

## Appellate Division Second Department Roundup 2009

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We are pleased to announce the launch of our Decisions of Interest 2009 web page, featuring detailed summaries of many of our Opinions emanating from the 4,371 dispositions which we rendered in 2009. This annual roundup highlights some of the Decisions of Interest 2009 which appear on our web page.<sup>1</sup>

### Eminent Domain

In *Matter of Goldstein v New York State Urban Dev. Corp.*,<sup>2</sup> an eminent domain case involving the proposed construction of the Atlantic Yards project featuring, *inter alia*, a sports arena for the New Jersey Nets, the Court rejected the petitioners' argument that the Public Use clause of the State Constitution should be literally interpreted to allow the power of eminent domain to be

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exercised only where the condemned property is to be held open for use by all members of the public. The Court noted that this narrow construction, rejected by the Court of Appeals more than 70 years earlier, was inconsistent with EDPL 207, which expressly authorizes the Appellate Division, in reviewing a condemnation determination, to consider whether "a public use, benefit or purpose will be served by the proposed acquisition."

Furthermore, there was an adequate foundation for the Empire State Development Corporation's finding that the project would serve a public benefit because the project site was underdeveloped and characterized by unsanitary and substandard conditions. The project also served additional public purposes, including building an arena, constructing affordable housing, and creating new job opportunities.

#### **Trade Fixtures: Inconsistent Use**

In *Matter of West Bushwick Urban Renewal Area*,<sup>3</sup> the Court rejected a claim for compensation for the taking of trade fixtures consisting, primarily, of "fencing, gating, paving, curb cuts and a sidewalk for a parking lot" and held that where trade fixtures are inconsistent with the highest and best use of the property that is the subject of the taking, claimants are not entitled to compensation for both the property in its highest and

best use, in this case mixed commercial and residential use, and the trade fixtures which are inconsistent therewith.

### **Social Abandonment**

In *Davis v Davis*,<sup>4</sup> the Court answered the question of whether "social abandonment" by one spouse provides a ground for divorce under New York law. The plaintiff alleged that her husband refused to engage in any social interaction with her by refusing to celebrate with her Valentine's Day, Christmas, Thanksgiving, and birthdays; by refusing to eat meals with her; by refusing to attend family functions with her; by refusing to accompany her to movies, shopping, restaurants, and church services; by removing her belongings from the marital bedroom; and by otherwise ignoring her. The parties maintained separate bedrooms and had been married for 41 years. The Court held that while New York State recognized "constructive" sexual abandonment as a ground for divorce it did not recognize social abandonment as a ground for divorce.

### **Plea Bargaining**

In *People v Grant*,<sup>5</sup> the defendant, who had been free on bail during the entire pendency of the case, pleaded guilty only after

the court told him that, if he did not, he would be remanded until his next scheduled court appearance. The issue on the appeal was whether the plea of guilty was voluntary. In concluding that the plea was not voluntary the Court held that a threatened change in bail status may not be used by the prosecution or the court as a "bargaining chip" to persuade a defendant to plead guilty. The record clearly established that the court made an unadorned threat to remand the defendant without bail if he did not plead guilty, and that the threat was a powerful factor in persuading the defendant to enter the plea when he did.

### **Reckless Disregard**

In *Tutrani v County of Suffolk*,<sup>6</sup> the plaintiff's vehicle was rear ended seconds after a police vehicle driven by a Suffolk County Police Officer came to an abrupt stop in front of the plaintiff's vehicle. The principle issue upon remittitur<sup>7</sup> was whether the evidence was legally sufficient to support the jury verdict that the Police Officer operated his police vehicle in reckless disregard for the safety of others. This Court held, in view of the evidence that the Police Officer came to a virtual stop, abruptly reducing speed from 40 miles per hour to 2 miles per hour within 2 seconds, in front of the plaintiff's vehicle,

in rush hour traffic, without any warning and just seconds before the collision, that it could not be said that there was no rational process by which the jury could have found that the Police Officer operated his vehicle in reckless disregard for the safety of others.

