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Reporting on Significant Court of Appeals Opinions and Developments in New York Practice

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CASE LAW DEVELOPMENTS

Court of Appeals Finds Lower Courts Abused Discretion in Granting Petitioners Leave to Serve Late Notices of Claim

Lower Courts Improperly Concluded That City's Employees Alleged Participation in Intentional Tort or Its Possession of Records Concerning Underlying Events Provided City With Actual Knowledge of Essential Facts Constituting the Claims

Matter of Jaime v. City of New York, 2024 N.Y. Slip Op. 01581 (March 21, 2024), dealt with the appeal of two matters in which the issue was whether the trial courts (affirmed by the Appellate Division) abused their discretion in granting petitioners' application for leave to serve late notices of claim against the City of New York (City) under General Municipal Law § 50-e (GML). On such an application, the court is to evaluate whether the public corporation "acquired actual knowledge of the essential facts constituting the claim or within a reasonable time thereafter." GML § 50-e (5). In addition, the court is to consider "all other relevant facts and circumstances." The statute provides a non-exhaustive list of factors. A key factor for a court to address is whether the delay in serving the notice of claim substantially prejudiced the public corporation. Courts also consider whether the petitioner had a reasonable excuse for failing timely to serve the notice of claim.

In *Matter of Orozco v. City of New York*, the petitioner was arrested for a narcotics-related offense. He asserted that in 2018 the NYC Police Department and the District Attorney had submitted false and fabricated evidence to a magistrate resulting in the issuance of a warrant for his arrest without probable cause; that he was maliciously prosecuted and "wrongfully detained" for five months; and that the criminal proceedings were terminated in his favor. He then sought to assert false arrest and malicious prosecution claims, among others.

The petitioner filed a petition for leave to serve a late notice of claim. The petition was not verified by the petitioner but by his counsel and only attached the notice of claim, not an affidavit from the petitioner. It claimed that the actual knowledge of the police officers could be imputed to the City and that the City had acquired actual knowledge by possessing records that its officers were required to create during the investigation and prosecution. The petitioner also alleged that the City was not substantially prejudiced by the late filing because the City had actual knowledge and his need to defend against the criminal charges, his limited English, his California residency, and the effects of COVID all constituted a reasonable excuse for his failure to serve a timely notice of claim.

In *Matter of Jaime v. City of New York*, petitioner filed a petition attaching five proposed virtually identical notices of claim relating to separate incidents at Riker's Island where he was detained and received medical attention for his injuries in the infirmary. The petitioner here, represented by the same attorney as in *Orozco*, raised essentially the same arguments as Orozco. However, his excuse for the late filing was his continued detention, his difficulty in retaining counsel while in jail, and the effects of COVID. Jaime also did not submit an affidavit or other evidence with his petition, relying on his proposed notices of claim. Eventually, he also provided copies of grievances that he filed at Riker's, but none related to the incidents covered in the notices of claim.

A majority of the Court of Appeals held that both petitioners had not sustained their burdens. In *Orozco*, the Court found that the petitioner's allegation that the police officers and the DA's office were involved in his arrest and prosecution did not establish that the City acquired actual knowledge of the essential facts constituting his false arrest and malicious prosecution claims; the petitioner offered no evidence establishing the City's actual knowledge; and, while a verified pleading can be used in place of an affidavit under CPLR 105(u), it only has value if the person verifying has personal knowledge of the facts.

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Thus, because the trial court had no competent evidence before it, it was not in a position to conduct "a fact-specific inquiry into whether the City acquired actual knowledge through any of its employees." The Court pointed to the petitioner's failure to submit his own affidavit, copies of papers filed in the underlying criminal proceeding, criminal court decisions, or other relevant evidence. "Orozco's mere allegation that NYPD officers participated in his arrest and prosecution does not constitute facts or evidence." *Id*. at *14. Moreover, the mere existence of records is not sufficient to establish actual knowledge, and there was no evidence that petitioner's counsel sought the records.

The Court stressed that if it were to hold "that a municipal employee's alleged participation in an intentional tort necessarily provided the municipality with actual knowledge, our holding would create a de facto exemption to the notice of claim requirement for claims of battery, false arrest, and malicious prosecution, among others." *Id*. This was not a result the legislature intended since it did not provide for such an exception in the statute (as it did for tort claims arising out of sex crimes against children). Moreover, since petitioner's claim that the City would not be substantially prejudiced by the late filing was based on the argument that the City acquired timely actual knowledge, that claim failed.

