

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

-----X
BORIS KAGAN,

Index No.: 106905/03

Plaintiff – Appellant,

-against-

BFP ONE LIBERTY PLAZA, et al.,

Defendant – Respondent.

-----X

PLAINTIFF-APPELLANT’S MEMORANDUM OF LAW
IN SUPPORT OF HIS MOTION TO VACATE, REARGUE,
RENEW, RECONSIDER THIS COURT’S MAY 19, 2009 ORDER
OR, ALTERNATIVELY, FOR PERMISSION TO APPEAL
TO THE COURT OF APPEALS

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SUPREME COURT OF THE STATE OF NEW YORK
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PRELIMINARY STATEMENT

In this motion for reconsideration and vacatur of this Court’s May 19, 2009 Order, plaintiff-appellant Boris Kagan asks this Court to vacate the May 19, 2009 order and the order of the IA Court before it, as the Supreme Court of the State of New York lacked subject matter jurisdiction. As will be demonstrated herein and in the annexed Affirmation of Denise A. Rubin dated June 18, 2009, Mr. Kagan’s claims arise from injuries suffered while working in the recovery, debris-removal and clean up efforts surrounding the World Trade Center site following the September 11, 2009 terrorist attacks and subsequent collapse of the twin towers.

Accordingly, those claims should have been, and must be, transferred to the United States District Court for the Southern District of New York pursuant to the express jurisdiction created by the Air Transportation Safety and System Stabilization Act of 2001 (ATSSSA) 49 USC § 40101 (“ATSSSA”), which requires, *inter alia*, that the claims brought under the statute be litigated solely and exclusively before the United States District Court for the Southern District of New York.

ISSUES PRESENTED

1. Whether the Supreme Court of the State of New York (and accordingly, the Appellate Division, First Department) has subject matter jurisdiction over a claim arising from damages arising out of [the 9/11 aircraft] crashes at the World Trade Center, notwithstanding the clear language of the federal statute placing exclusive jurisdiction for such claims in the United States District Court for the Southern District of New York?
2. Whether an order entered in a case by a Court that does not have subject matter jurisdiction over that action is void *ab initio* and must be vacated?

STATEMENT OF THE CASE

The facts relevant to this motion are set forth in the Affirmation of Denise A. Rubin dated June 18, 2009 and as such are adopted by reference as if fully set forth herein.

ARGUMENT

POINT I.

**AS THE SUPREME COURT DID NOT HAVE SUBJECT
MATTER JURISDICTION OVER THE KAGAN CASE, ITS
ORDERS ARE VOID *AB INITIO* AND THE MATTER
SHOULD HAVE BEEN TRANSFERRED TO THE UNITED
STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK**

The question of subject matter jurisdiction is a question of judicial power: whether the court has the power, conferred by the Constitution or statute, to entertain the case before it. *Fry v. Village of Tarrytown*, 89 N.Y.2d 714, 718 (1997); *see, Hunt v. Hunt*, 72 N.Y. 217, 230 (1878) [“jurisdiction of the subject-matter is the power lawfully conferred to deal with the general subject involved in the action”]). In our State court system, “Supreme Court is a court of original, unlimited and unqualified jurisdiction” (*Kagen v. Kagen*, 21 N.Y.2d 532, 537 [1968]; *see, N.Y. Const, art VI, § 7*) and “is competent to entertain all causes of actions *unless its jurisdiction has been specifically proscribed.*” *Thrasher v. United States Liab. Ins. Co.*, 19

N.Y.2d 159, 166 (1967). It is precisely that situation, *i.e.*, where subject matter jurisdiction of the Supreme Court has been *specifically proscribed*, that exists in the matter at bar.

The order or judgment of a court lacking subject matter jurisdiction is void, and objection to the court's jurisdiction in such a case may be taken at any stage of the action, including on appeal. *Robinson v. Oceanic Steam Navigation Co.*, 112 N.Y. 315, 324 (1889); *Matter of Stoddard v. Town Bd. of Town of Marilla*, 52 A.D.2d 1091 (4th Dep't 1976). "It is blackletter law that a judgment rendered without subject matter jurisdiction is void, and that the defect may be raised at any time and may not be waived (*see* 21 C.J.S. Courts §§ 108-110, 116)." *Lacks v. Lacks*, 41 N.Y.2d 71, 75 (1976). The *Lacks* Court continued, noting that "the breadth with which the rule is often stated indicates the importance traditionally attached to so-called subject matter jurisdiction, really competence of courts, and the grave consequences, including denial of Res judicata effect to judgments, which may result from a lack of true subject matter jurisdiction or competence." *Lacks*, 41 N.Y.2d at 75.

