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Summarizing recent significant New York appellate cases

I thought we learned our lesson the first time a lawyer cited cases that were fabricated by ChatGPT. Apparently not. Now, the Second Circuit has had to weigh in, send another lawyer for potential discipline for citing non-existent cases in a brief, and caution the bar that the rules governing attorney conduct already forbid the citation of ChatGPT fake cases, even without special court rules specifically prohibiting it. Let's take a look what else has been happening in New York's appellate courts over the past week.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ATTORNEY DISCIPLINE, CHATGPT

***Park v Kim*, No. 22-2057, ___ F4th ___ (CA2 Jan. 30, 2024)**

After U.S. District Judge P. Kevin Castel of the Southern District of New York sanctioned two lawyers last summer for citing in their brief to six cases that were fabricated by ChatGPT, and the legal world was set ablaze with a combination of astonishment and caution, I would have thought that we wouldn't so soon see another lawyer rely on ChatGPT for legal research. But alas, now the Second Circuit has had to weigh in after yet another lawyer filed a brief containing cites to fake ChatGPT cases.

In *Park v Kim*, the attorney for one of the parties had difficulty "locating a relevant case to establish a minimum wage for an injured worker lacking prior year income records for compensation determination." Apparently believing that applying minimum wage in that circumstance was well established, but being unable to find a case that said that, the attorney resorted to ChatGPT to find support for the proposition because the service "previously provided reliable information." ChatGPT provided a cite to "Matter of Bourguignon v. Coordinated Behavioral Health Servs., Inc., 114 A.D.3d 947 (3d Dep't 2014)," which the lawyer then cited in their brief without reading it.

The Second Circuit noticed, and demanded that the lawyer provide the Court with a copy of the case. Obviously, the lawyer couldn't do so, because ChatGPT had made the case up. The Second Circuit was none too pleased. Reminding the bar that "[a]ll counsel that appear before this Court are bound to exercise professional judgment and responsibility, and to comply with the Federal Rules of Civil Procedure" and, in particular, that Rule 11 requires lawyers to certify that their arguments have been researched and are supported by "existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law," the Court explained that, at the very least, Rule 11 "require[s] that attorneys read, and thereby confirm the existence and validity of, the legal authorities on which they rely. Indeed, we can think of no other way to ensure that the arguments made based on those authorities are 'warranted by existing law,' Fed. R. Civ. P. 11(b)(2), or otherwise 'legally tenable.'" Although the Court noted that some courts have adopted individual rules prohibiting the use of ChatGPT in filings, the Second Circuit explained that those rules are "not necessary to inform a licensed attorney, who is a member of the bar of this Court, that [they] must ensure that [their] submissions to the Court are accurate."

The lawyer in *Park* failed to comply with those obligations, the Court held. "The brief presents a false statement of law to this Court, and it appears that [the attorney] made no inquiry, much less the reasonable inquiry required by Rule 11 and long-standing precedent, into the validity of the arguments [they] presented." The Second Circuit therefore referred the attorney to the Court's Grievance Panel for investigation and possible discipline.

FIRST DEPARTMENT

CIVIL PROCEDURE

***White v Metropolitan Opera Assns., Inc.*, 2024 NY Slip Op 00467 (1st Dept Feb. 01, 2024)**

Issue: When is a trial preference warranted in the interests of justice under CPLR 3403(a)(3)?

Facts: In a personal injury action, the plaintiff, a renowned opera singer, was hurt when she fall from an elevated platform while she was performing at the Metropolitan Opera House. During the course of proceedings, the plaintiff asked the trial court for a special trial preference in the interests of justice under CPLR 3403(a)(3). The trial court denied the request.

Holding: The First Department held that under CPLR 3403, trial courts have discretion to grant special trial preferences in "an action in which the interests of justice will be served by an early trial." The Court has previously held that such a preference must be based on the unique facts of each case, and has previously been granted in personal injury cases when the plaintiff has been so injured that they are unable to work or obtain another means of adequate income as a result of the alleged injury. That wasn't the case, here, the Court held.

Rather, " while plaintiff's income decreased post-accident, it remained reasonably adequate." Thus, the trial court did not abuse its discretion in denying the trial preference. Finally, the Court noted that it "agree[d] with the second department that CPLR 3403(a) does not automatically entitle a litigant to more than one trial preference per case."

SECOND DEPARTMENT

PISTOL PERMITS

***Matter of Maher v Hyun Chin Kim*, 2024 NY Slip Op 00425 (2d Dept Jan. 31, 2024)**

Issue: **When can a court deny a pistol permit without granting the applicant a hearing?**

Facts: The petitioner filed an application for a pistol permit. In a determination the respondent, a Judge of the County Court, Orange County, denied the petitioner's application without a hearing, based upon the petitioner's prior arrests.

