Appellate Division Review

Spring's Leading Decisions Offer Insights and Analysis

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by E. Leo Milonas and Andrew C. Smith

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

Andrew C. Smith
Litigation
+1.212.858.1743
andrew.smith@pillsburylaw.com

E. Leo Milonas is a Litigation partner in Pillsbury's New York office. He is a former associate justice of the Appellate Division, First Department, and the former Chief Administrative Judge of the State of New York. **Andrew C. Smith** also is a Litigation partner in the firm's New York office. Associates Dina E. Yavich, Andrew J. Kim, David Babbott-Klein and Stephen R. Weingold assisted in preparing this column.

Summer time and the livin' is easy... but not yet for the justices of the Appellate Divisions who this spring have turned out scores of important decisions. For those lawyers who can get away, we hope the following review of some of the spring's leading decisions by the state's intermediate appellate judges makes for good beach-reading material (read only if you are victorious).

First Department

Right to Privacy. A living room may not be as private as it seems, the First Department concluded in *Foster v. Svenson*.[1]

In *Foster*, the First Department considered claims brought against critically acclaimed photographer Arne Svenson based on alleged violations of the statutory right to privacy. The complaint was based on Svenson's practice of using a telephoto camera lens to photograph his neighbors through the windows of their nearby luxury apartment building. Svenson's exhibit, "The Neighbors," was displayed in New York and Los Angeles; pieces from the exhibit also appeared for sale online.

In a unanimous opinion authored by Justice Dianne Renwick, the court dismissed the plaintiffs' claims, finding that the "newsworthy and public concern exemption" to the privacy statute covered many types of artistic expression, including Svenson's photos. Justice Renwick noted, however, that "[t]his case highlights the limitations of New York's statutory privacy tort as a means of redressing harm that may be caused by this type of technological home invasion," and called upon the Legislature "to revisit this important issue."

Long-Arm Jurisdiction. New York courts' long-arm jurisdiction may extend to disputes brought against foreign defendants under a contract governed by foreign law. In *Wilson v. Dantas*,[2] a divided 3-1 opinion authored by Justice Rolando Acosta, the First Department held that personal jurisdiction under New York's long-arm statute (CPLR 302) could extend to a dispute brought against Brazilian defendants, based on a contract dispute governed by Cayman Island law, on the basis that the contracts were negotiated and executed in New York.

The case involved a dispute between the plaintiff, a Citibank employee, and two Brazilian defendants—Brazilian citizen and resident Daniel Valente Dantas and Dantas' Brazilian investment fund—regarding defendants' refusal to distribute profits under the Shareholders' Agreement that

governed the investment fund. After Supreme Court (on remand from the Southern District of New York, which had dismissed for lack of jurisdiction) itself dismissed the claims for lack of jurisdiction, the First Department reversed.

The court held that because the parties conducted sufficient business within New York, long- arm jurisdiction over the claims was appropriate. Even though the claims arose solely out of the Shareholders' Agreement (governed by Cayman Island law), Justice Acosta found that the agreement, when read in conjunction with other relevant documents, comprised "a broader transaction of business in New York from which plaintiff's causes of action arise for the purposes of personal jurisdiction."

Second Department

Statutorily Required Notice. Addressing an issue of first impression in the Second Department, a unanimous panel held in *Paulus v. Christopher Vacirca*[3] that a party's failure to give notice of its motion for leave to enter a default judgment, in violation of CPLR §3215 (g)(1), is a fundamental defect that deprives the court of jurisdiction to render the judgment.

CPLR §3215(g) provides that a defendant who appears in an action, but subsequently defaults, "is entitled to at least five days' notice of the time and place" of the motion for leave to enter a default judgment. Here, defendant successfully dismissed five of the six causes of action asserted against him on a pre-answer motion. Upon his failure to answer the remaining cause of action, plaintiffs moved for and obtained a default judgment. The defendant then moved, pursuant to CPLR §5015(a)(4), to vacate the judgment on the grounds that the court lacked jurisdiction because plaintiffs failed to give defendant notice.