The *Lacks* Court explained why vacatur of even a final judgment pursuant to CPLR 5015 (as sought here) is appropriate where the court lacks subject matter jurisdiction:

A statement that a court lacks 'jurisdiction' to decide a case may, in reality, mean that elements of a cause of action are absent [internal citations omitted]. Similarly, questions of mootness and standing of parties may be characterized as raising questions of subject matter jurisdiction [citations omitted]. But these are not the kinds of judicial infirmities to which CPLR 5015 (subd. (a), par. 4) is addressed. That provision is designed to preserve objections so fundamental to the power of adjudication of a court that they survive even a final judgment or order.

Lacks, 41 N.Y.2d 71, 74-75 *see, generally*, 5 Weinstein-Korn-Miller, N.Y. Civ. Prac., ¶ 5015.10.

A defect in subject matter jurisdiction cannot be waived. *Robinson*, 112 N.Y. at 324. "a court's lack of subject matter jurisdiction is not waivable, but "may be [raised] at any stage of the action, and the court may, ex mero motu [on its own motion], at any time, *when its attention is*

called to the facts, refuse to proceed further and dismiss the action" (*Robinson*, 112 N.Y. at 324)." *Fry v. Village of Tarrytown*, 89 N.Y.2d at 719. Indeed, the Court of Appeals has recognized that a doctrine related to subject matter jurisdiction . . . *must* be considered by the court *sua sponte*. *Matter of Hearst Corp. v Clyne*, 50 N.Y.2d 707, 713-714 (1980); *People ex rel. Geer v Common Council*, 82 N.Y. 575, 576 (1880); *In re Grand Jury Subpoenas for Locals 17, 135, 257 & 608 of United Brotherhood of Carpenters & Joiners*, 72 N.Y.2d 307, 311 (1988) (emphasis added). Where a court has determined that it does not have subject matter jurisdiction over a particular action, the only function remaining to the court is that of announcing the fact and dismissing the cause. *Steel Co. v Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) quoting *Ex parte McCardle*, 7 Wall [74 US] 506, 514 (1868).

In a 1916 case where the objection to jurisdiction of the Court was not made until after several witnesses had been examined by commission and the case was about ready for trial, the Appellate Division, relying on *Robinson v. Oceanic Steam Navigation Co.*, held that the late timing of the jurisdiction objection was "immaterial, since objection to the jurisdiction of the court may be taken at any time." *Fairclough v. Southern Pac. Co.*, 171 A.D. 496, 497 (1st Dep't 1916) citing *Robinson v. Oceanic Steam, Navigation Co.*, *supra*.

If a court lacks subject matter jurisdiction, the parties may not confer it on the court by stipulation or otherwise. *See, Graham v. New York City Hous. Auth.*, 224 A.D.2d 248 (1st Dep't 1996); *Strina v. Troiano*, 119 A.D.2d 566 (2d Dep't 1986). Subject matter jurisdiction may not be created by laches or estoppel (*see Matter of Anthony J.*, 143 A.D.2d 668 [2d Dep't 1988]; *Nuernberger v. State of New York*, 41 N.Y.2d 111 [1976]) and it may not be acquired by waiver (*see, Matter of Rougeron's Estate*, 17 N.Y.2d 264, 271 (1966) *cert. denied* 385 U.S. 899 [1966]). "A judgment or order issued without subject matter jurisdiction is void, and that defect may be

raised at any time and may not be waived.” *Editorial Photocolor Archives v. Granger Collection*, 61 N.Y.2d 517, 523 (1984).

The question of whether a federal law preempts state law is fundamentally a matter of Congress's intent. *See, e.g., English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985). Since the existence of preemption turns on Congress's intent, this Court should “begin as we do in any exercise of statutory construction[,] with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs.” *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 655 (1995); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983).

