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CasePrepPlus

A New York State Bar Association member benefit

Editor:
Robert S. Rosborough IV

Summarizing recent significant New York appellate cases

It's Freedom of Information Law week here at the CasePrepPlus newsletter. This week, we have two cases, one from the First Department and one from the Second Department, that address the scope of what public records must and can't be disclosed, whether a municipality's public website on which records are posted is enough to satisfy its production obligations, and how far an agency must go before simply denying a FOIL request as unduly burdensome. Let's take a look at those, and what else has been happening in New York's appellate courts over the past week.

FIRST DEPARTMENT

FREEDOM OF INFORMATION LAW

Matter of Fisher v City of N.Y. Off. of the Mayor, 2023 NY Slip Op 05468 (1st Dept Oct. 31, 2023)

Issue: **Must "all Uniform Judicial Questionnaires for applicants" for judicial positions be disclosed under the Freedom of Information Law, and would redactions of certain private information be sufficient to protect the applicants' personal privacy?**

Facts: The petitioner sought production under FOIL of "all Uniform Judicial Questionnaires for applicants . . . under review by the Mayor's Advisory Committee on the Judiciary." The Mayor's Office applied the personal privacy exemption (Public Officer's Law § 89[2][a]) to deny petitioner's FOIL request in its entirety. In the ensuing FOIL litigation, Supreme Court ordered the records disclosed after redactions for information that fell within the personal privacy exemption.

Holding: The First Department reversed, and held that the Mayor's Office had properly denied the FOIL request under the personal privacy exemption from disclosure. The Court reasoned that "[d]isclosure of the questionnaire, which states the word 'CONFIDENTIAL' in upper-case letters and boldface near the top of its first page, would undermine the assurances of confidentiality provided to candidates for judicial office" and "would create a chilling effect, thus potentially diminishing the candor of applicants and causing others to decide against applying for judicial positions." Thus, the Court concluded that disclosing redacted records "would be judicially unworkable" because it would not address all of the potential problems caused by disclosure.

DISCOVERY, SANCTIONS

Small v DMRJ Group LLC, 2023 NY Slip Op 05551 (1st Dept Nov. 02, 2023)

Issue: **Under what circumstances may a court, in its discretion, dismiss a complaint for a plaintiff's repeated invocation of the Fifth Amendment privilege against self-incrimination in a deposition in a civil lawsuit?**

Facts: Plaintiff was a portfolio manager for numerous investments of Platinum Partners, L.P., a collapsed New York-based hedge fund, and part of his compensation was in membership interests in defendant DMRJ Group LLC. Plaintiff co-managed Platinum's investments in Black Elk Energy Offshore Operations, LLC (Black Elk), and was convicted of securities fraud and conspiracy for his part in a scheme to defraud Black Elk bondholders and deprive them of the proceeds of Black Elk's most valuable assets through misrepresentations and omissions regarding, among other things, Platinum's control over Black Elk bonds. Plaintiff nevertheless sued defendant for distributions as payment for his work. At Plaintiff's deposition, he repeatedly refused to answer questions about his work, invoking his Fifth Amendment right against self-incrimination.

Holding: The First Department explained that "[c]ourts have the inherent authority to strike the complaint and dismiss the action where the plaintiff refuses to answer questions posed at an examination before trial on grounds of the privilege against self-incrimination. The only inquiry in reviewing a dismissal made pursuant to this inherent power is whether the questions that the plaintiff refused to answer were material and necessary to the defendant's defense." Here, the Court held that the deposition questions about Plaintiff's criminal conduct with regard to the Black Elk scheme were material and necessary to defendant's defense because "Defendant was entitled to argue that plaintiff's fraudulent actions relating to Black Elk should deprive him of any compensation, including distributions from defendant, for his services as portfolio manager." Thus, the First Department affirmed the dismissal of Plaintiff's complaint as a discovery sanction.

CIVIL PROCEDURE, DISCOVERY

***Camelot Event Driven Fund v Morgan Stanley & Co. LLC*, 2023 NY Slip Op 05534 (1st Dept Nov. 02, 2023)**

Issue: Does the Private Securities Litigation Reform Act (15 USC § 77z-1[b][1]), which stays all discovery proceedings during the pendency of a motion to dismiss, apply to actions in state court, and continue a stay of discovery while appeals are pending from an order denying a motion to dismiss?

Facts: In a PSLRA action, the defendants moved for a stay of all discovery while they appealed the denial of their motions to dismiss, arguing that such a stay was required under the PSLRA's provisions. Supreme Court denied the motions.

Holding: The First Department held that the PSLRA mandatory stay of discovery during the pendency of motions to dismiss does apply to PSLRA actions brought in state court, but was not warranted in this case while the defendants' appeals were pending from Supreme Court's denial of their motions to dismiss. The Court reasoned that "15 USC § 77z-1(b)(1) states that discovery shall be stayed "during the pendency of any motion to dismiss." Thus, its plain language provides for a stay of discovery only while a motion to dismiss is awaiting disposition. Here, because defendants' motions to dismiss have been decided, the stay no longer applies." Indeed, the Court noted, that construction is consistent with the statute's purpose to "prevent abusive, expensive discovery in frivolous lawsuits by postponing discovery until after the Court has sustained the legal sufficiency of the complaint" and would avoid federal versus state court forum shopping because there would be no stay of discovery pending appeal in both, since the federal courts do not permit interlocutory appeals as of right.

