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Summarizing recent significant New York appellate cases

Happy new year, from all of us here at the NYSBA CasePrepPlus Newsletter! The courts have been busy, with new issues and Appellate Division conflicts popping up over the holidays. Let's take a look at the recent opinions and what else has been happening in New York's appellate courts over the past week.

FIRST DEPARTMENT

CONTRACT LAW, WAIVER OF RIGHT TO JURY TRIAL

***International Business Machs. Corp. v GlobalFoundries U.S. Inc.*, 2024 NY Slip Op 06425 (1st Dept Dec. 19, 2024)**

Issue: **May a broad contractual jury waiver provision apply to claims for fraudulent inducement and promissory estoppel?**

Facts: International Business Machines Corporation and GlobalFoundries U.S. Inc. entered a collaborative venture in which IBM transferred its microelectronics business, including technology, engineers and employees, to GlobalFoundries, along with a sum of $1.5 billion, and GlobalFoundries agreed to develop, manufacture, and supply next generation 14 nanometer and 10 nanometer high performance semiconductor chips for IBM. The parties entered a Master Transaction Agreement, and related agreements, all of which contained a similar waiver of the right to a jury trial. Shortly after the parties began the venture, GlobalFoundries indicated that it would not produce the 10nm chips, but would seek to amend the agreements to produce 7nm chips instead. GlobalFoundries eventually indicated that it would abandon the 7nm chips as well, but would continue to produce the 14nm chips. After IBM received the last shipment of 14nm chips, it sued GlobalFoundries for fraudulent inducement, breaches of the agreements, and promissory estoppel. Following the close of discovery, IBM filed note of issue with a demand for a jury trial. GlobalFoundries moved to strike the jury demand, relying on the contractual waiver provision. Supreme Court granted the motion.

Holding: The First Department affirmed, holding that although the New York Constitution guarantees the right to a jury trial, parties, especially sophisticated ones, are free to negotiate broad waivers of that right. The Court explained, however, "where a claim of fraudulent inducement challenges the validity of the agreement, a provision waiving the right to a jury trial in litigation arising out of the agreement may not apply. This Court has taken care to distinguish between actions where the primary claim is fraudulent inducement and the validity of the entire contract is clearly being challenged, and actions that do not challenge the validity of the contract but rather seek to enforce the underlying contract by obtaining damages for fraudulent inducement." In the latter case, where the party's challenge is not to the validity of the underlying agreement, courts will still uphold a board jury waiver. And here, the Court held, "[i]t is clear from IBM's complaint that its primary claim is not fraudulent inducement but rather breach of the agreements." Indeed, the Court reasoned, "IBM has chosen to affirm the agreements and maintain an action at law for compensatory and consequential damages on the theory that the defendant's fraud resulted in a subsisting contract which, on account of the falsity of the representations, is detrimental to them. Under these circumstances, the plaintiffs are not in a position to contend, as they might perhaps contend in an action for recission, that the stipulation waiving a jury trial perished with all the other rights and obligations under the agreement."

SECOND DEPARTMENT

FAMILY LAW, NEGLECT, CORPORAL PUNISHMENT

***Matter of Elina M. (Leonard M.)*, 2024 NY Slip Op 06574 (2d Dept Dec. 24, 2024)**

Issue: **When may a single incident of excessive corporal punishment be sufficient to support a finding of neglect?**

Facts: The "Administration for Children's Services, filed a petition pursuant to Family Court Act article 10 against the father, alleging that he had neglected the child by inflicting excessive corporal punishment on her. The petition alleged, more specifically, that on or about June 7, 2021, the father had grabbed the child's arm and squeezed it 'really, really hard,' leaving 'three circular, dark green marks' on the child's shoulder, which 'appeared to be the size of finger prints.' The petition did not contain any allegations that the father had engaged in any other acts of aggression toward the child or regarding any misuse of alcohol." At the fact-finding hearing, ACS elicited testimony regarding the father's misuse of alcohol while the child was in his custody and other episodes of corporal punishment that were not alleged in the petition. Family Court advised ACS that to conform the allegations of the petition to the proof at the hearing, it would need to file an amended petition. ACS never did so, however. Family Court nevertheless based its finding of neglect on the father's "aggressive

behaviors and outbursts towards [the child], and his *misuse of alcohol*, which makes her anxious and nervous. It is this in combination with the bruise, not the bruise itself, which establishes by a preponderance of the evidence that the father neglected the child."

