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CasePrepPlus

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Summarizing recent significant New York appellate cases

The Court of Appeals is back with new opinions about the meaning of the language "direct physical loss or damage" in insurance policies and whether a threat of litigation can constitute adverse action for a retaliation claim under the Human Rights Law. Let's take a look at those opinions and what else has been happening in New York's appellate courts over the past week.

COURT OF APPEALS

INSURANCE LAW

***Consolidated Rest. Operations, Inc. v Westport Ins. Corp.*, 2024 NY Slip Op 00795 (Ct App Feb. 15, 2024)**

Issue: **Are allegations that COVID-19 was present in insured restaurants and resulted in cessation of in-person dining services and related business interruption losses sufficient to state a claim for "direct physical loss or damage," as that phrase is used in a property insurance policy?**

Facts: Consolidated Restaurant Operations obtained from Westport Insurance Corporation an "all-risk" commercial property insurance policy covering the period from July 1, 2019 through July 1, 2020. The policy insured "all risks of direct physical loss or damage to insured property" and business interruption losses "directly resulting from direct physical loss or damage" to insured property. CRO sustained a significant reduction in revenue during the pandemic, and alleged that it was forced to suspend or substantially curtail its operations due to the presence of the coronavirus in its restaurants and government restrictions on nonessential businesses. After Westport denied coverage for CRO's losses, CRO commenced an action seeking a declaration as to Westport's obligations under the policy and damages for breach of contract. Westport moved to dismiss for failure to state a cause of action, arguing that CRO could not establish that the coronavirus caused "direct physical loss or damage" to its properties as a matter of law. Supreme Court agreed, and the Appellate Division affirmed.

Holding: The Court of Appeals held that "direct physical loss or damage requires a material alteration or a complete and persistent dispossession of insured property." Since CRO had not made those allegations, the Court affirmed dismissal of the complaint. Examining the language of the policy, the Court reasoned, "because the words 'direct' and 'physical' both modify the phrase 'loss or damage,' we read the phrase 'direct physical loss or damage' to mean 'direct physical loss' or 'direct physical damage.'" "Physical damage," in turn, "must be understood to require a material physical alteration to the property—one that is perceptible, even if not visible to the naked eye." And "'[d]irect physical loss' . . . requires more than loss of use; it requires an actual, complete dispossession." Based on that reading, the Court held, "CRO has alleged neither persistent contamination nor total uninhabitability of its restaurants" and "[a]lthough the complaint alleges that the coronavirus rendered its restaurants 'unusable' such that it had to 'suspend or severely curtail its operations' and 'limit its on-premises dining and operations,' it does not allege a complete shutdown—for example, that its employees could not enter the restaurants or that they could not provide take-out and delivery services." Thus, CRO was not entitled to coverage, and its complaint was properly dismissed.

DISCRIMINATION

***Matter of Clifton Park Apts., LLC v New York State Div. of Human Rights*, 2024 NY Slip Op 00793 (Ct App Feb. 15, 2024)**

Issue: **Can a threat of litigation constitute a sufficient adverse action to support a claim of retaliation under the Human Rights Law?**

Facts: CityVision is a Texas-based not-for-profit corporation which tests whether housing facilities engage in discrimination by having their agents pose as prospective tenants. In 2016, a CityVision employee placed a test call to Clifton Park Apartments, LLC, purportedly seeking to rent an apartment in one of its complexes. Following that call, CityVision filed a complaint with Division of Human Rights, alleging that CPA had discriminated against the CityVision employee based on her familial status in violation of the Human Rights Law, because it allegedly steered the CityVision employee to a different apartment complex after discovering that she intended to reside in the apartment with her children. DHR dismissed the complaint. Afterwards, CPA sent a pre-litigation demand letter to CityVision, alleging that its DHR complaint was "false, fraudulent and libelous" and threatening that if it didn't account for the damages that CPA sustained, CPA would "proceed accordingly." CityVision then filed a second DHR complaint, this time alleging retaliation for filing its first complaint. DHR placed the "initial burden on CPA to show that CityVision's initial discrimination complaint was 'made in bad faith,' . . . concluded that they failed to meet that burden," and thus found that CPA engaged in unlawful retaliation.

