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Summarizing recent significant New York appellate cases

Can the availability of health insurance to uninsured plaintiffs through the Patient Protection and Affordable Care Act entitle a defendant in a personal injury action to a collateral source hearing under CPLR 4545 to determine if that potential insurance could offset futural medical expense awards? The Second Department tackled that novel question in New York recently, holding that the availability of an ACA insurance policy could be a collateral source and entitled the defendant to a hearing. Let's take a look at that opinion and what else has been happening in New York's appellate courts over the past week.

FIRST DEPARTMENT

DEFAMATION, ANTI-SLAPP DEFENSE

***Reeves v Associated Newspapers, Ltd.*, 2024 NY Slip Op 04286 (1st Dept Aug. 22, 2024)**

Issue: **What constitutes a "substantial basis in law" under the anti-SLAPP law that a defamation plaintiff must establish to avoid dismissal under CPLR 3211(g)?**

Facts: In a defamation action arising out of a contentious divorce and custody action between a CEO and his estranged wife, the CEO sued the Daily Mail for publishing a story about him entitled "Seriously, I'll kill both of them: NY socialite and actress is locked in vicious custody battle with 'racist ketamine-snorting millionaire' CEO husband after he accused her of Pornhub fame and threatened to kill her parents." Defendants moved to dismiss the defamation claims under the anti-SLAPP statute, arguing that "eight of the statements in the complaint were protected statements under the fair report privilege (see Civil Rights Law § 74) because they accurately reported on court proceedings and records," that "four of the statements were substantially true and excerpted from text messages sent by [the CEO], as well as audio and video recordings of [the CEO]," and that "the headline was a fair index of the article." Rather than taking advantage of CPLR 3211(g)'s special discovery authorizations, the CEO merely opposed the motion on the face of the pleadings. Supreme Court dismissed the action for failure to state a claim, but denied Defendants' request for an attorneys' fees award under the anti-SLAPP statute.

Holding: The First Department affirmed the dismissal of the CEO's defamation claims, holding that they lacked the necessary "substantial basis in law" to avoid dismissal under CPLR 3211(g). The Court agreed with Supreme Court that the claims failed to state a claim under CPLR 3211(a)(7), and thus it also lacked a "substantial basis" under CPLR 3211(g) because "'substantial basis' under CPLR 3211(g) is a more rigorous standard than the CPLR 3211(a)(7) standard." Examining the legislative history underlying CPLR 3211(g), the Court held that the Legislature's intention was to tie the "substantial basis" standard to the Court of Appeals' longstanding substantive evidence standard from *300 Gramatan Avenue Associates v State Division of Human Rights* (45 NY2d 176 [1978]), which is used when reviewing determinations of an administrative agency following an evidentiary hearing. The Court explained:

"In applying the 'substantial basis' standard, it may be helpful to use the practical test that we applied [previously]: 'whether the allegations and evidence presented would require submission to a jury as a question of fact.' Procedurally, the 'substantial evidence' standard has been equated with the ordinary summary judgment standard, in that each seeks to determine whether there are triable issues of material fact. In this context, the CPLR 3211(g) motion is analogous to an accelerated summary judgment motion, albeit within the context of an anti-SLAPP action, claim, or cross-claim. As enhanced by the 2020 amendments, CPLR 3211(g) contemplates an adjudication based upon the submission of affidavits (see CPLR 3211[g][2]), with special provision for discovery upon an application by the party opposing the CPLR 3211(g) motion. This unique discovery provision, exclusive to CPLR 3211(g), is tailored to aid a party summon 'facts essential to justify its opposition' to an anti-SLAPP action, claim, cross-claim or counterclaim (CPLR 3211[g][3]) and thereby show a substantial basis for their claims." Therefore, the Court held, "a court reviewing the sufficiency of a pleading under CPLR 3211(g) must look beyond the face of the pleadings to determine whether the claim alleged is supported by substantial evidence."

