Appellate Division Review

Courts Address Challenges to Legislation and Power to Regulate

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The Appellate Division's four departments begin the new year with the daunting task of keeping up with their heavy caseloads despite three to six vacant positions in each, including the presiding justice positions in the First and Fourth Departments. Below we highlight some of their opinions from the busy last quarter of 2015, which clarify the rights, remedies and privileges of private litigants and governmental entities.

First Department

Equitable Relief. In an investor-friendly ruling, *Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital*,[1] the First Department held that a limitation on remedies clause does not foreclose money damages where specific performance is impossible.

HSBC Bank as Trustee (HSBC), suing on behalf of four residential mortgage-backed securities (RMBS) trusts, alleged that Japanese investment bank Nomura Credit & Capital Inc. and its affiliates (Nomura) had breached certain representations and warranties regarding loans it sold to the trusts under Mortgage Loan Purchase Agreements (MLPAs).

Each MLPA provided that the "sole remedy" for such breaches was "to cure [the defect or breach] or repurchase" the loan. HSBC sought monetary damages where the cure or repurchase remedy was impossible (because the loans had been liquidated or foreclosed), which Nomura argued were barred by the "sole remedy" provision.

In a unanimous decision by Justice John M. Sweeny, the First Department sided with HSBC, noting to find otherwise would "leave plaintiffs without a remedy." The court explained that the contractual limitation on remedies was subject to an equitable exception to New York's general rule favoring freedom of contract. "[W]here the granting of equitable relief appears to be impossible or impracticable, equity may award damages in lieu of the desired equitable remedy."

Attorney-Client Privilege. In *NAMA Holdings v. Greenberg Traurig*,[2] the First Department clarified when the fiduciary exception to the attorney-client privilege applies in the corporate context, "where a shareholder (or, as here, an investor in a company) brings suit against corporate management."

In an action commenced by NAMA Holdings, LLC against certain managers and lawyers of The Alliance Network LLC, of which NAMA was

the "70% majority investor," NAMA sought to compel production of over 3,000 documents Alliance claimed were privileged, arguing that Alliance "owed a fiduciary duty to NAMA."

The First Department noted that it "has not previously defined the parameters of the [fiduciary] exception," which historically has been used by trust beneficiaries to compel production of a trust's communications with counsel. The U.S. Court of Appeals for the Fifth Circuit extended the doctrine into corporate law in *Garner v. Wolfinbarger*,[3] holding that shareholders could pierce the corporate attorney-client privilege for "good cause."

Recognizing that "the precise meaning of good cause has not been articulated by the New York courts," the First Department—in a unanimous opinion by Justice Rolando Acosta—adopted *Garner's* non-exclusive "good cause" considerations, including the number of shareholders and the percentage of stock they represent, the bona fides of the shareholders, and the nature of the shareholders' claim.

The court reversed and remanded to Supreme Court to conduct a "comprehensive good-cause analysis." While Supreme Court had found "good cause" based upon a lack of "adversity" between the parties—in that the parties' interests remained aligned such that application of the fiduciary exception was appropriate—the court explained that "adversity is not a threshold inquiry but a component of the broader good-cause inquiry."

Wrongful Birth. Wrongful birth claims accrue upon an infant's birth, the First Department held in *B.F. v. Reproductive Medicine Assoc. of N.Y.*[4]

In *B.F.*, the court considered a medical malpractice action for "wrongful birth" brought by parents of a child conceived through in vitro fertilization. The parents alleged that the defendant reproductive clinic failed to adequately screen the egg donor for genetic disorders, resulting in the birth of an impaired child.

Noting the Court of Appeals has not addressed when a "wrongful birth" claim accrues, the court was faced with the question of whether it accrues "upon the termination of defendants' treatment of the plaintiff mother," or "upon the birth of the infant," which, here, would render the claim timely.

In a unanimous opinion by Justice David Friedman, the First Department held it accrued upon the birth of the infant. The court explained that the "legally cognizable injury" in a wrongful birth action is the parents' "increased financial obligation," but the extent of that injury cannot be known until the child's birth. Because "there is no legal right to relief" without "legally cognizable damages," the statute of limitations cannot begin to run until there is a legal right to relief—i.e., a live birth.

