Appellate Division Review

Novel Questions in Appellate Division Cases

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In this article, we summarize significant decisions of the Appellate Division departments rendered during the summer months. We also note that Justice Luis A. Gonzalez who, having reached age 70, will be required to step down as Presiding Justice of the Appellate Division, First Department, at the end of this year. He has been a judge for 30 years. During that time, he has been an associate justice of the First Department for 13 years and the presiding justice for the last six years. We wish him well.

First Department

At-Will Employment. An at-will employee can be fraudulently induced into entering into an employment contract, the First Department held in *Laduzinski v. Alvarez & Marsal Taxand*.[1]

Steven Laduzinski alleged that he voluntarily resigned as vice-president and senior tax manager at J.P. Morgan to accept the position of senior director at Alvarez & Marsal Taxand LLC (A&M) because he had been promised that his role would focus on management of A&M's "sizable" workload, rather than on business development. Yet, immediately after Laduzinski started, A&M requested that he compile a comprehensive list of his business contacts, and then terminated him after only eight months, citing a lack of work.

Laduzinski sued, claiming that A&M had fraudulently induced him into accepting the position. A&M successfully moved to dismiss, arguing that an at-will employee cannot claim reliance on an employer's promise not to terminate the employment.

In a unanimous opinion authored by Justice Rolando T. Acosta, the First Department reversed. Although at-will employees are not entitled to rely on representations regarding the duration or security of employment, they may assert fraudulent inducement claims if the injury alleged is "separate and distinct from termination." Thus, an at-will employee must allege that "[he] would not have taken the job in the first place if the true facts had been revealed to [him]."

Electronic Search Warrants. Facebook cannot litigate the constitutionality of warrants on its customers' behalf before the warrants are executed, the First Department held in *Matter of 381 Search Warrants Directed to Facebook*.[2]

In July 2013, the New York County District Attorney applied for 381 digital warrants to search Facebook accounts in connection with its investigation of fraudulent Social Security disability claims. Supreme Court found sufficient cause to issue the warrants, and subsequently

denied Facebook's motion to quash the warrants prior to execution.

Writing for the unanimous panel, Justice Diane T. Renwick affirmed, observing that "there is no constitutional or statutory right to challenge an alleged defective warrant before it is executed." Rather, a neutral judicial officer decides whether warrants should issue, and motions to suppress exclude improperly obtained evidence. "[T]hese protections eliminate any need for a suspected citizen to make a pre-execution motion to quash a search warrant."

The panel dismissed Facebook's argument that these warrants were more like subpoenas (and thus subject to a motion to quash) because they forced Facebook itself to seize the materials, calling that a "distinction without a difference." The court rejected "the notion that a warrant is limited only to traditional search warrants authorizing law enforcement agents to forcibly enter and search physical places," noting that it is "hard to imagine how a law enforcement officer could play a useful role in the Internet service provider's retrieval of the specified online information."

Second Department

Procedural Due Process. Under Article 10 of the Mental Hygiene Law, sex offenders are entitled to a jury trial before they can be subject to civil confinement based upon a "mental abnormality."[3] Addressing an issue of first impression for the Second Department, the court held in *Matter of the State of New York v. Ted B. (Anonymous)*[4] that this right to a jury trial can only be waived after an on-the-record colloquy.

Respondent was convicted of multiple sex offenses in 1993. In 2010, before his scheduled discharge date, the state commenced a civil confinement proceeding under Article 10. Before trial, respondent sent a letter to Supreme Court stating that he did not want a jury trial. Supreme Court proceeded without a jury, and found that respondent suffered from a mental abnormality requiring civil confinement. On appeal, respondent argued that his waiver of the right to a jury trial was not knowing and voluntary because he did not execute a written waiver or acknowledge on the record that he was forgoing his right.

In an opinion authored by Justice Cheryl E. Chambers, a unanimous panel of the Second Department agreed. Chambers explained that under Article 10, "and in accordance with due process, there must be an on-the-record colloquy." Looking to analogous cases from the Third Department and Massachusetts, the panel concluded that "the need to ensure that a respondent's decision to [forgo] his state constitutional and statutory right to a jury trial is the product of an informed and intelligent judgment" outweighed the "minimal burden on the State" of holding the colloquy.

Sentencing. The Second Department faced the following issue of first impression in New York's appellate courts: "whether an undocumented immigrant must be sentenced to a period of incarceration rather than to a term of probation because the continuing violation of federal immigration laws would constitute an automatic violation of the standard conditions of probation"? No, the unanimous panel determined in *People v. Cesar*.[5] While sentencing courts may consider a defendant's immigration status as one factor in determining an appropriate sentence, they may not rely on it to the exclusion of all other relevant factors.

Defendant, an undocumented immigrant, pleaded guilty to a Class E felony of aggravated driving while intoxicated. The People requested that the defendant's sentence include both incarceration and probation, while the defense requested probation only. The County Court sentenced defendant to incarceration only, explaining that probation is usually conditioned on compliance with all applicable laws, and given the defendant's undocumented status (a violation of federal immigration law), he would automatically be in violation of his probation.

The Second Department reversed. Justice Mark C. Dillon explained that it would violate the due process and equal protection clauses of the federal and New York constitutions to "refuse to consider a sentence of probation for an undocumented defendant solely on the basis of his or her immigration status." Dillon observed that the sentencing court could have modified the standard conditions of probation to provide that his undocumented status itself would not be a violation of his probation.

