Appellate Division Review

Business Judgment Rule, Privilege, Child Support, Animal Rights

This article was originally published in the *New York Law Journal* on January 16, 2015.

by E. Leo Milonas and Frederick A. Brodie

E. Leo Milonas
Litigation
+1.212.858.1615
eleo.milonas@pillsburylaw.com

Frederick A. Brodie
Litigation
+1.212.858.1628
fab@pillsburylaw.com

E. Leo Milonas is a litigation partner at Pillsbury Winthrop Shaw Pittman LLP. He is a former Associate Justice of the Appellate Division, First Department, and the former Chief Administrative Judge of the State of New York. Frederick A. Brodie is a litigation partner in Pillsbury's New York office. Both are members of the firm's appellate practice team. Pillsbury litigation associates Dina E. Yavich and Andrew J. Kim and law clerks David Babbott-Klein and Stephen R. Weingold assisted in preparing this column.

The more things change, the more they remain the same. As we enter a new year, New York's Appellate Division faces the same and greater challenges: increasing caseloads, staff shortages, judicial vacancies, and legal disputes that are even more complex. As usual, however, the Appellate Division's Justices are rising to the occasion. Below, we summarize some of the Appellate Division's leading decisions from the final quarter of 2014.

First Department

Corporations. The business judgment rule is "in" this season. Ruling on a shareholder challenge to a fashion house's going-private transaction, the First Department in *Erie County Employees Retirement System v. Blitzer*[1] evaluated a corporation's approval of its controlling shareholder's going-private buy-out using the deferential business judgment rule rather than the "entire fairness" standard.

In 2012, Kenneth Cole Productions (KCP) announced a proposal by its majority shareholder, fashion designer Kenneth Cole, to take the company private. Minority shareholders sued. New York County Supreme Court dismissed the lawsuit, applying the business judgment rule. The shareholders appealed, arguing that the transaction should have been reviewed under the tougher "entire fairness" test.

In an unsigned, unanimous decision, the First Department affirmed. The court referred to three safeguards implemented in the buy-out. First, the transaction required approval of the majority of the minority (non-Cole) shareholders. Second, KCP established a special committee to evaluate Cole's proposal. Third, Cole himself did not participate when KCP's board voted on the merger. There were "no allegations sufficient to demonstrate that the members of the board or the special committee did not act in good faith or were otherwise interested."

Privilege. The common interest doctrine allows parties to share their counsel's legal advice without waiving the attorney-client privilege, even when litigation is not pending or reasonably anticipated, the First Department ruled in *Ambac Assurance Corp. v. Countrywide Home Loans*.[2] The decision diverges from the rule in the Second Department, leaving the doctrine's reach in New York state courts unclear.

While negotiating a merger (ultimately consummated), Countrywide Financial Corporation

and Bank of America Corporation (BofA) entered into a common interest agreement. Ambac Assurance Corporation later sued Countrywide and BofA in an insurance dispute, and sought discovery of materials exchanged during the merger talks.

Countrywide and BofA objected based on the common interest privilege. Ambac countered that the doctrine did not apply because the parties had not anticipated litigation in connection with the merger when the common interest agreement was executed.

In a unanimous opinion authored by Justice Karla Moskowitz, the First Department ruled that the materials were protected. Communications may be subject to the common interest privilege even without pending or reasonably anticipated litigation, Justice Moskowitz wrote, so long as their main purpose is "to obtain legal advice or to further a legal interest common to the parties, and not to obtain advice of a predominantly business nature."

Countrywide and BofA "required the shared advice of counsel in order to accurately navigate the complex legal and regulatory process involved in completing the transaction," the court explained. Imposing a litigation requirement under those circumstances would "discourage[ ] parties with a shared legal interest...from seeking and sharing" legal advice, ironically resulting in more litigation "because of the parties' lack of sound guidance from counsel." Justice Moskowitz opined that such a result "would make poor legal as well as poor business policy."

Church and State. Excommunicated congregants of a Buddhist temple cannot look to the New York courts for reinstatement, the First Department ruled in *Tung v. China Buddhist Association*.[3]

In May 2011, Master Mew Fung Chen, the founder and spiritual leader of the China Buddhist Association (CBA) excommunicated more than 500 congregants—all members of the CBA's Manhattan temple and followers of Master Ming Tung, whom Chen regarded as a rogue monk. The CBA's board ratified the excommunication.

