New York State Law Digest

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No. 768 November 2024

Reporting on Significant Court of Appeals Opinions and Developments in New York Practice

NYSBA

CASE LAW DEVELOPMENTS

Plaintiffs Tenured Teachers Placed on Leave Without Pay for Failure to Follow Vaccine Mandate Not Entitled to Statutory Hearings

Hearings Not Warranted When Employment Eligibility Conditions Are Enforced, As Opposed to Those Facing Disciplinary Proceedings

In *Matter of O'Reilly v. Board of Educ. of the City Sch. Dist. of the City of N.Y.,* 2024 N.Y. Slip Op. 05130 (Oct. 17, 2024), the dispute concerned the COVID-19 vaccine mandate applicable to Department of Education employees for the 2021-2022 school year. The petitioners are tenured NYC Board of Education (BOE) public school teachers challenging their placement on leave without pay. This resulted from their failure to submit proof of vaccination in accordance with the mandate and pursuant to an arbitrator's Impact Award (following an impasse between the United Federation of Teachers or UFT and BOE) that established mechanisms for the implementation of the vaccine requirement. Specifically, the petitioners argued that the BOE violated Education Law §§ 3020 and 3020-a by placing them on leave without providing hearings under those provisions.

In affirming the Appellate Division order, the Court of Appeals ruled that the petitioners were not entitled to the Education Law §§ 3020 and 3020-a comprehensive system for conducting disciplinary hearings for tenured teachers before they were placed on leave without pay. The Court distinguished a circumstance where the tenured teachers are faced with disciplinary proceedings, where they *are* entitled to these statutory hearings, and where, as here, the petitioners were placed on leave for failing to comply with a condition of employment, that is, the vaccine mandate:

> This Court has long distinguished between disciplinary proceedings and employment conditions for employees entitled to statutory civil service protections, and has held that statutory hearings are not warranted when employment eligibility conditions are enforced. We have explicitly applied this distinction in the context of tenured teachers, holding that a teacher terminated for failure to comply with a requirement that "defines eligibility for employment" is not entitled to Education Law §§ 3020 and 3020-a hearings. Petitioners, who do not challenge imposition of the vaccine mandate here, did not face disciplinary proceedings, but instead failed to comply with "a condition of employment" that was "unrelated to job performance, misconduct or competency" (citations omitted).

Id. at *5.

The Court also concluded that the petitioners' due process rights were not violated:

> In terms of process, the UFT negotiated with the BOE over every aspect of the imposition of the mandate, which in the first instance was imposed by the Health Commissioner. As set out in Civil Service Law § 209, the UFT and the BOE negotiated, then engaged in mediation, and finally entered into arbitration over the implementation of the mandate and its impact on UFT's members. Indeed, one of the points of contention between the parties leading to the filing of an impasse declaration concerned the placement of teachers who failed to submit proof of vaccination on leave without pay. The UFT subsequently agreed to be bound by the Impact Award established by the arbitrator, and once the arbitrator issued the award, teachers received ample notice of the Impact Award's provisions.

Id. at *5–6.

IN THIS ISSUE

Court Holds Superintendent of Highways Was Not "Actually Engaged in Work on a Highway" When the Accident Occurred

Thus, Defendants Were Not Exempt from Liability for Ordinary Negligence

In *Orellana v. Town of Carmel,* 2024 N.Y. Slip Op. 05131 (Oct. 17, 2024), a vehicle owned by the defendant Town of Carmel, and operated by the defendant Michael J. Simone, the then-Superintendent of Highways for the defendant Town of Carmel Highway Department, entered into an intersection without the right of way and struck the plaintiff's car. Vehicle and Traffic Law (VTL) § 1103(b) exempts drivers of all vehicles that are "actually engaged in work on a highway" from liability for ordinary negligence and entitles them instead to be held to a recklessness standard ("reckless disregard"). The issue was whether Simone was "actually engaged in work on a highway" at the time of the collision.

On the morning of the accident in December 2018, Simone left his office during a snowstorm to inspect the condition of the roads; "[a]s was his practice, he drove to a bellwether location at the highest elevation in town, where snow accumulates first, to make an assessment of the conditions"; and when he observed a quarter inch of snow accumulation, he contacted his team and directed them to salt the town's roads, which he felt would take about an hour. Simone acknowledged that when he drove back to his office, "he did not believe there was any emergency, was not in a rush to return to the office, and had no intention of conducting any further road inspection while en route." *Id.* at *2. Simone stated that when he approached the accident intersection, he came to a complete stop at a stop sign, and although he observed on his left another quarter inch accumulation of snow on the road, he took no action "but resolved to inform his team about it upon returning to the office." The collision occurred when he then entered the intersection without looking to his right, the direction from which the plaintiff was travelling. The plaintiff alleged that she suffered personal injuries and that Simone was negligent in failing to look both ways before entering the intersection.

