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EDITOR: DAVID L. FERSTENDIG

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Reporting on Significant Court of Appeals Opinions and Developments in New York Practice

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CASE LAW DEVELOPMENTS

It Ain't Over Until It's Over

Law School's Rescission of Student's Admission After Three Semesters Based on Misrepresentations in Application Not Arbitrary or Capricious

In David Powers's application to St. John's University School of Law, he noted his conviction of "third degree possession of a controlled dangerous substance." The application inquired as to any charges, however, not just convictions or pleas, noting that disclosure with relevant facts was necessary even if convictions were sealed or expunged from the record. As became obvious later, Mr. Powers's statements in his application were misleading.

Fast forward three semesters, part-time into law school, and Mr. Powers, on leave while working in Hong Kong, sought an advance ruling from the Committee on Character and Fitness and asked the law school for a letter of support. In Mr. Powers's request to the school, he mentioned for the first time, among other things, that when he was 16 to 21 years old he habitually used drugs and at times would sell them, and he had been arrested and charged for distributing drugs in July 2001. Not only did the law school not offer its support, it rescinded Mr. Powers's admission based on material misrepresentations and omissions in his application as to his criminal history.

In *Powers v. St. John's Univ. Sch. of Law*, 25 N.Y.3d 210 (2015), a majority of the N.Y. Court of Appeals agreed with the Appellate Division that the university's decision was not arbitrary or capricious. The Court noted that the courts have a restricted role in reviewing a college and university determination, which is

> not [to] be disturbed unless a school acts arbitrarily and not in the exercise of its honest discretion, it fails to abide by its own rules or imposes a penalty so excessive that it shocks one's sense of fairness. None of those factors is present here (citations omitted).

Id. at 216.

The majority found that the school's treatment of the petitioner was rational, the school had an unwritten policy of not admitting students who sold drugs, the school did not fail to follow its own rules and procedures, and the penalty of rescission, even after three semesters of school, was not so "disproportionate to the conduct" as to shock one's sense of fairness:

> The law school application made it clear that dire consequences could result if there was a failure to provide truthful answers. Thus, Powers was on notice of the potential repercussions should he fail to truthfully and fully disclose his record. Given this notice and the school's unquestionable interest in ensuring the integrity of the future attorneys under its tutelage, the penalty of rescission was not excessive.

Id. at 218.

The dissent recognized Mr. Powers's various accomplishments since his conviction, concluding that the school had failed to demonstrate it would have refused to admit him had the school known when the petitioner applied that he had been convicted of a distribution offense, rather than a personal use offense. It also felt that the penalty was too harsh:

> Ironically, the only reason the nature of Powers's conviction was disclosed was because Powers requested a letter from St. John's in support of his application for an advanced ruling from the Appellate Division concerning whether he would be admitted to the New York bar in light of his prior conviction, thereby demonstrating his clear goal of becoming an attorney. Given that Powers had obtained three semesters worth of credit and presumably paid tuition to attend, rescission of Powers's application is, in my view, too harsh a penalty for the alleged infraction.

Id. at 219.

IN THIS ISSUE

Application of CPLR 205(a)

When Does a Prior Action Dismissed for Failure to Perfect Appeal Terminate?

CPLR 205(a) permits a plaintiff to bring a second action within six months after the termination of a prior action even if the statute of limitations has run in the interim. In order to take advantage of CPLR 205(a), several requirements must be met. For example, the second action must be based on the "same transaction or occurrence or series of transactions or occurrences" as the prior action. Moreover, the first action cannot have been terminated in certain ways, including a voluntary discontinuance, failure to obtain personal jurisdiction, a dismissal for neglect to prosecute or a final judgment on the merits. And, the second action must be commenced and service effected within six months after *termination* of the prior action. One issue is determining when the first action terminates when an earlier dismissal order is appealed. In *Lehman Bros. v. Hughes Hubbard & Reed*, 92 N.Y.2d 1014, 1016–17 (1998), the N.Y. Court of Appeals held that the prior action terminates when an appeal taken as of right is exhausted. Thus, a second action brought within six months of the exhaustion of a discretionary appeal would be untimely. *Lehman Bros.* did not address, however, what would happen if a party pursues, but does not properly perfect, an appeal as of right, resulting in the appeal being dismissed.

