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

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CASE LAW DEVELOPMENTS

Court of Appeals Deals With Special Duty Doctrine in Two Cases

In Both, Majority Finds That Requirements Were Not Met

In two recent cases, the New York State Court of Appeals dealt with the special duty doctrine, a concept we have touched on it in the past. Briefly, where a negligence claim is made against a municipality acting in a governmental capacity, the plaintiff is required to prove the existence of a special duty in order to recover. The Court has found that a special duty can arise in three situations, that is, where "(1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition." *Tara N.P. v. Western Suffolk Bd. of Coop. Educ. Servs.*, 28 N.Y.3d 709, 714 (2017).

Both of the recent cases dealt with the second situation, where it was alleged that the governmental entity voluntarily assumed a duty to the plaintiff. In both circumstances, a majority of the Court found there to be no special duty. To prove that the government voluntarily assumed a duty to the plaintiff beyond what it generally owes to the public, the plaintiff needs to establish:

> (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking.

Tara N.P., 28 N.Y.3d at 714–15 (quoting *Cuffy v. City of New York*, 69 N.Y.2d 255, 260 (1987)).

In *Maldovan v. Cnty. of Erie,* 2022 N.Y. Slip Op. 06632 (Nov. 22, 2022), the plaintiff sought damages for the pain and suffering of the decedent (Laura), and for her wrongful death, after she was abused and killed by her mother and brother (Luke Wright). An investigation revealed that the decedent, a 23-year-old woman with developmental disabilities, had suffered from physical and sexual abuse and torture by her brother and her mother in the months leading up to her death. The mother and brother were convicted of their crimes and were sentenced to long prison terms. Plaintiff here asserted negligence claims against the county predicated on, among other things, investigations conducted by Child Protective Services (CPS) and Adult Protective Services (APS) of complaints of decedent's possible abuse in the home. Plaintiff asserted that the CPS and APS caseworkers, as well as the sheriff's deputies, were negligent in the performance of their duties, leading to the decedent's death. The claim against the sheriff deputies arose out of an incident in which the decedent ran away from home and was found at an abandoned Girl Scout camp by two deputies, who returned the decedent to her mother's care, believing that the decedent and her mother had had a verbal altercation.

The parties moved for summary judgment, and the trial court denied both motions. The Appellate Division affirmed the order denying plaintiff's motion but granted summary judgment to the defendants. The Appellate Division concluded, as relevant here, that the fourth element above, justifiable reliance, had not been established and thus no special duty existed as a matter of law.

A majority of the Court of Appeals affirmed. The Court noted that

> the justifiable reliance element "provides the essential causative link between the 'special duty' assumed by the municipality and the alleged injury. Indeed, at the heart of most of these 'special duty' cases is the unfairness that the courts have perceived in precluding recovery when a

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municipality's voluntary undertaking has lulled the injured party into a false sense of security and has thereby induced [the injured party] either to relax [their] own vigilance or to forego other available avenues of protection" (citation omitted).

Id. at *6 (quoting *Cuffy*).

Here, the evidence established that another brother of the decedent, Richard Cummings, who was living out of state at the time, made complaints of possible abuse that were relayed to CPS and APS. Both agencies investigated the reports months before the decedent's death, concluded that they were unfounded, closed the investigations, and told Mr. Cummings that the investigations were closed and would not be reopened without new information. Significantly, the majority agreed with the Appellate Division that Mr. Cummings did not "relax his own vigilance" as evidenced by his two follow-up calls to an APS caseworker requesting that she reopen the investigation, "and he was not induced to forego other avenues of relief." Moreover, the Court concluded that the sheriff's deputies took no action that could have induced reliance.

Plaintiff argued that the special duty factors assume that the person who is injured is a competent adult who, when presented with a governmental failure, can pursue other avenues of protection. However, where, as here, the decedent "was part of the class of adults the legislature sought to protect [i.e., a child or an adult of diminished capacity] when it established APS, plaintiff should not be required to establish justifiable reliance in this case." *Id.* at *8. The dissent suggested that the special duty rule can be satisfied where CPS or APS receives an abuse report, opens an investigation, and has contact with the injured party.

In rejecting these approaches, the majority noted that the Court *has* relaxed the special duty rule requirements where there are "vulnerable victims" to permit a competent family member to satisfy the direct contact and justifiable reliance elements. In this case, the Court found that the "Appellate Division appropriately assessed whether Richard justifiably relied on promises or actions by government employees that would have induced him to relax his vigilance regarding Laura's safety and concluded that he did not." *Id*. at *9.

