New York State Law Digest

REPORTING IMPORTANT OPINIONS OF THE COURT OF APPEALS AND IN SPECIAL SITUATIONS OF OTHER COURTS

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GOOD FAITH E-FILING FOUL-UP HELD REMEDIABLE UNDER CPLR 2001

IN EXTENSIVE TREATMENT OF STATUTE, SECOND DEPARTMENT SAYS IT IS NOT ALWAYS NECESSARY TO SHOW ADVERSARY NOT PREJUDICED

The result is the preservation of an action by a personal injury plaintiff whose attorney got embroiled in a county's transition into electronic filing. He forwarded proper initiatory papers to a process server, well within the three-year statute of limitations, but was advised that the county (Westchester) had gone over to electronic filing (e-filing) and that a mere paper filing – as had been applicable for many years – was now unacceptable. The lawyer then undertook to ascertain and pursue Westchester's e-filing requirements and received what he took to be the county's confirmation that his action had been properly commenced by e-filing.

But the county later said that it hadn't been, because the procedure was still experimental and the papers were not in fact filed. They were received, though, but only – said the county – as part of a "practice" drill. More specifically, what the county told the plaintiff's lawyers was that that a "temporary user account has been created ... in the Practice New York State EFiling System"

The use of "Practice" in that way created an ambiguity, holds the appellate division in *Grskovic v. Holmes*, 2013 WL 5539380 (2d Dep't, Oct. 9, 2013), reversing the trial court, which had dismissed the action, and sustaining it. By now the statute of limitations had expired and the defendant, responding to the plaintiff's citation of CPLR 2001 (the pervasively important statute on correcting procedural mistakes in litigation), insisted that CPLR 2001 could not support a correction of this kind.

In an extensive treatment by a unanimous appellate division, Justice Dillon writes that there are actually two parts to CPLR 2001 that must be considered here. The statute reads that mistakes may be "corrected, upon such terms as may be just" or – the court stresses the "or" – "if a substantial right of a party is not prejudiced", the mistake "shall be disregarded".

Thus, holds the court, a showing that the defendant is not prejudiced is required only when the court proposes to "disregard" the mistake; it is not necessary when the court proposes just to "correct" the mistake. And correcting rather than disregarding is what the court says it's doing here: making a nunc pro tunc order directing the county clerk to accept for filing now a hard copy of the summons and complaint and deeming that filing to have occurred when plaintiff first attempted, however unsuccessfully, to establish an e-filing account – which occurred while the statute of limitations was still alive.

Most helpfully to plaintiffs in the long haul, the court says that what the plaintiff confronted here were "glitches", which are best assigned to the "corrected" segment of CPLR 2001 rather than the "disregard" segment, thus avoiding the "prejudice" issue.

It may also be observed that the delays that took the case beyond the statute of limitations in this case were not of an egregious nature, so perhaps – even if the "disregard" side of CPLR 2001 was being applied – it isn't all that certain that the short delay would be deemed the kind of prejudice the statute had in mind.

And as to the conduct of the clerk's office here, the court says that the ambiguous "confirmatory email messages should have contained warnings in bold letters stating that a practice filing [as the clerk deemed it] did not satisfy the requirements of a real filing".

A number of key cases, including some in the Court of Appeals, on the construction of CPLR 2001 are treated in *Grskovic*. We've done some of these cases in prior digests. (See, e.g., the lead note in Digest 617 on the Court of Appeals 2011 *Goldenberg* decision.) And on the adoption and implementation of the e-filing system, which the court in *Grskovic* treats in some depth and which involves several key statutes and rules, we've done a series of chronological notes. These appear in Siegel's Practice Review (including SPR 198:1, 213:1, 221:2, 231:2). And in SPR 247:3, there's a brief note on how an "electronic signature" is converted onto paper.

