

# *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 or [gspencer@nycourts.gov](mailto:gspencer@nycourts.gov).

To be argued Wednesday, February 7, 2018

## **No. 22 Gilbane Building Co./TDX Construction Corp. v St. Paul Fire and Marine Insurance Co.**

Gilbane Building Co./TDX Construction Corp., a joint venture, was retained by the Dormitory Authority of the State of New York (DASNY) in 2001 to serve as construction manager for the construction of a 15-story forensic laboratory for New York City's Office of the Chief Medical Examiner on the Bellevue Hospital Campus in Manhattan. By separate contract, DASNY hired Samson Construction Co. as the prime contractor for excavation and foundation work. In its contract with DASNY, Samson agreed to obtain general liability insurance that covered "the construction manager," among others, as additional insureds. Samson obtained its liability policy from Liberty Insurance Underwriters. The policy contained an "Additional Insured - By Written Contract" clause, which provided that Liberty would cover "as an insured any person or organization with whom you have agreed to add as an additional insured by written contract...."

Beginning in 2003, Samson's excavation work allegedly caused an adjacent building to settle, causing significant structural damage. In 2006, DASNY sued Samson and the project architect for negligence. In 2010, the architect brought a third-party action against Gilbane/TDX and its member companies, alleging the construction manager had been negligent in supervising Samson's work. Gilbane/TDX sought defense and indemnification from Liberty as an additional insured under its policy with Samson. Liberty denied coverage on the ground that Gilbane/TDX did not qualify as an additional insured and did not provide timely notice of the third-party claim. Gilbane/TDX brought this action seeking a declaration that Liberty was obligated to provide coverage. Liberty moved for summary judgment, arguing Gilbane/TDX was not entitled to coverage because it did not have a written contract with Samson to make it an additional insured.

Supreme Court denied Liberty's motion and declared that Gilbane/TDX was an additional insured under the policy. The court said the policy's "Additional Insured - By Written Contract" clause "requires only a written contract to which Samson is a party" and it found this requirement was met by Samson's contract with DASNY, which required Samson to obtain insurance naming the construction manager as an additional insured.

The Appellate Division, First Department reversed on a 4-1 vote, holding that "the language in the 'Additional Insured - By Written Contract' clause of the Liberty policy clearly and unambiguously requires that the named insured execute a contract with the party seeking coverage as an additional insured. Since there is no dispute that Samson did not enter into a written contract with [Gilbane/TDX], Samson's agreement in its contract with DASNY to procure coverage for [Gilbane/TDX] is insufficient to afford [Gilbane/TDX] coverage as an additional insured under the Liberty policy."

The dissenter said the additional insured clause "is poorly drafted in terms of syntax," but should be read "to cover any party the policyholder agreed by written contract to cover.... By entering into just such a written contract with the property owner, DASNY, which included an agreement that Samson would obtain a [liability] policy naming Gilbane as an additional insured, Samson both triggered the provisions of the 'additional insured' endorsement of the Samson-Liberty policy ... and acted in conformity with those terms."

For appellants Gilbane/TDX: Richard W. Brown, Trumbull, CT (203) 287-2100

For respondent Liberty Insurance Underwriters: George R. Hardin, Manhattan (212) 571-0111

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**No. 23 Gravano v Take-Two Interactive Software, Inc.**

**No. 24 Lohan v Take-Two Interactive Software, Inc.**

Lindsay Lohan and Karen Gravano brought these actions against video game makers Take-Two Interactive Software, Inc. and its subsidiary, Rockstar Games, each alleging the companies violated her right to privacy under Civil Rights Law § § 50 and 51 by incorporating her image, voice, and persona into the game *Grand Theft Auto V*, which was released in 2013. Section 50 makes it a misdemeanor to use "for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person...." Section 51 allows any person "whose name, portrait, picture or voice is used" in violation of section 50 to sue "to prevent and restrain the use thereof" and to recover damages. Lohan, an actress and celebrity, claims the character "Lacey Jonas" depicts her in the game, including references to her personal history. Images of the "Jonas" character were also used in advertising materials and on merchandise. Gravano is the daughter of Gambino underboss Sammy "The Bull" Gravano, who testified as a government witness against John Gotti and other mob figures. She starred in the television series "Mob Wives" and wrote a best-selling memoir about growing up with her infamous father. Gravano claims the character "Antonia Bottino" depicts her in the game and makes references to her background as the daughter of a mobster who became a government witness.

Supreme Court denied motions by Take-Two and Rockstar to dismiss the suits, ruling that both plaintiffs had sufficiently alleged violations of Civil Rights Law § 50 and 51 and that documents offered by the defendants to show that images of the game characters were not those of the plaintiffs "were vehemently and factually contested" by the plaintiffs, raising questions of fact.

