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Journal

Business Valuation Reports

The Importance of Proactive Lawyering

By Peter E. Bronstein and David A. Typermass

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A Primer on the New York False Claims Act

Employment Waivers and Releases

"Moot Points"

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A "Moot Point" Is an Ongoing Concern for Everyone

By Joseph F. Castiglione

The New York State Unified Court System's latest Annual Report reveals that in 2007 more than 4.5 million cases were filed statewide in New York trial courts.[1] In that year about 10,000 records on appeal were filed with the respective Appellate Divisions, and 221 records on appeal were filed with the Court of Appeals.[2] These are extraordinary filing numbers for a one-year period and should serve as a reminder that practitioners need to be constantly aware that a client's case could be lost in this sea of litigation by becoming what courts consider "moot." The numbers should simultaneously remind practitioners to continually question whether opposing litigation should be dismissed for having become moot. As mootness can occur unexpectedly in litigation if not properly addressed, and concomitantly could be pursued as a legitimate means to oppose continued litigation, practitioners must be concerned with the potential for a moot point occurring in litigation.

This article discusses the concept of mootness in New York civil litigation, including a court's lack of jurisdiction over moot controversies, the application of mootness primarily in construction-project related litigation, and methods for lawyers to comply with their obligation to inform a court that a controversy is potentially moot.

Actual Controversies

The legal authority of a New York state court "extends only to live controversies."[3] A "live" or "actual controversy" contemplates a situation in which "the rights of the parties will be directly affected by the determination of the [court] and the interest of the parties is an immediate consequence of the judgment."[4] However, an actual or live controversy can become moot by either the "passage of time or change in circumstances."[5] As explained by the Court of Appeals, "the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy."[6]

Mootness could arguably affect any type of litigation because every court's subject matter jurisdiction depends on the continued existence of an actual controversy. New York jurisprudence recognizes as a "fundamental principle that a court's power to declare the law is limited to determining actual controversies in pending cases."[7] If a

case lacks the necessary "actual controversy" the matter is considered not "justiciable," and therefore implicates the court's subject matter jurisdiction.[8] The question of subject matter jurisdiction is raised because mootness triggers the jurisprudential prohibition against courts issuing what are deemed "advisory opinions."[9]

Advisory opinions are considered judicial opinions that would not "have an immediate, practical effect on the conduct of the parties."[10] New York courts have historically recognized that "[t]he courts of New York do not issue advisory opinions for the fundamental reason that in this State 'the giving of such opinions is not the exercise of the judicial function.'"[11] This limitation on function "is not merely a question of judicial prudence or restraint; it is a constitutional command defining the proper role of the courts under a common-law system."[12] Therefore, mootness does not deprive a court of valid subject matter jurisdiction over the underlying asserted actual controversy but, rather, effectively precludes a court from issuing an advisory opinion when the asserted controversy is no longer deemed a live dispute by the court.

Mootness seemingly applies to any controversy that can be effectively concluded without a formal court decision; and any determination about whether mootness may apply is generally going to be "fact-driven."[13] However, the Court of Appeals has provided more direct guidance when determining mootness in litigation involving construction projects.

Mootness in Construction Litigation

The Court of Appeals extensively addressed mootness in litigation involving construction projects in *Dreikausen v. Zoning Board of Appeals of the City of Long Beach*, and shortly thereafter in *Citineighbors Coalition of Historic Carnegie Hill v. New York City Landmarks Preservation Commission*.[14] In *Dreikausen*, the Court identified and discussed "several factors significant in evaluating claims of mootness."[15] In *Citineighbors*, the Court quoted *Dreikausen*'s explanation, "[t]ypically the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy," noting that when "the change in circumstances involves a construction project, we must first consider how far the work has progressed towards completion."[16] However, even though there may be "substantial completion" of the underlying project, the Court of Appeals has explained that "[b]ecause a race to completion cannot be determinative,"[17] "other factors bear on mootness in this context as well."[18]

