MondayMonday

It Is What I Say It Is—Again

December 5, 2016

If "drain the swamp" meant "Betsy DeVos" as Secretary of Education, we'll take the swamp. As many of you know, we've been involved in public education policy making for over 20 years, so being candid, we are unapologetic accolytes in the wonder, the marvel, the frustration and the soul of American public education. Betsy DeVos is not and will be the first Education Secretary who has neither been a public school parent nor a public school student. To her, public education is a disease that must be eradicated. So instead, she has made herself a leader of the charter school and voucher movement, using her husband's substantial wealth to secure positions of executive control in organizations which that wealth either created or funded. One day the name of the organization is the "American Federation for Children"; the next day, the "Alliance for School Choice," but make no mistake, it's all the same. She and her husband are part of the charter school faithful, whether it be under the moniker of "Children First America" or the "American Education Reform Council." Her sole operational claim to fame was being responsible for the Detroit charter school disaster, where she was part of designing a system with no oversight that enabled lousy charter schools to keep enrolling students while grabbing public education money.

Now, of course, as wife of the heir to the Amway fortune, Betsy DeVos needs no real background in

education at all to serve. It appears her undergraduate degree in business administration/political science is more than adequate to lead American education. Odd then, that with all the time in the world over the past years (we don't think she has every held a real job) she never served on any of the more than 750 school boards in the DeVos' home state of Michigan. Not for Betsy; she goes right to the top as the country's Education Czarina. Must be all that experience as Chairwoman of the Michigan Republican Party or being on the Board of the Kennedy Center (though the latter might have had something to do with funding its "DeVos Institute of Arts Management".)

The trouble with "draining the swamp" is that when the water's all gone, only the mud remains at the bottom and the mud is the stuff that stinks the most. A nation's children now depend on Betsy DeVos. Drain, indeed.

When is a motion pursuant to CPLR 3211 not a procedural motion addressed only to the face of the pleadings? When the Appellate Division doesn't want it to be, of course. Being the nasty curmudgeon that we are, that's seems to be the philosophical sum of the Second Department's decision last week in *Blake v. City of New York*, 2016 NY Slip Op 08036 (2d Dep't 11/30/16). The case arises from the failure of a canister of mace to properly function in the hands of a police officer. She brought an action under GML 205-e, the statutory violation being Labor Law 27-a(3)(a)(1). AD2, in *Blake v. City of New York*, 109 A.D.3d 503, dismissed that action, holding that while that Labor Law section was a proper predicate for 205-e liability, the officer had failed to allege that her injuries resulted from a recognized hazard' within the meaning of the Labor Law."

Now, back comes Officer Blake alleging the same facts but adding the express allegation that her injuries "resulted from a recognized hazard within the meaning of Labor Law § 27-a(3)(a)(1)." The City moves to dismiss under res judicata and Supreme Kings denies the motion.

AD2 reverses and dismisses. While res judicata usually requires that a case be adjudicated on its merits and while a 3211(a)(7) motion is not a determination on the merits, its prior decision has a "preclusive effect" on this new complaint for the same cause of action which, once again, fails to correct the defect in the old one.

The court explains that its prior decision was not really based solely on the failure to include the statutory language in the complaint, but also discussed its factual allegations and substantive caselaw, "when taken as a whole", determined that even if the facts alleged were true, they would not state a cause of action. Since the facts in this second complaint were no different than the facts in the first, the court's decision as to the first complaint bars this one as well.

When is a 3211 motion not merely procedural? When the Appellate Division thinks it's being played and says it isn't.

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