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Weekly Reversal Report
August 12 – 16, 2024

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ADMINISTRATIVE LAW, CIVIL PROCEDURE.

PURSUANT TO THE PRIMARY JURISDICTION DOCTRINE, PLAINTIFFS' COMPLAINTS ABOUT FINES IMPOSED BY DEFENDANT NATURAL-GAS PROVIDER MUST FIRST BE HEARD BY THE PUBLIC SERVICE COMMISSION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the "primary jurisdiction" doctrine required that plaintiffs bring their complaint against defendant natural-gas provider before the Public Service Commission:

"The doctrine of primary jurisdiction is intended to co-ordinate the relationship between courts and administrative agencies to the end that divergence of opinion between them not render ineffective the statutes with which both are concerned, and to the extent that the matter before the court is within the agency's specialized field, to make available to the court in reaching its judgment the agency's views concerning not only the factual and technical issues involved but also the scope and meaning of the statute administered by the agency" … . "[W]hile concurrent jurisdiction does exist, where there is an administrative agency which has the necessary expertise to dispose of an issue, in the exercise of discretion, resort to a

judicial tribunal should be withheld pending resolution of the administrative proceeding" … .

Here, the Public Service Commission has primary jurisdiction over the plaintiff's claims … . The defendant was permitted to impose a $100 fine on any customer who prevented or hindered Brooklyn Union from inspecting the gas meters and gas lines of a building (see Public Service Law § 65[9][b]). Thus, the plaintiff's claim that she and other members of the prospective class were improperly charged a fine involves intricate questions of fact, thereby requiring the specialized knowledge and expertise of the Public Service Commission … . Calle v National Grid USA Serv. Co., Inc., 2024 NY Slip Op 04190, Second Dept 8-4-24

Practice Point: Here plaintiffs' complaint against defendant natural-gas provider raised issues within the expertise of the Public Service Commission. The doctrine of primary jurisdiction required that the Commission, not the court, hear the case first.

AUGUST 14, 2024

CIVIL PROCEDURE, JUDGES.

HERE THE DEFENDANTS DID NOT PRESENT A REASONABLE EXCUSE FOR FAILING TO APPEAR OR ANSWER AND DID NOT DEMONSTRATE THE EXISTENCE OF A POTENTIALLY MERITORIOUS DEFENSE; THE JUDGE SHOULD NOT HAVE, SUA SPONTE, GRANTED DEFENDANTS AN EXTENSION OF TIME TO ANSWER (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, granted defendants an extension of time to answer the complaint in the face of plaintiff's cross-motion to enter a default judgment, The defendants did not demonstrate a reasonable excuse for failing to appear or answer or the existence of a potentially meritorious defense:

… [I]n support of that branch of the plaintiff's cross-motion which was for leave to enter a default judgment on the issue of liability against the defendants, the plaintiff submitted proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defendants' default in answering or appearing … . The defendants' motion, which was, in effect, pursuant to CPLR

3211(a)(4), was untimely, since it was made after the time to file an answer had lapsed … . By not opposing the facially adequate branch of the plaintiff's cross-motion which for leave to enter a default judgment, in form or in effect, the defendants did not meet their burden of establishing a reasonable excuse for their default and demonstrating the existence of a potentially meritorious defense to the action. Accordingly, that branch of the plaintiff's cross-motion which was for leave to enter a default judgment on the issue of liability against the defendants should have been granted … , and the Supreme Court erred by, sua sponte, granting the defendants an extension of time to answer the complaint … . Digital Direct & More, Inc. v Dialectic Distrib., LLC, 2024 NY Slip Op 04196, Second Dept 8-14-24

Practice Point: Here is another example of the appellate courts cracking down on "sua sponte" rulings on motions which have no support in the record.

AUGUST 14, 2024

CONTRACT LAW, CONSTRUCTION BOND.

