NEW YORK APPELLATE DIGEST, LLC

Civil Procedure
Reversal Report
March 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Addressing Civil Procedure, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in March 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 the Reversal Report.

Contents

AMENDMENT OF COMPLAINT AFTER APPEAL.

THE MAJORITY HELD SUPREME COURT PROPERLY ALLOWED PLAINTIFFS TO FILE AN AMENDED COMPLAINT AFTER THE COMPLAINT HAD BEEN DISMISSED WITHOUT PREJUDICE BY THE APPELLATE DIVISION BECAUSE COUNTERCLAIMS WERE STILL BEFORE THE COURT (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Wilson, over a three-judge dissenting opinion, determined that plaintiffs were properly allowed to amend their complaint, which had been dismissed without prejudice, because counterclaims were still before the court:

… [T]he Appellate Division dismissal of the second amended complaint due to lack of standing or capacity was without prejudice …. . The order contemplated that the company could "in theory, be revived," but simply stated that [plaintiff] had done so improperly. Therefore, there is nothing in the Appellate Division's order or opinion that would prevent plaintiffs from pursuing their claims after curing the standing or capacity issue. …

The question on appeal, then, is whether the Appellate Division's decision required the plaintiffs to commence a separate action instead of seeking leave to file an amended complaint. Whatever the answer to that question might be in a case in which no action remained between the parties in Supreme Court, … here the action remained pending in Supreme Court because of the [defendants'] counterclaims. Therefore, Supreme Court retained control over the parties and continued to adjudicate claims related to the same transactions that formed the subject-matter of the complaint. For that reason, the Appellate Division order also did not render the case final for purposes of appealability, as no appeal to the Court of Appeals may be taken from an order which leaves claims pending in the action between the same parties … .

Because the original action remained pending in Supreme Court even after the complaint was dismissed, Supreme Court retained the power to grant leave to plaintiffs to file another amended complaint. Favourite Ltd. v Cico, 2024 NY Slip Op 01496, CtApp 3-19-24

Practice Point: Here the appellate court had dismissed the complaint without prejudice and the issue was whether plaintiffs could file an amended complaint, or whether plaintiffs had to start a new lawsuit. The Court of Appeals held Supreme Court retained the power to allow an amended complaint because counterclaims were still before the court.

MARCH 19, 2024

APPEALS, FAMILY LAW, NEW FACTS.

NEW FACTS RENDERED THE RECORD INSUFFICIENT FOR APPELLATE REVIEW IN THIS TERMINATION-OF-PARENTAL-RIGHTS PROCEEDING; MATTER REMITTED FOR A "BEST INTERESTS OF THE CHILDREN" HEARING (FOURTH DEPT).

The Fourth Department, sending the matter back for a "best interests of the children" hearing in this termination-of-parental rights proceeding, determined new facts prohibited an adequate review:

… [T]he three oldest children, along with the father, assert that new facts and allegations warrant remittal for a new dispositional hearing to determine the best interests of those children. We may "consider . . . new facts and allegations 'to the extent [that] they indicate that the record before us is no longer sufficient' to determine whether termination of . . . parental rights is in [a child's] best interests" … . * * * … [W]e conclude that the record before us is no longer sufficient to determine whether termination of respondents' parental rights is in the best interests of those children … . Matter of Noah C. (Greg C.), 2024 NY Slip Op 01430, Fourth Dept 3-15-24

Practice Point: In a Family Court case, new facts which render the record inadequate for appellate review require remittal for a hearing.

MARCH 15, 2024

APPEALS, PRETRIAL EVIDENCE RULINGS, MOTIONS IN LIMINE.

A PRETRIAL RULING ON THE ADMISSIBILITY OF EVIDENCE IS AN UNAPPEALABLE ADVISORY RULING; THE MOTION IN LIMINE SEEKING TO SET A LIMIT ON THE VALUE OF AN LLC WAS ACTUALLY AN UNTIMELY SUMMARY JUDGMENT MOTION WHICH SHOULD NOT HAVE BEEN CONSIDERED BY THE COURT (SECOND DEPT).

The Second Department, reversing Supreme Court in this divorce action, determined: (1) an advisory pretrial ruling on the admissibility of evidence is not

appealable, and (2) the motion to limit the evidence of the valuation of the LLC to $2,450,000, although couched as a motion in limine, was actually an untimely summary judgment motion:

"[A]n order, made in advance of trial, which merely determines the admissibility of [*2]evidence is an unappealable advisory ruling" … . * * *

… [P]laintiff's motion which sought, in effect, to set the minimum value of the LLC at $2,450,000 and preclude any evidence of a lower value, while styled as a motion in limine, was the functional equivalent of an untimely motion for partial summary judgment determining that the value of the LLC was at least $2,450,000 … . "[A] motion in limine is an inappropriate substitute for a motion for summary judgment" … , and "in the absence of any showing of good cause for the late filing of such a motion," should not have been considered … . Desantis v Desantis, 2024 NY Slip Op 01699, Second Dept 3-27-24

Practice Point: A pretrial ruling on the admissibility of evidence is an unappealable advisory ruling.

Practice Point: The motion in limine seeking to set a limit on the value of an LLC in this divorce proceeding was actually an untimely motion for summary judgment which should not have been considered.

MARCH 27, 2024

ARBITRATION, MOTION TO COMPEL, CONTRACT LAW.

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

ASSOCIATIONS, LAWSUIT AGAINST UNION SEEKING INJUCNTIVE RELIEF.

WHERE A LAWSUIT AGAINST A UNION SEEKS INJUNCTIVE RELIEF, AS OPPOSED TO MONETARY DAMAGES, THE COMPLAINT NEED NOT ALLEGE EVERY MEMBER OF THE UNION RATIFIED THE CHALLENGED CONDUCT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined the precedent (Martin v Curran (303 NY 276) prohibiting a lawsuit against a union (an unincorporated association) unless it was demonstrated every member of the union ratified the challenged action only applies when the lawsuit seeks monetary damages, not, as here, injunctive relief:

… [E]xtending [Martin v Curran (303 NY 276 [1951])] to bar union members from seeking any form of injunctive relief against a union, would have troubling implications. Respondents do not seriously dispute that, if Martin precludes petitioners' claim here, union members would have no recourse to the courts even when incumbent union officials are allegedly manipulating elections to maintain power. Applying Martin to bar suits seeking to compel union officials to abide by their respective union constitutions and bylaws would have "far-reaching

consequences" and risk "stifl[ing] all criticism" and democracy "within the union" … .

We therefore clarify that where, as here, union members seek only injunctive relief against the union and state no claim for pecuniary damages, the pleading is not governed by Martin and, as such, a plaintiff need not allege the participation of each individual member to bring a claim in accordance with General Associations Law § 13. The petition below was therefore improperly dismissed on that ground. Matter of Agramonte v Local 461, Dist. Council 37, Am. Fedn. of State, County & Mun. Empls., 2024 NY Slip Op 01332, CtApp 3-14-24

Practice Point: The complaint in a lawsuit against a union seeks injunctive relief, as opposed to monetary damages, the complaint need not allege that every member of the union ratified the challenged conduct.

MARCH 14, 2024

COLLATERAL ESTOPPEL, PRIOR PRVILEGE RULINGS.

