NEW YORK APPELLATE DIGEST, LLC

Weekly Reversal Report
July 8 – 12, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts July 8 – 12, 2024, and Posted on the New York Appellate Digest Website on Monday, July 15, 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

BANKING LAW, NEGLIGENCE, CIVIL PROCEDURE, FRAUD.

PLAINTIFF, UNDER NEW JERSEY LAW, SUFFICIENTLY PLED A SPECIAL RELATIONSHIP WITH DEFENDANT BANK GIVING RISE TO A DUTY TO ENFORCE ITS ANTI-FRAUD PROCEDURES; PLAINTIFF WIRED $300,000 TO AN ACCOUNT WHICH HAD BEEN SET UP TO DEFRAUD PLAINTIFF (FIRST DEPT).

The First Department, over a comprehensive dissent, determined defendant JPMorgan Chase Bank owed a duty to plaintiff based upon its anti-fraud polices advertised on the bank's website. Defendant David Tate opened an account at a New Jersey Chase bank in the name of his business, Alchemy. Tate did not provide any personal identification or any corporate documentation to the bank. Plaintiff, thinking she was investing in Alchemy, wired $300,000 to the Alchemy account which was appropriated by Tate:

Under New Jersey law, a bank and its depositor have an arm's-length, debtor-creditor relationship … . Banks do not have a duty to protect depositors from the wrongful conduct of third parties with whom the bank has done business .. .

Nonetheless, a bank may have a duty of care "where a special relationship has been established from which a duty can be deemed to flow" … . A special relationship may be formed "by agreement, undertaking or contact" … . As pertinent here, an

"undertaking" is "the willing assumption of an obligation by one party with respect to another or a pledge to take or refrain from taking particular action" … .

Crediting plaintiff's factual allegations, construing the complaint liberally, and according it the benefit of every possible favorable inference …, we find that the complaint adequately pleaded that Chase assumed a duty to abide by the anti-fraud procedures that it publicized.

… [P]laintiff has adequately pleaded the existence of a special relationship with Chase, giving rise to a duty to plaintiff to enforce its anti-fraud procedures … . Plaintiff has likewise stated a claim against Chase in negligence, based on its alleged failure to abide by these safeguards when Tate opened Alchemy's account with Chase … . Ben-Dor v Alchemy Consultant LLC, 2024 NY Slip Op 03797, Second Dept 7-11-24

Practice Point: In New Jersey, to sue a bank for the wrongful conduct of a third party, here the use of a bank account to defraud plaintiff, the bank must owe plaintiff a special duty. The majority held the anti-fraud policies on the bank's website may be the basis for such a special duty. There was an extensive and comprehensive dissent.

JULY 11, 2024

CIVIL PROCEDURE.

IN 2017 PLAINTIFF MISSED A COURT-ORDERED DEADLINE FOR FILING A NOTE OF ISSUE; IN 2022 PLAINTIFF MADE A MOTION TO RESTORE THE ACTION TO THE ACTIVE CALENDAR; THE MOTION SHOULD HAVE BEEN GRANTED, RESTORATION IS AUTOMATIC UNDER THE CIRCUMSTANCES HERE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's 2022 motion to restore the action to the active calendar should have been granted without considering whether there is a reasonable excuse for the delay. In 2017, plaintiff had failed to meet a court-ordered deadline for filing a note of issue, but no 90-day notice had been served and there was no order dismissing the complaint pursuant to 22 NYCRR 202.27. In that circumstance restoration is automatic and there is no specific time frame for a motion to restore:

Pursuant to a compliance conference order dated April 5, 2017, the plaintiff was required to file a note of issue on or before December 8, 2017. The plaintiff did not file a note of issue by that date, and the action was marked "inactive."

In November 2022, the plaintiff moved to restore the action to the active calendar. … Supreme Court denied the plaintiff's motion without prejudice to renewal "upon proper papers," including an affirmation detailing the reasons for the delay in moving for the relief requested. The plaintiff appeals from so much of the order as denied that branch of his motion which was to restore the action to the active calendar.

