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Reporting on Significant Court of Appeals Opinions and Developments in New York Practice

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CASE LAW DEVELOPMENTS

DOCCS Properly Withheld Documents Prepared by Counsel for the Parole Board in Response to FOIL Request

Court of Appeals Holds There to Be No Per Se Rule That Training Materials Cannot Be Protected

In *Appellate Advocs. v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 2023 N.Y. Slip Op. 06466 (Dec. 19, 2023), the issue was whether the Department of Corrections and Community Supervision (DOCCS) properly withheld certain documents, prepared by counsel for the Board of Parole (Board), as privileged communications exempt from disclosure under the Freedom of Information Law (FOIL). The relevant documents were intended to train and advise Board commissioners on compliance with their legal duties and obligations. The petitioner had filed a FOIL request for materials relating to the Board's decision-making process. While DOCCS produced thousands of pages, it withheld several documents that it claimed were privileged attorney-client communications. After the determination was confirmed on administrative appeal, the petitioner brought this Article 78 proceeding seeking to obtain the withheld documents. While the action was pending, the parties entered into a settlement by which DOCCS produced approximately 400 additional documents, but not the 11 documents that are the subject of the appeal.

The trial court affirmed DOCCS's denial of disclosure and dismissed the petition. The Appellate Division affirmed in a 3-2 decision, finding that the documents were protected by the attorney-client privilege and thus exempt from disclosure. A unanimous Court of Appeals affirmed.

The Court noted that under FOIL documents are required to be disclosed unless they satisfy an enumerated statutory exemption; FOIL is to be "'liberally construed and its exemptions narrowly interpreted' to achieve its legislative purpose of maximizing public access to government records"; an exemption is to be given "its 'natural and obvious meaning where such interpretation is consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL'"; and the government has the burden to establish that an exemption applies. *Id.* at *3.

DOCCS referenced the exemption in Public Officers Law § 87(2)(a), providing that an agency "may deny access to records or portions thereof, that [ ] are specifically exempted from disclosure by state or federal statute." Here, the attorney-client privilege codified in CPLR 4503(a)(1) was implicated. The Court emphasized that that privilege protects confidential attorney-client communications and is intended to foster "'the open dialogue between lawyer and client that is deemed essential to effective representation'"; it applies to communications from client to attorney and vice versa; the privilege must be narrowly construed; and "'[t]he critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client'(citation omitted)." *Id.* at *4.

DOCCS asserted that the Board's counsel prepared the documents as legal advice. The Court agreed:

> It is clear from the documents' content and the context in which they were prepared and presented—i.e. for training and advising commissioners on how to dispatch their duties and obligations in deciding parole applications—that these documents are privileged communications from counsel to client. The documents contain counsel's advice regarding compliance with legal requirements concerning parole interviews and parole determinations, including as applied to persons designated as minor offenders. The documents summarize recent court deci-

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> sions and advise on how to apply statutes, regulations, and case law to parole determinations. The documents also include guidance on drafting parole decisions that accord with the law.

Id. at *4–5.

The Court rejected the petitioner's argument that the privilege is applicable only where the communication responds to an existing "real world factual situation." In fact, the Court noted that it had never restricted the privilege to situations where the communications were made in anticipation of litigation or where there was an exchange of confidential information during a pending litigation:

> The reason is obvious given the advisory role served by an attorney. Counsel often provides legal advice to assist the client in deciding how best to order their affairs in compliance with legal mandates, including what action, if any, to take in order to avoid litigation. Encouraging proactive compliance with the law has patent benefits.

Id. at *5–6.

The Court similarly rejected the argument that

> the privilege is limited to communications by counsel triggered by a client's disclosure of confidential information or a direct request for advice. The privilege attaches so long as the communication is "made for the purpose of facilitating the rendition of legal advice or services in the course of a professional relationship." It is in furtherance of that professional relationship that counsel may bring to the client's attention legal matters concerning statutory, regulatory and decisional law, without the client initiating contact or positing a specific question. In so doing, counsel relies on their professional judgment, experience, skill, and knowledge of the law to assess the client's potential needs and possible risk exposure. This is the type of legal assistance and evaluation that a client may consider when ordering their affairs (citation omitted).

Id. at *6–7.

The Court refused to adopt a per se rule that "training materials" are not exempt from disclosure, characterizing that position as a misunderstanding of the privilege and its purpose. In fact, federal courts have ruled that when training materials convey confidential legal advice, they are privileged. Moreover, attorneys are "free to determine the best method to communicate legal advice to the client," and what mattered here "is that the information is advice on the law pertaining to the commissioners' decisions on whether to grant parole." *Id.* at *7–8.

