

# APPELLATE DIVISION REVIEW

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Just in time for Halloween, the Appellate Divisions as usual have supplied us with a variety of intellectual “treats,” without any “tricks.” For its seasonal offering, the Appellate Division, Fourth Department has taken a hard line against grave-robbing. The court’s decision that there is no “good faith” exception to the crimes of body-snatching, opening graves and unlawfully dissecting human corpses is discussed below, along with other advancements in the law from New York’s intermediate appellate courts during the third quarter of 2010.

## First Department

### Fraud

May a law firm be sued for aiding and abetting fraud when it prepared private placement memoranda (PPMs) soliciting investments in what ultimately was revealed as a Ponzi scheme? Yes, a First Department panel unanimously held in a forceful opinion by Justice Sallie Manzanet-Daniels in *Oster v. Kirschner*.<sup>1</sup> The case stemmed from the collapse of the Cobalt Multifamily entities, a Ponzi scheme run by two convicted criminals, one of whom the SEC had previously barred from the securities industry. Investors sued the law firm that prepared the PPMs, on which the plaintiffs had relied when investing. The lawyers knew of the principals’ criminal records, but the PPMs

failed to disclose their clients’ rap sheets. Rejecting the defendants’ challenge to the complaint’s pleading of knowledge and intent, the court ruled that aiding-and-abetting claims may be sustained against an attorney who, knowing of his clients’ criminal background, “consciously chose to look the other way” when preparing a PPM. “This Court cannot and will not endorse what is essentially a ‘see no evil, hear no evil’ approach,” Justice Manzanet-Daniels wrote.

### Sealing Orders

Confidentiality stipulations are common in commercial cases and other types of litigation. Yet, filing confidential documents under seal has become more difficult over the years. The First Department recently underscored the “substantial burden” that parties must meet to seal documents in *Mosallem v. Berenson*,<sup>2</sup> a unanimous decision authored by Justice Rosalyn H. Richter. The plaintiff, Mitchell Mosallem, was a former executive of Grey Global Group, Inc. (Grey), a leading international advertising agency, who pleaded guilty in a bid-rigging and kickback scheme. In a *pro se* civil complaint, Mosallem later sued Grey and others, alleging that bid-rigging, kickbacks and other corrupt practices were widespread at Grey. Supreme Court, New York County granted defendants’ motion to seal 44 documents that Mosallem

had submitted in opposition to the defendants' motion to dismiss.

The First Department reversed. Reminding the bar of the "broad presumption that the public is entitled to access to judicial proceedings and court records," the court found that the defendants had "failed to meet their burden of demonstrating compelling circumstances that would outweigh the public's interest." The mere fact that some documents were marked "confidential" or "private" did not control the court's decision, Justice Richter noted. The documents contained no trade secrets or information that could threaten Grey's competitive advantage. While the defendants had expressed concern that releasing the documents could "potentially humiliate them and harm their business reputations," the First Department held that "neither the potential for embarrassment or damage to reputation, nor the general desire for privacy, constitutes good cause to seal court records."

### **Torts**

Generally, violating a state statute that imposes a specific duty constitutes negligence *per se*, or may even create strict liability. In contrast, the breach of a municipal ordinance is only evidence of negligence. That familiar rule holds true even for an ordinance that was originally enacted as a state statute, the First Department ruled in *Yenem Corp. v. 281 Broadway Holdings*,<sup>3</sup> a 3-2 decision written by Justice Peter Tom. Thus, a provision of New York City's Administrative Code that regulates excavations<sup>4</sup> does not impose absolute liability upon

contractors who fail to comply.

In *Yenem Corp.*, the plaintiffs alleged that the defendants' excavation work had undermined the foundation of an adjoining building, which the Department of Buildings then ordered be vacated. Although the excavation provision began life in 1855 as a state law, in 1899, the statute was repealed and its terms were incorporated into the Administrative Code. As a result, the excavation rule could be—and has been—amended by the City. Because the excavation rule was subject to change without Legislative action, the First Department viewed it as "unsuitable ... for elevation to the status of a state statute imposing *per se* negligence or absolute liability." Since defendants had raised issues of fact as to whether they had undertaken adequate precautions and exercised due care, the First Department concluded that a trial was necessary.

## **Second Department**

### **Professional Responsibility**

The Supreme Court's Integrated Law firms representing institutional defendants frequently also represent the defendants' present and former employees in their capacity as witnesses. In a summary ruling with significant impact, however, the Second Department in *Rivera v. Lutheran Medical Center*<sup>5</sup> affirmed the disqualification of a law firm for offering to represent current and former employees of its client. Those offers, the Appellate Division held, were unlawful acts of solicitation in violation of Rule of Professional Conduct 7.3.

In *Rivera*, an employment case against a hospital, Kings County Supreme Court had disqualified defense counsel from also representing four non-party witnesses—two employees and two former employees of the defendant hospital.<sup>6</sup> The law firm was disqualified because it had contacted the witnesses and offered to represent them free of charge.

Supreme Court reasoned that the witnesses were not "alter egos" of the hospital whose acts or omissions would bind it; thus, the plaintiff would have been "entitled to informal interviews" with these witnesses "had [the hospital's counsel] not solicited them and retained them as clients." Even though the law firm was not being paid by the witnesses, the motion court viewed the defendant as having "gain[ed] a tactical advantage in this litigation by insulating [the witnesses] from any informal contact with plaintiff's counsel." Supreme Court criticized the tactic as an "end run" around the policy of promoting informal discovery practices, including private interviews of fact witnesses. The Second Department affirmed the trial court's controversial ruling in a brief memorandum decision.