Where, as here, a plaintiff has failed to file a note of issue by a court-ordered deadline, restoration of the action to the active calendar is automatic, unless either a 90-day notice has been served pursuant to CPLR 3216 or there has been an order directing dismissal of the complaint pursuant to 22 NYCRR 202.27 … .. Under these circumstances, a motion to restore the action to the calendar should be granted "without considering whether the plaintiff had a reasonable excuse for the delay or whether [he] engaged in dilatory conduct" … . "Moreover, since this action was pre-note of issue and could not properly be marked off the calendar pursuant to CPLR 3404, the plaintiff was not required to move to restore the action to the calendar within any specified time frame" … . Rosario v Scudieri, 2024 NY Slip Op 03769, Second Dept 7-10-24

Practice Point: If no 90-day notice has been served and there has been no dismissal pursuant to 22 NYCRR 202.27, restoration of an action to the active calendar is automatic, even five years beyond the court-ordered deadline for filing a note of issue.

JULY 10, 2024

CONTRACT LAW, CORPORATION LAW, FRAUD.

WITH THE EXCEPTION OF THE FRAUD CAUSE OF ACTION, THE NONRECOURSE CLAUSE PRECLUDED THIS LAWSUIT AGAINST THE PRINCIPALS OF DEFENDANT CORPORATION; PLAINTIFF HAD WON AN ARBITRATION AWARD AGAINST DEFENDANT FOR OVER $200 MILLION AND BROUGHT THIS ACTION AFTER DEFENDANT FILED FOR BANKRUPTCY (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Higgitt, determined the nonrecourse clause in the contract between two sophisticated, commercial parties precluded plaintiff's action. Plaintiff had won an arbitration award for over $200 million against defendant (Footprint) and this suit against Footprint's principals was brought after Footprint filed for bankruptcy:

Plaintiff, a sophisticated commercial actor, knew that it was entering into a significant contractual undertaking with a special-purpose entity, and the contract provided for a specific dispute-resolution mechanism — arbitration — that carried with it a risk that the special-purpose entity would not be able to satisfy an ensuing award. Plaintiff could have bargained for protections to avoid or mitigate losses occasioned by the conduct of a judgment-proof special-purpose entity (e.g., conditions on Footprint's ability to draw on the letter of credit, a payment guaranty from one or more of defendants, a narrow nonrecourse provision), but it chose to enter into the contract as written … . We cannot provide rough justice to plaintiff by dint of distorting the plain meaning of the contract to relieve plaintiff of the consequences of its contractual arrangement … . Similarly, we cannot, under the guise of contractual interpretation, disturb the clear, detailed allocation-of-risk-of-economic-loss scheme agreed upon by the parties … . Ultimately, plaintiff got the benefit of its bargain: arbitration on its cognizable claims against Footprint, which proceeding yielded a sizable award that was converted to a judgment. Iberdrola Energy Projects v Oaktree Capital Mgt. L.P., 2024 NY Slip Op 03798, First Dept 7-11-24

Practice Point: Sophisticated corporate commercial parties will be held to an unambiguous nonrecourse provision in their contract.

JULY 11, 2024

CRIMINAL LAW, JUDGES, APPEALS.

IT WAS REVERSIBLE ERROR TO EMPANEL AN ANONYMOUS JURY; ALTHOUGH THE ERROR WAS NOT PRESERVED, NEW TRIAL GRANTED IN THE INTEREST OF JUSTICE (THIRD DEPT).

