NYSBA CasePrepPlus

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August 23, 2024

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Summarizing recent significant New York appellate cases

Facebook and other social media sites are public fora under New York's statute protecting against strategic lawsuits against public participation. Indeed, the Second Department concluded, Facebook has long offered the public a forum for expressing their opinions on matters of public and private interest, so statements made on social media can qualify for protection under New York's broad anti-SLAPP statute. Let's take a look at that opinion and what else has been happening in New York's appellate courts.

FIRST DEPARTMENT

ZONING LAW, CIVIL PROCEDURE, STANDING

New York Univ. v City of New York, 2024 NY Slip Op 04183 (1st Dept Aug. 08, 2024)

Issue: **Does New York University have standing to challenge, on its face, the New York City Zoning Resolution that forbids as-of-right university educational uses in the zoning districts surrounding the university?**

Facts: "Historically, the SoHo and NoHo neighborhoods in New York City were primarily zoned for manufacturing. Over time, a significant residential presence evolved through loft conversions, variances, and special permits. In districts zoned for manufacturing uses, universities like . . . NYU can use their properties "as of right" for administrative functions (faculty offices) but may not use them for educational purposes (classrooms and dorms) unless they obtain a zoning variance from the Board of Standards." In 2020, the City Planning Commission approved the creation of a mixed-use district in SoHo/NoHo, which would have permitted colleges and university uses "as of right" throughout the newly proposed district. Residents complained, however, and the City modified the district to prohibit as-of-right university educational uses (such as classrooms and dorms) and maintained the variance requirement. NYU sued, arguing that "when creating the new Special District that transformed the manufacturing district into a mixed manufacturing-residential district, the City was required to amend the ZR to allow universities to use their properties for educational uses (classrooms/dorms) without having to satisfy the variance requirement that had applied in the manufacturing district." NYU alleged that it was harmed because "the unlawful ZR amendment 'will interfere improperly with NYU's future uses of properties it owns or will own in the Special District, citing the properties it owns or leases in the rezoned NoHo. It further alleges that the ZR amendment 'interferes materially with its ability to develop and use existing and future facilities . . . for educational purposes in furtherance of its mission.'" The City moved to dismiss, arguing that NYU "did not allege a cognizable 'injury in fact,' given that NYU did not allege any immediate plans that were affected by the rezoning and alleged interference only with potential future uses of properties in the Special District." Supreme Court granted the motion and dismissed the complaint for lack of standing.

Holding: The First Department reversed, holding that NYU had sufficiently alleged injury in fact to demonstrate its standing to bring a facial challenge to the City's zoning amendments. The Court explained that the "injury-in-fact requirement, i.e., that a party has 'an actual legal stake in the matter being adjudicated,' ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute in a form traditionally capable of judicial resolution." Here, NYU's injury was sufficiently concrete. "The complaint alleges, among other things, that this zoning amendment, which was adopted following public hearing testimony objecting to NYU's known efforts to expand its presence into the rezoned neighborhoods, 'interferes materially with its ability to develop and use existing and future facilities . . . for educational purposes in furtherance of its mission.' In addition, in opposition to the motion to dismiss, NYU submitted an affidavit providing details concerning its formulated plans for long-term growth and its need for additional educational space, which made clear NYU's past and present desire to develop and use properties in the Special District for educational purposes. Contrary to the City's argument, this provides sufficient evidence of NYU's injury in fact resulting from the enactment of the purportedly illegal zoning amendment, and NYU was not further required to allege or provide evidence that it has specific plans to use properties in the Special District for educational uses that are presently in place and immediately impacted by" the zoning amendment.

Finally, the Court explained, although NYU came forward with specific development plans that would be thwarted by the amendment, that was not necessary to show an injury-in-fact. "NYU's claim that it has had a long-standing and continuing interest in expanding educational uses in the Special District whose implementation has been limited by the variance requirement is further evidenced by the fact that NYU previously put one of its Special District properties to educational use after obtaining a variance. There is no valid basis for predicating the injury-in-fact showing on evidence that NYU has expended time, money and other resources developing a particular plan for the renovation or conversion of a particular Special District property to educational uses. Judicial consideration of NYU's claim seeking a declaration as to the unconstitutionality of the ZR amendment should not require that it first experience the harm it seeks to avoid by challenging the amendment."