Holding: The Court of Appeals held that a retaliation claim under the Human Rights Law must be analyzed using the same burden shifting framework as other discrimination claims. Thus, the Court held, "a plaintiff bears the burden to establish a prima facie retaliation claim. To meet that burden, the plaintiff must show that (1) they have engaged in protected activity, (2) the defendant was aware that the plaintiff participated in the protected activity, (3) the plaintiff suffered adverse action based upon the activity, and (4) there is a causal connection between the protected activity and the adverse action." On the third element, the Court held that "[a] per se rule precluding litigation threats from constituting adverse action would impermissibly restrict New York's antiretaliation statute in violation of the legislative directive to construe the Human Rights Law liberally to eliminate discrimination in this State." Thus, reviewing DHR's determination for substantial evidence, the Court held, "it was rational for DHR to conclude that the threatening letter caused CityVision to divert resources and could have dissuaded a person from pursuing a discrimination claim to protect their rights under the Human Rights Law. Indeed, a potential plaintiff might be chilled from filing a discrimination complaint when weighing the harm caused by the threat of retaliatory litigation, let alone the injury potentially occasioned by actual retaliatory litigation." The only remaining issue here was then whether CityVision engaged in protected activity to establish the first element. Because DHR erroneously placed that burden on CPA in the first instance, and DHR did not make any non-conclusory findings that CityVision had a reasonable belief that CPA engaged in discrimination when it filed its first DHR complaint, the Court remitted the matter to DHR for a hearing and new finding on that issue.

FIRST DEPARTMENT

LEGAL MALPRACTICE, INSURANCE LAW, EQUITABLE SUBROGATION

Century Prop. & Cas. Ins. Corp. v McManus & Richter, 2024 NY Slip Op 00799 (1st Dept Feb. 15, 2024)

Issue: **May a retrocessional insurer (i.e., the reinsurer of a reinsurer), maintain a legal malpractice claim against the lawyers representing the insured in an underlying personal injury action?**

Facts: An employee of Rite-Way Internal Removal, Inc. sustained injuries when he fell off an unsecured ladder while performing demolition work at a site owned by Tower B, which had contracted with Rite-Way to perform the demolition work. Rite-Way was contractually obligated to buy $6 million in insurance, but only secured a $2 million policy, and to indemnify Tower B for any losses arising out of its work. In the underlying personal injury action, the lawyers for Tower B, which were assigned by its primary insurer, moved for summary judgment in the third party action against Rite-Way, for breach of contract in failing to maintain the proper insurance and for indemnification. Rite-Way's insurer later agreed to accept defense and indemnification up to its $2 million policy, and Tower B's lawyers withdrew the summary judgment motions and discontinued the third party action, allegedly without Tower B's or its insurer's consent. Tower B was ultimately held liable, and settled with the injured employee for $4.6 million. After defense costs were subtracted, Tower B had $1.8 million of coverage remaining, and was on the hook for the remaining $2.8 million on its own. Plaintiff, Tower B's retrocessional insurer, ultimately paid that remaining $2.8 million of the settlement, and sued Tower B's lawyers for malpractice because had the lawyers not discontinued the third party indemnification claims against Rite-Way, Plaintiff wouldn't have had to pay any of the settlement. The lawyers moved to dismiss, arguing that Plaintiff lacked standing because it didn't have an attorney-client relationship with the lawyers. Supreme Court granted the motion.

Holding: The Second Department noted that absent an attorney-client relationship, a third party cannot typically bring a legal malpractice claim against a lawyer. But, the Court held, "[a] third party may still have standing to bring a claim for legal malpractice where, through contractual or equitable subrogation, it brings the claim on behalf of the attorney's client by stepping into their shoes legally." As the Court explained, "[i]n New York, we recognize at once the fairness of the proposition that an insurer who has been compelled by his contract to pay to or in behalf of the insured claims for damages ought to be reimbursed by the party whose fault has caused such damages and the principle of subrogation ought to be liberally applied for the protection of those who are its natural beneficiaries." Thus, the Court held on this novel issue, "[w]here a reinsurer, or retrocessionaire, has paid a claim on behalf of an insured, equitable principles demand that the reinsurer be entitled to equitable subrogation on behalf of the insured. Having pleaded that it was contractually obligated to, and did, pay the majority of Tower B's settlement amount in the underlying personal injury action, and that it brings the instant action for legal malpractice as subrogee of Tower B, plaintiff can proceed with this action under the theory of equitable subrogation."

