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Summarizing recent significant New York appellate cases

The Court of Appeals was busy the week right before Thanksgiving, so we'll focus this week on those decisions. The Court addressed notice of assignments of insurance policies, who can be held liable for failing to withhold and pay a business's taxes, whether collective bargaining is required before a municipality can give a police accountability board power to discipline police officers for misconduct, whether the Marihuana Regulation and Taxation Act should be applied retroactively, and how the U.S. Supreme Court's Second Amendment decision in *Bruen* affects firearms convictions before it was issued. Let's take a look what has been happening in New York's appellate courts over the past week.

COURT OF APPEALS

INSURANCE LAW

Brettler v Allianz Life Ins. Co. of N. Am., 2023 NY Slip Op 05958 (Ct App Nov. 20, 2023)

Issue: **Where a life insurance policy provides that "assignment will be effective upon notice" in writing to the insurer, does the failure to provide such written notice deprive the purported assignee of contractual standing to bring a claim under the policy against the insurer?**

Facts: In 2008, Allianz issued an $8,000,000 life insurance policy on the life of Dora Zupnick to the Zupnick Family Trust. The policy provided that an owner may assign the policy, subject to one condition: "You may assign or transfer all or specific ownership rights of this policy. *An assignment will be effective upon Notice*. We will record your assignment. We will not be responsible for its validity or effect, nor will we be liable for actions taken on payments made before we receive and record the assignment" (emphasis added). The contract defined "Notice" as "[o]ur receipt of a satisfactory written request." After an initial assignment of the policy from the Trust to a different party that was noticed in writing to Allianz, the policy was assigned back to the Trust, but no one provided notice to Allianz. When a dispute arose concerning whether the policy was still in effect, the Trust sued Allianz in federal court. The District Court held that the Trust lacked contractual standing because it failed to give written notice of the second assignment. The Second Circuit then certified the standing question to the Court of Appeals.

Holding: The Court of Appeals held that "[g]iven that the Notice Provision imposes a requirement that the policy owner can satisfy unilaterally, . . . it is simply a condition that must be met before an assignment binds Allianz, not an anti-assignment provision," which "prohibits unilateral assignments either by voiding the assignment entirely or by encumbering it by requiring the non-assigning party to approve or consent to any assignment of the contract." Thus, the failure to provide notice to Allianz of the second assignment back to the Trust deprived the Trust of standing to enforce any of the policyholder's contractual rights. Notably, the Court held, however, that the failure to provide notice of the second assignment to Allianz did not deprive the Trust of any rights as against the other party or affect the validity of the purchase agreement between the two.

TAX LAW

Matter of Black v New York State Tax Appeals Trib., 2023 NY Slip Op 05961 (Ct App Nov. 20, 2023)

Issue: **Was the petitioner a "person responsible" for the collection and payment of employee withholding taxes under Tax Law § 685 (g) on behalf of a corporation of which petitioner was president and the majority shareholder, and on behalf of which petitioner had repeatedly held himself out as being responsible for payment of taxes?**

Facts: Petitioner was president and 51% shareholder of NECC, which engaged in interior finish construction, including dry wall construction, acoustical ceilings and mill work. Petitioner represented the company in tax matters before the Department of Taxation and Finance, and signed a "responsible person questionnaire" on which "he averred that he (1) was responsible for the remittance of sales tax for NECC; (2) participated in making significant business decisions; (3) was responsible for maintaining and managing NECC; (4) managed NECC and had knowledge and control over its financial affairs; (5) had the authority to pay or direct payment of NECC's bills or other business liabilities; (6) had the authority to act on behalf of the business with the Department; (7) hired and fired employees; and (8) negotiated loans, borrowed money for the business and guaranteed business loans. Petitioner also averred on the form that NECC checks were signed by him in 'all circumstances' and that he was involved in 'all financial affairs dealing with NEC[C's] day to day business.'" The Tax Appeal Tribunal found, based on those representations, that petitioner was a "person responsible" under Tax Law § 685 (g). In the ensuing Article 78 proceeding, the Appellate Division, with two Justices dissenting, held substantial evidence existed to support the determination.