In *Malay v. City of Syracuse*, 2015 N.Y. Slip Op. 04164 (May 14, 2015), the plaintiff's initial federal court action was terminated after her federal claims were dismissed and the court refused to exercise jurisdiction over her state law claims. After taking an appeal as of right to the Second Circuit, the plaintiff decided "strategically" not to pursue the appeal and commenced a state court action before her appeal was dismissed. The N.Y. Court of Appeals held that the prior federal action terminated, under CPLR 205(a), when the intermediate appellate court dismissed the appeal, not when the underlying order was entered. The Court reasoned that its decision comported "with the statute's remedial purpose of allowing plaintiffs to avoid the harsh consequences of the statute of limitations and have their claims determined on the merits." *Id.* at 4. The Court rejected the defendants' argument that the Court's interpretation would encourage plaintiffs to take frivolous appeals they do not intend to perfect. In fact, a plaintiff whose appeal was dismissed because of a failure to perfect would lose the right to appeal those same issues. The Court also rejected defendants' argument that the plaintiff could have protected herself by bringing another state court action within six months of the appeal of the underlying order while also pursuing the appeal. The Court noted that the second action would have been wasteful and subject to dismissal under CPLR 3211(a)(4) (prior action pending).

Interestingly, because not preserved for review, the Court did not address whether the dismissal of the appeal for failure to perfect would be a "voluntary discontinuance" or "neglect to prosecute," which would exclude the case from CPLR 205(a) treatment.

No Bad Deed Goes Unpunished

Majority of Court Finds Claim Based on Forged Deed Not Subject to Statute of Limitations Defense

In *Faison v. Lewis*, 25 N.Y.3d 220 (2015), the plaintiff was seeking to set aside and cancel the defendant bank's mortgage interest in real property conveyed by an allegedly forged deed. A majority of the Court noted that a forged deed is void at its inception. *See Marden v. Dorthy*, 160 N.Y. 39, 47 (1899). As such, it is "a legal nullity at its creation . . . never entitled to legal effect." The Court distinguished a situation where the signature and authority for conveyance of a deed are acquired by fraudulent means, which merely renders the deed voidable. In the former instance, a forged deed is void initially and cannot convey good title. In the latter, the deed containing the title holder's actual signature is voidable and "has the effect of transferring the title to the fraudulent grantee" until set aside. Thus, the forged deed was never valid, and "a statute of limitations does not make an agreement that was void at its inception valid by the mere passage of time" (citing *Riverside Syndicate, Inc. v. Munroe*, 10 N.Y.3d 18, 24 (2008)).

The majority rejected the defendant's and dissent's argument that forgery is a category of fraud, subject to CPLR 213(8)'s limitation period. Moreover, it dismissed the dissent's concerns that, absent a statute of limitations, the mere passage of time will make it difficult to defend claims, noting that CPLR 213(8) contains a discovery provision which can result in the litigation of claims long after the relevant events. In addition, stale claims cut both ways, making them difficult to prove. Finally, the majority questioned why the desire for repose outweighed the "need to ferret out forged deeds and purge them from our real property system." *Faison*, 25 N.Y.3d at 230.

Attorneys who previously advised clients that their claims on a forged deed were untimely under CPLR 213(8) should contact those clients to review their rights with them.

Psychiatrist Reveals Defendant's Admission at Trial

Right or Obligation to Reveal Confidential Information Does Not Abrogate Privilege

In *People v. Rivera*, 2015 N.Y. Slip Op. 03764 (May 5, 2015), a child, in her mother's presence, told the pediatrician that she had been sexually abused by the defendant. The pediatrician then reported the accusation to the Administration for Children's Services (ACS). The child's mother informed the defendant's mother of the accusation, who then relayed that information to the defendant. The defendant was subsequently admitted to Columbia Presbyterian Hospital's psychiatric emergency room, complaining of depression and suicidal thoughts. There, the defendant told his treating psychiatrist that he had sexually abused the child.

After the People moved to subpoena the defendant's psychological records, including any admissions of guilt, the lower court reviewed the records in-camera and ruled that although the defendant's admission was privileged, it was admissible at trial because the psychiatrist had disclosed the abuse to ACS. After the child testified to the abuse at trial, the People called the defendant's psychiatrist who testified that the defendant had admitted to sexually abusing the child. Despite the defendant's denial of any wrongdoing, he was convicted and sentenced to 13 years to life.

