State of New York Court of Appeals

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To be argued Tuesday, October 10, 2017

No. 111 Davis v Scottish Re Group Limited

Paul Davis, an investor living in Mexico City who held substantial shares of the preferred and common stock of Scottish Re Group Limited, a Cayman Islands reinsurance company, filed this action in New York after the company merged in 2011 with affiliates of Massachusetts Mutual Life Insurance Company (MassMutual) and Cerberus Capital Management. He alleged that MassMutual and Cerberus, working through Scottish Re directors they controlled, structured the merger and other transactions to enrich themselves at the expense of minority shareholders like himself. Davis, who owned about 48 percent of the preferred shares and 20 percent of the common stock of Scottish Re, asserted both direct and derivative causes of action against MassMutual, Cerberus and certain Scottish Re directors, among others. In three derivative causes of action on behalf of Scottish Re, he asserted claims for breach of fiduciary duty and waste of company assets against the directors and others.

Supreme Court, as relevant to this appeal, dismissed the derivative claims. The court ruled Davis lacked standing to pursue the claims because he did not comply with rule 12A of the Grand Court Rules of the Cayman Islands, which provides, in part, that plaintiff-shareholders asserting derivative claims on behalf of a company "must apply to the Court for leave to continue the action.... The application must be supported by an affidavit verifying the facts on which the claim and the entitlement to sue on behalf of the company are based."

The Appellate Division, First Department affirmed, saying the derivative claims were correctly dismissed due to Davis's failure to comply with Grand Court rule 12A. "The rule is applicable in the courts of this state as a substantive, rather than procedural, condition precedent to the continuation of a derivative action, as the underlying remedy is extinguished if a plaintiff fails to file an application to continue the derivative action...," it said. "Accordingly, the law of the forum of incorporation governs plaintiff's derivative claims..., and plaintiff is barred from asserting those claims."

Davis argues that his derivative claims should be reinstated and his standing to pursue them decided by New York courts. "Rule 12A says nothing about the substantive rules for shareholder derivative claims against Cayman companies, and it does not mandate that only Cayman courts have authority to grant leave to proceed with such claims." He says the rule is a "procedural mechanism" for Cayman courts "to determine a shareholder's standing to sue on behalf of a corporation from *any* jurisdiction *regardless of whether it is a Cayman company or not and regardless of what substantive standing doctrines control*. In New York, the CPLR likewise has various pre-trial procedural mechanisms" to determine standing "under whatever substantive law controls -- Cayman or otherwise. New York courts have routinely undertaken this analysis in the past. There is no basis to prevent them from doing so" in the future.

For appellant Davis: Eric Brenner, Manhattan (212) 446-2300
For respondents Scottish Re et al: Jean-Marie L. Atamian, Manhattan (212) 506-2500

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No. 112 People v Roberto Estremera

Roberto Estremera was charged with murder and attempted murder after shooting at two men in Manhattan in 1999, killing one and wounding the other. In 2000, Estremera pled guilty to first-degree manslaughter and second-degree attempted murder in exchange for a prison term of 25 years. Supreme Court did not inform him prior to his plea that he would also face a mandatory term of post-release supervision (PRS) after his release from prison, nor did the court impose any term of PRS at his sentencing.

In 2005, the Court of Appeals ruled in People v Catu (4 NY3d 242) that mandatory PRS is a direct consequence of conviction and a court's failure to advise a defendant prior to his guilty plea that he would face a term of PRS renders the plea involuntary. In 2008, the Court held in People v Sparber (10 NY3d 457) that only the sentencing judge may impose a term of PRS and that the "sole remedy" for a judge's failure to do so would be resentencing. The State Legislature responded in 2008 by enacting Penal Law § 70.85, which provides that a trial court may, with consent of the district attorney, "re-impose the originally imposed determinate sentence of imprisonment without any term of [PRS], which then shall be deemed a lawful sentence."

In 2009, Estremera moved to vacate his plea based on the Catu violation. He also argued that his sentence was illegal because it did not include the mandatory term of PRS. In 2010, in a proceeding at which Estremera was not present, Supreme Court denied his motion to vacate the plea and granted the prosecution's request to re-impose the original prison sentence without PRS pursuant to Penal Law § 70.85. The court issued an order that said, "No resentence. Original sentence with no PRS stands." Estremera appealed, arguing the court violated CPL 380.40 by resentencing him in absentia. The statute provides, "The defendant must be personally present at the time sentence is pronounced."