It is well established that state law is preempted under the Supremacy Clause, U.S. CONST., ART. VI, CL. 2, in any of several circumstances. The applicable instance at issue here is when, acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. *In re WTC Disaster Site* (McNally), 414 F.3d 352, 371-372 (2d Cir. 2005) *citing Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

“If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.” *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Where the language of the statute plainly indicates that Congress intended preemption, “[w]e must give effect to th[e] plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.” *Shaw*, 463 U.S. at 97. If the text of the statute is ambiguous, either as to Congress's intent to preempt at all or as to the extent of an intended preemption, the meaning of the statute may be gleaned from its context and

from the statutory scheme as a whole, or by resort to the normal canons of construction and legislative history. *See Shaw*, 463 U.S. at 100 (finding that federal statute preempted state law based on the statute's “plain language ..., [its] structure ..., and its legislative history”); *see generally K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291(1988); *Canada Life Assurance Co. v. Converium Ruckversicherung (Deutschland) AG*, 335 F.3d 52, 57 (2d Cir. 2003); *Auburn Housing Authority v. Martinez*, 277 F.3d 138, 143-44 (2d Cir. 2002).

The Air Transportation Safety and System Stabilization Act of 2001 expressly states that jurisdiction for all claims arising out of the September 11, 2001 attacks at the World Trade Center must be vested in the United States District Court for the Southern District of New York:

408 (b) Federal cause of action.—

- (1) Availability of action.** There shall exist a Federal cause of action for damages arising out of the hijacking and subsequent crashes of American Airlines flights 11 and 77, and United Airlines flights 93 and 175, on September 11, 2001. Notwithstanding section 40120(c) of title 49, United States Code [49 U.S.C.A. § 40120(c)], this cause of action shall be the exclusive remedy for damages arising out of the hijacking and subsequent crashes of such flights.
- (2) ...**
- (3) Jurisdiction.** The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction *over all actions* brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001.

ATSSSA, §408(b) (emphasis added).

The Second Circuit discussed the creation and intent of ATSSSA in *McNally*, 414 F.3d at 373:

Congress enacted the original version of ATSSSA within days after the September 11 attacks. The principal components of the

original enactment were the creation of the Victim Compensation Fund to provide relief, without litigation, to individuals (or relatives of deceased individuals) physically injured or killed as a result of the September 11 aircraft crashes, *see* ATSSSA §§ 403, 405; the limitation of the airlines' liability for damages sustained as a result of those crashes, *see id.* § 408(a); *the creation of a federal cause of action as the exclusive judicial remedy for damages arising out of those crashes, see id.* § 408(b)(1); and the concentration in federal court in the Southern District of New York (or “Southern District”) of suits on that federal cause of action, *see id.* § 408(b)(3).

McNally, 414 F.3d at 373. Considering the question of federal-court jurisdiction over claims relating to respiratory injuries suffered by rescue *and clean-up workers as a result of exposure to toxins and other contaminants* in the aftermath of the September 11, 2001 attacks at the World Trade Center, the *McNally* court held:

Construing the express language of the Act, we think it clear beyond peradventure that some preemption was intended. Viewing the language, considering the statute as a whole and the differences between its relevant parts, and taking into account the statute's purpose and legislative history, we conclude that Congress intended ATSSSA to preempt at least the claims brought by the plaintiffs in the 35 cases dealt with in the district court's opinion.

McNally, 414 F.3d at 375. Since *McNally*, the District Court has established several master docket numbers to act as “umbrella” references for the cases brought under ATSSSA.

The District Court's 21 MC 100 Master Docket covers the cases of persons alleging primarily respiratory injuries suffered in the rescue, recovery and debris removal efforts at the WTC site (“Ground Zero” or “the pile”). In addition, the District Court also maintains a Master Docket numbered 21 MC 102 (AKH) for those matters, like Mr. Kagan's, arising from the claims of persons suffering primarily respiratory injuries due to exposure to the toxic dust, smoke and particulate matter while engaged in recovery, *debris removal and clean-up activities* at the Fresh Kills landfill in Staten Island *and in the offices and other buildings surrounding the site of the World Trade Center* following the terrorist attacks of September 11, 2001. *See* Order

Denying Motions To Remand, December 4, 2006, 21 MC 100 (AKH) and 21 MC 102 (AKH), Hellerstein, J., at p. 2 (a copy of that Order is annexed to the Rubin Affirmation in Support at Exhibit “B”). Mr. Kagan’s claims should have been brought under ATSSSA as part of the District Court’s 21 MC 102 Master Docket.

