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Editor:
Robert S. Rosborough IV

Summarizing recent significant New York appellate cases

Does the New York Constitution require voters to vote in person in their election districts, and thereby place a limitation on the power of the legislature to decide what methods of voting may be authorized without a constitutional amendment? Holding that the Constitution contains no such requirement, the Court of Appeals declared that the New York Early Mail Voter Act, which allows voters to vote by mail during the early voting period, is constitutional. Let's take a look at that opinion and what else has been happening in New York's appellate courts.

COURT OF APPEALS

ELECTION LAW, ABSENTEE VOTING

Stefanik v Hochul, 2024 NY Slip Op 04236 (Ct App Aug. 20, 2024)

Issue: **Is New York's Early Mail Voter Act, which permits all registered voters to vote early by mail in any election in which the voter is eligible to vote, unconstitutional?**

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*."

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." Following an extensive review of the constitutional history of the voting provisions, the Third Department 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 Third Department 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." Thus, the Third Department concluded, "universal mail-in voting does not violate article II of the NY Constitution and was properly implemented through legislative enactment." Plaintiffs appealed as of right to the Court of Appeals.

Holding: The Court of Appeals affirmed and upheld the constitutionality of the Early Mail Voter Act, holding that "nothing in the Constitution's text clearly establishes an in-person voting requirement." The Court explained, "the constitutional language, both in 1777 and today, article II, section 1 guarantees the right to vote to every person who satisfies the then-applicable eligibility requirements. It does not place a limitation on the physical location of voting . . . Accordingly, the 1777 constitutional provision 'at an election' cannot reasonably be interpreted to require in-person voting."

In the 1821 and 1846 Constitutions, the Court noted, the requirements that a person shall be "entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere" (the "Election District Provision") similarly did not "necessarily require that the vote be in person. The purpose of the provision, as reflected in the legislative history, shows that it was intended as an anti-fraud measure, designed to prevent people from swaying an election by traveling to vote for candidates who were not their own representatives." After the 1846 Constitution, "[t]he Civil War brought with it an exigency: how could Union soldiers stationed away from home vote, given the large numbers of otherwise eligible soldiers who were not present in their districts during elections." The Legislature tried to pass a bill to allow the soldiers to vote, but the Governor vetoed it, based on his interpretation of the Election District Provision to require in person voting. The Legislature then decided to amend the Constitution to allow out-of-district voting for soldiers. And "for nearly a century thereafter, when the legislature extended voting to groups of voters who were not present in their election district on election day, it did so by proposing a constitutional amendment, to be acted on by popular referendum . . . A fair interpretation is that,

from 1919 to 1963, the legislature believed that the Constitution forbade absentee voting, which therefore could be accomplished only by a constitutional amendment."

In 1966, the Court explained, the Election District Provision, which had been interpreted by the legislature and the executive to require in-person voting, was removed from the Constitution, "so it can no longer serve as a textual basis constraining the legislature's power to permit voting by mail . . . For several decades thereafter, the legislature extended absentee voting to several new groups by statute, without any suggestion that a constitutional amendment was needed." And the Court rejected Plaintiffs' arguments that the Constitution still required in-person voting even after the Election District Provision had been repealed.

The Court also held that "article II, section 7 reinforces the legislature's plenary power to conduct elections in the method it sees fit. Initially, the Constitution mandated that voting be 'by ballot'. In 1894, however, the Constitutional Convention removed that requirement, adopting instead language that elections 'shall be by ballot, or *by such other method as may be prescribed by law*' (NY Const, art II, § 7 [emphasis added]). That language allowed the legislature to authorize any 'method' for elections. A 'method' is 'a procedure or process for attaining an object' or 'a way, technique, or process of or for doing something'; voting by mail is a 'method' of conducting an election . . . The broad grant of power in the amendment is difficult to reconcile with the proposition that voting must be conducted in person, especially because the Constitution does not expressly require as such."

