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# CasePrepPlus

A New York State Bar Association member benefit

Editor:
**Robert S. Rosborough IV**

**Summarizing recent significant New York appellate cases**

This week, our most interesting case comes not from one of New York's appellate courts (at least not yet), but from our trial courts. In Supreme Court, Albany County, the court dismissed Congresswoman Elise Stefanik's constitutional challenge to New York's new early voting by mail law that just became effective in January 2024. Now, Congresswoman Stefanik has a choice: she can appeal to the Appellate Division, Third Department, or she can take her constitutional claim directly to the Court of Appeals under a little-used part of the Court's jurisdiction. That will be interesting to watch. Let's also take a look what else has been happening in New York's appellate courts over the past week.

# TRIAL COURT DECISION OF INTEREST

## ELECTION LAW

***Stefanik v Hochul*, Sup Ct, Albany County, Hon, Christina Ryba, Feb. 5, 2024, Index No. 908840-23**

**Issue**: **Does the New York Early Mail Voter Act, which authorizes all registered voters to vote by mail during the early voting period up to ten days before Election Day, and establishes procedures governing the early mail voting process including rules for obtaining, delivering and counting early mail ballots, violate Article II, § 2 of the New York Constitution, which requires all voters to vote in person at their polling place unless they fall into one of two specifically enumerated exceptions where absentee voting is allowed?**

**Facts**: The Legislature adopted the New York Early Mail Voter Act, effective January 1, 2024, to allow voters to vote by mail during the early voting period. The Plaintiffs challenged the statute as unconstitutional, arguing that the New York Constitution requires all voting to be in person at the polling places, with the two limited exceptions when absentee voting is permitted for voters who are absent from the County on election day or are physically disabled or ill and unable to make it to the polling place. Since those limitations are in the Constitution, the Plaintiffs argued, the Legislature was without power to permit other instances when voting by mail is permitted.

**Holding**: Supreme Court disagreed, noting that the New York Constitution specifically grants the Legislature the power to determine the manner of voting "by ballot, *or such other method as prescribed by law*." As the Court explained, "there is no express language in article II, § 2 that requires all individuals to vote in person at their designated polling place on the day of an election. Nor does that provision contain any express language prohibiting the Legislature from enacting laws that permit all eligible voters to vote by mail. Rather, the plain language of article II, § 2 simply permits the Legislature to create laws to provide special accommodations for certain categories of voters who are physically unable to appear at their designated polling place on the day of an election. It in no way limits the Legislature's inherent plenary power or its constitutional authority to enact laws that generally provide for voting methods other than by ballot." Nor does the absentee ballot constitutional provision imply any such limitation on the Legislature's power to determine proper methods of voting. The Court, therefore, held that the plaintiffs failed to establish that the Act was unconstitutional beyond a reasonable doubt, and dismissed the case.

The next step is an appeal to the Appellate Division, Third Department and then, inevitably, on to the Court of Appeals. One quick point of appellate practice to note: the plaintiffs could skip an appeal to the Third Department and appeal directly to the Court of Appeals right now. A little-used provision of the Court of Appeals' jurisdiction allows the Court of Appeals to hear and decide cases on direct appeal from a trial court order, like this one, that finally determines a case "where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States" (CPLR 5601 [b] [2]). That seems to me to apply here. We'll see what Congresswoman Elise Stefanik chooses to do.

# FIRST DEPARTMENT

## LANDLORD-TENANT, COVID-19

***Experience NY Now Inc. v 126 W. 34th St. Assoc. L.L.C.*, 2024 NY Slip Op 00675 (1st Dept Feb. 08, 2024)**

**Issue**: **May a tenant be excused for nonpayment of rent under a commercial lease's force majeure provision for period of time when the business was forced to shut down during the COVID-19 pandemic?**

**Facts**: When the parties entered this commercial lease, the plaintiff had a store selling "tourist apparel and souvenirs, general merchandise, and food." In March 2020, "the New York State PAUSE program was implemented in response to the COVID-19 pandemic, requiring nones-

sential businesses like plaintiff's to reduce their in-person workforce by 100%." On "June 8, 2020, retailers in New York State were permitted to offer curbside pickup and drop-off services, and as of June 22, 2020, they were permitted to resume in-store services, although at reduced capacity." Plaintiff failed to pay rent, asserting that its nonpayment should be excused under the lease's force majeure provision.

