State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

April 27 and 28, 2021
May 4 and 5, 2021

State of New York
Court of Appeals

To be argued Tuesday, April 27, 2021 (arguments begin at 2 p.m.)

No. 32 U.S. Bank National Association v DLJ Mortgage Capital, Inc.

U.S Bank National Association, as trustee for a residential mortgage-backed securities (RMBS) trust, filed a breach of contract suit against the seller of the mortgage loans, DLJ Mortgage Capitol, Inc., alleging that it failed to pay for defective loans as required by the "repurchase protocol" of the trust's pooling and service agreement. The repurchase protocol provides that within 120 days of receiving written notice of a breach of any of its representations and warranties regarding the quality of the loans "which materially and adversely affects" the interests of the investors, DLJ must cure the breach or repurchase the defective loan. Beginning in December 2011, U.S. Bank sent letters to DLJ demanding that it cure or repurchase hundreds of defective loans, and saying its investigation of the loans was ongoing and the breaches were pervasive. The bank filed this suit in 2013, claiming DLJ did not repurchase any loans in response. DLJ moved to dismiss all claims based on loans the plaintiffs did not specifically identify in their timely pre-suit breach notices.

Supreme Court denied DLJ's motion, ruling that U.S. Bank's timely pre-suit breach letters notified DLJ of numerous defective loans and also of the likelihood that additional breaches would be discovered, which would then relate back to the date of the initial complaint. The courts also ruled the plaintiffs were entitled to interest accrued on liquidated loans up to the date they are repurchased.

The Appellate Division, First Department affirmed based, in part, on the relation-back doctrine. In a related case, it said, "The trustee's timely presuit letters," which stated that DLJ had placed defective loans into the trust on a "substantial" scale and "stated that its investigation into the loans in the trusts was ongoing, put DLJ on notice that the breaches plaintiffs were investigating might uncover additional defective loans for which claims would be made. Therefore, plaintiffs' timely complaints that identified certain breaching loans may be amended to add the claims at issue, as they relate back to the original complaints...." It also upheld the ruling on interest.

DLJ argues that the plaintiff failed to comply with the repurchase protocols in the governing agreements, which "require timely notice as to every loan for which plaintiffs assert a claim." The parties "agreed to a loan-specific sole remedy that requires timely, loan-specific breach notices," it says, and "relation back cannot be used to excuse timely compliance with contractual requirements." It also contends that the plaintiff is not entitled to interest on liquidated loans.

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To be argued Tuesday, April 27, 2021 (arguments begin at 2 p.m.)

No. 33 Matter of West 58th Street Coalition, Inc. v City of New York

In 2017, New Hampton, LLC – owner of the former Park Savoy Hotel at 158 West 58th Street in Manhattan – sought permission to use the building as a shelter to be operated by the nonprofit Westhab, Inc., under a contract with the City. New Hampton and Westhab proposed housing 150 homeless men – with jobs or seeking jobs – in the shelter, which would also provide them with employment and housing placement services. At the City's public hearings on the project, a number of neighborhood residents and organizations opposed the plan for a new shelter, complaining it would hurt property values and increase "the threat of crime and danger." The City's Department of Buildings (DOB) assessed the structure and history of the nine-story building, which was built in 1910 and received, in 1942, a permanent certificate of occupancy as a tenement SRO (single room occupancy) building. DOB concluded that the building's prior designation as a tenement SRO was equivalent to a nontransient "apartment hotel" in the R-2 occupancy group of the current Building Code and in "Use Group 2" of the City's Zoning Resolution, based in part on its finding that Westhab's residents would on average remain in the shelter well beyond 30 days. Under the Code's grandfathering provisions, this meant the building would be exempt from most requirements of the current Code because there would be no significant change in its use. DOB approved renovation plans and issued a work permit for the building in May 2018. Two months later, the West 58th Street Coalition and other neighborhood opponents brought this suit to block the project, contending that it had to meet current standards because the building's use and occupancy group would change and that it was a dangerous fire trap. While the suit was pending, DOB issued a temporary certificate of occupancy (TCO) for the cellar and first four floors, which it renewed at 90-day intervals.

