OUTSIDE COUNSEL

New Court of Appeals Cases - Civil

By Alan J. Pierce
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In April and May the Court of Appeals granted leave to appeal, or accepted for full argument and briefing new appeals where leave was granted or questions were certified to the Court by another court, in several civil cases discussed here briefly.[1]

There is a strong emphasis on issues effecting governmental entities: of the 14 appeals addressed herein, eight involve municipal parties and issues of zoning, tax certiorari, SEQRA, annexation of property, FOIL, and the application of a shortened statute of limitations.

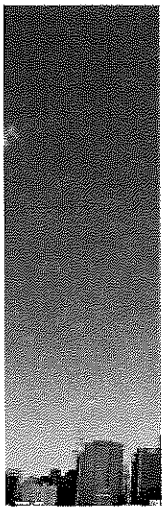
Town-Approved Subdivision Plats

In *O'Mara v. Town of Wappinger*,[2] the Court accepted the certification of a question of law from the U.S. Court of Appeals for the Second Circuit concerning the enforceability of zoning restrictions on town-approved subdivision plats.

In 2000 plaintiffs purchased two parcels that had been designated as open space in a subdivision plat approved by the Town Planning Board in 1963, and proceeded with plans to build 10 single-family homes, including a home for the plaintiff on one parcel. After the town issued a building permit and temporary certificate of occupancy and approved an interim survey plan for the house and a site plan, and work was underway on the home site, a relative of the original developer complained and the town building inspector issued a stop work order. After a bench trial the District Court found that the open space restriction was unenforceable because it had not been recorded with Dutchess County and therefore plaintiffs lacked notice, and that plaintiffs were entitled to damages for a violation of substantive due process under 42 USC §1983.

The Second Circuit vacated the award of damages and found an ambiguity under New York law regarding the enforceability of the open space restriction against plaintiffs because the District Court did not discuss why a duly promulgated zoning regulation would fall under Real Property Law §291, which addresses the recording of a "conveyance of real property," and why New York statutes that describe the powers of town planning boards in approving subdivisions and filing subdivision maps did not govern.

In *Matter of Haberman v. Zoning Board of Appeals of City of Long Beach*,[3] the Second Department dismissed a hybrid proceeding under CPLR Article 78 to review a determination of the Zoning Board revoking a building permit previously issued to petitioners. In so doing, the court found that Supreme Court properly reached the merits of the combined petition and complaint notwithstanding that respondents had never answered. Moreover, it found that the



Zoning Board had a rational basis for revoking the building permit because petitioners did not request the building permit within the allowable five-year period from the issuance of a variance previously granted to them, and the stipulation extending the time period was not ratified by the Zoning Appeals Board. Thus, the time period was not extended.

In *Matter of Steel Los III/Goya Foods, Inc. v. Board of Assessors of County of Nassau*,[4] the Second Department affirmed a judgment which granted Bethpage School District's motion to intervene in consolidated tax certiorari proceedings and a related action and vacated a prior order that improperly allowed Nassau County to shift the burden to Bethpage for credits due to petitioner resulting from a reduction in the assessed value of petitioner's real property. Since the county's obligation under the Nassau County Administrative Code was applicable to refunds of payments-in-lieu-of-taxes (PILOT) payments, any credits due to petitioner for PILOT payments were charges of the county and could not be used to reduce future PILOT payments to Bethpage. The county was directed to remit to Bethpage the full amount of petitioner's school PILOT levy without any reduction for credits issued to petitioner by the County.

SEQRA's 'Hard Look'

The Court will address whether a lead agency took the necessary "hard look" under the State Environmental Quality Review Act (SEQRA) in four proceedings related to a residential subdivision plat in *Matter of Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*[5] and *Matter of Ingraham v. Planning Bd. of Town of Southeast*.[6]

In a 3-1 decision in three joined proceedings in *Riverkeeper,* the Second Department held that a second Supplemental Environmental Impact Statement (SEIS) was required for final conditional approval of the plat where potential environmental impacts had changed in the more than 12 years since the final EIS and initial SEIS were submitted in connection with original plat. Moreover, the majority found that the final EIS and initial SEIS were inadequate, insofar as the Planning Board as lead agency simply deferred analysis of critical issues concerning wetlands, integrity of the watershed, control of phosphorus pollution, stormwater runoff, and sewage disposal to other involved agencies that were responsible for the issuance of numerous permits. The Planning Board could have properly deferred to other involved agencies, except here the Planning Board made an "environmentally significant determination" before the other agencies' permit processes were completed. *Ingraham* involved a separate challenge to the same Planning Board determination, which was annulled again based on the decision in *Riverkeeper.*

In *Matter of City of Utica v. Town of Frankfort*,[7] the Court will address the unusual issue of the annexation of property (225 acres owned by a single entity) by the city of Utica (located in Oneida County) from the town of Frankfort and Herkimer County. The city brought this original proceeding in the Fourth Department under General Municipal Law §712 and the court appointed three referees who, after a hearing, recommended that the petition be approved. The court held that the report of the referees was advisory only, but that their recommendation was entitled to great weight, and Utica met its burden of establishing that the annexation was in the overall public interest. The court noted that the property owner would receive the benefit of full time police and fire protection and the annexation would streamline the property owner's health care services by having all of its facilities located in one county.

