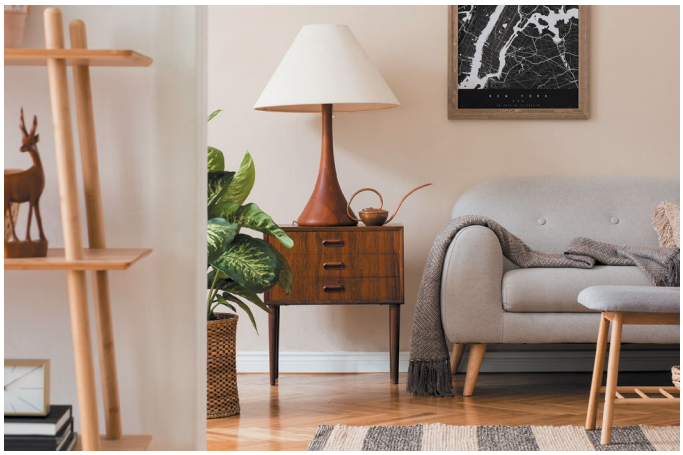
Meribear Productions, Inc. v. Frank: The Court Goes Its Own Way

By CHARLES D. RAY and MATTHEW A. WEINER

Take it from us, losing an appeal is not fun. But losing an appeal based on a legal doctrine from a different state that's applied by our Supreme Court without any input from the parties is an especially difficult way to suffer defeat. And that's exactly what happened to one of the defendants in *Meribear Productions, Inc. v. Frank*, ____ Conn. ____ (Sep. 22, 2021).



In 2011, the defendants, Joan and George Frank, decided to sell their home in Westport. Although the couple lived in the home, Joan Frank was its sole owner. The defendants contracted with the plaintiff, California-based Meribear Productions, Inc., to lease home furnishings and décor to help the house appear more attractive to potential buyers.

Under the terms of the contract, Joan, as homeowner, agreed to pay Meribear an initial fee of $19,000, which covered design services, the delivery of furnishings, the cost of removing the furnishings upon termination of the agreement, and the first four months of a lease. The agreement further required Joan to make monthly rental payments of $1,900 starting July 23, 2011. The agreement's initial term was for four months or until someone bought the home, whichever occurred first. If the home didn't sell before the initial term expired, the agreement would continue on a monthly basis, subject to the right of either party to end it by providing written notice.

Although Joan owned the home and signed the contract, she actually had little contact with Meribear. Instead, her husband, George, communicated and negotiated with Meribear's representatives. In fact, before Joan signed the contract, George made substantive revisions to it. For example, he attempted to change a choice of law provision by adding that "Connecticut laws will [supersede] those of California"—though he didn't alter a forum selection clause that provided that the parties would litigate any disputes in California. George also signed an addendum to the agreement, pursuant to which he "authorized the plaintiff to charge his…credit card a 'total amount' of $19,000." Before signing the addendum, George crossed out language that provided that he agreed to personally guarantee "any obligations that may become due." The contract provided that the addendum was "a part of this Agreement," and the addendum expressly referenced "this staging/design agreement."

The Westport home did not sell within four months and neither party terminated the agreement. Accordingly, Meribear sent invoices for additional monthly rental amounts due. The defendants refused to pay the rental amounts and, when Meribear sent a crew to remove the furnishings, the defendants denied the movers access to the home.

Meribear sued the defendants in California. On August 7, 2012, a California court entered a default judgment against the defendants in the amount of $259,746.10. Two months later, Meribear brought suit in Connecticut seeking to enforce the foreign judgment or, in the alternative, seeking recovery from the defendants for breach of contract and quantum meruit.

Before the trial court, the defendants claimed, among other things, that the California judgment was unenforceable because the California court lacked personal jurisdiction over them. Due to a service of process defect, the trial court agreed with Joan's claim. It rejected, however, George's claim, finding that, by signing the addendum, George established sufficient minimum contacts with California. After a bench trial, the trial court entered judgment against George on the common law enforcement of a foreign judgment claim in the full amount of $259,746.10 and against Joan for breach of contract in the amount of $283,106.45.

The defendants appealed to the Appellate Court, which affirmed the judgment. Regarding George's personal jurisdiction challenge, the Appellate Court concluded that he consented to personal jurisdiction in California by signing the addendum,

Image credit: FollowTheFlow/iStock/Getty Images Plus

which had been incorporated into the agreement containing the forum selection clause. *See Meribear Productions, Inc. v. Frank*, 165 Conn. App. 305 (2016).

