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Summarizing recent significant New York appellate cases

Can an accountant firm avoid liability for aiding and abetting corporate fraud when they reflected the fraud in the company's books and records, but failed to advise the other principals that it was occurring? The First Department tackled that novel question this week, holding that generally accepted accounting practices require an accountant to disclose fraud when it has been discovered, and can't avoid liability merely because its retainer obligation was only to provide limited services to the company. 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

TORTS, ACCOUNTANT LIABILITY FOR CORPORATE OFFICER FRAUD

***1650 Broadway Assoc., Inc. v Sturm*, 2024 NY Slip Op 01864 (1st Dept Apr. 04, 2024)**

Issue: **Is an accountant hired to perform "compilation services" shielded from liability for the alleged improper activities of an officer of the company?**

Facts: Plaintiff, a closely held family corporation, owns the iconic Stardust Diner, in which Irving and Ellen Strum held controlling interests and their son, Kenneth, owned a minority share. After Irving passed away and Ellen took a step back from the business, Kenneth took over day-to-day operations and gave himself huge salary raises and took out millions of dollars of loans against the company. The loans were reflected in the company's books and records, as were subsequent "reductions" of the loan amounts, which Plaintiff alleged that Kenneth fabricated after the fact. During this time, Defendant Getzel, Schiff & Pesce, LLP, a public accounting firm, performed certain "compilation services" and prepared the local, state, and federal tax returns for plaintiffs, the Diner, and Kenneth under year-after-year engagement letters. "[D]efendant's managing partner had annual meetings with Ellen at her home, during which the partner provided her only broad summary of the Diner's finances but never disclosed any details about the Diner's accounting, books and records." Ellen eventually hired new accountants, which discovered Kenneth's activities, including that he had used the loans to finance new personal businesses for which defendant also served as the accountant. Plaintiff then sued Kenneth for fraud and breach of fiduciary duty, and asserted claims against defendant for accounting malpractice and aiding and abetting fraud. Supreme Court dismissed the claims against the accountants, holding that "because it was undisputed that the loans were disclosed on the financial statements, plaintiffs could not show how defendant breached professional accounting standards or aided Kenneth's fraud."

Holding: The First Department reversed, holding that "[a] party alleging a claim of accountant malpractice must show that there was a departure from the accepted standards of practice and that the departure was a proximate cause of the injury. A plaintiff alleging an aiding and abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance." The Court noted, "[t]he law is very clear that an agreement to perform unaudited services does not shield an accountant from liability because an accountant must perform all services in accordance with the standard of a reasonable accountant under similar circumstances, which includes reporting fraud that is or should be apparent." Here, the Court held, the complaint sufficiently alleged that the accountants knew about Kenneth's fraud and failed to disclose it to Ellen. Moreover, "[o]ne who aids and abets a breach of a fiduciary duty is liable for that breach as well, even if he or she had no independent fiduciary obligation to the allegedly injured party, if the alleged aider and abettor rendered substantial assistance to the fiduciary in the course of effecting the alleged breaches of duty. In this case, it is alleged not only that the accountant had knowledge of Kenneth's alleged improper transactions but that he participated in the alleged breaches." That, the Court held, was sufficient to state a claim.

SECOND DEPARTMENT

EMPLOYMENT DISCRIMINATION, AIDING AND ABETTING LIABILITY

***Elco v Aguiar*, 2024 NY Slip Op 01796 (2d Dept Apr. 3, 2024)**

Issue: **Did the plaintiff state a claim against her ex-boyfriend for aiding and abetting employment discrimination under the New York State Human Rights Law?**

Facts: "The plaintiff, a public safety dispatcher for the Town of Riverhead Police Department, and the defendant Richard Freeborn, a patrol officer with the Police Department, entered into a relationship in 2006, and later had a child together. The plaintiff's relationship with

Freeborn ended in 2009." After their relationship ended, plaintiff alleged that Freeborn instigated her superiors at the Police Department to harass her by telling them about her personal relationships and making false accusations about custody issues and her work performance. The plaintiff then commenced this action alleging, among other things, that Freeborn had violated her rights under the New York State Human Rights Law by aiding and abetting the harassment. Supreme Court denied Freeborn's motion to dismiss.

Holding: The Second Department, noting that a plaintiff is no longer required to allege that the harassing conduct was severe or pervasive to state a claim under the NYSHRL, held that the plaintiff had adequately alleged her aiding and abetting claim against Freeborn. "It is . . . unlawful under the NYSHRL for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under the NYSHRL, or to attempt to do so." Plaintiff's allegations that Freeborn instigated her superior's harassing conduct and that "without Freeborn's conduct, there is no indication that her superiors would have subjected her to inferior terms of employment" were sufficient to state an aiding and abetting claim under the NYSHRL.

