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Editor:
Robert S. Rosborough IV

Summarizing recent significant New York appellate cases

It's a blockbuster week here at the NYSBA CasePrepPlus Newsletter. We're talking about two monumental constitutional law opinions out of the Third Department this week. In the first, former Governor Andrew Cuomo, in his attempt to keep his COVID-19 book royalties, successfully argued that the New York State Commission on Ethics and Lobbying in Government, New York's purportedly independent ethics watchdog, was unconstitutionally created in violation of the separation of powers. And in the second, the Third Department, in an extensively researched and well-reasoned opinion that is a model for constitutional law analysis, rejected Congresswoman Elise Stefanik's challenge to New York's new mail-in ballot statute. Let's take a look at those opinions and what else has been happening in New York's appellate courts over the past week.

FIRST DEPARTMENT

TORTS, HOTEL DUTY OF CARE OF GUEST

***Beadell v Eros Mgt. Reality, LLC*, 2024 NY Slip Op 02496 (1st Dept May 07, 2024)**

Issue: **Is a hotel subject to tort liability for failing to prevent a guest's suicide under a theory of assumed duty, where the hotel does not have custody or control of that guest but delays calling the police after a family member's request?**

Facts: The family of a hotel guest called the hotel to ask them to check on the guest, because the guest had indicated to the family members that he was distressed. The hotel did, and the guest responded that we was fine and wished to be left alone. About a half-hour later, the guest indicated to his family that he wished to end his life. The family again called the hotel and urged them to contact police to provide assistance. Following several communications over the course of approximately 40 minutes, the hotel called 911 and a hotel representative went personally to the police station and retrieved several officers to assist. It took another 20 minutes or so to open the locked door to the guest's room, and the police were ultimately unable to convince the guest to not harm himself. Following the guest's death by suicide, the family sued the hotel for negligence and wrongful death. The trial court denied the hotel's motion for summary judgment.

Holding: The First Department reversed, and dismissed the action. Noting that a landowner is not an insurer of any visitor's safety, the Court held that the hotel did not have a duty to prevent the guest's death by suicide. The Court explained, "there are two situations where liability exists for the failure to prevent suicide. The first is where a facility which is in actual physical custody of an individual fails to take reasonable steps to prevent a reasonably foreseeable suicide. The second is "where an institution or mental health professional with sufficient expertise to detect suicidal tendencies and with the control necessary to care for the person's well-being fails to take such steps." Neither applied here, the Court held.

The Court also rejected the family's urging to hold that the hotel had voluntarily assumed and breached a duty of care by agreeing to check on the guest. The Court held, "[w]hile one who assumes a duty to act, even though gratuitously, may thereby become subject to the duty of acting carefully, a defendant can only be held liable for a breach of an assumed duty where the plaintiff shows reliance on the defendant's course of conduct, such that the defendant's conduct placed him or her in a more vulnerable position than he or she would otherwise have been in had the defendant done nothing." Neither the first call where the hotel agreed to check on the guest, nor the second line of calls where the hotel agreed to contact the police, but delayed in doing so, satisfied this standard, the Court held. Finally, the Court noted, "[w]hile we agree that defendants could have escaped all liability at the outset by refusing to entertain decedent's sister's concerns, there must also be some articulable limit as to such liability for those facilities that choose to help and do not have custody or control of the individual in need. If we accept the dissent's argument, then any delay in contacting 911 in a circumstance involving suicidal ideations could be seen as a substantial factor to the outcome, no matter if the suicide is already in motion or law enforcement arrived before the departed dies by suicide. This simply is not the standard."

THIRD DEPARTMENT

CONSTITUTIONAL LAW, SEPARATION OF POWERS, ETHICS

Cuomo v New York State Commn. on Ethics & Lobbying in Govt., 2024 NY Slip Op 02568 (3d Dept May 9, 2024)

Issue: **Did the creation of the New York State Commission on Ethics and Lobbying in Government to administer, enforce, and interpret New York state's ethics and lobbying laws violate the constitutionally required separation of powers?**

Facts: Former Governor Andrew Cuomo sued NYSCOELG, arguing that its creation violated the separation of powers doctrine by usurping power granted exclusively to the sitting Governor of New York, after the agency investigated Cuomo's use of state resources to write his book, American Crisis: Leadership Lessons from the COVID-19 Pandemic, and ordered that he disgorge more than $5 million in profits from the book's sales. The trial court held that because NYSCOELG was granted not only the authority to investigate and report on ethics violations, but also the authority to punish, that usurps the Governor's power to impose and enforce penalties that has been traditionally the hallmark of executive power.

Holding: The Third Department affirmed, notwithstanding the laudable purpose for creating the ethics commission. The Court held, "by enacting the foregoing scheme for the enforcement of the applicable ethics laws, the Legislature, though well intentioned in its actions, violated the bedrock principles of separation of powers . . . [T]his Court may not utilize the Legislature's motive or the beneficial purposes of this legislation to overlook this violation. Even the most advantageous legislation violates the dictates of separation of powers if it results in one branch of government encroaching upon the powers of another for the purpose of expanding its own powers.

Pursuant to the Governor's authority to execute the laws, she is afforded wide discretion in determining the proper methods of enforcement. However, Executive Law § 94 revokes the Governor's enforcement power with respect to the ethics laws, thereby depriving her of all discretion in determining the methods of enforcement of these laws. Instead, it places this power into the hands of [NYSCOELG], an entity over which she maintains extremely limited control and oversight, as she appoints a minority of members and has no ability to remove members. Moreover, appointments must be approved by the IRC, an external nongovernmental entity made up of people who are in that position solely by virtue of their employment and do not answer to the populace. As such, Executive Law § 94 creates an agency with executive power, in that it has the authority to investigate and impose penalties for the violation of the ethics laws, while being entirely outside the control of the executive branch. Thus, it usurps the Governor's power to ensure the faithful execution of the applicable ethics laws."