A PRIOR RULING IN A PRIOR ACTION FINDING THAT THE WITHHELD DOCUMENTS WERE PROTECTED FROM DISCLOSURE DID NOT INDICATE THE SPECIFIC PRIVILEGE WHICH APPLIED TO EACH DOCUMENT; THEREFORE THE PRIOR RULING DID NOT TRIGGER THE COLLATERAL ESTOPPEL DOCTRINE AND THE DISCLOSURE OF DOCUMENTS MUST BE DETERMINED ANEW IN THE INSTANT ACTION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined a prior ruling in a prior action finding that withheld documents were protected from disclosure did not trigger the collateral estoppel doctrine in the instant action because the prior ruling did not indicate the specific privilege invoked for each document:

… [T]he court abused its discretion in summarily denying the motion on the basis that it had previously ruled that the withheld documents were protected from disclosure in a prior action involving the parties. Collateral estoppel bars

relitigation of an issue when "the identical issue necessarily [was] decided in the prior action and [is] decisive of the present action, and . . . the party to be precluded from relitigating the issue [had] a full and fair opportunity to contest the prior determination" … . Preclusion of an issue occurs only if that issue was " 'actually litigated, squarely addressed and specifically decided' " in the prior action … . While in the prior action the court denied a motion to compel the identical documents contained in the privilege log, the court did not specifically address whether the withheld documents were protected and which protection, such as attorney-client privilege, applied to each document. Thus, there is no evidence that the identical issue, decisive in this action, was necessarily decided in the prior action … . Wiltberger v Allen, 2024 NY Slip Op 01635, Fourth Dept 3-22-24

Practice Point: Collateral estoppel applies only when the issues are identical. Here, even though the documents at issue were found to be privileged in the prior action, the precise privilege applied to each document was not described in the prior order. Therefore it is not clear the issues are identical in the instant proceeding, so the application of collateral estoppel to preclude disclosure is not available.

MARCH 22, 2024

CONSTITUTIONAL LAW, EXTREME RISK ORDERS.

AFTER RESPONDENT-STUDENT THREATENED TO "SHOOT… UP THE SCHOOL," PETITIONER-POLICE-DEPARTMENT FILED A PETITION FOR AN EXTREME RISK PROTECTION ORDER PURSUANT TO CPLR ARTICLE 63-A WHICH SUPREME COURT DENIED ON THE GROUND THE STATUTE VIOLATES THE SECOND AMENDMENT; THE APPELLATE DIVISION REVERSED FINDING THE STATUTE CONSTITUTIONAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that petitioner-police-department's petition for an extreme risk protection order re: a 16-year-old student who had threatened to "shoot up the school" should not have been

dismissed on the ground that the controlling statute, CPLR article 63-A, is unconstitutional:

… [T]he respondent, born in 2009, told other students on his school bus that "they shouldn't come to school tomorrow" after they criticized the cleanliness of his hands. After the words "gun" and "shooting up the school" were mentioned, the respondent said that he was joking, but later said that he "may be serious" in carrying out his threat. School officials reported previous incidents involving violence by the respondent against other students, suicidal ideation and behavior by the respondent, and evidence that the respondent may have a mental illness.

The petitioner [police department] filed a petition for an extreme risk protection order pursuant to CPLR article 63-A. The Supreme Court dismissed the petition [on the ground that] CPLR article 63-A is unconstitutional. …

The respondent is a minor less than 16 years old, who … is not allowed to possess guns …, … [T]he Supreme Court of the United States stated that the Second Amendment of the United States Constitution protects "law-abiding, adult citizens." The respondent in this case is not an adult and has no general right to keep and bear arms. Therefore, he lacks standing to challenge CPLR article 63-A as a violation of the Second Amendment … .

Further, … CPLR article 63-A is constitutional and does not deprive the respondent of due process of law. Accordingly, the petition should be determined on the merits. Matter of Gallagher Town of New Windsor Police Dept. v D.M., 2024 NY Slip Op 01539, Second Dept 3-20-24

Practice Point: Here the police department sought an extreme risk protection order re: a 16-year-old student who threatened to shoot up the school Supreme Court dismissed the petition for the extreme risk order, finding the controlling statute, CPLR article 63-A, unconstitutional. The First Department reversed noting its opinion dated March 20, 2024, Matter of R.M. v C.M., 2024 NY Slip Op 01545, finding the statute constitutional.

MARCH 20, 2024

CONSTITUTIONAL LAW, EXTREME RISK ORDERS.

CPLR ARTICLE 63-A IS CONSTITUTIONAL; THE STATUTE ALLOWS ISSUANCE OF AN EXTREME RISK ORDER PROHIBITING A RESPONDENT FROM POSSESSING A FIREARM BASED UPON EVIDENCE RESPONDENT IS LIKELY TO CAUSE SERIOUS HARM (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Barros, determined the statute which allows the issuance of an extreme risk order prohibiting a person from possessing a firearm is constitutional. The statute is CPLR article 63-A:

CPLR 6342(1) provides, in pertinent part, that upon an application for an extreme risk protection order: "the court may issue a temporary extreme risk protection order, ex parte or otherwise, to prohibit the respondent from purchasing, possessing or attempting to purchase or possess a firearm, rifle or shotgun, upon a finding that there is probable cause to believe the respondent is likely to engage in conduct that would result in serious harm to himself, herself or others, as defined in paragraph one or two of subdivision (a) of section 9.39 of the mental hygiene law. Such application for a temporary order shall be determined in writing on the same day the application is filed."

In determining whether there are grounds for a temporary extreme risk protection order, the court "shall consider any relevant factors," including a nonexhaustive list of conduct by the respondent: "(a) a threat or act of violence or use of physical force directed toward self, the petitioner, or another person; "(b) a violation or alleged violation of an order of protection; "(c) any pending charge or conviction for an offense involving the use of a weapon; "(d) the reckless use, display or brandishing of a firearm, rifle or shotgun; "(e) any history of a violation of an extreme risk protection order; "(f) evidence of recent or ongoing abuse of controlled substances or alcohol; or "(g) evidence of recent acquisition of a firearm, rifle, shotgun or other deadly weapon or dangerous instrument, or any ammunition therefor. Matter of R.M. v C.M., 2024 NY Slip Op 01545, Second Dept 3-20-24

Practice Point: Overruling lower court precedent to the contrary, the Second Department held CPLR article 62-A, which allows issuance of an order prohibiting a respondent from possessing a firearm based upon an extreme risk of serious harm to the respondent or others is constitutional.

MARCH 20, 2024

CONTRACT LAW, POWER OF COURT TO LIMIT REACH OF RESTRICTIVE COVENANTS.

COURTS HAVE THE POWER TO LIMIT THE REACH OF OVERLY BROAD RESTRICTIVE COVENANTS IN COMMERCIAL CONTRACTS (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Connelly, affirming Supreme Court, discussed in detail the courts' power to limit the reach of overly broad restrictive covenants in commercial contracts. Here the plaintiff and defendant collaborated for decades in the design and manufacture of fabrics to be used in solar shades. Upon terminating the contractual arrangement, the question became whether the restrictive covenants in the contract are enforceable. Because the opinion addresses the issues in the context of motions to dismiss, most of the findings were preliminary and must await a more complete record. But the Second Department did conclude courts have the power to limit the enforcement of overly broad restrictive covenants in commercial contracts, short of re-writing the contract:

This appeal requires us to analyze the factors to consider when evaluating whether a restrictive covenant in an ordinary commercial contract is enforceable. Although there is a dearth of New York state case law on this issue, we agree with those courts that have analyzed these types of covenants under a rule of reason, considering (1) whether the covenant protects a legitimate business interest; (2) the reasonableness of the geographic scope and temporal duration; and (3) the degree of hardship upon the party against whom the covenant is enforced.

