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CasePrepPlus

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Summarizing recent significant New York appellate cases

This week's Newsletter is full of civil procedure questions for New York practice nerds like me. The First Department tackled forum non conveniens and the thorny pleading requirements necessary to establish the predicate sexual conduct for a Child Victims Act claim. The Second Department took us back to our first-year contracts class, with a case of what kind of consideration is necessary to enter into a valid contract. And the Third Department taught national fraternities and other similar organizations a lesson in how their agency relationships could lead to vicarious liability for the actions of their local chapters. Let's take a look at those opinions and what else has been happening in New York's appellate courts over the past week.

FIRST DEPARTMENT

CIVIL PROCEDURE, FORUM NON CONVENIENS

***Bangladesh Bank v Rizal Commercial Banking Corp.*, 2024 NY Slip Op 01112 (1st Dept Feb. 29, 2024)**

Issue: **Does a trial court have the discretion to deny a motion to dismiss a complaint pursuant to CPLR 327(a), on forum non conveniens grounds, after it has already found New York to be an inconvenient forum as to another defendant and dismissed the complaint as against it?**

Facts: This case arises from an international fraud and money laundering scheme, in which the central bank of the People's Republic of Bangladesh alleges that over $81 million was stolen from its account at the Federal Reserve Bank of New York when North Korean hackers used unauthorized payment orders to fraudulently transfer those funds through the accounts of defendant Rizal Commercial Banking Corporation, one of the Philippines's largest banks. The money was later laundered through a Philippines casino, among other venues. When Bangladesh Bank sued, the casino, and others, moved to dismiss on forum non conveniens grounds. Supreme Court granted the casino's motion, and the First Department affirmed. When RCBC later separately moved to dismiss also on forum non conveniens grounds, arguing that "plaintiff was a Bangladeshi entity; defendants were residents of the Philippines; the alleged conduct occurred in the Philippines; and litigating in New York would impose hardship on the court and RCBC," Supreme Court denied the motion, holding that "while the prior motions were focused on the alleged money laundering aspect of the scheme to steal over $100 million from plaintiff, the current motions focused on the theft itself in New York" and New York was a proper forum.

Holding: Noting that the doctrine of forum non conveniens "permits a court, in its discretion, to dismiss an action where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere," upon the balancing of five factors that the Court of Appeals has outlined (*see* ***Islamic Republic of Iran v Pahlavi*, 62 NY2d 474 [1984]**), the First Department held that Supreme Court properly exercised its discretion in balancing those factors and concluding that New York was a proper forum. The Court's role on appeal is not to replace the exercise of discretion undertaken by the trial court, but rather to evaluate "whether the court thoroughly considered each of the relevant factors in making its determination, even if [the Appellate Division] would have weighed those factors differently." And here, notably, the Court held that the different conclusions on the two separate forum non conveniens motions was adequately explained by the different circumstance of the parties: the first was focused on the money laundering in the Philippines, and RCBC's was focused on the actual theft of the funds in New York. Thus, Supreme Court's different forum non conveniens determinations did not render the second an abuse of its discretion.

CIVIL PROCEDURE, CHILD VICTIMS ACT

***Doe v Wilhelmina Models, Inc.*, 2024 NY Slip Op 00969 (1st Dept Feb. 27, 2024)**

Issue: **What are the pleading requirements for civil actions and proceedings brought pursuant to the Child Victims Act, as they relate to the allegations of predicate sexual conduct in satisfaction of CPLR 214-g and where that conduct occurred?**

Facts: Plaintiff, an aspiring model, sued her modeling agency and an advertiser under the Child Victims Act for two photoshoots when she was 16 and 17 years old, during which she alleged she was touched inappropriately. "As against both defendants, the complaint alleges a cause of action for invasion of privacy and a cause of action denominated 'negligence and breach of fiduciary duty.' Plaintiff alleges an additional cause of action against [the modeling agency] for sexual harassment. As to both defendants, for the purposes of revival under CPLR 214-g, plaintiff alleges that their conduct constituted both Penal Law article 130 offenses and a sexual performance under Penal Law § 263.05." Defendants moved to dismiss, arguing that the complaint did not "allege conduct meeting the requirements of the Penal Law that would permit revival of her claims, and thus the claims were time-barred." The advertiser also argued that since

their alleged misconduct occurred at a photoshoot in Mexico, the CVA revival did not apply. Supreme Court granted the motions and dismissed the complaint.

