State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

Week of March 20 thru March 22, 2018

State of New York
Court of Appeals

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To be argued Tuesday, March 20, 2018

No. 35 People v Lawrence Parker
No. 36 People v Mark Nonni

Six police officers responded to a radio report of a burglary in progress at the Westchester Country Club in the Bronx in January 2008. They arrived at the private, gated facility five minutes later and saw two men walking down the driveway from the clubhouse toward a public road. When an officer called out "please, stop, we want to ask you a question," one of the men, Mark Nonni, ran away with three officers in pursuit. They tackled and handcuffed Nonni, after a struggle, and recovered a foot-long knife, a smaller butcher knife, and duct tape from his backpack, and found $1000 in cash in his pocket. An officer said the other man, Lawrence Parker, "briskly walked" across the street and, despite being told to stop, continued to walk away. After officers handcuffed Parker, they found a sledgehammer and crow bar in his backpack and a steak knife in his coat pocket. The club's caretaker, who had been robbed of $3000 at knife point and left bound with duct tape, identified Parker and Nonni as the perpetrators.

Supreme Court denied motions to suppress evidence obtained at the scene, finding the officers' conduct justified under People v De Bour (40 NY2d 210), and the defendants proceeded to a joint trial. On the second day of deliberations, the jury sent out three notes before the lunch recess. The court read the first note into the record, responded to it, and told the jury "we'll leave the other two for after lunch." As soon as it returned from lunch, the jury announced it had reached a verdict. The court took the verdict without addressing the two remaining notes. Parker and Nonni were each convicted of second-degree robbery and sentenced to 20 years to life.

The Appellate Division, First Department affirmed in a 3-2 decision, saying Parker and Nonni "were first seen on private property where a burglary had just been reported, in a suburban area, with nobody else visible anywhere in the vicinity. This gave rise to a founded suspicion of criminality, justifying a level-two common-law inquiry under the De Bour analysis. The police did not exceed the bounds of a common-law inquiry when they requested defendants to stop so that the police could 'ask them a question,' because such a direction does not constitute a seizure." Since Nonni "immediately ran, and ... Parker immediately made what officers described as a 'hurried' and 'evasive' departure..., the record supports the conclusion that both defendants 'actively fled from the police'.... Defendants' flight elevated the existing level of suspicion to reasonable suspicion, justifying pursuit and an investigative detention...."

The dissenters said, when the officers arrived at the club, they "had no description of the alleged suspects and no information concerning the 911 caller. Defendants were observed ... leaving the driveway of the club and walking down the street at an unhurried pace. The entry and exit of individuals from a commercial establishment during normal business hours cannot be deemed out of the ordinary.... Given the limited information conveyed by the radio run, the officers had, at best, sufficient cause to conduct a level-one request for information.... They said the police were unjustified in pursuing Nonni, who ran away, and Parker, "who did not even flee but merely walked at a 'hurried pace'.... The majority's conclusion that the police were justified in pursuing defendants is based on the faulty premise that the circumstances gave rise to a founded suspicion of criminality."

Parker and Nonni, in addition to arguing the police pursuit and detention were illegal, contend their convictions must be reversed because the trial court committed a mode of proceedings error by failing to give defense counsel meaningful notice of the contents of two substantive notes from the jury.

For appellant Parker: Lorraine Maddalo, Manhattan (212) 577-3343
For appellant Nonni: Matthew Bova, Manhattan (212) 577-2523 ext. 543
For respondent: Bronx Assistant District Attorney Ryan P. Mansell (718) 838-6239

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To be argued Tuesday, March 20, 2018

No. 37 People v William Morrison

William Morrison was charged in 2006 with raping a 90-year-old dementia patient in the nursing home section of Rome Memorial Hospital, where he worked as a certified nurse's aid. At his trial in Oneida County Court, late on the second day of jury deliberations, the jurors sent out a note saying they had reached agreement on two lesser counts, but not on the top count of first-degree rape. The note said, "We have arrived on decision on [counts] 2 and 3, but we have a lot of work to do on #1. I don[']t see it being quick. Not sure what to do. We ar[e] starting to make way." The trial judge marked the note as court exhibit 9, but did not read it into the record. The court instructed the jury to continue working to try to reach a unanimous verdict, then at the juror's request sent them home for the night. The following day, the jury returned a verdict convicting Morrison of rape and sexual abuse in the first degree and endangering the welfare of a vulnerable elderly person in the second degree. He was sentenced to 25 years in prison.

