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CasePrepPlus

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Summarizing recent significant New York appellate cases

Welcome back! After our week-long Thanksgiving break, we have a lot to cover, because while the New York courts may close for Thanksgiving, litigation never rests. This week, we have procedural traps for the unwary, whether unsubstantiated complaints of police misconduct must be disclosed under FOIL, statute of limitations issues, and whether the Marriage Equality Act should be applied retroactively to recognize same-sex marriages performed before it was adopted. Let's take a look what has been happening in New York's appellate courts over the past week.

FIRST DEPARTMENT

CIVIL PROCEDURE

***Colonial Funding Network, Inc. v Finley*, 2023 NY Slip Op 05980 (1st Dept Nov. 21, 2023)**

Issue: **Can a party be sanctioned for failure to comply with relief granted in an order that grants a motion brought on by an order to show cause, when the order to show cause was not properly served in strict compliance with its language?**

Facts: The plaintiff brought on motions for contempt by order to show cause, which specified that the order to show cause and its supporting papers must be served "by overnight express mail." The plaintiff instead served the order to show cause on the defendant by "Priority Mail, which only guarantees delivery in one to three days." Supreme Court held the defendant in contempt and awarded the plaintiffs attorneys' fees.

Holding: The First Department reversed and denied the contempt motions. As the Court explained, "[f]ailure to comply strictly with the service provision of the order to show cause deprived the court of jurisdiction to hear the motion" and, thus, the defendant could not be held in contempt for failing to obey the Supreme Court order on the motion, due to the plaintiff's failure to comply strictly with the service requirements of the order to show cause. Thus, the First Department also reversed the plaintiff's award of attorneys' fees. This is a costly reminder of New York's procedural trap for the unwary: if you bring on a motion by order to show cause, you better be sure to do exactly what it says you must do to serve the order and its supporting papers or else.

SECOND DEPARTMENT

FOIL

***Matter of Newsday, LLC v Nassau County Police Dept.*, 2023 NY Slip Op 06050 (2d Dept Nov. 22, 2023)**

Issue: **Are unsubstantiated police disciplinary records categorically exempt from disclosure as an "unwarranted invasion of personal privacy" under Public Officers Law § 87(2)(b)?**

Facts: Following the Legislature's repeal of Civil Rights Law § 50-a, Newsday requested that the Nassau County Police Department produce under the Freedom certain law enforcement disciplinary records. The Police Department categorically refused to provide any records related to unsubstantiated police disciplinary complaints as exempt from disclosure as an unwarranted invasion of personal privacy. Supreme Court dismissed the ensuing Article 78 proceeding challenging the refusal to produce the records pursuant to FOIL.

Holding: The Second Department reversed, holding that "records concerning unsubstantiated complaints or allegations of [police] misconduct are not categorically exempt from disclosure as an unwarranted invasion of personal privacy, and the NCPD is required to disclose the requested records, subject to redactions with particularized and specific justification under Public Officers Law § 87(2)." As the Court explained, "the Legislature amended the Public Officers Law to specifically contemplate the disclosure of 'law enforcement disciplinary records,' which it defines to include 'complaints, allegations, and charges against an employee' (Public Officers Law § 86[6][a]). If the Legislature had intended to exclude from disclosure complaints and allegations that were not substantiated, it would simply have stated as much." Thus, the First Department joined the prior holdings of the "Appellate Division, First and Fourth Departments, that there is no categorical exemption from disclosure for unsubstantiated allegations or complaints of police misconduct."

ARBITRATION

***Matter of Village of Maybrook v Teamsters Local 445*, 2023 NY Slip Op 06051 (2d Dept Nov. 22, 2023)**

Issue: **Are union grievances for violations of a collective bargaining agreement challenges to administrative determinations of a municipality, subject to the 4-month CPLR Article 78 statute of limitations, or in the nature of breach of contract claims, subject to the otherwise applicable CPLR statute of limitations?**

Facts: The Union filed a demand for arbitration of a grievance against the Village of Maybrook alleging that the Village breached the parties' collective bargaining agreement by deducting a certain amount from each paycheck of a police sergeant for health insurance costs. Supreme Court granted the Village's petition to permanently stay arbitration on the ground that the claim sought to be arbitrated was barred by the four-month statute of limitations applicable to CPLR article 78 proceedings.

Holding: The Second Department reversed, holding that the union grievances for violations of the CBA were in the nature of breach of contract claims and, thus, were subject to the CPLR's statute of limitations for such claims. Although a 6-year statute of limitations would typically apply, because this claim was one for damages against a village, the Court held that CPLR 9802 governed, and "provides that an action to recover damages for breach of contract with a village must be commenced within 18 months after the cause of action accrued." Further, the Court held that each improper withholding of the health insurance costs was a separate continuing breach, so the union could seek a refund of any amounts improperly deducted from the sergeant's paychecks for the 18 months prior to the filing of the grievance. Because that particular relief was not foreclosed by the statute of limitations, the matter should have been sent to arbitration for determination of any relief.