OTHER DECISIONS

NEGLIGENT LAB TESTING

Lab Has Duty to Alleged Drug User to Report Test Result Accurately

And a misreporting can therefore support a damages claim by the alleged user (AU) against the lab (L).

In this case, *Landon v. Kroll Laboratory Specialists, Inc.*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2013 WL 5566452 (Oct. 10, 2013; 4-3 decision), the difficulty was that L had no contractual relationship with AU. AU had been convicted of a crime and sentenced to five years of conditional probation, with one of the conditions being that he submit to random drug testing. The county's probation department had

a contract with L to conduct the test, involving oral fluid samples, and in this case L did so, finding AU's test positive. On the same day, AU arranged for and secured an independent blood test, showing negative. On the basis of L's test, the department brought proceedings against AU. Because of these, AU's probation continued past what would have been the end of his probationary period. AU sued the lab for damages (restrained freedom, attorneys' fees, etc.).

The issue was whether the claim could go forward. It could, holds the majority, applying the usual standards of a CPLR 3211(a)(7) motion, which credits at the threshold the facts as alleged in the complaint. Among the grounds alleged here was that L had used test standards lower than those recommended by the maker of the device and by federal statutory sources.

L performed, however, exactly as the county had required in its contract. The issue, therefore, since L's contract was with the county, was whether L owed a duty of care directly to AU, such as would support this claim under tort law. Citing the discussion in its 2002 *Espinal* decision (Digest 512), the majority in *Landon*, in an opinion by Chief Judge Lippman, writes that

> [a]lthough the existence of a contractual relationship by itself generally is not a source of tort liability to third parties, we have recognized that there are certain circumstances where a duty of care is assumed to certain individuals outside the contract ... [recognizing] that the duty to avoid harm to others is distinct from the contractual duty of performance.

This principle, along with "strong policy-based considerations", prompts the majority to hold L to account to AU.

The Court distinguishes its 1990 *Hall* decision (Digest 372), which held that an employee failing a polygraph test has no damages claim against the person alleged to have administered it negligently. *Hall* involved "the heightened standards of a defamation cause of action", which involves damages to reputation, the Court points out, and also implicated federal statutory standards for polygraph use. *Hall* thus offers no parallel for this case, holds the majority. (Judge Smith, in his solo dissent, does find a parallel, and would apply "the time-tested rules that govern defamation actions".)

Judge Pigott, writing a two-judge dissent, says the majority defines duty "too broadly". The relief AU seeks "is better directed at the Probation Department" than at L, which "complied with its contractual obligations". It was the department's use of the test, not the way L conducted it, that caused the harm AU claimed.

LABOR LAW 240(1)

Retail Store Maintenance Man's Fall from Ladder While Dusting Clothing Shelf Is Not Among Situations Protected by "Scaffold" Law

That's the holding of a unanimous Court of Appeals applying Labor Law § 240(1) in *Soto v. J. Crew Inc.*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2013 WL 5566304 (Oct. 10, 2013). The "scenario", says the Court, is "analogous" to that in its recent (2012) *Dahar* decision (Digest 629), in which the Court held that falling from a ladder while cleaning a product during the product's manufacturing process is also not among the protections offered by the "scaffold" law, as Labor Law § 240(1) is commonly called.

The Court has construed the statute in a host of cases, many of them reviewed in *Soto*. One of these cases, the 1991 *Rocovich* decision (Digest 387), offers a description of the aims of § 240(1), which the Court formulates as follows:

> Labor Law § 240(1) imposes a nondelegable duty and absolute liability upon owners and contractors for failing to provide safety devices necessary for workers subjected to elevation-related risks

in construction and like projects. It's this absolute liability – contributory fault on the part of the injured worker is not a defense – that makes the statute such a coveted prize for plaintiffs in construction accident cases.

"Cleaning" is one of the chores listed in the statute, and it would seem at first blush that cleaning and all of the other activities listed must be in conjunction with the basic aim of the statute, which, says the Court, is to protect workers on significant construction projects. Elevation-related risks "encountered ... during ordinary household cleaning" don't qualify.

