Appellate Division Review

Rulings Reveal Courts With Conscience

by E. Leo Milonas and Frederick A. Brodie

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"There is a higher court than courts of justice and that is the court of conscience," wrote Mahatma Gandhi.

The Justices of the four Departments in New York's Appellate Division, however, try to join justice with conscience. Toiling assiduously in their chambers, they reach results that are not only legally correct, but also fair and just. Ideally, the court of conscience can then issue a quick concurrence.

Below, we highlight a few products of the Appellate Division's conscientious work during the second quarter of 2012.

First Department

Directors' Liability

Co-op directors who thought they couldn't be sued for discrimination will have to think again. In *Fletcher v. Dakota, Inc.*,[1] a unanimous panel of the First Department held that a resident's discrimination claim could go forward against two directors of the Dakota, the storied Manhattan co-op.

Alphonse Fletcher, an African-American resident of the Dakota, alleged that the co-op's board discriminated against him based on race when it refused to approve his purchase of an adjoining unit. Fletcher also claimed that the board retaliated against him for speaking up on behalf of minority and Jewish applicants and shareholders.

Two directors who were named individually as defendants argued that they were shielded from liability by the First Department's decision in *Pelton v. 77 Park Ave. Condominium*.[2] There, the court had suggested that managers of a condominium could not be sued individually for disability discrimination.

In *Fletcher*, however, the First Department expressly overruled that prior decision. Writing for the Court, Justice Rolando Acosta explained that *Pelton* had relied on precedent concerning liability for a corporation's breach of contract and mistakenly extended those cases to the tort context. "[A]lthough participation in a breach of contract will typically not give rise to individual director liability," Justice Acosta wrote, "the participation of an individual director in a corporation's tort is sufficient to give rise to individual liability."

In short, "discrimination, among other abusive practices, is not protected by the business judgment rule."

Civil Procedure

Like lawyers, physicians licensed to practice in New York can file an unsworn affirmation in lieu of an affidavit.[3] That right is of immense assistance to busy professionals working under a deadline who suddenly discover there's no notary in the office.

Now, making the process even more convenient, affirmations may be signed electronically rather than with a pen. The First Department held in *Martin v. Portexit Corp.*[4] that an affirmation may be "subscribed and affirmed" under CPLR 2106 through the use of an electronic signature.

The appeal arose because the defendants in a personal injury action sought summary judgment based upon the electronically signed affirmations of two physicians who attested that the plaintiff had not sustained a serious injury. The plaintiff contended that the electronically-signed affirmations were inadmissible, and a trial judge denied summary judgment on that ground.

Writing for a unanimous court, Justice Sheila Abdus-Salaam disagreed. By statute, she pointed out, "unless specifically provided otherwise by law, an electronic signature may be used by a person in lieu of a signature affixed by hand," and the electronic record may be admitted into evidence.[5] Since CPLR 2106 does not provide otherwise, the First Department concluded that the affirmations should have been admitted.

The decision creates a split among the Departments. The Second Department has ruled to the contrary in an opinion that Justice Abdus-Salaam regarded as "unpersuasive" and declined to follow.[6]

Second Department

Rent Control

Rent-controlled apartment leases in New York City may be many things, including inexpensive, tenant-friendly in evictions, and (of course) scarce. Indeed, some say that New Yorkers won't leave their rent-controlled apartments standing up. Nonetheless, rent-controlled apartments do not qualify as marital property.

Writing for a unanimous court on an issue of first impression in the Second Department, Justice John M. Leventhal in *Cudar v. Cudar*[7] held that a rent-controlled apartment is not distributable marital property. "Obtaining a leasehold interest," Justice Leventhal explained, "does not constitute an acquisition of property pursuant to the Domestic Relations Law."

The court acknowledged that "rent-controlled apartments are relatively scarce in New York City and, considering the favorable rental rates, the limitations on evictions, and the succession rights to qualified family members, rent-controlled tenants reap tangible benefits." Still, in the Second Department's view, "a leasehold interest in a rental apartment, even one subject to the rent control law, which is not expected to be converted into a form of ownership such as a cooperative, is neither marital nor separate property as defined by the Domestic Relations Law."

