# Appellate Division Review

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Summertime, and...the workflow never stops in New York's intermediate appellate courts. During the second quarter of 2010, the Appellate Division's four departments issued groundbreaking decisions in areas that affect nearly every aspect of our lives, including who we share our lives with, where we reside, and how we enforce our $116 million judgments. Some of the most significant developments are summarized below.

## First Department

### Securities Fraud

Under federal law, people can't recover for securities fraud if they were induced to continue holding securities they already own, rather than buying or selling them. But, what about state law? A divided panel of the First Department concluded that New York law likewise offers no assistance to defrauded holders who kept their securities.

In *Starr Foundation v. American International Group*,[1] the First Department rejected a fraud claim brought against American International Group (AIG) by a charitable foundation that alleged it had planned to sell its AIG shares, but was induced not to do so by the company's false statements. In a 4-1 decision authored by Justice David Friedman, the panel found an "intractable" problem with such-claims: they are "too remote and speculative to support cognizable damages." As summarized by the court, the plaintiff sought to recover "the value it might have realized from selling its shares during a period when it chose to hold, under hypothetical market conditions for AIG stock (assuming disclosures different from those actually made) that never existed."

The panel concluded that such a claim would violate New York's "out-of-pocket rule," under which the damages for fraud are the "actual pecuniary losses sustained as the direct result of the wrong"—not the benefit of the bargain or the value of a hypothetical lost sale.

### Jury Trial

When the right to a jury trial is at issue, an appeal may turn into an archaeological excavation. That was the case in Strachman v. Palestinian Authority,[2] when the First Department confronted the question of whether the plaintiffs could have a jury decide their declaratory judgment action.

The plaintiffs were survivors of decedents who had been murdered in a terrorist machine gun attack in Israel in June 1996. In 2004, they obtained a default judgment of $116

million, and have been seeking to enforce it ever since. In Strachman, they sought to reach more than $100 million in securities and debt instruments held by Swiss American Securities Inc., arguing that the entity for whom the funds were held was an alter ego of the judgment creditors, including the Palestinian Authority (PA).

In a 4-1 decision, Justice James M. Catterson explained that the right to a jury trial was frozen with the adoption of New York's 1894 Constitution, before the declaratory judgment action was created. The court's task, therefore, was to "examine which of the traditional common-law actions would most likely have been used to present the instant claim" in the 19th century. The "gravamen" of the complaint was that the securities were held in a "fictitious name used by the judgment debtor PA to shield PA assets," in an "attempt to mislead the court and to unlawfully prevent the plaintiffs from enforcing their judgment." The court viewed those allegations as stating a claim for "tortious interference with the enforcement of a judgment," a tort that has long been recognized in New York and has been triable by jury since at least 1814.[3]

## Second Department

### Foreclosures

Although the swell of residential foreclosures arising from the subprime mortgage crisis continues unabated, New York courts have not given lenders much assistance in prosecuting these actions. Addressing a question of first impression in New York's appellate courts, the Second Department in *First National Bank of Chicago v. Silver*[4] held that compliance with the notice requirements of the Home Equity Theft Prevention Act (HETPA) is a "mandatory condition or condition precedent" to a residential foreclosure action in New York.

Writing for a unanimous panel, Justice Anita R. Florio explained that HETPA, which took effect in 2007, was enacted to protect homeowners facing foreclosure. HETPA requires the foreclosing party to serve, along with the summons and complaint, a prescribed notice to homeowners containing specific language, in particular typefaces, on paper that is a different color from the summons and complaint.[5] If the foreclosing party fails to demonstrate compliance with the notice requirement, the foreclosure action must be dismissed. Failure to comply with HETPA does not need to be asserted as an affirmative defense in the homeowner's answer, the court ruled, but instead may be raised at any time during the action.

### Subpoenas

What showing suffices to obtain documents from a nonparty in New York? Since 1984, CPLR 3101(a)(4) has required only that a party seeking discovery from a nonparty state "the circumstances or reasons such disclosure is sought or required." Still, some courts have continued to employ the previous standard, which required a showing of "special circumstances." Writing for a unanimous panel in *Kooper v. Kooper*,[6] Justice Daniel D. Angiolillo officially put the kibosh on further application of the "special circumstances" test where not required by statute.

Nonetheless, more than mere relevance and materiality is necessary to require disclosure from a nonparty. "As a matter of policy," the court explained, "nonparties ordinarily should not be burdened with responding to subpoenas for lawsuits in which they have no stake or interest unless the particular circumstances of the case require their involvement." Nonparty document discovery is properly allowed when the disclosures at issue "cannot be obtained from sources other than the nonparty."

Other circumstances may also justify a nonparty subpoena, a determination which rests "within the sound discretion of the trial court." In Kooper, the subpoenas contained a generic statement that nonparty disclosure would help "identify and value certain marital property, which is material and necessary in the prosecution and defense of this action." Both the trial and appellate courts held that statement insufficient.

## Third Department

### Same-Sex Unions

The law on same-sex marriage and its near-equivalents is still being written in New York. For example, even though the New York Legislature has not created a specific mechanism for dissolving another state's civil union, the Third Department in *Dickerson v. Thompson*[7] found that such an action falls within the Supreme Court's general jurisdiction.