Writing for a unanimous panel, Justice Jeffrey A. Cohen noted that "the First, Third, and Fourth Departments have addressed the issue of vacating a default judgment for an appearing party who received no notice of the motion for leave to enter a default judgment, but with varying results." Following the First and Fourth Departments, the court held that the failure to provide proper notice was a jurisdictional defect because it deprived defendant of a fair opportunity to contest the factual sufficiency of the motion and the amount of damages sought by plaintiffs.

Tax Certiorari. Is the three-year moratorium on tax certiorari proceedings, provided for in RPTL 727(1), unconstitutional when applied to a successor property owner? Not necessarily, the Second Department held in response to a question of first impression before the Appellate Division in *Matter of ELT Harriman v. Assessor of Town of Woodbury.*[4]

RPTL 727(1) provides that where an assessment "is found to be unlawful, unequal, excessive, or misclassified," the property's assessed valuation cannot be changed for the next three succeeding assessment rolls. This three-year moratorium "prevents municipalities from increasing judicially reduced assessments in succeeding years, and likewise prevents property owners from perpetually challenging their tax assessments." RPTL 727(2) lists exceptions to the three-year moratorium; a change in a property's ownership is not one of them.

When petitioner, ELT Harriman, LLC, purchased the property at issue from Rutherford Chemical, LLC in 2007, it acknowledged that there were pending tax certiorari proceedings regarding the property, and that any tax modifications resulting from the proceedings would not alter the contract price between the contracting parties. Harriman subsequently commenced its own tax certiorari proceedings as the successor property owner, challenging the property tax assessment for 2008, 2009 and 2010.

Supreme Court granted the town's motion to dismiss the petitions on the grounds that Harriman did not fall within the scope of the enumerated exceptions to RPTL 727's moratorium. It also rejected Harriman's constitutional challenge based upon a trial court's decision in *Susquehanna*,[5] which found the moratorium to be unconstitutional with respect to a new property owner "under its unique facts."

Writing for a unanimous panel, Justice Mark C. Dillon affirmed. Distinguishing *Susquehanna*, which the trial court noted at the time "presented 'an unlikely combination of factors' that would rarely be repeated," the Second Department found no constitutional violation. Specifically, the court determined that Harriman was not a "noncomplicit transferee," unlike the new owner in *Susquehanna*, because Harriman could have undertaken steps to participate in negotiations between Rutherford and the town, but chose not to. Harriman also failed to establish that the challenged

assessment "exceeds the property's fair market value so as to render the assessment unconstitutional."

Third Department

Voting Rights. Do you own a second home and want to participate in the democratic process in that town? Now you can. In *Matter of Maas v. Gaebel*,[6] the Third Department found that part-time residents are eligible to choose the part-time town to cast their votes for public offices.

Presiding Justice Karen K. Peters authored the opinion on behalf of the unanimous panel, which reversed Supreme Court's opinion invalidating Lake Huntington part-time residents' absentee ballots. The Third Department noted that the Election Law[7] does not "preclude a person from having two residences and choosing one for election purposes provided he or she has 'legitimate, significant and continuing attachments' to that residence.'" To satisfy the Election Law requirements, individuals "must manifest an intent, coupled with physical presence 'without any aura of sham.'"

The Third Department found that Supreme Court's decision was based on its "faulty perception that 'the issue is where [voters'] permanent home is as opposed to a vacation home.'" However, "the inquiry is not which of [the Lake Huntington voters'] dual residences is 'the more appropriate one' for voting purposes, but whether the residence held by [them] is a legitimate one." The court concluded it was, given that, among other things, the voters had owned homes for nearly a decade (several for over 30 years), and each paid local property and school taxes and water and sewer fees. As such, the voters established "legitimate, significant and continuing attachments to the Town for the indefinite future such that they should be permitted to choose their Lake Huntington residence for voting purposes."

Though Supreme Court expressed concern "that the conceded purpose for [the voters'] change in voting residence was, in part, to attempt to express their political views," Justice Peters explained that "the fact that one's position on a specific political issue may serve as a motivating factor to register to vote in a place where he or she established a bona fide residence does not render such residence a 'sham.'"

