NEW YORK COURT OF APPEALS ROUNDUP

LEGAL MALPRACTICE CLAIM, DEFAMATION, SEPARATE ENTITY RULE

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In our first column of the new term we discuss cases involving the preservation of a legal malpractice claim and when a statement represents an assertion of fact or opinion for purposes of a defamation claim. We also address a recent decision with implications for New York's status as a global financial center in which the Court expressly recognized the "separate entity" rule for financial institutions with foreign branches.

Legal Malpractice Claim

In *Grace v. Law*, the court clarified the circumstances in which an aggrieved litigant must continue to pursue an appeal of an underlying litigation in order to preserve a potential malpractice claim against his lawyer. Plaintiff John Grace received treatment for an eye condition at a Veteran's Administration (VA) clinic in Rochester from ophthalmologist Dr. Shoba Boghani. Grace had an appointment with Boghani in July 2003 that was cancelled and not rescheduled for more than a year. Grace returned to the VA clinic in August 2004 and was diagnosed with neovascular glaucoma that subsequently rendered him blind in his right eye. When Grace apparently learned that his blindness might have been prevented if the glaucoma had been detected earlier, he retained Brenna, Brenna & Boyce to bring an administrative proceeding against the VA for malpractice arising out of the failure to diagnose Grace's glaucoma and its failure to follow up with Grace after cancelling his July 2003 appointment with Boghani.

When the government failed to respond to the administrative proceeding after six months, Brenna recommended that Grace retain Phillips Lytle to pursue a medical malpractice claim against the VA. Phillips Lytle then filed a complaint against the United States and the VA in the U.S. District Court for the Western District of New York.

During discovery, the government learned that Boghani was employed by the University of Rochester rather than the VA and the government was granted leave to file a third-party claim against him and the University. Because of a client conflict with the University, Phillips Lytle could no longer represent Grace and the Brenna firm resumed sole representation of the plaintiff. Grace then amended his complaint to add Boghani and the university as defendants. They moved for summary judgment on the grounds that Grace's claims against them were now time-barred. The VA also moved for summary judgment on the grounds that Boghani was not its employee. The district court granted Boghani's and the university's motions and dismissed the claims as time-barred. The court also found that Boghani was not a VA employee and dismissed the claims against the VA arising out of any alleged negligence by Boghani—leaving only a claim against the VA for failure to reschedule Grace's July 2013 appointment.

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Brenna informed Grace that he was unlikely to succeed on this remaining claim and that a trial would be long and expensive. Grace accordingly directed Brenna to discontinue the action. Grace subsequently sued Brenna and Phillips Lytle for legal malpractice in failing to file a claim against Boghani and the University within the limitations period.

The law firm defendants moved for summary judgment on the grounds that by voluntarily discontinuing the underlying action and failing to appeal the dismissal of claims against Boghani and the university, Grace forfeited any right he may have had to sue the law firms for malpractice. The Supreme Court denied the motions and the Appellate Division, Fourth Department, affirmed.

In an opinion by Judge Sheila Abdus-Salaam joined by Chief Judge Jonathan Lippman and Judges Victoria Graffeo, Susan Read, Robert Smith and Jenny Rivera, the court affirmed the Fourth Department's opinion.[1] The law firm defendants argued that a plaintiff is barred from bringing a malpractice claim if he or she fails to pursue a non-frivolous appeal in the underlying action. Plaintiff argued that a defendant should be required to show that the unpursued appeal would have been "likely to succeed," but defendants countered that this would require courts to speculate on the outcome of a potential appeal.

While this was an issue of first impression for the court, Abdus-Salaam noted other states have adopted the "likely to succeed" standard and she concluded that it represents the most efficient and fair result for all parties. It avoids a requirement that virtually any client pursue an appeal before bringing a legal malpractice action but still allows lawyers to avoid unnecessary malpractice suits by being given the opportunity to rectify an unfavorable result if the appeal is likely to succeed. As to the concern that courts would be speculating on the outcome of unfiled appeals, the court noted that courts already engage in exactly that type of analysis as any prima facie case of malpractice requires a showing that plaintiff would have succeeded on the merits but for the lawyer's malpractice.