SECOND DEPARTMENT

CIVIL PROCEDURE, COLLATERAL SOURCE

***Liciaga v New York City Tr. Auth.*, 2024 NY Slip Op 04257 (2d Dept Aug. 21, 2024)**

Issue: How does the Patient Protection and Affordable Care Act effect collateral source offsets in personal injury actions?

Facts: In August 2016, the plaintiff commenced this action to recover damages for personal injuries he alleged he sustained after he was struck in the back by a railroad tie that defendant's workers were removing during a construction project. Following a trial, the jury found in the plaintiff's favor and awarded him "the principal sums of $9,000,000 for past pain and suffering and $60,000,000 for future pain and suffering for 48 years, as well as $1,174,972.38 for past medical expenses and $40,000,000 for future medical expenses." Defendant moved to set aside the verdict, or in the alternative for a collateral source hearing under CPLR 4545 on the issue of future medical expenses, arguing that "the plaintiff, who was uninsured, was eligible for insurance coverage through the Patient Protection and Affordable Care Act, which would offset the costs of his future medical expenses." Supreme Court ordered a new trial "on the issue of damages for past and future pain and suffering, but only to the extent of directing a new trial on the issue of those damages unless the plaintiff stipulated to reduce the awards for past and future pain and suffering from the principal sums of $9,000,000 and $60,000,000, respectively, to the principal sums of $4,000,000 and $12,000,000, respectively." Plaintiff so stipulated.

Holding: The Second Department rejected most of Defendant's arguments for reversal of the verdict, but noted that the question whether Defendant should have been granted a collateral source hearing because insurance under the ACA was available to the Plaintiff if he applied was novel in New York. The Court explained that to demonstrate entitlement to a collateral source hearing, "the defendant must merely tender some competent evidence from available sources that the plaintiff's economic losses may in the past have been, or may in the future be, replaced, or the plaintiff indemnified, from collateral sources." Here, the defendant offered an affidavit from an insurance broker, explaining the individual mandate to obtain insurance and a policy that could be available, and affidavit from a forensic economic showing that the cost of plaintiff's future medical expenses could be reduced by approximately $3.7 million if plaintiff obtained an ACA policy. That, the Court held, was enough to make a collateral source hearing necessary.

"[B]y showing that the plaintiff could reduce his own future medical expenses by millions of dollars by procuring an insurance policy available to him pursuant to the ACA, the defendant necessarily satisfied its burden of demonstrating that such expenses may be paid by a collateral source. It stands to reason that the plaintiff would act in his own economic self-interest by taking the minimally burdensome steps required to obtain available insurance coverage. The defendant should have been afforded the opportunity to offer evidence at a hearing to demonstrate why the plaintiff could be expected to obtain such coverage and whether doing so would, with reasonable certainty, reduce his out-of-pocket costs for future medical expenses." Indeed, the Court noted, the ACA requires most Americans to obtain health insurance and "[t]o the extent that a plaintiff can mitigate his or her damages by procuring insurance coverage that would offset some portion of his or her future medical expenses, he or she cannot simply decline to do so without a plausible explanation and avoid potential consequences." Thus, although the Court declined to hold what the outcome of a collateral source hearing should be, it nonetheless held that a hearing should have been held.

THIRD DEPARTMENT

ELECTION LAW

***Matter of Amedure v State of New York*, 2024 NY Slip Op 04295 (3d Dept Aug. 23, 2024)**

Issue: Is Election Law § 9-209 (2) (g), which, in effect, requires disputes regarding the validity of the signature on a ballot envelope to be resolved in favor of counting the vote, constitutional?