The Appellate Division, Fourth Department initially affirmed the judgment, but subsequently granted Morrison's motion for a writ of error coram nobis based on his claim that he was deprived of effective assistance when his appellate counsel failed to challenge the trial court's handling of jury notes.

The Appellate Division ultimately reversed and ordered a new trial in a 4-1 decision, finding the trial court "violated a core requirement of CPL 310.30" and committed a mode of proceedings error "in failing to advise counsel on the record of the contents of a substantive jury note" marked court exhibit 9. "Our dissenting colleague concludes that the jury's statement, '[n]ot sure what to do,' was a ministerial inquiry concerning the logistics of the jury's deliberations, i.e., the jury was asking whether it should continue deliberating that evening considering the late hour. We agree that the note could be interpreted that way, but we conclude that it also could be interpreted as it was interpreted by the court, i.e., the jury was having difficulty reaching a unanimous verdict and was making a substantive inquiry for guidance concerning further deliberations. In response to the note, the court issued an Allen-type charge. Quite simply, even if we consider all the surrounding circumstances, the jury note was ambiguous, and we must resolve that ambiguity in defendant's favor...."

The dissenter argued the jury note "was ministerial in nature, and defendant was therefore required to preserve his challenge to County Court's handling of that jury note.... [C]onsidering the full text of court exhibit 9 and all of the surrounding circumstances, 'the only reasonable interpretation' ... of the jury's statement that it was '[n]ot sure what to do' is that the inquiry concerned the logistics of the jury's deliberations.... Consistent with the late hour and the court's practice of giving the jury a choice of whether to break for the evening or continue deliberating based on the status of the jury's deliberations, the record establishes that the jury raised a question of scheduling when it indicated that it was '[n]ot sure what to do'.... To the extent that the court provided a more robust response to the jury note than was required, I agree with the People that the court could not transform a ministerial inquiry regarding the logistics of a productive, continuing deliberation into a substantive deadlock announcement by merely exercising caution and reiterating the jury's deliberative obligations. Nor is the court's prudence indicative of an ambiguity."

For appellant: Assistant Attorney General Hannah Stith Long (212) 416-8729
For respondent Morrison: Mary R. Humphrey, New Hartford (315) 732-4055

State of New York
Court of Appeals

To be argued Tuesday, March 20, 2018

No. 38 Skanska USA Building Inc. v Atlantic Yards B2 Owner, LLC

In October 2012, Skanska USA Building Inc. entered into a construction management agreement with Atlantic Yards B2 Owner, LLC (B2 Owner), which provided for Skanska to build a high-rise residential tower as part of the Atlantic Yards development project covering 22 acres of public land in Brooklyn. Skanska was to receive a contract price of $116.9 million. The Empire State Development Corporation (ESDC), a public benefit corporation, had leased the project site through a related company to B2 Owner, an affiliate of Forest City Ratner Companies, LLC (Forest City). In December 2012, ESDC executed a development lease with Forest City affiliates which, among other things, required them to comply with Lien Law section 5. It also required Forest City Enterprises, Inc. to issue a formal "completion guarantee" that B2 Owner would complete the tower and would "use any and all amounts disbursed from time to time by the Construction Lender, solely to fully and punctually pay and discharge any and all costs, expenses and liabilities incurred for or in connection with the Guaranteed Work...."

