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, January 10, 2013

No. 22 Fundamental Long Term Care Holdings, LLC v Cammeby's Funding LLC *(papers sealed)*

Fundamental Long Term Care Holdings, LLC and its members, Leonard Grunstein and Murray Forman (collectively, Fundamental), and Cammeby's Funding LLC, controlled by Rubin Schron (collectively, Cam Funding), in 2006 entered into an option agreement that entitled Cam Funding to purchase a one-third interest in Fundamental at a strike price of $1,000. Section 5 of the agreement provides that Fundamental will not "cause, suffer or permit any of its subsidiaries to enter into any agreement ... that would conflict with or interfere with any of the rights of the Option Holder;" and that any conflicting agreement "shall be deemed void." Section 6 states that Fundamental will "(a) consent to the issuance of the Acquired Units to the Option Holder, (b) consent to the admission of the Option Holder as a member of [Fundamental], and (c) cause the Issuer to carry out its obligations herein and to execute and deliver such amendments and schedules to the Operating Agreement of [Fundamental] to reflect the issuance of the Acquired Units to the Option Holder." The option agreement includes a standard merger clause.

When Cam Funding sought to exercise the option in December 2010, Fundamental responded that it would have to comply with Condition 3.3 of Fundamental's operating agreement, which requires new members to make a capital contribution equal to at least the fair market value of the interest they seek to acquire. The parties agree the market value of a one-third interest in Fundamental would be more than $33 million. Fundamental brought this action for a declaratory judgment that Cam Funding is bound by the operating agreement and must pay the market value of any interest it acquires. Cam Funding counterclaimed for breach of contract.

Supreme Court granted Cam Funding's motion for summary judgment, ruling the option agreement is unambiguous and controls Cam Funding's rights to acquire an interest in Fundamental. It said enforcing Condition 3.3 of the operating agreement would violate Section 5 of the option contract by "allow[ing] a subsequent agreement -- the Operating Agreement -- to interfere with Cam Funding's rights under the terms of the Option Agreement." In the court's view, Section 6 of the option contract shows "the parties contemplated a future operating agreement and intended that the Operating Agreement yield to the Option Agreement."

The Appellate Division, First Department affirmed, saying, "Regardless of which document was executed first, the motion court correctly found unambiguous the parties' option agreement entitling [Cam Funding] to acquire units of [Fundamental] for $1,000 without the need for any capital contribution. We note that the integration clause in the option agreement bars parol evidence of the parties' intent and of any other agreements or understandings."

Fundamental argues that the option and operating agreements must be read together; it faults the Appellate Division for "erroneously invok[ing] the parol evidence rule to bar consideration of the Operating Agreement, based upon the presence of a merger clause in the Option. As a result, the Order permits an option holder to join an LLC and reap the benefits detailed in its Operating Agreement while conveniently avoiding any of its accompanying obligations." Moreover, the operating agreement "does not contradict the terms of the Option. Rather, the two agreements work together, with the Option describing only the process by which membership in Fundamental is achieved and the Operating Agreement alone addressing the rights and obligations of Fundamental's members."

For appellants Fundamental et al: Allen G. Reiter, Manhattan (212) 484-3900
For respondents Cam Funding et al: Steven A. Engel, Manhattan (212) 698-3500

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To be argued Thursday, January 10, 2013

No. 23 Schron v Troutman Sanders LLP
Mich II Holdings LLC v Schron *(papers sealed)*

In 2004, real estate investor Rubin Schron and several of his companies financed the acquisition of a nursing home company, Mariner Health Services, Inc., for $1.3 billion. Schron held ownership of Mariner's real estate through one of his corporate entities and leased the nursing homes to SVCare Holdings LLC, which was to operate them. SVCare is owned by Leonard Grunstein and Murray Forman. As part of the transaction, Schron and another of his entities, Cammeby's Equity Holdings LLC (Cam Equity), obtained an option to purchase SVCare for $100 million. The option agreement states that it was granted "in consideration for the mutual covenants and agreements hereinafter set forth, and other good and valuable consideration (the receipt and adequacy of which is hereby acknowledged by the Parties)." The agreement also contains a merger clause which states that it "supersedes and completely replaces all prior and other representations..., other agreements and understandings ... with respect to the matters contained in this Agreement." At the same time the option was granted, another Schron entity, Cammeby's Funding III LLC, agreed to loan $100 million to SVCare.