The Court of Appeals reversed the lower courts' holdings that the defendants were exempt from liability for ordinary negligence. The Court noted that while the VTL sets forth a uniform set of traffic regulations, or "rules of the road," it also provides that those rules "shall not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway" (Vehicle and Traffic Law § 1103 [b]); that class of people can only be held liable for "the consequences of their reckless disregard for the safety of others" but not for ordinary negligence; and "[i]n drafting Vehicle and Traffic Law § 1103 (b), the legislature aimed to support the work of 'keeping the roadways clean and safe for everyone,' while accounting for the fact that vehicles performing those functions 'may themselves cause risks to ordinary motorists with whom they share the road' (citation omitted)." *Id.* at *4.

The Court emphasized that VTL §1103(b) "turns on the nature of the work being performed (construction, repair, maintenance or similar work)—not on the nature of the vehicle performing the work (citation omitted)." *Id.* at __. In addition, one is to look at the work that *actually* took place when the accident occurred. Thus, the Court pointed to Appellate Division authority that "has consistently held that drivers are not 'actually engaged in work on a highway' when they are merely traveling between work sites and not actively performing any protected task on the road itself (citation omitted)." *Id.*

The Court concluded that Simone's own deposition testimony established that he was not actually engaged in work on a highway when the accident occurred because it happened after he

> had fully completed his assessment of roadway conditions at his bellwether location and mobilized his entire team to salt the town's roads. At the time of the accident, Simone was merely using the road to return to work. Although he testified that he saw a slushy accumulation of snow to his left shortly before the collision occurred, he took no action in response to observing that condition. Indeed, he testified that as he pulled into the intersection where the collision occurred, there was nothing keeping his attention drawn to his left and he was no longer looking at the condition.

Id. at *5.

Where Process Server Is Prevented From Reaching Defendant's Actual Place of Business, Leaving the Pleadings With a "Building Mailroom Clerk" Was Permitted

Thus, Plaintiff Effected Proper Service Under CPLR 308(2)

CPLR 308(2) permits the use of leave and mail service in the first instance for service on a natural person. The two-step process involves first to leave the initiating pleadings with a person of suitable age and discretion at the defendant's actual place of business, dwelling place, or usual place of abode. The second step requires a mailing either to the defendant's last known residence or by first class mail to the defendant's actual place of business

In *F.I. duPont, Glore Forgan & Co. v. Chen*, 41 N.Y.2d 794 (1977) (*citing to Weinstein, Korn & Miller*), the Court of Appeals ruled that where a process server has been barred by a doorman from the defendant's apartment, leaving the initiating pleadings with the doorman is sufficient to comply with the first step of CPLR 308(2).

In *Nath v. Chemtob Moss Forman & Beyda, LLP*, 2024 N.Y. Slip Op. 05061 (1st Dep't Oct. 15, 2024), the plaintiff commenced a legal malpractice action. The issue relevant here was whether proper service under CPLR 308(2) was effected upon the individual defendant, a partner of the defendant law firm. The plaintiff's process server was unable to reach not the defendant's dwelling place or usual place of abode but the defendant's "actual place of business." The impediment was that the process server was not permitted to proceed to the defendant law firm's floor. Instead, the building concierge advised the process server to leave the summons with the "Building Mailroom Clerk." Under these set of facts, the court concluded that "'the outer bounds' of the individual defendant's actual place of business should 'be deemed to extend to the location at which the process server's progress [was] arrested.'" *Id.* at *4–5 (citing to *F.I. duPont*). As a result, the court held that both the individual defendant partner and the law firm were properly served.

Majority and Dissent Disagree as to Whether Elements of Estoppel Were Met

Issue as to Whether Defendant's Failure to Update Address Constituted Affirmative Conduct

In *Citimortgage, Inc. v. Goldstein,* 2024 N.Y. Slip Op. 04453 (2d Dep't Sept. 18, 2024), a mortgage foreclosure action, service was attempted upon the defendant under CPLR 308(4) by affixing a copy of the summons and complaint to the door of the property and to the door of the defendant's former business address (and by mailing to those respective addresses). However, the defendant contended that he had moved out of the property a year and a half before and that the property was occupied by tenants. The dispute between the majority and dissent here concerned whether the defendant's conduct estopped him from contesting service.