Freedom of Information Law

The Court will address significant issues in *Matter of Data Tree, LLC v. Romaine*[8] that highlight how well the current Freedom of Information Law (FOIL) can be applied in the ever changing world of technology. Petitioner requested raw data utilized in compiling public documents - it was "data mining" said respondent, admittedly for commercial purposes - and the Suffolk County Clerk denied the request under Public Officers Law §87(2)(b) because the disclosure would entail an unwarranted invasion of personal privacy. The Second Department upheld this determination, but went further to find that - to the extent that petitioner's request fell within the broad parameters of a "record" as defined by §86(4) - the right to access and copy such public records has not been construed to require extraordinary efforts by an agency to provide the records in the manner requested and without regard to other statutorily mandated obligations to protect the privacy interests of the citizens of the state as determined by the county clerk here. Most importantly, the court held that "evolving concerns for protecting privacy even beyond

that contemplated by the exemptions enumerated in *** §87(2) can be a basis for denial of the requested items ***."

In *Matter of Amorosi v. South Colony Indep. Cent. School Dist.*,[9] the Court will again address a thorny statute of limitations issue. The Third Department held that the one-year statute of limitations contained in Education Law §3813(1) for actions against a school district applies to a discrimination claim under Executive Law §296 that otherwise would be governed by a three-year statute of limitations under CPLR 214(2). The Appellate Division read the statute broadly as applying to all actions, and specifically rejected two decisions from the Second Department to the contrary.[10]

Negligence Cases

The Court granted leave in two cases that address the general rule that a party who breaches its contractual duties is not liable to a stranger to the contract for negligent performance of its contractual duties. In *Fung v. Japan Airlines Co., Ltd.*[11] the Second Department held that a snow removal company that contracted with the airlines to remove snow and ice did not assume a duty to exercise reasonable care to prevent foreseeable harm to a Port Authority employee, who slipped and fell on a patch of ice in the parking lot.

The court awarded summary judgment to the snow removal company because plaintiff failed to raise a triable issue of fact on any of the three recognized exceptions to the general rule.

Similarly, in *Stiver v. Good & Fair Carting & Moving, Inc.*,[12] a motorist injured in an automobile accident brought a negligence action against the company that performed the mandatory New York State vehicle inspection on the other vehicle involved in the collision. The Fourth Department held that the vehicle inspection company owed no duty of care to the injured motorist and that it was not liable under either of the two following exceptions: (1) when the contracting party creates an unreasonable risk of harm or launches a force or instrument of harm, or (2) where the injured party detrimentally relies on the contracting party's continued performance of its contractual obligations.[13]

In *Yarborough v. City of New York*,[14] the Second Department held that plaintiff, a pedestrian who was injured when he stepped into a pothole, failed to raise a triable issue of fact that the city created a defect through an affirmative act of negligence. The city established that it had no prior written notice of the alleged dangerous condition as required under Administrative Code §7-201(c)(2). The Second Department found that regardless of whether Supreme Court erred in considering plaintiff's expert affidavits, the submissions were insufficient to raise a triable issue of fact. Although the expert affidavits asserted that the city was the only entity that could have been responsible for the allegedly defective street repair and outlined the manner in which the repair deviated from relevant construction industry practices, the affidavits did not address when the street repair occurred in relation to the accident or that the repair immediately resulted in a dangerous condition. The court held that the "mere 'eventual' emergence of a dangerous condition as a result of wear and tear and environmental factors, as described by one of the plaintiff's experts, does not constitute an affirmative act of negligence that abrogates the need to comply with prior written notice requirements ***."

Excess Insurance

In *Long Island Lighting Co. v. Allianz Underwriters Ins. Co.*,[15] the Court will determine if certain excess insurance policies are implicated by the insureds' actual and potential exposure at numerous environmental contamination sites. In a 3-2 decision the First Department held there was a question of fact precluding summary judgment in favor of Continental, finding that the insured's "potential liability" may reach into Continental's excess coverage. The majority noted that there are different ways to prorate liability among successive policies (various insurers over 33 years in this case), and that the "worst case" or "highest estimate of damages" may be used to ascertain whether a claim is justiciable against a particular excess insurer's policy. The dissenters found no justiciable controversy because they interpreted the report of the insured's expert as providing only a "slim chance" that the 1954-1956 policy will be reached and "virtually no chance" that any of the other Continental excess policies will be reached.