The District Court, addressing its subject matter jurisdiction over these cases, explained:

[ATSSSA] vests the Southern District of New York with “original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death)” arising from the September 11th attacks. *Id.* at § 408(b)(3). This court's exclusive jurisdiction over the Underlying Cases further supports supplemental jurisdiction. *A state court would not have the power to hear the whole dispute.* Thus, if I declined to exercise supplemental jurisdiction and no independent basis for jurisdiction is found, *this dispute would have to be filed in state court and heard separately and apart from the cases that control claims made under the policies. This would contradict Congress' desire for uniformity and expertise in dealing with these cases. See* 147 Cong. Rec. S. 9589, 9594 (Sept. 21, 2001), 9594 (remarks of Sen. McCain) (“the bill attempts to provide some sense to the litigation by consolidating all civil litigation arising from the terrorist attacks of September 11 in one court”); *id.* at 9595 (remarks of Sen. Hatch) (“we consolidated the causes of action in one Federal court so that there will be some consistency in the judgments awarded”). *Requiring a state court to hear this case would create the possibility of inconsistent and inefficient judgments regarding the amount of damages available to plaintiffs in the Underlying Cases.*

In re September 11th Liability Ins. Coverage Cases, 333 F.Supp.2d 111, 117 (S.D.N.Y., 2004)

(all emphasis added), *citing Canada Life Assurance Co. v. Converium Ruckversicherung (Deutschland) AG*, 335 F.3d 52, 55 (2d Cir.2003).

The question of whether federal law preempts state law is fundamentally a matter of Congress's intent. *See, e.g., English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985); *McNally*, 414 F.3d 352, 371 (2d Cir. 2005). Congress is empowered to pre-empt state law by so

stating in express terms, and Congress expressly stated its intent that the ATSSSA preempt State Law as demonstrated, *supra*. U.S. CONST., ART. VI, CL. 2; *McNally*, 414 F.3d at 371-372 *citing Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

This Court has already recognized the Federal Courts' subject matter jurisdiction over ATSSSA claims:

... the Air Transportation Safety and System Stabilization Act of 2001 (ATSSSA, P.L. 107-42, § 408[b][1]), created "a federal cause of action as the exclusive judicial remedy for damages arising out of [the 9/11 aircraft] crashes" at the World Trade Center providing exclusive jurisdiction over such lawsuits in the Southern District of New York (*In re: WTC Disaster Site*, 414 F.3d 352, 373 [2d Cir.2005]), ...

Felder v. City of New York, 53 A.D. 3d 401, 402 (1st Dep't 2008).

As this Court recognized in *Felder*, section 408 (b)(3) of the ATSSSA provides that "[t]he United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related crashes of September 11, 2001." Thus, by federal law and the express intent of the Congress, only the District Court has subject matter jurisdiction over ATSSSA claims.

The Second Circuit held in *WTC Disaster Site* that the ATSSSA preempts state law damages remedies (*McNally*, 414 F.3d at 380), over which the IA Court would otherwise have subject matter jurisdiction, as a court of original, unlimited jurisdiction. *See Kagen v Kagen*, 21 N.Y.2d 532 (1968).

In an order addressing subject matter jurisdiction over an insurance coverage matter inextricably intertwined with ATSSSA claims, Judge Hellerstein wrote:

I held, in *September 11th Liability Insurance Coverage Cases*, 333 F.Supp.2d 111 (S.D.N.Y.2004), a case concerning the allocation and sequence of insurance coverage among the insurance carriers

covering the owner and lessees of the Twin Towers of the World Trade Center, that the unique statutory framework of the ATSSSA made “the scope and extent of the defendants' liability coverage, whom the policies cover, ... crucial to the dispositions of the Underlying Cases”[footnote omitted]. 333 F.Supp.2d at 117. *I also noted the risk of inconsistent or inefficient judgments if the insurance dispute was litigated in various State courts while the underlying litigation remained before me, and observed that such a result would defeat “Congress' desire for uniformity and expertise in dealing with these cases”.* *Id.* at 117.

The instant dispute presents me with nearly identical legal issues. Whether the issues are raised by third and fourth party pleadings in each of the 10,000 cases, or by a single declaratory judgment relating to those cases, is not important. Supplemental jurisdiction is fundamentally needed to promote judicial economy and efficiency, *and to avoid delays and inconsistencies of proceedings in the state courts.*

See WTC Captive Ins. Co., Inc. v. Liberty Mut. Fire Ins. Co., 537 F.Supp.2d 619, 627 (S.D.N.Y., 2008) (emphasis added).