Supreme Court dismissed the suit, finding there was a rational basis for DOB's classification of the building and for the decision to open a homeless shelter there. Rejecting the opponents' argument that the building could not be grandfathered because it would endanger "the general safety and public welfare," the court said that "such considerations were already taken into account when issuing the TCO" and that DOB's judgment is entitled to judicial deference.

The Appellate Division, First Department modified by remanding the case for a hearing on whether the building's use as a shelter would threaten public safety and welfare. It ruled DOB had a rational basis for it's classification of the building and conclusion that the grandfathering provisions applied, but it said there was "conflicting evidence" on the safety issue. "We do not agree that the issuance of the TCO reflects DOB's assessment that the temporary occupancy of the building will not endanger public safety, health or welfare. The TCO 'merely creates a rebuttable presumption that a building complies with New York City law' which has been rebutted by petitioners' expert affidavits...," it said.

The City argues the Appellate Division, after it found DOB's assessment of the building was rational, should have deferred to the agency's judgment instead of ordering a hearing on safety issues. The petitioners argue that use of the building as a shelter is a change of use and occupancy classifications which eliminate any grandfathering protections and, therefor, they are entitled to an injunction barring operation of the shelter until it meets all requirements of the current Building Code. Alternatively, they say the Appellate Division properly ordered a hearing on public safety.

For appellant-respondent City et al: Asst. Corporation Counsel Barbara Graves-Poller (212) 356-2275
For appellant-respondent New Hampton et al: Nathan M. Ferst, Manhattan (212) 683-8055
For respondent-appellant West 58th et al: Jeremy B. Honig, Manhattan (212) 455-9555

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To be argued Wednesday, April 28, 2021 (arguments begin at noon)

No. 34 Simmons v Trans Express Inc.

Charlene Simmons worked for three years as a driver for Trans Express Inc., a Brooklyn-based charter bus operator, until she was terminated in June 2018. She sued the company for nonpayment of wages in Queens Small Claims Court. After a trial before an arbitrator, the court awarded her a $1000 judgment, which Trans Express paid in September 2018. One month later, Simmons filed this federal suit against Trans Express in U.S. District Court for the Eastern District of New York, contending the company violated the federal Fair Labor Standards Act and New York Labor Law by failing to pay her time-and-a-half for overtime hours she worked. Trans Express moved to dismiss the suit on the ground that her prior small claims action barred this federal suit under the doctrine of res judicata, or claim preclusion. In response, Simmons argued that New York City Civil Court Act § 1808 limits the preclusive effects of small claims judgments and allows subsequent litigation of claims "involving the same facts, issues and parties."

Section 1808 states, "A judgment obtained under this article shall not be deemed an adjudication of any fact at issue or found therein in any other action or court; except that a subsequent judgment obtained in another action or court involving the same facts, issues and parties shall be reduced by the amount of a judgment awarded under this article."

U.S. District Court dismissed the suit, finding that the doctrine of claim preclusion "plainly" applies to small claims judgments. The court said "the legislative history of [section 1808] makes clear that it concerns only collateral estoppel, or issue" preclusion, "as opposed to claim preclusion.... The legislative bill jacket ... makes clear that the very purpose of the bill was to clarify that '[t]he true intent of section 1808 is to make clear that a small claims judgment has no collateral estoppel or 'issue preclusion' effect in a subsequent proceeding.'"

