January 26, 2024

CasePrepPlus

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Summarizing recent significant
New York appellate cases

Bucking the trend in New York that almost every interlocutory order is immediately appealable, one appellate court said not so fast in SORA proceedings. Only the final SORA order after the mandatory hearing can be reviewed on appeal. Another introduced a conflict with a sister Appellate Division department over whether manual workers can recover liquidated damages for late payment of full wages. And a third delved into the complex world of Medicaid rate appeals. Let's take a look what has been happening in New York's appellate courts over the past week.

FIRST DEPARTMENT

SEX OFFENDER REGISTRATION ACT, CIVIL PROCEDURE

***People v Lewis*, 2024 NY Slip Op 00248 (1st Dept Jan. 18, 2024)**

Issue: **May a defendant appeal an interlocutory order denying dismissal of a Sex Offender Registration Act proceeding prior to a risk level adjudication?**

Facts: In 2019, defendant was convicted in federal court of production and distribution of obscene visual representations of the sexual abuse of children pursuant to 18 USC § 1466A (a) (1) (A). He was sentenced to 72 months incarceration and 3 years post release supervision. In 2022, the Board of Examiners of Sex Offenders was notified that defendant was living in a re-entry facility in Bronx County, and began the SORA proceedings necessary pending defendant's release from incarceration. "[T]he Board found that defendant's conviction under 18 USC § 1466A (a) (1) (A) included the essential elements of promoting a sexual performance by a child under Penal Law § 263.15," which required defendant to register as a sex offender. Before the trial court held the hearing to determine defendant's risk level, however, defendant moved to dismiss the proceeding, arguing that his conviction was not a registerable offense. The trial court denied the motion in an interlocutory order, and defendant appealed.

Holding: The First Department dismissed the appeal for lack of jurisdiction, holding that the interlocutory order was not appealable under Correction Law § 168-n, because that provides for an appeal only after the trial court has issued an order *after the SORA hearing* adjudicating the defendant a sex offender and determining his risk level classification. Until the hearing is held during which defendant can challenge whether the underlying conviction requires registration as a sex offender, and the final SORA order is issued, however, the Court held, "the defendant's liberty interest as related to the SORA proceeding has not yet been adjudicated." The Court also held that CPLR 5701 did not provide for jurisdiction to review the interlocutory SORA order before a hearing. Appeals as of right to the Appellate Division under CPLR 5701, while unquestionably broad, do not include order that do not "affect[] a substantial right" of the parties. Since the SORA procedures mandate that a hearing be held before defendant is actually adjudicated a sex offender, the interlocutory order did not affect one of the defendant's substantial rights. Rather, the registrability issue can and should be presented at the subsequent SORA hearing, and then can be reviewed on appeal once the trial court makes its final SORA determination.

SECOND DEPARTMENT

DEFAMATION, CIVIL PROCEDURE

***VIP Pet Grooming Studio, Inc. v Sproule*, 2024 NY Slip Op 00205 (2d Dept Jan. 17, 2024)**

Issue: **Do the 2020 amendments to New York's anti-SLAPP law apply retroactively to actions commenced before the amendments became effective, or prospectively, in connection with a motion to dismiss a complaint in lieu of an answer?**

Facts: The owners of a puppy took him to a groomer for a routine bathing and cut. After the grooming, the puppy's breathing was labored and the emergency vet concluded that the puppy had aspirated water and was, in essence, drowning. When treatments were unsuccessful, the owners had to put the puppy down. The owners then posted Yelp and Google reviews warning about their experience, and sued the groomer in District Court for negligence. The groomer countered by suing the owners in Supreme Court for defamation on November 2, 2020, eight days before the Legislature amended the anti-SLAPP law to expand its scope. In January 2021, the owners moved to dismiss the defamation suit. Supreme Court denied the motion.

Holding: The Second Department held that because the defamation suit was filed before the effective date of the 2020 amendments to the anti-SLAPP law, it was governed by the narrowed scope of the law that applied only to claims "brought by a public applicant or

permittee." Since the amendments expanded the scope of the anti-SLAPP law, and the expanded law would have covered this action, the Court was faced with deciding whether the 2020 amendments should be applied retroactively to this suit filed 8 days before they became effective. Although the Court noted that the federal courts had held the amendments should be applied retroactively, it disagreed. The Court explained, the First Department previously noted "the absence of any actual retroactivity language in the anti-SLAPP amendments and, therefore, applied the well-worn presumption that the amendments were prospective only as measured from their effective date." The Fourth Department had held similarly, the Court noted, and the Court of Appeals in a different case "did not find anything approaching the required expression of clear legislative intent to justify a retroactive application of the statute." Thus, the Second Department held that the presumption of prospective application of the amendments had not been overcome. Indeed, "[h]ad the Legislature intended for the 2020 amendments to the anti-SLAPP statute to be applied retroactively, it could have said so."