SECOND DEPARTMENT

FREEDOM OF INFORMATION LAW

***Matter of Goldstein v Incorporated Vil. of Mamaroneck*, 2023 NY Slip Op 05500 (2d Dept Nov. 1, 2023)**

Issue: What does it mean to "reasonably describe" a public record in a Freedom of Information Law request, and can a municipality satisfy its FOIL obligations by maintaining public records on a public website?

Facts: The petitioner, a member of the Village Planning Board, made FOIL requests for materials related to recusals and conflict-of-interest disclosures by members of a Village Commission and various Village Boards. Although the Village Clerk asked members of the Village Boards if they had ever recused themselves from matters before them, the Village ultimately denied the FOIL requests, asserting that "the Village does not file records in this way and to review all meetings/minutes of the Board of Trustees and Land Use Boards for the last five years is a Herculean task." The Village also claimed in the ensuing Article 78 that all of the records were maintained on its public website, which should satisfy its production obligations under FOIL.

Holding: The Second Department held that "the mere availability of government records on a public website is insufficient to satisfy a request under FOIL for reproduction of such materials." In particular, the Court noted, FOIL requires the responding agency to "provide records on the medium requested by the person submitting the FOIL request," and thus "[d]irecting a member of the public to a website when, as here, a request has been made for reproduction of records in a certain format would not satisfy these statutory requirements." The Second Department noted that to the extent that the First Department has held differently in ***Matter of Reclaim the Records v City of New York*, 214 AD3d 489 (1st Dept Mar. 14, 2023)**, the Second Department declined to follow that decision, thereby potentially creating a split amongst the Appellate Division departments on the issue.

As for whether the Village could deny the request as not reasonably described because it would take a significant effort to locate and produce the requested records, the Court held that to satisfy its FOIL obligations in that regard, "the agency must show that the descriptions provided are insufficient for purposes of extracting or retrieving the requested documents from the virtual files through an electronic word search . . . by name or other reasonable technological effort." Here, questions of fact existed whether that was the case. The Court reasoned that the Village's word searches for the recusal records were unreasonably broad, and suggested alternative searches that should have been run instead. Even if that would have taken a significant amount of time, the Court held that the Village was duty bound to perform a reasonable search for the records before denying the request. And, importantly, the Court noted that FOIL permits an agency to "condition disclosure upon the prepayment of [the] costs" of engaging an outside service to search for and identify the responsive records or of "employee time needed to retrieve or extract records or data from electronic databases." Thus, in a situation where obtaining the requested records would be burdensome, the agency is required to investigate the costs of production and correspond with the requester to see if they would be willing to bear those costs.

THIRD DEPARTMENT

REAL PROPERTY TAX LAW, EVIDENCE

***Matter of Channin v Minoia*, 2023 NY Slip Op 05571 (3d Dept Nov. 2, 2023)**

Issue: **Can comparable sales information taken from Zillow.com be sufficient to support a real property tax grievance?**

Facts: The petitioner challenged the real property tax assessment of his home, submitting to the Board of Assessment Review "a self-generated list of comparable sales data, which he obtained from Zillow.com, pertaining to 'all homes sold within [four] miles of the subject property . . . from July 1, 2021 to July 1, 2022.'" The petitioner used this information to generate an average price per square foot in the area and applied that to his home to argue that his assessment was too high. The BAR denied his grievance, and a hearing officer in the Small Claims Assessment Review process upheld the denial because the Zillow.com information was insufficient to rebut the presumption of validity that attached to his assessment.

Holding: The Third Department agreed that the petitioner's "self-generated and unverified [Zillow.com] list lacks the type of evidentiary value necessary to rebut the presumption" of validity that attaches to the Town's assessment. The Court clarified that "this standard is usually satisfied by a professional appraisal report" that addresses the subject tax years. Because the petitioner failed to rebut the presumption, "the municipality's assessor has no obligation to go forward with proof of the correctness of its valuation, and the petition is to be dismissed." And so it was.

CRIMINAL LAW, APPEALS

***People v Fleshman*, 2023 NY Slip Op 05557 (3d Dept Nov. 2, 2023)**

Issue: **Under what circumstances may the prosecution appeal from a criminal conviction?**

Facts: After the defendant was arrested for a series of online sex crimes involving multiple children under the age of 12, he negotiated a plea agreement with the Albany County District Attorney, the US Attorney's office for the Northern District of New York, and defendant's federal defense counsel that would allow him to avoid federal charges in exchange for a sentence of 15 years imprisonment. After the trial court accepted defendant's plea, it indicated that information in the presentence investigation report made it question whether the agreed-upon sentence was just and indicated a lesser sentence would be imposed. The People moved to withdraw their consent to the plea, but the trial court denied the motion. The People appealed.

Holding: Although the Third Department agreed with the People that "Supreme Court should have allowed them an opportunity to withdraw their consent to the waiver of indictment and, consequently, to the plea" because the Court deviated from the agreed-upon sentence, the Court held that the People's appeal was barred on jurisdictional grounds. Under the Criminal Procedure Law, "the People's ability to appeal from a sentence other than one of death is limited and may be based only upon the ground that such sentence was invalid as a matter of law." Since the sentence here was not illegal, but merely not the one that was agreed to in the plea agreement, the People's appeal had to be dismissed. But, the Third Department noted, in light of that statutorily constrained right to appeal, "a writ of prohibition sought through a timely CPLR article 78 proceeding could have provided the People with a legal pathway to challenge Supreme Court's actions of exceeding its authorized power."

FOURTH DEPARTMENT

None.

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