NEW YORK APPELLATE DIGEST, INC

Weekly Reversal Report
August 5 – 9, 2024

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts August 5 – 9, 2024, and posted on the New York Appellate Digest Website on Monday August 12, 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. Copyright 2024 New York Appellate Digest, Inc.

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CIVIL RIGHTS LAW, DEFAMATION.

DEFAMATORY STATEMENTS RELATING TO ISSUES OF BROAD PUBLIC INTEREST POSTED ON FACEBOOK MAY BE ENCOMPASSED BY THE ANTI-SLAPP STATUTE; HERE, HOWEVER, THE STATEMENTS (ALLEGATIONS OF SEXUAL ABUSE) RELATED TO A PURELY PRIVATE MATTER AND, THEREFORE, WERE NOT ENCOMPASSED BY THE STATUTE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Love, determined (1) Facebook is a "public forum" within the meaning of the anti-SLAPP statute, and (2) the allegedly defamatory statements defendants posted on Facebook involved a "purely private matter," not an issue of broad public interest, and therefore was not encompassed aby the anti-SLAPP statute. Therefore plaintiff's defamation per se cause of action properly survived dismissal:

… [T]he defendants … posted a series of responses to a post on the personal Facebook page of the plaintiff … alleging that the plaintiff had sexually abused [one of the defendants] approximately 17 years prior when she was 4 years old … .
* * *

Based upon the intent of the Legislature to redefine New York's anti-SLAPP statute as broadly as possible, and the interpretation in decisions by other state courts of their similar state anti-SLAPP statutes defining Facebook and other social media applications as public forums, we conclude that Facebook is a public forum within the meaning of Civil Rights Law § 76-a(1). …

… [T]his action is not subject to the anti-SLAPP statute because the defendants' statements published on the plaintiff's Facebook page concerned "a purely private matter" … and were "directed only to a limited, private audience" … . Although the defendants made generic reference to issues of broad public interest, their primary focus was not an issue of broad public interest. Nelson v Ardrey, 2024 NY Slip Op 04147, Second Dept 8-7-24

Practice Point: Facebook is a "public forum" within the meaning of the anti-SLAPP statute.

Practice Point: Statements which relate to purely private matters, here Facebook posts alleging sexual abuse, as opposed to statements relating to a broad public interest, are not encompassed by the anti-SLAPP statute.

AUGUST 7, 2024

CRIMINAL LAW, JUDGES, ATTORNEYS.

HERE TWO DISSENTERS ARGUED THE JUDGE DID NOT MAKE THE REQUIRED FINDINGS THAT THE PROSECUTOR'S RACE-NEUTRAL REASONS FOR PEREMPTORY CHALLENGES WERE NON-PRETEXTUAL (THIRD DEPT).

The Third Department, over a two-justice dissent, determined County Court properly denied Batson challenges to the prosecutor's peremptory challenges:

From the dissent:

Although trial courts are permitted to implicitly determine that the race-neutral explanations offered by the prosecutor are not pretextual … , we find that the language utilized by County Court cannot be construed as making an implicit determination. County Court did not state that it believed the race-neutral reasons offered by the prosecutor; instead, the court indicated that it "believe[d] there's a race-neutral reason . . . which would permit a . . . peremptory challenge by the People, not subject to Batson." This language demonstrates that the court only considered whether the People had proffered a race-neutral reason and not whether the race-neutral reason was pretextual as required under the third step of the Batson inquiry, despite defendant's arguments to this effect … . People v Morgan, 2024 NY Slip Op 04165, Third Dept 8-8-24

Practice Point: As part of a Batson juror challenge, the judge must determine whether the race-neutral reasons for a peremptory challenge are genuine (non-pretextual). Here two dissenters argued the judge did not make that determination.

AUGUST 8, 2024

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), EVIDENCE.

