March 15, 2024

CasePrepPlus

A New York State Bar Association member benefit

Editor:
Robert S. Rosborough IV

Summarizing recent significant New York appellate cases

It's not every day that the New York appellate courts face a $44 million scrivener's error in a contract. As the First Department explained this week, when the contract makes clear its true intent, the courts may overlook the scrivener's error to interpret the contract as the parties' clearly intended. And here, that decision kept the guarantor of a $44 million loan on the hook for repayment of the debt, reminding the parties and the bar "that proofreading is an essential, indispensable tool in the drafting of contracts." Let's take a look at that opinion and what else has been happening in New York's appellate courts over the past week.

FIRST DEPARTMENT

CONTRACTS, GUARANTY, SCRIVENER'S ERROR

***NCCMI, Inc. v Bersin Props., LLC*, 2024 NY Slip Op 01161 (1st Dept Mar. 05, 2024)**

Issue: **Can a scrivener's error in a guaranty insulate the supposed guarantor from liability?**

Facts: Bersin Properties, LLC entered into a $135 million loan agreement, as borrower, with the plaintiff's predecessor, as lender, for the purpose of renovating and re-leasing the Medley Centre, a struggling shopping mall located in Monroe County. The loan agreement provided that the loan was nonrecourse, allowing only a foreclosure or specific performance action as the remedy for any default, but provided an exception when the lender could have recourse against the borrower and the loan's guarantor, Scott Congel: if the borrower were to contest the foreclosure action or enforcement of the lender's rights. Although Congel was named the guarantor in the loan agreement, the specific guaranty that he signed provided, instead, that the loan was to be "fully recourse to *Borrower*," rather than to Congel as the indemnitor. After drawing $44 million under the loan, Bersin Properties defaulted and the lender sought to foreclose. Bersin Properties filed an answer with affirmative defenses in that proceeding, which the lender argued triggered the guaranty by Congel. After Bersin Properties then lost the property in a sheriff's sale, the lender sold the debt for $4 million, and converted the foreclosure proceeding into one seeking to recover against Congel individually under the guaranty, explaining that the guaranty language that the loan was "fully recourse to *Borrower*" was a scrivener's error that was transposed from the loan agreement, but was never changed to read "fully recourse to Indemnitor," as had clearly been intended. Supreme Court denied the parties' competing summary judgment motions on the guaranty claim.

Holding: The First Department used this case as a "reminder that proofreading is an essential, indispensable tool in the drafting of contracts." Although a claim for reformation of a contract based on a scrivener's error had to be commenced within 6 years after the mistake was made, and the lender's claim was not, the Court held that "a court may correct a scrivener's error outside of a claim for reformation of a contract in those limited instances where some absurdity has been identified or the contract would otherwise be unenforceable either in whole or in part. In other words, a court is not constrained to adopt an absurd phrasing in the contract merely because the statute of limitations for reformation had passed, when the error is obvious and the drafters' intention clear." That was certainly the case, here, the Court held. "[T]o accept a literal reading of the Guaranty's full debt recourse liability to apply to the 'Borrower' instead of 'Indemnitor' as urged by defendants would countenance an 'illogical' result, namely, Bersin Properties, as a single-purpose entity with no assets other than the Property, would be guaranteeing its own debt. That result renders the Guaranty illusory and meaningless, particularly given that the Property was encumbered at the time of the Guaranty and, notably, already lost in an unrelated foreclosure action when plaintiff sought to enforce the Guaranty." Thus, the Court held that Congel was still liable for the $44 million loan under the guaranty, notwithstanding the scrivener's error in the drafting.

TORTS, ALTER EGO, PIERCING THE CORPORATE VEIL

***Cortlandt St. Recovery Corp. v Bonderman*, 2024 NY Slip Op 01250 (1st Dept Mar. 07, 2024)**

Issue: **What must a plaintiff establish to pierce the corporate veil under an alter ego theory?**

Facts: The plaintiff brought an actions against numerous corporate defendants, alleging that the corporate structures were a sham and seeking to enforce a judgment against them as alter egos of the judgment debtor. Supreme Court denied the corporate defendants' motion for summary judgment dismissing the complaint.

Holding: The First Department explained, "[a] party seeking to pierce the corporate veil must show complete domination of the corporation in respect to the transaction attacked and that such domination was used to commit a fraud or wrong against the plaintiff. Because New York law disfavors disregard of the corporate form, mere conclusory allegations that the corporate structure is a sham are insufficient

to warrant piercing the corporate veil. Instead, the party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party." Evaluating the issue of domination, courts will examine "factors such as the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership; officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the alleged dominated corporation; whether the corporations are treated as independent profit centers; and the payment or guarantee of the corporation's debts by the dominating entity." Here, the First Department held, the plaintiff failed to demonstrate with any particularized proof that the corporate defendants exercised complete domination over the judgment debtor, or how that domination was used to perpetrate a fraud against the plaintiff. Thus, the plaintiff failed to establish alter ego liability, and the complaint should have been dismissed against the corporate defendants.