The Court also found that the petitioner did not provide a reasonable excuse for the late notice. His need to defend against the criminal charges was not relevant because his claims (for false arrest and malicious prosecution) did not accrue until he was released from custody, when there were no criminal charges against him. In addition, if anything, petitioner benefitted from the COVID toll since his claims were set to expire only days after the pandemic struck New York.

With respect to *Jaime*, the majority also found that the trial court abused its discretion. While acknowledging that the petitioner submitted some evidence, the grievances he offered actually undermined his claim since it established that he was familiar with the grievance process. Yet, there was no evidence that he had filed a grievance with respect to the subject incidents, which may have constituted evidence of the City's actual knowledge.

The Court dispensed with the argument that the petitioner's failure to file a grievance may have been for fear of reprisal as speculative, since no evidence was submitted in that regard. It also found unavailing the contention that the petitioner acquired actual knowledge through his visit to the infirmary and the records maintained by the Department of Corrections for his injuries. There was no evidence that the petitioner told the personnel at the infirmary that his injuries were caused by correction officers, thereby possibly prompting the infirmary personnel to file a report. In addition, there was no indication that the petitioner sought but was unsuccessful in obtaining these alleged records and documents from the City.

Judge Rivera dissented in part. While she agreed with the majority that the trial court abused its discretion in *Orozco,* she disagreed with respect to *Jaime*, finding he provided sufficient support for the City's actual knowledge. First, she pointed to the evidence provided as to petitioner's concerns he expressed during his incarceration about the dangers posed at Rikers and the medical attention provided to him there. Moreover, "[a] prisoner who goes to the infirmary with significant injuries from a physical assault should prompt an inference of negligence because corrections officers have a responsibility to keep prisoners safe." *Id.* at *23.

The dissent disagreed that an allegation (rather than record evidence, such as petitioner's affidavit) that the City possessed documents reflecting petitioner's injuries could not establish the acquired knowledge proponent. She maintained that especially in view of Rikers "appalling record of inmate injuries," an "injury to an inmate in and of itself places prison officials on notice of a potential tort claim." *Id.* at *24.

Plaintiff Can Amend Complaint After Appellate Division Dismissed It

Narrow Majority of Court of Appeals Reverses Appellate Division Order

In the August 2022 edition of the *Law Digest*, we reported on the First Department's decision in *Favourite Ltd. v. Cico*, 208 A.D.3d 99 (1st Dep't 2022), in which a narrow majority of the court held that the plaintiff could not amend a complaint previously dismissed by the Appellate Division. An equally narrow majority of the Court of Appeals has now reversed.

To review the critical facts very briefly, there were standing (capacity) issues and multiple amended complaints filed. The Appellate Division issued a March 20, 2020 order dismissing the second amended complaint on standing grounds with a direction to enter judgment. Subsequently plaintiff's motions for leave to reargue and leave to appeal were denied by an August 13, 2020 order. Plaintiff had also moved to dismiss defendants' counterclaims, which had been asserted in an answer filed prior to the Appellate Division's March 20, 2020 order. While that motion was pending, but over nine months after the Appellate Division order, plaintiff moved for leave to file a third amended complaint. In June 2021, the trial court granted plaintiff's amendment, and dismissed the defendants' breach of contract and declaratory judgment counterclaims.

A majority of the Court of Appeals focused on the fact that the Appellate Division's dismissal for lack of standing or capacity was without prejudice. Thus, "[t]he order contemplated that the company could 'in theory, be revived,' but simply stated that Sirio SRL had done so improperly. Therefore, there is nothing in the Appellate Division's order or opinion that would prevent plaintiffs from pursuing their claims after curing the standing or capacity issue." 2024 N.Y. Slip Op. 01496 (March 19, 2024) at *7–8.

The Court rejected the contention that the only avenue available to the plaintiff after the Appellate Division order was resort to CPLR 205(a) and the bringing of a second action. While that might be true in a "case in which no action remained between the parties in Supreme Court, here the action remained pending in Supreme Court because of the Cicos' counterclaims. Therefore, Supreme Court retained control over the parties and continued to adjudicate claims related to the same transactions that formed the subject-matter of the complaint." *Id*. at *8.

The majority noted that the Appellate Division dismissal of the complaint did not prevent the plaintiffs from repleading to cure a defect "discovered on appeal." It rejected the argument that an amendment was permitted only where the appellate court expressly granted such a right. It similarly dispensed with the proposition that leave was unavailable because there was no complaint to amend, since many courts, both at the trial level and the Appellate Division, dismiss complaints with leave to replead.