The Court expounded in *Dreikausen* that "[c]hief among [the mootness factors to consider] has been a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation."[19] New York appellate courts stringently apply this "chief" mootness consideration in litigation. Appellate courts routinely dismiss proceedings where the complaining party fails to try to preserve the status quo or prevent the other party from moving forward with the contested action, by seeking *both* preliminary injunctive relief before the lower court and an injunction on appeal; seeking only preliminary injunctive relief is not enough.[20]

The "chief" mootness consideration is also routinely applied by courts in litigation involving an agency's State Environmental Quality Review Act (SEQRA)[21] review when the action is considered moot.[22] The Court of Appeals directly noted that parties contesting an agency action "on SEQRA grounds may safeguard their challenge against mootness by promptly requesting injunctive relief."[23]

Relative to construction-project litigation, the Court of Appeals's decision in *Citineighbors* highlights the consideration of financial means in the context of a request for injunctive relief. There can be a very substantial financial disparity between parties in large-scale construction-project litigation. A party contesting any decision or action relating to a large-scale construction project may intentionally omit pursuing injunctive relief based upon its asserted inability, or simple unwillingness, to provide the appropriate financial undertaking for the injunction.[24] These decisions can have significant adverse consequences, as made clear by the Court in *Citineighbors*.

In *Citineighbors*, the Court determined that both the petitioners' failure to seek appropriate injunctive relief to enjoin construction based upon the petitioners' alleged "'monetary constraints'" and their perceived "unlikelihood of success" on the merits constituted "nonfeasance."[25] The Court sternly rebuked the petitioners' failure to take the appropriate actions to preserve the status quo:

> In short, petitioners simply assumed that Supreme Court would not grant them injunctive relief or, in the alternative, would require an undertaking in an amount more than they could or wanted to give. Under *Dreikausen*, however, petitioners were required, at a minimum, to seek an injunction in the circumstances presented here. Having pursued a strategy that foisted all financial risks (other than their own legal fees and related expenses) onto the property owner and the developer, petitioners may not expect us to overlook the substantial completion of this construction project.[26]

As such, a party's unwillingness to provide the appropriate financial undertaking, and even a party's alleged financial inability, are seemingly unacceptable reasons for not trying to preserve the status quo by seeking appropriate injunctive relief. Thus, practitioners should be vigilant to avoid any "half-hearted request for injunctive relief," as it may be strongly construed against their client if an

adversary asserts that the controversy has subsequently become moot.[27] A basic good faith effort to try to preserve the status quo seems to be the predicate standard in litigation relating to construction projects.

Additional mootness factors in construction-project related litigation include "whether work was undertaken without authority or in bad faith, and whether substantially completed work is 'readily undone, without undue hardship.'"[28] The work and hardship considerations should include identifying and weighing financial expenditures made by a party in moving forward with a construction project or approval.[29] When considering these work/bad-faith/undue hardship factors, the courts are also cognizant that builders have "every business incentive to complete the building as quickly as possible so as to profit from their investment and avoid paying interest on construction loans."[30] However, any finding that work was in bad faith or without authority weighs against mootness.[31]

The substantial completion and additional mootness factors ultimately provide greater clarity for practitioners endeavoring to avoid, or conversely to raise, the issue of mootness in construction-project related litigation. These factors, while limited here to construction-project related litigation, may help to provide some guidance when considering whether an actual controversy in non-construction related litigation is potentially moot.

Mootness Exception for Discretionary Review

There is an exception that allows courts to consider a moot controversy. New York jurisprudence affords courts "discretion to review a case if the controversy or issue involved is likely to recur, typically evades review, and raises a substantial and novel question."[32] The Court of Appeals noted in *Dreikausen* that "[c]ourts also have retained jurisdiction notwithstanding substantial completion [of a project in construction related litigation] in instances where novel issues or public interests such as environmental concerns warrant continuing review."[33] If a court determines that all elements exist and the mootness exception applies to any particular case, the "court may reach the moot issue even though its decision has no practical effect on the parties."[34] If, however, "there is a realistic likelihood that the issues presented [in the case] will recur with an adequately developed record and with a timely opportunity for review," the judicially recognized "exception to the mootness doctrine does not apply."[35]

Attorney's Obligation

Practitioners have an affirmative and ongoing obligation to raise the issue of mootness in litigation "when a change in circumstances renders the controversy between the parties potentially moot."[36] This continuing obligation extends to facts that constitute a "change in circumstances" that may render what started as an actual controversy potentially moot. But how do practitioners properly raise the facts that constitute the "change in circumstances"?

