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department provided that such other court has jurisdiction over the classes of persons named as parties.

Nish v. Town of Poestenkill¹⁹⁶⁶
(decided January 23, 1992)

Plaintiff Nish brought suit against the State of New York and others, alleging "appropriation of and trespass upon her property" during the widening of a state highway.¹⁹⁶⁷ As an affirmative defense, the defendant, the State of New York, claimed that the supreme court lacked subject matter jurisdiction over this action, pursuant to Civil Practice Law and Rules section 3211a(2).¹⁹⁶⁸

The court held that the supreme court erred in transferring the suit to the Court of Claims without first determining whether that court had subject matter jurisdiction over the action.¹⁹⁶⁹ It reasoned that the Court of Claims did not have the requisite jurisdiction due to the fact that the plaintiff "failed to timely and properly" serve the claim on the Clerk of the Court of Claims and on the Attorney General.¹⁹⁷⁰

Nish, the plaintiff, was a property owner, who claimed that the State appropriated and trespassed upon her property during the widening of Route 66, a State highway in Rensselaer County.¹⁹⁷¹ She commenced this action in the Supreme Court, Rensselaer

1966. 179 A.D.2d 929, 579 N.Y.S.2d 189 (3rd Dep't 1992).

1967. *Id.* at 930, 579 N.Y.S.2d at 190.

1968. *Id.*; N.Y. CIV. PRAC. L. & R. 3211a(2) (McKinney 1992). Section 3211a(2) provides in pertinent part: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: the court has no jurisdiction of the subject matter of the cause of action." *Id.*

1969. *Nish*, 179 A.D.2d at 930, 579 N.Y.S.2d at 190; *see* N.Y. CONST. art. VI, § 19(a) (providing that the supreme court may transfer any action "to any other court having jurisdiction of the subject matter").

1970. *Nish*, 179 A.D.2d at 930, 579 N.Y.S.2d at 190; *see also* CT. CL. ACT, art. II, §§ 10, 11. (Section 10 providing for filing in a timely fashion, and Section 11 providing that claim must be served on the court clerk and on the Attorney General.).

1971. *Nish*, 179 A.D.2d at 930, 579 N.Y.S.2d at 190.

County.¹⁹⁷² The State moved to dismiss the complaint due to the supreme court's lack of subject matter jurisdiction, pursuant to C.P.L.R. section 3211a (2).¹⁹⁷³ The supreme court denied this motion, and instead, granted the plaintiff's cross-motion to remove the causes of action against the State to the Court of Claims.¹⁹⁷⁴ The State appealed.¹⁹⁷⁵

The Appellate Division, Third Department disagreed with the supreme court in two respects. First, the court found error in the lower court's transfer of the causes of action to the Court of Claims, without first determining whether the Court had the requisite jurisdiction over the matter.¹⁹⁷⁶ Both the New York Constitution, article 6, section 19(a),¹⁹⁷⁷ and C.P.L.R. section 325¹⁹⁷⁸ allow the supreme court to transfer any action mistakenly brought in the supreme court to any other court, as long as that court has "jurisdiction of the subject matter."¹⁹⁷⁹ Accordingly, the court held that the Supreme Court should have first deter-

1972. *Id.*

1973. *Id.*; N.Y. CIV. PRAC. L. & R. 3211a(2) (McKinney 1992).

1974. *Nish*, 179 A.D.2d at 930, 579 N.Y.S.2d at 190; *see generally* N.Y. CONST. art. VI, §19(a) (directing the supreme court on transferring actions to other courts having subject matter jurisdiction); *see also* CT. CL. ACT, art. II, §9(2). Section 9(2) states in relevant part that:

The [Court of Claims] shall have jurisdiction:

- 1) To hear and determine all matters now pending in the said court of claims.
- 2) To hear and determine a claim of any person, corporation or municipality against the state for the appropriation of any real or personal property or any interest therein

Id.

1975. *Nish*, 179 A.D.2d at 930, 579 N.Y.S.2d at 190.

1976. *Id.*; *see generally* N.Y. CONST. art. VI, §19(a) (providing for transfer of action "to any other court having jurisdiction of the subject matter").