FAILURE TO COMPLY WITH THE NOTICE OF DEFAULT REQUIREMENTS IN THE BUILDING-CONSTRUCTION BOND PRECLUDED RECOVERY UNDER THE BOND FOR CONSTRUCTION DELAYS (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Friedman, determined plaintiff's failure to comply with the notice of default requirements in the building-construction bond precluded recovery under the bond for construction delays:

With regard to the "trigger" of the surety's obligation, paragraph 3 of the A312 bond provides that "the Surety's obligation under this Bond shall arise after" … the beneficiary of the bond (1) has notified the surety and the principal that it is considering declaring a default and offered to confer with the surety and the principal to discuss how to proceed, (2) has declared a default and formally terminated the principal's right to complete the contract no earlier than 20 days after the aforementioned notice, and (3) has agreed to pay the balance of the contract price to the surety or to a new contractor chosen by the surety. * * *

Upon [plaintiff's] appeal, we affirm on the ground that JDS's claim for delay damages under the 36-floor bond is barred by [plaintiff's] failure to have complied, at any time before the bonded work had been completed, with the condition

precedent of the notice and termination procedures specified in paragraph 3 of the bond. JDS Dev. LLC v Parkside Constr. Bldrs. Corp., 2024 NY Slip Op 04227, First Dept 8-15-24

Practice Point: Compliance with the notice of default provisions in an A312 building-construction bond is a condition precedent to recovery under the bond for construction delays.

AUGUST 15, 2024

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE SEXUAL ABUSE COUNT WAS FACIALLY VALID, THE VICTIM'S TESTIMONY RENDERED THE COUNT DUPLICITIOUS, REQUIRING REVERSAL ON THAT COUNT (THIRD DEPT).

The Third Department, reversing defendant's conviction of one count of sexual abuse, determined, although the count was facially valid, it was rendered duplicitous by the victim's testimony:

The evidence relative to these charges derived mostly from the victim's trial testimony, wherein she revealed that she and defendant lived in the same household during the relevant time frame and he touched her inappropriately on several occasions while in the basement of the residence. With respect to count 2, when asked on direct examination whether defendant had his clothes on, the victim answered that he would "sometimes . . . take off his shirt" and "sometimes he would have no shirt on at all" … . The prosecutor then asked the victim whether she remembered "more than one time that [defendant] didn't have a shirt on" and she stated: "I remember one time that he did not have his shirt on." On cross-examination, defense counsel asked the victim whether it was true that there were multiple times defendant "took his shirt off," to which she responded in the affirmative. She then explained that "[i]t was at least two" times and repeated this again when confronted with the fact that, during her grand jury testimony, she stated that defendant had taken his shirt off only once, clarifying that she "meant to say two."

… Where, as here, "trial testimony provides evidence of repeated acts that cannot be individually related to specific counts in the indictment, the prohibition against

duplicitousness has been violated” … . People v McNealy, 2024 NY Slip Op 04230, Third Dept 8-15-24

Practice Point: Where an indictment court charges one incident and the trial testimony indicates there were multiple similar incidents, it is impossible to tell whether the jury was unanimous in convicting under that count. The count was rendered duplicitous by the trial testimony, requiring reversal.

AUGUST 15, 2024

FAMILY LAW, CIVIL PROCEDURE, JUDGES.

THE USUAL PROHIBITIONS RE: VACATING ORDERS ISSUED OPON A PARTY’S DEFAULT DO NOT APPLY IN CHILD CUSTODY MATTERS; TO MODIFY CUSTODY, A FULL AND PLENARY HEARING IS NECESSARY; IF A PARTY DOES NOT APPEAR IN A MODIFICATION PROCEEDING, AN INQUEST SHOULD BE HELD TO CREATE A RECORD (SECOND DEPT).

The Second Department, reversing Family Court, noted that courts should be more willing to vacate orders issued upon a party’s default in child custody matters. Mother had defaulted and custody was modified awarding custody to father. Mother’s motion to vacate the modification order should have been granted:

Although the determination of whether to relieve a party of an order entered upon his or her default is a matter left to the sound discretion of the Family Court … , “the law favors resolution on the merits in child custody proceedings” … . “Thus, the ‘general rule with respect to opening defaults in civil actions is not to be rigorously applied to cases involving child custody'” … .

