

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.

To be argued Thursday, March 22, 2018 (arguments begin at noon)

No. 42 People v Kerri Roberts

No. 43 People v Terrie J. Rush

The key issue in these appeals concerns the evidence necessary to establish identity theft under Penal Law sections 190.79 and 190.80. Both statutes require proof that the defendant "knowingly and with intent to defraud assumes the identity of another person by presenting himself or herself as that other person, or by acting as that other person or by using personal identifying information of that other person, and thereby...." commits another crime.

Kerri Roberts was arrested after he attempted to use a forged credit card at a Manhattan store in 2011. The card bore a valid account number belonging to a woman, the victim, and the name of a fictitious man, Craig Jonathan. Roberts also had a forged driver's license with his photo and Jonathan's name. Roberts was convicted of second-degree identity theft under section 190.79 and two counts of possession of a forged instrument. He was sentenced to three to six years in prison.

The Appellate Division, First Department reversed the identity theft conviction for insufficient evidence. "As we held in People v Barden (117 AD3d 216 ...), to prove the commission of identity theft, evidence of the use of personal identifying information, alone, is insufficient. Rather, the People must show that the defendant both used the victim's personal identifying information and assumed the victim's identity. Here, while the proof was clear that defendant used the personal identifying information of the victim..., there was no proof that he assumed her identity. Instead, he assumed the identity of a fictitious person," Jonathan, it said.

Terrie Rush was accused of assuming the identity of another person, S.L., by using his name to deposit forged checks into a fraudulent bank account that had been opened in his name by an unidentified male at a Rochester-area bank, without S.L.'s knowledge or consent. The checks had been stolen from a local business and forged to pay thousands of dollars to S.L. shortly before the deposits were made in 2008. The funds were quickly withdrawn from the account at an ATM. Rush was convicted of first-degree identity theft under section 190.80 and possession of a forged instrument. She was sentenced to five years of probation.

The Appellate Division, Fourth Department affirmed, saying, "We reject defendant's contention that the phrase 'assumes the identity of another person' is a discrete element that must be proved.... In [People v Yuson (133 AD3d 1221)], we expressly declined to follow the decision of the First Department in [Barden]..., and we wrote that 'the statute is unambiguous and defines the phrase 'assumes the identity of another person' by the phrase that immediately follows it, i.e., by, inter alia, using the personal identifying information of that person'.... We thus concluded in Yuson that, 'inasmuch as the People established that defendant used the personal identifying information of the victims, they thereby established that defendant assumed their identities for the purposes of the statute'.... Likewise, here the People established that defendant used the personal identifying information of another person, i.e., that person's name and bank account number ... to defraud the bank...." It also rejected Rush's claim that, even if she did assume S.L.'s identity, "she did not 'thereby' commit the offense of criminal possession of a forged instrument because she possessed the check before she deposited it and the use of the identifying information did not cause her to commit the offense." The court said the term "thereby" means "[b]y that means' or 'in that way," and a "rational person" could conclude that Rush assumed S.L.'s identity "and thereby committed the crime" of possession of a forged instrument by presenting the check for deposit.

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To be argued Thursday, March 22, 2018 (arguments begin at noon)

No. 44 Altman v 285 West Fourth LLC

In 2003, Richard Altman subleased a Manhattan apartment from Keno Rider, the tenant of record who had a rent-stabilized lease with a monthly rent of \$1,829.49. Altman agreed to pay Rider \$2,012.44 per month, based on Rider's current rent plus 10% because the apartment was furnished. After the landlord claimed it was entitled to the 10% increase, the parties settled the dispute in 2005 by a written stipulation, in which Rider agreed to surrender the apartment and the landlord offered Altman a "decontrol lease" which, with a vacancy increase, exceeded \$2,000 per month. The landlord notified the state Division of Housing and Community Renewal (DHCR) that the apartment had been decontrolled due to "high rent vacancy." In 2006, 285 West Fourth LLC (Owner) bought the building. In 2007, the Owner and Altman entered into an agreement in which Altman was offered a market rate lease at \$2,600 per month and he acknowledged that his unit "is a free market apartment and is not subject to rent regulation of any kind." The parties entered into a series of renewal leases, the last of them in 2013, which set the monthly rent at \$3,800. Altman then brought this action against the Owner seeking, among other things, declarations that his apartment was subject to the Rent Stabilization Law (RSL) and the legal monthly rent was \$1,829.49, and a judgment for rent overcharges.

Supreme Court dismissed Altman's complaint and declared that, under RSL § 26-560.2, his apartment became exempt from rent-stabilization in 2005. The statute provides for vacancy deregulation "where at the time the tenant vacated such housing accommodation the legal regulated rent was [\$2,000] or more per month; or, for any housing accommodation which is or becomes vacant [between 1997 and 2011] with a legal regulated rent of [\$2,000] or more per month." The court said Rider's rent was \$1,829.49 when he surrendered the apartment and, under the Rent Regulation Reform Act (RRRA) of 1997, the landlord was entitled to apply a 20% vacancy increase to the rental amount when it leased the apartment to Altman, which raised the legal regulated rent above \$2,000 and deregulated the unit.

The Appellate Division, First Department modified by reinstating Altman's complaint and declaring his apartment is subject to rent stabilization. "Although defendant was entitled to a vacancy increase of 20% following the departure of [Rider,] the tenant of record, the increase could not effectuate a deregulation of the apartment since the rent at the time of the tenant's vacatur did not exceed \$2,000..., it said. The court also ruled the 2005 stipulation and the 2007 agreement were void "as a matter of public policy," the first because it set a rent that exceeded the legal maximum under the RSL and the second because Altman "could not waive the protections of the RSL, absent satisfaction of the conditions for deregulation."

On remand, Supreme Court awarded Altman rent overcharge damages of \$164,964, including treble damages and prejudgment interest. The Appellate Division affirmed.

The Owner argues the apartment qualified for vacancy deregulation under the second clause of RSL § 26-504.2. "The second clause, added by the New York State Legislature in June of 1997, more broadly provides that an apartment will be vacancy deregulated where the apartment was or became vacant ... "with a legal regulated rent of two thousand dollars or more per month." The relevant legislative history confirms that the Legislature's intent when adding the second clause was to limit the City Council's restrictive language in the first clause, and to provide that an apartment will become vacancy deregulated as long as the rent of the former tenant, *plus allowable post-vacancy increases*, brings the rent to \$2,000 or more." Alternatively, the Owner says the overcharge award should be sharply reduced because "such extraordinary penalties are inequitable. Owner treated the apartment as deregulated based on longstanding DHCR's guidance, a DHCR regulation, and existing case law, all of which [the Appellate Division] completely upended."

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