Despite that conclusion, the Second Department still found that the Domestic Relations Law gives courts discretion to award possession of a rental apartment as ancillary relief. The appellate panel therefore remanded the case to Supreme Court so that it could award sole possession to either the plaintiff or the defendant (both of whom are in their seventies).

Foreclosures

A statute enacted to protect homeowners embroiled in the mortgage foreclosure crisis does not extend to other types of liens, the Second Department ruled in *Board of Directors of House Beautiful at Woodbury Homeowners Ass'n, Inc. v. Godt*,[8] an unsigned opinion.

Construing a provision of the Home Equity Theft Prevention Act (HETPA) requiring that a foreclosing party deliver notice to any mortgagor of an owner-occupied one- to four-family home,[9] the Second Department observed that the statute's "underlying purpose" was to "afford greater protection to homeowners confronted with foreclosure."

Rather than foreclosures in general, however, the statute references mortgage foreclosures specifically. It "makes no reference to foreclosures of other types of liens," the Second Department observed. Therefore, the defendants—who faced the foreclosure of an unpaid assessment lien filed by their homeowners association—could not stop the proceedings based on inadequate notice.

Sex Offender Registration

Do juvenile offenses count for purposes of determining a defendant's risk level under the Sex Offender Registration Act (SORA)? According to the Risk Assessment Guidelines issued by the New York State Board of Examiners of Sex Offenders, juvenile delinquency findings should be considered in assessing a key risk factor: whether the defendant was under 20 when the first act of sexual misconduct was committed.

Family Court adjudications, however, by statute are not admissible as evidence in civil cases.[10] In *People v. Campbell*,[11] the Second Department therefore struck down the portion of the Guidelines that allows consideration of juvenile offenses in SORA proceedings, which are "civil in nature." Addressing the "clear conflict between the Family Court Act and the Guidelines," Justice Leventhal wrote for a unanimous court that "the Board, which is merely an advisory panel, exceeded its authority by adopting that portion of the Guidelines which includes juvenile delinquency adjudications in its definition of crimes for the purpose of determining a sex offender's criminal history."

While acknowledging that the age when an offender committed his first offense "is relevant to that offender's likelihood of reoffense and the danger to public safety," Justice Leventhal explained that the Board "was without the power to adopt a guideline which contravenes the clear legislative pronouncement" in the Family Court Act.

Third Department

Defamation

Now that New York allows same-sex marriage, one collateral consequence is a change in defamation law: according to the Third Department, it is no longer defamation *per se* to describe someone falsely as lesbian, gay or bisexual.

All four departments of the Appellate Division previously recognized the false imputation of homosexuality as defamatory *per se*, meaning that it was "so self-evidently injurious that the law will presume that pecuniary damages have resulted." In *Yonaty v. Mincolla*,[12] a unanimous decision authored by Justice Thomas Mercure, the Third Department concluded that those older cases are "inconsistent with current public policy and should no longer be followed."

Citing New York's approval of same-sex marriage and "the tremendous evolution in social attitudes regarding homosexuality" in recent years, Justice Mercure wrote that the "considerable legal protection and respect" that lesbians, gays and bisexuals now receive under New York law cannot be reconciled with cases holding that damages must be presumed if a person is falsely called gay.

Recognizing that a statement's defamatory character depends on "the temper of the times," the Third Department observed that current public opinion would not "equate statements imputing homosexuality with accusations of serious criminal conduct or insinuations that an individual has a loathsome disease."

Banking Law

New York's Banking Department violated the State Administrative Procedure Act when it changed its definition of "income" for mortgage banks without following the procedures for making and filing a rule, the Third Department has held.

In *Homestead Funding Corp. v. State of New York Banking Dept.*,[13] a unanimous decision authored by Justice William McCarthy, the petitioner was a mortgage bank. Each year, mortgage banks pay a "general assessment" based on their income, to cover the costs of regulation.

