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

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CASE LAW DEVELOPMENTS

Majority of Court of Appeals Applies Common Law Standard for Punitive Damages Charge Under New York City Human Rights Law

Dissent Would Permit Charge Wherever Liability Is Proven

While the New York City Human Rights Law (NYCHRL) permits an award of punitive damages for gender discrimination, it provides no guidance as to the standard to apply when such damages should be awarded. In *Chauca v. Abraham*, 2017 N.Y. Slip Op. 08158 (November 20, 2017), the Court of Appeals was asked by the Second Circuit, via a certified question, to determine the applicable standard.

The Second Circuit had noted that previously in *Farias v. Instructional Systems, Inc.*, 259 F.3d 91 (2d Cir. 2001), it had applied the Title VII standard for punitive damages to the NYCHRL. That standard is "whether plaintiff had submitted evidence that her employer had intentionally discriminated against her with malice or reckless indifference to her protected rights."

The district court applied that standard and denied the instruction, finding there to be no evidence of malice, reckless indifference, or intent. However, the Second Circuit recognized that the passage of the 2005 Local Civil Rights Restoration Act (Restoration Act) and subsequent amendments required a liberal construction of the NYCHRL and thus called into question its earlier holding.

The New York Court of Appeals unanimously agreed that the Title VII standard did not apply. The Court acknowledged that the Restoration Act amendment assured that the NYCHRL be construed liberally and broadly in favor of discriminated plaintiffs. However, it split (6–1) on what alternate standard should be applied.

The majority opined that the common law standard in New York, as enunciated by the Court in *Home Ins. Co. v. American Home Products Corp.*, 75 N.Y.2d 196 (1990), applied. That standard provides that

> a plaintiff is entitled to punitive damages where the wrongdoer's actions amount to willful or wanton negligence, or recklessness, or where there is "a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard" (citation omitted).

Chauca, 2017 N.Y. Slip Op. 08158, at *2.

The majority stated that the term "punitive damages" is a legal term with meaning under New York's common law. It rejected plaintiff's argument that she should be entitled to a punitive damage charge upon *any* showing of liability. The Court stressed that punitive damages differ conceptually from compensatory damages. Punitive damages constitute punishment for wrongful conduct beyond mere negligence and are to be awarded only upon a finding of an additional level of wrongful conduct. Thus, the Court reasoned, a punitive damage award requires a higher standard than is required for a mere compensatory award.

The majority dismissed plaintiff's argument that a punitive damages mitigation provision in § 807(13) of the NYCHRL supported her position that a heightened level of culpability is not required. That provision, reasoned the Court, merely provides an employer confronted with possible vicarious liability, *once the punitive damages standard has been met*, with the ability to mitigate punitive damages, if certain factors are established. "Nothing in that provision requires a punitive damages charge whenever liability, vicarious or direct, is demonstrated." *Id.* at *4.

The majority concluded that the *Home Ins. Co.* standard, which "requires neither a showing of malice or awareness of the violation of a protected right," represents "the most liberal construction of the statute that is 'reasonably possible' and furthers the purpose of the NYCHRL." *Id.* at *5.

The dissent, written by Judge Wilson, agreed with the plaintiff that she should be entitled to a punitive damages charge wherever liability is proven, "unless an employer has adopted and fully implemented the antidiscrimination programs, policies, and procedures promulgated by the Commission on Human Rights, as an augmentation to compensatory damages." *Id.*

IN THIS ISSUE

The dissent asserted that New York City has exhibited "its pioneering commitment to human rights through repeated revisions to its Human Rights Law"; the 2016 amendment to the NYCHRL was meant "to provide additional guidance for the development of an independent body of jurisprudence for the New York [C]ity [H]uman [R]ights [L]aw that is maximally protective of civil rights in all circumstances"; the standard for finding defendant liable for punitive damages under the NYCHRL should not be borrowed from federal or common law; the statute, as revised, provides that a punitive damage charge is automatic upon the finding of liability; and statutes, like the NYCHRL, which encourage civil actions by private attorneys general, automatically permit an award of damages above compensatory damages (e.g., treble damages under the federal antitrust laws and the RICO Act).

