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.

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

Week of January 7 - 10, 2013

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 Monday, January 7, 2013

No. 11 Applewhite v Accuhealth, Inc.

Tiffany Applewhite was 12 years old in February 1998, when she suffered anaphylactic shock after receiving an intravenous steroid medication from a private nurse in the Applewhites' Bronx apartment. While the nurse began cardiopulmonary resuscitation, Tiffany's mother called 911 and said her daughter was having difficulty breathing. A basic life support (BLS) ambulance was dispatched because no advanced life support (ALS) ambulance was available at the time. Tiffany was in cardiac arrest and was not breathing when it arrived. Her mother said she asked the ambulance EMTs to immediately take Tiffany to a nearby hospital, about four minutes away, but they advised her to wait for an ALS ambulance while they continued CPR. The ALS ambulance arrived about 20 minutes later and its paramedics administered oxygen and epinephrine, then took Tiffany to the hospital. She survived, but suffered severe brain damage. Her mother brought this action on her behalf against New York City, among other parties, claiming the BLS ambulance EMTs were negligent in failing to bring oxygen to the apartment and in waiting for the ALS ambulance to transport the girl.

Supreme Court granted the City's motion to dismiss the suit, ruling Applewhite failed to prove the City owed a special duty of care. That would require her to show, among other things, that the City assumed an affirmative duty to act on her behalf and that she justifiably relied on its assurances to her detriment. The court said there was no proof of "detrimental reliance" because Tiffany's mother had no other options for providing oxygen or transporting her and, thus, "there is no showing that Plaintiff was deprived of assistance that reasonably could have been expected from another source because of the government's conduct...."

The Appellate Division, First Department reversed and reinstated the suit, holding that justifiable reliance was established. It said the mother wanted to go to the hospital immediately, but the EMTs allegedly assured her it was best to wait for the ALS ambulance to arrive with paramedics and proper equipment, without telling her it would take another 20 minutes. It said, "The mother justifiably relied on the [EMTs], who had taken control of the emergency situation, and who elected to await the arrival of the ALS ambulance." It said any questions regarding the mother's credibility and the issue of proximate cause, including the degree to which Tiffany's brain damage could have been avoided or mitigated, could not be resolved on the existing record.

The City argues that Applewhite "failed to state a claim, as she did not allege that the City assumed or breached a special duty." Even if she did allege a special duty, it says, she failed to establish the justifiable reliance element because the EMTs' response to her request for immediate transport to the hospital -- that they should wait for the ALS ambulance -- "did not constitute an assurance or guarantee of her daughter's safety." It also argues that Applewhite cannot prove that any reliance by her on the EMTs' statements was detrimental because "no alternative transport could possibly have been utilized within the limited time frame for successful resuscitation and, in any event, [] no viable alternative means of transport existed, given Tiffany's need for uninterrupted CPR."

For appellant City: Assistant Corporation Counsel Drake A. Colley (212) 788-1613
For respondent Applewhite: Matthew Gaier, Manhattan (212) 267-4177

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 Monday, January 7, 2013

No. 12 Sunrise Check Cashing and Payroll Services, Inc. v Town of Hempstead

In 2006, the Town of Hempstead (Nassau County) amended article XXXI of its Building Zone Ordinance by adopting section 302(K), which restricts check-cashing businesses to industrial and light manufacturing districts. The new section required check-cashing businesses in other districts to shut down or relocate to industrial or light manufacturing zones within five years. Eight check-cashing businesses located in Hempstead's business district brought this action against the Town to strike down the new law. They argued, among other things, that section 302(K) is preempted by the New York State Banking Law, which gives licensing and regulatory authority over the check-cashing industry to the Superintendent of Financial Services (formerly the Superintendent of Banks).

Supreme Court granted the Town's motion for summary judgment and declared that section 302(K) is valid. It said there was no evidence the State Legislature intended to preempt such local zoning laws and held that section 302(K) did not run afoul of either the conflict preemption or field preemption doctrines.