This appeal also requires us to consider whether courts have the power to sever and grant partial enforcement of overly broad restrictive covenants in ordinary

commercial contracts. Because the Court of Appeals has held that courts have such power with regard to overly broad restrictive covenants in employment agreements (see BDO Seidman v Hirshberg, 93 NY2d 382, 395), we similarly hold that courts have the power to sever and grant partial enforcement of overly broad restrictive covenants in ordinary commercial contracts and may do so under the appropriate circumstances. Twitchell Tech. Prods., LLC v Mechoshade Sys., LLC, 2024 NY Slip Op 01744, Second Dept 3-27-24

Practice Point: Courts have to power to limit the reach of overly broad restrictive covenants in commercial contracts, criteria explained in depth.

MARCH 27, 2024

CORPORATION LAW, PIERCING THE CORPORATE VEIL, SUMMARY JUDGMENT.

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

COUNTERCLAIMS, ANTI-COMPETITIVE BEHAVIOR VIOLATING THE DONNELLY ACT.

THE SIGHTSEEING BUS COMPANY'S COUNTERCLAIMS ALLEGING CONCERTED ANTI-COMPETITIVE BEHAVIOR BY OTHER BUS COMPANIES IN VIOLATION OF THE DONNELLY ACT (GENERAL BUSINESS LAW 340) SHOULD NOT HAVE BEEN DISMSSED (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the counterclaims by a tour bus company, Go New York, alleging anti-competitive behavior in violation of the Donnelly Act by other bus companies, called the Gray Line respondents, should not have been dismissed:

The Donnelly Act prohibits "[e]very contract, agreement, arrangement or combination" through which "a monopoly . . . is or may be established or maintained," whereby "competition or the free exercise of any activity in the conduct of business . . . is or may be restrained," or whereby trade or business is or may be restrained "[f]or the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce" (General Business Law § 340 [1]). As with a claim brought "under its essentially similar federal progenitor, section 1 of the Sherman Act (15 USC § 1 et seq)," a claim brought under the Donnelly Act, at a minimum, "must allege both concerted action by two or more entities and a

consequent restraint of trade within an identified relevant product market" … . The Court has recognized that "the sweep of Donnelly may be broader than that of Sherman" insofar as the Donnelly Act proscribes "arrangements" in addition to contracts, combinations, and conspiracies … . …

Go New York alleges that the Gray Line respondents conspired with other counterclaim defendants (which Go New York refers to as "Big Bus/Leisure Pass"), to leverage their market share to "shut out" Go New York from the "hop-on, hop-off sightseeing tour bus market." According to the facts asserted—which we must accept as true on this motion—representatives from various New York City attractions refused to do business with Go New York after Gray Line and Big Bus/Leisure Pass impugned Go New York's reputation and threatened to end their business with those attractions if they did business with Go New York. Go New York also alleged that, although certain attractions referenced exclusive relationships with either Gray Line or Big Bus/Leisure Pass as a basis not to partner with Go New York, the attractions in fact partnered with both. Thus, it can be inferred that the claimed exclusive relationships were a pretext to cover for anticompetitive efforts to exclude Go New York. Although sparse, these factual assertions and all the possible inferences to be drawn therefrom are sufficient to allege concerted action between two or more entities and support a cognizable Donnelly Act counterclaim under our liberal notice pleading standards … . Taxi Tours Inc. v Go N.Y. Tours, Inc., 2024 NY Slip Op 01333, CtApp 3-14-24

Practice Point: The allegations here were deemed sufficient to state a cause of action for a violation of the Donnelly Act, which prohibits concerted anti-competitive behavior by businesses designed to exclude a competing business from the market.

MARCH 14, 2024

COVID TOLL, CHILD VICTIMS ACT.

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

DISCOVERY DEMANDS OVERLY BROAD, EDUCATION-SCHOOL LAW, NEGLIGENT SUPERVISION.

THE DISCOVERY DEMANDS IN THIS NEGLIGENT SUPERVISION ACTION AGAINST DEFENDANT SCHOOL DISTRICT ALLEGING SEXUAL ABUSE BY A TEACHER WERE OVERLY BROAD AND UNDULY BURDENSOME AND SHOULD HAVE BEEN STRUCK IN THEIR ENTIRETY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the discovery demands in this negligent supervision action against a school district, alleging the sexual abuse of plaintiff-student by a teacher, were overly broad and unduly burdensome. Therefore the demands should have been struck in their entirety with no attempt to prune them:

… [A] "' …party is not entitled to unlimited, uncontrolled, unfettered disclosure'" … . "Pursuant to CPLR 3103(a), the Supreme Court may issue a protective order striking a notice for discovery and inspection that is palpably improper" … . A notice for discovery and inspection is palpably improper if it is overbroad, burdensome, fails to specify with reasonable particularity many of the documents demanded, or seeks irrelevant or confidential information (see CPLR 3120[2] …). "Where the discovery demands are overbroad, the appropriate remedy is to vacate the entire demand rather than to prune it" … .

Here, many of the plaintiff's discovery demands were palpably improper in that they were overbroad and burdensome … . The plaintiff's discovery demands broadly sought, among other things, documents pertaining to any complaint of sexual abuse by any employee of the District from January 1, 1997, to the present and any suspected romantic or sexual relationship between any teacher and any student at the school from 1990 to the present. Thus, the Supreme Court should have denied the plaintiff's motion pursuant to CPLR 3124 to compel the District to comply with the plaintiff's first and second demands for discovery and granted the District's application pursuant to CPLR 3103(a) for a protective order striking those demands in their entirety instead of pruning them … . Ferrara v Longwood Cent. Sch. Dist., 2024 NY Slip Op 01293, Second Dept 3-13-24

Practice Point: In this negligent supervision action against a school district alleging sexual abuse by a teacher plaintiff's discovery demands included "documents pertaining to any complaint of sexual abuse by any employee of the District from January 1, 1997, to the present and any suspected romantic or sexual relationship between any teacher and any student at the school from 1990 to the present". The demand was overly broad and unduly burdensome and was struck in its entirety.

MARCH 13, 2024

FAMILY LAW, CPLR 3212 SUMMARY JUDGMENT MOTIONS CAN BE APPROPRIATE IN FAMILY COURT PROCEEDINGS.

THE ADMINISTRATION FOR CHILDREN'S SERVICES (ACS) RELIED SOLELY ON PRIOR NEGLECT FINDINGS FROM 2007 AND 2009 TO PROVE DERIVATIVE NEGLECT; NEGLECT FINDING REVERSED, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the Administration for Children's Services (ACS) did not demonstrate mother had derivatively neglected the child. ACS had brought a motion for summary judgment which the court granted. The Second Department noted that motions for summary judgment pursuant to CPLR 3212 can be appropriate in a Family Court proceeding:

While proof of the abuse or neglect of one child is admissible evidence on the issue of the abuse or neglect of any other child of the parent (see Family Ct Act § 1046[b]), "there is no per se rule that a finding of neglect of one sibling requires a finding of derivative neglect with respect to the other siblings. The focus of the inquiry . . . is whether the evidence of abuse or neglect of one child indicates a fundamental defect in the parent's understanding of the duties of parenthood" … . In determining whether a child born after the underlying acts of abuse or neglect should be adjudicated derivatively neglected, the "determinative factor is whether, taking into account the nature of the conduct and any other pertinent considerations, the conduct which formed the basis for a finding of abuse or neglect as to one child is so proximate in time to the derivative proceeding that it can reasonably be concluded that the condition still exists" … .

