NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
March 4 – 8. 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Out New York State Appellate Courts March 4 – 8, 2024, and Posted on the New York Appellate Digest Website on Monday, March 11, 2024. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in Reversal Report.

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ADMINISTRATIVE LAW, APPEALS, CIVIL PROCEDURE.

THE DECLARATORY RULING BY THE PUBLIC SERVICE COMMISSION (PSC) WAS FINAL AND THEREFORE WAS A PROPER SUBJECT OF AN ARTICLE 78 PETITION (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice McShan, determined the ruling by the Public Service Commission (PSC) was ripe for an Article 78 review and, therefore, the PSC's motion to dismiss the petition should not have been granted. The declaratory ruling by the PSC was final and could not be altered by he PSC:

"A declaratory ruling shall be binding upon the agency unless it is altered or set aside by a court" by virtue of a CPLR article 78 proceeding (State Administrative Procedure Act § 204 [1]). Particularly relevant here, State Administrative Procedure Act § 204 (1) does not permit an agency to "retroactively change a valid declaratory ruling," only allowing such changes to apply "prospectively." Thus, the explicit language of State Administrative Procedure Act § 204 did not allow the PSC to modify its initial ruling … . * * * … [T]he … declaratory ruling issued by the PSC is quasi-judicial in nature and, at the moment it was issued, was "accorded the [same] conclusiveness that attaches to judicial judgments," thus rendering it ripe for review … . Matter of Clean Air Coalition of W. N.Y., Inc. v New York State Pub. Serv. Commission, 2024 NY Slip Op 01233, Third Dept 3-7-24

Practice Point: A declaratory ruling by the Public Service Commission (PSC) is final and cannot be altered by the Commission. Therefore the ruling is ripe for an Article 78 review by a court.

MARCH 7, 2024

CIVIL PROCEDURE.

THE COVID EXECUTIVE ORDERS TOLLING STATUTES OF LIMITATIONS EXTENDED THE DEADLINE FOR FILING ACTIONS UNDER THE CHILD VICTIMS ACT UNTIL NOVEMBER 12, 2021 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the executive orders tolling statutes of limitations during COVID extended deadline for filing Child Victims Act suits for 90 days, from August 14, 2021, to November 12, 2021, rendering the instant lawsuit timely filed:

CPLR 214-g, enacted as part of the CVA, provides a revival window for "civil claims or causes of action alleging intentional or negligent acts or omissions that seek to recover for injuries suffered as a result of conduct which would constitute sex crimes, which conduct was committed against a child less than 18 years of age, for which the statute of limitations had already run" … . In 2019, the CVA became effective and originally permitted actions to be commenced between August 14, 2019, and August 14, 2020 … . On August 3, 2020, the CVA was amended so as to extend the revival window for one additional year, until August 14, 2021 … . After the date of this amendment, however, former Governor Andrew Cuomo, following prior executive orders issued amidst the COVID-19 pandemic, continued to issue executive orders that ultimately tolled statutes of limitations through November 3, 2020 … .

… [T]he executive orders issued subsequent to the CVA's amendment tolled the close of the CVA's revival window for 90 days, from August 14, 2021, until at least November 12, 2021 … . As the instant action was commenced on November 12, 2021, it was timely commenced … . Bethea v Children's Vil., 2024 NY Slip Op 01166,, Second Dept 3-6-24

Practice Point: The COVID executive orders tolling statutes of limitations extended the August 14, 2021, deadline for filing actions under the Child Victims Act until November 12, 2021.

MARCH 6, 2024

CONTRACT LAW, DEBTOR-CREDITOR, CIVIL PROCEDURE.