In deciding this issue, the court clarified that a client must continue to pursue an appeal to avoid forfeiting any malpractice claim against her lawyer only where that appeal would be likely to succeed.

Defamation Claim

In *Davis v. Boeheim*, the court reversed a Fourth Department order and found that a defamation complaint against Syracuse University basketball coach James Boeheim was sufficient to survive a motion to dismiss. The court's analysis focused on the question of whether Boeheim's statements constituted alleged facts or pure opinions, which cannot give rise to a defamation claim.

The case arose out of allegations by plaintiffs Robert Davis and Michael Lang that they were victims of sexual molestation by Bernie Fine, who was Boeheim's friend and an associate basketball coach at the university. According to plaintiffs, the abuse began in the 1980s when they were "ball boys" with the basketball team and continued for years.

In 2002, years after the alleged abuse ended, Davis reported his allegations to the Syracuse Police Department, which informed Davis the statute of limitations had expired, and took no further action. Davis also reported the allegations to ESPN at that time, which did not publicize them. In 2005, Davis reported the allegations to the university chancellor along with the names of persons Davis claimed could corroborate the allegations. The university informed Davis that it found the allegations to be unfounded.

The allegations did not become public until 2011 when ESPN issued a news report in the wake of the abuse scandal at Penn State University concerning assistant football coach Jerry Sandusky. The day after the ESPN story, the university released a statement saying that it had investigated Davis' allegations in 2005 and interviewed the four persons named by Davis, but found no corroborating evidence. Before the university's statement went public, the school released a statement by Boeheim announcing that it had concluded Davis' allegations to be unfounded and that Boeheim fully supported Fine.

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Boeheim also made several other statements to the press, claiming that the plaintiffs were liars and that their allegations were financially motivated, and indicating that Davis had previously made the same claims for financial reasons. These statements, which are the subject of the lawsuit, were reported on The New York Times website, the ESPN website and elsewhere.

Davis and Lang thereafter sued Boeheim and the university for defamation. The Supreme Court, Onondaga County, granted defendants' pre-answer motion to dismiss on the basis that the statements were nonactionable opinion. A divided Fourth Department affirmed. *Davis v. Boeheim*, 972 N.Y.S.2d 385 (4th Dept. 2013).

The court, in a unanimous decision by Judge Rivera,[2] considered whether Boeheim's statements were pure opinion, which is not actionable, or whether they could be construed as a "mixed opinion"—an opinion that impliedly is based on facts unknown to the reader—which is actionable. Distinguishing fact from opinion is a question of law, and the court considered three factors: (1) whether the language at issue has a precise meaning that is readily understood; (2) whether the statements can be proven true or false; and (3) whether the full context of the communication in which the statement appears or the broader social context signals to readers that the statement is opinion, not fact.

The court found the first two factors weighed in favor of treating Boeheim's statements as factual: The language was clear and the statements could be proven or disproven. The court focused its analysis on the third factor, which it often found to be the "key consideration." Defendants argued the context made clear to readers that Boeheim's statements were opinion: Boeheim was defending his longtime friend and defending himself against the implication that he knew about the abuse. Defendants also noted that Boeheim said, "I really don't have any facts" and prefaced some of his statements with "I believe."

The court found that while a reader could interpret the statements as pure opinion, they also could be interpreted as "mixed opinion." Boeheim's statement that Davis had made the same allegations in the past for similar financial reasons could indicate that Boeheim was relying on undisclosed facts. Also indicating to a reader that Boeheim's opinions could be based on facts not publicly available was Boeheim's position within the university, Boeheim's relationships with both Fine and Davis, and the fact that Boeheim's initial statement included information about the university investigation. The court also noted that Boeheim's statements were published in news articles rather than in op-ed form.

The court therefore concluded that it could not find Boeheim's statements to be pure opinion as a matter of law and that the complaint was therefore sufficient to survive a motion to dismiss.