Court Holds that Cayman Islands Rule Is Procedural in Nature

Thus, Under Choice of Law Principles, It Did Not Apply to Derivative Action Brought in New York

The issue in *Davis v. Scottish Re Group Ltd.*, 2017 N.Y. Slip Op. 08157 (November 20, 2017), was whether a particular Cayman Islands Rule was substantive and thus applied under choice of law principles to an action brought here.

Some basic principles first when analyzing choice of law issues. First, under New York common law principles, the forum's procedural rules govern. Moreover, the law of the forum generally governs the determination as to whether a particular foreign law is procedural or substantive in nature, although the foreign jurisdiction's characterization of the law is instructive, but not dispositive. *See Tanges v. Heidelberg N. Am., Inc.*, 93 N.Y.2d 48, 54 (1999).

Here, the plaintiff commenced an action asserting both direct and derivative claims against various defendants, including Scottish Re Group Limited (Scottish Re), a Cayman Islands company, formerly a reinsurer. Rule 12A, contained in Order 15 of the Cayman Islands Grand Court Rules 1995, provides that a plaintiff who brings a contested derivative action in the Cayman Islands is required to apply to the Cayman Islands Grand Court for leave to continue the action. The Rule is intended to avoid vexatious or unfounded litigation. If Rule 12A was determined to be substantive, then under choice of law principles, the plaintiff would be barred from bringing this action in New York (having failed to seek leave from the Cayman Islands Grand Court).

The parties agreed that Cayman Islands substantive law governed the merits of this action. Plaintiff argued Rule 12A was inapplicable because it

> is a procedural rule governing the way in which the parties appear before the Cayman courts, what manner of evidence shall be presented and, should a court make a determination to grant the plaintiff leave to continue, the next steps to be taken toward ultimate resolution of a derivative action.

Davis, 2017 N.Y. Slip Op. 08157, at *3.

The defendants countered that the rule is a "substantive 'gatekeeper' in derivative actions involving Cayman Island companies." *Id*. As a result, a plaintiff who files a derivative action anywhere in the world on behalf of a Cayman Islands-organized company is required to comply with Rule 12A and seek leave from the Cayman Islands Grand Court.

The Court first looked to the language of Rule 12A, which talks of derivative actions "commenced by writ," and states that an application to the Grand Court is required when the defendant has "given notice of intention to defend." The Court noted that these procedures are specific to Cayman Islands litigation; actions in New York are not commenced by writ, and the Grand Court rules have their own specific method for how a defendant acknowledges service of the writ. Thus, it concluded that Rule 12A was procedural and did not apply in New York courts. The Court added that there is no suggestion in the rule's language that it applies to derivative actions brought on behalf of Cayman Island companies outside the Cayman Islands.

The Court here found that the defendant's reliance on the Court's decision in *Tanges*, *supra*, was misplaced. In *Tanges*, answering a certified question from the Second Circuit, the Court of Appeals applied a Connecticut limitation period in products liability actions "barring any action commenced later than 10 years from the date the defendant no longer had control of the injury-causing product." *Tanges*, 93 N.Y.2d at 54–55. In doing so, the Court found the limitation period to be a statute of repose, which is substantive in nature, as opposed to a statute of limitations, which is procedural:

> In *Tanges*, we reasoned that statutes of limitation are generally treated as procedural in New York because they pertain "to the remedy rather than the right," meaning that when the allotted time period under the statute has expired, the plaintiff loses its remedy, although it continues to have the underlying right. Statutes of limitation begin to run when a cause of action accrues.
>
> Statutes of repose are "theoretically and functionally" different. A statute of repose begins to run when a specified event takes place, and can expire before a possibly valid cause of action ever accrues. The repose period creates an "absolute barrier" to a plaintiff's right of action. Given this potential impact on the right of a plaintiff to bring a cause of action, the *Tanges* Court held that repose statutes "exhibit a substantive texture, nature and consequence," different from regular statutes of limitation, and thus are substantive. In other words, unlike a statute of limitations, a statute of repose "envelop[es] both the right and the remedy" (citations omitted).

Davis, 2017 N.Y. Slip Op. 08157, at *5.

