GIBSON DUNN

New York Court of Appeals Round-Up

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The New York Court of Appeals Round-Up summarizes key opinions issued by the Court over the past year. The cases are organized by subject. We also highlight a number of civil cases that the Court will hear during the coming year, beginning in September 2017.

This Term, as last term, has been marked by significant changes in the Court's membership. On February 7, 2017, Rowan D. Wilson was confirmed as an Associate Judge, and on June 21, 2017, Paul G. Feinman was confirmed to fill the vacancy caused by the untimely passing of Associate Judge Sheila Abdus-Salaam. The next scheduled vacancy will not occur until January 1, 2022, when Associate Judge Eugene Fahey reaches the mandatory retirement age.

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I. Contract Law

Over the past year, the Court of Appeals decided several cases involving significant issues of contract law, including the conditions for contract formation, and issues regarding adjudication and interpretation of arbitration agreements and waivers.

1. ***Stonehill Capital Management, LLC v. Bank of the West*** **(28 N.Y.3d 439; December 20, 2016).**

   In a unanimous decision (Rivera, J.), the Court held that, based on the totality of the parties' conduct, written execution and deposit requirements in a contract were "not conditions precedent to formation" of the contract where the agreement and the parties' actions did not suggest otherwise. Thus, the failure to fulfill those conditions did "not render their agreement unenforceable." Plaintiff submitted the winning auction bid for a non-performing loan held by defendant, but defendant later chose not to sell the loan. Noting the "general rule . . . that a seller's acceptance of an auction bid forms a binding contract, unless the bid is contingent on future conduct," the Court reversed the Appellate Division and held that where "closure of the transaction required execution of a signed document" and "tender of the 10% deposit," there was no "clear expression that the parties were not bound to consummate the sale and that [defendant] could withdraw at any time, for any reason." Therefore, the Court found that "the signed writing and deposit were post-agreement requirements necessary for the consummation of the transfer," rather than conditions "delay[ing] the formation of a binding contract absent the passage of those events."

2. ***Town of Amherst v. Granite State Insurance Co.* (29 N.Y.3d 1016; June 1, 2017).**

   In a short memorandum decision (DiFiore, C.J., and Rivera, Garcia, and Wilson, J.J.), the Court held that, "[u]nder the facts of this case, including the terms of the parties' insurance policy, which incorporated the rules of the American Arbitration Association," an arbitrator had authority to determine whether a later agreement by the parties affected the arbitrability of the dispute. The relevant policy contained an arbitration clause requiring the parties to arbitrate any "disagreement as to the interpretation of [the] Policy." The Fourth Department found that language sufficiently broad as to empower an arbitrator to decide the significance of the parties' subsequent handwritten agreement "to litigate the issue of the ownership" of a challenged amount of post-judgment interest. The Court of Appeals affirmed, without elaboration. The dissent (Stein, J.) "interpret[ed] the arbitration clause at issue here as narrow, rather than broad," and would have had the courts, rather than the arbitrator, decide whether the dispute was arbitrable.

II. Torts

In the past year, the Court addressed numerous torts issues, including the scope of the New York's champerty statute and its safe harbor provision, defamation liability, and fraud allegations against commercial entities.

1. ***Justinian Capital SPC ex rel. Blue Heron Segregated Portfolio v. WestLB AG* (28 N.Y.3d 160; October 27, 2016).**

   In a 5-2 decision (DiFiore, C.J., joined by Rivera, Abdus-Salaam, Fahey, and Garcia, J.J.), the Court held that the state champerty statute's safe harbor provision requires "a binding and bona fide obligation to pay $500,000 or more for notes or other securities, which is satisfied by actual payment . . . or the transfer of financial value worth at least $500,000." Justinian agreed to purchase certain notes held by Blue Heron for $1 million, and brought a fraud claim against defendant, the issuer of the notes, before Justinian actually paid Blue Heron. The majority found that discovery showed that "Justinian's sole purpose in acquiring the notes was to" sue and therefore "its acquisition was champertous." The majority further found that the purchase agreement "was structured so that Justinian did not have to pay the purchase price unless the lawsuit was successful, in litigation or in settlement." Therefore, the agreement did not create a "binding and bona fide obligation to pay $500,000 or more," and the safe harbor provision had not been triggered. The dissent (Stein, J., joined by Pigott, J.) agreed with the majority's holding about how to satisfy the safe harbor, but argued that issues of fact precluded summary judgment on whether the purchase was champertous and whether the safe harbor was triggered.