POINT II.

REARGUMENT AND RENEWAL ARE APPROPRIATE WHERE THIS COURT MISAPPREHENDED OR OVERLOOKED LEGAL AUTHORITY

It is, of course, well settled that a motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. *Foley v. Roche*, 68 A.D.2d 558, 567 (1st Dep't 1979). The purpose of a motion for reargument “is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided.” *Fosdick v. Town of Hempstead*, 126 N.Y. 651 (1891) *Foley*, 68 A.D.2d at 567. Plainly, given our contention that this Court has no subject matter jurisdiction over Mr. Kagan's claim, we will not argue here the propriety or correctness of the holdings on the facts and the applicability of New York's Labor Law. Accordingly, while not conceding those issues, this motion does not seek reargument of the issues previously decided as to the quality of the

plaintiff's expert's report or the applicability of the Labor Law.¹ While we are cognizant that the Court of Appeals in *Simpson v. Loehmann*, 21 N.Y.2d 990 (1968) held that “[a] motion for reargument is not an appropriate vehicle for raising new questions,” the lack of subject matter jurisdiction, as explained supra, is one issue that may be raised for the first time on appeal and indeed, even in support of a motion to vacate under CPLR 5015 after entry of a final judgment.

Here, the Supreme Court (the IA Court) and this Court both failed to recognize that the Kagan claim was precisely the type of claim that the ATSSSA placed squarely within the exclusive jurisdiction of the United States District Court. Accordingly, this Court “overlooked or misapprehended the relevant facts, or misapplied [a] controlling principle of law,” in this case, the fact that subject matter jurisdiction for Boris Kagan’s claim was solely and exclusively in the District Court.

In construing the language of a statute (such as ATSSSA), this Court has held that “[s]tatutory construction requires that where the language of a statute is clear and unambiguous, it should be construed by a court so as to give effect to the plain and ordinary meaning of the words used, without limiting or extending its plain language.” *City of New York v. Land and Bldg. known as 355 West 41st Street*, 23 A.D.3d 183, 185 (1st Dep’t 2005); *Matter of Raritan Dev. Corp. v. Silva*, 91 N.Y.2d 98, 106-107 (1997); McKinney's Cons. Laws of N.Y., Book 1, Statutes § 94 (“The legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction”).

¹ Notably, however, plaintiff does not here concede the correctness of this Court’s holding on the application of the New York Labor Law to his claim; indeed, we believe that holding was incorrect, given the facts of Mr. Kagan’s claim and of similar claims in the District Court’s 21 MC 102 docket that have not been addressed in this State Court proceeding. Mr. Kagan does not waive any right to address those issues in the proper forum (*i.e.*, the District Court).

In another decision, this Court similarly held that “[t]he language of the section is to be given its plain meaning (N.Y. Stat. § 94) and construed according to the fair import of its terms. *City of New York v. Castro*, 160 A.D.2d 651, 652 (1st Dep’t 1990). The Second Department is fully in accord with this standard. *Prego v. City of New York*, 147 A.D.2d 165, 170 (2d Dep’t 1989), citing *Riegert Apts. Corp. v. Planning Bd.*, 57 N.Y.2d 206 (1982); *Giblin v. Nassau County Med. Center*, 61 N.Y.2d 67 (1984); *Sega v. State of New York*, 60 N.Y.2d 183 (1984); *New Amsterdam Cas. Co. v. Stecker*, 3 N.Y.2d 1 (1957).

CONCLUSION

This Court should grant reargument, renewal and reconsideration of the *Kagen* matter, and upon such reconsideration, should vacate its May 19, 2009 Order, replacing that order with an order:

- (1) Vacating the IA Court’s Order granting summary judgment and dismissing plaintiff’s complaint;
- (2) Reinstating Boris Kagen’s complaint and
- (3) Transferring the *Kagen* matter to the United States District Court for the Southern District of New York to be litigated and tried on the District Court’s 21 MC 102 docket,


or, in the alternative,

- (4) This Court should grant its permission to allow Mr. Kagen to appeal on the foregoing grounds to the Court of Appeals pursuant to CPLR 5601(a)(1)(i), on the certified question herein proposed; and
- (5) All of the foregoing along with such other and additional relief as this Court deems appropriate.

Dated: New York, New York
June 18, 2009

Respectfully submitted,

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