ALTHOUGH THE STATUTE OF LIMITATIONS FOR REFORMATION OF A CONTRACT BASED ON A SCRIVENER'S ERROR HAD PASSED; THE CLEAR ERROR PRODUCED AN ABSURD RESULT WHICH CANNOT BE ADOPTED OR CONDONED BY THE COURT (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Oing, determined plaintiff's motion for summary judgment finding defendant "indemnitor" liable as guarantor of a $44 million debt should have been granted. Plaintiff argued the term "borrower," instead of "indemnitor," was mistakenly used to indicate the identity of the guarantor of the loan. Although the statute of limitations on the alleged "scrivener's error" action had run, to interpret the language of the guaranty in the manner argued by defendant (i.e., "borrower" was the intended term) resulted in an absurdity, which would have rendered the loan unguaranteed:

… [A] court may correct a scrivener's error outside of a claim for reformation of a contract in "those limited instances where some absurdity has been identified or the contract would otherwise be unenforceable either in whole or in part" … . In other words, a court is not "constrained to adopt an absurd phrasing in the contract merely because the statute of limitations for reformation had passed, when the error is obvious and the drafters' intention clear" … . * * *

… [A] guaranty must be read in the context of the loan agreement and "in a manner that accords the words their 'fair and reasonable meaning,' and achieves 'a practical interpretation of the expressions of the parties'" … . In other words, a "contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties" … . NCCMI, Inc. v Bersin Props., LLC, 2024 NY Slip Op 01161, First Dept 3-5-24

Practice Point: A clear-cut scrivener's error in a contract which produces an absurd result the parties could not have intended will not be adopted or condoned by a court, despite the running of the statute of limitations on a contract-reformation cause of action.

MARCH 5, 2024

CORPORATION LAW, CIVIL PROCEDURE.

DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT DISMISSING THE ALTER-EGO (PIERCE-THE-CORPORATE VEIL) CLAIMS SHOULD HAVE BEEN GRANTED; CRITERIA EXPLAINED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Shulman, reversing Supreme Court, determined plaintiff did not raise a question of fact about whether the corporate veil should be pierced. The court explained the relevant criteria:

A party seeking to pierce the corporate veil must show "complete domination of the corporation in respect to the transaction attacked" and that "such domination was used to commit a fraud or wrong against the plaintiff" … . Because "New York law disfavors disregard of the corporate form" „„===… , "[m]ere conclusory allegations that the corporate structure is a sham are insufficient to warrant piercing the corporate veil" … . Instead, the party seeking to pierce the corporate veil "must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party" … . * * *

In considering domination, courts consider factors such as "the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership; officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the alleged dominated corporation; whether the corporations are treated as independent profit centers; and the payment or guarantee of the corporation's debts by the dominating entity" … . Cortlandt St. Recovery Corp. v Bonderman, 2024 NY Slip Op 01250, First Dept 3-7-24

Practice Point: The evidentiary criteria for piercing the corporate veil were not met by the plaintiff. Defendants' summary judgment motion should have been granted.

MARCH 7, 2024

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

BURGLARY SECOND DEGREE AS A SEXUALLY MOTIVATED FELONY IS NOT A REGISTRABLE OFFENSE UNDER SORA; DEFENDANT'S SEX OFFENDER ADJUDICATION VACATED (FIRST DEPT).

The First Department, vacating defendant's sex offender adjudication, noted that burglary second degree as a sexually motivated felony is not a registrable sex offense on SORA:

As the People concede, burglary in the second degree as a sexually motivated felony is not a registrable sex offense under Sora (see People v Conyers, 212 AD3d 417, 418 [1st Dept 2023], lv denied 39 NY3d 1110 [2023]; People v Simmons, 203 AD3d 106, 111-112 [1st Dept 2022], lv denied 38 NY3d 1035 [2022]). We therefore modify the judgment as indicated. People v Burgos, 2024 NY Slip Op 01255, First Dept 3-7-24

Practice Point: Burglary second as a sexually motivated felony is not a registrable offense under SORA.

MARCH 7, 2024

DISCIPLINARY HEARINGS (INMATES), EVIDENCE.

THE HEARSAY MISBEHAVIOR REPORT, UNSUPPORTED BY ANY INVESTIGATION, DID NOT CONSTITUTE SUBSTANTIAL EVIDENCE OF PETITIONER'S GUILT; DETERMINATION ANNULLED (THIRD DEPT).