After granting certification, receiving briefing, and hearing oral argument, the Supreme Court remanded the case to the Appellate Court with direction to dismiss the appeal. *See Meribear Productions, Inc. v. Frank*, 328 Conn. 709 (2018). As it turned out, the trial court had failed to address breach of contract and quantum meruit claims against George, leaving the case without a final judgment. On remand, Meribear withdrew these two counts against George, the defendants appealed again, the parties briefed the new appeal in the Appellate Court, and thereafter the Supreme Court transferred the case to itself.

In the new appeal, the defendants raised various issues, including George's claim that the California judgment was unenforceable against him because the California court lacked personal jurisdiction over him. Justice Ecker, writing for a majority that included himself, Chief Justice Robinson, and Justices McDonald and Kahn, ultimately concluded that the California court had personal jurisdiction over George. In so doing, the majority relied on a legal theory not advanced by the parties—a course that two dissenting justices found problematic.

The majority began its analysis with a refresher from first year civil procedure. It explained that, in California, a court has personal jurisdiction over a party where: (1) the party lives in the state; (2) there are minimum contacts with the state so that exercising jurisdiction does not offend due process; (3) the party participates in the suit; or (4) the party, lacking minimum contacts, nevertheless consents to personal jurisdiction. As the Appellate Court had determined in the first appeal, the majority found that the California court had personal jurisdiction over George based on consent. In doing so, however, the majority charted its own course, relying on a California legal theory that neither the parties nor the lower courts had addressed.

The majority observed that, under California law, a party consents to personal jurisdiction in one of two ways. First, a *signatory* to a contract consents to personal jurisdiction if the agreement contains a forum selection clause. Second, under the "closely related" doctrine, "a *nonsignatory* to a contract may be bound by a forum selection clause if the nonsignatory was so intimately involved in the negotiation, formation, execution, or ratification of the contract that it was reasonably foreseeable that he or she would be bound by the forum selection clause." (Emphasis added.) While the parties had litigated the first option, they had ignored the closely related doctrine.

For the majority, however, George clearly fell within the closely related doctrine, given that he had negotiated the agreement, "took charge of the project," made substantive changes to the agreement, paid Meribear, and "plainly enjoyed the use and benefit of the home furnishings and décor…." Reaching this conclusion obviated any need for the majority to address whether George satisfied the minimum contacts rule (as the trial court had decided) or whether his signature on the addendum constituted consent (as the Appellate Court had determined).

However, for Justice D'Auria, who was joined in dissent by Justice Mullins, the majority had gone "beyond the confines of our adversarial system" by identifying, researching, and deciding the case based upon a California legal theory never addressed by the parties. For the dissent, the majority's action raised two concerns. First, why, in this particular appeal—a "civil case, between two well represented parties"—should the Court look beyond the arguments raised by the parties? Absent an adequate justification, the majority's action might appear unfair not only to George Frank, but also to litigants in other appeals who could benefit from the Court's "ingenuity," but in which the Court limits its consideration to only those issues properly raised and briefed by the parties. Second, without any input from the parties, how could the majority be so sure that it had properly applied a legal doctrine from a foreign jurisdiction that no Connecticut court previously had addressed and that, apparently, no California court had applied where a plaintiff, rather than a defendant, sought the protection of a forum selection clause?

In reply to the dissent's concerns, the majority relied on cases that attempt to distinguish legal claims and issues (which, generally, an appellate court will not review unless properly raised by a party) from legal arguments (which, generally, a reviewing court may consider even if not raised by a party). The theory being that while it is incumbent upon the parties to identify the issues that they want the court to consider, "when [a case] is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law...."

However, there's something unsatisfying about that response, at least where reasonable minds (e.g., the two dissenting justices) can disagree as to the difference between a "claim" and an "argument" and the parties had no opportunity to weigh in. After nine years of litigation, two trips to the Supreme Court, and, we're assuming, the expenditure of considerable attorney's fees, learning that the case had been decided adversely based on a legal doctrine not considered by the trial or Appellate Court, not addressed by the parties, and never

Continued on page 40 →

■ Any views expressed herein are the personal views of DASA Weiner and do not necessarily reflect the views of the Office of the Chief State's Attorney and/or the Division of Criminal Justice.

Charles D. Ray *is a partner at McCarter & English LLP, in Hartford. He clerked for Justice David M. Shea during the Supreme Court's 1989–1990 term and appears before the Court on a regular basis.*

Matthew A. Weiner *is Assistant State's Attorney in the Appellate Bureau of the Office of the Chief State's Attorney. ASA Weiner clerked for Justice Richard N. Palmer during the Supreme Court's 2006–2007 term and litigates appellate matters on behalf of the State.*

President's Message

Continued from page 7

2017, 142 years after the CBA was founded, and 137 years after Edwin Archer Randolph was admitted to practice, that Karen DeMeola became the first person of color to lead the CBA.

