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Summarizing recent significant New York appellate cases

The Court of Appeals finished up its September session opinions this week with some interesting ones on the relation back doctrine, legislative delegation, and the constitutionality of the NYPD's inventory search protocol under the Fourth Amendment. Let's take a look at those, and what else has been happening in New York's appellate courts over the past week.

COURT OF APPEALS

CIVIL PROCEDURE

Matter of Nemeth v K-Tooling, 2023 NY Slip Op 05349 (NY Ct App Oct. 24, 2023)

Issue: **May claims against a party mistakenly omitted from the initial filing and then added after the expiration of the limitations period be treated, under CPLR 203(c) and the relation back doctrine, as interposed when the action was timely commenced against the originally named respondents?**

Facts: In this latest iteration of a decade-long land use dispute that has taken up many, many pages of the New York official reports, the petitioners brought an Article 78 proceeding challenging a zoning board of appeals' grant of a use variance, naming the businesses and the ZBA as respondents, but failing to name the property owners. After the Third Department ordered the property owners be joined to the suit, they moved to dismiss, arguing that the petition was time-barred as to them and the relation back doctrine did not apply. Supreme Court dismissed the petition as time-barred. The Third Department, with one Justice dissenting, agreed.

Holding: The Court of Appeals held that "[t]he relation back doctrine applies when (1) the claims arise out of the same conduct, transaction or occurrence; (2) the new party is 'united in interest' with an original defendant and thus can be charged with such notice of the commencement of the action such that a court concludes that the party will not be prejudiced in defending against the action; and (3) the new party knew or should have known that, but for a mistaken omission, they would have been named in the initial pleading (*see* ***Buran v Coupal*, 87 NY2d 173, 178 [1995]**)." Focusing on the third prong, the Court explained that the Third Department's "line of cases interpreting *Buran* as limiting the relation back doctrine to mistakes regarding the identity or status of a proper party" was mistaken. Rather, "the doctrine applies when the party knew or should have known that, but for the mistake—be it a simple oversight or a mistake of law (i.e., that the amending party failed to recognize the other party as a legally necessary party)—the non-amending party would have been named initially." Courts, however, can "decline to apply the doctrine in cases where the plaintiff omitted a defendant in order to obtain a tactical advantage in the litigation or where application of the doctrine would result in prejudice to the new party in defending on the merits." Here, that wasn't the case, so the Court of Appeals held that the relation back doctrine saved the initial failure to name the property owners, who obviously had actual notice of the dispute that they had been a party to for the last 13 years.

LEGISLATIVE POWER, CONSTITUTIONAL LAW, SEPARATION OF POWERS

Matter of Stevens v New York State Div. of Criminal Justice Servs., 2023 NY Slip Op 05351 (NY Ct App Oct. 24, 2023)

Issue: **Was the legislature's grant of rulemaking authority to the Commission on Forensic Sciences sufficient to authorize the Commission's promulgation of the Familial DNA Search Regulations, codified at 9 NYCRR §§ 6192.1 and 6192.3?**

Facts: The Legislature adopted the DNA Databank Act, which "authorized the creation of the New York State Commission on Forensic Sciences and . . . the establishment of the DNA Identification Index. The DNA Databank is a statewide DNA identification record system, containing DNA collected from designated offenders, individuals who are required to provide DNA samples after being convicted of certain statutorily enumerated crimes." The Act contains "strict guidelines on the approved uses of Databank information" and "authorizes the Commission to develop and promulgate regulations concerning the release of genetic and identifying information stored in the Databank in compliance with those guidelines." In 2017, the Commission adopted new regulations that authorize law enforcement officers to conduct familial DNA searches—an intentional search for partial DNA matches—of the DNA Databank if they satisfy stringent preconditions, including that the initial DNA search did not result in a match or partial match to an existing sample in the Databank and they have conducted "reasonable investigative efforts," or else that exigent circumstances exist. Petitioners challenged whether the Commission had statutory authority to promulgate the regulations.

Holding: Noting that "New York Constitution, article V, § 3 expressly provides that the legislature may from time to time assign by law new powers and functions to . . . commissions," the Court of Appeals held that the Legislature expressly did so to the Commission on Forensic Sciences. The Act specifically provided that "the Databank is to be used for 'law enforcement identification purposes'" and the familial

DNA search regulations fell well within that authorization. Indeed, as the Court explained, "the challenged FDS Regulations sharply limit the universe of data that might be disclosed. In the absence of those regulations—left purely to the statutory language—nothing would restrict requests for familial searches to, for example, instances where a law enforcement agency had not attempted any other means to identify the perpetrator." Thus, "[b]ecause the Databank Act charges the Commission with determining what constitutes a 'match' and authorizes the Commission to promulgate regulations that balance the legislative purpose of aiding law enforcement through the use of the Databank with concerns about misuse and security of the Databank and results produced from it," the Court rejected the challenge to the familial search regulations.