SECOND DEPARTMENT

CRIMINAL LAW

People v Riche, 2024 NY Slip Op 00785 (2d Dept Feb. 14, 2024)

Issue: **Was a search warrant properly executed "in the state," as required by CPL 690.20(1) and article VI, § 1(c) of the New York Constitution, where it was faxed by the People in New York to a company at a location in New Jersey?**

Facts: The People applied, pursuant to CPL article 690, for a warrant to search the historical cell site location information for Defendant's and his estranged wife's cell phones, while investigating Defendant for stabbing his wife's boyfriend. In the warrant application, the People averred that Defendant and his wife were calling each other at and around the time of the stabbing. A Justice of Kings County

Supreme Court granted the People the search warrant, which provided: "ORDERED that this Warrant shall be executed by [the prosecutor] by serving this Warrant on T-Mobile at 4 Sylvan Way, Parsippany, NJ 07054." The People served the search warrant "on T-Mobile via fax on October 5, 2018." T-Mobile provided the cell site location information, which was disclosed to Defendant. Defendant then moved to controvert the search warrant and to suppress the cell site location information, arguing that "the search warrant was jurisdictionally defective because it authorized a search outside of New York State." Supreme Court denied the motion.

Holding: The Second Department, noting that the Constitution and CPL 690.20 require that search warrants be executed within the state, held that the search warrant here was. In particular, the Court reasoned, "[j]ust as the term 'executed' is not defined in CPL article 700, it is also not defined in the New York Constitution or CPL article 690. Nevertheless, in determining where a warrant is 'executed' within the meaning of CPL 700.05(4), the Court of Appeals looked to where the actions of the law enforcement officers took place. It follows that in determining where a search warrant is 'executed' within the meaning of the New York Constitution and CPL 690.20(1), we similarly must look to where the actions of the law enforcement officers took place. Here, the action of the subject law enforcement officer—the act of faxing the search warrant to T-Mobile—took place in New York." That is consistent with the Fourth Amendment, the Court held, because "[a] service provider accessing and retrieving its subscribers' CSLI and call detail information located in the service provider's own business records does not implicate its subscribers' right to privacy protected by the Fourth Amendment. It is only when agents of the government act that the subscribers' Fourth Amendment rights are implicated. Since the actions of the government's agents that encroached on the defendant's Fourth Amendment rights—the faxing of the warrant—took place in New York, we conclude that this is where the search warrant was executed. Thus, there was no violation of the New York Constitution or CPL 690.20(1)."

THIRD DEPARTMENT

UNEMPLOYMENT INSURANCE

***Matter of Mena (Philips Bryant Park LLC--Commissioner of Labor)*, 2024 NY Slip Op 00839 (3d Dept Feb. 15, 2024)**

Issue: **Did the owner of Bryant Park Hotel have an employer-employee relationship with a doorman/bottle server who worked in the hotel's nightclub while it was rented out to separate party promoters?**

Facts: Philips Bryant Park LLC operates a hotel that also contains a bar and nightclub. On weekend nights, Philips contracts the use of the bar and nightclub out to party promoters. Philips entered into an agreement with claimant in April 2013 to act as a doorman/bottle host for the parties. After claimant stopped providing these services, he applied for unemployment insurance benefits. The Unemployment Insurance Appeal Board determined that claimant was an employee and the hotel was liable for unemployment insurance payments for him and those similarly situated.

Holding: The Third Department affirmed, holding that substantial evidence existed to support the Board's determination that an employer-employee relationship existed, because although the party promoters typically provided bottle hosts for the parties, the hotel hired claimant directly because the promoter's hosts were "hurting sales." As a doorman/bottle host, the hotel provided claimant with the reservation list, told him who to admit, and set the price for the bottles and tables that claimant was selling to those admitted. The hotel also set claimant's schedule and paid him weekly. Although claimant could take work from other employers and could refuse shifts, the Court held that an employer-employee relationship existed for claimant and all others similarly situated.

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