The Appellate Division, Second Department reversed and granted the check cashers' motion for summary judgment, holding that section 302(K) is invalid under the doctrine of conflict preemption. "[A]s the clear language of Banking Law § 369(1) demonstrates, the Legislature has vested the Superintendent with the duty to determine whether each applicant for a check-cashing license proposes to perform that function in an appropriate location, whether there is a community need for a new licensee in that location, and whether the granting of such an application will be advantageous to the public...," it said. "Accordingly, we conclude that the Town's attempt to control the determination of the appropriate locations of these establishments by enactment of section 302(K) is in conflict with existing state law."

Hempstead argues, "[T]he State Banking Law deals merely with the licensing of the operators of check cashing facilities with the stated goal of maintaining the stability of that industry in the general community. Distinguishably, the subject Zoning Ordinance deals, as it must, only with land regulation. Thus, there is no conflict and, therefore, no preemption. Banking is not land." The Superintendent of Financial Services, supporting the Town as amicus curiae, argues there is no conflict between the Banking Law and the local zoning law. He says his department, in granting a check-cashing license, "does not make the full range of determinations that inform land-use decisions. DFS determines whether a particular area is saturated with check-cashing establishments or can support another one, but defers to local zoning authorities for other questions about the proper siting of this type of business." He says DFS requires applicants to certify that they are in compliance with local zoning laws, and regards noncompliance as grounds to deny or revoke a license.

For appellant Hempstead: Peter Sullivan, Garden City (516) 222-6200
For respondent Sunrise et al (check cashers): Jeffrey G. Stark, Uniondale (516) 248-1700
For amicus curiae DFS: Assistant Solicitor General Matthew W. Grieco (212) 416-8014

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 Monday, January 7, 2013

No. 13 People v Damien Warren

Damien Warren and three co-defendants were charged with second-degree murder and weapon possession for the fatal shooting of Keone Littlejohn on Sherman Street in Buffalo in March 2006. One co-defendant was allowed to plead guilty to a misdemeanor in exchange for testifying on behalf of the prosecution, and Warren and the remaining defendants went to a joint trial. One defendant, Marvin Howard, waived his right to a jury and chose to proceed by a bench trial, while Warren and the other defendant were tried by a jury. The parties dispute whether Warren sought to sever his trial from Howard's, but the trials remained joined.

After the prosecution, Warren and the other jury defendant rested, Howard took the stand to testify in his own defense. Warren's attorney requested that Howard testify outside the presence of the jury, arguing that the issue of Howard's guilt was not before the jury and that the proof had closed with respect to Warren. County Court denied the request. Howard then testified before the jury that Warren, not he, was the shooter. The jury convicted Warren of both counts and acquitted his co-defendant, and County Court acquitted Howard. Warren was sentenced to 25 years to life in prison on the murder count.

The Appellate Division, Fourth Department reversed, ruling County Court's refusal to excuse the jury during Howard's testimony deprived Warren of a fair trial. It said the refusal was "particularly egregious in view of the fact that such testimony was obviously damaging to [Warren], was not properly a part of the jury trial and was easily severable from the evidence presented at the jury trial." The court said, "[I]t is difficult to imagine a more classic case in which the defenses of [Warren] and [Howard] 'were antagonistic at their crux'.... The jury should not have heard the defense set forth by [Howard] inasmuch as only the court, not the jury, was the trier of fact with respect to that codefendant. Moreover..., the People in essence received a windfall witness, and in effect a second prosecutor, i.e., counsel for [Howard]..., after resting their case against the two jury trial defendants."

The prosecution argues that Warren's "severance claim is both unpreserved and meritless." It says, "By the time the jury heard Howard's testimony, they had already heard similar proof incriminating [Warren] from the prosecution witnesses. Clearly, Howard's testimony which linked defendant to the crime was cumulative to the evidence elicited by the People, and thus it could not have caused the jury to unjustifiably infer defendant's guilt...." It says, "The evidence against all four defendants was identical and was provided by the same witnesses and exhibits.... While it may have been a wiser choice for the trial court to have excused the jury while Howard testified, whatever testimony Howard had to offer was properly before the jury as it bore on their consideration of the guilt or innocence" of Warren and the other jury trial defendant. It also argues that any error was harmless in view of the "overwhelming" proof of Warren's guilt.