The Third Department, reversing defendant's assault-related convictions and ordering a new trial, determined it was error to empanel an anonymous jury:

… [C]onsistent with our recent holding in People v Heidrich (226 AD3d 1096 [3d Dept 2024]), we find merit to defendant's contention that County Court's empaneling of an anonymous jury in his case was in error. We again note that the practice of empaneling an anonymous jury contains no statutory justification, as CPL 270.15 (1-a) merely permits the withholding of residential or business addresses of prospective jurors upon a showing of good cause … . While the Court of Appeals has not explicitly sanctioned the practice, it has suggested that, at the very least, "doing so is error where no 'factual predicate for the extraordinary procedure' has been shown" … . To that end, the People concede, and we agree, that the record contains no factual support for utilizing an anonymous jury in this case. Instead, the People focus their arguments on defendant's failure to preserve the issue by consenting to the practice, alongside the contention that the error was, in any event, harmless. On the latter point, we need only note that we recently rejected the applicability of a harmless error analysis to this manner of error … . As to preservation, although defendant concedes his failure to object during pretrial proceedings, he asks that we take corrective action in the interest of justice (see CPL 470.15 [6] [a] …) Considering the totality of circumstances, including the potential effect on the fairness of trial that flows from the decision to utilize an anonymous jury without any justification … , we find such action is appropriate. We therefore exercise our interest of justice jurisdiction and grant defendant a new trial. People v Tenace, 2024 NY Slip Op 03784, Third Dept 7-11-24

Practice Point: Absent factual support for the procedure in the record, it is reversible error to empanel an anonymous jury.

JULY 11, 2024

FAMILY LAW, CONTRACT LAW, EVIDENCE, JUDGES.

MOTHER BROUGHT A PETITION TO MODIFY CUSTODY AND ALLEGED SHE DID NOT CONSENT TO THE STIPULATION UNDERLYING THE EXISTING CUSTODY ORDER; BECAUSE THE STIPULATION WAS NOT IN THE RECORD AND ITS TERMS WERE NOT IN THE CUSTODY ORDER, A HEARING WAS REQUIRED (SECOND DEPT).

The Second Department, reversing Family Court, determined a hearing was required after mother alleged in her petition to modify custody she did not consent to the stipulation underlying the custody order. The stipulation was not part of the record and the custody order did not recount the terms of the agreement:

Pursuant to CPLR 2104, an agreement between parties is binding against them where, as here, it was reduced to the form of an order and entered. Since "settlement agreements must abide by the principles of contract law, 'for an enforceable agreement to exist, all material terms must be set forth and there must be a manifestation of mutual assent'" … . CPLR 2104 does not require the parties or the court to place on the record an agreement between the parties that is reduced to an order. However, failing to do so makes the agreement open to collateral litigation … . Here, in light of the mother's averment that she did not consent to the terms of the custody order, the fact that the terms of the settlement were not placed on the record, and the fact that there was no writing subscribed by the parties, there is an unresolved issue as to whether there was a manifestation of mutual assent to the terms set forth in the custody order. Matter of Izzo v Salzarulo, 2024 NY Slip Op 03751, Second Dept 7-11-24

Practice Point: If a custody order is based upon a stipulation which was not reduced to writing and the terms of the stipulation are not in the order, the order is subject to collateral litigation, here based on mother's allegation she did not agree to the terms.

JULY 10, 2024

FAMILY LAW, EVIDENCE.

EVIDENCE THE CHILD HAD RECANTED THE CHILD'S TESTIMONY THAT FATHER SEXUALLY ABUSED THE CHILD WAS VAGUE AND WAS NOT SUFFICIENT TO REBUT THE ABUSE FINDING (SECOND DEPT).

The Second Department, reversing Family Court, determined the recantation evidence did rebut the prima facie evidence that father had sexually abused the child:

… [P]etitioner established by a preponderance of the evidence that the father sexually abused the child. The child's testimony during the fact-finding hearing was consistent and detailed, and any minor inconsistencies "did not render such testimony unworthy of belief" … . The child's testimony was sufficient to establish a finding of sexual abuse pursuant to Family Court Act § 1046(b)(i) … .