The Court added that it would not ease the special duty rule because it is "based on the rationale that exposing municipalities to tort liability may 'render them less, not more, effective in protecting their citizens' (citation omitted)." *Id.* at *10. The rule is intended to assure that the municipalities do not become insurers for third-parties' conduct. The Court concluded that

> [i]mposing liability here where Laura's family members did not justifiably rely on any promises by CPS or APS and relax their vigilance as a result could impose a "crushing burden" on those agencies, which may render them less effective in fulfilling their mission to protect vulnerable individuals. . . Where, as here, the elements of a voluntarily assumed duty, including justifiable reliance, were capable of being satisfied through Laura's family members, but simply were not met, the sound principles supporting the special duty rule require us to decline to amend that rule here (citations omitted).

Id. at *11–12.

Similarly, Special Duty Requirement Not Met in Domestic Violence Case

Majority of Court Reiterates That the Existence of an Order of Protection Does Not, In and of Itself, Prove Justifiable Reliance

In *Howell v. City of New York*, 2022 N.Y. Slip Op. 06633 (Nov. 22, 2022), plaintiff was brutally attacked and thrown out of a third-floor window by Andre Gaskin, her former boyfriend and father of her child, in violation of an order of protection. The ex-boyfriend was sentenced to a maximum of seven years in prison.

In the days prior to the incident, the defendant police officers responded to several calls made by the plaintiff in which she stated that Gaskin was violating the order of protection. Notwithstanding three separate incidents, at no time prior to the incident was Gaskin arrested, and the police officers never told the plaintiff that they were going to arrest him. Plaintiff brought this negligence action against the City of New York and the two police officers, alleging that they failed to provide the plaintiff with sufficient protection to prevent the assault.

As in *Maldovan*, a majority of the Court in *Howell* found that the "critical" element (justifiable reliance) to establish a voluntarily assumed special duty had not been met:

> Plaintiff testified during her deposition that she had no contact with the police on the day of the incident prior to the attack, that her ex-boyfriend was in fact at liberty that day, and that the officers never told her that her ex-boyfriend would be arrested for violating the order of protection. Plaintiff's own testimony demonstrates that she did not relax her vigilance based on any police promises that her ex-boyfriend would be arrested for violating the order of protection. It also shows that the police were not on the scene or in a position to provide assistance if necessary, nor had they promised to "provide assistance at some reasonable time." In these circumstances, plaintiff could not have justifiably relied on any promises made or actions taken by defendants (citations omitted).

Id. at *3.

Responding to the dissent, the majority stressed, as it had in the past, that the existence of a protection order, in and of itself, does not establish justifiable reliance. Such a rule would "impermissibly expand governmental liability." The majority pointed to the 195,000 protection orders issued in 2021 in domestic violence cases in New York State:

> This grim statistic undermines the dissents' conclusion that the legislature intended to abrogate the *Cuffy* factors or markedly expand the potential for government tort liability by enacting the Family Protection and Domestic Violence Intervention Act of 1994, and its mandatory arrest. Indeed, that statute's legislative history provides that it would cause no "fiscal implications" for local municipalities and only appropriated $500,000 "to implement . . . training requirements" and for an initial evaluation. Given the numbers discussed above, the cost of potential

> municipal liability regarding violations of orders of protection would far exceed the amount appropriated and would have a significant impact on municipal finances (citations omitted).

Id. at *4–5.

The majority reiterated the Court's refusal to adopt "ad hoc exceptions" to the special duty rule, declining to "enlarge the ambit of duty," which could have consequential effects.

In dissent, Judge Wilson opined that the plaintiff should be able to pursue a claim by establishing that the City had a statutory special duty under the Domestic Violence Intervention Act, which was violated by the officers. In addition, he believed that there were triable issues of fact as to whether the officers assumed positive control of the dangerous situation and whether the officers' statements and conduct were representations justifiably relied upon by the plaintiff.

In a separate dissent, Judge Rivera found the majority's decision to be "incomprehensible," worsening an already failing legal system in effectively dealing with domestic violence matters:

> If, as the majority concludes, plaintiff cannot pursue her claims and test her allegations in court because the officers made it clear that they would not comply with the law, then how can—and why should—survivors trust our legal system? I disagree with the majority that our courts provide plaintiff with no recourse.

Id. at *51.