The majority noted that estoppel in this circumstance is only available if the defendant engages in "affirmative conduct which misleads a party into serving process at an incorrect address." However, "potential defendants ordinarily have no affirmative duty to keep those who might sue them abreast of their whereabouts." *Id*. at *6 (quoting the Court of Appeals decision in *Feinstein v. Bergner*, 48 N.Y.2d 234, 241–42 (1979)). The court found here that "the defendant's failure to update his address with the plaintiff, DMV, or USPS, or to update his voting records with a new address, did not constitute 'affirmative conduct.'" *Id*.

In addition, the majority looked to the defendant's action of forwarding "his mail from the property to a post office box and to a former business address after moving out of the property" as being "consistent with the defendant no longer residing at the property. Indeed, had the defendant neglected to forward his mail after moving out of the property, such inaction would have been more consistent with the defendant continuing to reside at the property." *Id*. at *7.

The court rejected the argument that the defendant had an affirmative obligation after moving out to give the plaintiff an updated address:

> The defendant explained in his affidavit that after he moved out of the property in October 2019, he did not provide an updated address because he was not "permanently settled anywhere," and that he stayed for periods of time at his mother's home in Pennsylvania and with his son in Florida. Further, to the extent our dissenting colleague asserts that the defendant had any heightened obligation because he "should have anticipated that service would be attempted" in light of the prior foreclosure actions commenced against him or his failure to make mortgage payments, we respectfully disagree. There is no authority imposing any heightened obligation on an individual merely because he or she has reason to believe that he or she will be named as a defendant in a foreclosure action, and we decline to hold that a defendant may be estopped from contesting service absent a showing of affirmative or deliberate conduct designed to avoid service.

Id. at *7–8.

Thus, the court remitted the matter to the trial court to conduct a hearing as to service.

The dissent felt that the elements of estoppel had been met. It believed that the plaintiff had established defendant's conduct was "calculated to prevent the plaintiff from learning his actual place of residence." That included the defendant renting the property but continuing to pay the mortgage; his failure to comply with a provision in the mortgage agreement obligating the defendant to notify the plaintiff of an address change; and his failure to update his voter registration records or notify the DMV of his change of residence address pursuant to VTL § 505(5). The dissent drew a totally different conclusion than the majority from the defendant's failure to file a change of address with the Post Office, instead forwarding his mail to a post office address

> and to an office that he asserts is his former business address, where the plaintiff made four attempts to personally serve the defendant. The defendant asserts, in effect, that he had no permanent residence or dwelling place, as he was traveling between family members' residences in Pennsylvania and Florida, and he was not "permanently settled anywhere," such that service under CPLR 308(1), (2), or (4) would have been nearly impossible. The circumstances here include the defendant's failure to notify multiple different entities of his purported change of address and his affirmative conduct of forwarding his mail to a business address that he apparently vacated, where the plaintiff repeatedly attempted to serve him. . . Furthermore, in light of the multiple prior foreclosure actions that were commenced against the defendant and the defendant's admitted continued failure to pay the mortgage, the defendant should have anticipated that service of process would be attempted to recover the outstanding mortgage payments.

Id. at *12–13.

A Party Cannot Serve Interrogatories Upon and Depose the Same Party in Action Premised Solely on Negligence, Which Includes a Medical Malpractice Action

Also, Interrogatories Cannot Be Served on a Nonparty

In last month's *Law Digest,* we referenced certain restrictions on the service of interrogatories. The First Department decision in *Schwartz v. Mount Sinai Hosp.,* 2024 N.Y. Slip Op. 04750 (1st Dep't Oct. 1, 2024), reflects some of the practical implications. In this medical malpractice action, plaintiff had already served interrogatories on the defendants. Plaintiff's subsequent efforts to depose the defendants were denied because CPLR 3130(1) provides that in a personal injury, property damage or wrongful death action premised solely on negligence, here in the context of professional negligence (medical malpractice), once the plaintiff chose to serve interrogatories, he could not depose the defendants absent leave of court. In fact, the trial court had directed the defendants to answer the interrogatories in a preliminary conference order, "noting that plaintiff had therefore waived depositions."

In addition, the trial court had properly granted the defendants a protective order with respect to interrogatories served on nonparty physicians. Unlike depositions and document requests that are applicable to parties and nonparties alike, inter-

rogatories are limited to parties. "Except as otherwise provided herein, after commencement of an action, *any party* may serve *upon any other party* written interrogatories." CPLR 3130(1) (emphasis added).

THE UNIFORM RULES

Interaction of CPLR 3122(b) and Commercial Division Rule 11-b on Privilege Logs

Here, Categorical Designations Were Not Agreed to by the Parties; Thus, Document-By-Document Log Was Required

If a party withholds a document responsive to a document request, it is required to provide a log identifying the document with some specificity to enable the requesting party to be able to contest before the court whether the particular document was justifiably withheld. The form of such a log is covered under both the CPLR and the Uniform Rules.