At the reopened fact-finding hearing, the mother of the father's other children (hereinafter the witness) testified that the child recanted her allegations of abuse. The child did not testify at the reopened fact-finding hearing. "[A] child's recantation of allegations of abuse does not necessarily require [the] Family Court to accept the later statements as true because it is accepted that such a reaction is common among abused children" … . "Rather, recantation of a party's initial statement simply creates a credibility issue which the trial court must resolve" … . Here, even assuming that the witness's testimony was credible, it was insufficient to warrant dismissal of the petition. The witness testified that she overheard the child telling other children that the child missed the father. After the witness confronted the child, the child told the witness that "she wished that she never lied . . . by saying that [the father] did those things." The witness did not specify what "things" the child was referring to. During cross-examination, the witness testified that immediately after she asked the child "what did she mean by she lied," the child indicated that "she never said that." The witness also testified on cross-examination that she had previously confronted the child about the allegations against the father, and the child told the witness that "she was sure . . . that these things took place." The alleged recantation as described by the witness was vague, and the witness's testimony was insufficient to rebut the finding of abuse … . Matter of Kenyana D. (Kenneth D.), 2024 NY Slip Op 03746, Second Dept 7-10-24

Practice Point: Here the evidence the child had recanted the child's testimony that father had abused the child was too vague to rebut the abuse finding.

JULY 10, 2024

FAMILY LAW, JUDGES.

FAMILY COURT HAD THE AUTHORITY TO ORDER VISITATION WITH THE CHILDREN'S FORMER FOSTER MOTHER; A STRONG DISSENT ARGUED THE COURT DID NOT HAVE THE POWER TO ORDER VISITATION WITH A "LEGAL STRANGER" (FIRST DEPT).

The First Department, over an extensive and comprehensive dissent, determined Family Court properly allowed visitation with the children by their former foster mother. The dissent argued the court did not have the power to order visitation with the former foster mother, a "legal stranger:"

Commonly, visitation plans for children in foster care involve parents, grandparents or siblings, all of whom have standing to commence visitation proceedings. However, in this case, there was no visitation petition or proceeding before the court at the time of the permanency hearing. Rather,the court ordered visitation between the children and the former foster mother in order to advance the children's "well-being" as it is required to do under Family Court Act § 1086. To accomplish that, the court gave special attention to the unique, undisputed circumstances of these children: (1) the children suffered from PTSD and other mental health issues following removal from their biological mother in 2016; (2) they each improved remarkably during the nearly six years they were cared for by the former foster mother; (3) removal from her care in December 2021 was traumatic for them; (4) at the time of the order, the children had only been in their current foster home for a few months; (5) ACS [Administration for Children's Services] and the foster care agency had previously consented to and facilitated visits with the former foster mother for approximately two years; and (6) the children remained strongly bonded to her as the only adult who had been a consistent positive presence in their lives at the time of the 2023 permanency hearing that resulted in the order.

… [A]s Family Court explained on the record, "there is no legal path where the children end up in [the] care" of the former foster mother. However, the court

expressed concern that discontinuing all contact with her at this time would be contrary to their well-being. The court noted that it was troubled "that we didn't have more details [presented at the hearing] about the children's therapy and medication" and that there was no testimony that "cutting off all contact with [the former foster mother] . . . is therapeutically beneficial." Under these circumstances, Family Court's continuation of visitation with the former foster mother was an appropriate exercise of its authority under Family Court Act § 1089, was tailored to the particular circumstances of these children, and was in keeping with the legislative goal of ensuring foster children's well-being. Matter of AL.C., 2024 NY Slip Op 03799, First Dept 7-11-24

Practice Point: Here Family Court properly ordered visitation with the children by their former foster mother, based primarily upon the children's improvement while in her care and the strong bond between her and the children. The dissent argued the court did not have the authority to order visitation with a "legal stranger."

JULY 11, 2024

FAMILY LAW, JUDGES.

FATHER'S FAILURE TO APPEAR DID NOT JUSTIFY FAMILY COURT'S AWARD OF CUSTODY TO MOTHER WITHOUT HOLDING A HEARING (SECOND DEPT).

