Appellate Division Review

Jurisdiction, Employment Law, Smoking Restrictions in State Parks

This article was originally published in the *New York Law Journal* on April 17, 2015.

by E. Leo Milonas and Andrew C. Smith

E. Leo Milonas
Litigation
+1.212.858.1615
eleo.milonas@pillsburylaw.com

Andrew C. Smith
Litigation
+1.212.858.1743
andrew.smith@pillsburylaw.com

E. Leo Milonas is a litigation partner at Pillsbury Winthrop Shaw Pittman LLP. He is a former Associate Justice of the Appellate Division, First Department, and the former Chief Administrative Judge of the State of New York. **Andrew C. Smith** is a partner at Pillsbury. Dina E. Yavich and Andrew J. Kim, associates at the firm, and law clerks David Babbott-Klein and Stephen R. Weingold assisted in preparing this column.

The first quarter of 2015 was harsh in terms of weather and the workload at the Appellate Divisions. However, as opposed to the snow, the caseload did not pile up as the judges dutifully shoveled away at their cases. As the last shovelful melts from our memories, we review some of the quarter's leading decisions rendered by the state's intermediate appellate judges, during which the Appellate Division justices exercised measured deference to trustees, administrative agencies and the Legislature, while also expanding access to the courts to redress commercial and tortious wrongs.

First Department

Jurisdiction. "Just a phone call away" has been given new meaning by *C. Mahendra (NY) v. National Gold & Diamond Ctr.*,[1] in which the First Department held that "long-arm" jurisdiction may be exercised over a defendant conducting business in New York by telephone.

The plaintiff, a New York-based diamond wholesaler, sold diamonds to defendant retailer in California. Throughout the course of their dealings over a number of years, the parties' business was conducted almost exclusively by telephone. The wholesaler thereafter sued the retailer in New York for failure to pay for certain merchandise it had received. The retailer moved to dismiss for lack of personal jurisdiction. The trial court granted the motion, finding "defendant's telephone orders from California to New York were not sufficiently purposeful activity [in New York] to confer jurisdiction."

In a unanimous, unsigned opinion, the First Department reversed. After recognizing that "courts of this state have generally held telephone communications to be insufficient for finding purposeful activity conferring personal jurisdiction," the First Department held that the quality of such communications may provide a sufficient basis for a court to exercise long-arm jurisdiction where they encompass multiple dealings over a period of years.

Trustees. Trustees in New York can rest easy (or at least easier), after a unanimous panel of the First Department reaffirmed the appropriate standard of deference due to a trustee's discretionary actions in *In re Bank of N.Y. Mellon*.[2]

The case arose out of a $11.5 billion settlement reached by Bank of New York Mellon (BNYM), as trustee for 530 residential mortgage-backed securitization trusts, with respect

to trust claims against Bank of America and its predecessor, Countrywide (collectively, BOA), for breaches of representations and warranties and deficient mortgage loan servicing. In negotiations leading up to the settlement, BNYM retained experienced securitization counsel, which in turn engaged outside experts to evaluate the allegations and the settlement. Thereafter, investors who had not participated in negotiations objected to the settlement, arguing that BNYM acted unreasonably, in bad faith, and outside the scope of its discretion.

While the trial court rejected the majority of these arguments, it invalidated certain settlement releases of claims arising from BOA's alleged failure to repurchase the modified loans, holding that the trustee "had acted 'unreasonably or beyond the bounds of reasonable judgment' by failing to investigate the potential worth or strength of those claims before releasing them." The First Department reversed, finding the trial court "disregarded the standard of deference due" to the trustee, by "improperly imposing a stricter and far less deferential standard, one that allows a court to micromanage and second guess the reasoned, and reliable, decisions of a Trustee."

Writing for the panel, Justice David B. Saxe explained that if a trustee has relied on the advice of qualified and competent counsel, a party challenging its decision can prevail only upon a showing that "the reliance on counsel's assessment was unreasonable and in bad faith." Here, BNYM's reliance on counsel was "eminently reasonable."