In March 2010, SVCare and other Grunstein/Forman entities filed suit in Mich II Holdings v Schron seeking, among other things, a declaration that the SVCare option was invalid. SVCare argued that the option was granted in consideration of the $100 million loan, that the loan was never provided and, therefore, the option was unenforceable. Cam Equity notified SVCare that it intended to exercise the option and moved to dismiss SVCare's complaint in Mich II. Supreme Court granted Cam Equity's motion to dismiss.

The Appellate Division, First Department affirmed, saying, "The motion courts correctly found that the option agreement provided that the parties' stated mutually beneficial covenants constituted the consideration, and that any additional consideration for the option, such as the claimed loan funds, was impermissibly at variance with that provision pursuant to the merger and integration clauses. The merger and integration clauses are explicit and therefore bar the use of parol evidence of the parties' intent and of any other agreements or understandings." Further, "[b]ecause the consideration consisted of mutual covenants, and not the loan, there was no occasion to use parol evidence to show that consideration was lacking because the loan funds had not been advanced."

SVCare argues that parol evidence should have been admitted to clarify the meaning of the words "other good and valuable consideration" in the option agreement because the phrase "is general and 'inherently and intrinsically ambiguous.'" Instead, "[t]he First Department held that parol evidence was inadmissible to give meaning to the words 'other good and valuable consideration' and therefore treated those words as superfluous. That holding is plainly wrong, for where a 'writing is not understandable without explanation, parol evidence is admissible to explain its meaning'.... That is especially true here, where if the 'other consideration' phrase is not given meaning, then a valuable option was conferred without consideration -- i.e., for free."

For appellant SVCare: Paul Shechtman, Manhattan (212) 704-9600
For respondent Cam Equity: Andrew J. Levander, Manhattan (212) 698-3500

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To be argued Thursday, January 10, 2013

No. 24 People v Daniel Vasquez

On the night of July 4, 2007, Gabriel Garcia was walking to work at a furniture store in Queens when a man tried to rob him with a knife. Garcia ran into the store and called 911, while watching his assailant pace around outside. When the police arrived, Garcia pointed out Daniel Vasquez as the would-be robber and officers apprehended him. One of the officers brought Vasquez to the store for a "showup" identification, and Garcia confirmed that Vasquez was the man who tried to rob him. Prior to trial, the prosecution gave notice pursuant to CPL 710.30 that it intended to introduce evidence of Garcia's initial point-out identification of Vasquez, but it did not mention his subsequent showup identification.

At the trial, held six months after the incident, Garcia was unable to identify Vasquez as the perpetrator, so Supreme Court allowed the prosecution to call one of the arresting officers to testify that Garcia pointed Vasquez out to them when they first arrived at the store and that he also confirmed the identification at a showup. Vasquez's defense attorney did not object to the officer's testimony about the showup identification. Vasquez was convicted of first-degree attempted robbery and related crimes and was sentenced to 10 years in prison.

The Appellate Division, Second Department affirmed, saying Vasquez's claim that admission of the police testimony about the showup identification deprived him of due process was unpreserved for appellate review. "In any event," it said, "although the trial court may have erred in admitting the showup identification testimony on the ground that the prosecution did not serve adequate notice pursuant to CPL 710.30(1)(b), any such error was harmless." The court also rejected the defendant's claim that he was deprived of effective assistance of counsel by his attorney's failure to object to the testimony.

Vasquez argues that he "was denied the effective assistance of counsel when defense counsel, who argued that the People failed to prove appellant's identity, failed to seek preclusion of the complainant's show-up identification, although the People had given no CPL 710.30 notice of their intent to elicit that evidence."

For appellant Vasquez: Warren S. Landau, Manhattan (212) 693-0085
For respondent: Queens Assistant District Attorney Donna Aldea (718) 286-5927

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To be argued Thursday, January 10, 2013

No. 25 People v Jarvis Lassalle

Jarvis Lassalle and a co-defendant, Steven Burns, were each indicted in Erie County on four counts of first-degree robbery and related charges arising from a hold-up at Prime Restaurant Supplies in May 2005. Both defendants agreed to plead guilty to one count of first-degree robbery. At Lassalle's plea colloquy, County Court asked him, "And do you understand that you could be sentenced up to 25 years followed by five years of post-release supervision [PRS]? That's the maximum." When Lassalle answered "Yes," the court said, "However, I've discussed your circumstances with your attorney and the Assistant District Attorney, and I have agreed to limit your sentence to no greater than 15 years concurrent to the sentence that you're currently serving" for an unrelated Niagara County conviction. The court did not mention that PRS would follow the 15-year sentence. The court conducted a similar colloquy with Burns. Lassalle was sentenced to 15 years in prison and a five-year term of PRS.