Third Department

Apportionment of Damages. "Who should pay?" When a car is hit by a falling branch while driving on a state highway, two possible defendants exist: the owner of the land with the tree and the State of New York for failing to maintain the trees along the highway. However, the state can only be sued in the Court of Claims. This

set of facts led to a thorny issue of first impression at the appellate level: whether the state, as a nonparty that cannot be sued in Supreme Court due to sovereign immunity, can nevertheless be included in a jury charge on the apportionment of damages? In *Artibee v. Home Place Corp.*,[6] the Third Department held that it can.

Under CPLR Article 16, if a defendant establishes that she is 50 percent or less at fault, she need only pay her own proportionate share of noneconomic damages. Section 1601(1) permits a defendant to introduce "the culpable conduct of any person not a party to the action" to obtain Article 16's protection, but such culpable conduct will not be considered if the plaintiff proves that "she was unable to obtain jurisdiction over such person."

While the CPLR expressly permits the state to introduce the share of the fault of a nonparty driver in the Court of Claims as long as the plaintiff can get jurisdiction over the driver in some other New York court, the Third Department found that "CPLR 1601(1) is silent" as to whether the defendant landowner can introduce the share of fault of the state in the Supreme Court action and get an apportionment charge. Supreme Court allowed evidence of the state's fault to be introduced, but refused to allow the apportionment charge.

A divided 3-2 panel reversed Supreme Court's denial of the apportionment charge. Justice William E. McCarthy, writing for the majority, reasoned that plaintiff did "not face a jurisdictional limitation in impleading the State as a codefendant, but instead cannot do so due to the doctrine of sovereign immunity." Justice McCarthy concluded that, "as a policy matter, prohibiting a jury from apportioning fault would seem to penalize a defendant for failing to implead a party that, as a matter of law, it cannot implead."

Administrative Law. Strict new DMV rules cracking down on drunken driving through longer suspensions or revoked licenses for repeated convictions are constitutional, the Third Department held in *Acevedo v. New York State Department of Motor Vehicles*.[7]

The regulations,[8] which were developed by the DMV in 2012, impose, among other things, a lifetime license revocation for drivers with five or more alcohol-related convictions within a 25-year span, and a five-year ban for those with three or more convictions within a 25-year span. They also require drivers whose licenses were suspended for a year or six months because of a drunken-driving conviction to lose their license for the entire period, not just until they complete a mandatory DMV drunk-driver program. Acevedo, who had three impaired driving convictions between 2003 and 2008, argued that the suspension and look-back period that were established after his 2008 offense were improperly applied to him, and that the DMV was engaged in illegal and unconstitutional rulemaking.

In an opinion for a divided 3-2 panel, Presiding Justice Karen K. Peters wrote that several statutory provisions giving the DMV Commissioner broad authority "led to the inexorable conclusion that the Legislature intended to grant DMV regulatory authority over the relicensing of persons" with alcohol-related offenses. The DMV had not usurped the Legislature's power by making "broad-based policy determinations" rather than "permissible, interstitial rulemaking." Instead, the DMV had "implemented the Legislature's policies of promoting highway safety and reducing instances of impaired and intoxicated driving." Finally, the regulations are not impermissibly retroactive, because a driver's license is a "personal privilege subject to reasonable restrictions" and "not a vested right."

Fourth Department

Conversion and Unjust Enrichment. If an embezzler agrees to repay money she stole from you, are you on notice that she may be doing so with illicit funds? Yes, ruled a unanimous panel of the Fourth Department in *Simpson & Simpson v. Lippes Mathias Wexler Friedman*.[9]

The law firm Lippes Mathias Wexler Friedman discovered that its former bookkeeper had embezzled over $270,000 from its bank accounts. It demanded that the bookkeeper repay the stolen funds. The former employee consented and repaid $210,000.

After leaving Lippes, the bookkeeper had taken a job at Simpson & Simpson, also a law firm. Perhaps unsurprisingly, she raised the $210,000 by embezzling funds from her new employer. Upon discovery, Simpson filed suit against Lippes and three of its partners, seeking the return of the embezzled money, asserting claims of conversion and unjust enrichment. The defendants sought and received summary judgment, based primarily

on their lack of knowledge of the money's illicit nature when they received it.

The Fourth Department reversed, finding issues of fact precluded summary judgment. In an unsigned opinion, the unanimous panel explained that "the circumstances known to the defendants were so obviously suspicious that no honest person (not just a reasonably prudent person) could turn a blind eye thereto, thus requiring the defendants to investigate" the source of the money.

Endnotes

1 2015 N.Y. Slip Op. 06646 (1st Dept. Aug. 25, 2015).

2 2015 N.Y. Slip Op. 06201 (1st Dept. July 21, 2015).

3 Mental Hygiene Law § 10.07(a).

4 2015 N.Y. Slip Op. 06352 (2d Dept. July 29, 2015).

5 2015 N.Y. Slip Op. 06252 (2d Dept. July 22, 2015).

6 2015 N.Y. Slip Op. 06556 (3d Dept. Aug. 13, 2015).

7 2015 N.Y. Slip Op. 06467 (3d Dept. Aug. 6, 2015).

8 15 NYCRR §136.5.

9 2015 N.Y. Slip Op. 06065 (4th Dept. July 10, 2015).