The U.S. Court of Appeals for the Second Circuit said it is unclear how the statute should be applied. "Section 1808 clearly contemplates a subsequent action 'involving the same facts, issues and parties' as the small claims court action. The statute even provides a set-off in those circumstances.... The text's plain meaning thus strongly supports Simmons's interpretation." However, it said, "The New York Court of Appeals has yet to interpret Section 1808, and despite the appeal of Simmons's textual interpretation, the conflicting decisions of the Appellate Division leave us unable to predict how the high court would rule.... Although the Appellate Division decisions to date all agree that small claims court judgments have some preclusive effect, they differ as to the contours of that effect." The Second Circuit is asking this Court to resolve the issue by answering a certified question:

"Under [Section] 1808, what issue preclusion, claim preclusion, and/or res judicata effects, if any, does a small claims court's prior judgment have on subsequent actions brought in other courts involving the same facts, issues, and/or parties? In particular, where a small claims court has rendered a judgment on a claim, does Section 1808 preclude a subsequent action involving a claim arising from the same transaction, occurrence, or employment relationship?"

For appellant Simmons: Abdul K. Hassan, Queens Village (718) 740-1000
For respondent Trans Express: Emory D. Moore, Jr., Chicago, IL (312) 372-2000

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To be argued Wednesday, April 28, 2021 (arguments begin at noon)

No. 35 People v William A. Wilkins

William Wilkins and a codefendant, Kesean McKenzie-Smith, were charged with robbing or attempting to rob six people who were waiting in line for a Rochester store to open in August 2012. One of the victims, Montre Bradley, resisted and was fatally shot during the struggle. Both defendants were convicted at a joint trial of felony murder and of robbery and attempted robbery in the first degree. Wilkins is serving an aggregate prison term of 40 years to life.

On appeal, Wilkins argued he was entitled to a new trial because the trial court violated the rule in People v Antommarchi (80 NY2d 247 [1992]) by conducting sidebar conferences with prospective jurors in his absence. At one of the sidebars the trial judge excused the prospective juror for cause; and at another sidebar the defense counsel for McKenzie-Smith used a peremptory challenge to dismiss the prospective juror. Wilkins also contended the trial court erred by instructing the jury, without any request from him, that it was to draw no adverse inference from his failure to testify and that it was to draw no unfavorable inferences from the fact that Wilkins was in custody.

The Appellate Division, Fourth Department affirmed Wilkins's convictions in a 4-1 decision. Regarding the sidebar conferences, the majority said reversal is not required where "'the defendant's presence could not have afforded him or her any meaningful opportunity to affect the outcome...,' such as where a prospective juror is excused for cause" by the trial judge. It said the same held true for the other sidebar, where the codefendant's attorney used a peremptory challenge to the second prospective juror. It said "the record establishes that the court directed each defense counsel to independently exercise peremptory challenges, without input from the other defense counsel," and "that defense counsel for the codefendant exercised his peremptory challenges before defense counsel for [Wilkins]," demonstrating that the second juror was challenged "before [Wilkins's] defense counsel had any opportunity to consider whether to challenge that prospective juror. Thus..., under the circumstances of this case, [Wilkins] could not 'have provided valuable input...,' or indeed any input, regarding the peremptory challenge of that prospective juror." The court said the trial judge's unrequested jury instructions to draw no adverse inferences were harmless errors because "'the jury is presumed to have followed that instruction'...."

The dissenter said the judgment should be reversed due to the Antommarchi violation at the second sidebar, where Wilkins was not present when his codefendant's attorney struck a juror with a peremptory challenge. Citing CPL 270.25(3), which provides that multiple defendants in a joint trial share the defense allotment of peremptory challenges and a challenge is allowed only "if a majority of the defendants join in such challenge," he said "the record is wholly devoid of support for the majority's conclusion that the court directed defense counsel to proceed in disregard of the requirements of CPL 270.25(3).... [G]iven the 'presumption of regularity [that] attaches to judicial proceedings' ... and the lack of any evidence that the court deviated from the procedure set forth in CPL 270.25(3), I conclude that CPL 270.25(3) was being followed at the time of the relevant sidebar conference and that the assent of both [Wilkins] and the codefendant was therefore needed to use any of their joint peremptory strikes." Since Wilkins "could have provided his defense counsel with some 'valuable input' during the relevant sidebar conference from which he was absent," the Antommarchi violation requires reversal, he said.

