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Summarizing recent significant New York appellate cases

The Fourth Department recently tackled whether an easement holder can delegate to another the duty to keep the premises over which the easement is held in a reasonably safe condition. That duty, the Court held, is nondelegable, even in the face of an express contract between the property owner and the easement holder delegating the duty to keep the premises safe to the property owner. 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

FREEDOM OF INFORMATION LAW

Matter of Legal Aid Socy. v Records Access Officer, 2025 NY Slip Op 00723 (1st Dept Feb. 06, 2025)

Issue: **How specific must an agency's denial of a Freedom of Information Law request be when the basis for the denial is that providing the records would be too burdensome?**

Facts: "Between 2007 and 2020, the NYPD procured an array of technology and surveillance products and services, including facial recognition software and cellphone tracking tools, using special expense purchase (SPEX) contracts. SPEX contracts are confidential agreements secured outside standard open-source procurement procedures . . . The NPYD determined that open-source procurement would undermine the effectiveness of the new surveillance technologies, and that the technologies would be more effective if kept secret from the public." In July 2020, however, the City Council adopted the Public Oversight of Surveillance Technology (POST) Act, which required the NYPD to report in public documents descriptions and uses of the surveillance technologies. "Starting in April 2021, the NYPD published its Final Surveillance and Use Policy on its website in a series of policy papers (currently numbering 37) broken down by technology, such as facial recognition, iris recognition, and mobile x-ray technology, to name a few."

In April 2020, the Legal Aid Society filed a FOIL request with the NYPD seeking any and all documents relating to "the NYPD's use of confidential SPEX contracts between 2007 and 2020" and included "a list of specific types of documents" that "corresponded with a list of specified contract documents that the NYPD was required to maintain as part of a 2010 agreement with the Comptroller." The NYPD denied the FOIL request only on the ground that it "did not reasonably describe a record in a manner that would enable a search to be conducted . . . The vacuousness of this denial was later further demonstrated when it became clear that the NYPD kept SPEX contract documents in hard copy form in a designated space at its offices. Because the NYPD wanted to keep the contract documents secret, they were not digitized and access to them was restricted. Therefore, the universe of responsive SPEX documents was segregated and kept in a single location, which would appear to facilitate a search." The NYPD also denied the Legal Aid Society's administrative appeal, citing a second reason for the denial—"that the number of records sought would mean that a response would be unreasonably burdensome, and would tax the limited resources of the NYPD."

In the ensuing Article 78 proceeding, Supreme Court held a hearing, where the NYPD offered one witness who testified that the "documents filled approximately 60 banker's boxes. The parties agree that there are approximately 165,000 pages of SPEX documents, all in hard copy. [The witness] testified that many of the documents would require redactions for the protection of personal information and trade secrets, and to ensure public safety, and that only he and one other colleague would have the expertise necessary to review the records and approve redactions." Although Supreme Court credited the testimony that the documents were voluminous, it nonetheless "found that [the witness] had not sufficiently explained why the production would 'take years' and could not be conducted within a reasonable amount of time. Supreme Court ordered that the NYPD provide a rolling production every quarter and provide status updates on its compliance."

Holding: The First Department affirmed, using this case to caution that an agency's invocation of FOIL exemptions, especially the voluminous and unduly burdensome grounds for denial under Public Officers Law § 89(3)(a), must be specific. Here, the Court held, the NYPD's evidence was not specific enough to carry its burden to justify the invocation of the FOIL exemptions. The Court reasoned, the NYPD witness "did not set forth the number of SPEX Contracts that are encompassed by the request. He also did not set out an approximate number of pages that contain potentially exempt information. Crucially, the NYPD made no effort to contend with the seismic shift caused by the POST Act. [The witness] made only passing mention of the public disclosures required by the POST Act and made no attempt to explain how those disclosures might affect the NYPD's claim of exemption. Because of the POST Act, the contracts in question no longer describe technologies hidden from the public. These technologies have been described by the NYPD itself in its published Final Surveillance and Use Policy. Thus, the NYPD failed to demonstrate, or even approximate, the portion of the documents that would fall

within the exemption for nonroutine criminal investigative techniques or procedures." Nor did the witness describe approximately how many redactions would have been necessary to protect personal privacy or trade secrets.

Finally, the Court held, "[t]he NYPD's assertion of the burdensomeness exemption also rests on the necessity of reviewing approximately 165,000 pages of hard-copy documents. While this is a considerable task, it is eased by Supreme Court's determination that the production could go forward quarterly, on a rolling basis. Additionally, the review is facilitated by the fact that the relevant documents are all in one place, and there is no need to search the NYPD's precincts and departments. While [the witness] stated that only he and one colleague were qualified to review this universe of documents, he failed to explain why other NYPD employees could not be trained to do so." Thus, the Court held, the NYPD's invocation of the burdensomeness exemption was not supported by specific evidence to carry its burden to deny access to the records, and could not allow the NYPD to "indefinitely foreclose disclosure."