In *Matter of the American Committee for the Weizmann Institute of Science v. Dunn*,[16] the Court will address a

claim of undue influence to vacate a probate decree, and decide what type of written agreement to make a testamentary bequest is sufficient to satisfy the statute of frauds under EPTL §13-2.1(a). The First Department affirmed the Surrogate's grant of a pre-answer motion to dismiss and held that the testator's decision to bequeath property to her niece after her brother provided hospice care for her, by itself, could not show undue influence. It also held that the alleged agreement to bequeath property to the charitable organization did not satisfy the statute of frauds because the necessary identity of the property was not set forth in the writing signed by the testator and a later writing referring to the property did not unequivocally refer to the alleged contract.

Finally, the Fourth Department granted leave to appeal in *Optic Plus Enterprises, Ltd. v. Bausch & Lomb Inc.*,[17] after holding, in a 4-1 decision, that documents withheld from disclosure by the defendant on attorney-client privilege grounds should have been subjected to an in-camera inspection. The files in question were in-house or staff counsel files, and the majority noted that in such a case the line between legal and non-legal communications may be blurred.

Justice Nancy Smith dissented on the grounds that the in-house counsel's sworn statement that the documents in question were for legal and not business advice was completely supported by the privilege log, which was an "exhaustive compilation" of detailed information. Thus, there was no basis to challenge the defendant's characterization of the documents as privileged.

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Endnotes:

1. This does not include cases where the Court of Appeals has subjected the proposed appeal to a sua sponte examination of its jurisdiction (Rule 500.10) or for resolution without full briefing and oral argument (Rule 500.11).

2. 485 F3d 693 (2d Cir 2007), certified question accepted 8 NY3d 957 (2007).

3. 27 AD3d 739 (2d Dept. 2006, recalled and vacated upon reargument, 35 AD3d 465 (2d Dept. 2006), lv granted 8 NY3d 913 (2007) (leave was granted to petitioners as to all respondents except the city of Long Beach, as to whom the Appellate Division Order was nonfinal because that court dismissed the petition and complaint except for the fourth cause of action against the city - an example of the doctrine of "party finality").

4. 35 AD3d 482 (2d Dept 2005), lv granted 8 NY3d 811 (2007).

5. 32 AD3d 431 (2d Dept 2006), lv granted 8 NY3d 808 (2007).

6. 36 AD3d 911 (2d Dept 2007), lv granted 8 NY3d 808 (2007).

7. 34 AD3d 1323 (4th Dept 2006), rearg & lv denied, 37 AD3d 1209 (4th Dept 2007), lv granted 8 NY3d 813 (2007). The Fourth Department granted a post-appeal cross-motion to the extent of dispensing with the requirement of a special election for approval of the proposed annexation.

8. 36 AD3d 804 (2d Dept 2007), lv granted 8 NY3d 813 (2007).

9. 34 AD3d 1073 (3d Dept 2006), lv granted 8 NY3d 811 (2007).

10. See *Lane-Weber v. Plain Edge Union Free School Dist.*, 213 AD2d 515 (2d Dept 1995), lv. dismissed 87 NY2d 968 (1996); *Stoetzel v. Wappingers Cent. School Dist.*, 166 AD2d 643 (2d Dept 1990); but see *Ximines v. George Wingate High School*, 2006 WL 2086483 (EDNY 2006); *Bucalo v. East Hampton Union Free School Dist.*, 351 F Supp. 2d 33 (EDNY 2005).

11. 31 AD3d 707 (2d Dept 2006), lv granted 8 NY3d 812 (2007).

12. 32 AD2d 1209 (4th Dept 2006), lv granted 8 NY3d 809 (2007).

13. Thus, the Court will revisit issues it last addressed in *Church v. Callanan Indus.*, 99 NY2d 104 (2002) and *Espinal v. Melville Snow Contrs.*, 98 NY2d 136 (2002).

14. 28 AD3d 650 (2d Dept 2006), lv granted 8 NY3d 813 (2007).

15. 35 AD3d 253 (1st Dept 2006), app dismissed 8 NY3d 956 (2007), lv granted AD3d (1st Dept May 10, 2007).

16. 36 AD3d 419 (1st Dept 2007), lv granted 8 NY3d 810 (2007).

17. 37 AD3d 1185 (4th Dept 2007), lv granted 39 AD3d 1285 (4th Dept 2007).