

APPELLATE DIVISION REVIEW

Foreign Judgments, Insurance, Resentencing, Criminal Appeals

This article was originally published in the *New York Law Journal* on April 18, 2014.

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"If no appeal were possible," a British jurist wrote, "this would not be a desirable country to live in."¹

In New York, litigants may prosecute interlocutory appeals. Thus, New York provides litigants with more opportunity to appeal than the federal system and some other states. That must make New York an extraordinarily desirable place in which to live. At least, as appellate lawyers, we think so.

Below, we summarize legal advancements from the first quarter of 2014 in the Appellate Division, where Justices from each of the four Departments have worked tirelessly to make New York a better place.

First Department

Foreign Judgments. Is the money judgment of a foreign criminal court, awarding compensation to a fraud victim, enforceable by the victim in New York? A unanimous panel of the First Department answered "yes" in *Harvardsky Prumyslovy Holding v. Kozeny*.²

The issue, which Justice Peter Tom observed "appears to be one of first impression," arose after a Czech Republic criminal court rendered a judgment against the defendant for looting investment funds. In addition to his lengthy prison sentence, the defendant was ordered to pay the plaintiff, a defrauded investor, nearly

\$410 million as "compensation for damage to the victim."

The plaintiff subsequently learned that defendant, who had fled to the Bahamas, held \$22 million in a New York account through a shell corporation. The plaintiff asked the New York courts to recognize and enforce the Czech judgment so it could execute against the account.

The defendant protested that, because the judgment was rendered by a foreign criminal court, it must be a "fine or other penalty" that cannot be enforced in New York.³ "The statutory basis for denying enforcement is predicated on the classification and purpose of the judgment, not the court that issued it," Justice Tom explained for a unanimous panel. Because the Czech judgment provided restitution "to compensate the victim for actual damages," it was not a penalty or fine, and therefore could be recognized and enforced.

Impossibility. In a case of first impression that "aptly illustrates the well-known axiom that cautions against mixing business with pleasure," the First Department held that a stipulated order of protection prohibiting all contact between plaintiff Hilary Kolodin, a professional jazz singer, and defendant John Valenti, her former romantic partner,

rendered it impossible for Kolodin to perform her contracts with Jayarvee, Inc., a management company owned by Valenti.

To resolve a proceeding in Family Court that resulted in a temporary order of protection, Valenti had stipulated that he would have “no further contact” with Kolodin, including through third parties (other than counsel). Kolodin then sued Valenti and Jayarvee, seeking rescission of her contracts with Jayarvee and a declaration that Jayarvee was in breach. Writing for a unanimous panel in *Kolodin v. Valenti*,⁴ Justice Rolando T. Acosta explained that the order of protection made performance of recording contracts between Kolodin and Jayarvee “objectively impossible.”

Jayarvee could not enforce its contracts with Kolodin because doing so would require interaction between Kolodin and Valenti, who was Jayarvee’s President and sole shareholder. “[R]ecording and management contracts are for personal services, so they require substantial and ongoing communication” between the parties. The protective order had “destroyed the means of performance by precluding all contact” between the parties, the court wrote. Therefore, Kolodin’s recording and management contracts with Jayarvee were properly terminated due to impossibility of performance.

Defamation. Being fired by a client is unpleasant. Having the client accuse you of malpractice in the dismissal letter is miserable. Still, a lawsuit for defamation is not the proper response, the First Department ruled in *Frechtman v. Gutterman*,⁵

a unanimous decision authored by Justice David B. Saxe.

In *Frechtman*, an attorney with more than 60 years’ experience sued a former client who had terminated their relationship. The client had fired the lawyer by sending letters that accused him of inadequate representation, “mistakes,” “oversights,” “misconduct, malpractice, and negligence.” Viewed in context, Saxe wrote, those statements amounted only to “the opinions and beliefs of dissatisfied clients about their attorney’s work.” They were not “assertions of provable fact, or claims supported by unstated facts.”