The Second Department, reversing (modifying) Family Court, determined father's default did not justify failing to hold a hearing before rendering a custody determination:

"[C]ustody determinations should generally be made only after a full and plenary hearing and inquiry" … . While "the 'general' right to a hearing in custody cases is not an absolute one[,] . . . [a] decision regarding child custody should be based on admissible evidence" and not "mere 'information'" or hearsay statements … . Moreover, where the circumstances "fit within the narrow exception to the general right to a hearing[,] . . . a court opting to forgo a plenary hearing must take care to clearly articulate which factors were—or were not—material to its determination, and the evidence supporting its decision" … .

Here, the Family Court erred in rendering a custody determination without conducting a hearing or without the submission of any admissible evidence,

seemingly relying upon the hearsay statements of the attorneys … . Furthermore, the court failed to make any specific findings of fact regarding the best interests of the child, and failed to clearly articulate which factors were material to its determination … . Under the circumstances, the court should have granted that branch of the father's motion which was to vacate the order … granting the mother's petition for sole legal and physical custody of the child … . Matter of Akaberi v Cruciani, 2024 NY Slip Op 03745, Second Dept 7-10-24

Practice Point: Custody determinations should rarely be made without a hearing, even when a parent fails to appear.

Similar issue and result in Matter of Meehan v Kittle, 2024 NY Slip Op 03754, Second Dept 7-10-24.

JULY 10, 2024

FREEDOM OF INFORMATION LAW (FOIL), ADMINISTRATIVE LAW.

THE REGULATION WHICH PROVIDES THAT THE TRANSCRIPTS OF PUBLIC EMPLOYMENT RELATIONS BOARD (PERB) HEARINGS ARE THE PROPERTY OF THE STENOGRAPHER CONFLICTS WITH THE ADMINISTRATIVE PROCEDURE ACT AND THE PUBLIC-ACCESS PRINCIPLES UNDERLYING FOIL (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined the Public Employment Relations Board (PERB) regulation (4 NYCRR 208.3 (c)) which provides that PERB hearing transcripts are the property of the stenographer conflicts with the Administrative Procedure Act and the public-access principles underlying FOIL:

"It is established as a general proposition that a regulation cannot be inconsistent with a statutory scheme" … . Here, 4 NYCRR 208.3 (c) is inconsistent with State Administrative Procedure Act § 302 (2), which imposes a duty on the agency to furnish a copy of the transcript to a party upon request.… Moreover, it is inconsistent with the statutory scheme of FOIL, which "imposes a broad standard of open disclosure in order to achieve maximum public access to government documents" … . Courts must construe FOIL liberally, to "require[ ] government agencies to make available for public inspection and copying all records" … .

Accordingly, Supreme Court improperly granted PERB's motion to dismiss and we remit the matter to Supreme Court for PERB to file an answer pursuant to CPLR 7804 (f). Matter of DeWolf v Wirenius, 2024 NY Slip Op 03790,, Second Dept 7-11-24

Practice Point: A regulation cannot be inconsistent with a statutory scheme.

JULY 11, 2024

NEGLIGENCE, ASSOCIATIONS, CIVIL PROCEDURE, EMPLOYMENT LAW, RELIGION.

"UNITED METHODIST CHURCH" IS NOT A JURAL ENTITY WHICH CAN BE SUED IN THIS CHILD VICTIMS ACT LAWSUIT (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Wan, reversing (modifying) Supreme Court, determined the "United Methodist Church" is not a jural entity which can be sued. In this Child Victims Act proceeding, the complaint alleged plaintiff was abused by an employee of the defendants United Methodist Church General Conference … , United Methodist Church Northeastern Jurisdiction New York-Connecticut District, New York Annual Conference of the United Methodist Church, United Methodist Church Long Island East District, Long Island East District of the New York Annual Conference of the United Methodist Church, … United Methodist Church of Woodbury New York. [and the] United Methodist Church … . The complaint alleged … United Methodist Church "is a not-for profit religious association and/or organization conducting business in the State of New York and organized and existing under the laws of the State of New York with its principal place of business located at c/o GFCA, 1 Music Circle North Nashville, Tennessee 37203."