SECOND DEPARTMENT

TORTS, ANTI-SLAPP STATUTE, PUBLIC FORUM

Nelson v Ardrey, 2024 NY Slip Op 04147 (2d Dept Aug. 7, 2024)

Issue: **Do Facebook and other similar social media platforms constitute public forums under the anti-SLAPP statute?**

Facts: Defendants posted a series of responses to a post on the personal Facebook page of the plaintiff, alleging that the plaintiff had sexually abused one of the defendants approximately 17 years prior when she was 4 years old. Plaintiff then commenced this action for defamation per se, intentional infliction of emotional distress, and prima facie tort. Plaintiff alleged that the statements posted to his Facebook page were false, that the defendants' publications were intentional and were solely motivated by spite with the intention to injure the plaintiff's reputation in the community, and that as the alleged conduct in those statements accused him of a serious crime, they constituted defamation per se. Defendants moved to dismiss the defamation claim, but Supreme Court denied the motion.

Holding: Noting that it was facing an issue of first impression, the Court explained that although New York's original anti-SLAPP statute narrowly confined the protections for protected speech, in 2020, the Legislature broadly expanded that protection to include "any communication in a place open to the public or a public forum in connection with an issue of public interest" or "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition." The Court also noted that "[t]he anti-SLAPP statute was similarly broadened to include the term 'public interest,' which means any subject other than a purely private matter."

The Court explained that "[t]he term 'public forum' is traditionally interpreted as a place that is open to the public where information is freely exchanged. Under its plain meaning, the term 'public forum' has evolved to include, inter alia, podcasts, as well as internet forums that feature customer reviews of various businesses." Facebook and other social media platforms qualify as public fora under the anti-SLAPP statute as well, the Court concluded, reasoning that because "Facebook has provided each user with a virtual 'wall' where each user can share on his or her wall, or any other public wall, his or her thoughts, pictures, opinions, and links to other websites and articles . . . [it] has, from inception, had the appearance and function of a forum." And it has been widely available to the public since 2006.

Although Facebook is a public forum, the Court nevertheless concluded that Defendants' motion to dismiss was properly denied because "the defendants' statements published on the plaintiff's Facebook page concerned a purely private matter and were directed only to a limited, private audience." Thus, the statements were not within the sphere of public interest, and the anti-SLAPP statute did not apply to offer protection.

THIRD DEPARTMENT

SEX OFFENDER REGISTRATION ACT, DOWNWARD DEPARTURE

People v Waterbury, 2024 NY Slip Op 04169 (3d Dept Aug. 8, 2024)

Issue: **Can the results of independent scientific risk assessment tests support a defendant's request for a downward departure from his or her presumptive Sex Offender Registration Act risk level classification in the Board's risk assessment instrument?**

Facts: Defendant worked in New Hampshire, shortly after leaving college, as a soccer coach at a local high school, where he cultivated a short-term sexual relationship with a 14-year-old student whom he was coaching. Defendant pleaded guilty in New Hampshire to four counts of felonious sexual assault, and misdemeanor charges related to the provision of alcohol to the student. After being released from prison, defendant moved back to New York, and was required to register under SORA due to his conviction. The Board's RAI scored defendant as a level two sex offender. Defendant did not challenge the points assessments, but rather moved for a downward departure to a level one risk classification, relying on, among other things, "multiple psychometric testing instruments and accompanying expert opinion" that concluded he was a low risk level to reoffend. Supreme Court denied the request, and classified defendant as a risk level two sex offender.

Holding: The Third Department reversed, holding that defendant had satisfied his burden for a downward departure from his presumptive risk level two classification and should have been classified as a risk level one. Noting that "the RAI — the risk assessment instrument used by the Board for decades since SORA's enactment — has been criticized for lack of scientific validation, and it has not been updated despite significant additional scientific research in this field," the Court explained, the "scientific evidence and the results of properly-validated, and broadly accepted, testing that sheds light upon an offender's risk of reoffending" that was not considered in the Board's assessment in the RAI. Defendant's licensed clinical social worker at the Department of Probation administered three risk assessment tests to defendant—the STATIC-99R, STABLE-2007 and ACUTE 2007—each of which concluded that defendant was a lower risk to reoffend, with the "combined results of the STABLE-2007 and STATIC-99R testing demonstrate[ing] that defendant was a below-average risk of reoffending, with about a 1.6% chance of doing so over a five-year period." Defendant's retained expert psychologist also administered those tests, reaching similar results, and a battery of others, all of which showed a low risk of recidivism. Further, following interviews with the defendant, "the psychologist found defendant to possess no acute or active risk factors related to sexual recidivism, concluding

that defendant did not pose a danger to himself or others, as he lacked substance abuse issues and a criminal history and had social, emotional and financial support."