For appellant: Erie County Assistant District Attorney Donna A. Milling (716) 858-2424
For respondent Warren: Michael L. D'Amico, Buffalo (716) 885-2889

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 Monday, January 7, 2013

No. 14 People v Michael Palmer *(papers sealed)*
No. 15 People v Cornell Long *(papers sealed)*

The convicted sex offenders in these appeals are challenging their risk level assessments under the Sex Offender Registration Act (SORA). A question raised in both cases is whether an offender's use of alcohol at the time of an offense, by itself, can constitute clear and convincing evidence of drug or alcohol abuse under SORA risk factor 11.

Michael Palmer was 40 years old in March 2006, when he engaged in sexual conduct with an 11-year-old girl in Brooklyn. The abuse continued for nearly two years. He told the Probation Department he had been drinking at an after-work party prior to the first encounter. He also said he avoided drugs and alcohol because his stepfather was an alcoholic. He pled guilty to criminal sexual act in the second degree and was sentenced to two years in prison.

Cornell Long was arrested in January 2009 for forcing his girlfriend, with whom he had lived for six years, to engage in deviate sexual intercourse after an argument in their apartment in Buffalo. He told detectives that he began drinking "a few beers" about an hour and a half before the incident. He pled guilty to criminal sexual act in the third degree and was sentenced to 12 months in jail.

In separate Supreme Court proceedings to determine their risk of re-offending, Palmer and Long were designated level two sex offenders based, in part, on 15 points assessed for having "a history of drug or alcohol abuse" under SORA risk factor 11.

The Appellate Division upheld the level two designation for both men. The Second Department said Palmer was properly assessed points for alcohol abuse "based upon his admission that he was using alcohol at the time of the offense...." In Long's appeal, the Fourth Department said the lower court "failed to set forth its findings of fact and conclusions of law" as required. but found the record was sufficient for it to make its own findings and conclusions. It said, "[W]e conclude that [Long's] admission that he was drinking alcohol during the 1½-hour period immediately preceding his offense provides a sufficient basis upon which to assess the points" for drug or alcohol abuse.

Palmer and Long argue that their statements that they consumed alcohol prior to their offense (just the first offense in Palmer's case) did not provide clear and convincing evidence of alcohol abuse in the absence of any evidence of their level of intoxication or evidence they had a history of alcohol abuse. Palmer says the SORA Risk Assessment Guidelines and Commentary "makes clear [that] its purpose is to properly account for the risk of recidivism posed by offenders who compulsively abuse drugs or alcohol. The Guidelines repeatedly refer to 'abuse' of alcohol and explicitly state that points should not be assessed for 'occasional social drinking.'" Long also argues he was deprived of due process by Supreme Court's failure to make required findings of fact and by the Appellate Division's affirmance based on an insufficient record.

No. 14 For appellant Palmer: Anna Pervukhin, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Adam M. Koelsch (718) 250-3823
No. 15 For appellant Long: Vincent F. Gugino, Buffalo (716) 853-9555
For respondent: Erie County Assistant District Attorney David A. Heraty (716) 858-2424

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 Tuesday, January 8, 2013

Nos. 16 and 17 People v Trevis D. Baker

This case arose in May 2006, when Trevis D.Baker intervened in a discussion between his girlfriend and a Rochester police officer who was questioning the registration of her grandfather's Cadillac. With his girlfriend videotaping the scene, Baker spoke with the officer through the window of his patrol car and then walked away, saying, "That's harassment, motherfucker," or words to that effect. When the officer asked what he had said, Baker repeated the phrase and concluded, "Fuck that." The officer arrested Baker for disorderly conduct and, in searching him, found 25 bags of crack cocaine in his pocket. Baker was charged with third-degree criminal possession of a controlled substance.