Holding: Section 685 (g) essentially provides that "a person responsible for collecting and paying taxes withheld from employees' wages is liable for a 100% civil penalty if [that person] willfully fails to collect and pay over the tax." The Court of Appeals, noting that the provision was modeled after its federal counterpart, held that the Tribunal applied the proper test for determining whether petitioner qualified as a "person responsible," which requires the evaluation of numerous factors regarding the person's financial authority within the company and, notably here, whether the person has held "oneself out as a responsible person." Under the facts here, the Court agreed that substantial evidence supported the Tribunal's conclusion that petitioner was a "responsible person." That was the case even though the IRS had evaluated the facts and reached the opposite conclusion, because the Tribunal was not bound by the IRS' factual evaluation under federal law.

COLLECTIVE BARGAINING, POLICE ACCOUNTABILITY, MUNICIPAL LAW

***Matter of Rochester Police Locust Club, Inc. v City of Rochester*, 2023 NY Slip Op 05959 (Ct App Nov. 20, 2023)**

Issue: **Must the issue of who has the power to discipline police officers be collectively bargained before a municipality may decide to vest that power in a Police Accountability Board, rather than the police chief?**

Facts: Since the 1980s, the collective bargaining agreement between Rochester and the Rochester Police Locust Club, Inc., the union representing police officers in the City, has governed the procedure for disciplining police officers. In 2019, the City Council adopted and voters approved Local Law No. 2, which created the Police Accountability Board, a body of nine City residents whose powers included the exclusive authority to "investigate and make determinations respecting" any police officer accused of misconduct. That authority included the power to conduct a hearing on the alleged misconduct and to impose disciplinary sanctions, up to and including dismissal, if the officer were found guilty. The City's police chief was free to impose additional punishment upon that officer, but was obliged at a minimum to implement the sanction determined by the PAB. This new procedure deviated significantly from what was permitted under the CBA, and so the union challenged the City's authority to transfer disciplinary authority without first collectively bargaining. Supreme Court and the Appellate Division annulled the law, as barred by the Taylor Law's mandate that police discipline be collectively bargained.

Holding: The Court of Appeals held that "some municipalities have the right to bargain about police discipline, and some do not, and the difference depends upon whether there is applicable legislation specifically committing police discipline to the discretion of local officials . . . in force." In Rochester, the City's 1907 Charter "constituted prior legislation committing police discipline to the discretion of the City official in charge of the police force," which was grandfathered when the Taylor Law was adopted mandating collective bargaining of that issue. Had that provision remained, then the City could have transferred its disciplinary authority to the PAB without first collective bargaining. But in 1985, the City repealed that provision and committed police disciplinary authority to the requirements of the Taylor Law, including the collective bargaining mandate. Thus, when the City attempted to give exclusive police disciplinary authority to the PAB in 2019, it could only do so if the union agreed through collective bargaining. Otherwise, the law would be inconsistent with the Taylor Law, which a local government lacks the authority to override. The Court finally noted that "[i]t may, or may not, be the popular will in this State to transfer the power over police discipline away from officials in charge of police forces — and some would argue that such a transfer of power is good public policy — but even those who favor that policy must admit that the Legislature has not acted to implement it." Therefore, the Court was bound to apply the law as it exists, until the Legislature changes it to implement a new policy directive.

CRIMINAL LAW

***People v Pastrana*, 2023 NY Slip Op 05966 (Ct App Nov. 21, 2023)**

Issue: **Should the Marihuana Regulation and Taxation Act (MRTA) be applied retroactively to render a police search of a vehicle based on the odor of marijuana unlawful, even though the search was conducted prior to the effective date of the Act?**

Facts: Defendant was driving a vehicle that was stopped at a roadblock set up by police on a bridge leading from Manhattan into the Bronx on the same day as the annual Puerto Rican Day Parade. After officers smelled marijuana in the car, they conducted a search, during which they recovered a loaded firearm. Defendant was convicted on multiple charges, and challenged the search, arguing that MRTA should be applied retroactively to render the search, which was conducted six years before MRTA was adopted, unlawful.