**Holding**: The First Department held that the PAUSE program constituted a force majeure excusing the nonpayment of rent for the period of time that the plaintiff's business was required to be 100% closed. The Court explained, "Plaintiff's business, which relied on the sale of souvenirs to tourists in person, was not the kind of business that could operate exclusively on a mail-order basis. Accordingly, during the period that plaintiff was obliged to suspend its business, the parties' reasonable expectation of performance was frustrated by circumstances beyond their control, and defendant was not entitled to rental arrears for the period in which plaintiff was completely closed to in-person staffing." That wasn't the case, however, the Court held, for the period of time from June 8, 2020 to the termination of the lease, because "plaintiff's decision not to reopen was voluntary, made for financial reasons. As a result, the force majeure provision does not excuse plaintiff's nonpayment of rent for the period after nonessential businesses were permitted to reopen on or about June 8, 2020, nor does it permit plaintiff's unilateral early termination of the lease."

# SECOND DEPARTMENT

## MATRIMONIAL LAW, FAMILY LAW

### *Chu v Chu*, 2024 NY Slip Op 00610 (2d Dept Feb. 7, 2024)

**Issue**: **When may a Court remove a forensic evaluator and disregard an evaluation prepared for use in a matrimonial and custody case?**

**Facts**: The trial court in a matrimonial case "appointed Marc Abrams, a psychologist, to serve as a neutral forensic evaluator for the purpose of assisting the court in rendering custody and parental access determinations." At the time, Mr. Adams was a member of the First and Second Department's approved Mental Health Professionals Panel, and the Court directed him to file his neutral evaluation by January 2021. Having not received any report from Mr. Adams, the parties stipulated in July 2021 to custody and parenting time. Mr. Adams then in August 2021 filed his evaluation with the Court. In December 2021, "the plaintiff submitted a letter to [the Second Department's] Office of Attorneys for Children, alleging that Abrams engaged in misconduct while performing his duties as a forensic evaluator in this action. In response, that office notified the plaintiff that, effective August 24, 2021, Abrams was no longer a member of the Mental Health Professionals Panel." Plaintiff then moved to remove Mr. Adams as the court-appointed evaluator, to deem his report inadmissible, and for a refund of the fees paid to him for the evaluation. The trial court denied the motion.

**Holding**: The Second Department, while extolling the virtue of the Mental Health Professionals Panel, held that the trial court should have granted the plaintiff's motion to remove Mr. Adams as the forensic evaluator, to deem his report inadmissible, and for a refund of his fees. The Court held that the Mental Health Professionals Certification Committee is charged with establishing who is qualified to serve as a neutral court-appointed forensic evaluator, and the removal of Mr. Adams from the Panel, resulting from a complaint against him, indicated that he was no longer qualified to serve. As to the report, the Court held that since it was more than 6 months old late, and nearly a year and a half old by the time of the trial court's order, it was no longer probative on the custody and parenting time issues that Mr. Adams had been appointed to evaluate. And the Court held, the trial court should have imposed a sanction upon Mr. Adams, in the return of the fees, for issuing a late forensic evaluation.