The 'Separate Entity' Rule

In a decision with implications for the international banking industry, the court in *Motorola Credit Corp. v. Standard Chartered Bank* addressed a question certified from the U.S. Court of Appeals for the Second Circuit and ruled that the "separate entity" rule prevented a judgment creditor from garnishing funds held in accounts of a bank's foreign branches.

In 2003, Motorola obtained a $2.1 billion compensatory judgment against members of Turkey's Uzan family in the U.S. District Court for the Southern District of New York arising out of a fraud perpetrated by the Uzans. In 2006, the Southern District awarded Motorola an additional $1 billion in punitive damages. Unfortunately for Motorola, it was easier to obtain the judgments than it has been to collect on them and in February 2013 the Southern District entered an order restraining the Uzans and anyone with notice, from selling, assigning or transferring their property. Motorola served the restraining order on the New York branch of Standard Chartered Bank (SCB). SCB is a foreign bank incorporated and headquartered in the United Kingdom with branches around the world.

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SCB did not identify any Uzan property at its New York branch, but it did locate approximately $30 million of Uzan-related assets at its branch in the United Arab Emirates (UAE). SCB froze those assets in accordance with the Southern District restraining order. The UAE Central Bank, however, then unilaterally debited $30 million from SCB's account at the Central Bank, and government bank examiners in Jordan seized documents at SCB's Jordan branch.

SCB accordingly sought relief from the restraining order in the Southern District in 2013. SCB contended that, pursuant to the separate entity rule, the restraining order was only effective as to assets held in its New York branch. The separate entity rule provides that even if a bank's New York branch is subject to personal jurisdiction, its other branches are to be treated as separate entities for purposes of prejudgment attachments and postjudgment restraining notices and turnover orders. The Southern District agreed but stayed the release of its restraining order pending appeal. On appeal, the Second Circuit certified the question to the court.

Judge Graffeo, writing for the majority, found that the separate entity rule did, in fact, limit the scope of any New York restraining order to assets held in SCB's New York branch. Motorola argued that the separate entity rule had never been expressly recognized by the court and had been abrogated by the court's ruling in *Koehler v. Bank of Bermuda*, 12 NY3d 533 (2009). Graffeo acknowledged that the rule had not been expressly recognized by the court but noted that it was a common law principle that had become well established in New York by lower courts and by federal courts applying New York law.

As to *Koehler*, that case held that a New York court can order a bank over which it enjoys personal jurisdiction to deliver stock certificates owned by judgment creditors even if the certificates are physically located outside New York. Graffeo distinguished *Koehler* on the grounds that it did not implicate the separate entity rule at all and did not involve bank branches or assets held in bank accounts. She also articulated several of the historic rationales for the separate entity rule including the importance of international comity, the burden that would otherwise be placed on banks to monitor accounts held in all of their other branches, and the possibility that banks would be subject to competing claims and potential double liability—which is exactly what happened to SCB here.

Accordingly, the majority concluded that the service of a restraining order by a judgment creditor on a garnishee bank's New York branch cannot serve to freeze assets in the bank's foreign branches. In doing so, the majority expressly noted that a contrary ruling would have serious implications for New York's preeminence in global financial affairs.

Judge Abdus-Salaam, in a dissent joined by Judge Eugene Pigott, disagreed and argued that the majority opinion permits banks to shield customer accounts in foreign branches from legitimate attempts by judgment creditors to collect on valid debts even in the face of egregious misconduct by debtors.

Abdus-Salaam pointed to the absence of any statutory support for the rule and the fact that changes in banking practice and technology since the rule's adoption have made it much easier to monitor assets in other branches. Abdus-Salaam also noted that any potential comity concerns are more appropriately addressed on a case-by-case basis than by a blanket rule that is inconsistent with the current trend to hold financial institutions more accountable for their actions concerning customers.

Nevertheless, global financial institutions will take comfort from the majority's decision that their presence in New York will not subject them to potentially competing claims in other countries.

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Endnotes:

1. Judge Pigott took no part in the court's opinion.

2. Judge Pigott took no part in the opinion.