The issue of mootness implicates a court's subject matter jurisdiction, and the "'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.'"[37] As such, in any lower court proceeding or on appeal, if facts constituting the "change in circumstances" are already in the record before the court, a party should have the opportunity to raise the issue of mootness in a merits brief. This method is consistent with the principle that a court can refuse to proceed with any case on its own volition, when existing record facts show that the court lacks subject matter jurisdiction. However, when facts constituting the "change in circumstances" are outside of the record, how does a practitioner best raise mootness?

During any lower court proceeding or even on appeal, an appropriate avenue to raise mootness appears to be through a motion to dismiss for lack of subject matter jurisdiction under CPLR 3211(a)(2).[38] A motion to dismiss based upon lack of subject matter jurisdiction can be made before service of a responsive pleading or "at any subsequent time" – *i.e.*, any time before the lower court or even when on appeal.[39] Through a motion to dismiss, parties have the opportunity to introduce new facts or other matters – by the motion's supporting affidavits – that are not already in the record.[40] Practically speaking, a motion to dismiss may generally be the preferred method to raise mootness: the motion can obviate the court and parties addressing the merits of the underlying case and be limited to the specific facts showing that a change in circumstances has rendered the controversy moot.[41]

The consequences of an actual controversy becoming moot are comprehensive and final: a court will generally dismiss a proceeding or appeal if the court determines that the underlying controversy is moot; however, "vacatur of an order or judgment on appeal may also be an appropriate exercise of discretion when necessary 'in order to prevent a judgment which is unreviewable for mootness from spawning any legal consequences or precedent.'"[42]

Conclusion

New York's staggering volume of cases underscores the sentiment that courts cannot and should not expend already strained judicial resources on potentially moot controversies in litigation. Lawyers generally have an affirmative obligation to inform a court when a controversy is potentially moot, so practitioners in litigation need to be vigilant and take the necessary actions to ensure the continued viability of their client's case; however, vigi-

lance is a two-way street, and practitioners should also continually be aware that, when the appropriate change in circumstances exists, mootness is a practical option to oppose continued litigation.

A "moot point" is an ongoing concern for everyone in litigation. If a practitioner fails to appreciate the significance of a potentially moot point in litigation, the point of this article may be moot. ■

1. New York State Unified Court System, Report of the Chief Administrator of the Courts, Annual Report 2007, at p. 21 (released April 2009), *available at* http://www.courts.state.ny.us/reports/annual/pdfs/2007AnnualReport.pdf.

2. *Id*. at pp. 20–21, p. 19.

3. *See Saratoga Co. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 810–11, 766 N.Y.S.2d 654 (2003); *see also Gonzalez v. Gonzalez*, 57 A.D.3d 896, 897, 870 N.Y.S.2d 410 (2d Dep't 2008) (stating that "the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted").

4. *Hearst Corp., v. Clyne*, 50 N.Y.2d 707, 714, 431 N.Y.S.2d 400 (1980); *see also Gonzalez*, 57 A.D.3d at 897.

5. *See Hearst Corp.,* 50 N.Y.2d at 714.

6. *Dreikausen v. Zoning Bd. of Appeals of the City of Long Beach*, 98 N.Y.2d 165, 172, 746 N.Y.S.2d 429 (2002); *Citineighbors Coalition of Historic Carnegie Hill v. N.Y. City Landmarks Pres. Comm'n*, 2 N.Y.3d 727, 728–29, 778 N.Y.S.2d 740 (2004); *see also Saratoga County Chamber of Commerce, Inc*., 100 N.Y.2d at 811.