Here, ACS failed to establish, prima facie, that the mother derivatively neglected the children based upon her alleged failure to address certain mental health issues underlying the 2007 and 2009 findings of neglect … . In support of its motion, ACS relied solely on the prior neglect findings and failed to include an affidavit from anyone with personal knowledge of the events alleged in the neglect petitions or any other evidentiary material (see CPLR 3212[b]). The prior neglect findings were not so proximate in time to establish, as a matter of law, that the conditions that formed the basis therefor continued to exist … . Matter of Kiarah V.R. (Virginia V.), 2024 NY Slip Op 01552, Second Dept 3-20-24

Practice Point: Here reliance on 2007 and 2009 neglect findings to demonstrate derivative neglect was deemed insufficient.

Practice Point: The court noted that summary judgment motions pursuant to CPLR 3212 can be brought in Family Court.

MARCH 20, 2024

FAMILY LAW, JURISDICTION OVER CUSTODY MATTERS.

ALTHOUGH THE COURT HAD, IN 2018, GRANTED MOTHER'S APPLICATION TO RELOCATE WITH THE CHILD TO CONNECTICUT, THE COURT SHOULD NOT HAVE DECIDED IT DID NOT HAVE JURISDICTION TO DETERMINE FATHER'S PETITION TO MODIFY THE CUSTODY ORDER WITHOUT HOLDING A HEARING ABOUT THE CHILD'S CONNECTIONS TO NEW YORK (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have determined New York courts no longer had jurisdiction over this modification of custody case without holding a hearing:

In November 2018, the Supreme Court granted the mother's application to relocate with the child from New York to Connecticut. In an order dated May 31, 2022, the court awarded sole custody of the child to the mother and suspended the father's parental access upon the father's default in appearing at a scheduled court appearance. The father subsequently filed a petition to modify the order dated May

31, 2022, so as to award him sole physical custody of the child. At a court appearance on December 5, 2022, the court stated, inter alia, that the mother had "relocated to Connecticut years ago" and that "[t]he [c]ourt no longer has jurisdiction." …

The Supreme Court should not have summarily determined, without a hearing, that it lacked jurisdiction on the ground that the child had been residing in Connecticut. The court made previous custody determinations in relation to the child in conformity with the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act and, therefore, would ordinarily retain exclusive, continuing jurisdiction pursuant to Domestic Relations Law § 76-a … . In order to determine whether it lacked exclusive, continuing jurisdiction pursuant to Domestic Relations Law § 76-a(1)(a), the court should have afforded the parties an opportunity to present evidence as to whether the child had maintained a significant connection with New York and whether substantial evidence was available in New York concerning the child's "care, protection, training, and personal relationships" … . Matter of Holley v Mills, 2024 NY Slip Op 01542, Second Dept 3-20-24

Practice Point: Although the court in 2018 granted mother's application to relocate to Connecticut with the child, it may have continuing jurisdiction. Therefore the court should not have decided it did not have jurisdiction over father's petition to modify the custody order without holding a hearing about the child's connections to New York.

Similar jurisdiction issue in a child support modification proceeding (governed by Family Court Act 580-205(a)) in Matter of Sherman v Killian, 2024 NY Slip Op 01550, Second Dept 3-20-24

MARCH 20, 2024

FAMILY LAW, SUBJECT MATTER JURISDICTION, FAMILY OFFENSE.

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

FAMILY LAW, DISPOSITIONAL HEARING REQUIRED.

EVEN THOUGH MOTHER DID NOT APPEAR IN THIS TERMINATION-OF-PARENTAL-RIGHTS PROCEEDING, FAMILY COURT SHOULD NOT HAVE DISPENSED WITH THE DISPOSITIONAL HEARING WITHOUT THE CONSENT OF THE PARTIES (SECOND DEPT).

The Second Department, reversing Family Court, determined the judge in this termination-of-parental-rights proceeding in which mother did not appear should not have dispensed with the dispositional hearing without the consent of thee parties:

The petitioner commenced this proceeding pursuant to Social Services Law § 384-b to terminate the mother's parental rights to the subject child on the ground of permanent neglect. The mother failed to appear at a scheduled court date, and the Family Court scheduled an inquest, which was conducted in the mother's absence. In an order of fact-finding and disposition …, the court found that the mother permanently neglected the child, stated that it had sufficient information to issue a dispositional order without any further hearing, and suspended judgment for a period of one year. The petitioner appeals from the dispositional portion of the order.

The Family Court should not have dispensed with the dispositional hearing in the absence of the consent of the parties (see Family Ct Act §§ 625[a]; 631 …). Accordingly, we remit the matter to the Family Court, Dutchess County, for a

dispositional hearing and a determination thereafter. Matter of Troy S.H. (Tianna S.S.), 2024 NY Slip Op 01711, Second Dept 3-27-24

Practice Point: Even though mother did not appear in this termination-of-parental-rights proceeding, the judge should not have dispensed with the dispositional hearing without the consent of the parties.

MARCH 27, 2024

FORUM NON CONVENIENS.

PLAINTIFF, A NEW YORK RESIDENT AND A SHAREHOLDER IN DEFENDANT LONDON CORPORATION, ALLEGED DEFENDANT WRONGFULLY FAILED TO PAY DIVIDENDS; THE LONDON DEFENDANT'S MOTION TO DISMISS ON FORUM NON CONVENIENS GROUNDS SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion to dismiss on "forum non conveniens" grounds should have been granted. Plaintiff is a New York resident and the defendant is a London corporation (Anderson). Plaintiff, a shareholder of Anderson, alleged Anderson failed to pay dividends to shareholders:

The doctrine of forum non conveniens permits a court to dismiss an action when it finds that "in the interest of substantial justice the action should be heard in another forum" (CPLR 327[a]). In reviewing the motion court's exercise of discretion, this Court, however, may exercise such discretion independently … . The factors to be considered on a forum non conveniens motion include: "the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit. The court may also consider that both parties to the action are nonresidents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction. No one factor is controlling" … . New York courts "need not entertain causes of action lacking a substantial nexus with New York" … .

… Although plaintiff is a resident of New York, Anderson, its documents, and the witnesses are all located in the United Kingdom. The dispute involves an accounting of a British private company and will likely involve the application of British law to determine what duty, if any, is owed to plaintiff. Furthermore, the United Kingdom has a stronger interest than New York in the actions, duties, and governance of its companies … . Hayes v Anderson & Sheppard Ltd., 2024 NY Slip Op 01344, First Dept 3-14-24

Practice Point: Here plaintiff, a New York resident and a shareholder in defendant London corporation, alleged defendant wrongfully failed to pay dividends. The London defendant's motion to dismiss on forum non conveniens grounds should have been granted, criteria explained.

MARCH 14, 2024

FRAUD, PRIVATE RIGHT OF ACTION AGAINST ATTORNEYS.