… [A]pplying neutral principles of law, we determine … the defendants established that United Methodist Church is not a jural entity with the capacity to be sued. Dismissal pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction is warranted where a named defendant is not a legal entity amenable to suit … . New York law recognizes that "[a]n action or special proceeding may be maintained, against the president or treasurer" of an "unincorporated association" "upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or

ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally" (General Associations Law § 13; see CPLR 1025 ["Two or more persons conducting a business as a partnership may sue or be sued in the partnership name, and actions may be brought by or against the president or treasurer of an unincorporated association on behalf of the association in accordance with the provisions of the general associations law"]). Although the term "unincorporated association" is not further defined by statute, New York courts have determined that "[i]t is only when a partnership has a President or a Treasurer that it is deemed an association within the meaning of" General Associations Law § 13 … . As such, "[a]n unincorporated association . . . has 'no legal existence separate and apart from its individual members'" … .

* * * [W]e conclude that the defendants established that United Methodist Church … is a religious denomination with a single purpose—"to make disciples for Jesus Christ for the transformation of the world"—and not a jural entity amenable to suit as an unincorporated association. It is undisputed that United Methodist Church does not have a principal place of business, does not have its own offices or employees, and does not and cannot hold title to property, and there is no proof in the record that United Methodist Church has incorporated or held itself out as a jural entity in any other jurisdiction. Moreover, the defendants demonstrated at the hearing that United Methodist Church, as such, does not have any involvement in the staffing or the removal of clergy or staff at the local church level. Chestnut v United Methodist Church, 2024 NY Slip Op 03726, Second Dept 7-11-24

Practice Point: Here the "United Methodist Church" was deemed a nonjural entity which cannot be sued in New York–criteria explained in depth.

JULY 10, 2024

RETIREMENT AND SOCIAL SECURITY LAW.

PETITIONER, A POLICE PARAMEDIC, INJURED HIS SHOULDER WHEN THE RETRACTABLE PORTION OF A STRETCHER JAMMED; THE UNEXPECTED EQUIPMENT MALFUNCTION WAS AN "ACCIDENT" ENTITLING PETITIONER TO ACCIDENTAL DISABILITY RETIREMENT BENEFITS (THIRD DEPT).

The Third Department, over a partial concurrence and dissent, determined petitioner, a police paramedic, was entitled to accidental disability retirement benefits based on an injury caused by the malfunction of the retractable portion of a stretcher:

For purposes of accidental disability retirement benefits, "an accident is defined as 'a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact' " * * *. "An injury which occurs without an unexpected event as the result of activity undertaken in the performance of ordinary employment duties, considered in view of the particular employment in question, is not an accidental injury" … . * * *

… [P]etitioner testified that when he squeezed the handle to extend the retractable head portion of the stretcher and pulled, which petitioner noted usually required "a little bit of force to push it in and out," he was able to extend it a little bit before it unexpectedly jammed — something that petitioner testified had never happened before. Petitioner testified that thereafter it took four firefighters banging on the handle with tools to finally extend the head section to the proper position. Although extending the retractable head portion of the stretcher was no doubt part of petitioner's job duties, the precipitating external event, i.e., the jamming of the retractable head section of the stretcher, was sudden, unexpected and not a risk in his ordinary employment duties. As petitioner's testimony reflects, this appears to have been a malfunction in the equipment … . Matter of Hamblin v DiNapoli, 2024 NY Slip Op 03787, Third Dept 7-11-24

Practice Point: Injury caused by an equipment malfunction can constitute a compensable "accident" under the Retirement and Social Security Law.

JULY 11, 2024