Second Department

Employment Discrimination. A plaintiff may establish a prima facie case of employment discrimination in New York by alleging "that he was discriminated against because of the religion of his spouse," the Second Department held in a matter of first impression in *Chiara v. Town of New Castle*.[3]

Plaintiff, who was married to a Jewish woman but who was not Jewish himself, had allegedly been subjected to anti-Semitic remarks during his employment by defendant Town of New Castle, where he worked from 1992 until his termination in 2007. Just prior to his termination, plaintiff commenced an action under the State Human Rights Law (Executive Law §296) against the town to recover damages for employment discrimination and a hostile work environment. Supreme Court granted the town's motion for summary judgment, holding that there were no grounds to find any religion-based adverse employment action.

In a 3-1 decision authored by Justice John M. Leventhal, the Second Department reversed as to plaintiff's employment discrimination claim. The court found persuasive federal precedent interpreting Title VII of the Civil Rights Act of 1964 (which is "analytically identical" to Executive Law §296) that upheld discrimination claims based upon a spouse's race. The Second Department held that a plaintiff may maintain a discrimination claim under the State Human Rights Law as a member of a protected class based upon a spouse's religion.

Insurance Law. New York's Insurance Law cannot be read so broadly as to provide coverage for defendant's "facility fees" where specific regulations already govern which medical facilities are entitled to recover such fees, the Second Department held in *Government Employees Ins. Co. v. Avanguard Medical Group*.[4] In this case of first impression, the unanimous panel held that medical providers performing "office-based surgery"—even though accredited under Public Health Law §230-d(i)(h)—may not charge no-fault insurers "facility fees" for the use of their medical facility, staff and equipment. Such fees are reserved for medical facilities accredited under Public Health Law article 28.

At the trial level, plaintiff GEICO brought a declaratory action against the defendant, an anesthesiologist's medical office, which claimed GEICO owed it "facility fees," for which only hospitals or ambulatory surgery centers may properly bill no-fault insurers under the express terms of New York's No-Fault Law. Supreme Court denied GEICO's summary judgment motion, but the Second Department reversed, noting that neither the express statutory terms nor any legislative intent indicated that office-based surgery facilities may collect facility fees from no-fault insurers.

Writing for the panel, Justice Ruth C. Balkin explained that "it would be improper" for the court to find that defendant "is entitled to a benefit of Public Health Law article 28 when it is not subject to the significant regulatory burdens and costs of that article." Rather, "it is for the Legislature and the Commissioner of Financial Services to determine whether the laws and regulations

should be changed" to expand the entitlement to facility fees.

Third Department

Administrative Law. The Cuomo administration's restrictions on smoking in state parks—including a near-total ban for state parks in New York City—are constitutional after all, the Third Department held in *In the Matter of NYC. C.L.A.S.H. v. New York State Office of Parks, Recreation, and Historic Preservation*.[5]

The regulation,[6] which was adopted by the Office of Parks, Recreation, and Historic Preservation (OPRHP) in 2012, prohibits smoking in outdoor areas of parks and historic sites designated as "No Smoking Areas" by the OPRHP Commissioner, and in nearly all such locations in New York City, except in limited circumstances within the Commissioner's discretion.

Rejecting the trial court's decision that the state parks office had improperly extended its reach beyond rulemaking and into the realm of legislating, a unanimous Third Department panel reversed. "[A]ll aspects of the regulation are grounded in OPRHP's stated purpose—to allow all patrons to enjoy the fresh air and natural beauty of its outdoor facilities—and are consistent with OPRHP's 'legislatively expressed goals' to operate and maintain the parks and to provide for the health, safety and welfare of their patrons," Presiding Justice Karen K. Peters wrote for the unanimous panel. Further, the regulation is not arbitrary and capricious because it treats New York City differently than the rest of the state, since city parks tend to be much more crowded and provide little opportunity for patrons to avoid tobacco smoke.

Applying the balancing factors set out by the Court of Appeals in 1987 when it struck down agency-issued restrictions on indoor smoking in *Boreali v. Axelrod*,[7] the Third Department distinguished both Boreali and the recent rejection of the Bloomberg administration's ban on large sodas and sugary drinks.[8] Specifically, OPRHP's regulation is not "laden with exceptions based solely upon economic and social concerns" as was the indoor smoking ban, and it does not have "indicators of political compromise" which were fatal to the soda ban.