For appellant Wilkins: David R. Juergens, Rochester (585) 753-4210
For respondent: Monroe County Assistant District Attorney Scott Myles (585) 753-4541

State of New York
Court of Appeals

To be argued Tuesday, May 4, 2021 (arguments begin at 2 p.m.)

No. 36 People v Eric J. Iverson
No. 37 People v Jack J. Cucceraldo

In separate incidents in Suffolk County, Eric Iverson and Jack Cucceraldo were issued traffic tickets charging them with Vehicle and Traffic Law violations, including driving without insurance and driving while using a cell phone. Both men pled not guilty and requested trials. The Suffolk County Traffic and Parking Violations Agency (SCTPVA) notified them by letter of their trial dates and warned, "If you fail to answer at that time, THE COURT MAY ISSUE A WARRANT FOR YOUR ARREST OR PROCEED IN YOUR ABSENCE AND YOU WILL BE LIABLE FOR ANY SENTENCE AND/OR FEES IMPOSED...." When they failed to appear for trial, SCTPVA hearing officers entered default judgments against them without conducting trials and imposed fines.

The Appellate Term, 9th and 10th Judicial Districts, reversed the convictions of both men "since no trial was held before the court entered the judgments of conviction." It said, "While Vehicle and Traffic Law § 1806-a(4) permits 'a default judgment of a fine' to be entered against a defendant who ... failed to 'answer within the time specified,' the statute expressly provides that '[w]hen a person has entered a plea of not guilty and has demanded a hearing, no fine or penalty shall be imposed for any reason, prior to the holding of the hearing which shall be scheduled by the traffic and parking violations agency.'" In Cucceraldo, it expressly rejected the SCTPVA's argument that Vehicle and Traffic Law article 2-A authorized it to enter default judgments for failure to appear. The court said, "We note that the SCTPVA in an 'arm of the District Court' ... and 'operate[s] under the direction and control of the county executive;'" and article 2-A is not applicable to the agency because "article 2-A applies only to traffic violations bureaus, which are administrative tribunals wherein hearings are conducted before hearing officers appointed by the Commissioner of Motor Vehicles ... and their determinations are submitted for review to an administrative appeals board..., with judicial review only as permitted by CPLR article 78...."

The SCTPVA argues the Appellate Term erred in applying the prohibition against default judgments in section 1806-a(1) to it because the statute "clearly and unambiguously" applies to city, village and town courts, while the SCTPVA is "a branch of the district court.... Nowhere in §1806-a(1) or any other provision of either the Criminal Procedure or the Vehicle and Traffic Law is there a prohibition against a district court and by extension a TPVA from imposing a fine or penalty against a defendant who has pled not guilty and requested a trial and then failed to appear (defaulted) for said trial." The agency also argues that article 2-A provides "statutory authority for both traffic violations bureaus and [traffic and parking violations agencies] to enter a default conviction when a defendant fails to appear for trial."

For appellant SCTPVA: Suffolk Co. Deputy Traffic Prosecutor Justin W. Smiloff (631) 853-8059
For respondents Iverson and Cucceraldo: Scott Lockwood, Deer Park (631) 242-3369

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To be argued Tuesday, May 4, 2021 (arguments begin at 2 p.m.)

No. 38 People v Cesar Garcia

Cesar Garcia was arrested by two plain clothes officers who followed him as he traveled on the Lexington Avenue subway line in Manhattan in June 2015, after they saw him masturbate on a platform at Union Square, rub up against a woman on a northbound subway car, and rub up against another woman on a southbound train. He was charged with five class-B misdemeanors: two counts each of forcible touching and sexual abuse and one of public lewdness.

Garcia, an undocumented immigrant from Mexico, moved for a jury trial. Although B misdemeanors are generally "petty offenses" that do not require a jury trial under the Sixth Amendment because the maximum sentence is less than six months, Garcia argued that he would be subject to deportation under federal immigration law if he were convicted, a "serious" consequence that should entitle him to a jury. Criminal Court denied his motion. After a bench trial in August 2016, Garcia was convicted of public lewdness and acquitted of the other four counts. He was sentenced to seven days of community service.

