State of New York Court of Appeals

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To be argued Tuesday, September 5, 2017

No. 91 People v John Andujar

A police officer stopped John Andujar as he was driving an Empire Tow Company pick-up truck in the Bronx in February 2013. The officer saw a police scanner in the front left pocket of Andujar's jacket and, when the officer turned it on, he found the receiver was tuned to frequencies used by the 47th and 49th precincts. Andujar was charged with a misdemeanor under Vehicle and Traffic Law § 397, which applies to "a person ... who equips a motor vehicle with a radio receiving set capable of receiving signals on the frequencies allocated for police use or knowingly uses a motor vehicle so equipped...."

Criminal Court granted Andujar's motion to dismiss the charge for facial insufficiency. The prosecution sufficiently alleged only that Andujar's device was a prohibited scanner, not that the truck was "equipped" with it because the scanner was neither attached to the truck nor specifically designed to be used in it, as are radios powered through a vehicle's cigarette lighter, the court said. "[T]he People have not pled any factual allegations that would allow the conclusion that Defendant's vehicle was equipped with the police radio scanner. The superseding information merely states the police scanner was found in Defendant's pocket and that it was capable of receiving police frequencies. There are no allegations that the scanner was specifically prepared to be used with a vehicle, either by having a particular power cord or otherwise."

The Appellate Term, First Department reversed and reinstated the charge, saying the "plain and ordinary meaning" of the word "equips," as it is used in the statute, does not apply only to scanners that are attached to a vehicle. "Given that the scanner was in defendant's jacket pocket, where it could be accessed and operated in the vehicle, within seconds, the accusatory instrument was sufficient for pleading purposes, to satisfy the 'equips a motor vehicle' element of the charge. Had the legislature intended to prohibit only such devices that defendant attached or installed in the vehicle, it would have so stated...," the court said.

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For respondent: Bronx Assistant District Attorney Catherine M. Reno (718) 838-7119

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No. 92 Princes Point LLC v Muss Development L.L.C.

In 2004, Princes Point LLC entered into a contract with companies controlled by the Muss family to buy a 23-acre parcel on Raritan Bay in Staten Island, which had been declared an inactive hazardous waste site in the 1980s. State environmental officials delisted the property in 2001, after Muss Development L.L.C. performed remediation work that included construction of a seawall to prevent erosion. Princes Point made a $1.9 million down payment on the $35.9 million purchase price. A condition precedent to closing required the Muss defendants to obtain government approvals for the development of more than 100 houses. In 2005, after Hurricane Katrina, the state identified defects in the seawall and ordered the Muss defendants to repair it. In March 2006, the parties amended their contract to extend the outside closing date to July 2007; increase the purchase price to $37.9 million and the down payment to $3,995,500; and required Princes Point to pay half the cost of repairing the seawall and obtaining development approvals. The amendment contained a forbearance provision prohibiting Princes Point from bringing "any legal action" against the Muss defendants if the work was not completed by the outside closing date, which was ultimately extended to July 22, 2008. In June 2008, a month prior to the closing date, Princes Point brought this action for rescission of the 2006 amendment and specific performance of the 2004 contract.

Supreme Court dismissed its claims and granted summary judgment to the defendants on their counterclaims, finding Princes Point anticipatorily breached the contract and the contract was terminated. It ruled the defendants were entitled to the $3,995,500 down payment and $911,863 Princes Point paid for the seawall, as well as contractual attorneys' fees and costs.

The Appellate Division, First Department affirmed, saying "because a rescission action unequivocally evinces the plaintiff's intent to disavow its contractual obligations, the commencement of such an action before the date of performance constitutes an anticipatory breach.... Although plaintiff argues that it only sought rescission of the 2006 amendment and specific performance of the 2004 contract, there was one amended contract which defined the parties' rights and obligations. Plaintiff anticipatorily breached that contract by commencing this action." It said the defendants were entitled to retain the down payment and other payments without showing they were "ready, willing, and able to complete the sale because the buyer's anticipatory breach relieved [them] of further contractual obligations.... Once plaintiff commenced the instant action, it would have been futile and wasteful for defendants to continue to seek the approvals in preparation for a closing that plaintiff was tirelessly seeking to avoid."

Princes Point argues that "the relief of rescission or reformation of the amendment only, specific performance of the contract without the amendment or with a reformed amendment, and a permanent injunction enjoining the termination of the contract did not seek to nullify the entire contract and did not in any way indicate Princes Point's 'unqualified and clear refusal' to close on the purchase of the property." In any case, the lower court "erroneously determined that [defendants] were not required to show that they were ready, willing and able" to complete the sale, it says, citing Pesa v Yoma Development Group, Inc. (18 NY3d 527).

For appellant Princes Point: John S. Ciulla, Garden City (516) 747-7400
For respondents Muss Development et al: Scott E. Mollen, Manhattan (212) 592-1400

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To be argued Tuesday, September 5, 2017

No. 104 Makinen v City of New York

Police Officers Kathleen Makinen and Jamie Nardini brought this federal suit against the City of New York and individual police officials under the New York City Human Rights Law (NYCHRL), alleging the defendants discriminated against them based on a mistaken perception that they were alcoholics. They said they suffered emotional and financial damages due to disruptions of their professional and personal lives caused by compelled compliance with alcohol treatment programs and by threats of disciplinary action, among other things.

