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Summarizing recent significant New York appellate cases

This week, by request, we'll take a look at one more Court of Appeals criminal law decision from the April session releases. In *People v Franklin*, the Court examined whether a Criminal Justice Agency questionnaire was "testimonial" for Sixth Amendment confrontation purposes. Beyond the Court of Appeals' order, the Third Department examined whether a short-term rental use of a home in a subdivision violates a restrictive covenant limiting the use of homes to "single-family residential purposes," a decision that could have a significant impact on New York's rental market. Let's take a look at those opinions and what else has been happening in New York's appellate courts over the past week.

COURT OF APPEALS

CRIMINAL LAW, SIXTH AMENDMENT RIGHT TO CONFRONTATION

People v Franklin, 2024 NY Slip Op 02227 (Ct App Apr. 25, 2024)

Issue: **When is an out-of-court statement considered "testimonial," thus triggering the requirements of the Sixth Amendment's Confrontation Clause?**

Facts: The Criminal Justice Agency is a non-profit in New York City that conducts pre-arraignment interviews of arrestees to obtain information necessary to determine whether they will be released pending trial. "In interviewing arrestees to determine their suitability for pretrial release, CJA employees ask them questions regarding community ties and warrant history, including an arrestee's address, how long they have lived there, their employment status, whether they expect anyone at their arraignment, their education, and other relevant queries. The CJA employee records the answers to these questions on a standardized form titled 'Interview Report.' The employee also verifies the information provided by the arrestee with a third person, whose contact information the CJA employee obtains from the arrestee, and records that verification in a separate section of the form. The CJA employee then gives the completed form, including a recommendation on whether the arrestee is suitable for release, to the arraignment judge, the prosecutor, and defense counsel." In this case, a CJA employee interviewed the defendant, who listed his address as "117-48 168th St, BSMT." The CJA form then became central to the People's case because it had no other evidence that the defendant lived in the basement where a gun was found during a search. Defense counsel objected to introduction of the CJA form as hearsay and a violation of the defendant's Sixth Amendment Confrontation Clause rights, but the trial court overruled the objections. Defendant was convicted, but the Second Department reversed, holding that admission of the CJA form through a supervisor, rather than the CJA interviewer, violated the Sixth Amendment.

Holding: The Court of Appeals reversed, and reinstated the defendant's conviction, over a dissent by the two vouched in Appellate Division Judges. The Court's majority held that under the Sixth Amendment's Confrontation Clause, a criminal defendant has "the right . . . to be confronted with the witnesses against [them]." Since the Confrontation Clause focuses on witnesses against the accused, the Court's inquiry in deciding whether Sixth Amendment confrontation rights have been implicated is whether the evidence admitted is "testimonial."

Examining its prior precedent, the Court noted that the U.S. Supreme Court "has refined its Confrontation Clause analysis" in recent years, and the test is now "whether in light of all the circumstances, viewed objectively, the primary purpose of the conversation was to create an out-of-court substitute for trial testimony. When that standard is met, the statement should be deemed testimonial for purpose of the Confrontation Clause." The Court explained that the following factors should be examined in making that determination: "whether the statements were made under circumstances indicating that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution; the informality of the situation and the interrogation, with a formal station-house interrogation . . . more likely to provoke testimonial statements, while less formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused; the standard rules of hearsay, designed to identify some statements as reliable; and to whom the statements are made, as statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers."

Here, the Court held, "the primary purpose of the CJA interview report was not to create an out-of-court substitute for trial testimony, and that it is not therefore testimonial. The primary purpose of a CJA interview and resulting report is administrative, not something tailored to establish or prove past events potentially relevant to later criminal prosecution. Its objective is to give the arraignment judge information pertaining to a defendant's suitability for pretrial release, not to elicit incriminating statements. This function is reflected in the pedigree nature of the questions posed to defendants during these interviews, and confirmed by the notation on the face of the

