LAW OFFICES OF JONATHAN M. COOPER

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INSIDE THIS ISSUE

How Both Sides Lost a NY Breach of Contract Case

In an unusual decision, a Suffolk County trial court found that **both** sides to a breach of contract claim lost. And that's not even the best part.

In *Palumbo v. Contemporary Stonescapes, Ltd.*, the judge found that both sides lost ***even though both sides had proved that the other party had breached their end of the agreement***.

"How is that possible?" you ask.

It's rather simple. Neither side was able to prove - other than through rank speculation (for more on this topic, see "Why Speculation Isn't Enough to Win a Breach of Contract Claim in New York") - how much damages they had sustained as a direct result of the other side's breach of the contract.

In dismissing both the plaintiff's claims as well as the defendant's counterclaims, the Court stated as follows:

"Without submitting an itemization of the value of the various project elements, the Court cannot value those items not completed by Defendant. Not even a scintilla of evidence, such as mere testimony by either party about the value of each project element, was provided to the Court. The inconclusive nature of this portion of the evidence requires the Court to resort to speculation, guesswork, and conjecture. Therefore, the Court cannot determine the value of any set-off to any amounts due and owing by the Plaintiff."

My Privilege of Arguing a School Negligence Case Before NY's Highest Court

A few weeks ago, I had the privilege of arguing one of my client's school negligence cases before New York State's highest court - the Court of Appeals. At its core, the issue in the case boils down to whether a New York school has a duty to notify a student's parent about a potential threat to the student, and if the school can be held responsible for harm that comes to the student - even if the harm occurs off school grounds and not during school hours.

In this particular case, the trial court sided with our position, holding that the school breached its common law (which is another way of saying that the rule is not set forth in any statute) duty to act in the same fashion as a reasonable parent by failing to notify my client's mother that there was a fight between my

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Not Taking Things for Granted

As many of you may know, my oldest son's bar mitzvah is right around the corner. As the date approaches, I found myself thinking increasingly of those that can - and cannot - be with us. (Naturally, the bar mitzvah falling out on the anniversary of my father's passing does rather readily lend itself to those thoughts).

In addition to my father, some of our closest friends and family can't attend in person. While that can certainly be chalked up to the viscissitudes of life (as this tends to happen to ***everybody***) and taken as a big disappointment, I think a deeper lesson can be gleaned here.

Almost nothing works out exactly the way we plan it. And I think a fundamental test we all face is not allowing those deviations from the "plan" to diminish our joy, because, after all, we're so fortunate to have these moments to celebrate in the first instance.

We strongly encourage the readers of our monthly newsletter to provide feedback about issues they would like to see addressed in our future publications.

To do so, please contact us through our website, www.JMCooperLaw.com or via e-mail at jmcooper@jmcooperlaw.com

"New York's courts will usually give you one shot at summary judgment, so you'd better make it count."

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Why Making Multiple Summary Judgment Motions in New York is a Bad Idea

In the last few years, I've been asked by several clients why we don't just move for summary judgment almost off the bat of the lawsuit; after all, the reasoning goes, isn't it clear that the other side is lying, and that we should win the case? (Moreover, at least in theory, the earlier you move for summary judgment, the less money has been spent on the case).

Generally speaking, however, the answer is no, if you intend to move for summary judgment, the best time to do so is to wait until fact discovery in the case is complete. Here's why: ***New York's courts will usually give you one shot at summary judgment, so you'd better make it count***.

New York's courts have summarized this rule as follows:

New York law has a "strong policy against allowing successive motions for summary judgment". *Baron v Charles Azzue, Inc.*, 240 AD2d 447, 449 (2d Dept 1997). This is particularly true where the motion is based on legal grounds and factual assertions that were or could have been raised in an earlier motion. *Levitz v Robbins Music Corp.*, 17 AD2d 801, 801 (1st Dept 1962) ("Parties will not be permitted to make successive fragmentary attacks upon a cause of action but must assert all available grounds when moving for summary judgment"); *Phoenix Four, Inc. v. Albertini*, 245 AD2d 166, 167 (1st Dept 1997) ("The IAS court properly denied the plaintiff's motion for summary judgment since the motion was based on matters that could have been but were not raised in an earlier summary judgment motion by plaintiff's predecessor in interest").