Baker moved to suppress the drug evidence, arguing that his statements to the officer were constitutionally protected speech that did not violate the disorderly conduct statute and, thus, the officer lacked probable cause to arrest him and the search was improper. Monroe County Court denied the motion, ruling the officer had probable cause for the arrest. It said Baker "used abusive or obscene language in a public place.... The defendant was not engaging in a 'private encounter' with the police officers. Rather, those words and the context of their use tend to support the charge of disorderly conduct under Penal Law [§] 240.20(3), and ... provided the police the sufficient probable cause to arrest the defendant... The facts establish that the defendant, by his words, intended to cause public inconvenience, annoyance or alarm." It said the discovery of the cocaine "was the result of a lawful search incident to an arrest."

Baker, who also faced charges of second-degree assault in an unrelated case arising from an altercation with police officers several days prior to his disorderly conduct arrest, accepted an offer to satisfy both indictments by pleading guilty to one count each of third-degree drug possession and second-degree assault in exchange for a promise the court would impose concurrent sentences of six years in prison. The Appellate Division, Fourth Department affirmed both convictions without opinion.

Baker argues that his arrest for disorderly conduct was unlawful, and the resulting search invalid, because the language he used to criticize the officer was constitutionally protected. He says, "[T]he Supreme Court has repeatedly held that in the context of an alleged breach of the peace, speech may only be proscribed if it is 'obscene,' likely to incite others to violence, or constitutes 'fighting words'.... Just as no reasonable person could interpret Mr. Baker's use of the words as erotic, no reasonable person could interpret his criticism as an attempt to incite the small crowd of onlookers to commit an unlawful act.... He made no attempt to rile up the crowd or encourage them to join in his denunciation." Nor were they fighting words, since he "made no attempt to threaten or otherwise instill fear of a physical attack." If his drug conviction is reversed, he argues, the assault conviction must be reversed, too, since both pleas were based on a promise of concurrent sentences.

For appellant Baker: Timothy S. Davis, Rochester (585) 753-4213
For respondent: Monroe County Assistant District Attorney Geoffrey Kaeuper (585) 753-4674

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 Tuesday, January 8, 2013

No. 18 Auqui v Seven Thirty One Limited Partnership

Jose Verdugo was injured in December 2003, while working as a deliveryman for a restaurant, when a sheet of plywood fell from a building under construction at 731 Lexington Avenue in Manhattan and struck him on the head. He was granted Workers' Compensation benefits for treatment of his head, neck and back injuries, as well as post-traumatic stress disorder and depression. Verdugo and his wife brought this personal injury action against the building's owner, Seven Thirty One Limited Partnership; the construction manager, Bovis Lend Lease LMB, Inc.; and the concrete subcontractor, North Side Structures, Inc.

Two years after the accident, the restaurant's insurance carrier sought to discontinue Verdugo's Workers' Compensation benefits on the ground that he was no longer disabled. After a hearing, a Workers' Compensation Law Judge found that Verdugo suffered from "no further causally related disability since January 24, 2006" and terminated his benefits as of that date. On administrative appeal, the Workers' Compensation Board reinstated his claim for post-traumatic stress disorder and otherwise upheld the determination.

In 2009, Seven Thirty One and the other defendants in this case moved for an order precluding Verdugo from litigating the issue of his accident-related injuries beyond January 24, 2006, on the ground that the issue had already been decided in the Workers' Compensation proceeding. Supreme Court granted the defendants' motion to preclude, saying Verdugo "had a full and fair opportunity to address the issue of ongoing causally-related disability" and was collaterally estopped from relitigating it. Shortly thereafter, a different judge appointed Maria Auqui as guardian of Verdugo's property, and Verdugo moved to renew the preclusion motion on the ground the guardianship order raised a triable issue of fact regarding his ongoing disability. Supreme Court adhered to its prior decision.