SECOND DEPARTMENT

CONTRACTS, USURY

***Alleon Capital Partners v Choudhry*, 2024 NY Slip Op 01165 (2d Dept Mar. 6, 2024)**

Issue: **When may a loan be rendered unenforceable under New York's usury laws?**

Facts: A lender entered into an agreement with the defendants, as borrowers, for a loan in the principal amount of $2,782,259.27. Due to certain fees and money placed into escrow, the borrowers received $2,360,200.75 from the lender. When the defendants failed to repay the entire amount of the loan, the lender filed a breach of contract action. The defendants moved to dismiss on the ground that the loan was usurious. Supreme Court denied the motion.

Holding: The Second Department held that under New York's usury law—General Obligations Law § 5-501—lenders cannot charge more than a specified amount of interest on loans. A usury defense to a loan's enforceability in a civil action typically doesn't apply to corporate borrowers, except when the loan is alleged to be criminally usurious (interest rate more than 25%). And the usury law provides that a usury defense is not available when the principal of the loan is more than $2.5 million. Here, the Court held that the usury defense was not available to the defendants here, because the loan principal was more than $2.5 million, even with subtractions for "the portion of the loan that was used to cover closing fees, attorney fees, and taxes." Thus, Supreme Court properly denied the motion to dismiss.

THIRD DEPARTMENT

ADMINISTRATIVE LAW, CLIMATE LEADERSHIP AND COMMUNITY PROTECTION ACT

***Matter of Clean Air Coalition of W. N.Y., Inc. v New York State Pub. Serv. Commission*, 2024 NY Slip Op 01233 (3d Dept Mar. 7, 2024)**

Issue: **Can an administrative determination be unripe for judicial review and a challenge to that determination be moot at the same time?**

Facts: In early 2021, Digihost International, Inc. sought to acquire the entire interest in Fortistar North Tonawanda, LLC from North Tonawanda Holdings, LLC, including ownership in a natural gas-fired cogeneration facility located in the City of North Tonawanda, Niagara County, and to use the power to operate a cryptocurrency mining operation next door. Fortistar and Digihost petitioned the Public Service Commission, seeking a declaratory ruling that the proposed transaction did not require further review under Public Service Law §§ 70 and 83 or, alternatively, that the PSC approve the transaction by finding it in the public interest under those statutes. Petitioners filed comments with the PSC, which criticized the environmental impacts of allowing Digihost to use the facility for the mining of cryptocurrency and argued that the transaction undermined the emission reduction objectives of the New York State Climate Leadership and Community Protection Act. The PSC granted Digihost and Fortistar's petition, finding that the proposed transaction did not require further PSC review and that the petitioners' environmental concerns were outside of the limited scope of the proceeding. Petitioners then filed an Article 78 and declaratory judgment proceeding, arguing that "that the PSC unlawfully ignored the requirement of sections 7 (2) and (3) of the CLCPA to consider the impact on the environment and disadvantaged communities when it reviewed the proposed transaction." The PSC and the crypto respondents moved to dismiss, with the PSC arguing that its ruling wasn't ripe for review because a petition for rehearing had been filed and was pending and the crypto respondents arguing that the proceeding was moot because the transaction had been closed. Supreme Court granted the PSC's motion, holding that the proceeding wasn't ripe.

Holding: The Third Department held that the petition for rehearing did not affect the ripeness of the PSC declaratory ruling, because "the explicit language of State Administrative Procedure Act § 204 did not allow the PSC to modify its initial ruling with respect to its immediate applicability to petitioners and the crypto respondents regardless of its determination on reconsideration." Accordingly, the Court held, "the September 2022 declaratory ruling issued by the PSC is quasi-judicial in nature and, at the moment it was issued, was accorded the same conclusiveness that attaches to judicial judgments, thus rendering it ripe for review." The Court then rejected the crypto respondents' argument that the proceeding was moot because the transaction had closed. Rather, the Court held, because the specific relief that petitioners requested was for the PSC to consider what the CLCPA requires to be considered, and "potential relief short of completely unwinding the transaction" may be available, including the imposition of environmental mitigation measures, the proceeding was not

moot. Since Supreme Court did not address the merits of the petitioners' challenge under the CLCPA, the Third Department remanded for further proceedings on the merits of the proceeding.

CasePrepPlus | March 15, 2024
© 2024 by the New York State Bar Association

To view archived issues of CasePrepPlus,
visit NYSBA.ORG/caseprepplus/.