report: a CJA report 'assesses the defendant's risk of flight by considering . . . community ties and warrant history as defined in sections 2(a)(ii) and 2(a)(iii) and (vi) of CPL 510.30 and open cases,' and 'does not consider other criteria listed in CPL 510.30 such as defendant's mental condition, the weight of the evidence, or the possible sentence.'" The Court held that it was "significant that a CJA interview report is routinely prepared for all arrestees in New York City. The information collected is the same in every case, regardless of the particular facts or the elements of the relevant crime: the interviewer collects a predetermined set of pedigree information from the defendant and makes a recommendation to the court as to the defendant's suitability for pretrial release." Since the CJA report was not testimonial, the defendant's Sixth Amendment Confrontation Clause rights were not violated by its admission.

FIRST DEPARTMENT

EDUCATION LAW, RACE DISCRIMINATION

***IntegrateNYC, Inc. v State of New York*, 2024 NY Slip Op 02369 (1st Dept May 02, 2024)**

Issue: **Are the plaintiffs' challenges to the New York City School District's Gifted and Talented Test and Special High School Admissions Test on the grounds that they violate the New York Constitution's right to a sound, basic education, the Equal Protection Clause, and the New York Human Rights Law race discrimination protections justiciable and do they state a claim?**

Facts: Plaintiffs challenge State and City policies that plaintiffs claim deny Black and Latinx students their state constitutional right to a "sound basic education," deny them their state constitutional right to equal protection, and subject them to unlawful discriminatory practices in violation of the New York State Human Rights Law. In particular, "Plaintiffs allege that State and City policies create a 'racialized' admission pipeline. According to plaintiffs, the pipeline begins with a single standardized test for the City's Gifted & Talented (G&T) programs taken by children as young as four-years-old. The G&T test, plaintiffs assert, disproportionately benefits 'privileged' white students and their 'in-the-know' parents, who have the 'navigational capital' to understand the admissions process and the economic capital to pay for expensive test preparation. The G&T programs, plaintiffs allege, provide superior academic preparation, which allows primarily white and Asian students to continue through the pipeline to academically screened middle and high schools, relegating Black and Latinx students to unscreened schools, often in poorly maintained buildings with limited extracurricular programs. The end of the pipeline, or 'zenith' as plaintiffs describe it, is admission to one of eight New York City specialized high schools based on the results of the Special High School Admissions Test." This, the plaintiffs allege, result in segregated schools in New York City. The defendant moved to dismiss, pre-answer, and the trial court held that the claims and requests for injunctive relief were nonjusticiable.

Holding: The First Department reversed, holding that although the courts could not sit as an "education czar," "even if, upon a finding of liability, a court could not grant the full panoply of injunctive relief sought by plaintiffs, a case may still be justiciable. Significantly, cases involving racial discrimination are commonly heard by the courts even though they touch often deeply education policies. The judiciary is also responsible for adjudicating the nature of educational adequacy." And the Court's role in determining whether a sound basic education is being provided is not limited merely to education funding cases, as the defendants suggested. "The Court of Appeals has never articulated such a constrained view. Indeed, if Education Article challenges unrelated to the constitutionality of New York State's funding methods were categorically not justiciable, the Court of Appeals has had numerous opportunities to say so." Significantly, the Court held, the plaintiffs also sought declaratory relief, which is unquestionably justiciable.

The Second Department also held that the plaintiffs' amended complaint, although not a model of clarity, sufficiently stated claims against the defendants to avoid the motion to dismiss. "The amended complaint sufficiently alleges that State and City policies cause New York City public school students, particularly Black and Latinx students, to receive less than the sound basic education to which they are entitled by the Education Article. The complaint alleges that these admissions policies result in Black and Latinx students attending severely segregated schools that are underresourced. The complaint avers, tersely but adequately, that there are inadequate "inputs" at such segregated, unscreened schools. It cites the dearth of adequate teaching materials; the overabundance of large class sizes; the absence of sports, arts, and other extracurricular programs; and the parlous physical state of school buildings." As to the Equal Protection claim challenging the admissions tests, the Court held that the plaintiffs' allegations were thin, but with the inferences owed on a motion to dismiss, they sufficiently alleged that those programs were designed to segregate New York City's schools. Finally, the Court held, the plaintiffs' NYSHRL discrimination claim alleging that the "City denied Black and Latinx students the use of its facilities to any person otherwise qualified . . . by reason of his race through discriminatory admissions testing" was adequately alleged because "plaintiffs sufficiently allege that the students were 'otherwise qualified' for admission, considering that they allege a denial of access to the City's best schools to which they have equal right."