JUDICIARY LAW 487 CREATES A PRIVATE RIGHT OF ACTION AGAINST AN ATTORNEY FOR DECEIT OR FRAUD ON THE COURT OR ANY PARTY TO A LAWSUIT; HERE THE PROOF OF DECEIT OR FRAUD WAS LACKING (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Halligan, determined Judiciary Law section 487 creates a private right of action seeking damages for deceit by an attorney, Here plaintiff alleged her attorney in a medical malpractice action defrauded the court in the calculation of attorney's fees. The Court of Appeals sided with plaintiff in finding a private right of action under Judiciary Law 487, but found plaintiff's evidence of deceit or fraud on the defendant-attorney's part was lacking:

We conclude … that section 487 authorizes a plenary action for attorney deceit under these circumstances. The text of the statute allows recovery of treble damages "in a civil action" where "[a]n attorney . . . [i]s guilty of any deceit or collusion . . . with intent to deceive the court or any party." The phrase "in a civil action" is most naturally read to include a plenary action. Notably, the provision does not differentiate between an action that might undermine or undo a final

judgment and one that does not, or between allegations of fraud that are intrinsic to the underlying action, as opposed to extrinsic. Interpreting the statute to permit a plenary action where the remedy would not entail undermining a final judgment (for example, when the deceit harms a prevailing party), but deny one where a final judgment could be impaired, would require us to rewrite the statute. That we cannot do. * * *

Plaintiff has not identified a material issue of fact as to whether [defendant-attorney's] representations that the fee calculations comport with the statutory schedule amounted to false statements. Urias v Daniel P. Buttafuoco & Assoc., PLLC, 2024 NY Slip Op 01497, CtApp 3-19-24

Practice Point: Judiciary Law 487 creates a private right of action against an attorney for fraud upon the court or any party to a lawsuit.

MARCH 19, 2024

FREEDOM OF INFORMATION LAW (FOIL), ATTORNEYS FEES, APPEALS.

THE NYPD'S FAILURE TO TIMELY COMPLY WITH A COURT ORDER REQUIRING THE RELEASE OF DOCUMENTS PURSUANT TO A FOIL REQUEST WARRANTED THE AWARD OF ATTORNEY'S FEES TO PETITIONER; RESPONDENT NYPD'S ABANDONING AN ISSUE IN A PRIOR APPEAL PRECLUDED APPELLATE REVIEW OF THAT ISSUE IN A SUBSEQUENT APPEAL (FIRST DEPT).

The First Department determined the NYPD's failure to timely comply with a court order mandating a response to petitioner's FOIL request warranted the award of attorney's fees to petitioner:

… [T]he court properly granted attorney's fees and costs arising from NYPD's noncompliance with this Court's prior order. NYPD's argument, that this noncompliance was justified because some of the records were sealed after NYPD's final administrative determination, was abandoned in the prior appeal … , and this Court has "no discretionary authority" to reach this unpreserved issue in the interest of justice in this article 78 proceeding challenging an administrative

determination … . The court providently exercised its discretion in holding NYPD in civil contempt, given that NYPD waited several months before disclosing a video and 407 heavily redacted pages of responsive records, after which petitioner was forced to continue litigating its entitlement to complete disclosure of unredacted copies of the records. After this Court's January 2021 order, NYPD should have disclosed all records responsive to petitioner's FOIL request, without the need for any further proceedings. "Once the court has issued a valid order, it is not for the recipient of that order to fashion its own remedy" … . The "lengthy delay" caused by NYPD "was unreasonable under the particular circumstances of this case," warranting an award of attorney's fees and costs pursuant to FOIL … . Matter of Jewish Press, Inc. v New York City Police Dept., 2024 NY Slip Op 01511, First Dept 3-19-24

Practice Point: Failure to timely respond to a court order requiring the release of documents pursuant to a FOIL request, necessitating further litigation by the petitioner, warrants the award of attorney's fees to petitioner.

MARCH 19, 2024

FREEDOM OF INFORMATION LAW (FOIL), STATUTE OF LIMITATIONS, ARTICLE 78.

BECAUSE THE RESPONDENT CREATED AMBIGUITY ABOUT WHETHER IT WAS STILL CONSIDERING PETITIONER'S FOIL REQUEST AFTER EXPIRATION OF THE 10-DAY CONSTRUCTIVE-DENIAL PERIOD, THE FOUR-MONTH PERIOD FOR COMMENCING AN ARTICLE 78 PROCEEDING DID NOT START ON THE CONSTRUCTIVE-DENIAL DATE; THE ARTICLE 78 PROCEEDING WAS TIMELY COMMENCED (FIRST DEPT).

The First Department, reversing Supreme Court, determined that the respondent Office of Court Administration (OCA) gave petitioner the impression it was still considering petitioner's FOIL request after the 10-day period for a response from the OCA expired on May 27, 2022. The OCA produced some documents on June

27, 2022. Therefore, the four-month period for commencing an Article 78 proceeding did not start on May 27, but rather on June 27, rendering the Article 78 commenced on November 8, 2022, timely:

… OCA's ongoing consideration of the request created an ambiguity and the impression of nonfinality regarding its May 27 constructive denial … . Twice, on June 16 and August 5, 2022, OCA issued substantive rulings on the FOIL request, stating that petitioner had 30 days to take a written appeal of the determination. OCA's treatment of its May 27 constructive denial as a final agency determination is inconsistent with its statements notifying petitioner that it had opportunities for further administrative appeals … . Thus, petitioner was justified in pursuing the administrative appeals that OCA appeared to offer rather than commencing what would have been a timely article 78 proceeding.

OCA created further doubt about the finality of its May 27 constructive denial when it wrote in its June 23, 2022 email that its substantive response to the FOIL request rendered the appeal of the constructive denial moot and issued a ruling on petitioner's appeal. OCA's contention that petitioner's May 13, 2022 appeal was denied with finality on May 27 is incompatible with its later characterization of that appeal as moot. Similarly, the July 27, 2022 production letter from OCA stated that OCA was producing records in response to petitioner's FOIL request, which, according to OCA, had been "remanded back . . . in response" to petitioner's appeal. Petitioner was justified in its understanding that its request had not been denied with finality on May 27, as it could not have been both conclusively denied and simultaneously "remanded back . . . in response" to petitioner's June 23, 2022 appeal.

Because OCA created an ambiguity, it is resolved against the agency, and the petition is deemed timely … . Matter of Portfolio Media, Inc. v New York State Off. of Ct. Admin., 2024 NY Slip Op 01523, First Dept 3-19-24

Practice Point: Here the respondent did not respond to petitioner's FOIL request within 10 days. But because the respondent created ambiguity about whether it was still considering the request after the constructive-denial date, the constructive-denial date should not have been used to calculate the four-month period for commencing an Article 78 proceeding. Therefore the Article 78 was timely commenced.

MARCH 19, 2024

JURY TRIAL, RIGHT TO, BOTH MONETARY DAMAGES AND EQUITABLE RELEIF REQUESTED.