Holding: The First Department held that the "the extraterritoriality of the conduct alleged against [the advertiser] does not preclude application of the CVA to plaintiff's claims against it," since the CVA was designed to revive claims that could be brought in New York, not just claims for conduct occurring in New York. Turning to the "statutory interpretation [issue] with respect to the function of CPLR 214-g's requirement that the alleged predicate acts be committed against 'a child less than 18 years of age,'" both defendants argued that to allege the predicate conduct to revive a claim under the CVA, the plaintiff in this case had to satisfy all elements of Penal Law § 263.05, use of a child in a sexual performance, which includes that the victim is less than 16 years of age. Plaintiff's complaint alleged, rather, that she was 16 and 17 when the offending conduct occurred. The Court, however, rejected the defendants' statutory interpretation. The Court held, "CPLR 214-g applies solely in the civil context (and it applies only to civil 'claims,' as opposed to crimes), and defendants offer no cogent argument why we should presume that the civil liability permitted thereunder is or was intended to be coextensive with or dependent upon the corresponding criminal liability." Thus, agreeing with the Second Department's analysis in ***S.H. v Diocese of Brooklyn* (205 AD3d 180 [2d Dept 2022])**, the Court held, "the CVA must be read as extending revival for those underlying criminal offense statutes to any instance where the victim is less than 18 years of age, regardless of whatever age limitation the underlying criminal statute may have imposed."

SECOND DEPARTMENT

CONTRACTS, CONSIDERATION

***Keller-Wala v Coello*, 2024 NY Slip Op 01004 (2d Dept Feb. 28, 2024)**

Issue: **Must a contract have enumerated consideration to be valid?**

Facts: It's the rare case where a basic law school contracts hypothetical happens in real life. This is one such case. The plaintiffs, Ericka Keller-Wala and Brisa Builders Corp., commenced an action against the defendant for a judgment declaring that a written contract between them was null and void and unenforceable for lack of consideration. In the contract, the plaintiffs promised to pay certain developer fees and profit shares in various construction projects to the defendant and to transfer 10% ownership in Brisa Builders to him. Supreme Court granted the plaintiffs summary judgment and declared the contract void.

Holding: The Second Department affirmed, reiterating those basic formation of contracts principles that we all learned in our first-year contracts courses: "To establish the existence of an enforceable agreement, there must be consideration, among other things. Consideration consists of either a benefit to the promisor or a detriment to the promisee. Under the contemporary definition of consideration, it is enough that something is promised, done, forborne or suffered by the party to whom the promise is made as consideration for the promise made to him or her." Here, the contract failed to enumerate any express consideration or "any mutual promises of the parties to it from which such consideration can be fairly inferred." The contract was, therefore, invalid, the Court held.

THIRD DEPARTMENT

TORTS, VICARIOUS LIABILITY

***Brown v University of Rochester*, 2024 NY Slip Op 01134 (3d Dept Feb. 29, 2024)**

Issue: **May the national chapter of a fraternity be held vicariously liable for the acts or omissions of one of its local chapters at a university based on an agency theory?**

Facts: Plaintiff brought Child Victims Act claims against the University of Rochester, Delta Kappa Epsilon, and other individuals, seeking to recover damages for alleged sexual assaults she endured when she was a student at the University. "Plaintiff alleged in the complaint that on each of two separate occasions in 1984 — at which time she was a 17-year-old freshman at the University — she attended a party at the fraternity house of defendant Delta Kappa Epsilon. That fraternity house was located on campus and, on both occasions, plaintiff was rendered incapacitated by alcohol spiked with drug(s) and then sexually assaulted, each time by a different member of the fraternity." Plaintiff alleged that "she reported both sexual assaults to a University counselor but no investigation by appropriate authorities ensued" and that DKE was on notice of the local chapter's ongoing, illegal activities involving alcohol and sex abuse, but also failed to take action. DKE moved to dismiss, but Supreme Court denied the motion.

Holding: Noting that it had previously affirmed the denial of the University's motion to dismiss, because "where, as here, a complaint alleges that a university received credible reports of ongoing and pervasive criminal conduct against students, perpetrated on campus by other students within the university's control, the university had a legal duty to take appropriate responsive action" (***Brown v University of Rochester*, 216 AD3d 1328 [3d Dept 2023]**), the Third Department also affirmed the denial of DKE's motion. The Court held that "in the absence of disbandment of the particular local chapter, a plaintiff can successfully plead . . . that a national fraternity like DKE can be liable under an agency theory." The plaintiff did so here, the Court held, because even though DKE did not control the day-to-day operations of the local chapter, it failed to address the ongoing illegal activities that were occurring at the local chapter once it had notice

that they were happening. And it was adequately alleged that DKE had a principal-agent relationship with the local chapter, the Court held, because "the local chapters are required to make payments to DKE to remain in good standing. A DKE Chapter Services document states that DKE provides support and guidance to the local chapters in a variety of areas, including 'harm prevention.' The documentation further indicates that some local chapters have become inactive due to 'health and safety concerns that demanded action from the International Fraternity.' DKE also requires local chapters to 'maintain the Fraternity Standards' and to intervene in and report violations," including violations involving sexual misconduct. Thus, the Court held, the plaintiff's negligence claim was sufficiently alleged to avoid DKE's motion to dismiss.

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