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Summarizing recent significant New York appellate cases

When the New York City Council adopts consumer protection measures, they are often construed broadly to protect the consumer. As the First Department held, the NYC requirement that a contractor have a valid home improvement license to perform work in the City is no different. Nor could a landlord avoid liability for an infant's lead poisoning merely because the infant was a subtenant and the landlord wasn't immediately told about the sublease. Let's take a look what has been happening in New York's appellate courts over the past week.

FIRST DEPARTMENT

TORTS

E.S. v Windsor Owners Corp., 2024 NY Slip Op 00267 (1st Dept Jan. 23, 2024)

Issue: **May a landlord avoid liability under New York City's lead paint regulations if it is unaware that its apartment has been subleased to a subtenant with a child under 7 years old?**

Facts: Windsor Owners Corp., the owner of the building, was sued when the infant plaintiff, who was residing in one of the owner's apartments, was diagnosed with lead poisoning. The owner, however, claimed that it didn't have "actual or constructive notice that the plaintiff was seven years old or younger while residing in the premises" because the tenant failed to advise it of the sublease to the infant plaintiff's parent. Supreme Court disagreed, holding that the owner had constructive notice that the infant plaintiff was residing in the apartment.

Holding: The First Department held that the owner could not escape liability for the infant plaintiff's lead poisoning merely because the tenant did not immediately disclose the sublease. Rather, the Court held that the owner had constructive notice because the subtenant "openly moved into the apartment in summer 2016; introduced herself, the infant plaintiff, and her other child to the doormen as the new tenants in the apartment; added herself as the tenant to the building communications system; regularly received packages and deliveries; scheduled repairs; and greeted the doormen with her children on a daily basis. The doormen's knowledge is attributed to Windsor because it is within the scope of their duty to observe tenants as they enter and leave the building." The owner "failed to proffer an affidavit from any of the doormen stating that they did not know plaintiff and the infant plaintiff or were unaware of their residence. Under these circumstances, Windsor failed to raise a triable issue of fact as to the issue of constructive notice."

CONSUMER PROTECTION

KSP Constr., LLC v LV Prop. Two, LLC, 2024 NY Slip Op 00356 (1st Dept Jan. 25, 2024)

Issue: **May a business-entity owner of residential property avail itself of the protections of the New York City home improvement contractor's license requirement, which "provides that '[n]o person shall solicit, canvass, sell, perform or obtain a home improvement contract as a contractor from an owner without a license"'?**

Facts: Plaintiff, a contractor, commenced this action to recover damages for renovation work it performed at a Manhattan townhouse situated at 22 Carlton Street. The title owners of the premises are three LLCs. The owners moved to dismiss the complaint, arguing that the contractor was barred from recovering for the renovation work because it did not possess a valid home improvement contractor's license from the New York City Department of Consumer Affairs. The contractor opposed the motion, arguing that that rule only applies when the owner of the residence is a person, not a corporate entity. Supreme Court granted the motion and dismissed the claim for damages for the work, holding that "'[n]othing in the Administrative Code or its declared legislative purpose distinguishes between an individual and a corporate homeowner,' and that [the First Department] had applied the home improvement contractor's licensing requirement to contractors that provided home improvement services to business entities."

Holding: Noting that the parties didn't dispute that the plaintiff was a "contractor" and didn't have a valid license at the time it did the work, the First Department distilled the issue to whether the LLCs are "'owners' within the meaning of Administrative Code § 20-387(a), and, if so, whether the agreement between the parties was a 'home improvement contract' (Administrative Code § 20-386[6])." The Court held that corporate entities do qualify as "owners" under the Code, because "the City Council expressly defined the term 'persons' as it is used in the Home Improvement Business subchapter to mean 'an individual, firm, company, partnership or corporation, trade group or association'. A legislature is entitled to define the terms used in an act, and it is entitled to courts giving effect to the definitions it chooses to employ. The City Council could have provided that the licensing requirement does not apply where the title owner is a business entity or otherwise not an individual. The Council chose not to do so." Doubling down, the contractor also argued that an agreement couldn't be a "home improvement contract" if the owner of the property didn't reside there, and a corporate entity couldn't reside in a residence. The

Court rejected that too, holding that the owner residing in the property isn't a requirement for an agreement to be a "home improvement contract." Even if it was, the Court held, the LLCs' principal "intended to reside on the property after the renovation was complete [and] . . . averred that he formed defendant owners for the sole purpose of having those entities listed as the owners of [the property]; that the premises were purchased for his use as his personal residence; and that, upon completion of a gut renovation of the townhouse, he would be using it solely as his personal residence." Since the LLCs were the "owner" and the parties entered into a "home improvement contract," the contractor's failure to have a valid home improvement license doomed its claim.