Tung, together with a nun and another congregant, sued for an order directing the CBA to hold an annual meeting and appointing a receiver to determine who could vote. Tung argued that the CBA had violated its corporate bylaws by failing to hold yearly meetings and elections. (Although the bylaws were adopted in 1964, there had been no meetings prior to 2011.).

New York County Supreme Court granted the petition and invalidated the board's vote for excommunication. The CBA appealed, contending that the ruling impermissibly interfered with a constitutionally protected religious matter.

In a 4-1 ruling, the First Department reversed. Writing for the majority, Justice Judith J. Gische concluded that the issues raised by Tung were "not secular in nature, but religious, and cannot be resolved by the application of neutral principles of law." Adjudicating the petition would "entail an inquiry into the validity of petitioners' excommunications," which is "an entirely ecclesiastical matter" that courts cannot decide.

In a 25-page dissenting opinion, Justice Peter Tom viewed the case as presenting a "straightforward issue" of whether a religious corporation was bound by its corporate procedures. Chen should not be rewarded for "ignoring provisions of the Religious Corporations Law and the association's bylaws for 43 years and treating the CBA as his alter ego," Justice Tom wrote.

The majority did not dispute that the CBA failed to follow corporate formalities. Nonetheless, Justice Gische responded, "because petitioners are not members of the CBA based upon Master Chen's excommunication of them, they cannot challenge these corporate actions."

Second Department

Theft. Is the unauthorized use of a credit card number punishable under statutes that prohibit theft of credit cards? In July 2014, we reported on *People v. Barden*,[4] in which the First Department held that it was. Now, in *Matter of Luis C.*,[5] the Second Department has held it is not.

Luis, a teenager, used his grandfather's debit card number to purchase sneakers on the Internet. There was no evidence that Luis possessed the card itself, as opposed to the card number. A family court found him guilty of stealing property that "consists of a ... debit card."[6]

Reviewing the relevant statutes and their legislative history, the Second Department reversed in a unanimous decision written by Justice Ruth C.

Balkin. Statutes referring to theft of a credit or debit card "speak only in terms of physical items" rather than intangibles such as account numbers, the court held. While Luis could have been charged with identity theft or unlawful possesion of personal identification information, there was insufficient evidence to charge him with stealing or possessing a "debit card."

The Court of Appeals has granted leave to appeal in *Barden*, setting the stage for resolution of this now-unsettled issue.

Child Support. The "fugitive disentitlement doctrine," under which an appeal may be dismissed if the appellant is a fugitive from justice, applies to child support cases, the Second Department held in *Allain v. Oriola-Allain*,[7] following precedent from other departments.

In *Allain*, a divorce judgment awarded the father sole custody of the parties' child and directed the mother to make monthly child support payments. In October 2011, the mother was found to have willfully failed to obey a support order. By then, she owed $46,184.18 in past-due support and was summoned to appear at a hearing.

The mother, however, relocated to Nigeria. As enforcement proceedings progressed, the mother sought repeated adjournments on various grounds and never personally appeared. Ultimately, a bench warrant was issued for her arrest.

In a decision written by Justice Sheri S. Roman, the Second Department unanimously dismissed the mother's appeal. The court explained that the fugitive disentitlement doctrine, which originated in criminal law, "is based upon the inherent power of the courts to enforce their judgments, and has long been applied to those who evade the law while simultaneously seeking its protection."

The doctrine applied in *Allain* because "the mother willfully and deliberately removed herself from the jurisdiction of the New York courts by leaving the state and failing to appear in subsequent proceedings to enforce the support orders." Dismissal of the appeal served the doctrine's main policies: "imposing a penalty for flouting the judicial process, discouraging flights from justice and promoting the efficient operation of the courts, and avoiding prejudice to the nonfugitive party."

Third Department

Animal Rights. Can the writ of habeas corpus free animals from captivity? No, answered the Third Department, rejecting an attempt by lawyers at the Nonhuman Rights Project to liberate a chimpanzee named Tommy in Fulton County.

Animal-rights activists had chosen New York as a potentially friendly forum in which to litigate the rights of chimpanzees. In *Nonhuman Rights Project v. Lavery*,[8] the first such case to reach the Appellate Division, the Third Department dealt the group's efforts a setback.

Answering the "novel question" of whether Tommy is a 'person' entitled to the rights and protections afforded by the writ of habeas corpus," Presiding Justice Karen K. Peters wrote for a unanimous court that chimpanzees do not possess the same legal rights as human beings.