A SORA RISK LEVEL ASSESSMENT SHOULD INCLUDE THE POTENTIAL FOR REHABILITATION; HERE PSYCHOLOGICAL EVIDENCE AND EVIDENCE OF FAMILY SUPPORT WARRANTED A DOWNWARD DEPARTURE (THIRD DEPT).

The Third Department, reducing defendant's SORA risk level from two to one, in a full-fledged opinion by Justice Garry, over an extensive dissent, determined the psychological evidence, evidence of family support, and evidence of defendant's long-term relationships warranted the downward departure. The nature and weight of the psychological evidence, including test results, is discussed in depth:

Defendant attended college in New Hampshire but left early and did not graduate as a result of grief stemming from the loss of multiple family members. He thereafter remained in New Hampshire and worked as a soccer coach at a local high school. In 2019, defendant cultivated a short-term sexual relationship with a 14-year-old student whom he was coaching; alcohol was involved. He ultimately pleaded guilty in New Hampshire to four counts of felonious sexual assault, and misdemeanor charges related to the provision of alcohol. * * *

The potential for rehabilitation should be recognized and considered in judicial review and imposition of SORA restrictions. As has been stated, "our application of SORA and its [g]uidelines holds the promise of the recognition of rehabilitation so as to incentivize a sex offender to achieve that which this defendant has achieved" … ; this quote applies in full measure here. Through his submission of multiple psychometric test results, expert opinions and expressions of familial support, defendant has demonstrated the presence of multiple mitigating factors not considered by the guidelines. The totality of the circumstances indicate defendant poses a low risk of reoffending. Thus, in the exercise of our independent discretion, to avoid imposing lifetime and very public restrictions of a risk level two offender

upon this young defendant (see Correction Law §§ 168-h [1]-[2]; 168-i; 168-l [6] [a]-[b]; 168-q [1]), we grant his motion for a downward departure and classify him as a risk level one sex offender subject to the applicable restrictions, for the requisite 20-year period … . Essentially, where we depart from the dissent is in our willingness to more fully consider the degree of evidence of rehabilitation and the resulting diminished potential for future criminal conduct. People v Waterbury, 2024 NY Slip Op 04169, Third Dept 8-8-24

Practice Point: Here defendant presented expert psychological testimony, the results of psychological tests and evidence of strong family support at the SORA risk-level-assessment hearing. On appeal the Third Department found the evidence should have been considered by the SORA court because it demonstrated a potential for rehabilitation.

AUGUST 8, 2024

FIDUCIARY DUTY, FRAUD, CIVIL PROCEDURE.

HERE ALLEGATIONS OF FRAUD WERE ESSENTIAL TO THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION; THEREFORE THE SIX-YEAR STATUTE OF LIMITATIONS FOR FRAUD APPLIED AND THE CAUSE OF ACTION WAS TIME-BARRED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the six-year statute of limitations for fraud controlled the breach of a fiduciary duty cause of action (which was therefore time-barred):

… [T]he six-year statute of limitations governing actions based on fraud applies (see CPLR 213[8]). "'[W]here an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213(8)'" … . Here, the defendants alleged that Hollander was part owner of a limited liability company that competed directly with the defendants, that Hollander failed to disclose that alleged conflict, and that Hollander used confidential information obtained from the defendants to directly compete with them. The plaintiffs allegedly denied GFR and Friedman Group, LLC, the opportunity to purchase at least four specific properties and used trade secrets to compete with GFR and Friedman Group, LLC, on at least three specific properties. The allegations of fraud are thus essential to the breach of fiduciary duty

counterclaim, and the six-year statute of limitations applies. South Shore Estates, Inc. v Guy Friedman Realty Corp., 2024 NY Slip Op 04156, Second Dept 8-7-24

Practice Point: Where allegations of fraud are essential to a breach of fiduciary duty cause of action, the six-year statute of limitations for fraud applies.

AUGUST 7, 2024

LABOR LAW-CONSTRUCTION LAW, COURT OF CLAIMS.