Holding: The Second Department, noting that "Penal Law § 400.00(1), which sets forth the eligibility requirements for obtaining a pistol permit, requires . . . that the applicant be of good moral character with no prior convictions of a felony or serious offense," held that denying the petitioner a hearing to address prior convictions was arbitrary and capricious. "Although the respondent was entitled to consider the petitioner's prior arrests, the record reflects . . . that none of the petitioner's arrests involved violent crimes or a weapon. The record also contains the petitioner's explanation of the circumstances surrounding his prior arrests; his activities since, which include employment, home ownership, charitable work, and abstinence from alcohol; evidence of the petitioner's having successfully completed a firearms course; and the opinion of a psychologist that the petitioner has no current risk factors that renders him unsuitable to own and carry a firearm. Further, based upon the record before us, it is apparent that the respondent did not give the petitioner an opportunity to respond to the stated objections to his pistol permit application."

THIRD DEPARTMENT

FREEDOM OF INFORMATION LAW, PRISONERS' RIGHTS

***Matter of New York State Corr. Officers & Police Benevolent Assn., Inc. v New York State Dept. of Corr. & Community Supervision*, 2024 NY Slip Op 00482 (3d Dept Feb. 1, 2024)**

Issue: **Are records expunged from an incarcerated individual's institutional file—such as misbehavior reports and records of disciplinary hearings—subject to disclosure under the Freedom of Information Law?**

Facts: NYSCOPBA filed a number of FOIL requests with DOCCS, seeking records associated with two disciplinary hearings involving different incarcerated individuals and separate incidents, after which the "charges against each incarcerated individual were ultimately found to be not substantiated and, resultantly, the corresponding misbehavior reports and disciplinary hearings were expunged from their institutional records." The DOCCS FOIL officer denied the requests, and the administrative appeals were similarly denied, because "disclosure of such documents would constitute an unwarranted invasion of personal privacy." Supreme Court granted NYSCOPBA's Article 78 petition and ordered that the records be disclosed subject to redactions.

Holding: The Third Department reversed, holding that it has long recognized that "certain information related to an incarcerated individual is subject to disclosure, such as arrest and conviction records, whereas other information such as dietary restrictions and next of kin should be redacted before disclosure. For certain other records, such as grievances, we have found that incarcerated individuals have a reasonable expectation that such grievance would be kept private — particularly where redactions were insufficient to prevent identification of the individual or grievance." Here, the Court held that "incarcerated individuals do have a reasonable expectation that misbehavior reports and disciplinary hearing records — which were determined to be unsubstantiated and expunged from such individual's institutional file — would be kept private." That is particularly so because of the risk that those records, if disclosed, could be misleading and used against the incarcerated individuals, even though they were determined unsubstantiated and expunged. DOCCS therefore properly declined to disclose the unsubstantiated misbehavior reports and disciplinary hearing records under the personal privacy exception to FOIL.

FOURTH DEPARTMENT

PARTNERSHIP LAW

***Capizzi v Brown Chiari LLP*, 2024 NY Slip Op 00535 (4th Dept Feb. 2, 2024)**

Issue: **When a law firm operates without a written partnership agreement, must each partner's equity percentage be determined under the default provisions of the Partnership Law?**

Facts: After the plaintiff resigned from his law firm, which operated without a written partnership agreement, he commenced an action seeking a declaration that he was an equity partner in the firm. Defendants argued that that plaintiff was not an equity partner and that, pursuant to an oral agreement, he was entitled to nothing more than the ability to take his own files with him when he left. The courts previously determined that the plaintiff was an equity partner, so the parties then litigated his percentage of ownership, with plaintiff arguing that under the default rule of the Partnership Law he should be an equal 33.3% partner, or alternatively a 20% owner of all firm files based on the partners' prior profits division. Defendants opposed, again arguing that he was only entitled to the files that he originated to the firm.

Holding: The Fourth Department held that the parties' 40/40/20 income division "does not dictate the resolution of plaintiff's equity percentage. '[D]ivision of income along certain lines does not establish conclusively that the equity in the partnership is divided in the same proportion.'" Nonetheless, the Court held, sufficient evidence existed to establish that their firm ownership percentages departed from the default "equal partners" rule under Partnership Law § 40. "[A]lthough an oral contract isn't worth the paper it's written on, an oral partnership agreement can supersede the terms of Partnership Law § 40 and thereby, for example, place the value of pending contingent-fee cases outside the scope of a law firm's distributed assets . . . The documents submitted on the motions established that the individual parties agreed that plaintiff would have an equity interest in the firm and that his equity interest was limited to 20%." A lesson for the bar: if you're going to join the partnership of a law firm, put everything in writing. Who wants to spend years of litigation and thousands upon thousands of dollars fighting about how much money you're owed from the firm's cases just because you never did?

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