CONSTITUTIONAL LAW, ELECTION LAW, MAIL-IN VOTING

Stefanik v Hochul, 2024 NY Slip Op 02569 (3d Dept May 9, 2024)

Issue: **Is New York's recently enacted universal mail-in voting law constitutional?**

Facts: The Legislature adopted the New York Early Mail Voter Act, effective January 1, 2024, to allow voters to vote by mail during the early voting period. The Plaintiffs challenged the statute as unconstitutional, arguing that the New York Constitution requires all voting to be in person at the polling places, with the two limited exceptions when absentee voting is permitted for voters who are absent from the County on election day or are physically disabled or ill and unable to make it to the polling place. Since those limitations are in the Constitution, the Plaintiffs argued, the Legislature was without power to permit other instances when voting by mail is permitted. Supreme Court disagreed, noting that the New York Constitution specifically grants the Legislature the power to determine the manner of voting "by ballot, *or such other method as prescribed by law*." Congresswoman Elise Stefanik and others appealed.

Holding: The Third Department affirmed, holding that New York's mail-in voting law is constitutional. The Court held, "Article II, § 1 [of the New York Constitution] sets forth the 'qualifications of voters,' providing that 'every citizen shall be entitled to vote at every election for all officers elected by the people and upon all questions submitted to the vote of the people provided that such citizen is 18 years of age or over and shall have been a resident of this state, and of the county, city, or village for 30 days next preceding an election.' This provision establishes broad and universal voting rights for the state electorate, subject only to qualifications for residency, citizenship and age. In its current format, nothing in this section addresses — let alone restricts — the manner in which voting is to occur." As the Court of Appeals has recognized, "the NY Constitution grants the Legislature plenary power to promulgate reasonable regulations for the conduct of elections . . . The only limitations placed on the Legislature's authority in this regard are to ensure ballot secrecy and to refrain from exercising its authority in a manner that would 'disfranchise constitutionally qualified electors.'"

Following an extensive, and very interesting, review of the constitutional history of the voting provisions, the Court concluded that a 1966 constitutional amendment to the qualifications of voters "effectively removed in-person voting as a voter qualification, opening the door for alternative methods of voting." The Court held, "[w]ith that operative language deleted from article II, § 1, there has been no express provision in the constitution mandating in-person voting since January 1, 1967. We note that, since the repeal of the Election District Provision, the Legislature has passed three statutes expanding absentee voting for certain BOE employees, domestic violence victims and emergency responders, all without resort to constitutional amendments."

Thus, the Court concluded, "universal mail-in voting does not violate article II of the NY Constitution and was properly implemented through legislative enactment. We recognize that a proposed constitutional amendment to authorize no-excuse absentee voting was

not ratified by the electorate at the November 2, 2021 election. Even so, that the Legislature, in first proposing the amendment in 2019, may have assumed that a constitutional amendment was necessary to implement universal mail-in voting does not make it so. The fact remains that, in its current form, the NY Constitution contains no requirement — express or implied — mandating that voting occur in-person on election day. At the same time, article II, § 7 grants the Legislature broad, plenary power to prescribe the manner in which voting is to occur. In these circumstances, plaintiffs have not satisfied their heavy burden to prove the Act's unconstitutionality beyond a reasonable doubt. Our decision upholding the Act comports with the NY Constitution's embrace of broad voting rights for the state electorate, the history and language of article II, and the fundamental right to vote."

FOURTH DEPARTMENT

CRIMINAL LAW, SENTENCING

***People v Parker*, 2024 NY Slip Op 02414 (4th Dept May 3, 2024)**

Issue: **Was defendant, who was sentenced as a second felony offender on the basis of a prior felony marihuana conviction, entitled to resentencing after successfully moving under the Marihuana Regulation and Taxation Act to vacate the prior felony marihuana conviction and have substituted therefor a misdemeanor conviction?**

Facts: In 2013, the defendant was convicted of felony possession of marijuana. In August 2019, the defendant was convicted of felony criminal possession of a weapon, and was sentenced as a second felony offender, based on the felony marijuana conviction, to five years imprisonment and five years of post-release supervision. Effective March 2021, however, the Legislature adopted the Marihuana Regulation and Taxation Act, which affords defendants an opportunity to move to vacate prior felony marijuana convictions if those crimes would be considered misdemeanors under the new law. Defendant availed himself of that opportunity, and successfully had his prior marijuana conviction reduced from a felony to a misdemeanor. Defendant then "moved pursuant to CPL 440.20 to vacate the sentence imposed for his 2019 conviction. He contended that the vacatur of his prior felony marihuana conviction invalidated the enhanced sentence imposed for his 2019 conviction, which was based on the prior felony conviction." Supreme Court granted the motion, and the People appealed.

Holding: The Fourth Department affirmed, and rejected the People's argument that "defendant was not entitled to have his 2019 sentence set aside because defendant's sentence on the felony marihuana conviction was legal when it was imposed in 2013 and the change in law by which his prior marihuana conviction was reduced from a felony to a misdemeanor does not apply retroactively to invalidate his second felony offender sentence." Rather, the Court held, "MRTA does apply retroactively for predicate felony purposes when a defendant successfully uses the procedural mechanism provided under CPL 440.46-a to vacate the predicate felony conviction" and, thus, Defendant was entitled to be resentenced for his 2019 conviction without the aggravating second felony offender status.

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