Appellate Division Review

Upholding Rights and Freedoms, Both Traditional and Novel

This article first appeared in *The New York Law Journal*, July 15, 2011

by E. Leo Milonas and Frederick A. Brodie

E. Leo Milonas
Litigation
+1.212.858.1615
eleo.milonas@pillsburylaw.com

Frederick A. Brodie
Litigation
+1.212.858.1628
fab@pillsburylaw.com

E. Leo Milonas is a litigation partner at Pillsbury Winthrop Shaw Pittman LLP. He is a former Associate Justice of the Appellate Division, First Department, and the former Chief Administrative Judge of the State of New York. Frederick A. Brodie is a litigation partner in Pillsbury's New York office. Both are members of the firm's appellate practice team.

Senior litigation associate Andrew C. Smith, litigation associates Jay Dealy and Tameka M. Beckford-Young, and summer law clerks Ria Dutta and Andrea Najemy assisted in preparing this column.

Yesterday was Bastille Day. Although the French monarchy was overthrown more than two centuries ago, the fall of the Bastille still reverberates throughout the world: not only in France and America, but also in Egypt, Yemen, Libya and the many other nations where people have struggled against oppression and autocratic rule.

In New York, the state judiciary has long been an active guardian of the people's freedoms. As shown in decisions over the past three months on issues ranging from internet speech to juvenile detention, the State's intermediate appellate judges continue to fulfill that responsibility. Below is a sampling of their noteworthy, if not revolutionary, decisions from the past quarter. *Liberté, égalité, fraternité!*

First Department

Free Speech

An anonymous e-mail questioning Sandals Resorts International's hiring practices provided no ground for a defamation claim, the First Department held, rebuffing the resort operator's attempt to uncover the sender's identity. In *Sandals Resorts Int'l Ltd. v. Google, Inc.*,[1] Sandals sought extensive pre-action disclosure related to a gmail account from which the sender e-mailed criticisms of the resort operator. The e-mail included links to news items and other sites, and implied that the company's hiring practices were racist or anti-Jamaican. In a unanimous decision authored by Justice David B. Saxe, the First Department held that Sandals lacked a meritorious defamation claim against the sender.

Observing that courts "must address both the words and the context of the e-mail as a whole, as well as its broader social context," Justice Saxe referred to the "freewheeling, anything-goes" nature of internet communications, and concluded that readers give less credence to allegedly defamatory remarks on the internet – especially those in an anonymous e-mail. Because "any reasonable reader" would have understood that the writer's purpose was "to foment questioning by native Jamaicans regarding the role of Sandals' resorts in their national economy," the e-mail was not actionable. The court cautioned that it did not intend to "immunize" internet communications that "disseminate injurious falsehoods about their subjects." Rather, the First Department sought to protect against the use of subpoenas by corporations that seek "to silence their online critics" and thereby "stifle the free exchange of ideas."

Sovereign Immunity

Victims of human rights abuses perpetrated by the late Philippines President Ferdinand E. Marcos won a money judgment against the Marcos estate. Still, they could not execute against funds held in New York, the First Department ruled in *Swezey v. Merrill Lynch*.[2] In the 4-1 decision written by Justice David Friedman, the court reluctantly dismissed the enforcement action, finding that the Republic of the Philippines was a necessary party that could not be joined because it had not waived its sovereign immunity.

Seeking to enforce a 1995 judgment obtained in Hawaii federal court, the plaintiff class had zeroed in on $35 million held in a Merrill Lynch account in the name of Arelma, Inc., a company formerly owned by Marcos. Because the funds were claimed to be derived from Marcos's misuse of public office, Justice Friedman wrote, they were forfeited to the Republic under Philippine law "from the moment of misappropriation." Because the Republic possesses "an actual, current interest in the property in question," it should be joined in the action. Although dismissal for nonjoinder of a necessary party is a "last resort," the First Department refused to "put the Republic to a Hobson's choice" by forcing it to waive sovereign immunity to protect its interest in the funds. Rather, because the Philippines had a "substantial claim of ownership" to the funds, the court was "bound to give effect to the doctrine of sovereign immunity by dismissing this proceeding."