Although chimpanzees may exhibit "highly complex cognitive functions," the Third Department observed that "animals have never been considered persons for the purpose of habeas corpus relief." Instead, "the ascription of rights has historically been connected with the imposition of societal obligation and duties."

Because chimpanzees cannot "bear any legal responsibilities and societal duties," it would be "inappropriate" to grant them the legal rights afforded to human beings, such as "the fundamental right to liberty protected by the writ of habeas corpus." Justice Peters noted that New York's criminal statutes protect against animal mistreatment, and concluded that further extension of those safeguards must come from the Legislature.

Fourth Department

Statutes. To "advance the health, safety, and welfare of the residents of the City of Rochester," the city council adopted an ordinance banning "outdoor storage" everywhere except in specifically enumerated commercial districts. The new law prohibited storage "of any materials, merchandise, stock, supplies, machines, and the like that are not kept in a structure having at least four walls and a roof, regardless of how long such materials are kept on the premises."

One can imagine the potential problems. Read literally, the ordinance would prohibit residents from parking cars in their driveways (cars are "machines"). In *Turner v. Municipal Code Violations Bureau*

of City of Rochester,[9] petitioners challenged the law as unconstitutionally vague.

While acknowledging that legislative enactments enjoy an "exceedingly strong presumption of constitutionality," the Fourth Department struck down the outdoor storage ordinance.

The court's unsigned memorandum applied a two-part test. First, the court asked whether the measure was "sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." Second, the court consideted "whether the enactment provides officials with clear standards for enforcement."

The outdoor storage ordinance failed both tests. It provided ordinary citizens with "virtually no guidance on how to conduct themselves in order to comply with it." Further, the measure's "vague language" left "virtually unfettered discretion in the hands of the code enforcement officer."

Confessions. Robert M. Knapp is "intellectually handicapped." He is "highly suggestible and easy to manipulate."

Under police interrogation, Knapp confessed that he had committed several sex offenses against a child. The confession was elicited after Knapp had received Miranda warnings, and served as the sole basis for his conviction on multiple counts.

Writing for a unanimous Fourth Department panel in *People v. Knapp*,[10] Justice Erin M. Peradotto held that the confession should have been suppressed. Knapp had been classified as "mentally retarded" in school. His verbal IQ is 63, lower than 99 percent of the test population.

Yet, a videotape of the interrogation showed that the Miranda warnings were recited at a "fairly rapid pace" which Knapp probably could not understand.

Moreover, the detective used leading questions and other techniques "that are popularly used in convincing someone to answer questions in a particular way." Based on all the circumstances—including Knapp's "intellectual limitations, his suggestibility and compliance tendencies, and the tactics employed by the interviewer"—the Fourth Department found the confession to be involuntary.

People with intellectual disabilities are "particularly vulnerable and susceptible to overreaching by law enforcement" and "more susceptible to subtle forms of coercion," the court cautioned.

Endnotes

1 2014 N.Y. Slip Op. 08105 (1st Dept. Dec. 4, 2014).

2 2014 N.Y. Slip Op. 32568 (1st Dept. Nov. 20, 2014).

3 2014 N.Y. Slip Op. 07777 (1st Dept. Nov. 13, 2014).

4 2014 N.Y. Slip Op. 02527 (1st Dept. April 10, 2014).

5 2014 N.Y. Slip Op. 08428 (2d Dept. Dec. 3, 2014).

6 Penal Law §155.30[4].

7 2014 N.Y. Slip Op. 07151 (2d Dept. Oct. 22, 2014).

8 2014 N.Y. Slip Op. 08531 (3d Dept. Dec. 4, 2014).

9 2014 N.Y. Slip Op. 08156 (4th Dept. Nov. 21, 2014).

10 2014 N.Y. Slip Op. 07801 (4th Dept. Nov. 14, 2014).

Reprinted with permission from the January 16, 2015 edition of the New York Law Journal© 2014 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382, reprints@alm.com or visit www.almreprints.com

Pillsbury Winthrop Shaw Pittman LLP | 1540 Broadway | New York, NY 10036 | +1.877.323.4171
ATTORNEY ADVERTISING. Results depend on a number of factors unique to each matter. Prior results do not guarantee a similar outcome.
© 2015 Pillsbury Winthrop Shaw Pittman LLP. All rights reserved.