The plaintiff had entered into a civil union in Vermont but was unable to obtain a dissolution there because neither party was a Vermont resident. Writing for a unanimous court, Justice Karen K. Peters concluded that New York public policy "evidence[s] a clear commitment to respect, uphold and protect parties to same-sex relationships." Thus, New York courts may recognize other states' civil unions as a matter of comity. The proceeding to dissolve a civil union was properly brought in supreme court because the subject matter of the action had not been proscribed and adequate relief was unavailable through an existing form of action.

In an enigmatic closing paragraph, however, Justice Peters wrote that the existence of subject matter jurisdiction "d[id] not in any way determine the ultimate question of what, if any, relief is available on the merits." In other words, stay tuned for further developments.

### Property Taxes

The ways in which a municipality may settle tax disputes are limited to those authorized by statute, the Third Department held in *County of Sullivan v. Town of Tusten*,[8] striking down a creative arrangement between the Town of Tusten and the Gurdjieff Foundation, a non-profit organization.

The Town had changed the foundation's tax status from non-profit to for-profit in 2008. The foundation appealed, and the Town entered into a settlement agreement under which the foundation would make an annual $10,000 "contribution" in lieu of taxes while its property remained exempt.

If you sense a potential scam at this point, you're not alone. The County of Sullivan and a local school district sued, since the Town had not sent them any portion of the foundation's contributions. Although Justice John A. Lahtinen's decision "ascribe[d] no ill intent" to the Town, the unanimous panel held that the parties' arrangement "opens the door for potential abuse, such as, among others, a governmental authority wielding the weighty power of taxation to commandeer 'contributions' from entities that are exempt from real property taxes, or a municipality negotiating an agreement to its benefit at the expense of other taxing jurisdictions."

Because the Town's agreement with the foundation "finds no support in the statutory taxing framework and also implicates a potential for abuse," the Third Department declared it void.

## Fourth Department

### Civil Commitment

Ruling on an issue that has sharply divided federal courts across the country but has not previously been addressed by a New York state court, the Fourth Department held that it is constitutional for previously convicted felons to be civilly committed based on "clear and convincing evidence" that their crimes were sexually motivated. Requiring proof beyond a reasonable doubt "may have been preferable," Justice Elizabeth W. Pine wrote for a unanimous panel in *State v. Farnsworth*,[9] but the Constitution does not require it.

The state had petitioned to have respondent Daniel Farnsworth civilly committed under Mental Hygiene Law §10 shortly before he was to be released from prison. Mr. Farnsworth had a criminal history "replete with evidence of sexually motivated offenses." He had been convicted of burglarizing homes, admittedly for the purpose of molesting young children.

Under §10.07 of the Mental Hygiene Law, effective in 2007, "a detained sex offender may be civilly committed if it is determined by clear and convincing evidence after a trial that the offender suffered from a mental abnormality, and the court thereafter concludes that the offender is a dangerous sex offender requiring confinement."

Mr. Farnsworth argued, among other things, that his constitutional right to due process was violated because requiring only "clear and convincing evidence" set the evidentiary bar too low. The Fourth Department disagreed. Noting that the U.S. Supreme Court has upheld other civil commitment statutes that incorporate "clear and convincing evidence" as the standard of proof, the appellate court found that Mr. Farnsworth's personal interest in liberty did not mandate application of the reasonable doubt standard. "[T]he fact that some states provide greater protections does not require New York to do the same," Justice Pine wrote.

**Adverse Possession**

Retroactive application of new adverse possession laws unconstitutionally interfered with property rights that vested before the laws were passed, the Fourth Department held in *Franza v. Olin*.[10] In 2008, the Real Property Actions and Proceedings Law (RPAPL) was amended to restrict the grounds on which a user of real property could obtain title through adverse possession. The amendment abrogated the common law. Six weeks after the amendments took effect, the plaintiff Sharon Franza sued for a declaratory judgment that certain property surrounding her home was hers by adverse possession.

Although the amended RPAPL governed Ms. Franza's action, Justice Erin M. Peradotto's opinion for a unanimous court found the statute unconstitutional as applied. The decision turned upon Ms. Franza's claim that she acquired title by adverse possession as early as 1985, that is, 10 years after the period of adverse possession allegedly commenced. Because "her title to the property would have vested long before the July 2008 amendments to the RPAPL," applying those amendments to impair her rights was unconstitutional. As to whether title actually had vested, the appellate panel found disputed issues of fact requiring a trial.

**Endnotes**

1. 2010 N.Y. Slip Op. 04526 (1st Dept. May 27, 2010).
2. 2010 N.Y. Slip Op. 02673 (1st Dept. March 30, 2010).
3. See *Yates v. Joyce*, 11 Johns 136 (1814).
4. 2010 Slip Op. 02511 (2d Dept. March 23, 2010).
5. RPAPL §1303(2).
6. 2010 Slip Op. 04147 (2d Dept. May 11, 2010).
7. 2010 N.Y. Slip Op. 02052 (3d Dept. March 18, 2010).
8. 2010 N.Y. Slip Op. 03524 (3d Dept. April 29, 2010).
9. 2010 N.Y. Slip Op. 03561 (4th Dept. April 30, 2010).
10. 2010 N.Y. Slip Op. 02224 (4th Dept. March 19, 2010).



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