Appellate Division Review

Fine-Tuning the Law in Business, Family, Government

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"I wear my reversals like badges of honor," a trial judge once remarked when discussing his (largely positive) record on appeal. Based on our review of the Appellate Division's decisions during the third quarter of 2012, New York's intermediate appellate courts have been generously decorating trial judges. Some highlights of the past quarter in the four departments are noted below.

First Department

Derivative Suits

New York courts have traditionally decided whether shareholders' claims are "derivative" or "direct" on a case-by-case basis. As a result, the distinction between derivative and direct lawsuits has been fact-dependent and difficult to pin down. In *Yudell v. Gilbert*,[1] the First Department resolved that problem by adopting a Delaware test that provides a "clear and simple framework" for determining whether a shareholder's claim is derivative or direct.

The plaintiffs in *Yudell* were trustees of an investor in a joint venture that owned a Long Island shopping center. They sued the shopping center's managing agent and others, alleging that the agent had mismanaged the property. The plaintiffs sought recovery for waste, negligence, breach of fiduciary duty and breach of contract. Supreme Court dismissed the claims because they were derivative in nature.

On appeal, in a unanimous decision authored by Justice Karla Moskowitz, the First Department affirmed the trial court, adopting a bright-line test developed in the Delaware courts.[2] Under the Delaware test, the court must consider (1) whether the alleged harm was suffered by the corporation or by the individual shareholder; and (2) who would receive the benefit of a recovery. As Justice Moskowitz explained, "[a] plaintiff asserting a derivative claim seeks to recover for injury to the business entity. A plaintiff asserting a direct claim seeks redress for injury to him or herself individually."

In *Yudell*, the First Department held that plaintiffs' fiduciary claim was derivative "because any pecuniary loss plaintiffs suffered derives from a breach of duty and harm to the business entity" in which they invested.

Issue Preclusion

When a question has been decided against litigants in a proceeding where they had a full and fair opportunity to contest it, issue preclusion (also known as "collateral estoppel") bars them from relitigating it in future proceedings. Thus, one adverse decision may become the proverbial gift that keeps on giving.

In *Feinberg v. Boros*,[3] a decision authored by Justice James M. Catterson, the First Department held that parties to an arbitration cannot avoid issue preclusion by entering into a post-award agreement that limits the award's preclusive effect. When made before arbitration, agreements to limit issue preclusion may evidence the parties' intention "not to litigate fully or vigorously." But, when limitation is agreed upon *after* the parties have arbitrated "fully, vigorously and exhaustively," and when the limitation is intended to prevent particular third parties from asserting issue preclusion, it becomes "nothing more than an egregious and unenforceable attempt to impermissibly thwart fundamental collateral estoppel principles."

In a vigorous concurrence, Justice Moskowitz (joined by Justice Dianne T. Renwick) opined that agreements to limit an arbitral award's collateral effect may sometimes be enforceable, but agreed with the majority that this one was not.

Second Department

Statute of Frauds

Do you bid compulsively at public auctions? Do you crave a "fine Russian silver/enamel covered box with gilt interior"? You can place a winning bid on that item and then renege without liability if the auction house's documents fail to include the consignor's name, the Second Department held in *William J. Jenack Estate Appraisers & Auctioneers v. Rabizadeh*.[4]

Writing for a unanimous panel, Justice Peter B. Skelos explained that New York's Statute of Frauds contains an exception, under which the Statute is satisfied if "the auctioneer at the time of the sale, enters in a sale book, a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made."[5]

In *Rabizadeh*, the auction house's "clerking sheets" and related papers contained the required information, with one exception: the consignor was identified only as "#428." The panel concluded that "#428" was not "the name of the person on whose account the sale was made."

Although the auction house protested that consignors' names are commonly withheld, the Second Department was unmoved. "[T]his court is governed not by the practice in the trade, but by the relevant statute," Justice Skelos observed.

Family Court

K.M., a child, was abused by her mother's boyfriend. Does Family Court have jurisdiction over the matter? In *Jose M. v. Angel V.*,[6] a unanimous decision authored by Justice John M. Leventhal, the Second Department concluded that it did.