Second Department

Separation of Powers. In *Agencies for Children's Therapy Services, Inc. v. New York State Dept. of Health*,[5] Justice Thomas A. Dickerson, writing for a unanimous panel of the Second Department, held that recently enacted Department of Health (DOH) rules regulating the state's early intervention program are constitutional.

The early intervention program provides funding for private health agencies to evaluate and treat developmentally disabled infants and toddlers. In 2013, DOH promulgated two new rules: (i) the "use-of-funds rule," which limits the proportion of state funding that a private agency may use for administrative costs and executive compensation; and (ii) the "conflict-of-interest rule," which prohibits the same private agency from both evaluating and treating a child for developmental disabilities.

Plaintiff Agencies for Children's Therapy Services, Inc., a not-for-profit corporation whose members employ individuals who serve as evaluators, service coordinators, and services providers in the early intervention program, sued DOH and Governor Andrew Cuomo, arguing that these rules constitute improper policy-making by the executive branch in violation of the separation-of-powers doctrine. Plaintiff pointed out that Cuomo proposed these very same rules to the Legislature in 2012, but it declined to pass them. Supreme Court agreed with plaintiff and held that these rules were not enforceable.

Reversing, the Second Department observed that "the Legislature has endowed the DOH with broad power to regulate in the public interest." While the early intervention legislation did not expressly authorize the use-of-funds or conflict-of-interest rules, both were consistent with the statutory language and furthered the underlying purpose of the legislation. Moreover, the Legislature's failure to pass these rules in 2012 did not show that

DOH was usurping the Legislature's role, because the Legislature likely believed the rules could be better formulated by DOH, which has special expertise in this area.

Secret Videotaping. Personal-injury plaintiffs' attorneys take note: Secretly videotaping an independent medical examination (IME) of your client could result in a mistrial, a re-examination of the plaintiff by a different medical expert, and even sanctions, a unanimous panel of the Second Department held in an opinion by Justice Sheri S. Roman.

In *Bermejo v. New York City Health & Hospitals Corp.*,[6] plaintiff's trial attorney surreptitiously videotaped an IME conducted by defendant's orthopedist. The recording was revealed for the first time at trial during a redirect examination by plaintiff's counsel, resulting in the declaration of a mistrial. After the trial judge repeatedly accused the orthopedist of perjury (based on the secret video), the orthopedist refused to voluntarily appear as an expert at the retrial. Defendant then moved for permission to conduct a new IME, and for sanctions against plaintiff's counsel to recoup the costs of the first trial. Supreme Court denied the motion.

The Second Department reversed. Joining appellate courts from other departments, the court held that plaintiff's attorney committed misconduct by secretly videotaping the IME without prior court approval, and committed a "clear violation of CPLR 3101" by not disclosing the recording to defense counsel prior to trial. Given that the mistrial was the result of misconduct by plaintiff's attorney, the Second Department granted defendant's motion to conduct a new IME and awarded sanctions against plaintiff's attorney.

Third Department

Constitutional Law. A different kind of "shotgun wedding" happened in Albany in January 2013, with the New York Legislature passing and Governor Cuomo signing the Secure Ammunition and Firearms Enforcement (SAFE) Act in less than two days after Cuomo requested its passage. The SAFE Act expanded the definition of banned assault weapons. Plaintiffs—numerous gun owners—challenged both the manner in which the bill was passed and the substantive limitations in the law as unconstitutional. In *Schulz v. State of New York Executive, Andrew Cuomo, Governor*,[7] the Third Department upheld both the procedural enactment and substance of the act.