### **Criminal Law**

Justification is not a defense to felony murder, a unanimous panel of the Second Department held in *People v. Timmy Lee Walker*.<sup>7</sup> After kidnapping and robbing at least two people to finance a crack cocaine and alcohol binge, Timmy Lee Walker shot one of the kidnapping victim's stepson five times, killing him. The stepson had accompanied

the kidnapping victim back to the crime scene after the latter had been released. Convicted of felony murder, Walker argued on appeal that the court should have charged the jury on the defense of justification because the stepson was armed. Writing for the court, Justice Ariel Belen disagreed, explaining that the purpose of the felony murder statute is to hold criminals responsible for all deaths, even accidental ones, that result from the danger created by their commission of certain felonies. “[H]aving created a potentially life-threatening situation, the defendant forfeits the right to use deadly physical force against the victim or any rescuer,” the court ruled. “[W]hile the defense of justification may be available to an underlying felony offense in a felony murder prosecution, it is never a defense to felony murder itself.”

### Third Department

#### Family Court Jurisdiction

Family Court may grant an order of protection to a married woman against her abusive boyfriend, even though she primarily resides with her husband, the Third Department ruled in *Jessica D. v. Jeremy H.*<sup>8</sup> Although married, the petitioner had an on-again, off-again relationship with the respondent that eventually became abusive. Writing for a unanimous panel, Justice Thomas E. Mercure explained that Family Court had jurisdiction because the petitioner and respondent were in an “intimate relationship” within the meaning of Family Court Act § 812(1)(e). Under Section 812, Family Court has jurisdiction over proceedings involving acts that would constitute certain

enumerated crimes when committed “between members of the same family or household.” In 2008, “the same family or household” was expanded to include individuals who have shared an “intimate relationship,” regardless of whether they have lived together. Where the parties have had “an intermittent sexual relationship and periodically lived together,” their relationship “fit[] within the plain terms of the amendment,” the Third Department concluded. In fact, Justice Mercure observed, it was “the Legislature’s intent—expressed both in the plain terms of the statute and the legislative history—to extend jurisdiction to cover relationships such as the parties’ herein.”

#### Economic Development Grants

New York’s Constitution prohibits gifts or loans of State funds to private entities.<sup>9</sup> That means the State Department of Agriculture and Markets cannot distribute funds to private entities for the purpose of fostering economic development, the Third Department held in *Bordeleau v. State of New York*.<sup>10</sup> According to Justice Robert S. Rose, who authored the court’s unanimous decision, it made no difference that the monies were funneled through two public benefit corporations. The State may not do “indirectly that which cannot be done directly.” Nor did it matter that the disbursements had a public purpose: the “existence of a public purpose for an appropriation that aids a private undertaking is not the test of whether it is lawful,” the court held. The defendants failed to establish “that the public benefits of the appropriations were so dominant and their private

benefits so incidental as to constitute adequate consideration as a matter of law.”

### Fourth Department

#### Grave-robbing

There is no good faith exception to the crimes of body stealing, opening graves and unlawful dissection of a human body, the Fourth Department ruled in *People v. Scott Batjer*,<sup>11</sup> affirming a funeral director’s conviction for those crimes. In a unanimous, unsigned opinion, the court rejected the defendant’s contention that the indictment should have been dismissed pursuant to the good faith exception set forth in Public Health Law §4306. Under that provision, “a person who acts in good faith in accord with the terms of [article 43] or with the anatomical gift laws of another state is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for his [or her] act.” Because the defendant was prosecuted under article 42 of the Public Health Law, which governs the treatment of cadavers, and not article 43, which concerns anatomical gifts, the exception did not apply. In any event, examining what must have been a rather gory record of a now-notorious stolen-body-parts-for-cash scheme, the court concluded that “the record does not support a determination that the defendant acted in good faith.”

#### Attorney Fees

New York’s Equal Access to Justice Act (EAJA) applies to sex discrimination cases against the state, the Fourth Department concluded in *Kimmel v. State of New York*.<sup>12</sup> Under EAJA, if the plaintiff prevails in “any

civil action brought against the state,” the court must award fees and expenses unless it finds that the state’s position was substantially justified or other circumstances would make an award unjust. In a 3-2 decision authored by Justice Erin M. Peradotto, the Fourth Department explained that EAJA’s “plain language” is not limited to actions seeking review of administrative determinations. Instead, EAJA applied to the sex harassment claim brought by the plaintiff, a former state trooper. The court explained that “the phrase ‘any civil action’ contained in the EAJA means just that—*any* civil action, including this action seeking relief pursuant to the Human Rights Law.”

### Endnotes

- <sup>1</sup> 2010 N.Y. Slip Op. 05981 (1st Dept. July 6, 2010).
- <sup>2</sup> 2010 N.Y. Slip Op. 06150 (1st Dept. July 20, 2010).
- <sup>3</sup> 2010 N.Y. Slip Op. 05703 (1st Dept. June 29, 2010)..
- <sup>4</sup> Admin. Code, tit. 28, §3309.4.
- <sup>5</sup> 2010 N.Y. Slip Op. 04168 (2d Dept. May 11, 2010).
- <sup>6</sup> 22 Misc.3d 178 (Sup. Ct. Kings County Oct. 16, 2008).
- <sup>7</sup> 2010 N.Y. Slip Op. 06821 (2d Dept. Sept. 28, 2010).
- <sup>8</sup> 2010 N.Y. Slip Op. 05616 (3d Dept. June 24, 2010).
- <sup>9</sup> N.Y. Const. art. VII, §8(1).
- <sup>10</sup> 2010 N.Y. Slip Op. 05649 (3d Dept. June 24, 2010).
- <sup>11</sup> 2010 N.Y. Slip Op. 06824 (4th Dept. Oct. 1, 2010).
- <sup>12</sup> 2010 N.Y. Slip Op. 05438 (4th Dept. June 18, 2010).