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Appellate Division Review

Waiver of Right to Counsel; Defamation; Identity Theft

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Despite a large number of vacancies in the Appellate Division this year—some of which have now been filled—the four Departments remained productive as the justices shouldered the extra burden.

Below, we discuss notable advancements in the law announced by New York's industrious intermediate appellate courts during the past three months.

First Department

Identity Theft. The First Department has confirmed what we knew intuitively: To commit identity theft, you must, in fact, assume another person's identity.

Here's what happened: Scott Barden was initially authorized to charge hotel expenses up to a certain amount on a credit card belonging to his then-business partner, Anthony Catalfamo. Due to an error at the hotel, however, the limit on the expenses was disregarded, and Barden ran up over $50,000 in unauthorized charges after his business relationship with Catalfamo went sour. Barden's spending spree led to convictions for identity theft, criminal possession of stolen property, and other offenses.

On appeal in *People v. Barden*,[1] the First Department ruled unanimously that Barden could not be convicted of identity theft because he never masqueraded as Catalfamo. Instead, Barden used Catalfamo's credit card for his own charges, without Catalfamo's authorization. Under the Penal Law, an identity thief must "assume the identity of another person," either by pretending to be that person or by using that person's identifying information.[2] Writing for the court, Justice Rolando T. Acosta concluded that the assumption of identity is a "discrete element" of the crime that must be independently proven.

Barden did not get off scot-free, however. The evidence was sufficient to support a conviction for possession of stolen property, which the First Department held could include intangible property such as credit card numbers.

Defamation. In 1995, the Court of Appeals perceived an "open question": How can a plaintiff show defamation by implication? At the time, the court left this question for "another day."[3] In *Stepanov v. Dow Jones & Co.*,[4] decided May 29, "its day has finally come."

Plaintiffs Maxim Stepanov and his company Midland Consult [Cyprus] Ltd. sued defendant Dow Jones for defamation over an article about a complex scheme in which a Russian civil servant named Olga Stepanova—married to Vladlen Stepanov—fraudulently caused the Russian government to pay hundreds of millions of dollars

in tax "refunds" to shell corporations that were not entitled to receive them, including a company called Bristoll Export. The article mentioned the plaintiff company when it stated that, within the shell of Bristoll Export was "yet another shell company whose directors work at Midland Consult, a Russia-focused representative of offshore banks founded by a former Russian diplomat named Maxim A. Stepanov in Cyprus."

This statement, plaintiffs alleged, was defamatory by implication because it falsely suggested they were involved in the scam.

The First Department disagreed. Writing for a unanimous panel on this issue of first impression in New York's appellate courts, Justice Paul G. Feinman held that defamation by implication requires "a rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference." In *Stepanov*, the challenged statements failed that test. The "lone fact" that Maxim Stepanov shared a last name with Olga and Vladlen was "far too attenuated" to support an implication that he participated in the fraud.

Consumer Affairs. At least in the small community of pedicab license holders, the First Department has confirmed that you are, in fact, related to your mother-in-law.

In *Zenk Pedicab Rental & Operation v. NYC Dept. of Consumer Affairs*,[5] an applicant had sought to renew his pedicab business license. The Department of Consumer Affairs (DCA) denied the application because the petitioner's mother-in-law also owned a pedicab business. The New York City Administrative Code limits the number of pedicab licenses one family can hold, and defines "family member" as "including, but not limited to, a…parent."[6] DCA reasoned that a mother-in-law is "sufficiently comparable to a parent." A New York County judge overturned the decision as arbitrary and capricious, and DCA appealed.

The First Department sided with DCA. In a unanimous unsigned order, the First Department observed that judicial review should be restricted to examining whether DCA's decision "has warrant in the record and a reasonable basis in law." DCA's view of mothers-in-law as family members was "neither irrational nor unreasonable," and "should have been upheld on that basis."

Second Department

Right to Counsel. Waiver of the right to counsel must be "unequivocal, voluntary, and intelligent" to be effective in a civil proceeding seeking confinement under the Sex Offender Management and Treatment Act (SOMTA), a unanimous panel of the Second Department ruled in *State of New York v. Raul L.*[7]

Raul L. perpetrated a violent sexual assault in 2003. As the end of his prison sentence neared, the state sought a civil commitment order against him. Raul's appointed counsel sought leave to withdraw because of disagreement over whether the trial should be adjourned. Raul stated that, to avoid additional time in custody, he would represent himself. Although the Assistant Attorney General expressed doubts, the trial court thought Raul's waiver was sufficient. Raul proceeded pro se and lost.

On appeal, in a decision authored by Justice John M. Leventhal, the Second Department required more. Just as in criminal cases, the court ruled, SOMTA's statutory right to counsel may be waived effectively "only after the court conducts a searching inquiry" and finds that the respondent waived his rights "intelligently and voluntarily."

Insurance. Hit-and-run victims may obtain default judgments in actions brought directly against the Motor Vehicle Accident Indemnification Corporation (MVAIC), the Second Department held in *Archer v. MVAIC*.[8]

MVAIC provides no-fault and bodily injury coverage to persons injured by uninsured vehicles, hit-and-run drivers, or motor vehicles operated without permission. Injured plaintiffs may sue the offending driver, but may also file a notice of claim with MVAIC, which then assumes defense of the action.

Of course, irresponsible drivers also are likely to default in court. Therefore, New York's Insurance Law gives MVAIC the right to contest default judgments.[9] Upon receiving notice, MVAIC is afforded a reasonable time to answer and defend actions where the driver has defaulted.