The New York Constitution requires that a bill be printed and placed upon the desks of legislators "at least three calendar legislative days prior to its final passage, unless the governor" certifies facts "which in his or her opinion necessitate an immediate vote thereon."[8] While Cuomo did issue such a "message of necessity," plaintiffs challenged the sufficiency of the facts it set forth and argued that heightened review was required because the act impacts fundamental rights. Because the SAFE Act expanded the definition of banned assault weapons, plaintiffs alleged that the act violated their Second Amendment right to keep and bear arms.[9]

In a unanimous opinion, Justice Eugene P. Devine found that "inasmuch as the message of necessity here provided a factual justification, Supreme Court was correct in holding that no further judicial review was warranted." Further, accepting "for purposes of discussion" that the act "substantially burdens the right to keep and bear arms," it survived intermediate constitutional scrutiny. Plaintiffs provided no proof against "the well-established premise behind the challenged provisions" that "the governmental interest in public safety is substantially furthered by reducing access to weapons designed to quickly fire significant amounts of ammunition."

Governmental Immunity. When the government negligently enrolls you in a donor registry and harvests your organs, can your survivors sue? No, a unanimous panel of the Third Department held in *Drever v. State of New York*.[10]

Department of Motor Vehicles (DMV) license and renewal applications contain a signature box where a driver can consent "to the donation of all organs and tissues" and enroll in the Donate Life registry. On Margaret Lanza's application, a straight line was drawn in the box, which DMV employees negligently interpreted as her consent and enrolled her in the program. Lanza died before receiving a letter confirming her registration as an organ donor, and her organs were harvested. Her survivors successfully sued the state for unlawful interference with Lanza's common-law right of sepulcher.

In an opinion authored by Presiding Justice Karen K. Peters, the Third Department reversed the Court of Claims' finding that donor enrollment was a proprietary function not afforded governmental immunity. While "governmental functions

undertaken for the protection and safety of the public" are "generally immune from negligence claims," proprietary functions, which "essentially substitute for or supplement traditionally private enterprises" (such as acting as a landlord), are not. Here, the court found that Donate Life was protecting public health and safety and that the government did not undertake the enrollment function for profit or revenue. As such, the suit "should have been dismissed on the basis of governmental immunity."

Fourth Department

Identity Theft. Can you be guilty of identity theft simply by using another person's identifying information? Yes, the Fourth Department held in *People v. Yuson*,[11] disagreeing with the First Department's decision in *People v. Barden*.[12]

After forging checks from two victims, Yuson was found guilty of identity theft in the first degree and two counts of second-degree criminal possession of a forged instrument. While the state showed that he used his victim's account numbers or codes to forge checks, Yuson argued that it had failed to demonstrate he "assumed the identity" of his victims, as required to prove identity under Penal Law §190.80[3].[13] He relied upon *People v. Barden*, which held that "assumption of identity is not necessarily accomplished when a person uses another's identifying information."

The Fourth Department rejected this approach, holding the state had satisfied its burden of proof by showing that Yuson used the personal identifying information of another person to commit a crime. Under Penal Law §190.80[3], a person "is guilty of identity theft in the first degree when he or she knowingly and with intent to defraud assumes the identity of another person" by "acting as that other person" or "by using personal identifying information of that other person" and "commits or attempts to commit a class D felony." Yuson's use of his victims' account information was the use of their personal identifying information, which, coupled with his other criminal conduct, constituted identity theft in the first degree.

Endnotes

1 2015 N.Y. Slip Op. 07458 (1st Dept. Oct. 13, 2015).

2 2015 N.Y. Slip Op. 07346 (1st Dept. Oct. 8, 2015).

3 430 F.2d 1093 (5th Cir. 1970).

4 2015 N.Y. Slip Op. 09370 (1st Dept. Dec. 17, 2015).

5 2015 N.Y. Slip Op. 09647 (2d Dept. Dec. 30, 2015).

6 2015 N.Y. Slip Op. 08374 (2d Dept. Nov. 18, 2015).

7 2015 N.Y. Slip Op. 07728 (3d Dept. Oct. 22, 2015).

8 N.Y. Const. art. III, §14.

9 U.S. Const. amend. II.

10 2015 N.Y. Slip Op. 07726 (3d Dept. Oct. 22, 2015).

11 2015 N.Y. Slip Op. 08259 (4th Dept. Nov. 13, 2015).

12 2014 N.Y. Slip Op. 02527 (1st Dept. April 10, 2014).

13 Penal Law §190.80.