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Appellate Division Review

Criminal, Business, Immigration Matters

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As this winter's cold gives way to spring flowers, the Appellate Division has experienced its own blossoming. This year has already seen 10 judges appointed to fill vacancies across the Appellate Division. They join their colleagues already hard at work resolving new and thorny issues of New York law. Below, we highlight some of the Appellate Division's leading decisions from the first quarter of 2016.

First Department

Employment Discrimination. While ex-offenders deserve a fresh start, working for the police department might not be the right place to begin. In *Matter of Belgrave v. City of New York*,[1] the First Department decided an issue of first impression and concluded that a law enforcement agency may reject a job application for a civilian position based solely on the applicant's prior criminal conviction.

After the NYPD denied the petitioner's application for a job as a 911 dispatcher based on her prior criminal conviction, she filed suit, arguing that the NYPD violated her rights under Correction Law article 23-A. That statute prohibits employers from discriminating against a prospective employee based on his or her criminal record (unless the employer determines there is a direct relationship between the offense and the duties of the position, or the employment would pose an unreasonable risk to the public).[2]

The statute expressly does not apply to job-seekers applying for "membership in any law enforcement agency," but the petitioner argued that the exception should be read narrowly to cover only applicants for positions with the authority to enforce the law (i.e., police officers and peace officers), and not to civilian employment at a law enforcement agency.

The First Department disagreed. In a unanimous, unsigned opinion, the court concluded that, although the term "membership" is undefined in the statute, its meaning is broad enough to encompass anyone who applies to a law enforcement agency. Notwithstanding the statute's intent "to eliminate the effect of bias against ex-offenders that prevented them from obtaining employment," the express exemption for law enforcement agencies includes civilian positions, such as 911 dispatchers, who have access to confidential information and are often "the first point of contact between the public and law enforcement."

Foreign Corporations. The First Department recognized its own limits in *Matter of Raharney Capital v. Capital Stack,*[3] overturning a prior decision and joining the Second and Third Departments to conclude that a New York court lacks the power to dissolve a foreign limited liability company.

The petitioner and respondent formed a limited liability company under Delaware law, with its sole place of business in New York County. From its inception, however, the LLC was plagued by the parties' inability to work together, including their inability to agree on the terms of an operating agreement. The petitioner asked a New York court to dissolve the LLC, relying on *Matter of Hospital Diagnostic Equipment Corp.*,[4] a 1994 First Department decision that rejected a challenge to the court's jurisdiction to dissolve a foreign corporation.

Writing for the unanimous panel, Justice Rosalyn H. Richter concluded that *Hospital Diagnostic* should no longer be followed and that the First Department agreed with "the near-universal view" that the state under whose law an entity was formed should be the place that determines whether the entity is dissolved. While New York courts may have jurisdiction over the internal affairs of a foreign corporation doing business in New York, the court explained, dissolution is a different matter: "An order of dissolution from a New York court would infringe on the sovereign authority of another state by, in effect, forcing that state to extinguish an entity formed under its own laws."

Second Department

Pharmacists' Duty of Care. Is a pharmacist's duty of care limited to filling a prescription precisely as directed by the prescribing physician? Or must a pharmacist also exercise his or her own professional judgment in dispensing prescription drugs? The Second Department in *Abrams v. Bute*[5] struck an intermediate position between these two extremes.

The plaintiff's decedent underwent surgery, was given a painkiller in the hospital, and was then prescribed the same painkiller for home use. The pharmacist filled the prescription precisely according to the physician's instructions. Shortly after taking the first dose at home, the decedent died from acute intoxication from the painkiller. The decedent's wife sued the physician, the pharmacist, and the pharmacy for negligence, alleging that the physician had prescribed too high a dose given the decedent's lack of prior exposure to the drug and the pharmacist failed to confirm that the dosage was appropriate.

In a unanimous decision written by Justice Robert J. Miller, the Second Department dismissed the claims against the pharmacist and pharmacy. In light of the "limited precedent" in New York regarding the scope of a pharmacist's duty of care, the Second Department took the opportunity to clarify that, "when a pharmacist has demonstrated that he or she did not undertake to exercise any independent professional judgment in filling and dispensing prescription medication, a pharmacist cannot be held liable for negligence in the absence of evidence that he or she failed to fill the prescription precisely as directed by the prescribing physician or that the prescription was so clearly contraindicated that ordinary prudence required the pharmacist to take additional measures before dispensing the medication."

In *Abrams*, the pharmacist filled the prescription exactly as the physician instructed, and otherwise had no information that would lead her to believe that the drug dosage was contraindicated for the decedent's condition.

Extending Orders of Protection. In 2010, the New York Legislature amended the Family Court Act (FCA) to allow the court to "extend [an] order of protection [OoP] for a reasonable period of time upon a showing of good cause" (previously, such an extension required a showing of "special circumstances"). In *Matter of Molloy v. Molloy,*[6] the Second Department got its first opportunity to define what constitutes "good cause."

The petitioner secured a two-year OoP against her husband. As the expiration date of the OoP approached, petitioner moved for a five-year extension in part because the Criminal Court had issued its own two-year OoP against the husband for violating the initial OoP. The Family Court denied the petitioner's motion on the grounds that, because the Criminal Court had already issued its OoP, petitioner had failed to establish good cause for an extension from the Family Court.

Justice Cheryl E. Chambers, writing for the unanimous panel, reversed.