2. ***Three Amigos v. CBS News Inc.* (28 N.Y.3d 82; October 25, 2016).**

   In a 5-1 decision (Pigott, J., joined by Rivera, Abdus-Salaam, Fahey, and Garcia, J.J.), the Court held that, as a matter of law, allegedly defamatory news reports were not "of and concerning" the plaintiffs when the reports "failed to include

sufficient particulars of identification in order to be actionable by any individual." Specifically, the "statement that [the Cheetah Club] was 'run by the mafia' could not reasonably have been understood to mean that certain unnamed individuals who do not work for Cheetah's but oversee its food, beverage and talent services are members of organized crime," and the statements did not "describe a particular, specifically-defined group of individuals who 'run' the Cheetah Club, such that the small group libel doctrine would apply." In dissent, Judge Stein argued that the challenged statements were "susceptible to more than one reasonable interpretation," and implicated only three individuals, so the issues should have been decided by a jury.

3. ***Connaughton v. Chipotle Mexican Grill, Inc.*** **(29 N.Y.3d 137; May 2, 2017).**

In a unanimous decision (Rivera, J.), the Court held that a plaintiff must allege "any out-of-pocket loss" or "otherwise plead a recoverable harm" to state a claim for fraudulent inducement. Plaintiff, a well-known chef, sued his former employer for fraudulent inducement, alleging that he would not have accepted the job if the employer had not concealed a business arrangement with another chef. As damages, plaintiff claimed that he lost equity in the employer corporation, potential unspecified business opportunities, and his reputation. The Court, affirming the decision by a divided Appellate Division, held that plaintiff's claim was "fatally deficient" because he had not asserted compensable damages. Specifically, he had asserted "the quintessential lost opportunity, which [is] not a recoverable out-of-pocket loss" because it is "too speculative a recovery." The Court further found that plaintiff's allegations of potential future litigation expenses and loss of reputation were "not claims of actual out-of-pocket loss but speculative claims of possible future damages." Therefore, it affirmed dismissal of the action.

III. Jurisdiction and Civil Procedure

In the past year, the Court decided a number of cases involving issues of jurisdiction and civil procedure, including significant decisions addressing the scope of personal jurisdiction. It also addressed issues of expert disclosure and late notice of claims.

1. ***Rushaid v. Pictet & Cie*** **(28 N.Y.3d 316; November 22, 2016).**

In a 4-3 decision (Rivera, J., joined by Abdus-Salaam, Fahey, and Garcia, J.J.), the Court reversed the First Department and held that "defendants' intentional and repeated use of New York correspondent bank accounts" was sufficient to "confer[] personal jurisdiction within the meaning of CPLR 302(a)(1)," New York's long-arm statute. Plaintiffs alleged that defendants, a Swiss bank and its leaders, participated in a scheme to launder money and conceal bribes and kickbacks paid through the bank's correspondent account in New York. The Court explained that—under *Licci v. Lebanese Canadian Bank, SAL*, 20 N.Y.3d 327 (2012) and *Amigo Foods Corp. v. Marine Midland Bank-NY*, 39 N.Y.2d 391 (1976)—"unintended and unapproved use of a correspondent bank account" is insufficient for jurisdiction, but "[r]epeated, deliberate use that is approved by the foreign bank on behalf of and for the benefit of the customer" demonstrated

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"more than banking by happenstance." That type of "correspondent banking activity is sufficient to establish a purposeful course of dealing, constituting the transaction of business in New York under CPLR 302(a)(1)." Judge Garcia concurred, and wrote separately to highlight why he believed the majority position was consistent with precedent. The dissent (Piggot, J., joined by DiFiore, C.J., and Stein, J.) argued that defendants had not "transacted business" within New York because they had merely maintained a New York correspondent account and passively received funds transferred into that account.