# THIRD DEPARTMENT

## ADMINISTRATIVE LAW, COVID-19 VACCINATION MANDATE

### *Matter of Ventresca-Cohen v DiFiore*, 2024 NY Slip Op 00664 (3d Dept Feb. 8, 2024)

**Issue**: **Were 29 nonjudicial employees of the New York State Unified Court System arbitrarily denied their respective requests for a religious exemption from a mandatory COVID-19 vaccination program applicable to all court system employees (judicial and nonjudicial) implemented in September 2021?**

**Facts**: When the New York court system implemented its COVID-19 vaccine mandate, it provided for an exemption request process under which judicial and non-judicial employees could seek a religious exemption from the mandate, as required by Title VII of the Civil Rights Act. "To implement the exemption process, . . . the Committee first issued a two-page application form requiring an applicant to detail the religious basis for the exemption request. The Committee's initial review of multiple applications revealed two primary reasons for seeking the religious exemption: (1) the connection between fetal cells and the testing of COVID-19 vaccines; and (2) a concern about the sanctity or purity of the applicant's body." Applicants were then asked to "address their past and future use of other commonly-used over-the-counter drugs, prescription medications and vaccinations also tested using fetal cell lines, and to explain any inconsistency." After a blind review, the Court System denied these exemption requests. Supreme Court annulled 19 of those denials, holding that "respondents irrationally adopted an 'all-or-nothing' approach by concluding that these petitioners could not have rejected the vaccine on religious grounds, without also rejecting the use or contemplated use of other medications or vaccinations developed using the same fetal cell lines." Supreme Court otherwise upheld the court system's denials.

**Holding**: The Third Department, with one Justice dissenting, held that the Court System rationally denied the 19 employees' exemption requests on the ground that the professed religious beliefs were not sincerely held, and thus reversed that part of the Supreme Court's order. As the Court explained, "the Committee could and did rationally conclude that an applicant's continued and/or contemplated use of other medications or vaccinations tested on fetal cell lines — including the current version of medications originating before fetal cell lines were developed, but now tested utilizing fetal cell lines — while refusing to take the COVID-19 vaccination on that very basis, reflected an inconsistency undermining the sincerity of that applicant's religious beliefs." The Court otherwise agreed with Supreme Court that the remaining petitioners failed to demonstrate that the denial of their exemption requests was arbitrary and capricious.

# FOURTH DEPARTMENT

## GENERAL OBLIGATIONS LAW

***Delaney v Syracuse Univ.*, 2024 NY Slip Op 00731 (4th Dept Feb. 9, 2024)**

**Issue**: **When does General Obligations Law § 9-103, the recreational use statute, provide protection for a property owner who allows the public to enter their land for specified recreational activities?**

**Facts**: Plaintiff was allegedly hurt when he fell from his motorized bicycle while riding on a defective sidewalk on the campus of Syracuse University. At the time of the accident, plaintiff was traveling from his home off campus to a destination outside of the campus. The University moved to dismiss, asserting that it was protected from liability by the recreational use statute and the plaintiff did not allege that the University "willfully or maliciously failed to guard against or warn of the dangerous condition, as required to state a cause of action against a landowner who is immune from liability for ordinary negligence under the recreational use statute." Supreme Court granted the motion to dismiss.

**Holding**: The Fourth Department reversed. Under the recreational use statute, the Court held, a landowner, "who might otherwise be reluctant to do so for fear of liability, [may] permit persons to come on their property to pursue specified activities" and will be protected from ordinary negligence claims if they do. The Court explained, "[t]he statute applies when two conditions are met: (1) the plaintiff is engaged in one of the activities identified in section 9-103 and (2) the plaintiff is recreating on land suitable for that activity." Although the plaintiff was unquestionably engaged in a qualified activity—bike riding—the Court held that his amended complaint sufficiently alleged that the sidewalk that he was riding on was not "suitable" for bike riding because "the sidewalk area where he fell was not designated by [the University] for bike riding and was situated along a busy campus roadway near the front entrance of an academic building containing classrooms and offices. Such a property is not appropriate for public use in pursuing bicycle riding as a recreational activity." Thus, the recreational use defense could not knock out the plaintiff's claim at the early motion to dismiss phase of the litigation.

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