REAL PROPERTY TAX, CIVIL PROCEDURE

***Matter of Coscia v Town of Greenburgh*, 2023 NY Slip Op 05729 (2d Dept Nov. 15, 2023)**

Issue: **Is a proceeding that is commenced prior to the finalization of the relevant tax assessment under article 7 of the Real Property Tax Law timely under the RPTL 702(2) statute of limitations provision?**

Facts: On September 19, 2016, the petitioner commenced a Real Property Tax Law article 7 proceeding against the Town of Greenburgh, its Assessor, and its Board of Assessment Review to challenge a 2016 tax assessment of the property which was finalized on November 7, 2016. The petition alleged, however, that the assessment roll had been finalized on September 15, 2016. The Town moved for summary judgment dismissing the proceeding as untimely, having been filed *before* the tax roll was finalized, which starts the time provided in RPTL 702(2) to bring a challenge to a real property tax assessment. Supreme Court granted the motion and dismissed the proceeding.

Holding: The Second Department agreed, holding that "the plain language of section 702(2) of the Real Property Tax law is precise and unambiguous—it sets forth a specific time period 'within' which a proceeding can be commenced." Particularly, section 702(2) provides that a RPTL article 7 challenge "shall be commenced *within* thirty days after the final completion and filing of the assessment roll containing such assessment." Indeed, the Court noted, "interpreting the language of the statute to allow proceedings that have been commenced prior to or outside the time period set forth in section 702(2) could result in court review of administrative determinations that are not yet final—which is not contemplated by the statute; section 702(2) of the Real Property Tax Law contemplates review of final assessment rolls, not anticipated or preliminary assessment rolls." Thus, failure to bring the RPTL article 7 challenge "within" the 30-day period "after" the tax roll is finalized is a "complete defense to the proceeding. In so holding, the Second Department declined to adopt the holding of the Third Department in *Matter of County of Broome v Eronimous* (68 AD2d 988 [3d Dept 1979]), which held that "the commencement of a proceeding under article 7 of the Real Property Tax Law, prior to the completion and filing of a final assessment roll did not render the proceeding jurisdictionally defective." Court of Appeals watchers rejoice! We have a new conflict amongst the Appellate Division departments!

DIVORCE LAW, MARRIAGE EQUALITY ACT

***Mackoff v Bluemke-Mackoff*, 2023 NY Slip Op 05721 (2d Dept Nov. 15, 2023)**

Issue: **May a party to a divorce proceeding amend a pleading to change the date of the parties' marriage from the date of their civil marriage ceremony, which occurred after the passage of the Marriage Equality Act, to the date of the parties' religious marriage ceremony, which occurred six years prior to the passage of the Marriage Equality Act?**

Facts: On July 21, 2005, in New York City, the plaintiff and defendant participated in a traditional Jewish marriage ceremony that was performed and solemnized by a rabbi. After this ceremony, they continued living together and held themselves out as spouses. In June 2011, New York State enacted the Marriage Equality Act, which authorized same-sex couples to enter into civil marriages in New York State. On July 28, 2011, four days after the MEA went into effect, the parties obtained a New York State marriage license and were married in a civil ceremony. The plaintiff then filed for divorce in 2019, alleging they were married in 2011. The defendant answered, and did not deny the 2011 marriage date. A year and a half later, the defendant moved for leave to amend her answer to reflect the 2005 marriage date, rather than the 2011 one. Supreme Court denied the motion, due to prejudice resulting from the delay in time in seeking the amendment and that it lacked merit because "the MEA did not confer validity to a same-sex marriage conducted prior to its enactment."

Holding: The Second Department held that the defendant should have been permitted to amend her answer to reflect the 2005 marriage date. Given the procedural posture of the case—a motion to amend a pleading that should not be denied absent prejudice or surprise to the opposing party—the Court held that the proposed amendment was not palpably insufficient or devoid of merit, merely because New York did not recognize same-sex marriage when the parties performed their marriage ceremony in 2005. The parties' 2005 marriage ceremony "was solemnized by a rabbi, despite the fact that they did not have a valid marriage license. The law is clear that, but for the fact that the parties are two women, their marriage would have been recognized as valid, despite their failure to obtain a marriage license, and that the date of the marriage for equitable distribution purposes would have been the date of the religious ceremony, not the date that the parties eventually obtained their marriage license." Although the MEA did not contain any express language mandating retroactive application of its recognition of same-sex marriages performed before its effective date, the Court held that there was a colorable claim that it should be applied retroactively, which was enough to allow the amendment of defendant's answer. Since the plaintiff was not able to otherwise show prejudice or surprise to defendant's new allegation that the marriage began in 2005, the Court held that the defendant should have been allowed to amend her answer.