The court noted that the legislative history showed that the intent of the 2010 FCA amendments was to make it easier to obtain OoP extensions: "The Legislature recognized that victims should not have to wait for the commission of another family offense before seeking an extension."

Relying on a New Hampshire Supreme Court opinion construing an almost identical statute in that state, the court held that, in determining whether good cause has been established, a court should consider (i) the nature of the relationship between the parties; (ii) the frequency of interaction between the parties; (iii) any subsequent instances of domestic violence or violations of the existing OoP; and (iv) whether under current circumstances concern for the safety and well-being of the petitioner is reasonable. These factors were met here, where the petitioner had a well-founded fear that the respondent might stalk, harass, or attack her, and the petitioner's need to interact with the respondent in connection with child custody and visitation issues could subject her to a recurrence of violence.

Involuntary Deportation. Addressing an issue of first impression in the Second Department, the court in *People v. Shim*[7] held that a defendant's appeal of an adverse ruling in a Sex Offender Registration Act (SORA) proceeding does not become academic merely because the defendant is deported while the appeal is pending.

Defendant pleaded guilty to attempted rape and was sentenced to four years' imprisonment. In anticipation of the defendant's release, the Board of Examiners of Sex Offenders assessed defendant as a level-one sex offender under the SORA guidelines, but in light of the extreme brutality of the defendant's crime, recommended that his risk level be increased to level two. The People adopted the recommendation, and the Supreme Court agreed. Defendant filed a notice of appeal, but was involuntarily deported while the appeal was pending.

In a unanimous decision written by Justice John M. Leventhal, the Second Department concluded that the defendant's absence did not render the appeal academic. Unlike instances where a defendant flees the jurisdiction to evade the law, thus justifying dismissal of an appeal, the defendant here was deported involuntarily. Moreover, the outcome of the appeal would have important consequences for the defendant (who would have to register as a level two offender, notwithstanding his deportation), and the defendant's continued participation in the appeal was not necessary. Proceeding to the merits, the court concluded that the Supreme Court did not abuse its discretion in granting an upward departure in light of the particularly violent nature of the sexual assault.

Third Department

Affirmative Covenants. All good things must come to an end, the Third Department teaches in *Niagara Mohawk Power Corp. v. Allied Healthcare Products.*[8] Justice Eugene P. Devine, writing for a unanimous panel, held unenforceable a century-old covenant requiring a hydroelectric facility to provide free electricity to a neighboring land owner.

In 1899, the owners of a textile mill on Kinderhook Creek deeded their water rights to the builder of a new hydroelectric power generation facility. Because the mill could no longer be powered by water from the creek, the builder agreed in return to supply the mill with free electricity. Since then, the ownership of the mill changed (and the mill switched from producing textiles to medical products) and the hydroelectric facility lay inactive for a time, but the owners of the facility (now National Grid) continued to provide free electricity to the mill. Shortly after National Grid sold its interest in the facility in 2008, however, it filed suit seeking a declaration that the power covenant was no longer enforceable.

The Third Department agreed, notwithstanding the fact that it found the covenant satisfied all the requirements to run with the land. Affirmative covenants are disfavored because they may place undue restrictions on the use of land in perpetuity, and the court cited evidence of such a burden here: the facility had not consistently generated electricity—indeed, it was presently incapable of directly providing usable electricity to the mill—and the mill itself had not been in continuous use. "To find that the power covenant remains enforceable under these circumstances would render it an 'onerous burden in perpetuity'...and overlook the very real changes in the hydroelectric facility and the manner for distributing electricity that defeat the original purpose of the power covenant."

Fourth Department

Police Stop. It may not be polite to stare, but you cannot be arrested because of it, the Fourth Department concluded in *People v. Damone Savage*.[9]

While conducting a traffic stop, Buffalo police officers noticed the defendant and two others "staring" at them while walking down the sidewalk on the other side of the street. After concluding the traffic stop, the officers pulled up alongside the men and asked, "What's up, guys?" The defendant put his head down and started walking away at a faster pace, at which point the officers observed the defendant drop a gun holster on the ground, and then throw a gun into nearby bushes. The defendant was apprehended and pleaded guilty to criminal possession of a weapon in the second degree.

In a unanimous, unsigned opinion, the court held that the handgun and the defendant's subsequent statements to the police should be suppressed, and the guilty plea vacated, because the police lacked justification for their approach and inquiry. "[M]erely staring at or otherwise looking in the direction of police officers or a patrol vehicle in a high crime area while continuing to proceed on one's way… is insufficient to provide the police with the requisite 'objective, credible reason, not necessarily indicative of criminality' to justify a level one encounter."

Endnotes

1. 2016 N.Y. Slip Op. 01548 (1st Dept. March 3, 2016).
2. Correction Law §§752, 753.
3. 2016 N.Y. Slip Op. 01425 (1st Dept. Feb. 25, 2016).
4. 205 A.D.2d 459 (1st Dept. 1994).
5. 2016 N.Y. Slip Op. 01627 (2d Dept. March 9, 2016).
6. 2016 N.Y. Slip Op. 00366 (2d Dept. Jan. 20, 2016).
7. 2016 N.Y. Slip Op. 01818 (2d Dept. March 16, 2016).
8. 2016 N.Y. Slip Op. 02504 (3d Dept. March 31, 2016).
9. 2016 N.Y. Slip Op. 02184 (4th Dept. March 25, 2016).

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