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Summarizing recent significant New York appellate cases

The Court of Appeals is back for its first opinions of the 2023–24 term, all from the September argument session. Let's take a look at some of those, and what else has been happening in New York's appellate courts over the past week.

COURT OF APPEALS

INSURANCE LAW

Nitkewicz v Lincoln Life & Annuity Co. of N.Y., 2023 NY Slip Op 05302 (NY Ct App Oct. 19, 2023)

Issue: **Does Insurance Law § 3203 (a) (2), which requires insurers to refund a portion of a life insurance premium "if the death of the insured occurs during a period for which the premium has been paid," apply to "planned payments into an interest-bearing policy account, as part of a universal life insurance policy?"**

Facts: On a question certified to the Court of Appeals from the Second Circuit, the Court of Appeals faced the differences between whole and term life insurance policies and universal life insurance policies. Explaining the difference, the Court noted that although universal life insurance policies typically require planned annual payments, those are not necessary to keep the policy in effect. Rather, the planned payments add to the policy value of the policy at the holder's death, and the policy will continue in effect so long as the policy value remains larger than the insurance company's administration cost deductions. In this case, a trust purchased a universal life insurance policy for an insured, and paid the planned payment annually. The trust paid the last planned payment in May 2018, and the insured died in October 2018. When the trust asked for a refund of a portion of the last planned payment, the insurance company declined.

Holding: The Court of Appeals, examining Insurance Law § 3203, held that "first relevant portion of the statute states that the refund rule only applies to 'premium[s] actually paid.' A premium is the amount paid at designated intervals for insurance; esp., the periodic payment required to keep an insurance policy in effect." Although the trust made planned annual payments for the universal life insurance policy, the Court held that those payments were "not 'for insurance.' Pursuant to the terms of the Policy, a Planned Premium was simply an amount that the Trust had elected to add to the Policy Value at a frequency of its choosing—it was defendant's monthly deductions that actually 'paid' for the insurance because those deductions kept the policy in force for another month." Additionally, the Court held, "a Planned Premium under the Policy was not paid 'for any period beyond the end of the policy month in which' [the insured's] death occurred. Though under the terms of subdivision (a) (2), the payment need not have been paid for any specific period, under the terms of the Policy, the amount of any given Planned Premium may or may not have been used to cover the monthly deductions." Thus, the Court held that planned payments for universal life insurance policies, unlike the premiums paid for whole or term life insurance, do not qualify for refunds under Insurance Law § 3203.

CRIMINAL LAW, RAPE SHIELD LAW

People v Cerda, 2023 NY Slip Op 05305 (NY Ct App Oct. 19, 2023)

Issue: **Did the trial court err in applying New York's Rape Shield Law (see CPL 60.42) to exclude forensic evidence proffered by defendant to demonstrate that someone else caused the complainant's injuries?**

Facts: Following an event during which the defendant was alleged to have sexually abused a minor victim, the victim underwent a sexual assault examination, which revealed, in a forensic report, "the presence of the complainant's saliva on the vulvar swab. An analysis of a saliva mixture taken from a stain on the complainant's underwear revealed three contributors: the complainant and two unidentified males. The vaginal swab revealed prostate specific antigen, which is an element of semen but can also be found in a number of bodily fluids. No spermatozoa were present in the vaginal swab and, thus, the presence of semen was not confirmed." The defendant moved in limine for a ruling on the admissibility of the forensic report, because it could suggest plausible alternative explanations for what the prosecution was trying to attribute to the defendant and, thus, should not be barred by the Rape Shield Law. The trial court excluded the forensic report, "concluding that the theories advanced by defense counsel were very speculative and the forensic findings risked confusing the jurors." The defendant was convicted of one of the charged counts of abuse.