2. ***D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro*** **(2017 N.Y. Slip Op. 04494; June 8, 2017).**

   In a unanimous decision (DiFiore, C.J.), the Court held that, under New York's long-arm statute, a Spanish winery was subject to personal jurisdiction in New York because it "engaged in activities in New York in furtherance of [an] agreement," and there was "an articulable nexus or substantial relationship between defendant's New York activities and the parties' contract." Plaintiff, a Spanish company, orally agreed to find an American importer and distributor for defendant's wine in exchange for commissions on wine sales. Plaintiff brought defendant to several "wine industry events" in New York, and later sued for breach of contract after defendant failed to pay commissions on the resulting sales. The Appellate Division found personal jurisdiction lacking because although those visits constituted a "transaction of business" under CPLR 302(a)(1), it saw no nexus between those visits and the contract at issue. The Court reversed. It agreed that defendant's visits constituted "transaction of business," but found a sufficient nexus because the wine sales flowing from those visits were "at the heart of plaintiff's claim" for unpaid commissions. The Court further found that exercising personal jurisdiction satisfied constitutional due process because defendant had "availed itself of the privilege of conducting business in New York by promoting its wine here, soliciting a distributor here, and selling wine to that New York-based distributor."

3. ***Wilson v. Dantas*** **(2017 N.Y. Slip Op. 04387; June 6, 2017).**

   In a unanimous memorandum opinion concerning the plaintiff's claims to recover the carried interest from investment entities that he was allegedly promised, the Court affirmed the Appellate Division without elaboration—finding that defendants "expressly abandoned their personal jurisdiction claims in their appeal," and that their "remaining claims, to the extent reviewable on this appeal, are without merit." In a lengthy dissent, Judge Wilson argued that the Court lacked appellate jurisdiction due to defendants' abandonment, and addressed the merits due to "disagree[ment] with the majority's conclusion as to the complaint's sufficiency" and the propriety of the Appellate Division's denial of dismissal on *forum non conveniens* grounds.

4. ***Rivera v. Montefiore Medical Center*** **(28 N.Y.3d 999; October 20, 2016).**

   In a unanimous memorandum opinion, the Court held that the trial court had not abused its discretion by denying as untimely a motion to preclude expert testimony, when the "motion was made at trial, rather than upon receipt of the

expert disclosure statement." Plaintiff argued at trial that defendant's expert disclosure statement, required by CPLR 3101(d), was deficient because it did not specify the expert's causation theory. The Court affirmed the decision, which found the motion untimely, holding, "on the facts and circumstances of this particular case, that the time to challenge the statement's content had passed because the basis of the objection was readily apparent from the face of the disclosure statement and could have been raised – and potentially cured – before trial."

5. ***Raymond Newcomb v. Middle Country Central School District*** **(28 N.Y.3d 455; December 22, 2016).**

   In a unanimous decision (DiFiore, C.J.), the Court held that denying a motion to file a late notice of claim was an "abuse of discretion as a matter of law" when a court decides, "in the absence of any record evidence to support such determination, that a respondent will be substantially prejudiced by a late notice of claim." Petitioner filed a late notice of claim under General Municipal Law § 50-e, arguing that its delay was reasonable and that defendant would not be prejudiced by late notice. The lower courts presumed defendant would be prejudiced and denied the motion. The Court reversed, explaining that a lower court's finding of prejudice "cannot be based solely on speculation and inference; rather, a determination of substantial prejudice must be based on evidence in the record." In addition, resolving a split within the Appellate Divisions, the Court held that petitioner has the initial burden "to show that the late notice will not substantially prejudice the public corporation," and that the corporation must then "respond with a particularized evidentiary showing that" it will be prejudiced by late notice.

IV. Administrative and Constitutional Law

In the past year, the Court decided major cases involving the ability to challenge third party subpoenas and the public trust doctrine. It also addressed the procedures that municipalities must follow in evaluating contract bids.