CLAIMANT FELL ATTEMPTING TO MOVE FROM AN UPPER WALKWAY TO A LOWER WALKWAY; CLAIMANT WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) AND LABOR LAW 241(6) CAUSES OF ACTION (SECOND DEPT).

The Second Department, reversing the Court of Claims, determined claimant construction-worker's motions for summary judgment pursuant to Labor Law 240(1) and Labor Law 241(6) should have been granted. Claimant was attempting to move from a walkway on one level to a walkway on a lower level when the handrail swung away from him, the walkway shifted, and he fell. The defendant's failure to provide a ladder warranted summary judgment on the Labor Law 240(1) cause of action. And the violation of two Industrial Code provisions warranted summary judgment on the Labor Law 241(6) cause of action:

Although the defendant contended that the sole proximate cause of the accident was the claimant's decision to use the wooden pallet, rather than a readily available ladder, to descend from the upper walkway, the defendant failed to submit sufficient evidence to raise a triable issue of fact as to whether a proper ladder was readily available to the claimant or whether the claimant had been instructed to use a ladder rather than the wooden pallet installed between the walkway levels … . …

… [T]he defendant violated 12 NYCRR 23-1.7(f) by failing to provide "ladders or other safe means of access" from walkway levels on the work site and that this violation was a proximate cause of the accident. ,,, [T]he defendant violated 12 NYCRR 23-1.15(a) by failing to provide a safety railing that was "securely supported." Chiarella v New York State Thruway Auth., 2024 NY Slip Op 04122, Second Dept 8-7-24

Practice Point: Defendant in the Labor Law 240(1) cause of action did not demonstrate a ladder was readily available. Therefore defendant did not demonstrate claimant's failure to use a ladder to move from an upper walkway to a lower walkway was the sole proximate cause of claimant's fall.

AUGUST 7, 2024

LANDLORD-TENANT, CONTRACT LAW, CONVERSION.

THE LEASE FOR THE LAND WHERE PLAINTIFF PLANTED CROPS HAD A MUTUAL 90-DAY TERMINATION PROVISION WHICH DEFENDANTS EXERCISED; DEFENDANTS THEN DESTROYED THE CROPS MONTHS BEFORE THEY COULD BE HARVESTED; PLAINTIFFS' COMPLAINT STATED CAUSES OF ACTION FOR BREACH OF CONTRACT AND CONVERSION BASED UPON THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING AND THE THEORY OF EMBLEMENTS (THIRD DEPT).

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Pritzker, over a partial dissent, determined the complaint stated causes of action for breach of contract and conversion. Plaintiffs leased land from defendants to grow crops. There was a provision in the lease allowing termination upon 90 days notice. Plaintiffs alleged they planted crops in the fall of 2019 which could not be harvested until the fall of 2020. Defendants elected to terminate the contract effective May 2020. In May 2020 defendants entered the land and destroyed the crops with herbicide: The Third Department found that the implied covenant of good faith and fair dealing and the theory of emblements should be harmonized with the termination provision:

… [T]he purpose of the lease agreement was clear and, since both parties were aware that the land was to be used to seed, maintain and harvest the crops[*3], defendants were under a contractual duty to allow plaintiffs to fulfill this purpose under the implied covenant of good faith and fair dealing … . Against this backdrop, both parties had the express right to terminate the lease agreement with 90 days' notice. Therefore, plaintiffs' right of possession would extinguish upon rightful termination and, as such, without an express or implied obligation,

plaintiffs would be unable to recover on a breach of contract theory … . However, given the nature of the agricultural lease agreement, the implied covenant of good faith and fair dealing and the theory of emblements must be harmonized with the mutual termination provision. * * *

… [G]iven the purpose of the lease agreement as well as the early termination provision, the doctrine of emblements created an implied contractual term granting plaintiffs a right of reentry to harvest their crops in the event that defendants exercised the early termination provision. * * *