THIRD DEPARTMENT

CIVIL PROCEDURE, APPEAL, FAMILY LAW

***Matter of Robert M. v Barbara L.*, 2024 NY Slip Op 01847 (3d Dept Apr. 4, 2024)**

Issue: **Is the Clerk of the Family Court emailing an order to a party sufficient to start the clock on that party's time to appeal the order under Family Court Act § 1113?**

Facts: The father and the mother are the parents of a child, and agreed that the mother would have sole custody of the child and the father would have specified parenting time. Thereafter, the father was convicted of sex offenses and was sentenced to 15 years in prison. The father sent the child several letters while in prison, but the child did not answer them. The father then petitioned Family Court for weekly letter or telephone contact with the child, and the mother cross-petitioned to end the father's parenting time. "Family Court issued an order in which it determined that in-person, virtual or telephonic communication between the child and the father was not in the child's best interests. Family Court accordingly dismissed the father's petition and granted the mother's cross-petition to the extent of modifying the custodial arrangement to eliminate the father's in-person visitation. In so doing, the court made clear that the father remained free to send letters to the child through the mother, who would screen them, and that the child was free to respond if she wanted to do so." The father appealed.

Holding: The Third Department initially rejected the mother's argument that the father's appeal was untimely taken. Under Family Court Act § 1113, "an appeal must be taken no later than 30 days after the service by a party or the child's attorney upon the appellant of any order from which the appeal is taken, 30 days from receipt of the order by the appellant in court or 35 days from the mailing of the order to the appellant by the clerk of the court, whichever is earliest." Here, the Court noted that the record did not reflect that the mother or the attorney for the child served the Family Court order on the father, and it only appeared that the clerk of Family Court emailed the father a copy, but did not mail one to him. Because Family Court Act § 1113 does not provide for "service by electronic means," the Clerk's email to the father did not start the clock for his appeal. Thus, the Court held, the mother failed to establish that the father's appeal was untimely. The Court nevertheless upheld the Family Court order, finding a sound and substantial basis for the determination that in-person visitation with the father was not in the child's best interests.

CRIMINAL LAW, SPECIAL PROSECUTOR

***People v Faison*, 2024 NY Slip Op 01836 (3d Dept Apr. 4, 2024)**

Issue: **When a special prosecutor has been appointed to prosecute a matter, but the special prosecutor cannot continue with the matter, may the matter be returned to the District Attorney's office to handle the prosecution?**

Facts: Defendant was charged with robbery and related crimes by felony complaint, but before a preliminary hearing was held, the Otsego County District Attorney's office sought to have a special prosecutor appointed pursuant to County Law § 701, which provides that when a district attorney is "disqualified" from prosecuting a case, the criminal court may appoint a local attorney to serve as a special prosecutor for the case. "As to disqualification, a district attorney who seeks the appointment of a special prosecutor need not show an actual conflict of interest; rather, the Court of Appeals has held that where there is legitimate doubt as to whether a district attorney and his or her office may proceed with a case, the district attorney is not barred from resolving that doubt by choosing to step aside upon a good faith application containing the reasonable grounds for his or her belief that he or she is so disqualified." Here, the DA's office advised the court that it had a conflict because it was separately prosecuting the victim of the defendant's crime and would have to call the victim as a witness in defendant's prosecution. The Court appointed a special prosecutor, who served for about a week before requesting to be relieved of the appointment. The Court granted the request and determined that "by operation of law, the prosecutorial duties are returned to the DA's office, citing Public Officers Law § 700 (1)." Defendant appealed this order, and after the DA's office presented the case to a grand jury, Defendant moved to disqualify the DA's office and for the appointment of a new special prosecutor. The Court denied the motion.

Holding: The Third Department held that "County Law § 701 does not specifically detail the procedure to be followed when a special prosecutor is relieved of his or her appointment, and there is little case law relevant to this issue; however, it is apparent that the only options are to either appoint another special prosecutor or to return the matter, if appropriate, to the DA's office." Although there is a significant public interest to have the constitutional officer from the DA's office prosecute crimes, the Court noted that just a few months earlier, the DA's office had sworn that it had a conflict requiring the appointment of a special prosecutor, and the defendant's concerns when the case was reassigned back to the DA's office were ignored by the trial court. The Court, thus, held, "because on this record we cannot determine why County Court deemed it appropriate to no longer disqualify the DA's office, we find that the court committed reversible error in returning the matter to the DA's office. As such, because the matter was presented to the grand jury by the DA's office, the indictment must be dismissed, without prejudice to a new special prosecutor to re-present to another grand jury."

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