CPLR 3122(b) provides that "[w]henever a person is required . . . to produce documents for inspection, and where such person withholds one or more documents that appear to be within the category of the documents required . . . to be produced, such person shall give notice to the party seeking the production and inspection of the documents that one or more such documents are being withheld. This notice shall indicate the legal ground for withholding each such document, and shall provide the following information as to each such document, unless the party withholding the document states that divulgence of such information would cause disclosure of the allegedly privileged information: (1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document. . ."

The Commercial Division has its own rule addressing privilege logs, Rule 11-b (22 N.Y.C.R.R. § 202.70(g)), which permits and encourages the use of "categorical designations," especially important when dealing with emails and the like. Thus, it provides in part:

> (1) The preference in the Commercial Division is for the parties to use categorical designations, where appropriate, to reduce the time and costs associated with preparing privilege logs. The parties are expected to address such considerations in good faith as part of the meet and confer process (see paragraph (a) above) and to agree, where possible, to employ a categorical approach to privilege designations. The parties are encouraged to utilize any reasoned method of organizing the documents that will facilitate an orderly assessment as to the appropriateness of withholding documents in the specified category.

Rule 11-b(1).

In the February 2021 onslaught of new rules in the general trial courts, a new § 202.20-a, entitled "Privilege Logs," was adopted. Patterned after the commercial division rule it provides, in part, that the parties should meet and confer at the beginning of the case "and from time to time thereafter" to discuss the following issues: the scope of the privilege review; the amount of information to be set forth in the privilege log; the utilization of categories to reduce document-by-document logging; whether categories of information can be excluded; and any other relevant privilege review issues, "including the entry of an appropriate non-waiver order."

In *Joseph v. Rassi*, 2024 N.Y. Slip Op. 04548 (2d Dep't Sept. 25, 2024), the defendants did not comply with CPLR 3122(b) because their privilege log did not individually identify each type of document withheld or the general subject matter or date of each document. The court rejected the defendants' contention that their "unilateral use" of categorical designations complied with the commercial division rule because Rule 11-b

> does not authorize the defendants' unilateral use of categorical designations in their privilege log, absent an agreement by the parties to employ a categorical approach or the issuance of a protective order. Under the circumstances of this case, the Supreme Court should have granted that branch of the plaintiff's motion which was to compel the defendants to produce a document-by-document privilege log in conformity with CPLR 3122(b) (citation omitted).

Id. at *3.

Objections, Directions Not to Answer at a Deposition, and 22 N.Y.C.R.R. Part 221

As a Result of Improper Objections, Plaintiffs Permitted to Conduct Limited Reexamination of Certain Witnesses

In last month's *Digest* we referred to 22 N.Y.C.R.R. Part 221, which provides that a deponent is required to answer all questions at a deposition, except to preserve a privilege or right of confidentiality, to enforce a limitation in a court order, or "when the question is plainly improper and would, if answered, cause significant prejudice to any person." As a result, an attorney cannot direct a witness not to answer except in the instances described above or as specifically allowed in CPLR 3115.

In *Gulledge v. Jefferson County*, 229 A.D.3d 991 (3d Dep't 2024), the trial court granted the plaintiffs permission to conduct a limited deposition (reexamination) of certain witnesses based on a finding that the defendants had failed to comply with 22 N.Y.C.R.R. § 221.2 and CPLR 3115. The Third Department noted that "the relationship between plaintiffs' and defendants' respective counsel was contentious throughout the discovery process, with each contributing to difficulties in conducting and completing witness depositions." Relevant here was defense counsel's repeated instruction (some 100 times) to witnesses not to answer plaintiffs' counsel's questions. Although the Third Department agreed with the trial court that "a significant number" of the questions posed were "improper and unlikely to survive a form objection or lead to admissible evidence at trial, it is likewise evident from the record that some questions were not and that defendants should not have instructed witnesses to not provide an answer. Accordingly, Supreme Court properly found that defendants had violated 22 NYCRR 221.2 and CPLR 3115." *Id.* at 994–95.

Moreover, the trial court properly limited the reexamination to certified questions of witnesses that they had been previously instructed not to answer "and permitted only 'related and relevant' follow-up questioning." Finally, "[c]ontrary to defendants' assertions on appeal, the court's order expressly permits defense counsel to direct witnesses not to answer questions upon reexamination, requiring only that such instruction be proper under 22 NYCRR 221.2 and CPLR 3115." *Id.* at 995.

ISSN 0028-7636 (print) ISSN 2379-1225 (online)