The tower project was beset by delays and cost overruns, and in September 2014 Skanska terminated the construction management agreement. It then filed this action against B2 Owner and Forest City for breach of contract, including a claim that they violated Lien Law section 5 by failing to provide adequate security for payments owed to contractors and vendors. The statute provides that, for large private development projects on public land, "the public owner shall require the private entity for whom the public improvement is being made to post, or cause to be posted, a bond or other form of undertaking guaranteeing prompt payment of moneys due to the contractor," subcontractors, and suppliers. Supreme Court granted the defendants' motion to dismiss the Lien Law claim. It denied Skanska's motion to disqualify a law firm representing the defendants, Troutman Sanders LLP, for alleged conflicts of interest.

The Appellate Division, First Department affirmed the dismissal of the Lien Law claim on a 3-2 vote, saying the completion guarantee in the development lease satisfied the requirements of the statute. "This guarantee follows the letter of the statute, namely 'guaranteeing prompt payment' to contractors," it said. "That there are better guarantees available, such as a letter of credit, as the dissent notes, is beside the point. ESDC, as the public owner, was satisfied with the guarantee issued by Forest City Enterprises, Inc. Certainly, if the legislature had wanted the guarantee to be on par with a letter of credit it could have said that or identified the various types of guarantees that would satisfy the statute." The court agreed unanimously that the motion to disqualify Troutman was properly denied."

The dissenters said, "In order to achieve the objective of the Lien Law..., any alternative undertaking must provide substantially equivalent protection to that provided by a bond.... The Completion Guaranty that [Forest City] provided in this case ... is not the functional equivalent of a bond or other form of undertaking, because it is no more than [Forest City's] contractual promise to complete the project and pay its account, which, if not honored, requires a lawsuit to secure a judgment and a collection process to obtain satisfaction.... Moreover, recovery is dependent upon a guarantor's particular financial circumstances at the time a protected party is in need of the remedies that the Lien Law provides. This is hardly the streamlined and predictable process Lien Law § 5 calls for in 'guaranteeing prompt payment of moneys due to the contractor....' Nor is it an identifiable fund or asset on which a protected party can draw down payment."

For appellant Skanska: Bruce D. Meller, Manhattan (212) 382-0909
For respondents B2 Owner and Forest City: Harold P. Weinberger, Manhattan (212) 715-9132

State of New York
Court of Appeals

To be argued Wednesday, March 21, 2018

No. 39 Contact Chiropractic, P.C. v New York City Transit Authority

Contact Chiropractic brought this action against the New York City Transit Authority (NYCTA) in January 2007, seeking to recover $1,503.40 in no-fault insurance benefits for medical services provided in 2001. Contact Chiropractic submitted its claims for those benefits to NYCTA from March through August 2001. NYCTA, a self-insured public benefit corporation, moved to dismiss the suit as time-barred. It contended that, because it does not maintain an insurance policy, its obligation to pay no-fault benefits is imposed by Insurance Law section 5103 and the action should be subject to the three-year statute of limitations for claims based on statutory liability. Contact Chiropractic argued that its suit was timely because it was subject to the six-year statute of limitations for claims based on contractual liability, which applies to no-fault claims against insurance companies.

Queens Civil Court denied NYCTA's motion to dismiss. Noting "a split of authority" in the Appellate Division, with the First Department applying a three-year limitations period and the Second Department a six-year limitations period, the court said no-fault matters "are arguably contractual in nature, even when dealing with a self-insured entity such as the NYCTA," and it applied the six-year statute of limitations.

Appellate Term for the 2nd, 11th and 13th Judicial Districts affirmed, saying, "It stands to reason that the intent of the legislature was not to impose a lesser duty on a public carrier which posts a bond than the duty imposed upon an owner who purchases insurance. In Mandarino v Travelers Prop. Cas. Ins. Co. (37 AD3d 775 [2007]), the Second Department recognized the existence of a six-year statute of limitations on claims arising from wrongfully withheld first-party no-fault benefits. The Mandarino court reasoned: "'as a matter of strict statutory interpretation, where the plaintiff's action is based upon *both* a "contractual obligation or liability" *and* upon a "liability, penalty or forfeiture created or imposed by statute," the longer, six-year statute of limitations ... is applied....'"