1977. N.Y. CONST. art. VI, §19(a). Section 19(a) provides in pertinent part: "The Supreme Court may transfer any action . . . to any other court having jurisdiction of the subject matter . . ." *Id.*

1978. N.Y. CIV. PRAC. L. & R. 325(a) (McKinney 1990).

1979. *Nish*, 179 A.D.2d at 930, 579 N.Y.S.2d at 190; N.Y. CONST. art. VI, §19(a).

mined whether the Court of Claims had subject matter jurisdiction in this case.¹⁹⁸⁰

Second, the court in *Nish* found that the Court of Claims did not have the requisite jurisdiction over the subject matter because the plaintiff did not “timely and properly comply with the provisions of the Court of Claims Act sections 10 and 11.”¹⁹⁸¹ Pursuant to section 10,¹⁹⁸² of the Court of Claims Act, the plaintiff’s claim must be filed in a timely fashion. Pursuant to section 11, of the Court of Claims Act,¹⁹⁸³ the claim must be served on the clerk of the court and the Attorney General; otherwise no judgment can be rendered. Because *Nish* did not meet these jurisdictional requirements, the Court of Claims was “deprived of its subject matter jurisdiction over the claim.”¹⁹⁸⁴ Thus, the *Nish* court found that the supreme court erred in transferring this suit to the Court of Claims, and dismissed the complaint against the State of New York.¹⁹⁸⁵

The Court of Appeals in *Finnery v. New York State Thruway Auth.*,¹⁹⁸⁶ likewise found subject matter jurisdiction lacking due to the fact that the plaintiff neglected to serve the Attorney General, as required by the Court of Claims Act section 11.¹⁹⁸⁷ The Court of Appeals in *Finnerty*, relying on such decisions as *Buckles v. State of New York*,¹⁹⁸⁸ declared that the jurisdictional requirements of section 11¹⁹⁸⁹ “must be strictly construed.”¹⁹⁹⁰

1980. *Nish*, 179 A.D.2d at 930, 579 N.Y.S.2d at 190; *see generally* N.Y. CONST. art. VI, § 19(a). Transfer only to a court that has subject matter jurisdiction.

1981. *Nish*, 179 A.D.2d at 930, 579 N.Y.S.2d at 190; CT. CL. ACT, art. II, §§10, 11.

1982. CT. CL. ACT, art. II, §10.

1983. CT. CL. ACT, art. II, §11; *see generally* CT. CL. ACT, art. II, § 9(2). Section 9(2) states in relevant part: “The court shall have jurisdiction: to hear and determine a claim of any person . . . against the state for the appropriation of any real or personal property or any interest therein.” *Id.*

1984. *Nish*, 179 A.D.2d at 930, 579 N.Y.S.2d at 190.

1985. *Id.*

1986. 75 N.Y.2d 721, 550 N.E.2d 441, 551 N.Y.S.2d 188 (1989).

1987. *Id.*

1988. 221 N.Y. 418, 117 N.E. 811 (1917).

1989. CT. CL. ACT, art. II, §11.

The *Buckles* Court succinctly stated the reasons for such a holding, when it declared that:

the state cannot be sued without its consent and it has the right . . . to impose such terms and conditions and to prescribe such procedure as its legislative body shall deem proper. The conditions imposed become jurisdictional facts . . . [and so] could be *raised at any time, and could not be waived by any officer or authority* [emphasis added]¹⁹⁹¹

In *Dreger v. New York State Thruway Auth.*, the third department similarly dismissed a suit due to plaintiff's untimely filing of the suit. The *Dreger* court, stressed the need to serve the Attorney General as "a jurisdictional prerequisite and condition precedent to the proper commencement of the action in the Court of Claims,"¹⁹⁹² and declared the failure to serve the Attorney General to be "fatal."¹⁹⁹³

On the federal level no comparable provision exists to either the New York Constitution, article 6, section 19(a),¹⁹⁹⁴ or to section 325 of C.P.L.R..¹⁹⁹⁵ However, FRCP 12(h)(3) provides that "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."¹⁹⁹⁶

1990. *Finnerty*, 75 N.Y.2d at 722, 550 N.E.2d at 442, 551 N.Y.S.2d at 189.

1991. *Buckles*, 221 N.Y. at 423-24, 117 N.E.2d at 812-13 (1917).

1992. *Dreger v. New York State Thruway Auth.*, 177 A.D.2d 762, 575 N.Y.S.2d 743, 744 (3rd Dep't 1991).

1993. *Id.*

1994. N.Y. CONST. art. VI, §19(a).

1995. N.Y. CIV. PRAC. L. & R. 325(a) (McKinney 1990).

1996. FED. R. CIV. P. 12(h)(3).