SECOND DEPARTMENT

FAMILY LAW

***Matter of Martynchuk v Vasylkovska*, 2024 NY Slip Op 00313 (1st Dept Jan. 24, 2024)**

Issue: **When may a court, in a Family Court Act Article 6 custody proceeding, decide that the record on appeal is insufficient to determine the best interests of the child due to the passage of time since entry of the order appealed from?**

Facts: In April 2019, the parents of a child stipulated that the mother would have sole physical and legal custody of the child and the father would have 4 hours of parenting time. In December 2019, the father petitioned for a modification of that custody order, asserting that the prior order was entered to allow him to develop a relationship with the child and that he and the child had developed a meaningful relationship over the prior 7 months, such that he should be awarded more time to continue fostering that relationship. The mother moved to dismiss, arguing that the father failed to demonstrate a sufficient change in circumstances. After a hearing, Family Court, in a March 2022 order, dismissed the father's modification petition. The father appealed.

Holding: In the Attorney for the Child brief, the attorney brought to the Second Department's attention new developments that occurred after the March 2022 order was entered, including that the child, now 8 years old, wished to spend more time with the father. "As the Court of Appeals recognized, changed circumstances may have particular significance in child custody matters and may render a record on appeal insufficient to review whether the Family Court's determination is still in the best interests of the child." The Second Department thus held that because of the passage of 4 years since the father's petition was first filed and two years since the entry of the March 2022 order, the record was no longer sufficient to determine the child's best interests. The Court therefore remitted the proceeding back to Family Court for a new determination based on the child's current best interests.

THIRD DEPARTMENT

CRIMINAL LAW

***People v Hafer*, 2024 NY Slip Op 00341 (3d Dept Jan. 25, 2024)**

Issue: **Is a criminal defendant precluded from challenging on appeal evidentiary rulings if he pleads guilty to the crime and, if so, can the defendant's plea be withdrawn if he did not understand that consequence?**

Facts: Defendant was charged with two counts of kidnapping in the second degree and two counts of conspiracy in the fifth degree, after he and a male codefendant drove from Missouri to New York, during which time the codefendant engaged in sexual conduct with a 14-year-old female on various occasions. Prior to trial, the court granted the People's motion to preclude defendant's proffered defenses of ignorance of the age of the victims and their inability to consent. As a result, defendant then entered an *Alford* plea to the reduced charge of attempted kidnapping in the second degree, with the understanding that he could challenge on appeal the court's ruling regarding the preclusion of his defenses.

Holding: The Third Department held that by pleading guilty, defendant forfeited his right to challenge the preclusion of his proffered defenses, and New York does not permit conditional pleas where evidentiary issues such as this survive a guilty plea. Nevertheless, the Court held, because defendant's decision to enter the *Alford* plea was based on this misunderstanding, he was "no longer receiving the full extent of his bargain." The Court therefore reversed defendant's conviction to allow him the opportunity to withdraw his plea before the trial court, if he so chose.

REAL PROPERTY TAX LAW

***Matter of SLIC Network Solutions, Inc. v New York State Dept. of Taxation & Fin.*, 2024 NY Slip Op 00342 (3d Dept Jan. 25, 2024)**

Issue: **Are fiber-optic cables excluded from the definition of taxable public utility mass real property because they are used in the "transmission of . . . cable television signals"?**

Facts: Petitioner, a "company that provides Internet, telephone and cable television services via fiber-optic cables and conduits to its private customers around the state," challenged its tax assessment for certain tax years, arguing that its fiber optic cables transmit cable television signals and thus fall within an exemption from constituting taxable real property. The Department of Taxation and Finance disagreed.

Holding: The Third Department held that to qualify for the limited exemption for fiber optic cables that transmit cable television signals, the company must show that the "fiber-optic installations . . . are 'primarily or exclusively used' for one of the excluded purposes, lest the exception swallow the rule that such property is generally taxable." Here, the Court held that the company failed that burden. While the company submitted an affidavit from its COO explaining that the almost 100% of the fiber optic cables are used to transmit television signals, that evidence did not "address the extent to which the fiber-optic cables are used for the transmission of cable television signals *in comparison to* the other documented uses of those same lines . . . Also absent is any evidence concerning the allegedly ancillary nature of the Internet and telephone signals transmitted by petitioner. In sum, although it is clear that the transmission of cable television signals is among petitioner's uses of its fiber-optic cables, the type of proof of use contemplated by the RPTL and case law needed to demonstrate entitlement to the subject exclusion is lacking."

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