Holding: The Court of Appeals held that the Legislature did not intend to retroactively apply MRTA's prohibition that "the odor of marijuana or possession of marijuana in legally authorized amounts can no longer be the basis for a police search" to searches that happened before the Act became effective on March 31, 2021. The Court explained, "[n]othing in the text or legislative history of the MRTA requires or supports the conclusion that the legislature intended for the newly-enacted Penal Law § 222.05 to apply retroactively to invalidate searches that were conducted before the effective date of the statute. The fact that Penal Law § 222.05 was to take effect 'immediately' merely supports the conclusion that as of March 31, 2021, law enforcement could no longer conduct searches based solely on the odor of cannabis." Indeed, the Court noted, the Legislature did include provisions in MRTA that expressly were to be applied retroactively and, thus, having failed to do so for this provision, the Legislature's omission must have been intentional.

CRIMINAL LAW, PRESERVATION, APPELLATE JURISDICTION

***People v Cabrera*, 2023 NY Slip Op 05968 (Ct App Nov. 21, 2023)**

Issue: Did the defendant preserve a constitutional challenge to New York's criminal prohibition on the unlicensed public carry of a loaded firearm, in in light of the U.S. Supreme Court's recent decision in *New York State Rifle & Pistol Assn., Inc. v Bruen*, 142 S Ct 2111 (2022)?

Facts: While Defendant was travelling through South Carolina, he was pulled over for speeding. During the stop, Defendant told the officer that he was traveling to his mother's home in the Bronx and that he had firearms in the car, which he was licensed to possess in Florida. The officer warned Defendant that possessing the firearms would not be lawful when he arrived in New York, and contacted the ATF about Defendant's travel plans. The ATF then told the NYPD that Defendant was coming to New York with firearms, and the NYPD and an ATF agent began a stakeout of Defendant's mother's residence. Defendant was stopped upon his arrival, and while in custody, admitted that he had the firearms in the vehicle. Since all of this happened well before the United States Supreme Court declared unconstitutional New York's proper cause requirement for firearm licensure, Defendant didn't raise the Second Amendment issue before he pled guilty to criminal possession of a weapon in the second degree at either the trial court or the Appellate Division.

Holding: The Court of Appeals held that Defendant's failure to preserve the Second Amendment issue regarding the impact of *Bruen* foreclosed the Court from considering the constitutional issue. The Court explained that its jurisdiction is limited to the consideration of "questions of law," and "that, absent certain limited exceptions, a reviewable question of law exists only if it was presented to the trial court in the first instance; generally, points which were not raised at trial may not be considered for the first time on appeal." This rule is especially important for constitutional challenges, the Court held, because preservation "ensures that the drastic step of striking duly enacted legislation will be taken not in a vacuum but only after the lower courts have had an opportunity to address the issue and the unconstitutionality of the challenged provision has been established beyond a reasonable doubt." The Court explained that an intervening U.S. Supreme Court ruling generally does not excuse a failure to preserve a constitutional challenge, except in limited circumstances that the Court held did not apply here, especially because "*Bruen* did not directly address the constitutional questions that [Defendant] now seeks to raise. *Bruen* ruled that New York's proper cause standard for issuance of public carry licenses violates the Second and Fourteenth Amendments. It did not address the rest of New York's licensing scheme or the interplay between the invalidation of New York's proper cause requirement and state statutes criminalizing unlicensed possession of a firearm." And the Court held, since the U.S. Supreme Court adopted a "one-step history and tradition test" in *Bruen* to assess claims of Second Amendment violations, the failure to preserve the issue and develop the necessary record to analyze the history and tradition of New York's firearm regulations prevented the Court from "giv[ing] the constitutional questions regarding Penal Law § 265.03 (3) the careful consideration they deserve."

FIRST DEPARTMENT

None.

SECOND DEPARTMENT

None.

THIRD DEPARTMENT

None.

FOURTH DEPARTMENT

None.

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