Finally, the Court dispensed with the petitioner's position that "the public policy in favor of transparency in parole board determinations trumps attorney-client privilege." In fact, both represent important policy issues. FOIL furthers the state's policy of government transparency and the public's access to government documents. The attorney-client privilege intends "to foster candid discussion between lawyer and client. This policy is important in the public setting, where society at large benefits immensely from the free and candid communication between government lawyers and government actors. The public is well served when counsel advises government clients on how to lawfully fulfill their public duties." *Id.* at *8.

Majority of Court of Appeals Holds Ordinary Vehicle Repair Not Covered by Labor Law § 240(1)

Fears Finding Such Activity To Be Covered Would Result in an "Enormous Expansion of Liability"

In *Stoneham v. Joseph Barsuk, Inc.*, 2023 N.Y. Slip Op. 06467 (Dec. 19, 2023), the issue was whether the plaintiff was engaged in an activity covered by Labor Law § 240(1), which protects against elevation-related hazards, when he was severely injured while lying beneath a lifted trailer working on a faulty air brake system. As he was installing new air brake equipment, the front loader rolled backwards, the trailer fell on him, and he was pinned underneath. The trial court denied plaintiff's summary judgment on liability on his § 240(1) claim and granted defendant's cross-motion for summary judgment dismissing the claim. The Appellate Division affirmed with two dissents. In a 6-1 decision, the Court of Appeals affirmed.

The majority explained the background and purpose of Labor Law § 240(1), noting that it

> applies to workers "employed" in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." The statute's "central concern is the dangers that beset workers in the construction industry." If an employee is engaged in an activity covered by section 240 (1), "contractors and owners" must "furnish or erect" enumerated safety devices "to give proper protection" to the employee. "Whether a plaintiff is entitled to recovery under [section] 240 (1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies." To make this determination, a court must examine the "type of work the plaintiff was performing at the time of injury" (citations omitted).

Id. at *3.

The Court emphasized that the statute is to be construed liberally, but "with a commonsense approach to the realities of the workplace at issue." It does not apply in all circumstances where an employee is injured because of an elevation differential. Thus, the mere occurrence of an accident does not qualify as a Labor Law § 240(1) violation. As relevant here, the Court has held that Labor Law § 240(1) does not apply to "work completed 'during the normal manufacturing process.'" The majority concluded that the work performed here—ordinary vehicle repair—was not an activity covered by Labor Law § 240(1):

> Such work is analogous to that of a factory worker engaged in the normal manufacturing process. Plaintiff is a mechanic who was fixing the brakes on a trailer, a "[v]ehicle" as that term is defined in Vehicle and Traffic Law § 159. Expanding the statute's scope to cover a mechanic engaged in ordinary vehicle repair would "extend the statute . . . far beyond the purposes it was designed to serve" (citation omitted).

Id. at *6.

The Court cautioned of the "enormous expansion of liability" if it applied the statute to the facts of this case:

> [C]ar owners would be absolutely liable for gravity-related injuries that occurred when a mechanic was working on their car. . . . Indeed, this state's section 240 (1) jurisprudence is devoid of cases in which a mechanic recovered under the statute for an injury suffered while engaged in ordinary vehicle repair. "Such injuries can hardly be uncommon; we infer that it has been generally—and correctly—understood that the statute does not apply to them" (id.). We decline to strain the statute's reach to encompass what the legislature did not intend to include.

Id. at *6–7.

The sole dissenter, Judge Cannataro, rejected the majority's exclusion of "ordinary vehicle repair" from protection. He found that the prior precedent cited by the majority did not support its conclusion. The dissent believed that Labor Law § 240(1) covered the facts here because the statute applies to both falling workers and falling objects relating "'to a significant risk inherent in . . . the relative elevation . . . at which materials or loads must be positioned or secured. . . . A plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute' (citations omitted)." *Id.* at *10–11. The dissent believed there was, at the very least, an issue of fact as to whether the statute applied "because plaintiff suffered an injury due to a 'significant elevation differential' which could have been avoided by the provision of appropriate safety equipment." *Id.* at *11.