Municipalities Required to Engage in Collective Bargaining Over Procedures for Terminating Municipal Employees

Presumption in Favor of Bargaining Not Overcome

In the *Matter of City of Long Beach v. New York State Pub. Empl. Relations Bd.*, 39 N.Y.3d 17 (2022), the Court ruled that a municipality is required under the Taylor Law to engage in collective bargaining over the procedures for terminating municipal employees, where they have been absent from work for more than a year as a result of an in-the-line-of-duty injury.

A nonparty, Jay Gusler, a professional firefighter, was injured in the line of duty, determined to be compensable under the Workers' Compensation Law. He was absent from work starting on November 13, 2014. Almost a year later, the City of Long Beach Fire Commissioner notified Gusler that the City of Long Beach (City) was evaluating whether to exercise its right to separate Gussler from his employment (terminate him) under Civil Service Law § 71 once Gusler was absent from work for more than a year due to the injury. The letter advised that if Gusler wanted to contest the potential termination, a meeting would be scheduled giving Gussler an opportunity to be heard. If he failed to attend the meeting, however, it would be decided that Gossler did not dispute the termination, and termination would be recommended.

The Union demanded that the City negotiate the procedure for separating a member from service under Civil Service Law § 71. The City refused and the Union filed an improper practice charge, alleging that the City's failure to negotiate in good faith violated Civil Service Law § 209-a(1)(d) of the Taylor law. An administrative law judge determined that there was a violation, and the New York State Public Employment Relations Board (PERB) affirmed.

The trial court dismissed the City's article 78 proceeding, which sought to annul the PERB determination. The Appellate Division reversed, however, holding that it did not have to defer to the PERB's interpretation of Civil Service Law § 71 and the City overcame the presumption in favor of mandatory bargaining.

A unanimous Court of Appeals reversed. Initially it noted that it was deciding the issue de novo, because the question here was one of pure statutory construction, which depended "'only on accurate apprehension of legislative intent [with] little basis to rely on any special competence of PERB' (citation omitted)." *Id.* at *22.

The Court stressed that the Taylor Law requirement that public employers "collectively bargain over public employees' 'terms and conditions of employment'" reflected "the 'strong and sweeping' public policy in favor of collective bargaining in this state (citation omitted)." *Id*. The presumption in favor of bargaining can be overcome "'only in "special circumstances" where the legislative intent to remove the issue from mandatory bargaining is "plain" and "clear" . . . or where a specific statutory directive leaves "no room for negotiation"' (citation omitted)." *Id.*

Such special circumstances foreclosing bargaining, can be established (1) "when a statute directs that a certain action be taken by the employer," (2) "when the subject of bargaining would result in the employer surrendering nondelegable, statutory responsibilities," or (3) (rarely) where "some subjects are excluded from collective bargaining as a matter of policy, even where no statute explicitly says so." *Id*.

The Court held that none of these special circumstances applied here. It explained that the statute addresses prolonged employee absences and entitles "public employees disabled by an occupational injury to a one-year leave of absence, while also providing them with a means for later reinstatement if they are terminated for being absent longer than a year." *Id*. at *23. Thus, § 71 provides a necessary balance for the employer and employee: an employee who suffers a work-related disability is entitled to a leave of absence of up to one year and conditional reinstatement after that year. Conversely, the employer can fill the position if it decides to terminate the employee.

The Court saw no "plain and clear evidence" of the Legislature's intent (either in the statute or the legislative history) to preclude the application of the mandatory bargaining procedures for terminating employees. In addition, there was no "'specific statutory directive [that] leaves "no room for negotiation"' of pretermination procedures (citation omitted)." *Id*. at *24. In fact, § 71 does not reference pretermination procedures.

The Court found that the City's need to provide pretermination procedures was not eliminated by a terminated employee's ability to seek reinstatement. Moreover, it disagreed with the City

> that requiring municipalities to negotiate those pretermination procedures frustrates the legislative intent of allowing employers to maintain efficiency by quickly filling vacancies on a permanent basis after a year. In the future, the City and the Union will only need to negotiate pretermination procedures as part of any new collective bargaining agreement, not every time the City seeks to terminate an employee. . . [T]he City can negotiate for procedures that it deems efficient.

Id. at *26.

Finally, any alleged concerns that the Union could use collective bargaining to sabotage the City's right to terminate disabled employees at the appropriate time can be addressed in impasse arbitration or PERB declaratory rulings (subject to judicial review).