The Third Department, annulling the determination, held that the hearsay misbehavior report which was not substantiated by an investigation was insufficient to support guilty finding:

"[H]earsay misbehavior reports can constitute substantial evidence to support a determination of guilt so long as the evidence has sufficient relevance and probative value" … . Here, the correction officer who authored the misbehavior report testified at the hearing that no investigation into the allegation was conducted, explaining that the matter was reported toward the end of his shift and,

therefore, there was no time for any investigation. Although the correction officer testified that the incarcerated individual who accused petitioner of making threats was "pretty convincing," he offered no further basis or details as to why he found the report of the threat to be credible. Further, the incarcerated individual who made the allegations against petitioner, and who is identified in the misbehavior report, refused to testify at the hearing. As such, the only evidence to support the charge is the hearsay misbehavior report reciting nothing more than an unverified and uninvestigated accusation that petitioner threatened a fellow incarcerated individual. Under these circumstances, the misbehavior report does not constitute substantial evidence of petitioner's guilt, and the determination must be annulled … . Matter of Alvarado v Annucci, 2024 NY Slip Op 01227, Third Dept 3-7-24

Practice Point: In inmate disciplinary hearings, a hearsay misbehavior report unsupported by any investigation does not constitute substantial evidence of guilt and will not support a guilty determination.

MARCH 7, 2024

FAMILY LAW, CRIMINAL LAW, ATTORNEYS, JUDGES.

THE RECORD WAS NOT SUFFICIENT TO CONCLUDE APPELLANT IN THIS FAMILY OFFENSE PROCEEDING VALIDLY WAIVED HIS RIGHT TO COUNSEL; NEW HEARING ORDERED (SECOND DEPT).

The Second Department, reversing Family Court in this family offense proceeding, determined the record was insufficient to conclude the appellant had validly waived his right to counsel:

A party in a Family Court Act article 8 proceeding has the right to be represented by counsel (see Family Ct Act § 262[a][ii] …). That party, however, may waive the right to counsel, provided that the waiver is knowing, voluntary, and intelligent … . To ensure a valid waiver, the court must conduct a "searching inquiry" of that party … . While there is no rigid formula to be followed in such an inquiry, and the approach is a flexible one … , the record must demonstrate that the party "'was aware of the dangers and disadvantages of proceeding without counsel'" … .

Here, the record is inadequate to demonstrate that the appellant validly waived his right to counsel … . The deprivation of a party's right to counsel guaranteed by Family Court Act § 262 requires reversal without regard to the merits of the unrepresented party's position … . Matter of Mendez-Emmanuel v Emmanuel, 2024 NY Slip Op 01180, Second Dept 3-6-24

Practice Point: In a family offense proceeding the respondent has a right to counsel. If the record doesn't demonstrate a valid waiver of the right to counsel, a new hearing will be ordered.

MARCH 6, 2024

FAMILY LAW, CRIMINAL LAW, CIVIL PROCEDURE.

FAMILY COURT DID NOT HAVE SUBJECT MATTER JURISDICTION IN THIS FAMILY OFFENSE CASE BECAUSE THE APPELLANT DID NOT HAVE AN "INTIMATE RELATIONSHIP" WITH THE SUBJECT CHILDREN WITHIN THE MEANING OF FAMILY COURT ACT 812 (SECOND DEPT).

The Second Department, reversing Family Court, determined the court did not have subject matter jurisdiction in this family offense case because the appellant did not have an "intimate relationship" with the subject children within the meaning of Family Court Act 812:

The "Family Court is a court of limited jurisdiction, constrained to exercise only those powers granted to it by the State Constitution or by statute" … . Pursuant to Family Court Act § 812(1), the Family Court's jurisdiction in family offense proceedings is limited to certain prescribed acts that occur "between spouses or former spouses, or between parent and child or between members of the same family or household" … . "[M]embers of the same family or household" include, among others, "persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time" … . "Expressly excluded from the ambit of 'intimate relationship' are 'casual acquaintance[s]' and 'ordinary fraternization between two individuals in business or social contexts'" … . "Beyond those delineated exclusions, what qualifies as an intimate relationship within the

meaning of Family Court Act § 812(1)(e) is determined on a case-by-case basis, and the factors a court may consider include 'the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship'" … .

Here, the appellant and the subject children have no direct relationship, and the appellant was only connected to the subject children through her children, who were the half-siblings of three of the subject children. The appellant and the subject children do not reside together and there was no evidence that they have any direct interaction with each other. Accordingly, there is no "intimate relationship" between the appellant and the subject children within the meaning of Family Court Act § 812(1)(e) … . Matter of Watson v Brown, 2024 NY Slip Op 01191, Second Dept 3-6-24

Practice Point: In order for Family Court to have subject matter jurisdiction over a family offense proceeding, the respondent must have an "intimate relationship" with the victims within the meaning of Family Court Act 812. The criteria for an "intimate relationship," which was absent here, are explained in some detail.