CRIMINAL LAW, FOURTH AMENDMENT

***People v Douglas*, 2023 NY Slip Op 05350 (NY Ct App Oct. 24, 2023)**

Issue: **Does the New York City Police Department's (NYPD) standardized, written inventory search protocol violate the Fourth Amendment of the U.S. Constitution, or the same provision of the State Constitution?**

Facts: After the defendant was arrested, the NYPD conducted an inventory search of his vehicle and recovered a gun from the trunk. "Defendant moved to suppress the firearm, arguing that the NYPD's inventory search protocol was unconstitutional because it gives officers too much discretion in conducting inventory searches and that the searching officers failed to create a meaningful inventory of defendant's items." Supreme Court denied the suppression motion, "concluding that the NYPD's inventory search protocol was constitutionally sufficient, and the officers acted in accordance with the protocol in executing the inventory search."

Holding: The Court of Appeals held that the NYPD's inventory search protocol was constitutionally sufficient, because it met "three specific objectives: to protect the property of the defendant, to protect the police against any claim of lost property, and to protect police personnel and others from any dangerous instruments." The Court cautioned that "reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure." Because the inventory search was conducted under the NYPD's protocol, the Court affirmed the defendant's conviction.

APPELLATE DIVISION, FIRST DEPARTMENT

ETHICS, TORTS

***Suzuki v Greenberg*, 2023 NY Slip Op 05455 (1st Dept Oct. 26, 2023)**

Issue: **When may a party recover damages from the other side's lawyer for a violation of Judiciary Law § 487, which entitles an injured party to treble damages when a lawyer is "guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court"?**

Facts: Defendant, an attorney, represented the plaintiff's former husband in a matrimonial action. During that representation, the defendant knowingly failed to inform the court that the plaintiff had been awarded primary physical custody of the child of the marriage. Defendant also prepared an affidavit for his client, falsely stating that the client had never been party to a neglect proceeding and asserting that the client was the child's custodial parent. The plaintiff then sued the defendant for treble damages under Judiciary Law § 487.

Holding: The First Department held that plaintiff was entitled to summary judgment because she demonstrated that the "defendant had intentionally failed to apprise the court of the Kings County custody order, thus affirmatively misrepresenting the existence of adverse information relevant to the proceedings." That was sufficient egregious conduct for liability under section 487. The Court explained that "a plaintiff need not demonstrate a chronic pattern of delinquency to recover on a Judiciary Law § 487 action; on the contrary, a single egregious act, such as the one presented here, is sufficient."

APPELLATE DIVISION, SECOND DEPARTMENT

CIVIL PROCEDURE

***DeMarzo v Cuba Hill Elementary Sch.*, 2023 NY Slip Op 05389 (2d Dept Oct. 25, 2023)**

Issue: **Was the pleading of an unknown defendant as "Doe Alleman" sufficient to timely interpose a Child Victim's Act claim against the defendant?**

Facts: The plaintiff filed a CVA action against the school district and "the defendant Doe Alleman." One month later, "the plaintiff filed an amended complaint substituting Susan Alleman as a party defendant in place of Doe Alleman." Alleman moved to dismiss the amended complaint as time-barred, arguing it was filed nearly four weeks after the expiration of the CVA revival window in CPLR 214-g, and that CPLR 1024 did not apply because the plaintiff failed to exercise due diligence to discover her identity prior to the expiration of the statute of limitations. Supreme Court denied the motion.

Holding: The Second Department held that "[t]he description of Alleman in the original complaint was sufficient to identify her as the intended defendant." Because of that, the Court held, "her first name 'Susan' could have been added pursuant to CPLR 305(c), without reference to a due diligence requirement." Even if a due diligence requirement applied under CPLR 1024, the Court noted, the plaintiff "exercised due diligence to discover Alleman's full name through online searches. The plaintiff specified that those online searches included searches through Google, online yearbooks, Lexis Public Records, the New York State teacher license database, and the White Pages." Thus, the amended complaint was timely interposed.

APPELLATE DIVISION, THIRD DEPARTMENT

CIVIL PROCEDURE, MORTGAGE FORECLOSURE

***Deutsche Bank Natl. Trust Co. v Zatari*, 2023 NY Slip Op 05436 (3d Dept Oct. 26, 2023)**

Issue: **May joint borrowers receive the required 90-day notice of foreclosure in a single envelope under Real Property Actions and Proceedings Law § 1304?**

Facts: After the borrowers executed a note and mortgage, and defaulted, the mortgage company mailed "90-day notices of foreclosure to defendants at the property and to their last known address in Stamford, Connecticut." In the subsequent foreclosure action, the borrowers argued that the notices were insufficient under RPAPL 1304 because they were not mailed individually in separate envelopes.

Holding: The Third Department, noting that it had not before passed on this issue, joined the First and Second Departments, holding that that "the 'separate envelope' requirement set forth in RPAPL 1304 (2) . . . mean[s] that notices cannot be sent to more than one borrower in the same envelope, and that each borrower should receive separate notices." Thus, the Court held, because the requisite 90-day notices were jointly addressed to both borrowers, the mortgage company did not comply with RPAPL 1304.

APPELLATE DIVISION, FOURTH DEPARTMENT

None.

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