"Indeed, '[s]uccessive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification." *Jones v 636 Holding Corp.*, 73 AD3d 409, 409 (1st Dept 2010)."

In other words, you're vastly better off waiting until fact discovery has been completed, because it allows you to argue more effectively that all of the competent evidence in the case points in your favor.

New Book on the Way

In the next few months, I anticipate completing a new book on Non-Compete Agreements under New York law.

This book is (or, more accurately, will be) designed to answer questions by people who are confronted with a non-compete agreement, and want to gain some basic knowledge about the law in this area, and at what point they need to consult an attorney with some expertise regarding non-compete provisions.

Here's where I (and the general public) could use your help:

Please let me know what questions you would like to see answered in the book.

Q: "Daddy, is this what happens when you violate a non-compete agreement?"
(A: "No, Isaac. It's what happens when you have an allergic reaction to a bug bite.")

My Privilege of Arguing a Case Before NY's Highest Court

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client and the other student (the one who later injured him rather seriously), and that there was still simmering tension between the two (the other student specifically threatened to "get him jumped").

A majority of the five-judge panel at the Appellate Division disagreed, saying in essence, that once the school takes some steps to address the misconduct, which in this case was meting out an in-school suspension to the other student of 1-2 weeks and 1 day to my client, we are not permitted to inquire further into the adequacy of the school's actions.

"I can honestly say that arguing a case before such a smart 7-judge panel is quite a thrill."

Since two justices at the appellate level authored a vigorous dissent (which is extremely rare), we were permitted to go to the Court of Appeals (very few cases are permitted to go to this Court).

For the uninitiated, I can honestly say that arguing a case before such a smart 7-judge panel is quite a thrill; the judges were intimately familiar with the case before I even stepped foot in the courtroom, and seemed genuinely interested and concerned about the policy implications of their decision in this case.

In short, this is exactly what I had always imagined the practice of law would be like.

***COMMUNICATION POLICY**: As a general rule, Mr. Cooper does not accept unscheduled phone calls. This policy affords Mr. Cooper the ability to pay closer and more focused attention to each case, resulting in more efficient and effective representation for his clients. Moreover, it avoids the endless and needless game of phone tag played by most businesses and law firms. To schedule a phone call or in-person appointment with Mr. Cooper, please call his office at 516.791.5700.*

Just Because You Bought a Defective Product Doesn't Mean You've Won Lotto

I recently received a message from a woman inquiring whether she had a valid defective products lawsuit because she bought a brownie that had an unidentified, hard foreign substance in it, and she was upset. She hadn't even cracked a tooth.

As you might well surmise, there are several problems with this fact scenario.

First, ***if you haven't been hurt, you have no defective products case - at least not in New York***. Leaving aside for the moment that suffering actual, demonstrable damages is a technical prerequisite to a valid claim, consider the following: when a judge will ultimately ask, "So what happened to you?" your answer has to be something significantly more than "Nothing really. I was just really upset."

Second, ***if you can't identify what caused your injury, you can't prove your case***. Stated differently, the plaintiff bears the burden of proving both that the defendant's product was defective, and that the defect in the defendant's product caused her injuries. (For additional information on this topic, please see "The 5 Ways to Prove Your Defective Products Lawsuit Under New York Law"). In this instance, the woman didn't know what the foreign substance was, and therefore, she had no way of proving that the defendant should be responsible for it.

In truth, the first prong bothers me far more than the second. Why would anyone think that they might have a claim worth pursuing if they weren't actually hurt? Such a case, assuming a lawyer would be willing to take such a case on, would - at least in my book - rank as a frivolous lawsuit.

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