PLAINTIFF'S DEMAND FOR MONETARY DAMAGES AND EQUITABLE RELIEF IN THIS EMPLOYMENT DISCRIMINATION CASE DID NOT WAIVE THE RIGHT TO A JURY TRIAL; PLAINTIFF COULD BE MADE WHOLE ENTIRELY BY A MONETARY AWARD (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the demand for both money damages and equitable relief in this employment discrimination case did not waive plaintiff's right to a jury trial. The plaintiff could be made whole entirely with money damages:

CPLR 4101(1) provides, in pertinent part, that "issues of fact shall be tried by a jury, unless a jury trial is waived," in any action "in which a party demands and sets forth facts which would permit a judgment for a sum of money only." The "deliberate joinder of claims for legal and equitable relief arising out of the same transaction" may constitute a waiver of the right to a jury trial … . However, the right to a jury trial must be determined by the facts alleged in the complaint and not by the prayer for relief … , and "[w]here a plaintiff alleges facts upon which monetary damages alone will afford full relief, inclusion of a demand for equitable relief in the complaint's prayer for relief will not constitute a waiver of the right to a jury trial" … . A jury trial will not be waived if the equitable relief sought by the plaintiff is "incidental to [his or her] demand for money damages" … .

Here, the gravamen of the plaintiff's action is to recover damages for employment discrimination. Therefore, the character of the action is essentially legal, and even though the prayer for relief in the complaint contains demands for equitable relief, only an award of monetary damages would afford the plaintiff a full and complete remedy … . Blackman v Metropolitan Tr. Auth., 2024 NY Slip Op 01530, Second Dept 3-20-24

Practice Point: Although a demand for equitable relief may waive the right to a jury trial, here there was no waiver because plaintiff could be made whole with a monetary award.

MARCH 20, 2024

LAW OF THE CASE, RULINGS ON MOTIONS TO DISMISS ARE NOT THE LAW OF THE CASE RE: SUMMARY JUDGMENT MOTIONS.

A RULING ON A MOTION TO DISMISS DEALS ONLY WITH THE SUFFICIENCY OF THE PLEADINGS AND DOES NOT CONSTITUTE THE LAW OF THE CASE WITH RESPECT TO A SUBSEQUENT MOTION FOR SUMMARY JUDGMENT (FOURTH DEPT).

The Fourth Department, reversing the Court of Claims, determined the judge improperly refused to consider evidence submitted by defendants in opposition to claimant's summary judgment motion citing the law of the case doctrine. The judge's "law of the case" ruling, however, was based on her prior ruling on a motion to dismiss. Because a motion to dismiss addresses only the sufficiency of the pleadings, a ruling on a motion to dismiss is not the law of the case with respect to a subsequent summary judgment motion:

It is well settled that the law of the case doctrine "applies only to legal determinations that were necessarily resolved on the merits in a prior decision" … , and that a court's order denying a motion to dismiss is "addressed to the sufficiency of the pleadings" and does not "establish the law of the case for the purpose of" motions for summary judgment … . We thus agree with defendants that the court erred in refusing to consider defendants' proof in opposition to the motion … . Riley v State of New York, 2024 NY Slip Op 01647, Fourth Dept 3-22-24

Practice Point: A ruling on a motion to dismiss is not the law of the case for a subsequent summary judgment motion.

MARCH 22, 2024

MANDAMUS, WRIT OF, ADMINISTRATIVE LAW, FIRE PREVENTION AND BUILDING CODE STANDARDS.

THE THIRD DEPARTMENT DETERMINED THE NEW YORK STATE UNIFORM FIRE PREVENTION AND BUILDING CODE PROVIDES SUFFICIENT STANDARDS AND MECHANISMS FOR ENFORCEMENT OF THE CODE PROVISIONS; A TENANT WHOSE BUILDING WAS DECLARED UNSAFE AFTER ORDERS TO REMEDY DEFECTS WERE IGNORED BY THE LANDLORD BROUGHT A PETITION FOR A WRIT OF MANDAMUS TO COMPEL THE SECRETARY OF STATE TO STRENGTHEN CODE ENFORCEMENT STANDARDS AND MECHANISMS; THE PETITION WAS DENIED (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice McShan, over a two-justice dissent, determined that the regulations associated with the enforcement of the NYS Uniform Fire Prevention and Building Code (Uniform Code) are adequate. Petitioner, a former tenant in a building which was ultimately declared unsafe after several orders to remedy building-defects were ignored by the landlord, brought a petition for a writ of mandamus requiring the NYS Secretary of State to provide standards for the enforcement of the Uniform Code. The petition was dismissed after an exhaustive discussion of the relevant regulations and enforcement standards and mechanisms. The opinion is too detailed to fairly summarize here. Matter of Clements v New York Secretary of State, 2024 NY Slip Op 01756, Third Dept 3-28-24

MARCH 28, 2024

PRIVILEGE, PATIENT-PHYSICIAN, DISCOVERY.

SM STABBED INFANT PLAINTIFF SHORTLY AFTER BEING TREATED BY DEFENDANT HOSPITAL WHICH ALLEGEDLY NEGLIGENTLY FAILED TO DETAIN OR REPORT SM; ALTHOUGH SM DID NOT WAIVE THE PATIENT-PHYSICIAN PRIVILEGE, PLAINTIFF WAS ENTITLED TO AN IN CAMERA REVIEW OF SM'S MEDICAL RECORDS AND DISCLOSURE OF ANY RELEVANT NONMEDICAL INFORMATION (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the demand for disclosure of SM's medical records was properly denied because SM had not waived the physician-patient privilege, but the request for an in camera review of the records for nonmedical information should have been granted. SM has been treated by defendant New York City Health + Hospital/Lincoln Medical Center (NYCHH) shortly before SM stabbed infant plaintiff. Plaintiff alleged NYCHH should have reported SM and detained her or taken some other measures to protect infant plaintiff:

Infant plaintiff and her father allege that NYCHH's employees negligently treated SM when she presented to the hospital on April 26 and April 27, 2016, shortly before she stabbed the infant plaintiff and brother, resulting in the brother's death. They allege that SM had a history of mental illness for which she had been treated by NYCHH on "scores of previous occasions," and that NYCHH failed to detain SM, call a report to the Statewide Central Register of Child Abuse and Maltreatment, or "take any other action to protect" the infant plaintiff. SM, who is currently incarcerated, has not waived the physician-patient privilege and is believed to be unable or unwilling to do so.

Supreme Court properly determined that Mental Hygiene Law § 33.13(c)(1) does not apply to allow disclosure of SM's hospital records in the interests of justice, absent SM's consent or express or implied waiver of the physician-patient privilege provided by CPLR 4504, 4507 … . … Supreme Court should have granted plaintiffs' alternative request for in camera review to determine whether the records include information of a nonmedical nature, such as observations of SM's conduct,

language, and appearance and factual matters, which is subject to disclosure … . S.M. v City of New York, 2024 NY Slip Op 01689, First Dept 3-26-24

Practice Point: Although medical records are protected from disclosure by the patient-physician privilege, relevant nonmedical, factual information in the records may be disclosed pursuant to an in camera review.

MARCH 26, 2024

SERVICE OF PROCESS, DUE DILIGENCE.

AFTER BEING TOLD THE PREMISES WAS NOT DEFENDANT'S RESIDENCE, THE PROCESS SERVER DID NOT EXERCISE DUE DILIGENCE TO DETERMINE WHERE DEFENDANT RESIDED BEFORE RESORTING TO NAIL-AND-MAIL SERVICE; THE DEFAULT JUDGMENT AGAINST DEFENDANT VACATED (FIRST DEPT).