Failure to Comply With 22 N.Y.C.R.R. § 202.48 Results in Vacatur of Default Judgment and Damages Award

Appellate Court Finds Plaintiff Failed to Show Good Cause for Lengthy Delay in Settling Judgment

22 N.Y.C.R.R. § 202.48(a) of the Uniform Rules provides that "[p]roposed orders or judgments, with proof of service on all parties where the order is directed to be settled or submitted on notice, must be submitted for signature, unless otherwise directed by the court, within 60 days after the signing and filing of the decision directing that the order be settled or submitted." The failure timely to submit the order or judgment is deemed an abandonment of the motion or action, unless good cause is shown. 202.48(b).

Back in the "old days," before electronic filing and personal computers were widespread, there were times when a fairly diligent attorney could be unaware that a decision had been issued that expressly required that an order or judgment be settled or submitted. Results of many downstate motions were gleaned by reviewing pages and pages and line after line of decisions in the *New York Law Journal*. (You notice that I did not refer to them as the "good" old days!) In moments of concern, some of us would arrange for someone in the office to go to the physical court files to see if any decisions had been filed.

Those days, for the most part, are gone, and determining whether a decision has been issued should be relatively easy. In addition, while this may be far from a scientific analysis, it appears that there are fewer "decisions" today, with most dispositions being in the form of an order or at least short form order. Thus, the failure to comply with 202.48 . . . is less forgivable. And yet there continue to be reported decisions.

For example, in *Cruz v. Pierce*, 2022 N.Y. Slip Op. 07054 (2d Dep't Dec. 14, 2022), after the defendant failed to answer the complaint, the plaintiff successfully moved for leave to enter a default judgment, and the trial court directed an inquest on damages. The court found that the plaintiff was due $274,541.54 in damages, and directed the plaintiff to "[s]ettle judgment on notice." However, the plaintiff failed to submit a notice of settlement and proposed judgment until two-and-half years later. The trial court denied the defendant's motion pursuant to 22 N.Y.C.R.R. § 202.48 to vacate both the original order granting the plaintiff's motion for a default judgment and the decision made after the inquest. The Second Department reversed, finding that the plaintiff failed to comply with the 60-day rule in 202.48, by not submitting a timely notice of settlement and proposed judgment, and failing to show good cause for the lengthy delay in submitting a notice of settlement and proposed judgment. The Appellate Division ruled that the order and decision should have been vacated.

As a result, everything that the plaintiff had achieved was for naught.

Beware of Another Danger of Abandonment: CPLR 3215(c) and the Failure to Take Proceedings Within One Year Following a Default

Majority of Second Department Holds That Here Plaintiff Took the Necessary Actions and Any Subsequent Delays Were of No Moment

CPLR 3215(c) provides its own form of abandonment. It states in relevant part that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default," the court is to dismiss the complaint as abandoned "unless sufficient cause is shown why the complaint should not be dismissed." The section does *not* require that a judgment be entered within the one-year period. Rather, the plaintiff is required to "take proceedings" within one year of the default. In the April 2022 edition of the *Law Digest*, we referred to the decision in *Citibank, N.A. v. Kerszko*, 203 A.D.3d 42 (2d Dep't 2022), in which the Second Department ruled that presenting a proposed ex parte order to show cause that was rejected by the court nevertheless qualified as the taking of proceedings under CPLR 3215(c).

More recently, in *Deutsche Bank Natl. Trust Co. v. Lamarre*, 2022 N.Y. Slip Op. 07056 (2d Dep't Dec. 14, 2022), the plaintiff filed a motion for a reference within one year of the defendants' default which, according to a majority of the Second Department, "was sufficient to demonstrate the plaintiff's intent to have the action proceed, notwithstanding that the motion papers were ultimately rejected by the court as defective (citation omitted)." *Id*. at *4. The majority dispensed with the dissent's concerns about the plaintiff's failure to explain why it did not remedy the defects that caused the motion papers to be rejected for 10 years, because "once a plaintiff establishes 'compliance with CPLR 3215(c),' it is 'not required, under the plain language of that subdivision, to account for any additional periods of delay that may have occurred subsequent to the initial one-year period contemplated by CPLR 3215(c)' (citation omitted)." *Id*. As a result, the appellate court found that the trial court erred in not granting plaintiff's motion to vacate the earlier sua sponte dismissal order and restore the action to the active calendar.

Notwithstanding the forgiving majority here, a plaintiff should act with alacrity to seek entry of a judgment following a default.

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