THIRD DEPARTMENT

COURT OF CLAIMS PLEADING SUFFICIENCY, CHILD VICTIMS ACT

Wright v State of New York, 2023 NY Slip Op 06013 (3d Dept Nov. 22, 2023)

Issue: **Were the plaintiff's claims under the Childs Victims Act sufficiently detailed to enable the State to investigate and promptly ascertain the existence and extent of its liability, as required to invoke the Court of Claims subject matter jurisdiction?**

Facts: The plaintiff brought CVA claims against the State for negligent hiring, retention and supervision of employees who sexually abused the plaintiff at the Egg between 1986 and 1990, when he was a minor. The Court of Claims held that the 4-year time period was insufficiently specific to detail the time when the claim arose and the details that were alleged did not give the State enough to be able to investigate, as required under the Court of Claims Act.

Holding: The Third Department reversed, holding that although the CVA amended the Court of Claims Act to revive claims of liability for sexual abuse against the State, it did not alter the Court of Claims Act's pleading requirements, "leaving the courts with the difficult task of determining, on a sui generis basis, whether claims filed decades after the fact are sufficiently specific to enable the State to investigate and promptly ascertain the existence and extent of its liability." Here, the Court held that the plaintiff's 4-year timeframe was sufficiently specific to allow the State an opportunity to investigate the claim. As the Court noted, "[w]here sexual abuse is alleged to have occurred several decades ago when the claimant was a child, it is not reasonable to expect the claimant to be able to provide exact dates when each instance of abuse occurred, nor is it required." The Court also held that the plaintiff's factual allegations of the abuse to which he was subjected, including descriptions of the abusers and the locations where it was alleged to have occurred, were enough to allow the State to investigate, which "satisfies the nature of the claim requirement of Court of Claims Act § 11 (b)."

FOURTH DEPARTMENT

LAND USE, ZONING LAW

Matter of Friedman v Town of Dunkirk, 2023 NY Slip Op 05912 (4th Dept Nov. 17, 2023)

Issue: **Does a short-term rental of a single-family home qualify as a permitted use of land in a zoning district that allows only "single family dwellings"?**

Facts: Petitioner used her home for short-term rentals, and asked the Town of Dunkirk Zoning Board of Appeals to determine that her use of the property was permitted under the Town Zoning Code as a "single family dwelling." The ZBA determined, instead, that the short-term rental use was not permitted because "a group of tenants that is transient or temporary does not meet the code's definition of a family." Supreme Court denied Petitioner's Article 78 challenge to the ZBA's determination.

Holding: The Fourth Department reversed, and held that the ZBA's interpretation of the zoning code was irrational. The Court held, "under the Zoning Ordinance, the transient or temporary nature of a group is but one factor that 'may' be considered to determine whether four or more persons who are *not* related by blood, marriage, or adoption are the 'functional equivalent' of a 'traditional family.' Indeed, if petitioner rented her property to three or fewer persons, or to four or more persons who are related by blood, marriage, or adoption, those groups would meet the Zoning Ordinance's definition of a '[f]amily' without regard to whether their tenancy was transient or temporary in nature."

STANDING

***Matter of Borrello v Hochul*, 2023 NY Slip Op 05834 (4th Dept Nov. 17, 2023)**

Issue: **Did the petitioners—three members of the New York Legislature and an advocacy organization—have standing to challenge the Department of Health's COVID-19 isolation and quarantine regulations?**

Facts: During the COVID-19 emergency, the Department of Health adopted a series of emergency regulations governing isolation and quarantine procedures aimed at controlling the spread of highly contagious communicable diseases. Near the end of those emergency regulations, DOH declared its intent to adopt the regulations permanently. The petitioners sued, arguing that the regulations violated separation of powers principles by unlawfully intruding into legislative policymaking. Supreme Court agreed, holding the regulations unconstitutional, without addressing petitioners' standing to bring the suit.

Holding: The Fourth Department reversed, holding that none of the petitioners actually had standing to challenge the DOH's COVID-19 isolation and quarantine regulations. For the legislator petitioners, the Court held that legislators may have standing in two circumstances: (1) vote nullification and (2) usurpation of their power. Thus, "in limited circumstances, legislators do have . . . standing to sue when conduct unlawfully interferes with or usurps their duties as legislators. Nonetheless, to confer legislator standing, the alleged action must have caused a direct and personal injury that is within a legislator's zone of interest and represents a concrete and particularized harm." The petitioners did not allege that their votes had been nullified, and so they could only have standing if their power had been usurped by the COVID-19 regulations. The Court held, however, that that wasn't the case. The only allegations of harm to the legislators was general, not particularized, harm to "the separation of powers shared by the legislative branch as a whole," which was insufficient to confer standing. For the organizational petitioner, the Fourth Department held that it failed to allege that any of its members would have standing because they had actually been "personally subjected to isolation and quarantine under any regulation," and its own "generalized concern that promulgation of the regulation deprived its members of a voice in the policymaking process" was not different than harm to the general public, insufficient to confer organizational standing,

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