Beginning in 2010–2011, the Banking Department (now known as the Department of Financial Services) instructed mortgage banks to include in "income" for assessment purposes not only revenues from loan origination, but also income from the sale of mortgages in the secondary market and mortgage loan servicing activities. The Department's change of direction resulted in a "significant increase" in the petitioner's general assessment, and the petitioner objected.

When the Banking Department redefined "income," the Third Department ruled, the agency "did more than just explain part of its methodology or interpret the policy as it already existed." Instead, the regulators "crafted a new aspect of the policy and declared what is considered income for all mortgage banks when they calculate their general assessments." Because "no rule was properly promulgated" to implement that change, the assessment based on the new definition was unenforceable, the court held.

"Son of Sam" Law

After "Son of Sam" murderer David Berkowitz was apprehended and book and movie deals were feared to be imminent, New York's legislature passed the Son of Sam Law, which permitted victims to recover profits from a crime. In 2001, the law was expanded to cover "all funds and property received from any source" by the criminal.[14]

New York law, however, also protects public employee pensions from "execution, garnishment, attachment, or any other process whatsoever."[15] The protections afforded to public pensions collide with the Son of Sam Law when the offender is a government pensioner like Steven Raucci, who was convicted of weapons possession after attempting to detonate explosives at his victims' homes.

The Third Department analyzed the tension between the two laws in *New York State Office of Victim Services v. Raucci*.[16] Writing for a unanimous panel, Justice Mercure observed that the Son of Sam Law contains only two narrow exceptions, and does not exclude government pensions. Therefore, "public pensions are not exempt from the statute's reach." The Third Department noted that this result is consistent with the Son of Sam Law's underlying policy of ensuring that "[c]rime victims and their families ... will never again fear that they can only watch helplessly while convicted criminals freely spend their income."

Fourth Department

Long-Arm Jurisdiction

The long arm of New York's Family Court Act can reach parents living in New Mexico and compel them to support children placed with relatives in New York, the Fourth Department has ruled.

In *Matter of Chautauqua County Department of Social Services v. Rita M.S./Kenneth M.Y.*,[17] a unanimous unsigned opinion, the Fourth Department considered an attempt to compel a father and stepmother to support four children who were sent to live with their aunt in New York after a New Mexico court ordered the couple to avoid all contact with the children. In New York, a Support Magistrate directed the couple to pay child support retroactive to the time the children were placed in their aunt's care.

The father and stepmother argued that the court lacked personal jurisdiction over them. The Fourth Department disagreed. The panel observed that the couple "chose to send the children to New York after they were ordered to have no contact with the children." The couple's voluntary decision to place their children here, and their formal actions to effectuate that decision (for example, executing powers of attorney), brought them within the New York courts' jurisdiction.

Endnotes

1 2012 N.Y. Slip Op. 05338 (1st Dept. July 3, 2012).

2 38 A.D.3d 1 (1st Dept. 2006).

3 CPLR Rule 2106.

4 2012 N.Y. Slip Op. 05088 (1st Dept. June 21, 2012).

5 Technology Law §§ 304(2), 306.

6 *Vista Surgical Supplies, Inc. v. Travelers Ins. Co.*, 50 A.D.3d 778 (2d Dept. 2008).

7 2012 N.Y. Slip Op. 04965 (2d Dept. June 20, 2012).

8 2012 N.Y. Slip Op. 05129 (2d Dept. June 27, 2012).

9 RPAPL §1303

10 Family Court Act §§381.2, 380.1(1).

11 2012 N.Y. Slip Op. 04727 (2d Dept. June 13, 2012).

12 2012 N.Y. Slip Op. 04248 (3d Dept. May 31, 2012).

13 2012 N.Y. Slip Op. 3499 (3d Dept. May 3, 2012).

14 Exec. L. §632-a(1)(c).

15 Retirement & Soc. Sec. L. §110.

16 2012 N.Y. Slip Op. 04440 (3d Dept. June 7, 2012).

17 2012 N.Y. Slip Op. 03306 (4th Dept. April 27, 2012).

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