State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Thursday, February 7, 2013

No. 37 Gelman v Buehler

Geoffrey Gelman and Antonio Buehler entered into an oral agreement in September 2007 to form Cardinal and Crimson Capital, LLC for the purpose of engaging in a "search fund" venture. They agreed to solicit $600,000 in capital from investors, search for and acquire a business with growth potential, operate the business to increase its value, and then create a "liquidity event" such as selling it for a profit, allowing the investors to receive a return on their investments. Gelman alleges that they agreed to "operate the business until the liquidity event could be achieved, or, if the liquidity event could not be achieved earlier, they would operate the business for a period of approximately 4 to 7 years." Buehler withdrew from the partnership in February 2008, after he and Gelman had found potential investors, but before they received any investment money. Gelman brought this breach of contract action against Buehler.

Supreme Court dismissed the suit, saying Gelman "failed to allege sufficient facts or submit any evidence to support a finding that the partnership was for a definite term or a particular defined objective. Accordingly..., this court finds that the alleged partnership was a partnership 'at will subject to dissolution at any time by any partner.'"

The Appellate Division, First Department reinstated the breach of contract claim on a 3-2 vote. Buehler "could not unilaterally dissolve the partnership since the partnership had the specific undertaking of acquiring a business and expanding it until the investors would receive a return on their capital investments," the court said. "Moreover, the partnership also had a definite term, namely, to achieve the liquidity event.... Here, neither party expressly held out that the partnership was to be one terminable at will. Nor was the venture to be perpetual in nature. That is, the partnership did not seek to achieve an indefinite number of 'liquidity events,' but rather to achieve the one discernable event to give a return to a limited number of investors...."

The dissenters argued that, while "the parties discussed various plans and business scenarios," Gelman failed to show that "the oral partnership agreement was for a definite term or particular undertaking." They said, "[A] partnership formed for the purpose of acquiring, improving and reselling a business with no specified term of duration is a partnership at will. Absent a 'definite term,' the purported partnership was at will and the defendant could dissolve it at any time."

For appellant Buehler: Paul R. Niehaus, Manhattan (212) 631-0223
For respondent Gelman: Geoffrey Gelman (*pro se*), Brooklyn (617) 909-2066

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To be argued Thursday, February 7, 2013

No. 38 Hecker v State of New York

Kenneth J. Hecker was a millwright employed by Hohl Industrial Services, Inc. in December 2007, when he was injured at a state-owned work site in the Town of Ogden, Monroe County. About six months earlier, Hohl had completed a contract to renovate the historic Washington Street Lift Bridge over the Erie Canal, but it sent a crew back to the bridge in December to replace defective components in the lift mechanism located 30 feet below ground. Hecker was directed to shovel more than a foot of snow from metal decking at all four corners of the bridge in order to clear access doors that would enable the workmen to reach the lift mechanism. After about 40 minutes of shoveling, he slipped and fell, injuring his back.

Hecker brought this personal injury action against the State under Labor Law § 241(6), based on alleged violation of an Industrial Code provision, 12 NYCRR 23-1.7(d), which states, "Ice, snow, [and] water ... which may cause slippery footing shall be removed, sanded or covered to provide safe footing." The Court of Claims granted the State's motion for summary judgment dismissing the claim, saying Hecker "cannot maintain a Labor Law cause of action for Defendant's failure to have removed the snow and ice from his work area, when he was the very person charged with removing that snow and ice."

The Appellate Division, Fourth Department unanimously rejected the lower court's rationale, but split 3-2 in affirming the order on the ground that 12 NYCRR 23-1.7(d) does not apply to the facts of the case. The majority said, "Although claimant had shoveled sidewalks to reach the corners of the bridge where he would access the subterranean work site, and the pit door through which he would access the work site was located in a sidewalk, we conclude that claimant was not using the area in which he fell as a floor, passageway or walkway at the time of his fall...." Although the parties did not "specifically address" whether the regulation applies, the majority said it could decide that question because "claimant's bill of particulars and cross motion alleged the applicability of the regulation and claimant appealed from the entire order, including that part denying his cross motion."

The dissenters argued Hecker's claim should be reinstated, saying the State never disputed the applicability of 12 NYCRR 23-1.7(d) and "it is 'fundamentally unfair to determine this issue sua sponte'.... We should not be 'in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made' (Misicki v Caradonna, 12 NY3d 511, 519 [2009])." They also argued that the regulation applies, saying, "Inasmuch as the pit door was located on the sidewalk and was the only way to access the underground work site, we conclude that, at the time of his accident, claimant was using a passageway or walkway within the meaning of the regulation...."