The Court here stated that Rule 12A was not functionally similar to a statute of repose, since it did not nullify a plaintiff's right to ever bring an action. Rather,

> it *allows* any plaintiff the right to commence a derivative action, and sets forth a procedural mechanism for a threshold determination of merits and standing. Certainly, if a plaintiff does not seek leave to continue, the rule creates an impregnable barrier to continuing the derivative action, forestalling any remedy, just as a statute of limitations forecloses a plaintiff who sleeps on its rights from obtaining a remedy. However, Rule 12A itself neither creates a right, nor defeats it. Rather, it is the initial decision by the Grand Court judge, made after an evaluation of the plaintiff's complaint using the substantive law, along with the defendant's evidence, that may terminate the action.

Id. at *5–6.

Finally, the Court maintained that the general policy considerations described in *Tanges* compelled the Court here to conclude that Rule 12A is procedural. Finding that Rule 12A is procedural does not impose a burden on either the New York or Cayman Islands courts. However, if the rule was determined to be substantive

> it is unclear what procedural path a party seeking to bring a derivative action in New York on behalf of a Cayman company would follow to comply with Rule 12A. Must the party first proceed by writ in the Grand Court and then discontinue the Cayman action to return to, or commence its action here in New York? Would the ruling by the Grand Court that there was a sufficient showing of merit be binding on a New York court on a motion to dismiss or for summary judgment? Rule 12A provides no answers.

Id. at *6.

As a result, the Court concluded that plaintiff's failure to first seek leave from the Cayman Islands Grand Court did not bar his derivative claims here.

Court Addresses Affixing and Mailing Provision Under New York City Charter

Only Single Prior Reasonable Attempt at Personal Delivery at the Premises Is Required

In *Mestecky v. City of New York*, 2017 N.Y. Slip Op. 08162 (November 20, 2017), the Department of Buildings' inspectors issued nine Notices of Violation (NOV) in connection with the petitioner's residential property. Each of the NOVs identified the claimed violation and described a single successful effort by the inspector to personally serve the NOV at the premises. The inspector then utilized "alternative service," that is, affixing the NOV to the premises in a conspicuous place and mailing a copy to the petitioner at the premises address (and, for some of the NOVs, at his home).

The petitioner failed to appear on the hearing dates, resulting in administrative default judgments, fines and penalties. At a hearing challenging the NOVs, the petitioner asserted that he did not receive any of the NOVs and argued that more than a single attempt at personal delivery was required before permitting the affix and mail service.

The relevant provision here is New York City Charter § 1049-a(d)(2), which permits the use of affix and mail service after "a reasonable attempt" has been made to deliver the notice "to a person in such premises upon whom service may be made as provided for by article three of the civil practice law and rules or article three of the business corporation law."

The "generic" nail and mail service that most of us are familiar with is contained in CPLR 308(4). There, the statute expressly states that the resort to nail and mail service can only be made upon a showing that service by personal delivery (CPLR 308(1)) or leave and mail (CPLR 308(2)) could not be effected with "due diligence." The latter requirement has been interpreted to require multiple attempts at different times. *See e.g., Sinay v. Schwartzman*, 148 A.D.3d 1068 (2d Dep't 2017).

The petitioner here argued that by referencing CPLR Article 3, the relevant charter provision incorporated the "due diligence" requirement of CPLR 308(4), as interpreted by case law. Thus, the petitioner maintained that the single attempt to deliver the NOVs to a person at the premises was insufficient.

The Court of Appeals rejected the argument. It focused on the language of New York City Charter § 1049-a(d)(2), which begins with a general rule that CPLR Article 3 service rules apply, and follows with certain alternative service exceptions, including the one relevant here. Thus, to read the provision in the manner advocated by the petitioner

> would make the exception indistinguishable from the general rule, thereby rendering it superfluous. Considered in context, the only reasonable conclusion is that the cross-reference to CPLR article 3 and Business Corporation Law article 3 in the exception was intended to import the provisions of those articles clarifying the parties or entities who can accept service, such as the clause permitting delivery to "a person of suitable age and discretion" (see CPLR 308[2]). Indeed, this is the most natural reading of section 1049-a(d)(2)(b) given that the phrase containing the statutory cross-references directly follows the clause requiring "a reasonable attempt" to deliver the notice "to a person in such premises upon whom service may be made."

Mestecky, 2017 N.Y. Slip Op. 08162, at *4–5.