… [P]laintiffs have adequately alleged a possessory interest in the … crops because, under the doctrine of emblements, they retained a right to harvest and take away those crops after defendants terminated their tenancy early … . Together with plaintiffs' allegation that defendants destroyed the cereal crops, plaintiffs' conversion cause of action was improperly dismissed … . Van Amburgh v Boadle, 2024 NY Slip Op 04168, Third Dept 8-8-24

Practice Point: Here, although the land-lease for crop-growing included a mutual 90-day termination provision, the exercise of the termination provision must be harmonized with the implied covenant of good faith and fair dealing and the theory of emblements. Because defendants terminated the lease before plaintiffs could harvest the crops, the complaint stated causes of action for breach of contract and conversion.

AUGUST 8, 2024

NEGLIGENCE, CIVIL PROCEDURE.

PLAINTIFF, AN INNOCENT PASSENGER IN THIS TRAFFIC ACCIDENT CASE, WAS ENTITLED TO SUMMARY JUDGMENT DISMISSSING DEFENDANT'S AFFIRMATIVE DEFENSES AS AGAINST HER (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that plaintiff (Brizan), a passenger in a car involved in an accident, was entitled to summary judgment dismissing defendant's affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct on Brizan's part:

The right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident is not restricted by potential issues of comparative negligence as between two defendant drivers (see CPLR 3212[g] …). Brizan demonstrated, prima facie, that she did not engage in any culpable conduct that contributed to the happening of the accident … . Husbands v City of New York, 2024 NY Slip Op 04126, Second Dept 8-7-24

Practice Point: An innocent passenger in a traffic accident is not subject to the affirmative defenses raised by the defendant against the driver of the car in which plaintiff was riding.

AUGUST 7, 2024

NEGLIGENCE, VEHICLE AND TRAFFIC LAW.

PLAINTIFF WAS STOPPED WHEN PLAINTIFF WAS REAR-ENDED BY DEFENDANT; BECAUSE DEFENDANT DID NOT OFFER A NONNEGLIGENT EXPLANATION, PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON LIABILITY; HOWEVER PLAINTIFF MAY HAVE BEEN STOPPED ON AN ENTRANCE RAMP; THEREFORE DEFENDANT'S COMPARATIVE NEGLIGENCE AFFIRMATIVE DEFENSE PROPERLY SURVIVED DISMSSAL (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on liability in the rear-end-collision traffic accident case. However, because plaintiff may have been parked on an entrance ramp to an expressway, the comparative negligence affirmative defense properly survived dismissal:

A rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision … . Here, the plaintiff established her prima facie entitlement to judgment as a matter of law on the issue of liability through the submission of, among other things, her affidavit, which established that the plaintiff's vehicle was parked on the side of a service road to the Major Deegan Expressway in the Bronx (hereinafter the expressway), with the hazard lights

activated, when it was struck in the rear by the defendants' vehicle … . In opposition to the plaintiff's prima facie showing, the defendants failed to rebut the inference of negligence with admissible evidence … . …

The plaintiff also established her prima facie entitlement to judgment as a matter of law dismissing the defendants' affirmative defenses alleging comparative negligence by demonstrating that she was not at fault in the happening of the accident … . In opposition to the plaintiff's prima face showing, however, the defendants raised triable issues of fact as to whether the plaintiff was comparatively at fault in the happening of the accident, including whether the plaintiff's vehicle was stopped on the entrance ramp to the expressway (see Vehicle and Traffic Law § 1202[a][1][j] …). Ramirez v Greiner, 2024 NY Slip Op 04154, Second Dept 8-7-24

Practice Point: Unless defendant offers a nonnegligent explanation for a rear-end collision with plaintiff's stopped vehicle, plaintiff is entitled to summary judgment on liability.

Practice Point: However, summary judgment on liability in favor of plaintiff does not preclude a valid comparative-fault affirmative defense.