Holding: The Court of Appeals reversed the defendant's conviction, holding that the forensic report should not have been precluded under the Rape Shield Law because "defendant did not seek to use the forensic evidence in violation of the statute, to impugn complainant's character by presenting her as a promiscuous female who could not be believed — a tactical attack based on now-rejected views of female sexuality." Rather, "[t]he forensic evidence confirming the presence of the complainant's saliva in the vicinity of her internal injuries,

juxtaposed against the expert testimony that such injuries were consistent with digital penetration, speaks to an alternative, innocent explanation for the cause of the identified injuries and bears on the issue of guilt or innocence." That was what the defendant sought to base his defense on—"that the complainant's allegations against him were untrue in that the petechial bruising was caused by her own actions or a third-party." Thus, the Court held, precluding the defendant from doing so deprived him of a fair trial. Finally, the Court noted, it was not for the Court of Appeals to decide whether the defendant's offer of proof was enough to sway the jury to acquit; rather, the Court's only role was to decide whether the forensic report was relevant, and it was up to the jury to decide the weight to afford that evidence.

JUDICIAL CONDUCT

***Matter of Putorti (New York State Commn. on Jud. Conduct)*, 2023 NY Slip Op 05304 (NY Ct App Oct. 19, 2023)**

Issue: **Should a sitting judge pull a firearm on a litigant and refer to the litigant using racist language? To ask the question is to answer it.**

Facts: While a justice in Town and Village Court, the petitioner's regular practice was to carry a concealed firearm while on the bench and, one day in 2015, brandished the firearm at a litigant during an appearance on a criminal complaint. The judge later recounted the story boastfully to his cousin, a journalism student on Long Island, and was featured in a news article. As the judge continued to tell the story to other judges over the years, he repeatedly referred to the litigant as an "agitated big Black man" and recounted that he pulled the firearm and pointed it at the litigant because the litigant had approached the bench quickly." The Commission on Judicial Conduct determined that removal from the bench was the appropriate sanction "for petitioner's extreme breach of judicial decorum in brandishing a loaded firearm at a litigant in court, for creating the appearance of racial bias by repeatedly mentioning the litigant's race in his retellings of the incident, for his apparent pride in and lack of remorse for his misconduct, and his lack of attention to his ethical responsibilities."

Holding: The Court of Appeals agreed and removed the petitioner from the bench. The Court rejected the petitioner's attempt to challenge that his actions raised an appearance of racial bias because, first, he agreed to a stipulation of facts in which he agreed that they did and, second, "[b]y repeatedly referring to the litigant in the manner that he did, petitioner exploited a classic and common racist trope that Black men are inherently threatening or dangerous, exhibiting bias or, at least, implicit bias." Noting that "[j]udges must observe higher standards of conduct than members of the general public, so that the integrity of the judiciary will be preserved," the Court held that removal was warranted not only because of his egregious conduct in the courtroom, but also because he tried to deny responsibility for any bias, even though he previously agreed to it. Thus, the Court held that no amount of mitigation could restore the public's confidence in the petitioner and removal was the only appropriate sanction.

FIRST DEPARTMENT

CIVIL PROCEDURE

***Magna Equities II, LLC v Writ Media Group Inc.*, 2023 NY Slip Op 05320 (1st Dept Oct. 19, 2023)**

Issue: **Can a trial court issue a judgment altering, sua sponte, the liability and relief previously granted in a prior decision or order?**

Facts: After the trial court issued a decision that had confirmed a Report and Recommendation awarding the plaintiff a certain amount of damages and held that the defendant Signature Stock Transfer, Inc. was liable for those damages, the trial court, on its own accord, issued a judgment upon the decision that eliminated millions of dollars in damages to plaintiffs and extinguished liability as against Signature Stock Transfer, Inc.

Holding: The First Department held: you can't just do that. The First Department explained, "[a] written order or judgment must conform strictly to the court's decision, and in the event of an inconsistency between a judgment and a decision or order upon which it is based, the decision or order controls. A court exceeds its authority when it sua sponte vacates its prior order, as it has no revisory or appellate jurisdiction, sua sponte, to vacate its own order." Thus, the First Department held that the trial court "exceeded its authority in entering the judgment, which effectively reversed or vacated its prior confirmation order without notice," and modified to reinstate the damages and liability findings that had been confirmed in the decision.

