NYSBA CasePrepPlus

A New York State Bar Association member benefit

April 26, 2024

Editor:
Robert S. Rosborough IV

Summarizing recent significant New York appellate cases

May a company that acquires all of the assets and liabilities of another company have the personal jurisdiction contacts of the other company attributed to it for purposes of suit on the liabilities it acquired? The Court of Appeals clarified that when a company buys assets and liabilities, it is also buying the acquired company's personal jurisdiction contacts for purposes of New York's long arm jurisdiction statute, so it can be amenable to suit in New York even if it hasn't previously done business in the state. Let's take a look at that opinion and what else has been happening in New York's appellate courts over the past week.

COURT OF APPEALS

CIVIL PROCEDURE, PERSONAL JURISDICTION, CORPORATE LAW

Lelchook v Société Générale de Banque au Liban SAL, 2024 NY Slip Op 02081 (Ct App Apr. 18, 2024)

Issue: **Under New York law, does an entity that acquires all of another entity's liabilities and assets, but does not merge with that entity, inherit the acquired entity's status for purposes of specific personal jurisdiction?**

Facts: 21 United States citizens who were harmed in rocket attacks perpetrated in 2006 by the Hizbollah terrorist organization in Israel brought suit against Lebanese Canadian Bank, which they alleged provided extensive financial services to Hizbollah, including millions of dollars in wire transfers through a New York-based correspondent bank. In that litigation, the Court of Appeals held that the transaction of business in New York was sufficient to confer personal jurisdiction under NY's long arm statute, and the Second Circuit held that doing so comported with due process. While that litigation was pending, LCB sold its assets and liabilities to Société Générale de Banque au Liban SAL (SGBL). Plaintiffs subsequently brought similar claims against SGBL in federal court, alleging that "SGBL inherited LCB's jurisdictional status and is subject to personal jurisdiction in New York because it 'assumed and bears successor liability for LCB's liability to the plaintiffs' by virtue of the June 2011 deal between LCB and SGBL." SGBL argued that a new company only inherits the jurisdictional status of its predecessor in a merger, not in an asset and liabilities purchase. The federal district court agreed, and the Second Circuit certified the question to the Court of Appeals.

Holding: Noting that it had "not decided when, if ever, a successor corporation may inherit a predecessor's jurisdictional status," the Court of Appeals, drawing an analogy to successor liability principles, held that it must examine "the impact of our rule on parties to a potential acquisition, whether imputing jurisdiction fairly reflects the reasonable assumptions and expectations of the parties to such transactions, whether doing so induces responsible parties to internalize responsibility for risks they create, and the impact of imputing jurisdiction on those injured by a predecessor's acts." Those factors, the Court held, "tip in favor of allowing successor jurisdiction where a successor purchases all assets and liabilities . . . Sophisticated corporate entities such as SGBL will undoubtedly engage in robust due diligence before agreeing to acquire all assets and liabilities of another entity. In doing so, they should understand where jurisdiction over such liabilities may lie and the potential cost if ultimately found liable, and will presumably negotiate a purchase price that is discounted by that prospect." As the Court explained, "[a] contrary rule would give rise to unfortunate incentives. Allowing a successor to acquire all assets and liabilities, but escape jurisdiction in a forum where its predecessor would have been answerable for those liabilities, would allow those assets to be shielded from direct claims for those liabilities in that forum . . . Injured parties would be left to directly sue the successor in a forum that may well be less favorable, with respect to both the likely outcome and available mechanisms to enforce a judgment . . . We see no good reason to require plaintiffs to take an indirect and uncertain path to recompense where a predecessor entity allegedly caused harm, subjecting it to jurisdiction in New York, and then agreed to an acquisition of all of its assets and liabilities by a successor, who in turn reaps the benefits of the predecessor's business in New York while evading jurisdiction here. Thus, we clarify that where an entity acquires all of another entity's liabilities and assets, but does not merge with that entity, it inherits the acquired entity's status for purposes of specific personal jurisdiction."

FIRST DEPARTMENT

TORTS, CIVIL PROCEDURE

***Bledsoe v Center for Human Reproduction*, 2024 NY Slip Op 02088 (1st Dept Apr. 18, 2024)**

Issue: **When tort claims are brought against a medical facility for failing to properly cryopreserve embryos, leading to them being unviable for in vitro fertilization, what statute of limitations applies?**

Facts: Plaintiffs asked the Center for Human Reproduction to assist with in vitro fertilization, in which eggs would be retrieved, fertilized, and then cryopreserved before one of the plaintiff's chemotherapy. CHR performed those services, but when plaintiffs transferred the nine cryopreserved embryos to Yale Fertility Center for later implantation, it was determined that two were missing, and three were so degraded that they were no longer viable. None of the remaining four embryos resulted in a successful pregnancy. Plaintiffs then sued CHR, 2 years and 10 months after the latest date that the embryos were cryopreserved, alleging medical malpractice and ordinary negligence. CHR argued that the claims sounded in medical malpractice and were untimely under the 2–1/2-year statute of limitations. Supreme Court dismissed the claims.

