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Summarizing recent significant New York appellate cases

The First Department once again refused to intervene to rescind the gag order in Donald Trump's criminal proceeding, holding that because the former president has not yet been sentenced, the pared down gag order to protect against statements about the prosecution and court staff remain necessary to protect them from threats, intimidation, harassment, and harm. Let's take a look at that opinion and what else has been happening in New York's appellate courts.

FIRST DEPARTMENT

CRIMINAL LAW, GAG ORDERS

***Matter of Trump v Merchan*, 2024 NY Slip Op 04117 (1st Dept Aug. 01, 2024)**

Issue: Should Supreme Court have rescinded its gag order against Donald Trump following the conclusion of his criminal trial?

Facts: In this second CPLR Article 78 prohibition proceeding, Donald Trump sought to rescind the gag order that Supreme Court had imposed prior to his criminal trial, which prohibited Trump from making public statements about the jury, trial witnesses, the prosecutors, and the Judge. Following the conclusion of his criminal trial, Trump sought to rescind the gag order in its entirety. Supreme Court granted the motion, in part, removing the restrictions on statements concerning the jury and trial witnesses, but left in place the restrictions on statements concerning the prosecution and the Judge's staff.

Holding: The First Department affirmed, holding that because the criminal proceeding did not conclude until sentencing is completed, "Justice Merchan did not act in excess of jurisdiction by maintaining the narrowly tailored protections in paragraph (b) of the Restraining order" that protect the prosecution and court staff from threats, intimidation, harassment, and harm. The Court explained, "the People's evidentiary submissions in opposition to his motion in Supreme Court demonstrate that threats received by District Attorney staff after the jury verdict continued to pose a significant and imminent threat." Thus, a writ of prohibition did not lie to require termination of the remaining provision of the gag order.

SECOND DEPARTMENT

FREEDOM OF INFORMATION LAW, PRIVACY EXEMPTION

***Matter of Gannett Co., Inc. v Town of Greenburgh Police Dept.*, 2024 NY Slip Op 04071 (2d Dept July 31, 2024)**

Issue: May a police department withhold under the Freedom of Information Law the disciplinary records of unsubstantiated allegations of police misconduct?

Facts: The Democrat & Chronicle newspaper requested the production of certain law enforcement disciplinary records and records relating to allegations of misconduct from the Town of Greenburgh Police Department under the Freedom of Information Law. The GPD withheld all disciplinary records created prior to June 12, 2020, the date of the repeal of Civil Rights Law § 50-a, and all records related to unsubstantiated allegations of misconduct, and indicated that disciplinary records related to substantiated allegations of misconduct created on or after June 12, 2020, were not required to be released under the personal privacy exemption from disclosure. The newspaper appealed to the Town of Greenburgh Town Board, which granted the appeal to the extent of directing the GPD to disclose records of unsubstantiated allegations of misconduct to the extent that those allegations were not otherwise exempt from disclosure pursuant to the provisions of FOIL, but noted that the newspaper's FOIL request did not reasonably describe the records requested as required by Public Officers Law § 89(3)(a). The Town Board denied the appeal insofar as it related to the petitioner's request for disciplinary records and/or records of unsubstantiated allegations of misconduct created prior to the repeal of Civil Rights Law § 50-a. The newspaper then brought a CPLR Article 78 proceeding challenging the Town's determination, but Supreme Court dismissed the proceeding.

Holding: The Second Department reversed, holding that although Civil Rights Law § 50-a previously granted "a blanket shield from public disclosure for police officer personnel records, including records relating to disciplinary proceedings arising out of allegations of misconduct," the Legislature repealed that provision in June 2020 "to make specific provisions relating to the disclosure of law enforcement disciplinary records and the types of redactions to be made thereto prior to disclosure. Thus, the statutory exemption under Public Officers Law § 87(2)(a) no longer applies to law enforcement personnel records." Further, the Court held, for records to be withheld under the personal privacy exemption from disclosure, the agency "must present specific, persuasive evidence" that the privacy interests at

stake outweigh the public interest in the disclosure of the information. Here, however, "the respondents withheld the requested records containing unsubstantiated allegations of misconduct in their entirety and did not articulate any particularized and specific justification for withholding any of the records, [and thus] did not meet their burden of establishing that the privacy exemption applies." Accordingly, the Court ordered that the GPD disclose the records that had been withheld.

TORTS, WRONGFUL DEATH

***McMullin v Village of Spring Val.*, 2024 NY Slip Op 04069 (2d Dept July 31, 2024)**

Issue: **May a plaintiff recover for negligent or grossly negligent assault and battery?**

Facts: Following an encounter with the Spring Valley Police Department, the decedent suffered serious injuries and ultimately died. The decedent's administrator then brought this wrongful death suit against the SVPD, alleging that "decedent's death was caused by several 'actions and omissions evincing negligence or gross negligence.'" The complaint, however, "did not assert a cause of action for assault or battery." The SVPD moved to dismiss, and Supreme Court "dismiss so much of the complaint as sought to recover damages for use of excessive force and, in determining whether there was any cognizable cause of action, determined that the complaint did not state a cause of action for intentional assault."

Holding: The Second Department rejected the plaintiff's argument on appeal that the complaint stated claims for assault or battery. The Court held, "New York does not recognize a cause of action to recover for negligent assault or battery. Negligence is distinguished from assault and battery by the absence of that intent which is a necessary ingredient of the latter. Here, inasmuch as the complaint alleged that the police officers negligently departed from the appropriate standard of care and negligently caused the decedent's death, the complaint failed to state a viable cause of action sounding in assault or battery."

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