MARCH 6, 2024

NEGLIGENCE, CONTRACT LAW, ARBITRATION, AGENCY.

THE PLAINTIFF IN THIS WRONGFUL DEATH ACTION AGAINST DEFENDANT NURSING HOME IS THE DECEDENT'S DAUGHTER AND HAD SIGNED THE ADMISSION AGREEMENT AS THE "RESPONSIBLE PARTY;" THE LANGUAGE OF THE AGREEMENT DID NOT CREATE AN AGENCY RELATIONSHIP BETWEEN PLAINTIFF AND HER MOTHER; THE ARBITRATION CLAUSE IN THE ADMISSION AGREEMENT COULD NOT, THEREFORE, BE ENFORCED BY THE NURSING HOME (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant nursing home's (the Facility's) motion to compel arbitration of the wrongful death action should not have been granted. The admission agreement had been signed by plaintiff, not the decedent (the resident of the nursing home). The admission

agreement referred to plaintiff as the "responsible party" who was "primarily responsible to assist the [decedent] to meet … her obligations under [the agreement]." But there was no indication the decedent agreed to have plaintiff act on her behalf:

"Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by [her or] his own acts imbue [herself or] himself with apparent authority. Rather, the existence of apparent authority depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal — not the agent. Moreover, a third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable" … .

… [T]he Facility failed to demonstrate that it reasonably relied upon any word or action of the decedent to conclude that the plaintiff had the apparent authority to enter into the agreement or to bind the decedent to arbitration on the decedent's behalf … . To the extent that the Facility contends that it reasonably relied upon the plaintiff's own acts, this contention is also without merit, as an agent cannot "by [her] own acts imbue [her]self with apparent authority" … . … [T]he plaintiff's status as the decedent's daughter did not give rise to an agency relationship … . Lisi v New York Ctr. for Rehabilitation & Nursing, 2024 NY Slip Op 01171, Second Dept 3-6-24

Practice Point: Here decedent's daughter signed the nursing-home admission agreement as the "responsible party." Because there was no indication decedent agreed to have her daughter act on her behalf, the nursing home could not claim the daughter had the "apparent authority" to bind decedent to the agreement. Therefore the nursing home could not enforce the arbitration clause in the wrongful death action.

MARCH 6, 2024

NEGLIGENCE, MUNICIPAL LAW.

THE PROOF THAT PLAINTIFF SLIPPED AND FELL AT A BUS STOP, WHERE THE CITY IS RESPONSIBLE FOR KEEPING THE AREA SAFE, AS OPPOSED TO THE SIDEWALK ABUTTING DEFENDANT'S PROPERTY, WHERE DEFENDANT IS RESPONSIBLE, WAS NOT SUFFICIENT TO WARRANT SUMMARY JUDGMENT IN FAVOR OF DEFENDANT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this sidewalk slip and fall case should not have been granted. Although the NYC Administrative Code makes abutting property owner's like the defendant responsible for keeping the sidewalks safe, the Code also indicates the City is responsible for keeping bus stops safe. The defendant argued plaintiff slipped and fell at a bus stop, but the Second Department did not find the evidence for that claim sufficient to warrant summary judgment:

Under Administrative Code § 7-210, an abutting property owner has a duty to maintain the public sidewalk, but the City continues to be responsible for maintaining any part of the sidewalk that is within a designated bus stop location … .

Here, the defendant failed to demonstrate, prima facie, that the area of the sidewalk where the accident occurred was within a designated bus stop location maintained by the City … . Moonilal v Roman Catholic Church of St. Mary Gate of Heaven, 2024 NY Slip Op 01172, Second Dept 3-6-24

Practice Point: Pursuant to the NYC Administrative Code, abutting property owners are responsible for keeping the sidewalk safe, but the City is responsible for keeping bus stops safe.

MARCH 6, 2024

NEGLIGENCE.