The Appellate Division, Second Department affirmed, saying an action to recover no-fault benefits from a self-insured defendant "is subject to a six-year statute of limitations, since the claim is essentially contractual, as opposed to statutory, in nature...."

NYCTA says, "As a self-insurer, the New York City Transit Authority does not write insurance policies or otherwise enter into insurance contracts with its passengers. Thus, the Transit Authority's obligation to provide No-Fault benefits to the [plaintiff's patient] would not exist but for the provisions of the Vehicle and Traffic Law, Insurance Law § 5103, and the No-Fault Regulations." It says, "The motion court and the Appellate Division erred in applying a six-year statute of limitations based on their finding that the dispute is 'contractual in nature' despite the undisputed fact that there is no contractual relationship between the parties. The Appellate Term similarly erred in affirming the lower court's order based on the determination that because insurers and self-insurers are subject to the same liability under the No-Fault law they must also be subject to the same statute of limitations." It says "self-insurers' liability under the No-Fault law is imposed strictly by statute while insurers' obligations are based in contract."

For appellant NYCTA: Agnes Neiger, Manhattan (212) 776-1808
For respondent Contact Chiropractic: Tricia Smith, Lake Success (516) 358-6900

State of New York
Court of Appeals

To be argued Wednesday, March 21, 2018

No. 40 People, by Schneiderman v Credit Suisse Securities (USA) LLC

Attorney General Eric Schneiderman brought this action for injunctive relief and damages against Credit Suisse Securities (USA) LLC and related companies under the Martin Act (General Business Law article 23-A) and under Executive Law section 63(12), alleging that Credit Suisse engaged in fraudulent and deceptive acts in the creation and sale of residential mortgage-backed securities in 2006 and 2007. Credit Suisse moved to dismiss the action as untimely, contending it was subject to the three-year statute of limitations for claims based on liability created or imposed by statute. The Attorney General argued the action was subject to a six-year limitations period, and was therefore timely, because it sought relief for fraud recognized at common-law prior to the enactment of the statutes. Supreme Court denied the motion to dismiss the suit, applying a six-year limitations period.

The Appellate Division, First Department affirmed in a 3-2 decision, adhering to its prior determination that the six-year statute of limitations in CPLR 213(8), which governs common-law fraud, applies to Martin Act actions alleging investor fraud. It also cited its 2016 ruling that fraud claims by the Attorney General under Executive Law section 63(12) are subject to the residual six-year statute of limitations in CPLR 213(1) because the section "does not create any liability nonexistent at common law, at least under the court's equitable powers." The majority said, "The conduct targeted under section 63(12) parallels the conduct covered under the Martin Act's definition of fraud in that both the Martin Act and section 63(12) target wrongs that existed before the statutes' enactment, as opposed to targeting wrongs that were not legally cognizable before enactment.... Contrary to the dissent's conclusion, the complaint sets forth the elements of common-law fraud, including scienter or intent, reliance, and damages."

The dissenters argued, "These claims, as pleaded, fall within the category of claims that would not exist but for the statutes, creating a new basis for liability, not a new remedy, and the three-year statute of limitations of CPLR 214(2) applies.... [U]nlike an action for common-law fraud..., to state a claim under [the Martin Act] the Attorney General does not have to allege scienter or intentional fraud, or reliance ... and liability would be imposed based solely on a misrepresentation or an omission of a material fact.... Accordingly..., the claim would not exist at common law because it makes 'actionable conduct that does not necessarily rise to the level of fraud'.... Accordingly, as the Attorney General is seeking relief under a broader definition of fraud created by the statutes, defendants' motion to dismiss the Martin Act and Executive Law [section] 63(12) claims as time-barred under CPLR 214(2) should be granted."