In 2018, while his appeal was pending at the Appellate Term, the Court of Appeals held for the first time in People v Saylor Suazo (32 NY3d 491) that "a noncitizen defendant who demonstrates that a charged crime carries the potential penalty of deportation – i.e. removal from the country – is entitled to a jury trial under the Sixth Amendment."

The Appellate Term, First Department, affirmed Garcia's conviction in 2019, saying he "is not entitled to a jury trial, since he failed to meet his burden to establish that a conviction for public lewdness carries the potential for deportation (see People v Suazo ...). Even assuming that public lewdness ... is a crime of moral turpitude" under federal law, "an issue that has not yet been categorically decided..., defendant would still not be deportable ... because that provision requires convictions for two or more crimes involving moral turpitude to subject an individual to deportation.... Moreover, even if we now consider all the crimes for which defendant was tried, including the offenses of which he was acquitted, as two or more crimes of moral turpitude, he would not have been subject to deportation by a conviction because the charges arose out of a single scheme of criminal misconduct." The federal statute "makes deportable any alien who has been convicted of 'two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct' (emphasis added)."

Garcia argues that he "faced trial for an assortment of charges relating to three incidents: public lewdness on the subway platform, and forcible touching and third-degree sexual abuse against" different victims on different trains. "Each one of these offenses was a crime involving moral turpitude under federal immigration law subjecting noncitizen defendants to the potential penalty of deportation. A showing that a crime is classified as a crime of moral turpitude alone is enough to establish jury-trial entitlement for a noncitizen. More, because the charges here involved three separate incidents, a conviction arising from any two of those incidents would have mandated Mr. Garcia's deportation. That Mr. Garcia was ultimately convicted of only the public lewdness charge does not change this result, because entitlement to a jury trial is measured by the potential penalty defendant faces when the trial begins, not the ultimate penalty imposed."

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

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To be argued Wednesday, May 5, 2021 (arguments begin at noon)

No. 39 Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Company

Plaintiffs brought this proposed class action against legal publisher Matthew Bender & Company in 2017 alleging, among other things, that it engaged in deceptive business practices in the marketing and sale of its book titled "New York Landlord-Tenant Law," commonly known as the "Tanbook," in violation of General Business Law (GBL) § 349. The Tanbook is an annual compilation of statutes, regulations and other legal and editorial materials. The named plaintiffs – Himmelstein, McConnell, Gribben, Donoghue & Joseph (HMGDJ), a law firm engaged in landlord-tenant disputes; the not-for-profit Housing Court Answers, which assists pro se litigants in Housing Court; and tenant advocate and organizer Michael McKee – said Matthew Bender promoted the book as "a complete and definitive compilation of the New York rent regulations and laws," while it was actually "rife with omissions and inaccuracies," some of which went uncorrected for years. They claimed class members are "entitled to recover their contract damages consisting of the amount they paid for the book." The plaintiffs obtained their Tanbooks through the company's subscription service by which the books were mailed to them upon release each year, along with a three-page "agreement and order form," which ended with the statement: "WE DISCLAIM ALL WARRANTIES WITH RESPECT TO PUBLICATIONS, EXPRESS OR IMPLIED.... WE DO NOT WARRANT THE ACCURACY, RELIABILITY OR CURRENTNESS OF THE MATERIALS CONTAINED IN THE PUBLICATIONS."

GBL prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state."

Supreme Court granted Matthew Benders' motion to dismiss the suit, saying the plaintiffs did not show its conduct was "consumer oriented" as required for GBL § 349 claims. Citing First Department precedent, it said "consumers are those 'who purchase goods and services for personal, family, or household use'.... The sale of goods directed at professionals is not a consumer oriented conduct, and Plaintiffs have failed to state facts demonstrating that the sale of Tanbooks is oriented towards consumers rather than professionals." It said the breach of contract claim was defeated by the sales contracts, which "included a disclaimer wherein Matthew Bender explicitly stated that it was not warranting the accuracy or completeness of the Tanbook."