For appellant Hecker: Jeffrey A. Vaisey, Rochester (585) 287-6525
For respondent State: Richard C. Brister, Rochester (585) 232-1911

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To be argued Thursday, February 7, 2013

No. 39 People v Tyrell Norris
No. 40 People v Elbert Norris

Tyrell Norris and Elbert Norris were arrested in 2002 during a police crackdown on drug trafficking at the Cypress Hills Houses in Brooklyn. The defendants, who are not related to each other, were convicted of multiple counts of third-degree criminal sale of a controlled substance and were sentenced to consecutive terms of 5 to 10 years on each count, resulting in an aggregate sentence of 15 to 30 years for each defendant.

In 2010, the defendants moved for resentencing on their B felony drug convictions under the Drug Law Reform Act of 2009 (2009 DLRA) and asked that the new sentences be made concurrent. Supreme Court, the same justice who presided at their trial, issued orders specifying that he would impose consecutive terms unless the defendants withdrew their motions. He informed Tyrell Norris that he would impose consecutive terms of 7 years on 3 drug sale counts, for an aggregate determinate sentence of 21 years. He informed Elbert Norris that he would impose consecutive terms of 6 years on each of four counts, for an aggregate determinate sentence of 24 years. The judge said he was required to impose consecutive sentences by People v Acevedo (14 NY3d 828 [2010]), which rejected a drug offender's argument that the 2004 DLRA gave the resentencing court the power to make his drug sentences, which were originally ordered to run consecutively to a sentence for weapon possession, run concurrently instead. Tyrell and Elbert Norris rejected the proposed resentences and appealed.

The Appellate Division, Second Department affirmed. Citing Acevedo, it held that the 2009 DLRA "does not authorize the Supreme Court to alter the sentences for multiple felony drug convictions, originally imposed to run consecutively to each other, such that they run concurrently with each other" (People v Tyrell Norris [90 AD3d 788]).

The defendants argue that Acevedo "only considered the question of whether a resentencing court could alter a previous order that DLRA-eligible drug sentences run consecutively to non-drug sentences not subject to DLRA relief; the decision was silent with respect to whether a resentencing court can order the very drug sentences that are being vacated to run concurrently with each other. Applying Acevedo to the situation at hand would directly contradict the sweeping structural and philosophical changes the Legislature has enacted in [the 2009 DLRA] and seriously impede the ameliorative relief it intended in reforming New York's draconian drug laws."

For Tyrell Norris: Paul Skip Laisure, Manhattan (212) 693-0085
For Elbert Norris: Kathleen E. Whooley, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Caroline R. Donhauser (718) 250-2487

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No. 41 People v William Monroe

In 2007, William Monroe pled guilty to second-degree conspiracy in exchange for a promised sentence of 6 to 12 years to run concurrently with a prior sentence of 4½ to 9 years, which was imposed in 2006 for two drug felony convictions stemming from cocaine sales in Manhattan. Supreme Court explained to him that, under the 2007 sentencing agreement, his conspiracy plea would effectively add 1½ to 3 years to the time he was already serving for the drug convictions.

After adoption of the Drug Law Reform Act of 2009, Monroe moved for resentencing on his prior drug convictions. His motion was granted, the original sentence of 4½ to 9 years was vacated, and he was resentenced to a determinate term of 3 years. Monroe then moved to vacate his conspiracy conviction and withdraw his plea, arguing that his plea was unknowing because it was induced by the promise of concurrent time to a sentence that was later reduced. He cited People v Pichardo (1 NY3d 126) and People v Rowland (8 NY3d 342), which held that a defendant who pled guilty in return for a promise of concurrent sentencing is entitled to withdraw his plea and face trial when "the removal or reduction of the preexisting sentence nullified a benefit that was expressly promised and was a material inducement to the guilty plea." Supreme Court denied Monroe's motion.

The Appellate Division, First Department affirmed, saying, "What distinguishes this case from Rowland and Pichardo is that defendant's drug convictions and sentences were never reversed on appeal or otherwise invalidated. Instead, defendant invoked the ameliorative provisions of the Drug Law Reform Act to obtain a more lenient sentence. A concurrent sentence that subsequently proves to be invalid cannot be equated with a valid concurrent sentence that is subsequently reduced as a result of a defendant's request for leniency. The former, but not the latter, may be viewed as an unfair inducement to plead guilty that affects the voluntariness of the plea."

Monroe argues that his conspiracy plea must be vacated "because the reduction of his drug sentences means that the original promise cannot be fulfilled..... That the reduction of the preexisting sentence resulted from an ameliorative legislative enactment rather than following a successful appeal is of no import. The relevant focus is on whether there has been a change in the factual circumstances that induced the plea.... The 4½-to-9 year sentences that induced Mr. Monroe to accept a 6-to-12 year sentence on the conspiracy charge were reduced, altering the benefit of the bargain. As such, Mr. Monroe is entitled to get his plea back."

For appellant Monroe: Claudia S. Trupp, Manhattan (212) 577-2523
For respondent: Manhattan Assistant District Attorney Frank Glaser (212) 335-9000