The Family Court Act confers jurisdiction over certain offenses committed among "members of the same family or household." Following a 2008 amendment, that phrase has encompassed persons in an "intimate relationship."[7]

In determining whether a relationship is "intimate," the Act instructs courts to consider all the relevant factors, including the nature of the relationship, the frequency with which the persons interact, and the relationship's duration. In K.M.'s case, her mother's boyfriend acted as a "quasi-stepparent." The boyfriend and the child interacted regularly, the boyfriend had dated the child's mother for over three years, the boyfriend resided with the child's mother, and the child spent substantial time visiting the mother in their home.

Even before 2008, Family Court's jurisdiction covered relations between stepparent and stepchild. The Second Department observed that bringing unmarried quasi-stepparents within the statute's scope was "consistent with the goals of a family offense proceeding, which are to 'stop the violence, end the family disruption and obtain protection.'"[8]

Third Department

Tax Law

Your mailroom likely contains envelopes, packages, boxes, forms, labels, software, stickers and pouches supplied by overnight couriers. Although the couriers expect those items to be used in shipping goods, the swag still qualifies as "promotional materials" that are exempt from sales and use taxes, according to the Third Department.

In *United Parcel Service, Inc. v. Tax Appeals Tribunal*,[9] a 4-1 decision written by Justice Leslie E. Stein,

the court considered whether materials with the UPS logo that were provided free to new customers qualified as tax-exempt "printed promotional materials."[10] Promotional materials may include advertising literature and "related tangible personal property," including "free gifts."

The Third Department ruled that the mailing supplies at issue "satisfy the ordinary meaning of 'promotional materials' because they were designed and distributed for the purpose of promoting [UPS's] business and contain a clear promotional message." In addition, Justice Stein wrote, the materials were "free gifts." "It would be illogical to eliminate an item from the category of promotional 'free gifts' because the donor realistically expects that the gift will generate increased sales; indeed, that is the very purpose of promotional materials."

Justice William E. McCarthy concurred with the majority on the ground that it was "irrational" to find the disputed items were not free gifts. Dissenting Justice E. Michael Kavanagh argued that UPS had failed to meet the heavy burden of showing that its view of the statute was "the only rational interpretation possible."

Public Officers

John H. Cunningham must be quite a guy. In 2010, the Town of Colonie made him its Commissioner of Public Works, even though he didn't reside there. Last year, the Third Department struck down the appointment because the Public Officers Law and the Town Law require that a person appointed to a local office live within the locality.[11] The Town then passed a new local law providing, among other things, that the Commissioner of Public Works need not be a resident. It proceeded to reappoint Cunningham.

This time around, the Third Department upheld Cunningham's appointment in *Ricket v. Mahan*.[12] The unanimous decision by Justice E. Michael Kavanagh explained that local laws must be consistent with "general law[s]" of the State. In contrast, "there is no requirement that a local law be consistent with a special law," which is a statute that applies to some but not all counties, cities, towns or villages.

The residency requirements in the Public Officers Law and the Town Law have been the subject of numerous exceptions, which were "grafted" onto those statutes by the Legislature. "As a result," Justice Kavanagh wrote, "each statute, in terms of the residency requirement, is a special law which can, in a given circumstance, be superseded by a local legislative enactment." Mr. Cunningham, please take your appointed seat.

Fourth Department

Marriage Equality

On June 24, 2011, New York State joined the small but growing number of states that have legalized same-sex marriage.[13] This apparently did not sit well with a group called "New Yorkers for Constitutional Freedoms," which had unsuccessfully opposed the passage of the Marriage Equality Act. A month after the Act became law, the group and three individual plaintiffs sued to overturn it, alleging that the legislation violated the Open Meetings Law.[14] In addition to a declaration that the law was invalid, the plaintiffs sought to void all marriages that had been performed pursuant to the Act.

Couples married under the Act need not fear, however. In *New Yorkers for Constitutional Freedoms v. New York State Senate*,[15] a unanimous decision written by Justice Eugene M. Fahey, the Fourth Department entered judgment upholding the Act and marriages performed under it.