Workers' Compensation Law Judge Lacked Discretion to Deny Request for Cross-Examination Made at Hearing

Mandatory Nature of Language in Relevant Section Provides for No Discretion Where Request Made Before a Decision on the Merits

In *Matter of Lazalee v. Wegman's Food Mkts., Inc.*, 2023 N.Y. Slip Op. 06343 (Dec. 12, 2023), the claimant sustained a work-related injury to his right hand. He filed a claim for benefits in 2018, and his employer did not contest the claim and paid claimant at the temporary total disability rate. The Workers' Compensation Board (Board) awarded the claimant 36.4 weeks compensation for an established right thumb injury. Following his return to work in 2019, claimant's doctor diagnosed him with similar injuries to his left hand. Again, the claimant filed for benefits, and his employer paid him at the temporary total disability rate. In January 2020, after returning to work from his left hand injury, the claimant sought a hearing to amend the prior award to include the additional injuries. At an April 2020 hearing, the employer accepted liability but requested that it be permitted to cross-examine the doctor with respect to the degree of impairment during the claimant's most recent period out of work. The workers' compensation law judge (WCLJ) denied the request on the ground that the claimant's absence from work was not "excessive" and awarded the claimant compensation over that period at the temporary total disability rate.

The Board affirmed, finding that the employer's request to cross-examine claimant's physician was untimely, because it found that (i) the request was made after the employer had paid the claimant at the total disability rate until his return to work; and (ii) the employer then waited three months to raise the issue and sought "to 'retroactively argue that the claimant was not totally disabled,' and made that argument based only on counsel's interpretation of the reports 'without any contrary credible medical evidence.'" *Id.* at *2. The Appellate Division affirmed.

A unanimous Court of Appeals reversed. The Board rules provide that if an employer "desires to produce for cross-examination an attending physician whose report is on file, the referee shall grant an adjournment for such purpose." The issue here was whether the WCLJ had the discretion to deny a request for cross-examination made at the hearing, *before* a decision on the merits was rendered. The Court found the language of the relevant section was mandatory and, unlike other Board rules, *did not* provide the WCLJ with such discretion:

> The mandatory nature of this language contrasts with the language used in the Board's other rules governing adjournment of hearings, which afford referees discretion and create exceptions to otherwise mandatory rules. For example, if the employer fails to present evidence as directed by the Board, the referee "*may* adjourn the hearing" and, if the employer fails to present evidence on the adjourned date, the referee "shall proceed to make a decision *unless*" the referee finds "extraordinary circumstances" warranting "a further adjournment" (12 NYCRR 300.10 [b] [emphasis added]). Under the plain language of the rule, the employer properly exercised its rights by making its request at a hearing on the claim prior to the WCLJ's ruling on the merits (citations omitted).

Id. at *3–4.

The Court found that the Board's reliance on cases involving belated requests was misplaced. In those cases, the requests were made not at the hearing but later before the Board or the Appellate Division. Thus, in those circumstances, the courts found the requests to be waived. The Court here emphasized that if the Board wished the WCLJ to have the discretion to deny a request to cross-examine, it could amend its rules accordingly.

Voluntary Discontinuance Does Not Divest Court of Jurisdiction to Award Sanctions for Pre-Discontinuance Conduct

Status of Litigation Not Determinative

In *13 E. 124 LLC v. J&M Realty Servs. Corp.*, 2023 N.Y. Slip Op. 06326 (1st Dep't Dec. 12, 2023), plaintiffs moved by order to show cause for a preliminary injunction. Defendants cross-moved for sanctions based on plaintiffs' allegedly frivolous conduct. Subsequently, although the defendants attempted to resolve the case and drafted a proposed stipulation of settlement, the plaintiffs refused to agree to the stipulation. The trial court denied the plaintiffs' motion for a preliminary injunction and granted defendants' motion for sanctions, finding that the plaintiffs had acted in bad faith when they refused

to withdraw their motion even though the defendants had consented to all the relief requested. The court directed that the plaintiffs pay the defendants' attorneys' fees incurred in the action and asked the parties to submit affirmations.

On the same day that the defendants submitted their affirmation, the plaintiffs filed a notice of discontinuance. In their subsequent affirmation, plaintiffs argued that the court lacked jurisdiction to issue further orders after the action was discontinued under CPLR 3217. Nevertheless, the trial court entered an order, pursuant to 22 N.Y.C.R.R. § 130-1.1, directing plaintiffs to pay defendants $22,133.45 in attorneys' fees and disbursements. The plaintiffs asserted on appeal that "their voluntary discontinuance of the action on October 4, 2022 divested Supreme Court of jurisdiction to impose sanctions based on their pre-discontinuance conduct." *Id*. at *4.