The dissent, written by Judge Rivera (and joined by Judges Garcia and Troutman), concluded that following the Appellate Division dismissal order, the plaintiff had only one way to preserve its claims: bring a new action under CPLR 205 (a) if it acquired standing to sue within the relevant time period. Contrary to the majority's conclusion, however, the trial court had no authority to grant plaintiff's motion to amend, since the defect here "that the company had no legal existence when the second amended complaint was filed—could not be cured retroactively." In addition, "because the Appellate Division dismissed the complaint in its entirety, there was no plaintiff's pleading to amend under CPLR 3025 (b)." *Id*. at *14.

The dissent also disagreed that the existence of defendant's counterclaims meant the action was still pending after the complaint was dismissed. In fact, "there was no existing pleading interposed by the plaintiffs to be amended." *Id*. at *23. Further, the majority confused "a nonmerits dismissal without prejudice to amend with the class of dismissal here, which was without prejudice to file a new action." *Id.* at *24.

Nonresident Plaintiff Not Yet Employed in New York Can Satisfy Impact Requirement of Human Rights Laws by Proactively Seeking Actual New York Job Opportunity

New York State Court of Appeals Answers Certified Question From Second Circuit

In *Syeed v. Bloomberg L.P.*, 2024 N.Y. Slip Op. 01330 (March 14, 2024), the plaintiff, a South Asian-American woman, brought an employment discrimination action against Bloomberg L.P. She claimed that in 2014 she began working for the defendant, a privately held company with New York City global headquarters; she was subjected to discrimination on the basis of sex and race while working as a reporter in defendant's Washington, D.C. bureau; in 2018, after concluding that there was no career path for her in the Washington, D.C. bureau, she applied for several reporting jobs with Bloomberg in NYC and was particularly interested in a U.N.-reporter position, but ultimately the U.N. job was given to a man allegedly with less practical experience and formal education than plaintiff. Plaintiff's managing editor in Washington, D.C. told her that the U.N. job had not been converted to a "diversity slot." Plaintiff took this to mean that she would only be considered for promotions to positions identified as diversity slots. Claiming that she was constructively discharged, plaintiff quit Bloomberg.

Two years later, now a California resident, plaintiff filed this class action in New York State court, asserting individual claims under the NYS and NYC Human Rights Laws, among other causes of action. She alleged that by denying her promotions the defendant discriminated against her on the basis of sex and race. The defendant removed the case to federal district court, which granted defendant's motion to dismiss all of plaintiff's claims under both Human Rights Laws. It relied on the NYS Court of Appeals decision in *Hoffman v. Parade Publs,* 15 N.Y.3d 285 (2010), believing that *Hoffman* and its progeny stood for the proposition that the Human Rights Laws were limited to people who live or work in New York.

On appeal, the Second Circuit reserved decision and certified the following question to the New York State Court of Appeals: "Whether a nonresident plaintiff not yet employed in New York City or State satisfies the impact requirement of the New York City Human Rights Law or the New York State Human Rights Law if the plaintiff pleads and later proves that an employer deprived the plaintiff of a New York City- or State-based job opportunity on discriminatory grounds."

A unanimous Court answered the question in the affirmative. It initially noted that both the state and city Human Rights Laws proscribe employment discrimination based on race and either sex or gender, among other grounds; they both contain provisions directing that they be liberally construed; and exceptions or exemptions are to be construed narrowly.

The Court then dealt with the federal district court's reliance on *Hoffman v. Parade Publs, supra*, which announced an "impact" test where nonresidents assert claims under the Human Rights Laws. The plaintiff in *Hoffman* resided in Georgia and worked in Atlanta for the defendant, a company with headquarters in NYC. The plaintiff brought an age discrimination action in New York where the decision to fire him was made. The Court in *Hoffman* provided nonresidents with two ways to satisfy the impact requirement: they had to work in New York or establish "that the challenged conduct had some impact on the plaintiff within the respective New York geographic boundaries." In *Hoffman*, the Court concluded that the plaintiff had not satisfied either.

In *Syeed*, however, the Court concluded, based on the facts in the case, that a nonresident who proactively seeks "an actual New York City- or State-based job opportunity" can seek protection under the Human Rights Laws. In contrast, in *Hoffman* the plaintiff was neither a resident nor sought to become one. The Court stressed that a nonresident who has been denied a job in New York has certainly been impacted there

> because that is where the person wished to work (and perhaps relocate) and where they were denied the chance to do so. When applying the required liberal construction of "inhabitants" and "individual within this state," a prospective inhabitant or employee, who was denied a job opportunity because of discriminatory conduct, fits comfortably within the Human Rights Laws' protection (citations omitted).

Syeed, 2024 N.Y. Slip Op. 01330 at *8.