The asserted ground for the challenge was that New York City's Mayor Michael Bloomberg, a registered Independent, New York City Council Speaker Christine Quinn, a registered Democrat, and Governor Andrew Cuomo, a registered Democrat, privately lobbied Senate Republicans to support the Act.

While the Open Meetings Law requires that "every meeting of a public body shall be open to the general public," it exempts conferences and caucuses that are "comprised of members of the same political party...without regard to... whether [the participants] invite staff or guests to participate in the deliberations."[16]

The Fourth Department held that the three officials who lobbied Senate Republicans were "guests," and thus were not required to be the same political party as the meetings' other participants. Further, the plaintiffs did not allege that actions taken at the meetings had caused

the harm alleged (for example, by resulting in an agreement to pass the legislation). Notably, the Act itself "was approved at a regular session of the Senate that was open to the public."

Firearms

Gun manufacturers and distributors can be sued if they violate federal firearms laws by selling guns to irresponsible dealers who, in turn, profit from sales to the criminal gun market. That's the conclusion of a Fourth Department panel in *Williams v. Beemiller, Inc.*,[17] a unanimous decision authored by Justice Erin M. Peradotto.

In 2003, Daniel Williams was shot by defendant Cornell Caldwell with a Hi-Point 9 mm semi-automatic pistol manufactured by defendant Beemiller, Inc. Caldwell had apparently misidentified Williams as a rival gang member. Beemiller had sold the gun to a wholesale distributor, who sold it in turn to defendant Charles Brown, who sold it at a gun show in Ohio to defendants Kimberly Upshaw and James Bostic along with 86 other handguns in an alleged "straw purchase." Bostic then supplied the guns to the criminal market in New York.

Defendants argued that the Protection of Lawful Commerce in Arms Act (PLCAA)[18] shielded manufacturers and sellers of firearms from liability for harm caused by the criminal misuse of their non-defective products. The PLCAA contains six exceptions, however, including one for cases where (among other things) a manufacturer or seller "knowingly violated a State or Federal statute applicable to the sale or marketing of the product."

The Fourth Department concluded that Williams' claim, as pleaded, fell within that exception. The complaint "sufficiently alleges facts supporting a finding that defendants knowingly violated federal gun laws," Justice Peradotto wrote. Among other things, plaintiffs alleged that Bostic was a convicted felon who was prohibited from purchasing firearms, and that Bostic acquired the guns through a "prohibited straw purchase" conducted by Upshaw. According to the plaintiffs, Brown "knew or should have known that Upshaw and/or Bostic were purchasing the 87 handguns for trafficking in the criminal market rather than for their personal use."

Endnotes

1 2012 N.Y. Slip Op. 05896 (1st Dept. Aug. 7, 2012).

2 *Tooley v. Donaldson*, 845 A.2d 1031 (Del. 2004).

3 2012 N.Y. Slip Op. 06114 (1st Dept. Sept. 11, 2012).

4 2012 N.Y. Slip Op. 06211 (2d Dept. Sept. 19, 2012).

5 G.O.L. §5-701(a)(6).

6 2012 N.Y. Slip Op. 06301 (2d Dept. Sept. 26, 2012).

7 Family Court Act §812(1)(e).

8 *Quoting* Family Court Act §812(2)(b).

9 2012 N.Y. Slip Op. 05991 (3d Dept. Aug. 16, 2012).

10 Tax Law §1115(n)(4).

11 *Ricket v. Mahan*, 82 A.D.3d 1565 (3d Dept. 2011).

12 2012 N.Y. Slip Op. 05773 (3d Dept. July 26, 2012).

13 L.2011, ch. 95, §3.

14 Public Officers L. Art. 7.

15 2012 N.Y. Slip Op. 05455 (4th Dept. July 6, 2012).

16 Public Officers Law §108.

17 2012 N.Y. Slip Op. 06695 (4th Dept. Oct. 5, 2012).

18 15 U.S.C. §§7901-7903.

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