1. ***In re 381 Search Warrants Directed to Facebook, Inc.*** **(29 N.Y.3d 231; April 4, 2017).**

   In a 5-1 decision (Stein, J., joined by DiFiore, C.J., and Abdus-Salaam and Fahey, J.J.; Rivera, J., concurring in the judgment), the Court held that an electronic service provider cannot appeal the denial of a motion to quash a search warrant issued under the Stored Communications Act (SCA). The case arose after Facebook moved to quash 381 search warrants, issued under the SCA and state law, seeking information from its users' accounts as part of an investigation by the New York County District Attorney. The trial court denied Facebook's motion, and the Appellate Division held that the denial was a nonappealable order issued in a criminal proceeding. The Court of Appeals held that it was "constrained by law to affirm." Although noting that the case presented "novel and important substantive issues regarding the constitutional rights of privacy and freedom from unreasonable search and seizure," the Court found appellate

jurisdiction lacking because the legislature had not authorized an appeal from an order denying a motion to quash a search warrant. In a lengthy dissent, Judge Wilson argued that service providers have a right to challenge SCA warrants and a right to appeal the denial of that challenge. Judge Rivera agreed with Judge Wilson, but concurred in the judgment, finding that Facebook had not preserved its right to appeal.

2. ***Avella v. City of New York* (2017 N.Y. Slip Op. 04383; June 6, 2017).**

   In a 5-1 decision (Wilson, J., joined by Rivera, Stein, Fahey, and Garcia, J.J.), the Court held that the state legislature's approval to build a stadium and related facilities on a tract of parkland did not also grant the City authority to allow construction of a retail and entertainment center on that site. Plaintiffs sued to enjoin development of the center on a parking lot where Shea Stadium once stood, arguing that it violated the Public Trust Doctrine because the legislature had not approved alienation of that land for that purpose. The trial court denied relief but the Appellate Division reversed, finding that the legislature's approval did not "authoriz[e] the construction of another structure that has no natural connection to a stadium." The Court affirmed, holding that the text and legislative history of the statute indicated that the legislature did not grant the City authority to construct the development at issue. Chief Judge DiFiore dissented, arguing that "the statute expressly authorizes the proposed development of Willets West" because the project "would promote the specific public purposes set forth in the statute."

3. ***ACME Bus Corp. v. Orange County* (28 N.Y.3d 417; November 22, 2016).**

   In a 5-2 decision (Fahey, J., joined by DiFiore, C.J., and Rivera, Abdus-Salaam, and Stein, J.J.), the Court held that a contract award is arbitrary and capricious under Article 78 when the awarding county "fails to comply with its own rules" or "evaluates a proposal using a standard that deviates" from its stated standard. Petitioner sued to invalidate transportation contracts awarded by Orange County after the Country "abandoned the cost formula it had promised to apply" in its request for proposals and "instead created a new formula." The Court held that deviating from the RFP was improper, extending its decision in *AAA Carting & Rubbish Removal, Inc. v. Town of Southeast*, 17 N.Y.3d 136 (2011), which outlined the standards for awarding a competitive-bid contract under General Municipal Law § 104-b. The dissent (Garcia, J., joined by Piggott, J.) argued that the County acted rationally in revising the criteria for evaluating the proposals and that the majority's decision subjects counties to unnecessary costs.

V. Copyright Law

In the past year, the Court decided a major case addressing the scope of common-law copyright protections for creators of sound recordings.

1. ***Flo & Eddie, Inc. v. Sirius XM Radio, Inc.* (28 N.Y.3d 583; December 20, 2016).**

   In a case presenting two questions certified by the Second Circuit, the Court held that "New York common-law copyright does not recognize a right of public

performance for creators of sound recordings" fixed prior to 1972. The majority (Stein, J., joined by Pigott, Fahey, and Garcia, J.J.) concluded that in light of state and federal precedent, New York common-law copyright protection was best understood as preventing only unauthorized reproduction of a copyrighted work, but did not using copies of sound recordings to play them. The majority noted that because "the consequences" of recognizing such rights could be "extensive and far-reaching, and there are many competing interests at stake," recognition "should be left to the legislature." Judge Fahey wrote separately to argue that "'public performance' does not include the act of allowing members of the public to receive 'on-demand' transmission of sound recordings specifically selected by those listeners." The dissent (Rivera, J., joined by Abdus-Salaam, J.) argued that "New York's broad and flexible common-law copyright protections for sound recordings encompass a public performance right that extends to the outer boundaries of current federal law, and ceases upon preemption by Congress."