Facts: "As a result of the COVID-19 pandemic, there was a vast increase in the number of absentee ballots requested and returned in the 2020 general election, resulting in significant delays in tabulating the election results for multiple races. In anticipation of large numbers of voters again using absentee ballots in 2021, the Legislature enacted Laws of 2021, chapter 763, overhauling the canvass process contained in Election Law § 9-209 'in order to obtain the results of an election in a more expedited manner and to ensure that every valid vote by a qualified voter is counted.'" In particular, section 9-209 provides that when ballots are being counted, "each local board of elections is required to designate one or more sets of poll clerks to review early mail, absentee, military and special ballot envelopes," and the clerks must be divided equally between the two political parties. If during that review, the clerks disagree regarding whether a signature on a ballot envelope matches the voter's signature on the poll records, section 9-209 (2) (g) provides that the tie should be resolved in favor of counting the vote. "[H]aving delineated a statutory review process in which the voter has already been deemed to be qualified, properly registered and entitled to vote, the Legislature has determined that a disagreement between partisan representatives as to whether that voter's signature on the ballot envelope matches the signature(s) on file should not stop the canvassing of the ballot." Following the adoption of chapter 763, petitioners challenged the law as unconstitutional, arguing that "by requiring the casting and canvassing of a ballot in the face of such disagreement, the section violates the equal representation mandate contained in NY Constitution, article II, § 8 and usurps the power of the judiciary to determine election law disputes." Supreme Court agreed.

Holding: The Third Department reversed, rejecting the petitioner's argument that section 9-209 (2) (g) violated the equal representation constitutional mandate. "There is no justification for departing from th[e] literal language [of the Constitution] to hold that 'equal representation' must mean 'bipartisan action' when counting votes — i.e., that representatives of the two political parties must be forced to agree as to the authenticity of the signature on a ballot envelope duly issued to a qualified, registered voter for that ballot to be counted. All that the Constitution requires in this respect is 'equality of representation to the two majority political parties on all such boards and nothing more.'" Nor does the Legislature's policy choice to favor counting votes usurp judicial power, the Court held. The courts retain many roles to exercise judicial review in election matters, the Court noted, and thus "the legislative decision to preclude judicial challenges to timely-received, sealed ballots duly issued to qualified, registered voters found to be authentic by at least one election official — in order to ensure all valid votes are counted, with the proliferation of absentee and early mail voting — does not unconstitutionally intrude upon the judiciary's powers."

ELECTION LAW

Matter of Cartwright v Kennedy, 2024 NY Slip Op 04354 (3d Dept Aug. 29, 2024)

Issue: **Was Robert F. Kennedy Jr.'s nominating petition for President invalid for listing an address that was not his residence?**

Facts: In May 2024, the independent body We the People filed an independent nominating petition for Kennedy as a candidate for President, Nicole Shanahan as a candidate for Vice President, and 28 individuals as candidates for Elector of President and Vice President in the November 5, 2024, general election. The nominating petition listed Kennedy's address on Croton Lake Road in the hamlet of Katonah, New York. Petitioners filed objections to the nominating petition with the Board and, prior to the Board ruling on the objections, petitioners commenced this proceeding challenging the nominating petition's validity based upon their belief that Kennedy's place of residence, as stated in the petition, was not his true residence. "Supreme Court concluded that the address listed in the independent nominating petition was not Kennedy's address within the meaning of the Election Law and invalidated the respondent candidates' nominating petition."

Holding: The Third Department affirmed, holding that the evidence demonstrated that Kennedy had not resided in New York since 2017. The Court explained, "the Election Law requires that independent nominating petitions list the candidate's place of residence (see Election Law § 6-140 [1] [a]). Residence is defined as a place 'where a person maintains a fixed, permanent and principal home and to which he [or she], wherever temporarily located, always intends to return' (Election Law § 1-104 [22])." "[P]etitioners have demonstrated by clear and convincing evidence that the Katonah address listed in the nominating petition was not Kennedy's residence under the Election Law. In the 15 months that Kennedy claimed the Katonah address was his residence, he admittedly only spent one night there and that was after he filed his nominating petition and after the media had questioned his stated residence. It also was not until this time that he began paying rent. Although Kennedy testified that he currently resides in California, he expressed that he intended to return to New York at some point. However, 'intention without residence' is unavailing."

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