LABOR LAW

Grant v Global Aircraft Dispatch, Inc., 2024 NY Slip Op 00183 (2d Dept Jan. 17, 2024)

Issue: **Do manual workers have a private right of action against their employer to enforce Labor Law § 191(1)(a)'s requirement that they be paid weekly no later than 7 days after the end of the week in which they worked and recover liquidated damages for the delayed pay?**

Facts: Manual workers brought a putative class action against their employer for allegedly paying them biweekly, rather than weekly as required by Labor Law § 191(1)(a), and sought liquidated damages, prejudgment interest, and attorneys' fees. The employer moved to dismiss that claim, arguing that Labor Law § 191(1)(a) does not provide for a private right of action. Supreme Court agreed, and dismissed that claim.

Holding: Disagreeing with the First Department's holding on this issue in ***Vega v CM & Assoc. Constr. Mgt., LLC* (175 AD3d 1144 [1st Dept 2019])**, the Second Department held that Labor Law § 191(1)(a) provides only for enforcement by the Department of Labor, and does not allow for a private right of action brought by manual workers against their employer for liquidated damages. The Court reasoned that section 191(1)(a) deals with the frequency of payment of wages, not the "nonpayment and underpayment of wages," and thus liquidated damages were not available under the Labor Law for a delayed payment of full wages. The Court explained, "where an employer uses a regular biweekly pay schedule, that employer's payment of wages is due, under the employment agreement between the employer and an employee, every two weeks. Such an agreed-upon pay schedule between an employer and a manual worker violates the frequency of payments requirement, but is not equivalent, in our view, with a nonpayment or underpayment of wages subject to collection with an additional assessment of liquidated damages. The employer's payment of full wages on the regular payday is crucial and distinguishes this case from federal cases under the Fair Labor Standards Act in which courts have concluded that employers were liable for liquidated damages for violating the prompt payment requirement implied in that law by, for example, paying overtime compensation two years after it was earned." With the Second Department staking out a different position on the issue than did the First Department in *Vega*, we now have a conflict amongst the Appellate Division departments on the issue that is likely headed to the Court of Appeals.

THIRD DEPARTMENT

ADMINISTRATIVE LAW

Matter of Woodside Manor Nursing Home, Inc. v Zucker, 2024 NY Slip Op 00211 (3d Dept Jan. 18, 2024)

Issue: **Does mandamus to compel lie to force the Department of Health to decide hundreds of Medicaid rate appeals that were supposed to be decided within a reasonable time?**

Facts: 23 residential health care facilities that participate in the federal and New York Medicaid programs sued the Department of Health because they had 160 pending Medicaid rate appeals that had not been decided. Under New York's Medicaid review procedure, the time frame to review a rate appeal specified in the applicable statutes and regulations: 42 CFR 447.253 (e) requires "prompt administrative review"; Public Health Law § 2808 (17) (a) provides that DOH must consider rate appeals "within a reasonable period"; and 10 NYCRR 86-2.14 provides that appeals should be decided "within one year of the end of the 120-day period" within which the facilities have to file the rate appeals. "In 2010, the Legislature enacted Public Health Law § 2808 (17) (b), providing for a moratorium on rate appeals, an attendant monetary cap limiting the amount of funds available for payment of rate appeals, and, in light of this cap, directing [DOH] to prioritize which appeals to hear." The facilities argued that they were entitled to mandamus to compel the DOH to decide their pending appeals, and for DOH to adopt regulations to "establish priorities and time frames for processing rate appeals."

Holding: The Third Department held that mandamus to compel DOH to decide the appeals did not lie, because the DOH's statutory and regulatory duty to process the appeals was not nondiscretionary, as is required for a writ of mandamus to compel. Rather, the Court reasoned, "the determination of whether something has taken place within a reasonable time necessarily 'involves a discretionary determination' and thus precludes mandamus relief." Further, "the statutory cap directs that in determining which appeals to hear, respondent must consider which facilities are facing significant financial hardship as well as 'such other considerations as [respondent] deems ap-

propriate.' The amorphous nature of this latter phrase necessarily requires [DOH's] discretion in its determination of how to prioritize the rate appeals."

CasePrepPlus | January 26, 2024
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