka relied on *United States v. Twentieth Century Fox Film Corp.*,¹¹⁰ which held that where a fine of \$100,000 or more is imposed upon a corporation, it is entitled to a jury trial regardless of its financial resources.¹¹¹ In the instant case, if the fines and penalties imposed (including those labeled civil as well as those labeled criminal) were considered in sum, they would have amounted to more than \$100,000.¹¹² Deka reasoned that because the sum could potentially exceed \$100,000, it was entitled to a jury trial.¹¹³ The court rejected this argument, reasoning that (1) the criminal contempt fines had already been reduced by the appellate term and were not an issue on remand;¹¹⁴ (2) the civil contempt fines and penalties, being “compensatory and not punitive in nature, [] do[] not permit the invocation of a right to trial by jury under either the Sixth Amendment or under Article I, section 2 of the New York State Constitution.”¹¹⁵

The Appellate Term, Second Department, seemed to adopt the federal “magnitude of the deprivation” analysis to determine whether a monetary sanction was sufficiently serious to engender

107. *Id.* (citing *United States v. Troxler Hosiery Co.*, 681 F.2d 934 (4th Cir. 1982) (holding that a contempt fine of \$80,000 was not serious when measured against the defendant’s ability to pay)).

108. *Id.* at 49, 620 N.Y.S.2d at 844.

109. *Id.* (citing *New York State Org. for Women v. Terry*, 886 F.2d 1339, 1353 (2d Cir. 1989) (stating that “[a] contemner’s failure to provide financial information upon which the burden of a sanction may be evaluated may not be charged . . . against the [petitioner] or result in a holding that the court abused its discretion in imposing the sanction”)), *cert. denied*, 495 U.S. 947 (1990).

110. 882 F.2d 656 (2d Cir. 1989).

111. *Id.* at 658.

112. *Deka*, 208 A.D.2d at 49, 620 N.Y.S.2d at 844-45. The court noted that “HPD still demands a total of \$313,695 in punitive contempt fines and penalties (\$53,000 in criminal contempt fines, \$13,250 in civil contempt fines, and \$247,445 in civil penalties).” *Id.*

113. *Id.* at 49-50, 620 N.Y.S.2d at 845.

114. *Id.* at 49, 620 N.Y.S.2d at 845.

115. *Id.*

a right to trial by jury.¹¹⁶ The court noted approvingly that “in many of the [federal] cases, the right to a jury trial was gauged on the defendant’s ability to pay.”¹¹⁷ However, as *Deka* failed to provide information about its financial situation, the court refused to determine whether the fines imposed in this circumstance were “serious.”¹¹⁸ The court rejected the argument that the civil penalties imposed were punitive in nature, as *Deka* failed to cite a single federal case in which civil penalties were held to be sufficiently punitive so as to give rise to a constitutional right to a jury trial.¹¹⁹ The court seemed willing to consider in the future the possibility raised by the United States Supreme Court in *United States v. Halper*¹²⁰ that “a given civil penalty, if punitive, could engender additional constitutional protections,”¹²¹ but refused to do so at this time. Given that the issue of civil contempt fines had been remitted for a determination of “‘actual damages’ suffered by the tenants,”¹²² and that such fines would, therefore, be “compensatory and not punitive in nature,” the court held that *Deka* did not have the right to a jury trial.¹²³

The second constitutional issue raised was whether “the requirement of a written waiver of the right to a jury trial under Article I, section 2 of the New York Constitution applies to a civil action in which punitive sanctions are imposed.”¹²⁴ The court rejected *Deka*’s argument that a written waiver was required, noting that “[i]t is well settled that applications seeking the imposition of criminal contempt sanctions arising out of a civil action constitute a civil special proceeding to which the rules of civil procedure governing jury demands apply.”¹²⁵ New York

116. *Id.* at 47, 620 N.Y.S.2d at 843.

117. *Id.* at 48, 620 N.Y.S.2d at 844 (citation omitted).

118. *Id.* at 49, 620 N.Y.S.2d at 844.