CONTRACTS

***IBT Media Inc. v Pragad*, 2023 NY Slip Op 05315 (1st Dept Oct. 19, 2023)**

Issue: **If a party sells its ownership interest in a business while under a threat of criminal indictment, can it later try to get out of the deal by showing that the transaction was intended to be a sham?**

Facts: When the Manhattan District Attorney's office began to investigate the plaintiff and its principal, and then it appeared that they would be indicted, the plaintiff decided to sell its ownership interests in Newsweek to defendant NW Media Holdings Corp., a company owned partially by defendant Dev Pragad and formed for the purpose of buying plaintiff's interest in Newsweek. The parties signed a

purchase agreement, with a merger clause, to transfer the ownership interests "free and clear of any claims or restrictions, and that the transaction would convey good title in Newsweek to NW Media." Three years later, the plaintiff asked for its ownership interests in Newsweek back, and the defendants (presumably laughed and) said no.

Holding: The First Department held that the plaintiff could not seek to void the transaction because the purchase agreement was clear that the transfer of the ownership interests was free and clear, and the "merger clause provides that it constitutes the entire contract between the parties and forecloses the introduction of parol evidence to vary or contradict the terms of the writing." The Court thus rejected "plaintiff's contention that parol evidence may be offered to show that the purchase agreement was a sham transaction, as plaintiff pleaded no facts establishing that at the time of the agreement, defendants did not intend to enter into an enforceable contract. On the contrary, plaintiff does not dispute that it intended to transfer its membership interest in Newsweek to NW Media, and all parties agree that the transfer ownership did take place. Rather, plaintiff maintains that, in actuality, the parties intended the transfer to be temporary. Thus, plaintiff merely challenges the completeness of the purchase agreement, not its existence or its validity."

SECOND DEPARTMENT

MORTGAGE FORECLOSURE, CIVIL PROCEDURE'

***Bank of N.Y. Mellon v DeMatteis*, 2023 NY Slip Op 05242 (2d Dept Oct. 18, 2023)**

Issue: **Does the stay provided by section 362 of the 1978 Bankruptcy Code (11 USC § 362[a]) operate as a "statutory prohibition" under CPLR 204(a) to toll the statute of limitations to commence a mortgage foreclosure action against a defendant debtor who no longer owns the property that is the subject of the mortgage foreclosure action?**

Facts: The defendant Joseph DeMatteis obtained a mortgage for a property in Ossining in 2006, and later deeded the property to defendant Hunter Street Properties, LLC in 2012. In 2014, the Bank of New York commenced a foreclosure action against DeMatteis and Hunter, alleging that DeMatteis failed to make the payments starting in 2008 and the complaint elected to call the entire balance due. That action was dismissed against Hunter for lack of personal jurisdiction and against DeMatteis for failure to prosecute. In 2020, DeMatteis filed for Chapter 7 bankruptcy in Arizona, but failed to list the property in his petition and claimed he did not own an interest in any real property as of the date of the filing. In 2021, after the bankruptcy discharge, the Bank of New York filed a new foreclosure proceeding against the defendants for failure to pay installments due in 2015. The defendants argued that the claim was time-barred due to the 2014 action accelerating the mortgage. The Bank opposed, arguing that the COVID-19 tolls and bankruptcy proceeding tolled the statute of limitations to file the foreclosure.

Holding: The Second Department held that "the bankruptcy stay pursuant to subsection 362(a)(1) (*see* 11 USC § 362[a][1]) tolls the statute of limitations for commencing a mortgage foreclosure action against the defendant debtor, regardless of whether that defendant owns the property at the time of the bankruptcy filing." Applying the Foreclosure Abuse Prevention Act, the Court held that the Bank was estopped from arguing that the 2014 foreclosure action that called the entire amount due did not start the statute of limitations, because that action was not dismissed upon an express determination that the acceleration was not valid. Although the defendants showed that the action was commenced more than 6 years after the debt had been accelerated in the 2014 foreclosure complaint, the Bank was able to show that it timely filed the action as against DeMatteis due to two different statute of limitations tolls: (1) the COVID-19 executive order tolls from March 20, 2020 to November 3, 2020, and (2) the automatic bankruptcy stay that tolled the statute of limitations from October 20, 2020 when DeMatteis filed the bankruptcy petition "until February 2, 2021, which was the date that DeMatteis received a discharge." The claim against Hunter was a different story, however. The Court held that "the automatic stay provision of subsection 362(a)(1) does not typically protect nondebtor codefendants" and because the property was not listed as a property of DeMatteis's bankruptcy estate, the automatic stay did not apply to claims against Hunter. Those claims were therefore untimely, and should have been dismissed.