For appellants Credit Suisse et al: Richard W. Clary, Manhattan (212) 474-1000
For respondent Attorney General: Solicitor General Barbara D. Underwood (212) 416-8022

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To be argued Wednesday, March 21, 2018

No. 41 Matter of FMC Corporation v New York State Department of Environmental Conservation

FMC Corporation owns a 103-acre facility in the Village of Middleport, Niagara County, where it produced pesticides and herbicides for more than 60 years and, in the process, contaminated the facility itself and surrounding areas with arsenic, lead, and other toxic chemicals. The FMC facility has been listed on New York's registry of hazardous waste disposal sites since 1980. In 2010, at the direction of the state Department of Environmental Conservation (DEC) and federal authorities, FMC submitted a report proposing eight remedial plans, known as corrective measure alternatives (CMAs), to address contamination on about 500 acres of off-site residential, commercial, and school properties. In 2012, the DEC proposed a more thorough cleanup plan, CMA 9, which mandated that arsenic remaining in the soil could not exceed 20 parts per million. FMC challenged the proposal. In 2013, after a public comment period, DEC issued a "final statement of basis" in which it formally selected CMA 9. FMC continued to dispute the decision. In 2014, the DEC advised FMC that, due to its "refusal" to implement CMA 9, the DEC would do the work at FMC's expense using the State Superfund.

FMC then brought this article 78 proceeding against the DEC, alleging the agency exceeded its authority in proceeding with the remedial work and that its selection of CMA 9 was arbitrary and capricious. Supreme Court granted DEC's motion to dismiss the suit as time-barred, finding it was commenced more than four months after the DEC's determination.

The Appellate Division, Third Department reversed, ruling the suit was timely based on a series of tolling agreements the parties executed as they tried to negotiate a voluntary cleanup plan. Turning to the merits, it said DEC "has the authority to undertake remedial work" under both title 9 and title 13 of Environmental Conservation Law (ECL) article 27, but neither provision permitted DEC's actions in this case. Under title 9, DEC's "authority to act exists where the hazardous waste is managed 'unlawfully in violation of [ECL] 27-0914,' i.e., without authorization.... But here, [DEC] explained in the statement of basis that [FMC] 'does not presently have an operating permit but is subject to what are called "interim status" requirements.' Thus, it appears that ... [FMC] was operating lawfully pursuant to its 'interim status'...." Under title 13, the court said, FMC "was entitled to ... an opportunity for a hearing prior to the issuance of an order directing [it] to implement CMA 9. As it turns out, [FMC] was not accorded an opportunity for a hearing to assert its challenge to CMA 9 and no implementation order was issued. Absent such an order, we must agree ... that [DEC's] determination that it was authorized to proceed with the remedial work based on [FMC's] 'refusal' to perform the work was arbitrary and capricious." It remitted the matter to DEC to provide a hearing.

The DEC argues that both title 9 and title 13 of ECL article 27 authorized it to remediate the site at FMC's expense using CMA 9. Under title 9, "'Interim status' ... does not mean a facility is 'operating lawfully' when it releases hazardous waste to the environment. It means only that the facility may operate prior to completing the permitting process. And the record here shows that FMC *unlawfully* released contaminants into the environment on multiple occasions.... Title 13 requires DEC to afford a hearing only when it issues an order identifying a responsible person and directing that party to clean up hazardous waste. DEC is not required to issue such an order when, as here, it undertakes a cleanup itself after making reasonable efforts to secure a voluntary agreement with the responsible person." It says a hearing under title 13 "is intended to give a party an opportunity to contest its responsibility for cleanup" and was not needed here, since "FMC does not contest its responsibility, but rather seeks only to challenge DEC's determination to adopt a particular remediation measure."

For appellant DEC: Assistant Solicitor General Frederick A. Brodie (518) 776-2317
For respondent FMC: David G. Mandelbaum, Philadelphia, PA (215) 988-7813

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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.

No. 42 For appellant: Manhattan Assistant District Attorney Philip Morrow (212) 335-9000
For respondent Roberts: John Vang, Manhattan (212) 577-2523
No. 43 For appellant Rush: Deena K. Mueller-Funke, Buffalo (716) 847-7029
For respondent: Monroe County Assistant District Attorney Daniel Gross (585) 753-4588

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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."

For appellant 285 West Fourth: Jeffrey Turkel, Manhattan (212) 867-6000
For respondent Altman: Lawrence W. Rader, Manhattan (212) 791-5200