The Court noted, however, that "the recent sequence of events is troubling. In 2019 and 2020, the legislature passed resolutions authorizing a ballot referendum to amend the Constitution to permit voting by mail and, in 2021, informed the voters that if they wished to be able to vote by mail, they needed to vote to amend the Constitution. The voters considered the proposition and voted against it. Having lost the question before the voters, the legislature then decided that no constitutional amendment was required and passed the Act. Upholding the Act in these circumstances may be seen by some as disregarding the will of those who voted in 2021. But our role is to determine what our Constitution requires, even when the resulting analysis leads to a conclusion that appears, or is, unpopular . . . Had there been a clear, unequivocal, and persistent understanding by our coordinate branches that the Constitution required in-person voting, this would be a more difficult case. However, the lack of textual support for an in-person voting requirement and the equivocal nature of the constitutional history regarding such a requirement do not allow us to overcome the very strong presumption of constitutionality we must afford to the Act."

FIRST DEPARTMENT

CONSTRUCTION LAW, CONDITION PRECEDENT TO SUIT

***JDS Dev. LLC v Parkside Constr. Bldrs. Corp.*, 2024 NY Slip Op 04227 (1st Dept Aug. 15, 2024)**

Issue: **Must a beneficiary comply with the explicit pre-suit procedures of a performance bond written on the form known as "AIA Document A312" before suing the surety for delay damages?**

Facts: "The A312 bond, which is published by the American Institute of Architects, has been described as 'one of the clearest, most definitive, and widely used type of traditional common law performance bonds in private construction'. The form 'was developed to define clearly . . . the trigger of the surety's obligation to perform,' among other variables. With regard to the 'trigger' of the surety's obligation, paragraph 3 of the A312 bond provides that 'the Surety's obligation under this Bond *shall arise after*' the beneficiary of the bond (1) has notified the surety and the principal that it is considering declaring a default and offered to confer with the surety and the principal to discuss how to proceed, (2) has declared a default and formally terminated the principal's right to complete the contract no earlier than 20 days after the aforementioned notice, and (3) has agreed to pay the balance of the contract price to the surety or to a new contractor chosen by the surety."

"In this case, in which the bond covered the principal's work only through the 36th floor of an 85-story building, the beneficiary of the bond did not carry out the procedures specified by paragraph 3 of the A312 bond — the notification of a potential default, the offer to confer, and the declaration of default and termination of the principal — until long after the principal had completed, and had been paid for, the portion of the work covered by the bond." The beneficiary nevertheless sued, trying to recover under the bond. Following summary judgment motions, Supreme Court dismissed the beneficiary's action against the surety for failure to timely satisfy the pre-suit conditions of the A312 bond.

Holding: The First Department affirmed, holding that "New York courts have given effect to the Court of Appeals' recognition that paragraph 3 of the A312 bond — which, to reiterate, provides that the surety's obligation 'shall arise after' the beneficiary complies with the procedures set forth in subparagraphs 3.1, 3.2 and 3.3 — creates mandatory conditions precedent to a valid claim under the bond." The Court easily rejected the beneficiary's argument that "while the paragraph 3 requirements may be preconditions for requiring the surety to complete the defaulting contractor's work, they should not be deemed to constitute conditions precedent to a claim for delay damages." The Court held, nothing in the bond's language "excludes the surety's potential obligation to pay delay damages from the scope of 'the Surety's obligation under this Bond' that paragraph 3 directs '*shall arise after*' there has been compliance with the procedures set forth in subparagraphs 3.1, 3.2, and 3.3. Further, a performance bond is not insurance against the cost of any breach by the principal, but, rather, a guarantee of the principal's performance that is triggered only upon the termination of the principal from the project for a breach sufficiently egregious to constitute a default warranting termination. Thus, even though delay damages cannot be avoided once

the delay has taken place, the surety's obligation to pay those past damages is only triggered if, and when, the beneficiary follows the notice and termination procedures of paragraph 3 of the A312 bond."