The Appellate Division unanimously reversed the judgment and remanded the case for a new trial, finding that the trial court erred in permitting the psychiatrist to testify about the defendant's admission.

The Court of Appeals affirmed, holding that the trial court ruling violated the physician-patient privilege. The People argued that since the legislature established several exceptions to the privilege, the defendant could not have reasonably expected his statements to remain confidential. The Court rejected this argument, finding that even if a doctor may or must by law report instances of abuse or threatened future harm to authorities, including confidential information, the evidentiary privilege under CPLR 4504(a) is not abrogated. The Court noted that while confidentiality is an ethical requirement essential to treatment, privilege is a rule of evidence protecting communications and medical records. Moreover, the Court maintained that if the legislature wished to carve out another exception it would have done so; in fact, CPLR 4504 requires certain physicians and other professionals to disclose information under certain circumstances. The Court stressed that the physician-patient privilege should be afforded a "broad and liberal construction"; there is a difference between admitting a statement in a child protection proceeding and introducing a statement at the defendant's criminal trial; and there is no express exception applicable here. Thus, the Court held that the admission of the psychiatrist's testimony violated CPLR 4504(a), it would not curtail the privilege here as the People requested, and the error was not harmless.

And So You Thought You Knew How to Plead a Statute of Limitations Defense?

First Department Casts Doubt on Common Practice

When asserting many affirmative defenses, most of us learned something perhaps alien to certain attorneys: brevity is a virtue. Thus, we were taught that a bare assertion of "the statutes of limitations" with no detail, such as the applicable limitation period, was a sufficiently pleaded defense. However, a majority of the First Department has recently questioned that basic premise and asked the Court of Appeals to revisit the issue. In *Scholastic Inc. v. Pace Plumbing Corp.*, 8 N.Y.S.3d 143 (1st Dep't 2015), the defendant's answer contained the following "boilerplate, catchall paragraph":

> That the answering defendant not being fully advised as to all the facts and circumstances surrounding the incident complained of hereby asserts and reserves onto [sic] itself the defenses of accord and satisfaction, arbitration and award, discharge of bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or an affirmative defense which further investigation of this matter may prove applicable herein.

The court was unanimous in finding that the defendant failed to separately state and number the statute of limitations defense, as required by CPLR 3014. In addition, there was agreement as to the remedy: not to deem the defense waived or to dismiss it but instead to permit the defendant to amend the answer to plead the defense properly and the plaintiff to conduct discovery on the statute of limitations issue.

Where the majority and concurrence disagreed, however, was in the detail necessary to assert the defense. The majority found a conflict between the Court of Appeals decision in *Immediate v. St. John's Queens Hosp.*, 48 N.Y.2d 671 (1979), and Form 17 of the official forms promulgated by the state administrator, pursuant to CPLR 107. In *Immediate*, the Court permitted a conclusory statute of limitations defense. Thus, merely stating that, "this action is barred by the applicable statute of limitations" would be sufficient – precisely the type of language used by most practitioners. However, official Form 17, which according to CPLR 107, "shall be sufficient . . . and shall illustrate the simplicity and brevity of statement which the [CPLR] contemplate[s]," provides alternate language including the limitation period: "The cause of action set forth in the complaint did not accrue within six years next before the commencement of this action."

While the majority acknowledged that official Form 17 provides a "ceiling, not a floor" to what is required in pleading that defense, it also questioned whether *Immediate* intended "to entirely obviate the Official Form 17 standard." Apparently concerned about what it perceived as a lack of case law and "scant" secondary source analysis of this "problem," the majority suggested there might be an instance where a plaintiff would be prejudiced by a defendant's failure to plead the applicable limitation period. In conclusion, the majority asked the N.Y. Court of Appeals to give the issue a "second look."