The Court stated that its conclusion was supported by the Human Rights Laws' important policy considerations, which affect both the discriminated individuals and New York institutions:

> The state and the city are deprived of economic and civic contributions from individuals discriminatorily denied the opportunity to work in New York, along with the more diverse workforces and communities that the individuals would advance. Our resolution of the certified question has the beneficial effect of protecting New York institutions and the general welfare of the state and city—as the legislature and city council intended.

Id. at *9–10.

Majority of First Department Holds Golfer's Action for Injury on Golf Course Was Precluded by Primary Assumption of Risk Doctrine

Dissent Believes This is Battle of the Experts Requiring Denial of the Summary Judgment Motion

In recent editions of the Law Digest, we referred to *Grady v. Chenango Val. Cent. Sch. Dist.,* 40 N.Y.3d 89 (2023), and *Gilliard v. Manhattan Nuvo* LLC, 223 A.D.3d 563 (1st Dep't 2024), which dealt with the applicability of the still viable primary assumption of risk doctrine, precluding liability. To review, even after comparative fault was adopted in New York, a form of primary assumption of risk doctrine has been retained with respect to athletic and recreative activities, based on a premise that "[o]ne who takes part in . . . a sport, accepts the dangers that inhere in it so far as they are obvious and necessary."

More recently, in *Katleski v. Cazenovia Golf Club, Inc.,* 2024 N.Y. Slip Op. 01366 (3d Dep't March 14, 2024), an experienced golfer was struck in the left eye by a golf ball during defendant's golf tournament. Plaintiff was riding in a golf cart on the seventh hole fairway when he was hit by a ball struck by another golfer, teeing off from the third hole. The fairways for the two holes run parallel in part, and part of the seventh fairway approaching the green is adjacent to and to the right of the third tee.

A majority of the First Department noted that it was "well established that 'being hit without warning by a shanked shot' is 'a commonly appreciated risk' of participating in the sport; '"golfers are deemed to assume the risks of open topographical features of a golf course"'; and "'evidence establishing that the proximity of [a tee] to [a different] green and hole was open and obvious' will preclude liability against a golf course for injuries sustained as a result of such proximity (citations omitted)." *Id*. at*3–4.

The court pointed to the facts, among others, that the plaintiff was an experienced golfer who conceded that he was "absolutely" aware of the risks of being hit by a golf ball while playing; that the tournament rules provided for a "shotgun start," in which each group of golfers would begin at different holes; the plaintiff recognized that there would be groups of players in front and behind him; and he acknowledged that on the day of the incident the view of the seventh hole fairway was obstructed from the third tee, he shared his concern with other golfers that the tee location was "dangerous" because of inadequate sight lines, but nevertheless continued to play.

The defendants also offered testimony that the layout between the third and seventh holes was typical for a "classic" course; there "were no 'industry standard[s], rule[s] or regulation[s] requiring [defendant] to re-design or re-build its holes to accommodate all possible shots' and 'no authoritative texts or guidelines which establish minimum standards for golf course design'"; there were no concealed or hidden conditions; there was no increased risk based on the course's topography or proximity of the holes that a player would be hit with an errant tee shot; "shotgun starts" are not uncommon; and "[t]he risk of being struck by a golf ball is an inherent risk of the game of golf.'" *Id.* at *9.

The court thus concluded that the defendant had carried its burden. In response, the plaintiff did not establish a material issue of fact. The court noted that although plaintiff's experts came to different conclusions "the determinative fact is that plaintiff, a highly experienced golfer, knew of the risks involved in playing in the tournament and made an informed decision to keep doing so despite the lack of protective barriers and his asserted concern during the first round about the tee A location at hole three." *Id.* at *13. The majority distinguished this case, where the course topography and the hole three tee A location were as safe as they appeared, from *Grady,* where "the protective barrier arguably made the drill appear safer than it actually was." *Id*. at *16.

The dissent countered that the plaintiff carried his burden to raise a question of fact as to whether the defendant unreasonably enhanced the risks inherent in the game of golf; the plaintiff's experts testified that tee A design "was extremely dangerous and reckless, unreasonably increasing the risk that players on the seventh hole would be struck by an errantly hit ball, as occurred here"; this was a battle of the experts; and on summary judgment the court is required to view the evidence in the light most favorable to the plaintiff.

The dissent criticized the majority for

> requiring plaintiff to establish both that defendant unreasonably enhanced the risks inherent in golf and that the increased risks were unknown to him. . . . The majority's . . . conclusion inappropriately fuses the two exceptions of the primary assumption of risk doctrine into one, effectively immunizing golf course owners from all liability for golf-ball injuries, regardless of how unreasonably they have acted.

Id. at *22–23.

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