Even if the letters had been defamatory, they would be protected by both absolute and qualified privilege, the First Department added. Statements made in the context of a legal proceeding – including a letter terminating an attorney’s services – enjoy absolute immunity from suit. Further, qualified immunity attaches to non-malicious “communications upon a subject matter in which both parties [have] an interest.” In the First Department’s view, both privileges attached to the disgruntled client’s accusations.

“As a matter of public policy,” Saxe concluded, “clients must be permitted to make such claims, or complaints, directly to their attorneys, and to their attorneys alone, without threat of a lawsuit.”

Second Department

Insurance. Frustrated by your health insurer’s testudinal claims processing? The Second Department feels your pain and has given you a private right of action.

In *Maimonides Med. Ctr. v. First United Am. Life Ins. Co.*,⁶ a unanimous decision authored by Justice Leonard B. Austin, the Second Department ruled that the Prompt Pay Law⁷ includes an implied private right of action to recover the face amount of health insurance claims plus 12 percent statutory interest per year.

The Prompt Pay Law requires health insurers to pay or dispute claims within a set time. The plaintiff, a hospital, had rendered \$19 million in services to six patients with health policies issued by the defendant insurer. The insurer neither paid the hospital’s claim nor formally disputed it. In court, the insurer argued that the Prompt Pay Law vested the Superintendent of Insurance with sole authority to enforce its provisions.

The Second Department disagreed. The statute provides that insurers who violate its standards “shall be obligated” to pay claimants the amount of the claim plus interest.⁸ In the court’s view, that obligation “militates in favor of the recognition of an implied private right of action to enforce such rights.” Indeed, the court observed, the Prompt Pay Law “contains all of the indications of the availability of an implied private right of action” as set forth in governing law.

Actual Innocence. Addressing an issue of first impression in the New York appellate courts, the Second Department has held that a defendant’s claim of “actual innocence” can support relief under CPL 440.10(1)(h), which authorizes vacatur of a conviction obtained in violation of the defendant’s constitutional rights.

Derrick Hamilton was convicted of murder based on his girlfriend's testimony, which she later recanted. He filed a series of motions to vacate his conviction, the last of which asserted a free-standing claim of actual innocence based on alibi testimony.

Writing for a unanimous panel in *People v. Hamilton*,⁹ Justice Sylvia O. Hinds-Radix held that the defendant had made a prima facie showing of "possible merit to warrant a fuller exploration" by a court. Although Hamilton will now receive a hearing, the Second Department cautioned that a defendant who has been convicted "no longer enjoys the presumption of innocence, and in fact is presumed to be guilty." Thus, on remand, Hamilton must prove his innocence by "clear and convincing evidence."

Resentencing. Parolees as well as prisoners may now apply for resentencing on drug convictions, the Second Department held in *People v. Brown*,¹⁰ a unanimous decision by Justice Jeffrey A. Cohen.

In 2004, the New York Legislature began reforming the harsh punishments that had been adopted in the Rockefeller Drug Laws during the early 1970s. The Drug Law Reform Act of 2009 allowed persons "in the custody of the department of correctional services" to apply for resentencing if their case met certain criteria. In 2011, the Department of Correctional Services merged with the Division of Parole to create a single agency, the Department of Corrections and Community Supervision. The resentencing statute was amended to cover persons "in the custody" of the new agency, DOCCS.¹¹

Did that mean parolees could also be resentenced? Yes it did, Justice Cohen ruled. Under related statutes, a non-incarcerated parolee remains "within the legal custody" of DOCCS. Thus, "a plain reading of the statute leads to the conclusion that a non-incarcerated parolee is eligible to apply for resentencing." Had the Legislature intended to limit relief to incarcerated offenders, it would have said so.

Third Department

Executive Law. Last June, an Albany County judge threatened to upset the entire state parole system by annulling a determination of the Board of Parole because the Board had failed to promulgate written rules regarding risks and needs assessments pursuant to a 2011 amendment.