7. *See In re David C*., 69 N.Y.2d 796, 798, 513 N.Y.S.2d 377 (1987); *see also Workmen's Comp. Fund Self-Insurers' Ass'n v. State Indus. Comm*., 224 N.Y. 13, 16, 119 N.E. 1027 (1918) (stating "[t]he function of the courts is to determine controversies between litigants").

8. *See Cuomo v. Long Island Lighting Co*., 71 N.Y.2d 349, 354–58, 525 N.Y.S.2d 828 (1988) (holding that the "nonjusticiable dispute" was "outside the subject matter jurisdiction of this court"); *see also Police Benevolent Ass'n of the N.Y. State Troopers v. N.Y. State Div. of State Police*, 40 A.D.3d 1350, 1353 n.2, 838 N.Y.S.2d 199 (3d Dep't 2007) (stating "[t]he lack of a justiciable issue implicates the subject matter jurisdiction of a court"); *see also Morrison v. Budget Rent A Car Sys., Inc*., 230 A.D.2d 253, 258–59, 657 N.Y.S.2d 721 (2d Dep't 1997).

9. *See Saratoga County Chamber of Commerce, Inc*., 100 N.Y.2d at 810–11 (identifying the plaintiffs' challenges, which the court deemed to be moot, were "requests for advisory opinions." Further holding that a court's "jurisdiction . . . extends only to live controversies," and courts "are prohibited from giving advisory opinions or ruling on 'academic, hypothetical, moot, or otherwise abstract questions.'"); *see also Gonzalez*, 57 A.D.3d at 897 (holding that "[c]ourts are prohibited from rendering advisory opinions and 'an appeal will be considered moot unless the rights of the parties will be directly affected"); *Becher v. Becher*, 245 A.D.2d 408, 409, 667 N.Y.S.2d 50 (2d Dep't 1997) (holding that the "underlying controversy had been rendered moot and [] the judicial determination sought would constitute the rendering of an advisory opinion").

10. *See King v. Glass*, 223 A.D.2d 708, 708, 637 N.Y.S.2d 187 (2d Dep't 1996); *see also Employers' Fire Ins. Co. v. Klemons*, 229 A.D.2d 513, 514, 645 N.Y.S.2d 849 (2d Dep't 1996).

11. *See Cuomo*, 71 N.Y.2d at 354 (internal brackets omitted); *County of Monroe v. City of Rochester*, 39 A.D.3d 1272, 1273, 834 N.Y.S.2d 817 (4th Dep't 2007).

12. *N.Y. Pub. Interest Research Group, Inc. v. Carey*, 42 N.Y.2d 527, 529, 399 N.Y.S.2d 621 (1977).

13. *See Dreikausen*, 98 N.Y.2d at 172–73.

14. 2 N.Y.3d at 729–30.

15. *Dreikausen*, 98 N.Y.2d at 172–73; *see also Citineighbors*, 2 N.Y.3d at 729.

16. *Citineighbors*, 2 N.Y.3d at 728–29 (quoting *Dreikausen*, 98 N.Y.2d at 172).

17. *Citineighbors*, 2 N.Y.3d at 729 (internal quotes omitted); *see also Dreikausen*, 98 N.Y.2d at 172.

18. *Citineighbors*, 2 N.Y.3d at 729; *see also Dreikausen*, 98 N.Y.2d at 173.

19. *Id.* at 173; *Citineighbors*, 2 N.Y.3d at 729.