On direct appeal, Lassalle's counsel argued that his waiver of the right to appeal was invalid, the prosecution's identification procedures were prejudicial, and the sentence was excessive. The Appellate Division, Fourth Department affirmed the judgment in October 2008, rejecting all of the defendant's appellate claims. More than a year later, in February 2010, the Fourth Department reversed the convictions and vacated the pleas of his co-defendant, Burns, "because County Court failed to advise [him] prior to the entry of his pleas that his sentences would include periods of [PRS]," as required under People v Catu (4 NY3d 242 [2005]).

Lassalle then moved for a writ of error coram nobis, arguing that his appellate counsel's failure to raise the issue of County Court's apparent Catu violation on direct appeal deprived him of the effective assistance of appellate counsel. The Fourth Department denied his motion without opinion.

Lassalle argues, "The record is clear that County Court failed to inform defendant that his sentence would include a period of PRS. That is, County Court committed a Catu error. Defendant's position ... is that counsel's failure to raise the issue on the direct appeal constituted the type of 'single failing' that the Court has held is 'so egregious and prejudicial' that it deprives a defendant of his constitutional right to effective assistance of counsel (People v Turner, 5 NY3d at 480)."

For appellant Lassalle: Kevin J. Bauer, Albany (518) 225-1508
For respondent: Erie County Assistant District Attorney Donna A. Milling (716) 858-2424

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To be argued Thursday, January 10, 2013

No. 26 Matter of Perez v Rhea

Jacqueline Perez, a single mother of three, lived for many years with her children in a New York City Housing Authority (NYCHA) apartment subsidized by the federal Section 8 housing program. From 1999 through 2005, she filed annual income affidavits certifying that she was unemployed. In 2005, NYCHA discovered that Perez had been employed since 1999, earning between $29,000 and $34,000 per year. NYCHA referred the matter to its Office of Inspector General, which found that she had concealed more than $200,000 in income during the period, resulting in rent underpayments totaling more than $27,000. Arrested for theft, Perez pled guilty to a misdemeanor charge of petit larceny, was ordered to pay $20,000 in restitution, and was sentenced to a conditional discharge.

NYCHA moved to terminate her tenancy and held a hearing in 2009. Perez admitted she failed to report her income, but testified that she did not intend to defraud NYCHA. She also testified that two of her children had learning disabilities and emotional problems and that she could not afford non-NYCHA housing. The Hearing Officer decided Perez should be terminated, saying she "provided no explanation for failing to report employment income which could show that she did not intend to defraud NYCHA. The plight of the family, especially with a disabled child, has been considered; however, this is an insufficiently mitigating circumstance. An individual who through misrepresentation obtains from the tax-paying public a greater subsidy than that to which she is entitled is not eligible for tenancy." NYCHA approved the decision, and Perez brought this article 78 proceeding to challenge it.

Supreme Court confirmed NYCHA's determination and dismissed the suit, ruling termination is not excessive "when the tenant conceals a large amount of income over an extended period causing a substantial rent underpayment, even if a child is part of the household." The Appellate Division, First Department reversed in a 4-1 decision, vacated the termination, and remanded to NYCHA for imposition of a lesser penalty. It said, "Where [Perez], a model tenant, has faithfully abided by an agreement with NYCHA to make full restitution of her rent underpayments, the decision to terminate her tenancy constituted a disproportionate penalty that would likely leave [her], the single mother of three children who also reside in the apartment, two of whom have diagnosed disabilities, homeless." The court viewed the penalty as unjustifiable because public housing is often "a tenancy of last resort," and Perez "has made every effort to cure the violation by making restitution."

The dissenter objected that, "[s]tripped of its verbiage, the majority's rationale is that [Perez's] tenancy should not be terminated because it might render her homeless.... [U]niversal application of the principle would result in no tenant of public housing ever being evicted, whatever the grounds." He said Perez's "intentional concealment of her earnings had a material and substantial effect on the reduction of her rent"; her "payment of restitution was compelled by the prospect of imprisonment, not the willing exercise of her own free will"; and "the loss of her tenancy is entirely attributable to her own conduct."

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For respondent Perez: Marc Sackin, Auburn Hills, MI (248) 990-8099