### **Involuntary Servitude**

In *Matter of Vinlaun v Doyle*,<sup>8</sup> 10 nurses recruited from the Republic of the Philippines, and an attorney who had given them legal advice, petitioned for a writ of prohibition to halt the prosecution of them for misdemeanor offenses including endangering the welfare of a child and endangering the welfare of a physically-disabled person. The prosecution of the nurses came in the aftermath of their simultaneous resignations from a Long Island nursing home based upon allegedly intolerable working conditions. The primary issue raised was whether prosecution of the nurses for resigning their positions violated the Thirteenth Amendment's prohibition against involuntary servitude. In granting the petition, the Court concluded that subjecting the nurses to criminal sanctions for their acts of resigning contravened the Thirteenth Amendment proscription against involuntary servitude. In reaching its conclusion, the Court noted that the indictment explicitly made the nurses' conduct in

resigning a component of each of the crimes charged, and thus had the practical effect of exposing the nurses to criminal penalty for the exercise of their right to leave their employment at will. This Court reasoned that, while Thirteenth Amendment rights are not absolute, this was not an exceptional case justifying an infringement of those rights given that the nurses were engaged in private employment, and no facts suggesting an imminent threat to the pediatric patients at the nursing home had been alleged.

#### **The Dram Shop Act**

In *O'Gara v Alacci*,<sup>9</sup> a case arising from an accident in which an intoxicated pedestrian attempting to cross a parkway on foot in the early morning hours was struck by a car. Prior to the incident the pedestrian had been at a bar where she consumed copious amounts of alcohol. The pedestrian sued the car's driver and owner, who in turn commenced a third-party action against the bar. The Court found that if the bar violated the Dram Shop Act which imposes a duty on sellers of alcohol to protect the public from the dangers intoxicated people pose, the bar would have breached a duty owed to the car's driver and owner, who were members of the public. The Court then held that where an intoxicated plaintiff is injured by a tortfeasor, and the

circumstances support a finding that the accident was caused, in part, by the provision of alcohol to the plaintiff, the tortfeasor may properly seek contribution from the provider of the alcohol.

### **Mortgages; Standing**

In *Wells Fargo Bank, N.A. v Marchione*,<sup>10</sup> the plaintiff, acting as trustee for the mortgagee, commenced a foreclosure action on defendants mortgaged property. After filing the complaint, but prior to its service, the mortgagee retroactively assigned the mortgage to the plaintiff. The assignment provided for an effective date prior to the commencement of the action. The defendants argued that the plaintiff did not have standing to commence the foreclosure action because it did not have a legal or equitable interest in the mortgage at the time it commenced the action. Noting that a foreclosure action may not be commenced "by one who has no title to it," the Court determined that a retroactively assigned mortgage could not be used to confer standing.

### **Kendra's Law**

In *Matter of William C.*,<sup>11</sup> the Executive Director of the

Pilgrim Psychiatric Center sought authorization for the imposition of an involuntary assisted outpatient treatment program (AOT) pursuant to Mental Hygiene Law § 9.60, commonly known as Kendra's Law, for the respondent who suffered from bipolar schizoaffective disorder and had a history of noncompliance with treatment. The Court held, as an issue of first impression, that Kendra's law authorizes the appointment of a money manager to assist with the financial affairs of a mentally-ill person who has not been declared incompetent under Mental Hygiene Law article 81. There was clear and convincing evidence that William C. was unwilling to pay his rent and to pay for medical services, thereby jeopardizing his Medicaid eligibility and his access to medications.