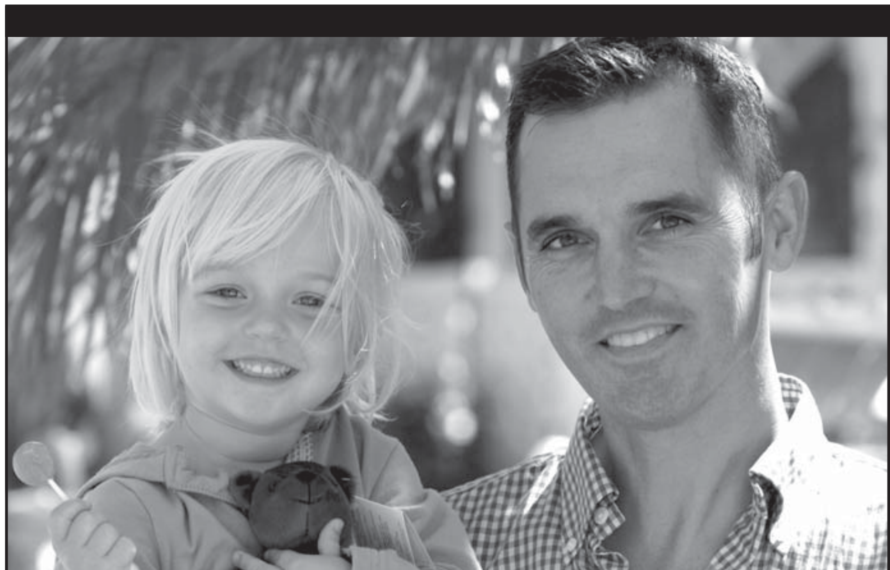
20. *See Imperial Improvements, LLC v. Town of Wappinger Zoning Bd. of Appeals*, 290 A.D.2d 507, 507–508, 736 N.Y.S.2d 409 (2d Dep't 2002); *see also Save the Pine Bush Inc., v. City of Albany*, 281 A.D.2d 832, 832–33, 722 N.Y.S.2d 310 (3d Dep't 2001); *see also Gorman v. Town Bd. of the Town of E. Hampton*, 273 A.D.2d 235, 236, 709 N.Y.S.2d 433 (2d Dep't 2000); *see also Schaffer v. Zoning Bd. of Appeals of Town/Vill. of Harrison*, 22 A.D.3d 501, 501, 803 N.Y.S.2d 644 (2d Dep't 2005).

21. *See generally* N.Y. Environmental Conservation Law §§ 8-0101–8-0117.

22. *See Many v. Vill. of Sharon Springs Bd. of Trustees*, 234 A.D.2d 643, 645, 650 N.Y.S.2d 486 (3d Dep't 1996); *see also Sutherland v. N.Y. City Hous. Dev. Corp*., 20 Misc. 3d 1115(A), *4, 2008 WL 2663599 (Sup. Ct., N.Y. Co. 2008), *aff'd*, 61 A.D.3d 479, 877 N.Y.S.2d 43 (1st Dep't 2009); *see also Save the Pine Bush Inc.*, 281 A.D.2d at 832–33.

23. *See Citineighbors*, 2 N.Y.3d at 730; *see also Vill. of Sharon Springs Bd. of Trustees*, 234 A.D.2d at 645.

24. *See also* CPLR 6312(b) (requiring as a prerequisite for an injunction that the requesting party "shall" provide an undertaking to compensate for "all damages and costs which may be sustained by reason of the injunction").



Tim McQueen, leukemia survivor, with daughter Bridget

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25. 2 N.Y.3d at 729.

26. *Id.* at 729–30; *see also Dreikausen*, 98 N.Y.2d at 174.

27. *See Dreikausen*, 98 N.Y.2d at 174. The consequences of a party's failure to seek the appropriate injunctive relief may seem, at times, unduly severe. However, the potential consequences to any party moving forward with a construction project when their opponent actually endeavors to maintain the status quo through seeking proper injunctive relief, but the requested injunctive relief is denied, can be equally severe. As long as a party seeks to properly maintain the status quo, even though they are denied the requested injunctive relief, it is irrelevant if the opposing party subsequently completes construction of the underlying project and then raises mootness. The courts have determined that, in those circumstances, "relief remains available 'even after completion of the project' because 'structures . . . most often can be destroyed.'" *Schupak v. Zoning Bd. of Appeals of the Town of Marbletown*, 31 A.D.3d 1018, 1020, 819 N.Y.S.2d 335 (3d Dep't 2006) (quoting *Dreikausen*, 98 N.Y.2d at 172).