Moreover, modification of an existing order of custody and parental access may be made only “‘upon a showing that there has been a subsequent change [in] circumstances such that modification is required to protect the best interests of the child'” … . “‘A custody determination, whether made upon the default of a party or not, must always have a sound and substantial basis in the record'” … . “Generally, the court’s determination should be made only after a full and plenary hearing and inquiry, or, where a party failed to appear, after an inquest” … . Matter of Paez v Bambauer, 2024 NY Slip Op 04205, Second Dept 8-14-24

Practice Point: Child custody should not be modified without a full and plenary hearing, or an inquest (if a party fails to appear).

Practice Point: The rigorous rules re: vacating an order issued upon a party's default are relaxed in child custody matters.

AUGUST 14, 2024

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

ONCE AGAIN, BECAUSE THE RELEVANT BUSINESS RECORDS WERE NOT ATTACHED TO THE AFFIDAVITS, THE STATEMENTS IN THE AFFIDAVITS WERE HEARSAY; PLAINTIFF BANK DID NOT PROVE STANDING TO FORECLOSE OR DEFENDANT'S DEFAULT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action did not prove standing and did not prove defendant's default because the relevant business records were not attached to the relevant affidavits (yet another of the hundreds of reversals on this issue):

… "'[i]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted'" … . Thus, "[w]hile a witness may read into the record from the contents of a document which has been admitted into evidence, a witness's description of a document not admitted into evidence is hearsay" … . In addition, "'[a] proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures'" … . Here, neither affidavit relied upon by the plaintiff to establish its physical possession of the note stated that the affiant had personal knowledge of … the plaintiff's record-keeping practices, and the affiants did not annex the records that they relied upon to their affidavits. Thus, the affidavits were inadmissible hearsay lacking in evidentiary value.

Likewise, without the submission of the business records upon which she relied, Ballard's assertions regarding the defendant's alleged default on the loan were inadmissible … . HSBC Bank USA, N.A. v Pacifico, 2024 NY Slip Op 04198, Second Dept 8-14-24

Practice Point: If the business records described in an affidavit are not attached, the statements in the affidavit about the records are inadmissible hearsay.

AUGUST 14, 2024

JUDGES, CIVIL PROCEDURE, FORECLOSURE.

TO, SUA SPONTE, DECIDE BRANCHES OF A MOTION AND CROSS-MOTION ON A GROUND NOT RAISED BY THE PARTIES DEPRIVED PLAIINTIFF OF THE OPPORTUNITY TO REFUTE THE JUDGE'S DETERMINATION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court in this foreclosure action, determined the judge should not have decided branches of a motion and cross-motion on a ground not raised by the parties, i.e. "in the interest of justice" on the ground the action was commenced "when foreclosures were stayed due to [the[Covid-19 pandemic:"

"The lack of notice and opportunity to be heard implicates the fundamental issue of fairness that is the cornerstone of due process" … . As the plaintiff correctly contends, the Supreme Court improperly determined the subject branches of the parties' motion and cross-motion on the ground that the action was commenced when "foreclosures were stayed due to [the] Covid-19 pandemic." Sino [defendant] did not argue in support of the cross-motion that the plaintiff improperly commenced the action during any COVID-19-related stay or that it was prejudiced because the action was commenced during any COVID-19-related stay. Thus, the plaintiff was prejudiced, since it was "never afforded the opportunity to present evidence refuting the court's sua sponte determination" … . Accordingly, the court should not have determined the subject branches of the motion and cross-motion on a ground that was never raised by the parties … . Austin 26 Dental Group, PLLC v Sino Northeast Metals (U.S.A.), Inc., 2024 NY Slip Op 04187, Second Dept 8-14-24

Practice Point: Judges cannot decide motions on a ground not raised by the parties.

AUGUST 14, 2024

LIEN LAW, CIVIL PROCEDURE, CONVERSION.