The First Department rejected the argument. First, it found that the trial court had properly exercised its discretion in finding that the plaintiffs had acted in bad faith before filing the discontinuance by refusing to sign off on the stipulation that afforded them all the relief they requested. Second, it ruled that the plaintiffs' voluntary discontinuance

> did not divest the court of jurisdiction to impose sanctions for pre-discontinuance conduct. The Second Circuit has held that the District Court "clearly [has] jurisdiction to impose sanctions irrespective of the status of the underlying case because the imposition of sanctions is an issue collateral to and independent from the underlying case." Similarly, this Court has held that the trial court's jurisdiction over the underlying case is not necessary to impose sanctions pursuant to 22 NYCRR 130-1.1 (citations omitted).

Id. at *5.

Exchange of Texts Found To Be Unenforceable Agreement To Agree

Did Not Contain All Material Terms of Alleged Settlement Agreement

Maxgain LLC v. Rai, 2023 N.Y. Slip Op. 06444 (1st Dep't Dec. 14, 2023), was an action to recover rent arrears of $202,000 and other amounts owed by the tenant (SVN) under a residential lease for a condominium unit. While the tenant did not dispute the amount owed, the defendants claimed there were issues of fact precluding summary judgment. Specifically, the defendants referred to an alleged binding settlement agreement reached via a phone call and text messages that superseded and terminated the lease.

The lease provided that it could only be terminated in a writing signed by the plaintiff and the tenant. Here, there was an exchange of texts between the plaintiff's manager and the defendant (Sumit Rai) on behalf of the tenant, where there was an apparent agreement to a $143,000 "settlement amount," to which the tenant's security deposit could be applied. The defendant Rai was to draft the agreement, and the plaintiff's manager stated that he would have to inspect the condo before signing off on the deal. Later that day, however, the plaintiff's manager told the defendant Rai that the plaintiff did not agree to the proposed settlement terms.

The Appellate Division held that the trial court

> properly concluded that the exchange of texts did not contain all material terms of a settlement agreement. Furthermore, since the parties indicated they did not intend to be bound until an agreement was drafted and signed, these text messages could not constitute a contract. Accordingly, the exchange of texts was only an unenforceable "agreement to agree," which does not provide a defense to plaintiff's claims (citations omitted).

Id. at *2.

Conflict as to Whether Trial Court Is Authorized To Dismiss Case as Abandoned Under Rule 202.27 When Party Fails Timely To Comply With a Court's Directive at a Conference

Third Department Says "Yes"; Second Department Says "No"

Pursuant to 22 N.Y.C.R.R. § 202.27, a court has discretion to dismiss an action where a plaintiff fails to appear "[a]t any scheduled call of a calendar or at any conference." In *Bank of N.Y. Mellon v. Vaiana*, 218 A.D.3d 1094 (3d Dep't 2023), the Third Department highlighted a conflict in the Appellate Division, holding that a trial court is authorized to dismiss a case as abandoned under Rule 202.27, even where a party appears at the conference, if it fails timely to comply with a court's directive at the conference to progress the case. The court rejected the plaintiff's entreaty to adopt recent Second Department authority.

In *U.S. Bank N.A. v. Bhagwandeen*, 216 A.D.3d 700 (2d Dept 2023), the Second Department overruled prior precedent in that Department and ruled that where a party appears as scheduled for a conference, Rule 202.27 does *not* permit the court to direct dismissal for noncompliance with a court's directive. The Second Department reasoned that the courts do not have the inherent power to dismiss an action for general delay. The legislature provided the mechanism in CPLR 3216 for want of prosecution and the conditions under that statute were not met in the case.

Conversely, in *Bank of N.Y. Mello*, the Third Department refused to buck its precedent permitting the court to dismiss an action when a party fails timely to comply with a court's directive to progress the case:

> Pursuant to CPLR 3401, the chief administrator of the courts is required to adopt rules regulating "the hearing of causes . . . and the calendar practice for the courts." Beyond requiring a party's appearance at a conference, Rule 202.27 implements that statutory directive by requiring each party to be ready to proceed with the case. Here, the order of reference had been outstanding for almost nine months when Supreme Court scheduled the conference to address plaintiff's delay in moving for a judgment of foreclosure. At that conference, the court granted plaintiff's counsel's request for an extension of time to make the motion. When plaintiff failed to comply, the court was authorized to dismiss the action pursuant to Rule 202.27 (citations omitted).

Bank of N.Y. Mello, 218 A.D.3d 1094, 1096.

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