The Appellate Division, First Department dismissed both suits, saying the plaintiffs' claims under section 51 "must fail because the defendants did not use [their] 'name, portrait or picture,'" did not use either plaintiff "as an actor for the video game," and did not use any photographs of them. Even if the game characters could be considered representations of the plaintiffs, it said, their "claims should be dismissed because this video game does not fall under the statutory definitions of 'advertising' or 'trade'.... This video game's unique story, characters, dialogue, and environment, combined with the player's ability to choose how to proceed in the game, render it a work of fiction and satire." Rejecting Lohan's argument that her image was used in advertising materials for the game, the court said, "The images are not of Lohan herself, but merely the avatar in the game that Lohan claims is a depiction of her."

The plaintiffs argue that they pled viable claims for invasion of privacy under the Civil Rights Law. Lohan says the defendants' "unauthorized deliberate use of [her] recognizable image on billboards and disc packaging solely to advertise and promote their video game violates" section 51. She says the First Department "erred in holding that 'portrait' or 'picture' does not include a reasonably recognizable digital image," and she contends the use of the image in advertising violated the statute because it was not merely ancillary to the permitted use in the game itself. Gravano argues "the First Amendment does not afford video games an absolute protection" against privacy claims because the games are primarily commercial.

For appellant Gravano: Thomas A. Farinella, Manhattan (917) 319-8579

For appellant Lohan: Frank A. Delle Donne, Brooklyn (718) 872-0533

For respondents Take-Two and Rockstar Games: Jeremy Feigelson, Manhattan (212) 909-6000

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## **No. 25 People v Nicholas Brooks**

Nicholas Brooks was charged with murdering his girlfriend, Sylvie Cachay, after hotel staff found her body submerged in the bathtub of their room at the SoHo House in Manhattan in December 2010. The tub's faucet was running. Brooks was at a bar when the body was found and he was arrested when he returned to the room less than an hour later. The prosecution contended that Brooks strangled and drowned Cachay because she intended to break up with him, and that he left her in the tub and went to the bar in an attempt to create an alibi. Brooks contended that, after he left, Cachay accidentally drowned in the tub due to the combined sedative effects of five prescription medications found in her system during the autopsy. In support, he offered expert testimony by a former chief medical examiner for Suffolk County. After granting the prosecution's motion for a Frye hearing to challenge the scientific basis for the expert's theory, the court allowed him to testify with limits on the scope of his testimony. The court also allowed prosecutors to call 11 of Cachay's friends to testify about the mercurial nature of their relationship, Cachay's low views of Brooks' character, and her attempts to break up with him. Brooks was convicted of second-degree murder and sentenced to 25 years to life in prison.

The Appellate Division, First Department affirmed, saying the trial court properly granted the Frye hearing. "Defendant's forensic pathologist was not an expert in toxicology and could provide no authority to support his theory that five prescription drugs found in the victim's system interacted with one another so as to heighten their sedative effect and cause the victim to die accidentally, either directly from overdose or secondarily through accidental drowning ... as a result of unintended drug-induced incapacitation. Defendant's claim that he was prejudiced by the mere fact that a hearing was held is unsubstantiated." It said the testimony of Cachay's friends was properly admitted. "Proof of the 'murder victim's espoused intention to terminate her relationship with, and stay away from, defendant' was admissible to show the 'victim's state of mind' and was 'relevant to the issue of the motive of defendant, who was aware of the victim's attitude, to kill the victim'.... Hence, the background information about the couple's 'strife and unhappiness' was admissible as 'highly probative of the defendant's motive and [was] either directly related to or inextricably interwoven with the issue of his identity as the killer'...."

Brooks argues the trial court erred in granting the Frye hearing "because the expert's testimony did not involve a novel scientific theory or procedure," and further erred in "permitting it to become a discovery tool that the People exploited to prepare for trial." He says the court "permitted the People essentially to 'depose' [his expert] at great length on subjects far afield from a proper Frye inquiry. The hearing went on for four days and consumed over 500 transcript pages." He argues the erred in allowing "inadmissible, prejudicial hearsay" testimony by Cachay's friends that "portrayed Brooks as a lazy, lascivious, marijuana-smoking, contemptible bum, who patronized prostitutes, visited adult websites, and once ... threatened to kill her. The testimony served no proper purpose and conveyed to the jury that Brooks had a bad character and a propensity to do bad things."

For appellant Brooks: Susan C. Wolfe, Manhattan (212) 885-5000

For respondent: Manhattan Assistant District Attorney David M. Cohn (212) 335-9000