SECOND DEPARTMENT

CIVIL PROCEDURE, APPELLATE PRACTICE

***Matter of Wydra v Brach*, 2024 NY Slip Op 02327 (2d Dept May 1, 2024)**

Issue: **Is a document referenced in a motion but not cited to by its NYSCEF document number part of the record on appeal?**

Facts: In a proceeding to confirm an arbitration award, the parties each cited to certain deposition testimony in support and opposition to a motion to compel certain discovery. None of the parties, however, actually included the NYSCEF document number for that deposition testimony in their filings.

Holding: The Second Department refused to consider the deposition testimony in resolving the appeal. The Court noted that "[p]ursuant to CPLR 2214(c), a party in an e-filed action may rely on e-filed papers and need not include those papers in its motion papers, but may make reference to them, giving the docket numbers on the e-filing system. However, the docket numbers on the e-filing system must be provided." Here, since none of the parties actually included the NYSCEF document number in the motion papers, the Court held that the e-filed deposition testimony was not part of the record on appeal and could not be considered by the Court. Lawyers beware!

THIRD DEPARTMENT

PROPERTY LAW, SHORT-TERM RENTAL, RESTRICTIVE COVENANTS

***West Mtn. Assets LLC v Dobkowski*, 2024 NY Slip Op 02355 (3d Dept May 2, 2024)**

Issue: **Does the use of a residential property for short-term rentals violate a restrictive covenant that permits the use of property only for "single-family residential purposes?"**

Facts: Plaintiff owns a property in a subdivision that is used as a short-term rental through Airbnb, with stays ranging in duration from a few days to a couple of weeks. Defendants own the property next door, where they live full time. All properties in the subdivision were from a common grantor who imposed a number of restrictive covenants for the benefit of all of the owners in the subdivision. Among other restrictions, permissible use of properties within the subdivision is limited to only "single-family residential purposes." When Plaintiff brought an action alleging that Defendant interfered with its use of the property, Defendant counterclaimed, seeking a declaration that the short-term rental use of Plaintiff's property violated the subdivision's restrictive covenant. Supreme Court agreed with Defendant, "declared that plaintiff's use of its parcel as a short-term rental property violated the restrictive covenant prohibiting all uses other than single-family residential and enjoined this improper use."

Holding: The Third Department affirmed, holding that the Plaintiff's short-term rental use of its property did not qualify as "single-family residential" use under the plain meaning of those terms. The Court explained, "[t]hough owners of properties within the subdivision are permitted to rent pursuant to the express language of the deed restrictions, the restrictive covenant limits the permissible use to only 'single-family residential purposes.' This phrase unambiguously directs that all properties within the subdivision must be used for only residential purposes, and, thus, any and all rentals must be to those who would utilize the property for residential purposes — i.e., as a residence. A residence is the location where an individual 'actually lives' and is established by 'the act or fact of living in a given place for some time' (Black's Law Dictionary [11th ed 2019], residence). Although there is no express durational requirement, a stay in a short-term rental property does not meet this definition. Lodgers in short-term rental properties do not live on the premises but are instead on a short trip and often maintain a residence elsewhere where they actually live. This is true even though lodgers may have access to the entirety of the property and may use it in the same manner as a resident, including by cooking meals and sleeping as plaintiff highlighted." The Court held, therefore, that the short-term rental use of the Plaintiff's property violated the subdivision's restrictive covenant, and was properly enjoined. The short-term rental issue has been cropping up in the courts more and more frequently, so I wouldn't be surprised to see this case head to the Court of Appeals to address whether a short-term rental use of land can qualify as use for a single-family residential purpose.

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