HERE THE MARINA OWNER SERVED THE BOAT OWNER WITH A NOTICE OF SALE (FOR FAILURE TO PAY STORAGE FEES) BY MAIL; THE LIEN LAW REQUIRES AN INITIAL ATTEMPT AT PERSONAL SERVICE OF THE NOTICE OF SALE BEFORE RESORTING TO SERVICE BY MAIL; THE FAILURE TO MAKE AN ATTEMPT AT PERSONAL SERVICE BEFORE SELLING THE BOAT VIOLATED THE LIEN LAW; THE SALE OF THE BOAT THEREFORE CONSTITUTED CONVERSION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant did not properly serve the plaintiff pursuant to the Lien Law. Defendant, a marina-owner, sought to satisfy a garagekeeper's lien by selling plaintiff's boat because plaintiff had stopped making payments for storage of the boat. Defendant did not attempt personal service, as required by the Lien Law, and instead served plaintiff by mail. Plaintiff was entitled to summary judgment on the conversion cause of action:

A lienor may satisfy a lien against personal property by selling such property … . However, before such sale is held, the lienor "must serve a notice of sale, by personal service, within the county where [the] lien arose, unless the person to be served cannot with due diligence be found within such county" (… see Lien Law § 201). After exercising due diligence in attempting personal service of the notice of sale, a lienor may then resort to service "by certified mail, return receipt requested, and by first-class mail" to the owner's last known place of residence … . "[I]nasmuch as a garagekeeper's lien is a statutory creation in derogation of common law," the failure to comply with the statutory service requirements "renders service defective" … . The unauthorized disposition of property by a lienor to a third party without proper notice to the owner entitles the owner to damages for conversion … . …

… Since the defendant admitted that it had not exercised due diligence in attempting to serve the notice of sale by personal service before resorting to the statutory alternative of service by mail, the defendant failed to raise a triable issue of fact as to whether it properly served the plaintiff with the notice of sale before disposing of the plaintiff's boat … . Slattery v Strong's Mar., LLC, 2024 NY Slip Op 04219, Second Dept 8-14-24

Practice Point: The Lien Law requires a garagekeeper to attempt to personally serve a notice of sale before resorting to service by mail. The failure to attempt personal service of the notice of sale essentially nullifies the notice. A subsequent sale of the property to satisfy the garagekeeper's lien constitutes conversion.

AUGUST 14, 2024

NEGLIGENCE, CHILD VICTIMS ACT, COURT OF CLAIMS, CIVIL PROCEDURE.

HERE THE COMPLAINT STATED A CHILD-VICTIMS-ACT CAUSE OF ACTION AGAINST THE STATE; THE STATE ASSUMES A DUTY OF PROTECTION AGAINST HARM FOR A CHILD IN ITS CUSTODY; THE COMPLAINT WAS NOT DEFECTIVE FOR FAILURE TO ALLEGE THE STATE OWED PLAINTIFF A SPECIAL DUTY, OVER AND ABOVE THAT OWED THE GENERAL PUBLIC (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Aarons, over a concurrence, determined the complaint in this Child Victims Act action alleging sexual abuse which under the care of the state should not have been dismissed. The issue was whether the complaint must allege a special duty owed by the government to the plaintiff. The Third Department found that a special duty need not be alleged to survive a motion to dismiss under the facts alleged:

A cause of action for negligence requires proof that defendant owed the claimant a legally recognized duty, that "defendant breached that duty and that such breach was a proximate cause of an injury suffered by the [claimant]" … . That said, "an agency of government is not liable for the negligent performance of a governmental function unless there existed a special duty to the injured person, in contrast to a general duty owed to the public" … . "A special duty can arise in three situations: (1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition" … . Claimant does not dispute that he has not pleaded one of those three bases for a special duty, instead contending that he was not required to so plead because he was in OCFS's [Office of Children's and Family Services'] custody.

We agree. Mindful that our review requires us to determine "whether the alleged facts fit within any cognizable legal theory" … , claimant's failure to plead a special duty is not fatal to the extent his claim alleges negligence in the performance of obligations stemming from OCFS's custody of him during his placement at the Schenectady facility … . When a government entity assumes custody of a person, thus diminishing that person's ability to self-protect or access those usually charged with such protection, that entity owes to that person a duty of protection against harms that are reasonably foreseeable under the circumstances … . The duty of protection is coextensive with the entity's "physical custody of and control" of the person, terminating at the point the person passes out of the "orbit of [the entity's] authority" … . Thus, we have held that "[a] governmental foster care agency is under a duty to adequately supervise the children in its charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision," including "negligence in the selection of foster parents and in supervision of the foster home" … . A.J. v State of New York, 2024 NY Slip Op 04231, Third Dept 8-15-24

Practice Point; When the state assumes custody of a child, it owes the child a duty of protection against harm. Under the facts of this case, the plaintiff was not required to alleged the state owed a special duty to the plaintiff.