VI. Looking Ahead

We highlight below a number of the civil cases the Court of Appeals will hear during the coming year, beginning in September 2017.

1. **Contract Law**

   a. ***Kolchins v. Evolution Markets, Inc.* (128 A.D.3d 47 (1st Dep't 2015); APL-2016-00234; argument not yet scheduled).**

      The First Department granted leave for the Court of Appeals to address whether the parties' emails and other correspondence created an enforceable contract to extend an employment agreement, despite the absence of a formal contract.

   b. ***Garthon Business Inc. v. Stein* (138 A.D.3d 587 (1st Dep't 2016); APL-2016-00097; argument scheduled for September 12, 2017).**

      The Court of Appeals granted leave to address whether a court or arbitrator has the authority to resolve claims arising out of more than one agreement, where the agreements at issue provide for different dispute resolution mechanisms.

   c. ***Morgan Stanley Mortg. Loan Trust 2006-13ARX v. Morgan Stanley Mortg. Cap. Holdings LLC* (143 A.D.3d 1 (1st Dep't 2016); APL-2016-00240; argument not yet scheduled).**

      The First Department granted leave for the Court of Appeals to address whether a "sole remedy" clause in an agreement related to residential mortgage-backed securities is enforceable when a plaintiff alleges gross negligence and that the sole remedy will not make it whole, and whether a plaintiff must show an independent tort duty to render that clause unenforceable.

d. ***Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*** **(133 A.D.3d 96; APL-2016-00024; reargument not yet scheduled).**

The Court of Appeals has ordered reargument in this case, which was initially argued on March 22, 2017. The First Department originally granted leave for the Court of Appeals to address whether the "sole remedy" provision in a residential mortgage-backed securitization's Pooling and Servicing Agreement prohibits plaintiffs from seeking additional remedies based on an alleged breach of a general provision, in a related Mortgage Loan Purchase Agreement, providing that the deal documents contain no untrue statements.

e. ***Deutsche Bank Nat'l Trust Co. v. Flagstar Cap. Mkts. Corp.*** **(143 A.D.3d 16 (1st Dep't 2016); APL-2016-00234; argument not yet scheduled).**

The First Department granted leave for the Court of Appeals to address whether the plaintiff's breach of contract claim, brought more than six years after the seller's alleged misrepresentations, is barred by the statute of limitations when the parties' agreement includes a provision that delayed the cause of action's accrual, and thereby effectively extended the statute of limitations based on a discovery rule. The Court may also address whether the claim accrual provision is unenforceable as against public policy under *ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v. DB Structured Prods., Inc.*, 25 N.Y.3d 581 (2015).

f. ***Guidance Enhanced Green Terrain, LLC v. Bank of America Merrill Lynch*** **(146 A.D.3d 431 (1st Dep't 2017); APL-2017-00042; argument not yet scheduled).**

The First Department granted leave for the Court of Appeals to address whether, under the agreement at issue, the plaintiff assignor had a contractual right to compel the defendant assignee to reassign the claims it purchased to a third party, as a condition of a settling a related claim.

2. **Corporate Law**

a. ***Congel v. Malfitano*** **(141 A.D.3d 64 (2d Dep't 2016); APL-2017-00005; argument not yet scheduled).**

The Court of Appeals granted leave to address the scope of provisions regarding wrongful dissolution under New York Partnership Law; whether certain discounts may be applied in determining the value of the dissolving partnership; and whether counsel fees are recoverable by the prevailing party as damages in an action brought against the wrongful dissolver of a partnership.

b. ***Davis v. Scottish Re Group Ltd.*** **(138 A.D.3d 230 (1st Dep't 2016); APL-2016-00146; argument not yet scheduled).**

The First Department granted leave for the Court of Appeals to address whether, under New York choice of law doctrine, a minority shareholder has

standing to assert derivative claims in a New York court arising from a cash-out merger on behalf of a company incorporated in the Cayman Islands, when the Cayman courts have not granted leave to proceed with the derivative claims. The Court may also clarify when a plaintiff has standing to bring a derivative claim under the exceptions noted in *Foss v. Harbottle*, [1843] 2 Hare 461.