Second Department

Foreclosure

The New York courts continue to make life difficult for the owners of mortgage-backed securities in foreclosure proceedings. In *Bank of New York v. Silverberg*,[3] the Second Department took on a key industry player: Mortgage Electronic Registrations Systems, Inc. ("MERS"). MERS was created by several large mortgage industry participants to facilitate the transfer of mortgages into pools for securitization. MERS operates an electronic registry that tracks transfers of servicing and mortgage rights while remaining the nominee and mortgagee in county land records.

In *Silverberg*, the Second Department held that MERS could not assign the right to foreclose upon a mortgage if it lacked the right to, or possession of, the actual underlying promissory note. Writing for a unanimous panel, Justice John M. Leventhal explained that only a holder or assignee of both the mortgage and the note has standing to foreclose. Because MERS was neither the holder nor assignee of the note, it was "without authority" to assign the power to foreclose to the plaintiff, a trustee for the certificate holders who owned the mortgage pool. Acknowledging that the decision may have far-reaching implications, the Second Department noted that MERS "purportedly holds approximately 60 million mortgage loans." However, the court wrote, "the law must not yield to expediency and the convenience of lending institutions."

Family Court

When a juvenile is detained prior to a delinquency petition being filed, "[a] petition shall be filed and a probable-cause hearing held ... within four days." If a petition is not filed within four days, "the child shall be released."[4] Giving effect to that unequivocal statutory mandate, the Second Department held unanimously in *Matter of Kevin M.*,[5] an unsigned order, that the four-day window cannot be extended, regardless of what excuse may be offered. Thus, in the case of Kevin M., who was arrested after being observed with a stolen motor scooter, it did not matter that the four-day window ended on a Saturday, or that 21 cases were scheduled for that Friday. The strict four-day deadline "contains no indication that extensions for weekends or holidays were intended." To the contrary, the court stated that allowing any extension "would be inconsistent with the statute's general object of swift adjudication and the Legislature's concern regarding the needless detention of children."

Third Department

Taxation

"You just keep your mind on the money," Tina Turner sang in "Private Dancer." Taking that advice, the State sought to collect sales taxes on the dances performed at Nite Moves, an "adult juice bar ... where patrons may view exotic dances performed by women in various stages of undress." In *Matter of 677 New Loudon Corp. v. Tax Appeals Tribunal*,[6] a unanimous decision authored by Justice John C. Egan Jr., the Third Department agreed that

the dancers' private performances were subject to New York's sales tax. Rejecting Nite Moves' defense that the dances qualified as tax-exempt "dramatic or musical arts performances,"[7] the court observed that the club—"at a bare minimum" (pun intended?)—had failed to meet its burden of establishing that the private dances were "choreographed performances."[7] Although Nite Moves had submitted the expert testimony of a cultural anthropologist who opined that the dances were "dramatic choreographic performances," the Tax Appeals Tribunal reasonably rejected that testimony because the expert had not actually viewed any of the private dances performed at the club.

Sentencing

Under the 2009 Drug Law Reform Act,[8] convicts who meet the statutory criteria may be resentenced to a lesser term. That option is unavailable, however, if the defendant is in prison only because he violated parole after being released from his first sentence, the Third Department concluded in *People v. Chatham*.[9] Writing for a unanimous panel, Justice Leslie E. Stein confronted a split of authority on this point between the First Department (which barred resentencing for inmates who are released on parole and then put back in jail for parole violations) and the Second Department (which allowed resentencing). Moving into the First Department's camp, Justice Stein explained that the law's purpose was "to relieve prison inmates of onerous sentences of incarceration." Unlike other defendants, Mr. Chatham "could have remained at liberty by adhering to his parole conditions," in which case "he would not be eligible for resentencing" because he would not be imprisoned. It would be "contrary to the dictates of reason" if inmates' parole violations could "trigger resentencing opportunities that would otherwise be unavailable."