The First Department determined plaintiff failed to show defendant Lopez was properly served at the traverse hearing. The default judgment against Lopez was vacated. The decisions provides a rare opportunity to look inside a traverse hearing:

During the traverse hearing, plaintiff's process server testified that he posted the summons and complaint on the door of the subject premises located at 713 Prospect Avenue in the Bronx (the premises), after making four attempts to serve Lopez there. However, the process server also testified that while he was attempting to personally serve Lopez at the premises, which his employer had represented was her residence, someone at the premises told him Lopez did not live there. This testimony established that the nail-and-mail service of process on Lopez was insufficient because plaintiff's process server did not first comply with the due diligence requirement of CPLR 308(4) … . Upon obtaining information that Lopez did not reside at the premises, due diligence required the process server to investigate her whereabouts on the date of service and whether the service address was actually her dwelling place or usual place of abode before resorting to the alternative method of serving her with the summons and complaint by nail-and-

mail service … . There is no evidence that the process server did so, and the affidavit of service simply states that the process server served Lopez at her "dwelling place/usual place of abode." Casanova v Lopez, 2024 NY Slip Op 01269, Frist Dept 3-12-24

Practice Point: Here the process server was told defendant did not reside at the premises but he did not exercise due diligence (CPLR 308(4)) to find out where defendant did reside before resorting to nail-and-mail service. The default judgment against defendant was vacated.

MARCH 12, 2024

STATUTE OF LIMITATIONS, CONTRACT LAW, OBVIOUS SCRIVNER'S ERROR.

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

STATUTE OF LIMITATIONS, NUISANCE, TRESPASS.

PLAINTIFF ALLEGED CONSTRUCTION WORK ON DEFENDANT'S PROPERTY CAUSED WATER TO ENCROACH ON PLAINTIFF'S PROPERTY; THE NEGLIGENCE ACTION WAS TIME-BARRED BECAUSE THE CONSTRUCTION WORK WAS DONE MORE THAN THREE YEARS BEFORE THE ACTION WAS FILED; THE RELATED NUISANCE AND TRESPASS ACTIONS WERE NOT TIME-BARRED BECAUSE THEY MAY CONSTITUTE "CONTINUING WRONGS" (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the negligence cause of action was time-barred but the related nuisance and trespass actions constituted "continuing wrongs" and therefore were not time-barred. Plaintiff alleged defendant did construction work on defendant's property which caused water to encroach on plaintiff's property. Because the construction work was done more than three years before the action was filed, the negligence action was not timely:

The defendant demonstrated, prima facie, that the negligence cause of action was barred under the applicable three-year statute of limitations (see CPLR 214[4]) by submitting evidence that the allegedly negligent construction work performed on its property occurred in or around June 2012, more than four years prior to the commencement of this action … .

… Here, the acts of continuous nuisance and trespass alleged in the amended complaint may give rise to successive causes of action pursuant to the continuous wrong doctrine … . Jefferson v New Life Tabernacle, Inc., 2024 NY Slip Op 01295, Second Dept 3-13-24

Practice Point: Here construction work on defendant's land was alleged to have caused water to encroach on plaintiff's property. The negligence action accrued when the construction work was done and was time-barred. But the related nuisance and trespass actions may constitute "continuing wrongs" which were not time-barred.

MARCH 13, 2024

STATUTE OF LIMITATIONS, TRESPASS.

TRESPASS BY PERMANENT PHYSICAL ENCROACHMENT (PLUMBING PIPES) IS NOT SUBJECT TO THE SAME STATUTE OF LIMITATIONS ANALYSIS AS TRESPASS BY THE ARTIFICIAL DIVERSION OF WATER; TRESPASS BY PERMANENT PHYSICAL ENCROACHMENT IS A CONTINUING TRESPASS UNTIL THE EXPIRATION OF THE TIME PERIOD FOR ADVERSE POSSESSION OR AN EASEMENT BY PRESCRIPTION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the trespass cause of action should not have been dismissed as time-barred. A trespass claim based upon a permanent physical encroachment (here plumbing pipes connected to a septic system) is a continuing trespass which gives rise to successive trespass causes of action until the expiration of the time period for an easement by prescription or adverse possession:

… [P]laintiff's claim for trespass seeking monetary damages should not be analyzed for statute of limitations purposes in the same way as a claim for the artificial diversion of water onto an adjoining property … , inasmuch as plaintiff's trespass claim is based upon a permanent physical encroachment, i.e., the underground plumbing that defendants installed on plaintiff's property. "[The] encroaching structure is a continuing trespass [that] gives rise to successive causes of action, except where barred by acquisition of title or an easement by operation of law" … . " 'Thus, for purposes of the statute of limitations, suits will only be time-barred by the expiration of such time as would create an easement by prescription or change of title by operation of law,' [namely], by adverse possession" … . Inasmuch as the complaint, which was filed on July 23, 2021, alleges that defendants' "plumbing material" was unlawfully installed on plaintiff's property in 2014, plaintiff's claim for damages here is not barred by the statute of limitations (see RPAPL 501 [2]). Kramer v Kleiber, 2024 NY Slip Op 01387, Fourth Dept 3-15-24

Practice Point: Trespass by artificial diversion of water is not subject to the same statute of limitations analysis as trespass by a permanent physical encroachment (plumbing pipes in this case). Trespass by permanent physical encroachment is a continuing trespass until the expiration of the time period required for adverse possession or an easement by prescription.

MARCH 15, 2024

SUA SPONTE DISMISSAL OF COMPLAINT.

THE JUDGE'S SUA SPONTE DISMISSAL OF THE COMPLAINT FOR FAILURE TO COMPLY WITH A STATUS CONFERENCE ORDER REVERSED; A JUDGE'S POWER TO DISMISS A COMPLAINT, SUA SPONTE, IS LIMITED AND SHOULD BE USED SPARINGLY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's failure to comply with a status conference order in this foreclosure action was not an adequate ground for the judge's sua sponte dismissal of the complaint:

"'[A] court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal'" … .

Here, the plaintiff's failure to comply with the directive of the status conference order that it file an application for an order of reference by April 1, 2015, was not a sufficient ground upon which to dismiss the complaint … .

… [D]ismissal of the action also was not warranted based on the plaintiff's alleged neglect to prosecute. "A court may not dismiss an action based on neglect to prosecute unless the CPLR 3216 statutory preconditions to dismissal are met" … . HSBC Bank USA, NA v Sung Eun Oh, 2024 NY Slip Op 01700, Second Dept 3-27-24

Practice Point: A judge's power to dismiss a complaint sua sponte is limited and should be used sparingly. To dismiss a complaint pursuant to CPLR 3216, all the statutory criterial must be met. Here dismissal was not warranted.

MARCH 27, 2024

SUMMARY JUDGMENT MOTIONS, JUDGES.

