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CasePrepPlus

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FIRST DEPARTMENT

CIVIL PROCEDURE, CONSUMER LAW, FRAUD, NUISANCE.

NEW YORK HAS JURISDICTION OVER OUT-OF-STATE DEFENDANT JUUL LABS, THE MANUFACTURER OF ELECTRONIC CIGARETTES, AND TWO CORPORATE OFFICERS IN AN ACTION ALLEGING DECEPTIVE BUSINESS PRACTICES, FRAUD AND PUBLIC NUISANCE.

The First Department determined New York had jurisdiction over the defendant JUUL, the manufacture of electronic cigarettes, and two corporate officers involved JUUL's marketing campaign in New York. The complaint alleged "causes of action pursuant to General Business Law §§ 349 and 350, for deceptive acts and practices and for false advertising, respectively; pursuant to Executive Law § 63(12), for repeated and persistent fraud and illegal conduct in violation of General Business Law §§ 349 and 350 and section 5 of the Federal Trade Commission Act (15 USC § 45); and, for public nuisance:" "[T]he People submitted internal emails and reports demonstrating ... that defendants traveled to New York City for investment meetings ... ; that defendants personally attended JUUL's launch party in New York City ..., JUUL also sought to arrange in-person meetings between defendants and both 'New York targets' and broadcast media organizations; and, that defendants and JUUL considered the New York City launch to have been a success. ... [D]efendants were involved in marketing strategy, which included ... months of events in New York; identifying New York as the target of JUUL's northeastern U.S. marketing efforts, at and after launch; advertising on billboards in Times Square; hosting in-store product samplings at New York vape shops and social events; and escalating marketing efforts in the New York City metropolitan area post-launch. After New York proved to be a substantial market for JUUL's product, defendants went so far as to describe the efforts as 'NYC takeover' and to declare that New York City users should be 'the focus of [JUUL's] branding/marketing.' This evidence establishes that defendants conducted sufficient in-person activities within New York State related to the People's claims against them in this action, and sufficiently supports the exercise of specific personal jurisdiction over them pursuant to CPLR 302(a)(1) ...". ***People v JUUL Labs, Inc.*, 2023 N.Y. Slip Op. 00040, First Dept 1-5-22**

CIVIL PROCEDURE, JUDGES, FORECLOSURE.

TO DEPRIVE A PLAINTIFF OF THE SIX-MONTH RECOMMENCEMENT BENEFIT OF CPLR 205(a) THERE MUST HAVE BEEN A PATTERN OF NEGLECT, NOT, AS HERE, A SINGLE INSTANCE OF NEGLECT (PLAINTIFF WAS NOT READY FOR TRIAL); THERE WAS A DISSENT.

The First Department, reversing Supreme Court, over a dissent, determined that dismissal for failure to prosecute requires more than one instance of neglect (here plaintiff was not ready to proceed on the trial date). Rather, a pattern of neglect must be shown in order to deprive plaintiff of the six-month recommencement benefit of CPLR 205(a): "While the prior action was dismissed due to plaintiff's unreadiness to go forward with the trial as scheduled on December 16, 2022 ... , the ... trial court, in dismissing the case, did not set forth on the record any additional instances of neglect by the plaintiff that could 'demonstrate a general pattern of delay in proceeding with the litigation' (CPLR 205[a] ...), as opposed to one particular lapse, namely, the lack of readiness on the trial date. The court's statement that the case had been 'languishing since 2010' does not suffice, inasmuch as it fails to specify any 'specific conduct . . . demonstrat[ing] a general pattern of delay' (CPLR 205[a] ...). As this Court has recently held, a 'general pattern of delay' must comprise more than one instance of dilatory conduct ...". ***U.S. Bank Natl. Assn. v. Fox*, 2023 N.Y. Slip Op. 00046, First Dept 1-5-23**

CORPORATION LAW, CIVIL PROCEDURE.

THE ALLEGATIONS IN THE COMPLAINT WERE NOT SUFFICIENT TO SUPPORT LIABILITY ON A PIERCING-THE-CORPORATE-VEIL THEORY AND THE HOPE THAT DISCOVERY WOULD REVEAL SOMETHING WAS NOT A BASIS FOR DENIAL OF THE MOTION TO DISMISS.