In 2015, an editorial in the *Connecticut Law Tribune* pronounced that the "CBA is Failing in Diversity Efforts." This was a call to action, and an important moment of organizational self-evaluation and growth, which has produced significant results through the selfless efforts and commitment of many leaders. The CBA adopted its first Diversity and Inclusion Policy and its first Diversity and Inclusion Strategic Plan in 2015, which have guided so many critical elements of our organizational mission advancement. In 2016, we adopted our first Model Section DEI Plan, just significantly revised in 2021. The CBA Presidential Fellows Program, launched in 2016 and now in its 7th year, provides leadership training and development for young and diverse lawyers. In October of 2016, the CBA launched its Diversity and Inclusion Pledge, now grown to over 40 signatory organizations. We held our first Annual Diversity, Equity, and Inclusion Summit that year, which will be held for the 7th time in October 2022. In 2017, the Pathways to the Legal Profession initiative brought a new focus on our pipeline efforts, with the CBA becoming the host of LAW Camp in 2018 and launching the Future of the Legal Profession Scholars Program in 2019. Dr. Amani Edwards joined the CBA as our first director of diversity and human resources in 2019, and has become integral in all of our DEI efforts. In 2019, we held a full-year centennial celebration of the 19th amendment. In 2020 and 2021, we launched The Karen Lynn DeMeola Diversity, Equity, and Inclusion Fund; the Policing Task Force; the Constance Baker Motley Speaker Series on Racial Inequality in partnership with the Connecticut Bar Foundation; a new recurring DEI column in *CT Lawyer* magazine; and successfully advanced Rule of Professional Conduct 8.4(7) defining discrimination, harassment, and sexual harassment as professional misconduct. Since 2015, we have held two major symposia on implicit bias and achieving meaningful inclusion for lawyers and law students with disabilities, countless educational events, and many other events and initiatives which I cannot fully recount here.

Our DEI commitment must be to the journey. Our founders were prescient in their vision in some ways, deeply committed to their view of the good, and established the mechanisms by which we continue to advance the goals and ideals of our profession today. They were then, as we are now, imperfect. Were they to join us today, they would undoubtedly be amazed at the immense changes in the organization, in the practice of law, in technology, in the way we live and associate with each other, in the many ways we have made the world smaller and more immediately accessible. I would like to imagine that they would also recognize and appreciate the enduring quality of what they built, even if the expression of our collective efforts has changed significantly. In joining together to form the first statewide bar association in Connecticut in 1875, and then the American Bar Association in 1878, our founding members sought to bridge worlds and form ties across previously significant barriers. Today, almost 150 years later, the fabric of our bar association—the volunteer efforts of lawyers joined together to strengthen and protect the rule of law, uphold the integrity of our profession, advance our mutual interests, and to serve the public good—remains much the same. It is through this force, the power and potential when groups come together to advance greater common purpose, that we have advanced a more diverse, equitable, and inclusive CBA in recent years. That road still beckons us on, to continue to build a more diverse, equitable, and inclusive organization and profession, reflective of the society that we serve, for the future. ■

NOTES

1. Lawrence M. Friedman, *A History of American Law* (4th Edition) (2019), p. 634-5.
2. *Id.*
3. Constitution of the State Bar Association of Connecticut, Article III, Sec. 1 (1875)
4. *Id.* at Article III, Sec. 2 (1875).
5. Friedman, *A History of American Law*, p. 634-635.
6. Friedman, p. 635-639.
7. *Id.* at p. 639.
8. "A History of the First One Hundred Years of the Connecticut Bar Association 1875-1975," 49 *Connecticut Bar Journal* 2, p. 203-226 (June 1975).
9. Records of the State Bar Association of Connecticut (1875-1910) p. 125
10. Records of the State Bar Association of Connecticut (1921-1926) p. 81
11. "We March On - Women's Suffrage Exhibit." UConn School of Law, February 23, 2022. https://libguides.law.uconn.edu/womens-suffrage/uconnlawwomen.
12. 6 *Connecticut Bar Journal* 104 (1932)
13. "A History of the First One Hundred Years of the Connecticut Bar Association 1875-1975," 49 *Connecticut Bar Journal* 2, p. 245 (June 1975).
14. *Id.* at p. 260.

Supreme Deliberations

Continued from page 35

before litigated in Connecticut, must have been a bitter pill for George—and his attorneys—to swallow. Though defeat is never a good feeling, we suspect that it would have been easier to accept had the Court provided George's attorneys with an opportunity to address the applicability of the closely related doctrine, once the Court determined that it might be dispositive. And this would not have been difficult to accomplish given the common practice of supplemental briefing.

We commend the Court for its desire to "get it right" even when the litigants may have missed the mark. But we'd much rather see the Court err on the side of giving the parties a say. ■