THERE IS A QUESTION OF FACT WHETHER DEFENDANTS LAUNCHED AN INSTRUMENT OF HARM BY ERECTING AN OPAQUE FENCE AROUND A CONSTRUCTION SITE WHICH BLOCKED DRIVERS' AND PEDESTRIANS' LINES OF SIGHT IN AN INTERSECTION; PLAINTIFF PEDESTRIAN WAS STRUCK BY A CAR WHEN HE STEPPED BEYOND THE FENCE INTO A LANE OF TRAFFIC (FIRST DEPT).

The First Department, reversing Supreme Court, determined there was a question of fact whether defendant general contractor and defendant engineer launched an instrument of harm by erecting an opaque fence around a construction site which extended into a road parallel to the crosswalk. Plaintiff, a pedestrian, assumed the fence had blocked off the road to traffic, but there was one lane open. Plaintiff was struck by a car when he walked past the end of the fence into the lane:

The fabric-covered fencing obstructed the line-of-sight of pedestrians and motorists who were in the vicinity of the crosswalk at 29th Street and 9th Avenue in Manhattan, as the fence enclosure extended halfway into 29th Street, paralleling the crosswalk. Plaintiff, believing 29th Street to be fenced-off to traffic, crossed more than halfway through the crosswalk, against a "Don't Walk" signal, at which time he was hit by a vehicle that passed through a narrow lane on the other side of the fence enclosure from where plaintiff had approached. There was no construction activity taking place on that Saturday, and crossing guards and traffic agents who were ordinarily deployed during actual construction hours were not provided on the weekend. Triable issues exist whether the fence enclosure created a foreseeable, unreasonable risk to others, or exacerbated risks inherent at the subject intersection … .**Hyland v MFM Contr. Corp., 2024 NY Slip Op 01252, First Dept 3-7-24**

Practice Point: Here an opaque fence parallel to a crosswalk made it appear the road had been blocked off. Plaintiff pedestrian, who assumed the street was blocked off and was using the crosswalk parallel to the fence, was struck by a car when he stepped beyond the end of the fence into a lane of traffic. There was

question of fact whether the erection of the fence by defendants launched an instrument of harm.

MARCH 7, 2024

REAL ESTATE, REAL PROPERTY LAW, CONTRACT LAW.

THE CONDITION ATTACHED TO THE SUBDIVISION OF A LOT AND THE SALE OF ONE PARCEL BENEFITTED BOTH THE BUYER AND THE SELLER; THEREFORE THE BUYER ALONE COULD NOT WAIVE THE CONDITION WHEN IT COULD NOT BE MET; THE BUYER'S ACTION FOR SPECIFIC PERFORMANCE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the condition attached to the sale of a lot by decedent to plaintiff, i.e., that a single-family home be built on the lot, benefited both parties and therefore could not be waived by the plaintiff alone. Plaintiff was unable to procure a building permit but elected to proceed with the sale. The decedent cancelled the sale Plaintiff then brought an action for specific performance which Supreme Court granted:

The contract of sale between the plaintiff and the decedent for the subject property provided in a rider that it was subject to the plaintiff obtaining an as-of-right building permit to build a single-family residence. The plaintiff was subsequently unable to obtain a building permit because a covenant of conditions had never been filed to complete the process of subdividing Norman's single parcel into the two parcels referred to as 112 Jessup Lane and 114 Jessup Lane. The plaintiff's and the decedent's efforts to have the covenant filed so as to complete the subdivision process failed. * * *

Generally, "the party for whose benefit a condition is inserted in an agreement may waive the condition and accept performance as is" … . "However, where the relevant circumstances reveal that the condition has been inserted for the benefit of both parties to the agreement, either party may validly cancel the contract upon

failure of the condition, and the condition may be waived only by the mutual assent of both parties" … . …

Inasmuch as the building permit could only be obtained if the subdivision of the property were completed, that condition cannot be interpreted as existing solely for the benefit of the plaintiff where the decedent retained an interest in the other lot to be included in the subdivision … . D&J Realty Partners, LLC v Booth, 2024 NY Slip Op 01169, Second Dept 3-6-24

Practice Point: With respect to the sale of real property, if a condition of the sale, here the construction of a single-family residence on the lot to be sold, benefits only one party, the condition can be waived by that party. Here, however, the condition benefitted both parties and could only be waived by the consent of both.

MARCH 6, 2024