But, what happens when the victim sues MVAIC directly and MVAIC itself defaults? In *Archer*, MVAIC did not respond to a victim's complaint until its answering time had expired, never requested an extension, and offered no excuse for the default.

According to Justice Sylvia O. Hinds-Radix's opinion for a unanimous panel, in those circumstances MVAIC was out of luck. The Insurance Law's default provision was intended to "protect MVAIC from the defaults of, or possible collusion by, uninsured defendants." In actions commenced directly against MVAIC, such concerns "are not implicated."

Third Department

Prisons. Could a cell phone used by a prisoner to call his wife be "dangerous contraband"? Yes, according to the Third Department's unanimous ruling in *People v. Green*.[10]

Barry Green, incarcerated in Sullivan County, was strip-frisked after a correction officer overheard "one-sided, business-like conversation[s]" emanating from the cell where Green was the sole occupant. A cell phone was uncovered from between Green's buttocks. Green explained that he had been speaking to his wife, with whom he was experiencing marital problems.

A jury was unmoved and convicted Green of "promoting prison contraband." On appeal, Green argued that the People had failed to prove his cell phone was "dangerous contraband." In a decision by Justice John C. Egan Jr., the court disagreed.

Under the Penal Law, "dangerous contraband" must be "capable of such use as may endanger the safety or security of a detention facility or any person therein."[11] A cell phone is not "inherently—or even obviously—dangerous," the court acknowledged. Based on the record, however, Egan explained that a cell phone could "create a dangerous situation inside the correctional facility" because it could be used to facilitate escape, threaten security, and circumvent the recording and monitoring of inmate calls.

Pollution. The owners of contaminated property are relieved of a financial headache, thanks to the Third Department. In *Thompson Corners v. NYS Dept. of Envtl. Conservation*,[12] the court ruled that the Department of Environmental Conservation (DEC) cannot require "financial assurance for the ongoing performance of corrective action" from subsequent owners of property formerly used as a permitted hazardous waste facility.

The issue was one of first impression in New York. DEC had sought to compel the subsequent owners of property previously used as a metals recovery facility to provide "financial assurance" guaranteeing that remediation would be completed—for instance, a surety bond or letter of credit.

Justice Leslie E. Stein, however, wrote for a unanimous panel that the "financial assurance" requirement was "expressly link[ed]" to the issuance of permits to operate a hazardous waste facility. Because the subsequent owners were not operating such a facility and did not seek permits, the requirement did not affect them. Of course, DEC could still seek redress from the facility's former owner, who remained obligated to remediate the property.

Fourth Department

Cemeteries. Concerned by complaints about consumer pricing and unfair competition in the funeral industry, New York's Legislature in 1998 enacted the Anti-Combination Law. Among other things, the statute prohibited for-profit businesses from partnering with not-for-profit cemeteries to operate crematoria. To protect existing arrangements, however, the Legislature included a "grandfather clause" excluding "any crematory...if the funeral entity operated such crematory...prior to January 1, 1998."[13]

In *Sheridan Park v. NYS Division of Cemeteries*,[14] the petitioners contended that the grandfather clause permitted them to relocate their pre-existing crematory and operate it at a different location. The Fourth Department was required to determine what sort of "grandfather" the clause contemplated.

In a unanimous unsigned order, the court agreed with the State Cemetery Board's view that the grandfather clause "applies only to the crematory that was being operated by petitioners at the time the Anti-Combination Law took effect." The grandfather clause was intended to "prevent the forfeiture of existing crematory structures and facilities," not to create a loophole for "a crematory at any new location."

Jury Notes. Judges in criminal trials must respond to jurors' requests for information.[15] But, what happens when the jury submits questions and then reaches a verdict without ever receiving the answers? In *People v. Mack*,[16] the Fourth Department ruled 3-1 that the answer is: "reversal."

Terrance Mack was convicted of gang assault in the first degree, but only one eyewitness identified him as a participant. During a recess, the jury sent notes requesting a read-back of the instructions on reasonable doubt

and the treatment of a single witness versus multiple witnesses. The jurors also asked to hear the eyewitness' testimony about the defendant leaving the crime scene.

Before the court responded, however, the jury sent an additional note saying it had reached a verdict. The trial court accepted the verdict without further mention of the jury notes.

That was error, the Fourth Department concluded. The jury requests demonstrated the jurors' "confusion and doubt" about "crucial issues" in the trial. Even without an objection from defense counsel, "the court's failure to respond to the jury's notes seeking clarification of those instructions before the verdict was accepted 'seriously prejudiced' the defendant."

Endnotes

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

2 Penal Law §190.90(1).

3 *Armstrong v. Simon & Schuster,* 85 N.Y.2d 373, 381 (1995).

4 2014 N.Y. Slip Op 03940 (1st Dept. May 29, 2014).

5 2014 N.Y. Slip Op. 02495 (1st Dept. April 10, 2014).

6 Administrative Code of City of NY §20-249[a].

7 2014 N.Y. Slip Op. 04019 (2d Dept. June 4, 2014).

8 2014 N.Y. Slip Op. 02732 (2d Dept. April 23, 2014).

9 Insurance Law §5214(a).

10 2014 N.Y. Slip Op. 03303 (3d Dept. May 8, 2014).

11 Penal Law §205.00[4].

12 2014 N.Y. Slip Op. 03556 (3d Dept. May 15, 2014).

13 L. 1998, ch. 560, §14.

14 2014 N.Y. Slip Op. 03368 (4th Dept. May 9, 2014).

15 CPL §310.30.

16 2014 N.Y. Slip Op. 03075 (4th Dept. May 2, 2014).

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