Holding: The Second Department reversed the neglect finding, holding that "although parents have a right to use reasonable physical force against a child in order to maintain discipline or to promote the child's welfare, the use of excessive corporal punishment constitutes neglect. Parenting and discipline methods have changed significantly in recent years, and the use of any physical force against children has been frowned upon in society as an acceptable means of discipline. It is less acceptable today to see parents discipline their child physically through corporal punishment by means such as grabbing, spanking, or smacking in public or even at home . . . Under today's societal norms, parents are encouraged to speak to their children and use other methods of discipline without any form of aggression whatsoever. However, that is not to say that the methods of discipline through reasonable physical force as corporal punishment are not permitted. As such, we must be guided by our jurisprudence. There are some facts that so obviously support a finding of excessive physical force, but others require some reflection as to whether the act itself in the context of parenting was reasonable, or at least not excessive, so as to support a finding of neglect." A single episode of excessive corporal punishment can support a finding of neglect, the Court held, but whether such an event is excessive must be determined on a case-by-case basis. Here, however, the Court held that "under the particular circumstances in the present case, the single incident of the father grabbing the child's arm or shoulder did not rise to the level of neglect under Family Court Act article 10."

The Court also agreed that "Family Court improperly based its finding of neglect, at least, in part, upon allegations that were not included in the petition, to wit, that the father had previously engaged in unspecified acts of aggression toward the child and that he misused alcohol in the child's presence." Although Family Court had cautioned that it would not base its decision on any unpled allegation if ACS did not file an amended petition to conform to the proof, it nevertheless improperly disregarded its own holding and based its decision on the unpled allegations.

THIRD DEPARTMENT

ZONING LAW, USE VARIANCE, SOLAR POWER

Matter of Freepoint Solar LLC v Town of Athens Zoning Bd. of Appeals, 2024 NY Slip Op 06409 (3d Dept Dec. 19, 2024)

Issue: **What standard applies to a use variance application when the applicant proposes to develop public utility infrastructure?**

Facts: Developers of renewable energy infrastructure bought two parcels of real property in a rural residential zoning district in the Town of Athens, to build a new solar energy generation facility. In response, the Athens Town Board amended the its zoning code to prohibit solar facilities in all zoning districts except in certain commercial and industrial zones. Petitioners then filed a public utility use variance application for the project, which was denied based on an application of the normal use variance criteria contained in Town Law § 267-b (2) (b). Petitioners challenged the Town's first denial of the use variance request, and Supreme Court annulled the denial, holding that the Town incorrectly applied the standard set forth in Town Law § 267-b (2) (b) rather than the public utility necessity standard set forth in *Matter of Consolidated Edison Co. of N.Y. v Hoffman* (43 NY2d 598, 610 [1978]). Upon remittal, the Town again denied petitioners' use variance request because they "failed to establish the public necessity of the project]." Petitioners then filed another Article 78 challenging the denial. Supreme Court dismissed the petition.

Holding: The Third Department reversed, holding that "[w]hile Town Law § 267-b (2) (b) provides guidelines for use variance applications generally, applicants that are proposing to develop public utility infrastructure are subject to the 'public necessity' use variance test, which sets a lower burden for establishing the applicant's right to an approved variance. Indeed, it has long been held that a zoning board may not exclude a utility from a community where the utility has shown a need for its facilities. As such, a public utility provider seeking a use variance for the siting or modification of a proposed facility must show that siting a new facility or modification of an existing facility is a public necessity in that it is required to render safe and adequate service, and that there are compelling reasons, economic or otherwise, which make it more feasible to grant a use variance than to use alternative sources of power such as may be provided by other facilities and that where the intrusion or burden on the community is minimal, the showing required by the utility should be correspondingly reduced."