SECOND DEPARTMENT

ADMINISTRATIVE LAW, DOCTRINE OF PRIMARY JURISDICTION

***Calle v National Grid USA Serv. Co., Inc.*, 2024 NY Slip Op 04190 (2d Dept Aug. 14, 2024)**

Issue: **When should a court defer determination of a case to an administrative agency under the doctrine of primary jurisdiction?**

Facts: "The plaintiff is a customer of Brooklyn Union Gas Company, a public utility that distributes natural gas to customers in New York City. In July 2022, the plaintiff commenced this putative class action alleging that she and other customers were improperly charged fines by the defendant for allegedly failing to timely schedule gas meter inspections." Defendant moved to dismiss, arguing that the Public Service Commission had primary jurisdiction over this dispute and the claim needed to first be brought before the Commission. Supreme Court denied the motion.

Holding: The Second Department reversed, holding that the plaintiff was first required to bring her claims before the Commission under the doctrine of primary jurisdiction. The Court explained, "[t]he doctrine of primary jurisdiction is intended to co-ordinate the relationship between courts and administrative agencies to the end that divergence of opinion between them not render ineffective the statutes with which both are concerned, and to the extent that the matter before the court is within the agency's specialized field, to make available to the court in reaching its judgment the agency's views concerning not only the factual and technical issues involved but also the scope and meaning of the statute administered by the agency. While concurrent jurisdiction does exist, where there is an administrative agency which has the necessary expertise to dispose of an issue, in the exercise of discretion, resort to a judicial tribunal should be withheld pending resolution of the administrative proceeding." Here, the Court held, because the Public Service Law authorizes the charges that the plaintiff is challenging, the claims involved "intricate questions of fact, thereby requiring the specialized knowledge and expertise of the Public Service Commission. Moreover, to the extent that the plaintiff seeks to enjoin the defendant from 'unfairly issuing fines' to customers, this request for relief raises issues concerning whether the defendant abided by the Public Service Commission's orders and, thus, falls within the expertise of the Public Service Commission." Dismissal in favor of pursuit of the claims before the Commission was, therefore, required.

THIRD DEPARTMENT

TORTS, CHILD VICTIMS ACT, DUTY TO SUPERVISE

***A.J. v State of New York*, 2024 NY Slip Op 04231 (3d Dept Aug. 15, 2024)**

Issue: **Does a government agency have a duty to adequately supervise youths adjudicated as juvenile delinquents and placed by that agency in private, not-for-profit detention facilities?**

Facts: Claimant commenced this Child Victims Act negligence action, alleging that, in 1993, when he was 11 and 12 years old, he was adjudicated a juvenile delinquent and placed by Defendant in a non-secure residential facility operated by a nonprofit. While in the placement, claimant alleged, he was sexually abused on several occasions by an adult employee of the nonprofit. Defendant moved to dismiss, arguing that claimant failed to allege that defendant owed him a special duty of care and, therefore, the claim failed to state a cause of action for negligence in the execution of a governmental function. Supreme Court agreed, and dismissed the claim.

Holding: The Third Department reversed. Noting that "an agency of government is not liable for the negligent performance of a governmental function unless there existed a special duty to the injured person, in contrast to a general duty owed to the public," the Court nonetheless held that a special duty was not required in this case. Likening the claimant's juvenile detention to placement in the foster care system, the Court held, "[w]hen a government entity assumes custody of a person, thus diminishing that person's ability to self-protect or access those usually charged with such protection, that entity owes to that person a duty of protection against harms that are reasonably foreseeable under the circumstances. The duty of protection is coextensive with the entity's physical custody of and control of the person, terminating at the point the person passes out of the orbit of the entity's authority." Here, the Court explained, "residential detention is sufficiently analogous to incarceration. Of course, detention is intended to be rehabilitative rather than punitive; however, at this early stage [on a motion to dismiss], we infer that 11-year-old claimant's access to alternative means of protection was diminished when he was removed from his usual environment and placed at the [nonprofit's] facility . . . Yet, the absence of bars and locks does not necessarily mean claimant was at liberty to seek out protections from harm that he could have accessed but for his custodial placement." Thus, the duty to protect the claimant while in Defendant's custody still remained. The Court also rejected Defendant's argument that it could not be liable because it had placed the claimant with the nonprofit and did not have physical custody over him. The Court held instead that, based on the complaint's allegations, it inferred that the nonprofit was performing Defendant's custodial obligations.

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