The retail store in *Soto* was of course a commercial establishment, but the Court rejects the plaintiff's argument that the statute embraces "all cleaning that occurs in a commercial setting, no matter how mundane". In an opinion by Judge Graffeo, it recites a quartet of standards that, taken together, make the "cleaning" category unavailable. It's unavailable if the cleaning

1. is routine, occurring on "a daily, weekly or other relatively frequent" basis;

2. requires no "specialized equipment or expertise";

3. involves only "insignificant" elevation risks "inherent in typical domestic or household cleaning"; and

4. doesn't relate "to any ongoing construction, renovation, painting, alteration or repair project".

Remaining mindful of how difficult it has been over the years – as witness the constant reappearance of § 240(1) in cases before it – the Court hedges even after drawing the above list. It says that

> [t]he presence or absence of any one [of the listed items] is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other.

In other words, plaintiffs should be warned that not even being armed with what would seem to be the quartet of showings enumerated can they be sure of satisfying the Court about § 240(1)'s application. (If it were otherwise, there wouldn't already be on the books so long a parade of cases under this statute, many of them at least arguably irreconcilable.)

EMPLOYMENT DISCRIMINATION

Plaintiff's Wrongful Dismissal Claim Against Employer Is Sustained under City But Not under State Human Rights Law

The dismissal of the claims was sought at the threshold, so once again the question was whether the plaintiff (P), suing the employer in this case (D) for discriminatory dismissal based on plaintiff's disability, had alleged enough in his complaint to be allowed to proceed to trial.

Violations of both state and city human rights laws were alleged. The whole Court agrees that P made out enough on the claim based on city law, but not the one predicated on state law. Hence the claim based on the state law is dismissed, while the one based on the city law is allowed to go forward. *Romanello v. Intesa Sanpaolo, S.p.A.*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2013 WL 5566332 (Oct. 10, 2013).

And even the dismissal of the state law-based claim is questioned by the three-judge dissent, written by Judge Abdus-Salaam. In a memorandum opinion, however, the majority of four sees a difference between the state law provisions in point, finds that under the state law the burden of proof was on P on the key issue, and holds that P did not sustain it.

The key issue revolved around P's claim of disability. After five months absence based on his claim of illness, during which time D paid P's full salary, the issue of P's ability to resume his job took center stage. Asked by D whether he intended "to return to work or to abandon his position", P responded that he was presently unable to work "in any capacity" but that he did not intend to "abandon" his job. Apparently finding that response inadequate, D dismissed P.

Under the state law on "disability", if a "reasonable accommodation" is possible to enable the employee to return to the job without imposing "an undue hardship on the business", the employer is required to make it. (Exec.L. § 292[21-e].) But the Court finds that the burden of proof on that issue lies with P, the employee, and that P did not plead facts sufficient to sustain it. The complaint just alleged that P sought "a continued leave of absence to allow him to recover and return to work", but did not show what kind of "reasonable accommodation" D might make that could enable P to keep the job.

The dissent finds that under the state statutes it is the employer's duty, not the employee's, to address the issue of accommodation once the need for it is known to the employer, or requested by the employee. As the dissent reads it, the complaint here did the required job; it

> expressly alleges that [D] failed to undertake this duty and, instead, terminated [P] immediately after receiving [P's] letter.

The case thus rests on paragraph 7 of CPLR 3211(a), posing the usual issue of whether a cause of action was stated. The majority finds one stated only under the city human rights laws; the dissent sees one stated under the state law as well.

TERM LIMITS ON DA'S

State Law Requires Uniformity in Terms for District Attorneys; County Can't with Local Law Curtail Them

The state constitution in Art. XIII, § 13(a) requires each county to conduct a district attorney election every three or four years, "as the legislature shall direct", and it imposes no limit on the number of terms one person can serve. The legislature has directed that for counties outside New York City the term shall be four years. The Court of Appeals holds in a per curiam opinion that Suffolk County cannot, with a local law, limit the number of terms; only the legislature can do that. *Hoerger v. Spota*, ... N.Y.3d ...., ... N.Y.S.2d .... (Aug. 22, 2013; 6-1 decision).