THIRD DEPARTMENT

GUARDIANSHIP

***Matter of Kimberly DD.*, 2023 NY Slip Op 05298 (3d Dept Oct. 19, 2023)**

Issue: **When a person in a skilled nursing facility is in need of guardianship and is without family or a close relative to serve as the guardian, which of two County Commissioners of Social Services is the appropriate guardian—the Commissioner from the county where the person currently resides in the facility, or the Commissioner from the county where the person resided before the facility and through which the person receives Medicaid assistance?**

Facts: Although the trial court proposed that Washington County should be the guardian because it is where the person in need of guardianship currently resides in the skilled nursing facility, Washington County objected and argued that Saratoga County should be appointed because it is the county through which the person receives Medicaid assistance.

Holding: The Third Department held that although it was not an abuse of discretion for the trial court to appoint Washington County, the Court exercised its own discretion to appoint Saratoga County instead. The Court explained, the statutory mandates directed to the county of a person's residence for purposes of medical assistance and public assistance or care under Social Services Law §§ 62 and 473 made Saratoga County the more appropriate guardian. In particular, the Court held, "[u]nder Social Services Law § 62 (5) (d), when, as here, a person who was admitted to a nursing home located in a district other than the district in which he [or she] was then residing . . . is or becomes in need of medical assistance, the social services district from which he [or she] was admitted . . . shall be responsible for providing such medical assistance." And "under Social Services Law § 473, a resident social services district must also provide protective services to an individual in need, including services arranging, when necessary, for . . . guardianship . . . either directly or through referral to another appropriate agency." Both of those mandates pointed to Saratoga County as the proper guardian.

CRIMINAL LAW

***People v Mawhiney*, 2023 NY Slip Op 05289 (3d Dept Oct. 19, 2023)**

Issue: **Did the trial court abuse its discretion in precluding the criminal defendant from introducing testimony from an expert psychiatrist regarding the impact of mixing alcohol with the prescription drug clonazepam on the defendant's ability to form the requisite criminal intent for attempted murder in the first degree and aggravated assault upon a police officer?**

Facts: Following a difficult day at work, the defendant took a dose of the prescription drug clonazepam, drove home, drank three White Russians, and got into a physical altercation with his fiancée and daughter. When the fiancée and daughter left the house, she called 911 and reported the altercation and that the defendant had a shotgun. When state troopers arrived at the scene, the defendant fired shots at the police vehicle, striking a trooper, and held the officers in a standoff for over an hour before surrendering. County Court precluded the defendant from offering the psychiatrist's testimony, "finding that the issue of defendant's intoxication and the impact it had on his thinking and behavior was a matter within the average juror's understanding and did not require expert knowledge." The defendant was convicted, and sentenced to 30 years to life.

Holding: The Third Department reversed the defendant's conviction, holding that it was an abuse of discretion to preclude the defendant from offering the psychiatrist's testimony. Noting that the Court of Appeals had addressed this issue before (*People v Cronin*, 60 NY2d 430, 433 [1983]), the Court held that "the testimony proffered here regarding the effect of combined clonazepam and alcohol use would undoubtedly be useful to a lay jury in assessing the ability of a defendant to form the intent to commit a crime following drug and alcohol consumption . . . [and], while jurors might be familiar with the effects of alcohol on one's mental state, the combined impact of alcohol and other drugs on a person's ability to act purposefully cannot be said as a matter of law to be within the ken of the typical juror."

FOURTH DEPARTMENT

None.

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