SECOND DEPARTMENT

FAMILY LAW

***Matter of Sapphire W. (Kenneth L.)*, 2025 NY Slip Op 00662 (2d Dept Feb. 5, 2025)**

Issue: **May the Family Court place a nonrespondent custodial parent under the supervision of the Administration for Children's Services and the court, and direct the parent to cooperate with ACS in various ways, in circumstances where the respondent parent resides elsewhere and the child has not been removed from the nonrespondent parent's home?**

Facts: "In August 2023, ACS commenced this proceeding pursuant to Family Court Act article 10 against the father, alleging that he neglected the child by committing acts of domestic violence against the mother at her home in the presence of the child." At the initial hearing, the nonrespondent mother appeared before Family Court, but the respondent father did not. "ACS requested that the court issue a temporary order of protection in favor of the mother and the child and against the father, while also seeking the child's 'release' to the mother's custody under ACS's supervision." The attorney for the child objected, as did the mother. Although the Court noted that the nonrespondent mother "was not accused of anything," it nevertheless "placed the mother under the supervision of ACS and the court, and directed the mother to cooperate with ACS in certain respects. Specifically, the court required the mother to maintain contact with ACS, permit ACS's staff members to make announced and unannounced visits to the home, and accept any reasonable referrals for services." The mother appealed.

Holding: Noting that Family Court is a court of limited jurisdiction that can only exercise the powers granted to it under the Family Court Act, the Second Department held that no provision of the Family Court Act expressly authorized Family Court's directives to the nonrespondent mother. The Court reasoned, "the relevant provisions of Family Court Act § 1017 apply only when a court orders the removal of a child from his or her home and releases the child to the home of a nonrespondent and noncustodial parent. By the plain language of the statutory text, the provisions requiring the nonrespondent parent . . . to 'submit to the jurisdiction of the court with respect to the child' and 'to cooperate' with 'the child protective agency' in various ways are only triggered after the child is removed from the home. Here, since the court never determined that the child must be removed from her home, it did not have authority pursuant to Family Court Act § 1017 to impose the challenged directives upon the mother, no matter how 'well-intended' the court's 'goals' may have been." The Court further explained, "considering that [Family Court Act] article 10 serves, in part, to enact procedures preventing unwarranted state intervention in family life, and that the relevant provisions of Family Court Act § 1017, in particular, serve to help the child maintain family ties while respecting the rights of parents, ACS's position is necessarily at odds with the statute's legislative purpose. The challenged directives constitute precisely the type of state intervention that the Legislature sought to avoid in circumstances when it is not warranted, particularly considering the impact ACS involvement can have on a child or a parent."

FOURTH DEPARTMENT

TORTS, DUTY TO KEEP PREMISES SAFE

***Otero v Rochester Broadway Theatre League, Inc.*, 2025 NY Slip Op 00769 (4th Dept Feb. 7, 2025)**

Issue: **May a party delegate to another party the duty it owes to members of the public to keep its property—or property over which it has easement rights—in a reasonably safe condition?**

Facts: In this personal injury action involving a slip and fall on ice in a parking lot, the defendant moved for summary judgment, asserting that it "had absolutely no involvement with" the parking lot where plaintiff was injured, and that it was owned instead by an adjacent property owner. In opposition, the plaintiff submitted "a 2004 easement agreement between defendant and the nonparty owner of the adjacent property at that time, which was filed in the Monroe County Clerk's Office. The easement agreement granted defendant, which hosts public events in its theater, a 'perpetual easement over and through the exterior parking area' owned by the nonparty owner of 875 East Main Street." On reply, the defendant acknowledged the easement, but "submitted for the first time a 2004 Parking Agreement between defendant and the nonparty owner of 875 East Main Street, pursuant to which the latter agreed to maintain the parking lot and keep it 'reasonably clear of ice and snow.' Relying on that parking agreement, defendant contended that it should not be held liable for

maintenance of an area that it did not own, occupy or control and was not otherwise contractually obligated to maintain. Supreme Court agreed with defendant and granted its motion."

Holding: The Fourth Department reversed, holding that Supreme Court erred in two ways: (1) by granting the motion based on defendant's argument raised for the first time on reply, and (2) by holding that defendant did not owe a duty of care to keep the parking lot reasonably clear of ice and snow. The Court explained, Supreme Court "erred in determining that defendant had no duty to maintain the parking lot and thus owed no duty of care to plaintiff. As the owner of the dominant estate granted by the easement agreement, defendant had a duty to maintain the parking lot in a reasonably safe condition, and defendant cites no authority for the proposition that a party may delegate to another party the duty it owes to members of the public to keep its property—or property over which it has easement rights—in a reasonably safe condition." To the contrary, the Court adopted the Second Circuit's rule that "the duty of an easement holder is the same as that owed by a landowner and is nondelegable. We therefore conclude that defendant's duty to exercise reasonable care toward third parties making use of the parking lot subject to the easement, once established, is not abrogated by a covenant on the part of the servient owner, i.e., the nonparty owner of 875 East Main Street, to clear ice and snow from the lot. The general rule that a servient owner may assume duties of maintenance, while undoubtedly relevant as between dominant and servient owners, does not apply when the rights of injured third parties are implicated, as in the case here. The fact that the nonparty owner of 875 East Main Street may also have had a duty to maintain the parking lot does not serve to insulate defendant from liability to plaintiff."

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