#### **No-Fault Interest Tolled**

In *East Acupuncture, P.C. v Allstate Ins. Co.*,<sup>12</sup> the Court defined the scope of the toll on the accrual of statutory interest on overdue no-fault claims applied to claims submitted to insurers by provider/assignees and those submitted directly by policyholders themselves. This interpretation was consistent with the primary aims of the no-fault system, to ensure prompt payment of claims, and the interest which accrues on overdue no-fault benefits is a statutory penalty designed to encourage prompt

adjustments of claims and inflict a punitive economic sanction on those insurers who do not comply. Interpreting 11 NYCRR 65-3.9(c) as applying only to injured persons would allow a provider/assignee, who delays commencing legal action or requesting arbitration on denied claims, to continue to accrue interest pursuant to Insurance Law throughout this period of delay.

**Public Officers Law § 18**

In *Matter of Barkan v Roslyn Union Free School Dist.*,<sup>13</sup> the Court held that a board of education that has in sum and substance adopted Public Officers Law § 18 is not obligated to provide a defense to, or indemnify, one of its employees against whom the school district, on behalf of the board of education, has commenced a civil action. The School District commenced an action against current or former members of the Board, alleging, inter alia, that they failed to properly monitor the School District's finances and detect the theft of millions of dollars by former School District employees during a six-year period. Following receipt of his timely demand, the School District advised one Board member that he was not entitled to a defense or indemnification in the underlying action pursuant to Public Officers Law § 18. The Court held that when the School District

commenced the underlying action, it did so, in effect, on behalf of the Board with whose interests it is aligned, and that the duty to defend would not arise when a civil action was commenced by either the Board or the School District, or both, against an employee of either. Accordingly, there was no duty to defend.

### **Family Law**

In *Matter of Rubackin v Rubackin*,<sup>14</sup> the Court held that a petition alleging a failure to obey a lawful order of the court may result in a finding of civil contempt, criminal contempt, or both, and the distinction impacts on the applicable evidentiary burden. The burden of proof to establish willful criminal violation of a Family Court order of protection is proof beyond a reasonable doubt. In an earlier case, the Court held that the quantum of proof necessary for establishing guilt under Family Court Act article 8 was clear and convincing evidence since the proceedings under that act are essentially civil in nature. However, after the Court of Appeals decision in *People v Wood*,<sup>15</sup> such analysis is not absolute, and the proper burden of proof required before a definite term of incarceration may be imposed under Family Court Act § 846-a is proof beyond a reasonable doubt.

## ENDNOTES

1. [www.nycourts.gov/courts/ad2/decisionsofinterest.shtml](http://www.nycourts.gov/courts/ad2/decisionsofinterest.shtml)
2. *Matter of Goldstein v New York State Urban Dev. Corp.*, 64 AD3d 168, *affd* 13 NY3d 511; *cf.* *Matter of Kaur v New York State Urban Dev. Corp.*, 15 NY3d 235 (approving the acquisition by condemnation of approximately 17 acres in the Manhattanville area of West Harlem for the development of a new campus for Columbia University); see also Dickerson & LaCava, *2009 Survey of Tax Certiorari, Property Tax Exemption, Eminent Domain Cases*, NYLJ, Apr. 23, 2010, at 4.
3. *Matter of West Bushwick Urban Renewal Area Phase 2*, 69 AD3d 176
4. *Davis v Davis*, 71 AD3d 13
5. *People v Grant*, 61 AD3d 177
6. *Tutrani v County of Suffolk*, 64 AD3d 53
7. *Tutrani v County of Suffolk*, 10 NY3d 906
8. *Matter of Vinlaun v Doyle*, 60 AD3d 237
9. *O'Gara v Alacci*, 67 AD3d 54
10. *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204
11. *Matter of William C.*, 64 AD3d 277
12. *East Acupuncture, P.C. v Allstate Ins. Co.*, 61 AD3d 202
13. *Matter of Barkan v Roslyn Union Free School Dist.*, 67 AD3d 61
14. *Matter of Rubackin v Rubackin*, 62 AD3d 11
15. *People v Wood*, 95 NY2d 509