Moreover, the Court pointed to language in the statute which talks in terms of "a reasonable attempt," that is, the use of the singular "attempt" (as opposed to multiple attempts). As a result, the statutory language supported the conclusion that a single attempt at personal delivery was required. The Court added that the legislative history further supported this interpretation, because it stressed the difficulties encountered in identifying and locating the persons responsible for the violation(s), and frequent amendments have thus sought to liberalize the service rules to deal with the widespread problem of violators avoiding service.

Finally, the Court concluded that the procedure providing for a single attempt to deliver the NOV personally followed by affix and mail "is reasonably calculated to inform owners of violations relating to their properties." *Id*. at *5.

Dismissal of Neglect Petition Terminates Family Court Jurisdiction

Family Court Is Thus Without Power to Issue Any Order or Impose New Conditions

In *Matter of Jamie J. (Michelle E.C.)*, 2017 N.Y. Slip Op. 08161 (November 20, 2017), a week after the subject child, Jamie J., was born, the Family Court directed her temporary removal from her mother Michelle E.C.'s custody. This was done at the request of the Wayne County Department of Social Services (the Department) and via an ex parte pre-petition order, pursuant to Family Court Act (FCA) § 1022. A few days later, the Department filed a FCA article 10 neglect petition. Article 10 permits a pre-petition temporary removal of a child (followed by a prompt filing of the petition) where the child

> "appears so to suffer from the abuse or neglect of his or her parent or other person legally responsible for his or her care that his or her immediate removal is necessary to avoid imminent danger to the child's life or health" and if there is not enough time to hold a preliminary post-petition hearing (id. § 1022 [a] [i]).

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Id. at *3.

Over a year later, the Department made a motion to amend its petition to conform the pleadings with the proof, which motion was denied as unfairly prejudicial. A fact-finding hearing was then conducted and the Family Court dismissed the petition, finding that the Department had failed to prove neglect. It did not release the child into the mother's custody, however, but instead held a permanency hearing under FCA article 10-A. The plaintiff-mother argued that the Family Court lacked subject matter jurisdiction, once the neglect proceeding had been dismissed, and her daughter should have been returned to her immediately. The Department maintained that the Family Court had continuing jurisdiction, notwithstanding the Department's failure to prove neglect, and the child could continue in foster care.

The question presented here was whether FCA article 10-A provides its own independent grant of continuing jurisdiction to the Family Court that survives the underlying article 10 neglect petition's dismissal. The Court initially explained that article 10-A

> exists "to provide children placed out of their homes timely and effective judicial review that promotes permanency, safety and well-being in their lives." Enacted in 2005, it establishes a system of "permanency hearings" for children who have been removed from parental custody. . . . [O]nce a child has been placed in foster care pursuant to certain sections of the Social Services Law or of FCA articles 10 and 10-C (Destitute Children), "the case shall remain on the court's calendar and the court shall maintain jurisdiction over the case until the child is discharged from placement and all orders regarding supervision, protection or services have expired" (citations omitted).

Id. at *4.

The Department argued, in what the Court characterized as "a hyperliteral reading of section 1088, divorced from all context," that once the child is removed from parental custody pre-petition by the Family Court, it has continuing jurisdiction even if the child has not been neglected or abused. The Court here rejected the argument, stating that "in the overall statutory scheme, the legislative history of article 10-A, and the dictates of parents' and children's constitutional rights to remain together compel the opposite conclusion: Family Court's jurisdiction terminates upon dismissal of the original neglect or abuse petition." *Id*. at *4–5.

The Court maintained that § 1088 and article 10-A have to be construed together with other FCA provisions on which their triggering depends. The Court stressed that the Department's interpretation would permit an end- run around the article 10 protections via a temporary order issued in an ex parte proceeding. Significantly, permanency hearing decisions under Article 10-a are made "in accordance with the best interests and safety of the child," not the elevated article 10 "imminent harm" standard. Moreover, there is nothing in the article 10-A legislative history suggesting that the case law existing before its enactment in 2005 was no longer good law. Those pre-2005 decisions held that once a neglect petition is dismissed, the Family Court is divested of jurisdiction to issue any further orders or impose new conditions. In fact, the legislative history

> demonstrates that the drafters intended only to correct a technical issue that plagued article 10 and threatened the State's continued access to federal funding under Title IV of the Social Security Act: Family Court's need to constantly reassert jurisdiction *after* a child had been determined to be the victim of neglect or abuse.

Id. at *5.

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