The Court cites among other cases its 1995 *Curry* decision (Digest 431), in which it held that the state requirement that a district attorney be a duly admitted lawyer could not be disregarded for Hamilton County, despite the diminished pool of potential applicants wrought by its small population.

Curry noted that the applicant must be both a resident and a lawyer. This created an obvious problem for Hamilton, where the eligibles can hardly support even a hot dog stand. The Court nevertheless did not see the issue as reaching a point justifying a departure from the law.

Suffolk County does not have a population problem. What it does have, however, is a three-term district attorney at loggerheads with the local legislature, and some residents (and a would-be competitor) trying to invalidate the incumbent's effort at a fourth term. They fail.

To allow the legislature such term-reducing power, said the Court, would enable it to

> end the tenure of an incumbent district attorney whose investigatory or prosecutorial actions were unpopular or contrary to the interests of county legislators.

APPELLATE REVIEW STANDARD

Appellate Division Reviewing Appellate Term Has Diminished Fact-Finding Powers

The appellate division reviews issues of law and issues of fact. As a general matter it stands in the shoes of the trial court and can do anything with the facts that the trial court could do, including, in a bench trial, rejecting the trial court's fact-findings and substituting its own.

The Court of Appeals does not have that jurisdiction, however. It has plenary power of review of issues of law, but a narrower role on issues of fact, where it is generally restricted to determining only whether the record manifests a sufficient basis to support the fact-findings made below. If in a bench trial, for example, the record shows such sufficiency, the Court of Appeals is obliged to affirm, even if, on an independent exercise, it would have found the facts the other way.

That's the rule when the appellate division is the first reviewing court, as it is when the trial court – the court of first instance – is the supreme court, county court, surrogate's court, or court of claims. What's the rule when the court of first instance is one of the state's lower courts, such as the New York City Civil Court? Does the appellate division have similar powers?

It does not. On that scene, the appellate term, not the appellate division, is the initial reviewing court, and hence it's the appellate term that has all those plenary powers of review over both law and fact. When an appeal is then taken from the appellate term to the appellate division, the latter's review powers over the facts are curtailed.

The point arose in *409-411 Sixth St., LLC v. Mogi*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2013 WL 5566290 (Oct. 10, 2013; memorandum decision), involving a holdover summary proceeding brought in the civil court under the rent stabilization law. Under that law, a landlord may oust a tenant for not using the apartment as her primary residence. The landlord said that that was the case in *Mogi*. The facts were vigorously disputed.

After a bench trial the civil court found for the landlord. The appellate term affirmed, but on further appeal the First Department, in a 3-2 decision, reversed and dismissed the proceeding – in effect finding as a matter of law that the tenant was using the apartment as her primary residence.

The appellate division is reversed for applying the "incorrect standard", because where the appellate division acts as the second appellate court, it, too, like the Court of Appeals, has diminished powers of review over fact-findings. Quoting, ironically, from an earlier (1990) decision of the same court – the First Department – in *Claridge Gardens v. Menotti*, 160 A.D.2d 544, 554 N.Y.S.2d 193, the Court holds that

> the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on ... the credibility of witnesses.

Instead of applying that standard, the appellate division majority of three in *Mogi* substituted "its own view of the trial evidence". Agreeing with the two dissenters in *Mogi*, the Court of Appeals remands the case to the appellate division "to apply the appropriate standard of review".

A significant if not identical parallel to the situation in *Mogi* is perhaps best seen when a case turns on an exercise of discretion, which can occur and is best viewed in Court of Appeals context. (See Siegel, New York Practice 5th Ed. § 529.)