The Court held that petitioners had made that reduced showing for a public utility use variance. In particular, the Court determined that petitioners showed that the project was a public necessity, which "'must be viewed in a broader consideration of the general public's need for the service.' In this regard, local concerns are not typically part of the more general public necessity calculus; instead, local concerns involve aesthetics and environmental impacts. These specific local concerns, however, were directly analyzed and considered during the aforementioned SEQRA process, which revealed the minimal impact the project would actually have." And in light of New York's Climate Leadership and Community Protection Act, "New York State's goal of transitioning to renewable energy is designed to benefit the public at large, and this project is in line with that goal. Moreover, respondent's finding of no public necessity because the State was 'on track' to meet certain goals is arbitrary and capricious and unsupported by substantial evidence. Not only did this finding focus on established floors rather than ceilings but, perhaps most importantly, it side-steps the consideration of the overarching goals of the CLCPA and future, long-term goals and targets."

FOURTH DEPARTMENT

CRIMINAL LAW, IMPAIRMENT UNDER DWAI

***People v Dondorfer*, 2024 NY Slip Op 06432 (4th Dept Dec. 20, 2024)**

Issue: **Did the People properly instruct the grand jury on the definition of the term "impaired" as it related to a charge of felony aggravated driving while intoxicated (DWI) based on driving a vehicle while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs with a child present?**

Facts: "Just after midnight, the police stopped a vehicle being driven by defendant because its inspection was expired. Also in the vehicle at that time was defendant's 15-year-old daughter. During the vehicle stop, the police determined that defendant was impaired by drugs and alcohol based on his observed demeanor, his admission to recently using those substances, and his failure to successfully perform several field sobriety tests." The People presented a charge of aggravated DWI predicated on defendant driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs with a child present to a grand jury for consideration, defining "impaired" as "[a] person's ability to operate a motor vehicle is impaired by the combined use of alcohol and drugs when that combination of alcohol and drugs has actually impaired, to any extent, the physical and mental abilities which such person is expected to possess in order to operate a motor vehicle as a reasonable and prudent driver." The grand jury indicted defendant, and defendant moved to dismiss based on the People's definition of "impaired." Supreme Court denied the motion.

Leading up to the trial, defendant asked that the court instruct the jury on impairment consistently with the Third Department's definition in *People v Caden N.* (189 AD3d 84 [3d Dept 2020], *lv denied* 36 NY3d 1050 [2021])—that is, "whether his consumption of a combination of drugs and alcohol rendered him '*incapable* of employing the physical and mental abilities which he . . . is expected to possess in order to operate a vehicle as a reasonable and prudent driver.'" The People objected, arguing "that the standard requested by defendant applied only to intoxication by alcohol and that the correct definition to use in this context was whether defendant's consumption of a combination of drugs and alcohol 'has actually impaired, to any extent, the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver.'" Supreme Court agreed with defendant on the proper definition for the jury instruction. Just before trial, defendant renewed his motion to dismiss the indictment, and Supreme Court, citing its prior ruling on the jury charge, granted defendant's motion.

Holding: The Fourth Department reversed the dismissal of the indictment, agreeing with the People that the proper definition of impairment under Vehicle and Traffic Law § 1192 (4-a), for purposes of a felony aggravated driving while intoxicated charge, is "whether a defendant's consumption of drugs, or a combination of drugs and alcohol, "has actually impaired, to any extent, the physical and mental abilities which they are expected to possess in order to operate a vehicle as a reasonable and prudent driver." The Court explained, "[i]n defining 'impaired' that way, the Court [of Appeals] sharply distinguished the term 'impaired' from the separate term 'intoxication,' as used in Vehicle and Traffic Law § 1192 (3), noting that the latter term denoted a greater degree of impairment which is reached when a driver has voluntarily consumed alcohol to the extent that they are incapable of employing the physical and mental abilities which they are expected to possess in order to operate a vehicle as a reasonable and prudent driver. The Court concluded that the terms impaired and intoxicated are not interchangeable, which is entirely consistent with the principle that, by using separate terms, the legislature is presumed to have given each word a different meaning." The Fourth Department thus disagreed with the Third Department's interpretation of the term in *Caden N.*, creating a conflict ripe for Court of Appeals review.

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