The Appellate Division, First Department reversed in a 3-2 decision, saying, "The determination that workers' compensation coverage would terminate as of a certain date for plaintiff's injuries ... is not, nor could it be, a definitive determination as to whether plaintiff's documented and continuing injuries were proximately caused by defendants' actions. While factual issues necessarily decided in an administrative proceeding may have collateral estoppel effect, it is well settled that 'an administrative agency's final conclusion, characterized as an ultimate fact or mixed question of law and fact, is not entitled to preclusive effect'" because it "is imbued with policy considerations as well as the agency's expertise." The Appellate Division also concluded the 2009 guardianship order "raises an issue of fact as to the cause of plaintiff's ongoing disability sufficient to warrant denial of defendants' motion."

The dissenters took the position that plaintiff "should be precluded from relitigating the issue of continuing disability" since "the duration of [his] disability was an evidentiary determination fully and fairly litigated by him at the Workers' Compensation proceeding terminating his benefits." Additionally, "the uncontested appointment of a guardian for the plaintiff more than three years later does not raise a triable issue of fact as to when his work-related disability ended."

For appellants Seven Thirty One et al: Matthew W. Naparty, Great Neck (516) 487-5800
For respondents Auqui & Verdugo: Annette G. Hasapidis, South Salem (914) 533-3049

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 Tuesday, January 8, 2013

No. 19 Caldwell v Cablevision Systems Corporation

On a rainy night in October 2006, Bessie Caldwell was injured when she tripped and fell while walking her 100-pound dog on Benefield Boulevard in Peekskill, Westchester County. Communications Specialists, Inc. (CSI) had dug a trench and a series of test pits along the street for installation of a fiber-optic cable, then backfilled the excavations. Caldwell and her husband filed this personal injury action against CSI, among other parties, alleging it created a dangerous condition that caused her accident by failing to properly fill and cover the trench and test pits.

At trial, Caldwell testified that she fell when she tripped on a "dip in the trench" that CSI had dug and filled. To rebut her testimony, CSI subpoenaed Dr. Barry Krosser, one of the emergency room physicians who examined Caldwell after her accident. Dr. Krosser testified that he had no independent recollection of Caldwell, but based on the consultation note he dictated after examining her, she had indicated to him that she "tripped over a dog while walking last night in the rain." On cross-examination, he said CSI was paying him $10,000 to testify.

Caldwell moved to have Dr. Krosser's testimony stricken or for "a curative instruction to the jury ... dealing with monetary influence." Caldwell argued that, as a subpoenaed witness, Dr. Krosser was entitled under CPLR 8001(a) to only $15 per day of testimony and 23 cents per mile traveled and that it was improper to pay a fact witness $10,000 for an hour of testimony on a single day. CSI argued that CPLR 8001 sets the minimum compensation for a fact witness, but does not prohibit it from compensating Dr. Krosser for his time away from his practice "as if he was an expert coming in" to testify. Supreme Court refused to strike his testimony or give a curative instruction, but ruled both attorneys could address his compensation in their summations. The jury found CSI had been negligent, but also found its negligence was not a substantial factor in Caldwell's accident, and the court dismissed the complaint against CSI.

The Appellate Division, Second Department affirmed, saying even if the $10,000 payment was unreasonable, the exclusion of Dr. Krosser's testimony was not required. Rather, the remedy, "where one might reasonably infer that a fact witness has been paid a fee for testifying, is to permit opposing counsel to fully explore the matter of compensation on cross-examination and summation, and to leave it for a properly instructed jury to consider whether the payment made to the witness was, in fact, disproportionate to the reasonable value of the witness's lost time and, if so, what effect, if any, that payment had on the witness's credibility." The Appellate Division concluded the trial court erred in failing to instruct the jury on witness compensation, since "more than the general credibility charge is ... warranted where, as here, a reasonable inference can be drawn that a fact witness has been paid an amount disproportionate to the reasonable value of his or her lost time," but that this error "was not so prejudicial as to warrant reversal" because Dr. Krosser's testimony "was based only on what was written in his note."