AUGUST 15, 2024

REAL PROPERTY LAW, CONTRACT LAW, TRUSTS AND ESTATES.

HERE THE RIGHT OF FIRST REFUSAL IN THE ORIGINAL DEED DIVIDING THE PROPERTY INTO EIGHT PARTS WAS A VALID DEFENSE TO THE PARTITION ACTION; HOWEVER, IF DEEMED TO RUN WITH THE LAND, THE RIGHT OF FIRST REFUSAL VIOLATED THE RULE AGAINST PERPETUITIES (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the right of first refusal in the original deed which divided the property into eight parts was a valid defense to the partition action. However the right of first refusal could not be enforced because it violated the rule against perpetuities:

A right of first refusal . . . is a preemptive or contractual right to 'receive an offer'" … . "[I]t is a restriction on the power of one party to sell without first making an

offer of purchase to the other party upon the happening of a contingency" … . A reasonable, valid, and enforceable right of first refusal constitutes a good defense to a partition action … . However, with narrow exceptions not applicable here, rights of first refusal are subject to the rule against perpetuities and are thus invalid if it is possible for the future interests they represent to vest outside the prescribed time period (see EPTL 9-1.1[b] …).

Here, the 1966 deed demonstrates that the right of first refusal was for the benefit of the original grantees only … . Moreover, to the extent that the surrounding circumstances demonstrate an intent that the covenant should run with the land … , the restriction would violate the rule against perpetuities (see EPTL 9-1.1[b]…). Block 865 Lot 300, LLC v Baione, 2024 NY Slip Op 04189, Second Dept 8-14-24

Practice Point: A right of first refusal in a deed is a valid defense to a partition action.

Practice Point: Here the right of first refusal in the original deed applied only to the original grantees and, if deemed a covenant which runs with the land, it violated the rule against perpetuities.

AUGUST 14, 2024

TAX LAW, CIVIL PROCEDURE, EMPLOYMENT LAW, LABOR LAW.

ABSENT AN ORDER BASED UPON AN EXCEPTION TO THE SECRECY PROVSIONS IN TAX LAW SECTION 697, THE NYS DEPARTMENT OF TAXATION AND FINANCE WAS NOT REQUIRED TO TURN OVER TAX FORMS SUBMITTED BY THE CORPORATE DEFENDANTS IN THIS LABOR LAW ACTION TO RECOVER UNPAID WAGES AND TIPS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs' subpoena demanding that the nonparty NYS Department of Taxation and Finance turn over tax forms submitted by the corporate defendants should have been quashed. The plaintiffs brought a class action to recover unpaid wages and tips pursuant to Labor Law 196-d. The relevant portion of the Tax Law prohibits disclosure of the tax forms absent an order based upon an exception in the controlling statute:

The Supreme Court should have granted that branch of the Department's motion which was to quash so much of the subpoena as sought "All Form NYS-45 for each quarter from 2009 until present submitted by or related to" the corporate defendants pursuant to Tax Law § 697 (see CPLR 2304). The Department established that it should not be required to disclose the information contained in any return filed with it, as, pursuant to Tax Law § 697(e)(1) and (2), "'[e]xcept in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful' for the [D]epartment or any of its officers to divulge the information contained in any return filed with it, and . . . it 'shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court'" … . "[A] 'proper order' is one which either effectuates the enumerated exceptions within the statute or which arises out of a case in which the report is itself at issue, as in a forgery or perjury prosecution" … . In opposition, the plaintiffs failed to identify any exceptions to the statute … or demonstrate extraordinary circumstances … . Cornejo v Rose Castle Corp., 2024 NY Slip Op 04193, Second Dept 8-14-24

Practice Point: The NYS Department of Taxation and Finance is not required to turn over tax forms pursuant to a subpoena absent a court order based upon an exception to the privacy/secrecy provisions in Tax Law section 697.

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