The First Department, reversing Supreme Court, determined the complaint did not allege sufficient facts to hold defendant MMC liable on a piercing-the-corporate veil theory in this medical malpractice case: "[T]he complaint does not contain allegations sufficient to support holding MMC liable on a theory of piercing the corporate veil, since it does not allege facts supporting a finding that MMC completely dominated and controlled Nyack Hospital or abused the privilege of doing business in the corporate form (CPLR 3211[a][7] ...). Moreover, the lack of discovery does not excuse plaintiff's failure to plead any facts that would support piercing the corporate veil ..., and the hope that something will turn up in discovery is an insufficient basis to deny the motion to dismiss ...". ***Yovich v. Montefiore Nyack Hosp.*, 2023 N.Y. Slip Op. 00047, First Dept 1-5-23**

THIRD DEPARTMENT

FAMILY LAW, CRIMINAL LAW.

THE MAJORITY HELD THE EVIDENCE DID NOT ESTABLISH DISORDERLY CONDUCT AS A FAMILY OFFENSE, FINDING THE CONDUCT WAS NOT "PUBLIC;" THE DISSENT ARGUED THE CONDUCT WAS "PUBLIC" IN THAT IT TOOK PLACE IN THE PRESENCE OF ADULTS AND CHILDREN OUTSIDE A DAYCARE CENTER.

The Third Department, over a dissent, determined the evidence did not establish a family offense (disorderly conduct): The majority and the dissenter disagreed on whether the conduct was "public" in nature: " '[C]ritical to a charge of disorderly conduct is a finding that [the mother's] disruptive statements and behavior were of a public rather than an individual dimension . . ., which requires proof of an intent to threaten public safety, peace or order' ... . '[A] person may be guilty of disorderly conduct only when the situation extends beyond the exchange between the individual disputants to a point where it becomes a potential or immediate public problem' ... . **From the dissent:** [The] disruptive behavior outside a daycare program in the direct presence of other adults and children took on a public dimension that was no doubt alarming to the grandmother, the child and the bystanders. Whether intentional or not, such conduct satisfies the reckless component for the charge. On this record, the charge of disorderly conduct within the petition was established by a preponderance of the evidence and should have been sustained (see Penal Law § 240.20 [1], [3] ...)." ***Matter of Linda UU. v. Dana VV*****., 2023 N.Y. Slip Op. 00013, Third Dept 1-5-22**

PUBLIC HEALTH LAW, TAX LAW, MEDICAID

NONPUBLIC RESIDENTIAL HEALTH CARE FACILITIES NEED PERMISSION TO WITHDRAW EQUITY OR TRANSFER ASSETS IN EXCESS OF 3% OF THE FACILITIES' REVENUE; CORPORATE OWNERS NEED NOT INCLUDE FEDERAL AND STATE INCOME TAXES IN THE 3% CALCULATION; FACILITIES OWNED BY PASS-THROUGH ENTITIES (i.e., LIMITED LIABILITY COMPANIES) MUST INCLUDE FEDERAL AND STATE INCOME TAXES IN THE 3% CALCULATION.

The Third Department, in two full-fledged opinions by Justice Lynch, determined that nonpublic residential health care facilities owned by pass-through entities (i.e., a limited liability company, S corporation, partnership or sole proprietorship) *must include* federal and state income taxes in the calculation of equity withdrawals. Public Health Law § 2808(5) prohibits the withdrawal of equity or transfer of assets in excess of 3% of the facility's total revenue without prior written approval of the Commissioner of Health. If the residential health care facility is owned by a corporation, federal and state income taxes are *not* included in the 3% calculation: "Public Health Law § 2808 (5) (c) responds to the Legislature's concern that a facility's improvident withdrawal of substantial assets would compromise the facility's operation and 'occasion irreparable harm within an especially fragile and dependent resident population' ... . Given this context, '[w]ithdrawals for facility purposes' are necessarily those that concern a facility's own financial obligations and expenses ... . Petitioners do not dispute that, for a pass-through entity, income tax liability is borne by the owner, not the facility. Thus, given the regulatory scheme, income tax payments by such an entity would necessarily be equity withdrawals or asset transfers satisfying the obligation of the owner, not the facility ... . In other words, even though such withdrawals are for tax payments, they are not '[w]ithdrawals for facility purposes' ...". ***Matter of Brightonian Nursing Home, Inc. v. Zucker*****, 2023 N.Y. Slip Op. 00008, Third Dept 1-5-23**

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