3. **Civil Procedure**

   a. ***Paramount Pictures Corp. v. Allianz Risk Transfer AG* (141 A.D.3d 464 (1st Dep't 2016); APL-2016-00221; argument not yet scheduled).**

      The Court granted leave to address whether a party that fails in a federal action to assert a counterclaim deemed compulsory under the Federal Rules of Civil Procedure is subsequently barred by the doctrine of res judicata from asserting that claim in a subsequent state action between the same parties. The Court may also clarify whether a claim for breach of a covenant not to sue is a compulsory counterclaim under Federal Rule 13(a).

   b. ***Desrosiers v. Perry Ellis Menswear, LLC* (139 A.D.3d 473 (1st Dep't 2016); APL-2016-00188; argument not yet scheduled); *Vasquez v. Nat'l Securities Corp.* (139 A.D.3d 503 (1st Dep't 2016); APL-2016-00239; argument not yet scheduled).**

      The First Department granted leave in two cases for the Court of Appeals to address whether members of a putative class must be given notice under CPLR 908 when a putative class action is discontinued, when the time for the individual plaintiff to move for class certification under CPLR 902 has expired. The Court may also clarify how class-action tolling under the federal rule of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), applies under state law.

   c. ***Cortlandt Street Recovery Corp. v. Bonderman* (142 A.D.3d 833 (1st Dep't 2016); APL-2017-00014; argument not yet scheduled).**

      The First Department granted leave for the Court of Appeals to address whether an indenture trustee has standing under the indenture at issue to assert third-party claims on behalf of all noteholders. The Court may also address whether a complaint sufficiently alleges alter ego liability by claiming that defendants controlled and caused the issuer of notes to divest itself of proceeds and thereby become insolvent.

4. **Administrative and Constitutional Law**

   a. ***People v. Credit Suisse Securities (USA), LLC* (145 A.D.3d 533 (1st Dep't 2016); APL-2017-00056; argument not yet scheduled).**

      The First Department granted leave for the Court of Appeals to consider whether an action brought by the Attorney General under the Martin Act and Executive Law § 63(12) for alleged investor fraud is subject to a three-year

statute of limitations under CPLR 214, or a six-year statute of limitations under CPLR 213. The court may clarify the scope of *Gaidon v. Guardian Life Insurance Co. of America*, 96 N.Y.2d 201 (2001), where the court applied the three-year limitations period because the basis of liability, though akin to common-law fraud, was nonetheless a "creature of statute."

b. ***Abdur-Rashid v. NYPD*** **(140 A.D.3d 419 (1st Dep't 2016); APL-2016-00219; argument not yet scheduled).**

The Court granted leave to address whether the New York State Freedom of Information Law (FOIL) allows a respondent to refuse to confirm or deny the existence of records in response to a FOIL request, under the Glomar doctrine applicable to federal Freedom of Information Act requests, where the respondent has shown that such confirmation or denial would cause harm under a FOIL exception.

5. **Insurance**

a. ***Keyspan Gas East Corp. v. Munich Reins. America, Inc.*** **(143 A.D.3d 86 (1st Dep't 2016); APL-2016-00236; argument not yet scheduled).**

The First Department granted leave for the Court of Appeals to address whether under the terms of an agreement the policyholders or the insurers bear the risk of pro-rata liability for long-term, continuous injuries, such as environmental contamination, for periods where insurance coverage was not available on the marketplace. The Court may also address whether "all sums" allocation of liability is required by the insurance policies at issue, and clarify the Court's recent decision in *Matter of Viking Pump, Inc.*, 27 N.Y.3d 244 (2016).

b. ***Carlson v. American Int'l Grp., Inc.*** **(130 A.D.3d 1477 (4th Dep't 2015), 130 A.D.3d 1479 (4th Dep't 2015); APL-2016-00041; reargument not yet scheduled).**

The Court of Appeals has ordered reargument of this case, in which it granted leave to address whether an insurer did not "issue or deliver" an insurance policy in New York, thus precluding a lawsuit against it under Insurance Law § 3420(A)(2). The Court may also address whether the tortfeasor's vehicle was "hired" by another company, and therefore covered under its automobile insurance policy.