Stem Cells

Egg donors can be paid for their contributions to stem cell research, the Third Department held in Matter of *Feminists Choosing Life of N.Y., Inc. v. Empire State Stem Cell Bd.*[10] In a unanimous decision authored by Justice Elizabeth H. Garry, the court found that the Empire State Stem Cell Board, created by the Legislature in 2007 to fund stem cell research, did not exceed its statutory authority by authorizing compensation from the Empire State Stem Cell Trust Fund for eggs to be used to create stem cells for research. Although the Public Health Law provides that "[n]o grants" from the Fund "shall be directly or indirectly utilized for research involving human reproductive cloning,"[11] the Third Department deferred to the Board's determination that "human reproductive cloning" did not include the creation of stem cells for research or therapeutic purposes. The court also rejected the claim that knowledge derived from stem cell research could be "indirectly utilized" for reproductive cloning research. As used in the statute, the word "indirectly" applies "to the utilization of grants," not to later researchers' use of "knowledge derived from state-funded research."

Fourth Department

Liquor Law

Under Alcoholic Beverage Control Law §128, it is unlawful for a police official to hold a liquor license. But, what happens when the holder of a liquor license is elected Mayor? When Michael Kinnie, proprietor of a comedy club, was elected Mayor of the Village of Sackets Harbor, the State Liquor Authority tried to slap him with a civil penalty of $5,000. The Liquor Authority argued that Kinnie, who held a liquor license, upon his election also became an "ex officio member of the police department" under former Village Law §188.

The Fourth Department was unimpressed, and annulled the determination. In *Matter of Comedy Playhouse, LLC v. New York State Liq. Auth.*,[12] a unanimous unsigned memorandum, the appellate court observed that the section of the Village Law relied upon by the Liquor Authority had been repealed in 1972. Under current law, the court stated, "the village mayor is no longer an ex officio member of the police department nor vested with all the powers conferred upon the police."

Government Contracts

New York's Office of General Services (OGS) overstepped its authority when it included a "prevailing wage" clause in a lease of already-built, privately-owned space, the Fourth Department held in *Ellicott Group, LLC v. State Exec. Dept. Off of Gen. Servs.*[13] Under the Labor Law,[14] certain contracts for public works projects must require that workers be paid the prevailing

wage. OGS, which leases building and office space from private landlords for various state agencies, adopted a policy of inserting a prevailing wage clause in all of its standard lease agreements. The plaintiff, which owned office space in downtown Buffalo, sought a declaratory judgment that OGS lacked statutory authority to mandate that the prevailing wage be paid for maintenance work on privately owned property leased by OGS. In a unanimous opinion by Justice John V. Centra, the Fourth Department agreed. For the prevailing wage requirement to apply, Justice Centra reasoned, "there must be a public works contract." The lease of existing office space concededly was not a public works project. Thus, the court concluded, "OGS usurped the role of the Legislature in making its policy decision that prevailing wages should be paid even for work that was not public work." "[W]hen prevailing wages should be paid" is a question "for the Legislature, not OGS."

Endnotes

1 2011 N.Y. Slip Op. 04179 (1st Dept. May 19, 2011).

2 2011 N.Y. Slip Op. 05208 (1st Dept. June 16, 2011).

3 2011 N.Y. Slip Op. 00131 (2d Dept. June 7, 2011).

4 Family Court Act § 307.4(7).

5 2011 N.Y. Slip Op. 05279 (2d Dept. June 14, 2011).

6 2011 N.Y. Slip Op. 04787 (3d Dept. June 9, 2011).

7 *See* Tax Law §1105(f)(1).

8 CPL §440.46.

9 2011 N.Y. Slip Op. 04550 (3d Dept. June 2, 2011).

10 2011 N.Y. Slip Op. 05160 (3d Dept. June 16, 2011).

11 Public Health L. §265-a(2).

12 2011 N.Y. Slip Op. 02556 (4th Dept. Apr. 1, 2011).

13 2011 N.Y. Slip Op. 03447 (4th Dept. Apr. 29, 2011).

14 Labor Law §220.

The Honorable E. Leo Milonas and Frederick A. Brodie, partners in Pillsbury's litigation practice, co-authored the article "Upholding Rights and Freedoms, Both Traditional and Novel," which originally appeared in *The New York Law Journal*, July 15, 2011.

Pillsbury Winthrop Shaw Pittman LLP | 1540 Broadway | New York, NY 10036 | 1.877.323.4171