The Court explained, "[t]hese tests enhance the information available to the SORA court, as they review and include information beyond that incorporated in the RAI. To illustrate, the STATIC-99R accounts for an offender's sentencing dates in calculating an offender's criminal history, rather than using the number of convictions, as the RAI does. Whether an offender has lived with a romantic partner for over two years is not considered by the RAI at all, and the record here indicates that defendant has had such relationships. Moreover, in contrast to the ACUTE 2007's methodology, the guidelines do not consider an offender's hostility or emotional issues, and they do not fully consider the degree of an individual's sexual preoccupation. Further, the RAI does not consider an offender's sexual interests, mental health or personality issues, or whether an offender is generally prone to violence." Based on the volume of information that defendant submitted that was not considered in the RAI score, and that "[t]he potential for rehabilitation should be recognized and considered in judicial review and imposition of SORA restrictions," the Court concluded that defendant should have been granted the downward departure from his presumptive risk level classification and classified instead as a risk level one offender.

CONTRACTS, DOCTRINE OF EMBLEMENTS

***Van Amburgh v Boadle*, 2024 NY Slip Op 04168 (3d Dept Aug. 8, 2024)**

Issue: **May the doctrine of emblements, which recognizes planted crops as part of the land and grants to one holding an interest in the land the right to care for and harvest those crops, imply a right to reentry upon the land following termination of a lease of farmland?**

Facts: Plaintiffs and defendants entered into a five-year Organic Farm Land Lease Agreement to use two parcels of farmland owned by defendants, effective January 1, 2016 to January 1, 2021. The lease also provided that either party could terminate the lease upon 90 days' notice. In Fall 2019, plaintiffs planted crops on one of the parcels that they said could not be harvested until September 2020. "On February 1, 2020, defendants exercised the early termination provision in the lease agreement, gave plaintiffs notice that their tenancy would end May 1, 2020, and advised them to harvest their crops in the spring. Plaintiffs responded that they could not meet defendants' deadline, as the crops would not be ready for harvest until the fall of 2020. In May 2020, after plaintiffs' tenancy terminated, herbicide was sprayed on the land, killing plaintiffs' crops." Plaintiffs sued for breach of contract and conversion of their crops. Defendants moved to dismiss, and Supreme Court granted the motion.

Holding: The Third Department reversed, holding that plaintiffs had sufficiently stated claims for breach of contract under the implied covenant of good faith and the doctrine of emblements. The Court reasoned that "the purpose of the lease agreement was clear and, since both parties were aware that the land was to be used to seed, maintain and harvest the crops, defendants were under a contractual duty to allow plaintiffs to fulfill this purpose under the implied covenant of good faith and fair dealing." Further, the Court noted, "[p]ursuant to the doctrine of emblements, one who holds land for a period of time which is of uncertain duration may remove from the land, after termination of his or her tenancy, the after-grown crops or emblements which were planted before such termination. If the duration of the tenancy is for a certain period, the doctrine of emblements is not applicable. Conversely, as is the case here, the invocation of the early termination clause had the effect of rendering the lease agreement indefinite in length, thus we find the doctrine of emblements to be applicable." Thus, the Court held, the only way to reconcile defendants' contractual right to terminate the lease early with the duties implied by the doctrines of good faith and fair dealing and emblements was to imply in the agreement "a nonexclusive . . . right of reentry, permitting the after-grown crops to be cared for and harvested. This preserves defendants' right to exercise the early termination clause while also adequately accounting for plaintiffs' rights as they relate to emblements. Defendants' actions in exercising the early termination provision without allowing plaintiffs to reenter the land to care for and harvest their crops set forth a breach of the implied covenant of good faith and fair dealing . . .

Significant to this conclusion is that, here, without a right of reentry, the lease agreement could be rendered illusory. For instance, defendants could terminate the lease agreement at any time, even after week one, despite funds and efforts having already been expended by plaintiffs. A right of reentry would preserve both parties' rights, i.e., the right to terminate and the right to emblements . . . Notably, we believe the contractual cause of action is not just viable, but an essential protection for farmers who lease land for consideration and expend great effort tending to the land, thus reasonably anticipating that they will have the opportunity to reap what they sow."

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