The concurrence found there was no conflict between the *Immediate* decision and official Form 17. As the majority noted, Form 17 sets a ceiling, not a floor. Moreover, *Immediate* established that official Form 17 provides more information than necessary, expressly stating that there was no requirement to plead the limitation period. The concurrence did not see how requiring the defense to plead factual particulars would help the plaintiff frame discovery requests or inform the plaintiff as to when the cause of action accrued. It also noted that the "scant analysis" the majority found on this issue was instead indicative of the unity of belief that a conclusory assertion of the statute of limitations defense was sufficient. Finally, the concurrence questioned why a defendant, through its answer, is required to educate the plaintiff on the length of the limitation period or when the cause of action accrued. Most problematic are the possible repercussions caused by the majority's opinion:

> [I]ts decision will inevitably lead to the proliferation of motion practice and appeals on the issue of the sufficiency of the pleading of the statute of limitations defense. In the face of the majority's call for the Court of Appeals to "revisit" *Immediate*, counsel for plaintiffs may be expected routinely to move to strike the statute of limitations defense, not only for failure to plead a period of limitation, but also for arguably pleading the wrong period, in the hope of preserving the issue for the reconsideration of the Court of Appeals to which the majority looks forward. I fail to see how this development will enhance either the efficiency or the fairness of our civil justice system.

Scholastic, 8 N.Y.S.3d at 160.

Practitioners are left to ponder what to do next. Should defendants include the limitation period in their statute of limitations defenses? And if the plaintiff's claims were barred by a different limitation period, not the one enumerated by the defendant, would the defense be waived? Will

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plaintiff's counsel seek such information in a bill of particulars or otherwise or leave the defense as is, hoping to find a court to go one step further and find the defense waived? Could a court find that other particulars are necessary in this or other common defenses?

One can only hope that the Court of Appeals will put this issue to rest. Based on the procedural status of *Scholastic*, however, it appears that this will not be the case to resolve the issue.

Be Careful the Next Time You Say: Facebook Me!

Service by Facebook – I'm Not a Friend

CPLR 308(5) provides that where personal delivery, leave and mail and "nail and mail" service on a natural person are impracticable, a plaintiff can move for an alternate type of service. With the rapid expansion of communication through electronic means, particularly email, we are seeing more cases permitting email service, although usually with a second backup means of service. *See, e.g.*, *Hollow v. Hollow*, 193 Misc. 2d 691 (Sup. Ct., Oswego Co. 2002) (email plus international registered air mail and international mail standard service on defendant employed by American engineering company in Saudi Arabia compound).

Recently, a Supreme Court Justice went further, permitting service exclusively by Facebook and without any additional service in a divorce action. In *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709 (Sup. Ct., N.Y. Co. 2015), Justice Matthew Cooper noted that the plaintiff easily demonstrated that she was unable to serve the defendant via personal service. Moreover, she established that Facebook service was reasonably calculated to apprise the defendant that he was being sued for divorce. The court acknowledged that "Facebook service" represented a radical departure from traditional notions of service of process. It pointed out that the few decisions addressing service via social media, mostly from federal district courts, were split on its propriety. Nevertheless, the court concluded that although Facebook service was novel and nontraditional, it should not be rejected for that reason alone. The determining factor was whether the service comported with the fundamentals of due process by being reasonably calculated to provide the defendant with notice of the divorce. In finding that the plaintiff had met that burden, the court noted that she had established that the Facebook account she identified actually belonged to the defendant; the defendant regularly logged onto his account; and the plaintiff had no other means of contacting or serving the defendant, thereby obviating the need for a second backup or supplemental service.

In this case, publication service was simply not reliable and "almost guaranteed not to provide a defendant with notice." *Id.* at 715. Thus, although publication is the method most used in divorce actions where the defendant cannot be served by other means, the court refused to sanction it even as supplemental service, noting the substantial cost and that the chances of it being seen by the defendant were "infinitesimal." *See id.* at 716.

To assure the best opportunity at notice, the court specified the precise procedure to be followed, including a follow-up call and text message:

> [P]laintiff's attorney shall log into plaintiff's Facebook account and message the defendant by first identifying himself, and then including either a web address of the summons or attaching an image of the summons. This transmittal shall be repeated by plaintiff's attorney to defendant once a week for three consecutive weeks or until acknowledged by the defendant. Additionally, after the initial transmittal, plaintiff and her attorney are to call and text message defendant to inform him that the summons for divorce has been sent to him via Facebook.

Id.

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