119. *Id.* at 50, 620 N.Y.S.2d at 845.

120. 490 U.S. 435 (1989).

121. *Deka*, 208 A.D.2d at 50, 620 N.Y.S.2d at 845.

122. *Id.* at 49, 620 N.Y.S.2d at 845.

123. *Id.*

124. *Id.* at 40, 620 N.Y.S.2d at 839.

125. *Id.* at 51, 620 N.Y.S.2d at 846 (citations omitted).

Civil Practice Law and Rules sections 410¹²⁶ and 4102(a)¹²⁷ require that a jury demand be made in a timely manner, and that failure to make such a demand will result in a waiver of such right.¹²⁸ *Deka*, by failing to demand a jury trial, waived its right.¹²⁹ The court rejected *Deka*'s contention that the New York Constitution requirement of a written waiver¹³⁰ was applicable here, determining that provision applies only to "criminal cases."¹³¹ It reasoned that "[t]he procedural safeguards contained therein were intended solely for criminal prosecutions,"¹³² and as this case was not a criminal prosecution but a civil proceeding, the provision did not apply.¹³³

The federal courts require a right to a jury trial in all serious criminal contempt cases, but do not extend that right to petty criminal contempt cases, or civil contempt cases.¹³⁴ Distinguishing between the types of criminal contempt was initially achieved by classifying serious crimes as any crime which carried a sentence of more than six months in jail.¹³⁵ However, incarceration is no longer the sole test used by federal

126. N.Y. CIV. PRAC. L. & R. 410 (McKinney 1995). Section 410 provides:

If triable issues of fact are raised they shall be tried forthwith and the court shall make a final determination thereon. If issue are triable of right by jury, the court shall give the parties an opportunity to demand a jury trial of such issues. Failure to make such demand within the time limited by the court, or, if no such time is limited, before trial begins, shall be deemed a waiver of the right to trial by jury.

Id.

127. N.Y. CIV. PRAC. L. & R. 4102 (McKinney 1995). Section 4102 provides on pertinent part: "(a) Demand. Any party may demand a trial by jury of any issue of fact triable by a jury If no party shall demand a trial by jury as provided herein, the right to trial by jury shall be deemed waived by all parties." *Id.*

128. *Deka*, 208 A.D.2d at 51, 620 N.Y.S.2d at 846.

129. *Id.*

130. N.Y. CONST. art. I, § 2.

131. *Deka*, 208 A.D.2d at 52, 620 N.Y.S.2d at 846.

132. *Id.*

133. *Id.*

134. *See Bloom v. Illinois*, 391 U.S. 194, 198-205 (1968); *see also Taylor v. Hayes*, 418 U.S. 488 (1974).

135. *Codispoti v. Pennsylvania*, 418 U.S. 506, 512 (1974).

courts to determine whether a crime is petty or serious.¹³⁶ In addition, the Supreme Court has held that “the magnitude of the deprivation under the circumstances of the case” should also be evaluated to decide whether the criminal offense is petty or serious.¹³⁷ The Supreme Court has held, however, that civil fines which are found to be punitive in nature may give rise to further constitutional protections.¹³⁸ The *Deka* court noted, however, that *Halper* should be limited to its facts.¹³⁹ Nevertheless, the court added that the decision had seriously raised the possibility of a right to a jury trial under certain circumstances in a civil proceeding.¹⁴⁰ As the *Deka* court apparently illustrates by structuring its discussion around Supreme Court cases, New York adheres to precedent set out under the Federal Constitution concerning the right to a jury trial in contempt proceedings.

136. *Deka*, 208 A.D.2d at 47, 620 N.Y.S.2d at 843.

137. *Id.* See *Muniz v. Hoffman*, 422 U.S. 454 (1975); see also *International Union, United Mine Workers of Am. v. Bagwell*, 114 S. Ct. 2552 (1994); *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989). See *supra* note 94.

138. See *United States v. Halper*, 490 U.S. 435 (1989).

139. *Deka*, 208 A.D.2d at 50-51, 620 N.Y.S.2d at 845.

140. *Id.*