The Appellate Division, First Department affirmed on a different ground, saying the GBL § 349 "claim was correctly dismissed because the only injury alleged to have resulted from defendant's allegedly deceptive business practices is the amount that plaintiffs paid for the book, which does not constitute an injury cognizable under the statute...."

The plaintiffs argue that GBL § 349 "is a broad remedial statute intended to apply to 'virtually all economic activity' in the state." Their argument is supported by an amicus brief from the Attorney General's Office, which says this Court "should reject any limitation of GBL § 349 to purchases made for personal, family, and household purposes, and recognize that the statute also prohibits deceptive acts or practices aimed at businesses seeking to buy goods and services in the marketplace." It says, "The text, history, and purpose of GBL § 349 do not support the First Department's restriction of its scope."

For appellants HMGDJ et al: James B. Fishman, Manhattan (212) 897-5840
For respondent Matthew Bender: Anthony J. Dreyer, Manhattan (212) 735-3000

State of New York
Court of Appeals

To be argued Wednesday, May 5, 2021 (arguments begin at noon)

No. 41 People v Joseph Schneider

Joseph Schneider was charged in Brooklyn in 2016 with enterprise corruption and other crimes stemming from his participation in a national internet gambling enterprise based in Costa Rica, which involved operations in Brooklyn and other locations throughout the nation. Much of the evidence against him was obtained by monitoring his cell phone calls and electronic messages pursuant to eavesdropping warrants issued by a Supreme Court justice in Brooklyn. Schneider, a California resident, moved to suppress the eavesdropping evidence, arguing that the Brooklyn court did not have authority to issue the warrants because he placed his calls from California primarily to New Jersey, he had never set foot in New York, and he had no contacts with anyone in New York.

Criminal Procedure Law (CPL) 700.10(1) provides that a "justice" may issue an eavesdropping warrant, and CPL 700.05(4) defines "justice" as "any justice of the supreme court of the judicial district in which the eavesdropping warrant is to be executed." CPL article 700 does not define the term "executed."

Supreme Court denied the suppression motion, saying, "The issue here is whether 'execution of the warrant' occurred in Kings County, where the calls were monitored, or in California, where the defendant made the phone calls." Citing the requirement in CPL 700.35(1) that an eavesdropping warrant "must be executed according to its terms by a law enforcement officer," the court said, "based on the plain meaning of the term and its use in CPL 700.35, an eavesdropping warrant is 'executed' by law enforcement officers, and not the participants to the communication.... In this case, the eavesdropping warrants were to be executed in Kings County," so the warrants were valid. Schneider subsequently pled guilty to enterprise corruption, first-degree promoting gambling and possession of gambling records, and conspiracy. He was sentenced to concurrent terms of one to three years.

The Appellate Division, Second Department affirmed, saying "the plain meaning of the word 'execute' and the use of that word in relevant sections of the Criminal Procedure Law reveal that an eavesdropping warrant is 'executed' when a communication is intercepted by law enforcement officers," which in this case occurred in Brooklyn. "Moreover, we reject the defendant's argument that the eavesdropping warrants, which were authorized for the purpose of investigating crimes that were occurring in New York, constituted an unconstitutional extraterritorial application of New York State law...."

Schneider argues that Supreme Court "erred and acted beyond the scope of its authority when it authorized eavesdropping warrants for a California resident who never set foot in New York and never made calls to or received calls from New York and committed no crimes in New York." He also says the lower court acted unconstitutionally "when it authorized an eavesdropping warrant on a cell phone in a state [California] that does not permit electronic eavesdropping for gambling related offenses and does not permit eavesdropping from another state absent a joint state investigation."

For appellant Schneider: Stephen N. Preziosi, Manhattan (212) 300-3845
For respondent: Brooklyn Assistant District Attorney Morgan J. Dennehy (718) 250-2515