The New York Police Department referred the officers to its Counseling Services Unit (CSU) based on allegations by Makinen's ex-husband and Nardini's ex-boyfriend that they were alcoholics. Makinen, who was referred to CSU in 2007, 2008 and 2010, was diagnosed by its staff as suffering from alcohol dependence. Nardini was referred just once in 2010 and was diagnosed as suffering from alcohol abuse. CSU directed both officers to participate in treatment programs. However, the federal jury found Makinen and Nardini were not actually alcoholics and returned a verdict in their favor under NYCHRL section 8-107(1)(a). It awarded compensatory and punitive damages of $46,100 to Makinen and $105,000 to Nardini.

Section 8-107(1)(a) of the NYCHRL prohibits employment discrimination based on an "actual or perceived ... disability;" and section 8-102(16)(a) defines "disability" as "any physical, medical, mental or psychological impairment, or a history or record of such impairment." However, section 8-102(16)(c) provides, "In the case of alcoholism, drug addiction or other substance abuse, the term 'disability' shall only apply to a person who (1) is recovering or has recovered and (2) currently is free of such abuse." The City defendants argue on appeal that the NYCHRL "does not allow discrimination claims based on a mistaken perception of active alcoholism" because, under section 8-102(16)(c), only recovered or recovering alcoholics are defined as having a disability. The plaintiffs argue the section's narrowed definition of disability applies only to people who actually suffer from alcoholism, not to those who are mistakenly perceived to be alcoholics.

The U.S. Court of Appeals for the Second Circuit found that, due to "the absence of authority from New York courts," it is unclear how it should "reconcile the broad, remedial purpose of the NYCHRL with the specific language of section 8-102(16)(c)." It is asking this Court to resolve the issue in a certified question: "Do sections 8-102(16)(c) and 8-107(1)(a) of the New York City Administrative Code preclude a plaintiff from bringing a disability discrimination claim based solely on a perception of untreated alcoholism?"

For appellants City et al: Assistant Corporation Counsel Kathy Chang Park (212) 356-0855
For respondents Makinen and Nardini: Lisa F. Joslin, Albany (518) 432-7511

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To be argued Tuesday, September 5, 2017

No. 90 Matter of Madeiros v New York State Education Department

In 2013, after audits by the State Comptroller disclosed widespread financial abuses by providers of preschool special education programs, Education Law § 4410 and related regulations were amended to encourage municipalities to conduct fiscal audits of the programs and require the municipalities to obtain approval of their audit plans from the State Education Department to ensure the plans were consistent with guidelines and standards issued by the Department. In September 2013, attorney Pamela A. Madeiros submitted a Freedom of Information Law (FOIL) request to the Education Department seeking copies of its audit guidelines, standards and procedures; any audit plans that had been submitted by municipalities; and any related communications between the Department and municipalities.

The Department denied her request under FOIL's law enforcement exception, Public Officers Law § 87(2)(e), which permits agencies to withhold records that "are compiled for law enforcement purposes and which, if disclosed, would: i. interfere with law enforcement investigations or judicial proceedings; ... or iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures." After Madeiros filed this suit to challenge the determination, the Department released 55 pages of documents relating to its audit guidelines and standards, but contended the remaining documents fell within the law enforcement exception because disclosure of specific audit procedures would enable providers to "evade or circumvent the audit process."

Supreme Court ordered the release of two more pages and otherwise dismissed her petition. Saying the Comptroller's audits "revealed frequent abuses, and in some cases, resulted in referrals for criminal prosecutions," it ruled the withheld information "is appropriately limited to nonroutine audit techniques and procedures compiled for law enforcement purposes."

The Appellate Division, Third Department affirmed. As with the Comptroller's audits, it said, "there is no reason to doubt" that the municipal audits at issue here "are also aimed at uncovering financial malfeasance. As such, while the guidelines and related documents did not arise from a specific law enforcement investigation, they were nevertheless compiled with law enforcement purposes in mind...." The withheld documents are exempt from FOIL because disclosure "would indeed reveal to 'unscrupulous [providers] the path that an audit is likely to take and alert[] them to items to which investigators are instructed to pay particular attention,'" the court said, citing Matter of Fink v Lefkowitz (47 NY2d 567).

Madeiros argues the Department cannot invoke the law enforcement exception because the records it withheld "were not compiled for law enforcement purposes," but instead relate to its oversight of "routine fiscal audits." She says the records are not shielded by subdivision (i) of the exception because there are no pending "law enforcement investigations or judicial proceedings" with which disclosure might interfere; nor by subdivision (iv) because it "applies only to *criminal* investigative techniques or procedures," while these audits "are administrative in nature, not criminal." She says the Appellate Division decision "is contrary to the ... clear legislative intent to impose a broad standard of disclosure upon State agencies."

For appellant Madeiros: Cynthia E. Neidl, Albany (518) 689-1400
For respondents Education Dept. et al: Asst. Solicitor General Jeffrey W. Lang (518) 776-2027