The Appellate Division, First Department affirmed the order. "Even assuming, without deciding, that this appeal is properly before us as an appeal from a judgment of resentence..., notwithstanding that the court's order expressly states: 'No resentence. Original sentence with no PRS stands,' we find no basis for a remand," it said. "Defendant was not adversely affected by any alleged procedural defect in the court's determination, including the fact that he was not present when the court let stand his original sentence, 'because the result, i.e., freedom from having to serve a term of PRS, was in his favor'...."

Estremera argues the 2010 proceeding held pursuant to Penal Law § 70.85 was clearly a resentencing because the statute says the procedure for correcting an illegal sentence that omitted PRS is to "re-impose the originally imposed determinate sentence," and because "[t]his Court has consistently recognized that the 're-impos[ition]' of a sentence under Penal Law § 70.85 is a resentencing." He says CPL 380.40 gives defendants an "unyielding right" to be present at sentencing, a right he neither waived nor forfeited, and one the lower court violated by sentencing him in absentia. He says he is entitled to "a new resentencing" in his presence, without any need to show he was "adversely affected" by the prior proceeding.

For appellant Estremera: Samuel J. Mendez, Manhattan (212) 402-4100
For respondent: Manhattan Assistant District Attorney Vincent Rivellese (212) 335-9000

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No. 113 Chauca v Abraham

Veronika Chauca began working for Park Management Systems as a physical therapy aid at its Park Health Center in Queens in 2006. In July 2009, she informed her supervisors, Dr. Jamil Abraham and Office Manager Ann Marie Garriques, that she was pregnant and requested maternity leave until November, which they approved. When she contacted the Center about returning to work, she said the supervisors delayed and then declined to reinstate her, telling her there was not enough work available. Chauca complained the explanation was pretextual because no other employees had been laid off and, she alleged, at least three other women had been illegally terminated after becoming pregnant. In December 2009, she filed a pregnancy discrimination charge with the Equal Employment Opportunity Commission. And in November 2010, she filed this suit against the Center, Abraham and Garriques in U.S. District Court for the Eastern District of New York, alleging pregnancy discrimination in violation of the New York City Human Rights Law (NYCHRL), New York State Human Rights Law, and the federal Pregnancy Discrimination Act, which is part of Title VII of the Civil Rights Act of 1964.

At trial, the District Court denied Chauca's request to instruct the jury on punitive damages under the City Human Rights Law. "There is nothing here that supports punitive damages under any stretch of anybody's imagination.... There's no showing of malice, reckless indifference, that there was an intent to violate the law," the court said, invoking the standard for punitive damages under Title VII. The jury awarded her compensatory damages of $10,500 for lost pay and $50,000 for pain and suffering. Chauca appealed, arguing that she was entitled to have the jury consider punitive damages as well.

The U.S. Court of Appeals for the Second Circuit is asking this Court to resolve the key issue with a certified question: "What is the standard for finding a defendant liable for punitive damages under the New York City Human Rights Law...?" The NYCHRL does not provide a standard for liability. In Farias v Instructional Systems, Inc. (259 F3d 91 [2001]), the Second Circuit ruled the federal Title VII standard applies to punitive damages under the NYCHRL, limiting liability to defendants who engaged in intentional discrimination "with malice or with reckless indifference" to the rights of plaintiffs. However, it said the ruling has been called into question by subsequent actions of the New York City Council, which "has twice legislatively clarified the 'uniquely broad and remedial purposes' of the NYCHRL.... As part of the Restoration Act of 2005, the City Council instructed that '[t]he provisions of [the NYCHRL] shall be construed liberally ... regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of [the NYCHRL], have been so construed.'" On the other hand, the court said, neither the Restoration Act of 2005 nor amendments to the NYCHRL adopted in 2016 name Farias among the cases they were intended to override, and neither statute discusses punitive damages. "Given the lack of clarity concerning the appropriate standard for punitive damages and the importance of this issue to state and city law, we believe the prudent course of action is to certify this question to the New York Court of Appeals," the Second Circuit said.

For appellant Chauca: Stephen Bergstein, New Paltz (845) 469-1277
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