Holding: Addressing this issue of first impression, the Second Department was required to decide "which aspects of the IVF process implicate ordinary negligence or medical malpractice . . . The critical factor in distinguishing whether conduct constitutes medical malpractice or ordinary negligence is the nature of the duty owed to the plaintiff that the defendant allegedly breached." As the Court explained, "[a] cause of action for medical malpractice involves a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or involving a consideration of professional skill and judgment. By contrast, when the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the medical provider's failure in fulfilling a different duty, the claim sounds in negligence." Drawing those distinctions with respect to the IVF process, the Court held, "[t]he underlying parts of the IVF process implicate both medical malpractice and ordinary negligence. Retrieving the eggs from the ovaries, fertilizing the egg with a donated sperm, grading the quality of the embryos, and preparing them for cryopreservation are clear acts of medical science or art requiring a specialized skillset appropriately characterized as medical in nature." The plaintiffs' claims involving those parts of the IVF process, thus, sounded in medical malpractice and were untimely. "On the other hand, once cryopreservation has commenced, the mere maintenance of the storage tanks containing the frozen embryos does not comprise acts of medical science or art requiring special skills not ordinarily possessed by lay persons." The claims relating to the negligent storage of the cryopreserved embryos, thus, sounded in ordinary negligence and were timely brought, notwithstanding that it was medical staff who were tasked with checking the cryopreservation tanks.

SECOND DEPARTMENT

INSURANCE LAW, CIVIL PROCEDURE, FORUM SELECTION CLAUSES

***Air-Sea Packing Group, Inc. v Applied Underwriters, Inc.*, 2024 NY Slip Op 02032 (2d Dept Apr. 17, 2024)**

Issue: **May an insurer enforce a forum selection clause of an illegal insurance policy?**

Facts: Plaintiff bought a workers' compensation policy from defendants, which required it to enter into a separate agreement that charged much higher fees than had been reviewed by the Department of Financial Services. After investigating these policies, DFS charged defendants with violating multiple provisions of the Insurance Law, and Plaintiff commenced this suit, alleging fraudulent inducement and fraud, among other claims. One month later, Defendants entered a consent order with DFS to resolve the Insurance Law violations, but declined to admit any liability. Responding to Plaintiff's lawsuit, Defendants moved to dismiss, arguing that a forum selection clause in the insurance agreements required the suit to be litigated in Nebraska, where Defendants were headquartered. Supreme Court, however, denied the motion to dismiss.

Holding: The Second Department held that "[a] contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court." In this unique case, the Court held, multiple bases existed to decline to enforce the agreement's forum selection clause. First, the Court held that enforcement of the forum selection clause would violate public policy because "the fraud alleged in the instant action implicates New York's regulatory framework for workers' compensation insurance," which New York courts are better to interpret than would be Nebraska courts, and the policies violated the Insurance Law. Enforcement of an illegal insurance contract, including a forum selection clause, cannot be had in New York. Second, the Court held, "[t]he forum selection clause requiring the plaintiff to commence this action in Nebraska is unenforceable because enforcement would be unreasonable and unjust insofar as an intermediate appellate court in Nebraska has all but declined to hear a nearly identical action on the ground that New York is the better forum." Thus, Plaintiff's fraud-based claims were allowed to proceed in New York.

THIRD DEPARTMENT

WORKERS' COMPENSATION LAW

***Matter of Birro v Wolkow-Braker Roofing Corp.*, 2024 NY Slip Op 02111 (3d Dept Apr. 18, 2024)**

Issue: **May the Workers' Compensation Board reject the only medical opinion offered on the issue of apportionment of compensation between two established claims?**

Facts: Claimant, a roofer, has two established claims for work-related injuries sustained while working for the employer — one in 2006 and the other in 2015. After two independent medical exams, a Workers Compensation Law Judge apportioned the compensation between the two claims equally. The Workers' Compensation Board, however, rescinded the WCLJ's opinion due to defects in the medical testimony and ordered the parties to submit new medical information on apportionment. One side did, but the other did not. Based on that one medical report, the WCLJ revised the apportionment to 80% attributable to the 2006 claim and 20% attributable to the 2015 claim. The Board, however, again rejected the WCLJ's order, determining the medical evidence was inadequate and, thus, apportioned the entire liability to the 2015 claim.

Holding: The Third Department rejected the claimant's only argument on appeal, which was that the Board was required to adhere to the only medical evidence on apportionment in front of it. Indeed, the Court held, "the Board found that the physician failed to account for, among other things, the fact that claimant continued to work after the 2006 injury (and indeed was actively working at the time of the 2015 incident), that the most recent medical evidence relative to the 2006 claim was a 2010 report from claimant's treating chiropractor, which reflected that claimant was temporarily disabled and was continuing to work with certain lifting restrictions, and that claimant did not undergo surgery for his back and knee until after the 2015 incident. The absence of further documented medical treatment relative to the 2006 claim, the Board concluded, undercut the physician's testimony that claimant experienced significant ongoing problems prior to the work accident of 2015 and rendered the physician's opinion as to apportionment incredible." Since the Board was entitled to reject the incredible medical testimony, and the Board's apportionment determination was otherwise supported by the record, the Court refused to set aside the Board's determination.

CasePrepPlus | April 26, 2024

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