IN THIS ACTION BY A PROPERTY OWNER WHO LOST THE PROPERTY TO FORECLOSURE: (1) THE JUDGE SHOULD NOT HAVE GRANTED DEFENDANT REAL ESTATE BROKERS SUMMARY JUDGMENT ON A GROUND NOT RAISED IN THE MOTION; AND (2) THE BREACH OF FIDUCIARY DUTY, BREACH OF REAL PROPERTY LAW 441-C, AND CONSTRUCTIVE TRUST CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversed Supreme Court in this action against real state brokers who, plaintiff alleged, did not provide plaintiff with proper documentation for a short sale of plaintiff's property. The short sale was not approved by the lender and plaintiff lost the property in foreclosure. The Second Department determined: (1) the judge should not have granted summary judgment to defendants on the ground plaintiff suffered no damages because that issue was

not raised by defendants in the motion; (2) the breach of fiduciary duty cause of action should not have been dismissed; (3) the Real Property Law section 441-c action alleging defendants acted with "untrustworthiness and incompetency" should not have been dismissed; and (4) the constructive-trust cause of action should not have been dismissed:

A court is generally limited to the issues or defenses that are the subject of the motion … . * * *

"[I]t is well settled that a real estate broker is a fiduciary with a duty of loyalty and an obligation to act in the best interests of the principal" … . * * *

… [T]he causes of action pursuant to Real Property Law § 441-c(1)(a) and 19 NYCRR 175.4, alleging that they acted with "untrustworthiness and incompetency" in dealing with the plaintiff and the property [should not have been dismissed].. … [T]here exists a private right of action for such offenses … . Perez v Mendicino, 2024 NY Slip Op 01323, Second Dept 3-13-24

Practice Point: A judge does not have the authority to grant summary judgment on a ground not raised in the motion papers;

Practice Point: Real estate brokers owe a fiduciary duty to their clients.

Practice Point: There exists a private right of action for a violation of Real Property Law 441-c for a real estate broker's "untrustworthiness and incompetency."

MARCH 13, 2024

SUMMARY JUDGMENT, INABILITY TO IDENTIFY CAUSE OF SLIP AND FALL.

THE INABILITY TO IDENTIFY THE SLIPPERY SUBSTANCE WHICH CAUSED PLAINTIFF'S SLIP AND FALL WAS FATAL TO THE LAWSUIT; ALLEGING THE FLOOR WAS SHINY OR SLIPPERY IS NOT ENOUGH, CRITERIA EXPLAINED IN SOME DEPTH (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff's inability to identify the cause of her slip and fall was fatal to the lawsuit. Evidence

that the floor was shiny or slippery was not enough to survive a summary judgment motion:

The plaintiff expressly testified that she did not know what caused her to fall … , nor did she recall observing garbage or liquid on the floor, either before or after her fall … .

… The plaintiff's affidavit and additional portions of her deposition testimony submitted in opposition to the [summary judgment] motion merely confirmed that she fell as a result of a slippery substance that she could not identify. To the extent that the plaintiff's two witnesses identified the cause of the fall in their affidavits without engaging in speculation … , this evidence was insufficient to raise a triable issue of fact. Although each witness averred that the plaintiff's fall may have been caused by the "shiny" and "slippery" nature of the floor, "the mere fact that a smooth floor may be shiny or slippery," without more, "does not support a cause of action to recover damages for negligence, nor does it give rise to an inference of negligence" … . Alvarez v Staten Is. R.T. Operating Auth., 2024 NY Slip Op 01695, Second Dept 3-27-24

Practice Point: Here plaintiff's inability to identify the slippery substance which caused the fall required summary judgment in defendant's favor. The fact that a floor is shiny or slippery is not enough. The relevant proof requirements are laid out in detail.

MARCH 27, 2024

SUMMARY JUDMENT MOTIONS.

PORTIONS OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED AS UNTIMELY; THE PORTION OF THE UNTIMELY MOTION WHICH HAD BEEN TIMELY RAISED BY ANOTHER DEFENDANT WAS PROPERLY CONSIDERED; THE LABOR LAW 241(6) CAUSE OF ACTION PROPERLY RELIED ON INDUSTRIAL CODE PROVISIONS REQUIRING THAT ELECTRICAL POWER BE SHUT DOWN TO PROTECT ELECTRICAL WORKERS (SECOND DEPT).

The Second Department, reversing Supreme Court in this Labor Law 241(6, 200 and common law negligence action, determined; (1) portions of a defendant's summary judgment motion brought more than a month after the ordered deadline where properly dismissed as untimely; (2) the aspect of the untimely summary judgment motion which had been timely raised in another defendant's summary judgment motion was properly considered; (3) the industrial code requires shutting down the electricity when worker's are doing electrical work, therefore plaintiff's Labor Law 241(6) cause of action should not have been dismissed. Plaintiff was in an aerial bucket working on electrical lines when injured in an explosion:

Absent a "satisfactory explanation for the untimeliness," constituting good cause for the delay, an untimely summary judgment motion must be denied without consideration of the merits … . However, "[a]n untimely motion or cross motion for summary judgment may be considered by the court where a timely motion was made on nearly identical grounds" … . * * *

… [T]he defendants … failed to establish their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 241(6), which was predicated on 12 NYCRR 23-1.13(b)(3) and (4). 12 NYCRR 23-1.13(b)(3) provides, among other things, that where the performance of the work may bring any person into physical or electrical contact with an electric power circuit, the employer "shall advise his [or her] employees of the locations of such lines, the hazards involved and the protective measures to be taken." 12 NYCRR 23-1.13(b)(4) requires, in pertinent part, that employees who may come into contact with an electric power circuit be protected against electric shock "by

de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means" … . These regulations, which refer to the duty of employers, also impose a duty upon owners … . Wittenberg v Long Is. Power Auth., 2024 NY Slip Op 01329

Practice Point: A summary judgment motion brought a month after the ordered deadline may be dismissed as untimely.

Practice Point: A portion of an untimely summary judgment motion which was timely raised by another defendant may be considered.

Practice Point: The industrial code provisions requiring that electrical power be shut down to protect electrical workers supported plaintiff's Labor Law 241(6) cause of action.

MARCH 13, 2024

UNCLEAN HANDS, LACHES.

DISPUTES ABOUT ENCROACHMENTS ON EASEMENTS RESOLVED; UNCLEAN HANDS AND LACHES DEFENSES REINSTATED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Moulton, modifying Supreme Court, determined the unclean hands and laches defenses should not have been dismissed in this complicated case resolving the removal of encroachments from easements. The case is too complex and entails too much minutia to fairly summarize. 214 Lafayette House LLC v Akasa Holdings LLC, 2024 NY Slip Op 01762, First Dept 3-28-24

MARCH 28, 2024

VENUE, MOTION TO CHANGE.

THE STATUTORY CRITERIA FOR A MOTION TO CHANGE VENUE IN CPLR 510(3) WERE NOT MET; THE MOTION SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendants' motion to change the venue in this insurance-coverage dispute should not have been granted because the statutory criteria in CPLR 510(3) were not met. The statute requires detailed information about the witnesses who will testify and how those witnesses would be inconvenienced if venue is not changed:

To warrant a change of venue pursuant to CPLR 510(3), "[t]he affidavit in support of such motion must contain the names, addresses and occupations of the prospective witnesses, must disclose the facts to which the proposed witnesses will testify at the trial, must show that the proposed witnesses are, in fact, willing to testify and must show how the proposed witnesses would be inconvenienced in the event that a change of venue is not granted" … . Defendants have failed to meet any part of this standard. Defendants' general statements that nonparty witnesses involved in the renovation project will be inconvenienced by venue in New York County is inadequate to satisfy the standard … . Corner of Walnut LLC v Tompkins Ins. Agencies, Inc., 2024 NY Slip Op 01339, First Dept 3-14-24

Practice Point: CPLR 510(3) describes the required contents of a motion to change venue which includes detailed information about the witnesses who will testify and how the witnesses will be inconvenienced if venue is not changed.

MARCH 14, 2024