The Third Department set things right in *Montane v. Evans*,¹² a decision authored by Presiding Justice Karen K. Peters. The relevant statute required the Board to adopt "written procedures" for use in making parole release decisions.¹³ Those procedures are intended to "assist" Board members in determining which inmates may be paroled. In October 2011, the Chair of the Division of Parole issued a memorandum to Board members "specifically addressing the amendment" and "providing guidance concerning application of the statutory guidelines in light of the changes effectuated by the amendment."

That memorandum was all that was necessary. The Third Department found "no indication" that the amendment "required the promulgation of formal rules and regulations." If the Legislature had intended

to require formal rulemaking, the appellate court ruled, "it could have explicitly said so, as it has in numerous other statutory provisions." Moreover, the Legislature did not intend the written procedures to be "determinative of whether an inmate could obtain release to parole."

Fourth Department

Criminal Appeals. The Appellate Division can reduce a murder conviction to the lesser included offense of manslaughter where the evidence is not legally sufficient to support the greater offense, even if the defendant has challenged only the weight of the evidence, the Fourth Department ruled in *People v. Heatley*.¹⁴ The fragmented court generated lengthy dissenting and concurring opinions that cast a cloud over the result.

Todd Heatley was convicted of murder after he stabbed the victim eight times with two knives, left the scene, and discarded the knives (which were later recovered by police). On appeal, Heatley challenged the weight, rather than sufficiency, of the evidence.

If the weight of the evidence does not support a conviction, the governing statute requires that the appellate court "must dismiss" the indictment.¹⁵ The Fourth Department obviously did not feel comfortable dismissing the indictment. Instead, it reduced the defendant's conviction to manslaughter in the first degree.

Writing for the majority, Presiding Justice Henry J. Scudder acknowledged that "the legislature explicitly provided the alternative remedy of reducing a conviction to a lesser included offense if the evidence was

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legally insufficient to support the conviction but was *legally sufficient* to support the conviction of a lesser included offense,” while “the statute is silent with respect to that remedy if the verdict is against the weight of the evidence.” (Emphasis in original.)

The Fourth Department then opined that, based on the location of the stab

wounds and the fact that the victim apparently was the aggressor, the evidence was insufficient to support a finding of intent to kill. It acted under the statutory section applicable to cases of insufficient evidence, which allows an appellate court to “modify the judgment by changing it to one of conviction for the lesser offense.”¹⁶ Justice Scudder observed that the

Appellate Division was not bound to dismiss the indictment simply because the defendant’s appeal challenged weight, rather than sufficiency, of the evidence.

Endnotes

- ¹ *The Queen v. Justices of County of London*, L.R. 2 Q.B. 492 (1893).
- ² 2014 N.Y. Slip Op. 02250 (1st Dept. Apr. 1, 2014).
- ³ See CPLR §5301(b).
- ⁴ 2014 N.Y. Slip Op. 00745 (1st Dept. Feb. 6, 2014).
- ⁵ 2014 N.Y. Slip Op. 00437 (1st Dept. Jan. 23, 2014).
- ⁶ 2014 N.Y. Slip Op. 01441 (2d Dept. Mar. 5, 2014).
- ⁷ Insurance Law § 3224-a.
- ⁸ Insurance Law § 3224-a(c)(1).
- ⁹ 2014 N.Y. Slip Op. 00238 (2d Dept. Jan. 15, 2014).
- ¹⁰ 2014 N.Y. Slip Op. 00524 (2d Dept. Jan. 29, 2014).
- ¹¹ CPL §440.46(1).
- ¹² 2014 N.Y. Slip Op. 01659 (3d Dept. March 13, 2014).
- ¹³ See Executive Law §259-c(4).
- ¹⁴ 2014 N.Y. Slip Op. 01085 (4th Dept. Feb. 14, 2014).
- ¹⁵ CPL §470.20(5).
- ¹⁶ CPL §470.15(2)(a).

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