Judicial Retirement. "Double-dipping" is back. State court administration officials cannot pass a rule preventing simultaneous collection of salary and retirement pension income by state Supreme Court justices after they stay on the bench past the age of 70, the Third Department held in *Matter of Loehr v. Administrative Board of the Courts of the State of New York*.[8]

New York state judges reach constitutionally mandated retirement at age 70. Supreme Court justices can seek certification by the Office of Court Administration (OCA) to remain on the bench for two three-year periods under Judiciary Law §115 (until age 76). The administrative board of the OCA, composed of the Chief Administrative Judge and the presiding justices of the four Appellate Divisions, adopted a new rule in October 2013 intended to stop the practice of collecting both an active judicial salary and a public retirement pension after age 70, commonly known as "double-dipping." Under the rule, Supreme Court justices would not be approved for certification (or recertification) by the OCA unless they agreed to defer their public pensions until they left the bench.

Supreme Court upheld the OCA's policy against double-dipping after three elected Supreme Court justices sued to block the rule.

In an opinion authored by Justice Christine M. Clark, a unanimous panel of the Third Department reversed. The court held that, "as a matter of law," Retirement and Social Security Law §212 preempts OCA's ability to implement a policy such as the one at issue here. The statute "explicitly allows New York public employees—including Supreme Court justices—to retire in place and continue to work while collecting their state pension." Thus, the court found that "respondent's policy is illegal and contrary to law."

While acknowledging OCA's "unfettered discretion" to make individual certification decisions, Justice Clark explained that respondent's "act of adding a condition of recertification that is not included in the NY Constitution, the Judiciary Law or the Retirement and Social Security Law cannot be sustained."

Fourth Department

Public Health Law. Is a group home a "residential health care facility?" In *Burkhart v. Mazurkiewicz*,[9] the Fourth Department confronted the question of whether Public Health Law §2801-d,[10] which creates a cause of action for patients at a "residential healthcare facility" against the facility for violations of contractual or legal obligations, extends to a

group home for the developmentally disabled. The court concluded that, because the group home did not serve "principally" as a facility "for the rendering of health-related service," §2801-d did not apply.

Brian Burkhart, a developmentally disabled resident of a group home, filed a negligence suit against the home, alleging that the home had responded inadequately to seizures he suffered, and allowed him to wander into a busy roadway, where he was struck by a car. Burkhart filed suit under §2801-d based on the theory that his group home provided a "health-related service." The trial court agreed, denying the home's motion to dismiss.

The Fourth Department reversed, holding that §2801-d did not apply. The court noted that the group home was governed by the Mental Hygiene Law, which classifies a group home as an "individual residential alternative" community residence, which provided "individualized protective oversight" for persons who are developmentally disabled and need "supportive interpersonal relationships, supervision, and training assistance in the activities of daily living."[11] The court concluded that, while a group home's duties might include some "physical care" for residents, it did not serve principally as a facility for the rendering of health-related services for purposes of Public Health Law §2801-d.

Endnotes

1 2015 N.Y. Slip Op. 03068 (1st Dept. April 9, 2015).

2 2015 N.Y. Slip Op. 03088 (1st Dept. April 14, 2015).

3 2015 N.Y. Slip Op. 02944 (2d Dept. April 8, 2015).2015.

4 2015 N.Y. Slip Op. 03356 (2d Dept. April 22, 2015).

5 *Susquehanna Dev. v. Assessor of the City of Binghamton*,185 Misc. 2d 267 (Sup. Ct. 2000).

6 2015 N.Y. Slip Op. 04353 (3d. Dept. May 21, 2015).

7 Election Law §1-220.

8 2015 N.Y. Slip Op. 05243 (3d Dept. June 18, 2015).

9 2015 N.Y. Slip. Op. 04974 (4th Dept. June 12, 2015).

10 N.Y. Pub. Health Law 2801-d .

11 14 N.Y.C.R.R. 686.99.