Marital Property. Thinking of buying property with your significant other before getting married? Be aware that it will not be considered marital property if it is purchased and held in one spouse's name, even if the other spouse contributes a portion of the down payment and pays off the entire mortgage, the Third Department held in *Ceravolo v. DeSantis*.[9]

Before Michael DeSantis and Sherri Ceravolo married, DeSantis put $130,000 toward the purchase of a house in Albany, and Ceravolo contributed $30,000. Ceravolo did not attend the closing, and DeSantis took title in his name alone. Years after paying off the mortgage entirely herself, Ceravolo filed for divorce.

The trial court awarded Ceravolo 50 percent of the house's stipulated value, reasoning that Ceravolo's contributions transformed the residence from separate property to marital property subject to equitable distribution. The Third Department reversed in a 3-1 decision authored by then-Justice Leslie E. Stein, noting that premarital financial transactions "cannot be considered to have been the product of the marital enterprise" and thus are not part of the "economic partnership" created by marriage. "[T]itle is a critical consideration in identifying the nature of real property acquired before the marriage," Stein explained, and "the circumstances surrounding the purchase of the residence and the parties' intent relative thereto are irrelevant to the legal classification of the residence as separate or marital property."

The court noted that, to the extent prior Third Department decisions might "be read as holding that separate property contributions made by a nontitled spouse toward the acquisition or improvement of premarital property can serve to transform such property into a marital asset, they should no longer be followed."

Fourth Department

Motion to Dismiss. Addressing "an issue of first impression" in the Fourth Department, a unanimous panel held that the recent Court of Appeals' decision in *Miglino v. Bally Total Fitness of Greater New York*[10] "had not altered the long-standing practice by which dismissal might be obtained under CPLR 3211(a)(7) with sufficiently 'conclusive' evidentiary submissions."

Historically, a motion to dismiss for failure to state a claim in New York was "limited to the face of the complaint." The "legislature enlarged the scope of facial sufficiency motions by enacting [CPLR 3211(c)]," however, explained Justice Gerald J. Whelan in *Liberty Affordable Housing v. Maple Court Apartments*,[11] which allows the consideration of affidavits on such motions. In *Miglino*, the Court

of Appeals held that a trial court appropriately denied a motion to dismiss that relied upon affidavits because "the case [was] not currently in a posture to be resolved as a matter of law on the basis of the parties' affidavits, and [the plaintiff had] pleaded a viable cause of action."

Here, plaintiff sued defendant for specific performance of a contract for the purchase of a housing complex. The defendant moved to dismiss the complaint based on communications that established the contract had been terminated years earlier because the sale had not taken place on the scheduled closing date. The trial court concluded that, because "the authenticity of [the communications was] undisputed," it was proper for the trial court to consider them under CPLR 3211(c), and granted defendant's motion.

On appeal, plaintiff argued that "*Miglino* fundamentally changed the parameters of CPLR 3211(a)(7) and effectively barred the consideration of any evidentiary submissions outside the four corners of the complaint." Following a recent decision by the First Department,[12] the Fourth Department rejected this contention, and concluded that the Miglino court simply refused to grant the motion based on the affidavits "because the evidentiary submissions were insufficiently conclusive, not because they were categorically inadmissible."

Endnotes

1 2015 NY Slip Op. 01157 (1st Dept. Feb. 10, 2015).

2 2015 NY Slip Op. 01880 (1st Dept. Mar. 5, 2015).

3 2015 N.Y. Slip Op. 00326 (2d Dept. Jan. 14, 2015).

4 2015 N.Y. Slip Op. 01413 (2d Dept. Feb. 18, 2015).

5 2014 N.Y. Slip Op. 09085 (3d Dept. Dec. 31, 2014).

6 9 NYCRR §386.1.

7 71 N.Y.2d 1 (1987).

8 *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dept. of Health & Mental Hygiene*, 23 N.Y.3d 681 (2014).

9 2015 N.Y. Slip Op. 00266 (3d Dept. Jan. 8, 2015).

10 20 N.Y.3d 342 (2013).

11 2015 N.Y. Slip Op 00003 (4th Dept. Jan. 2, 2015).

12 See *Basis Yield Alpha Fund v. Goldman Sachs Group*, 980 N.Y.S.2d 21 (1st Dept. 2014).