28. *Citineighbors,* 2 N.Y.3d at 729 (quoting *Dreikausen*, 98 N.Y.2d at 173).

29. *See Citineighbors*, 2 N.Y.3d at 729 (noting "property owner and developer had already spent roughly $25.7 million"); *see also Save the Pine Bush Inc., v. City of Albany*, 281 A.D.2d 832, 832–33, 722 N.Y.S.2d 310 (3d Dep't 2001) (identifying that "[d]uring the pendency of this appeal, the current owner of the parcel expended over $1 million" in moving forward under contested SEQRA review); *Save the Pine Bush Inc. v. Cuomo*, 200 A.D.2d 859, 860, 606 N.Y.S.2d 818 (3d Dep't 1994) (finding "[p]etitioners failed to seek a stay pending appeal and the City has expended millions of dollars on the project").

30. *Citineighbors,* 2 N.Y.3d at 730; *see also Dreikausen*, 98 N.Y.2d at 174.

31. *Id*. at 173.

32. *See Saratoga Co. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 811, 766 N.Y.S.2d 1654 (2003); *Hearst Corp., v. Clyne*, 50 N.Y.2d 707, 714–15, 731 N.Y.S.2d 400 (1980). A party's efforts to maintain the status quo in construction-project litigation by seeking appropriate injunctive relief is not an exception to mootness, but will generally obviate subsequent potential mootness claims. *See* endnote 27 *supra*.

33. 98 N.Y.2d at 173.

34. *See Saratoga County Chamber of Commerce, Inc.*, 100 N.Y.2d at 811; *see also Schermerhorn v. Becker*, 64 A.D.3d 843, 845, 883 N.Y.S.2d 325 (3d Dep't 2009) (reiterating all elements must be met for exception to apply).

35. *See Citineighbors*, 2 N.Y.3d at 730; *but see also Schermerhorn*, 64 A.D.3d at 845 (applying the mootness exception).

36. *See Spano v. Wing*, 285 A.D.2d 809, 811, 728 N.Y.S.2d 809 (3d Dep't 2004); *see also Wellman v. Surles*, 185 A.D.2d 464, 466, 586 N.Y.S.2d 341(3d Dep't 1992). The obligation to raise mootness is seemingly intended in part to prevent the "dissipation of judicial resources" and "prevents devaluation of the force of judicial decrees." *See Cuomo*, 71 N.Y.2d at 354.

37. *Fin. Industry Regulatory Auth., Inc. v. Fiero*, 10 N.Y.3d 12, 17, 853 N.Y.S.2d 267 (2008) (quoting *Fry v. Vill. of Tarrytown*, 89 N.Y.2d 714, 718, 658 N.Y.S.2d 205 (1997)).

38. *See also generally e.g., Imperial Improvements, LLC v. Town of Wappinger Zoning Bd. of Appeals*, 290 A.D.2d 507, 736 N.Y.S.2d 409 (2d Dep't 2002) (raising mootness by motion during appeal).

39. *See* CPLR 3211(e).

40. *See* CPLR 2214(b).

41. Practitioners should consult their court clerk about preferred procedure to determine if a motion to dismiss versus a merits brief would be the preferred procedure for raising mootness. If the motion to dismiss method is used, a practitioner should always remember to consult the lower court's local rules and/or the appellate court's appellate rules of practice for motions to the court.

42. *Gonzalez*, 57 A.D.3d at 897 (quoting *Hearst Corp., v. Clyne*, 50 N.Y.2d 707, 718, 731 N.Y.S.2d 400 (1980)); *see also Saratoga County Chamber of Commerce, Inc.*, 100 N.Y.2d at 811.

NEW YORK STATE BAR ASSOCIATION

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