Caldwell argues that "[t]he agreement by defendant's attorneys to pay $10,000 to a fact witness for one hour of testimony was unethical and constituted a bribe, and the testimony of that witness should have been stricken." She also claims the failure to instruct the jury on the payment was not harmless because "the issue of causation heavily depended on the testimony of the doctor who had received the $10,000 payment.... [T]he error in failing to remedy the ethical transgression was central to this case and highly prejudicial."

For appellant Caldwell: Fred R. Profeta, Jr., Manhattan (212) 577-6500
For respondent CSI: Christopher Simone, Lake Success (516) 488-3300

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 Tuesday, January 8, 2013

No. 20 Matter of Beck-Nichols v Bianco
No. 21 Matter of Adrian v Board of Education of City School District of Niagara Falls
No. 27 Matter of Luchey v Board of Education of City School District of Niagara Falls

The three petitioners in these cases were among 20 employees of the Niagara Falls City School District who were terminated in September 2009 for violating the District's residency policy, which "requires that employees ... be residents of the City of Niagara Falls and maintain their residency during their term of employment." The policy defines residency as "an individual's actual principal domicile at which he or she maintains usual personal and household effects." The District used a Westlaw database to check the addresses of employees and hired a surveillance company to investigate some who had multiple addresses. At affirmation meetings with District officials, the employees were permitted to present documents supporting their claims of city residency, including rent and utility receipts, driver's license, and voter registration. Relying on other evidence, including surveillance reports, the District determined the employees were no longer city residents and fired them. Karri Beck-Nichols, a production control manager for the Information Systems unit, English teacher Roxanne Adrian, and counselor Keli-Koran Luchey commenced these article 78 proceedings to challenge their terminations.

Beck-Nichols' suit was transferred to the Appellate Division, Fourth Department, which annulled the District's determination as arbitrary and capricious. According to the court, a party alleging a change in domicile must prove the change by clear and convincing evidence; and under that standard, the district "failed to establish that petitioner evinced 'a present, definite and honest purpose to give up the old and take up the new place as [her] domicile.'"

The District argues that the Appellate Division applied the wrong standard of review in requiring clear and convincing evidence and, in doing so, "improperly shifted the burden of proof" to the School District and "usurped the [District's] authority to weigh the evidence ... and assess credibility." In an article 78 proceeding, the District says, the burden is on the petitioner to prove an agency's decision was irrational.

In Adrian and Luchey, Supreme Court ordered both petitioners reinstated with back pay because the policy's definition of residency was "vague and ambiguous," which, coupled with the superintendent's failure to develop procedures and guidelines to enforce the residency rule as required by the policy, "has resulted in varied and subjective interpretations leading to disparate results." The court ruled the policy was "unenforceable, incomplete and any action taken" to terminate the petitioners' employment was "arbitrary and capricious." The Appellate Division affirmed in Luchey without opinion, but reversed in Adrian, finding sufficient evidence to support her termination.

The School District argues in Luchey that its residency policy is enforceable as written, since it "simply requires an employee reside in the City," and the lower courts erred in finding the policy vague and ambiguous. Adrian contends the policy is vague, produces disparate results, and is unenforceable, as found by Supreme Court and affirmed by the Appellate Division as to Luchey, but not her. She also claims she was entitled to a hearing based on the Education Law and her "constitutionally protected property interest" in her tenured position.

For School District (appellant in nos. 20 & 27, respondent in no. 21):
Michael F. Perley, Buffalo (716) 849-8900
For respondent Beck-Nichols: Terry M. Sugrue, Buffalo (716) 856-0277
For appellant Adrian & respondent Luchey: Anthony J. Brock, Latham (518) 213-6000

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

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. 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

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. 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

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. 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

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. 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."

For appellant NYCHA: Seth E. Kramer, Manhattan (212) 776-5206
For respondent Perez: Marc Sackin, Auburn Hills, MI (248) 990-8099