AUGUST 7, 2024

SOCIAL SERVICES LAW.

THE COMMISSIONER OF TEMPORARY AND DISABILITY ASSISTANCE CAN RECOUP MONEY PAID TO A SSI-BENEFIT-APPLICANT UNDER A WORK EXPERIENCE PROGRAM (WEP) DURING THE PERIOD THE APPLICANT IS AWAITING SSI-BENEFIT APPROVAL (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the Commissioner of Temporary and Disability Assistance can seek reimbursement of income earned in a work experience program (WEP) while awaiting approval of Supplemental Security Income (SSI) benefits:

… [T]he Commissioner offers the example of an individual who receives $14,000 in interim assistance while waiting 28 months for the Social Security Administration to render a determination on his or her SSI application. The interim assistance recipient performs unpaid work under a WEP during that period and

would have received $11,200 had a minimum wage been paid for that work. The SSI application is then approved and an initial lump sum retroactive payment of $16,800 is made, at which point the State seeks and obtains reimbursement for the $14,000 in interim assistance benefits. The benefits recipient has received $14,000 in interim assistance benefits for the 28-month pendency of the SSI application — an amount that includes the value of his or her work — and retains that money. The only effect of the recoupment upon the recipient is to reduce the retroactive SSI payment to account for the duplicative interim assistance payments for those 28 months, preventing the recipient from "double dipping" and receiving both interim assistance benefits and SSI benefits during that period.

The Commissioner's logic is compelling and, as it comports with the statutory framework, we reverse. Matter of Andersen v Hein, 2024 NY Slip Op 04167, Third Dept 8-8-24

AUGUST 8, 2024

ZONING, CONSTITUTIONAL LAW, CIVIL PROCEDURE.

NYU SUFFICIENTLY ALLEGED AN INJURY-IN-FACT ENTITLING IT TO LITIGATE THE CONSTITUTIONALITY OF A NYC ZONING RESOLUTION PROHIBITING THE CONSTRUCTION OF CLASSROOMS AND DORMITORIES IN THE SPECIAL DISTRICT; THERE WAS A COMPREHENSIVE DISSENT (FIRST DEPT).

The First Department, over an extensive dissent, reversing Supreme Court, determined plaintiff New York University (NYU) had demonstrated an "injury in fact" which provided standing to contest the constitutionality of a New York City Zoning Regulation (ZR) prohibiting the construction of classrooms and dormitories:

NYU has sufficiently alleged an injury in fact. As stated by the Court of Appeals … , "[t]he injury-in-fact requirement necessitates a showing that the party has an actual legal stake in the matter being adjudicated and has suffered a cognizable harm that is not tenuous, ephemeral, or conjectural but is sufficiently concrete and particularized to warrant judicial intervention"; while this requirement "is closely aligned with [the] policy not to render advisory opinions," "standing rules should

not be applied in an overly restrictive manner where the result would be to completely shield a particular action from judicial review" … . * * *

NYU … has alleged not just an interference with its ability or abstract interest but with its actual present intentions and desires, a showing of specific plans is not a necessary additional requirement for an injury-in-fact showing. NYU's claim that it has had a long-standing and continuing interest in expanding educational uses in the Special District whose implementation has been limited by the variance requirement is further evidenced by the fact that NYU previously put one of its Special District properties to educational use after obtaining a variance. There is no valid basis for predicating the injury-in-fact showing on evidence that NYU has expended time, money and other resources developing a particular plan for the renovation or conversion of a particular Special District property to educational uses. Judicial consideration of NYU's claim seeking a declaration as to the unconstitutionality of the ZR amendment should not require that it first experience the harm it seeks to avoid by challenging the amendment. New York Univ. v City of New York, 2024 NY Slip Op 04183, First Dept 8-7-24

Practice Point: Consult this decision for an explanation of what constitutes an injury-in-fact providing a party with standing to litigate the constitutionality of a zoning provision.

AUGUST 8, 2024

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