

***State of New York
Court of Appeals***

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

Week of October 13 - 15, 2009

State of New York Court of Appeals

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To be argued Tuesday, October 13, 2009

No. 147 Godfrey v Spano

No. 148 Lewis v New York State Department of Civil Service

The plaintiffs in these cases, New York residents suing in their capacity as taxpayers, are challenging executive and administrative orders that extend government benefits to same-sex couples who married in jurisdictions where such marriages are legal. In Case No. 147, they seek to enjoin implementation of an executive order issued in 2006 by Westchester County Executive Andrew J. Spano, which directs all county agencies to recognize valid same-sex marriages from foreign jurisdictions "in the same manner as they currently recognize opposite sex marriages for the purposes of extending and administering all rights and benefits belonging to these couples, to the maximum extent allowed by law." In Case No. 148, they challenge a policy adopted by the State Department of Civil Service (DCS) in 2007 recognizing, as spouses, the parties to any same-sex marriage legally performed in another jurisdiction. The DCS policy extended the health insurance benefits of state and local government employees to their same-sex spouses.

The plaintiffs, represented in both cases by the Alliance Defense Fund of Scottsdale, Arizona, contended the orders were illegal, unconstitutional, and resulted in the unlawful disbursement of public funds. Two same-sex couples, both legally married in Canada, intervened in defense of the government actions, contending their marriages were entitled to recognition in New York under longstanding comity principles. Trial courts ruled in both cases that recognition of same-sex marriages by Spano and DCS were valid exercises of their authority.

The Appellate Division, Third Department unanimously affirmed in No. 148, but split 3-2 on the legal analysis. The majority relied primarily on "the well-settled marriage recognition rule," which provides that, if a marriage is valid in the place where it was entered, it must be recognized as valid in New York unless it is contrary to the express prohibitions of a statute or abhorrent to New York public policy. Rejecting the claim that the rule did not apply because same-sex marriages are not "marriages" as defined in New York, the court said, "In every case in which the rule has been applied..., the out-of-state marriage failed to meet New York's definition of a marriage in some respect." It ruled that neither exception applies because no statute expressly precludes recognition of such marriages and because New York has taken no steps to do so. The concurrence would have affirmed on the narrower ground that the Legislature has given DCS broad discretion to determine who is entitled to health coverage as the "spouse" of a state employee and its determination is entitled to deference.

The Appellate Division, Second Department affirmed the dismissal in No. 147, saying Spano's order requires recognition of same-sex marriages "to the maximum extent allowed by law" and, therefore, it "can never require recognition of such a marriage where it would be outside the law to do so."

The plaintiffs argue the marriage recognition rule does not apply to same-sex marriages, saying, "Comity does not extend to such an 'altogether different' foreign-created relation even if labeled 'marriage' by another jurisdiction." They say "the Legislature's policy on marriage reflects an enduring structure -- one man and one woman -- and that structure is based on well-established public policies linking marriage in New York to procreation and the welfare of children." The challenged policies "would structurally alter the institution of marriage," they say. "Such fundamental changes to that vital social institution, if they ever occur, should come not through the extension of comity, but only through legislative action." They also contend the rule does not apply to same-sex marriages "because recognizing those unions conflicts with natural law."

For appellants Godfrey and Lewis et al: Brian W. Raum, Scottsdale, AZ (480) 444-0020

For respondent Spano: Mary Lynn Nicolas-Brewster, White Plains (914) 995-3648

For State respondents: Assistant Solicitor General Sasha Samberg-Champion (212) 416-6229

For intervenors-respondents Sabatino et al: Susan L. Sommer, Manhattan (212) 809-8585

State of New York Court of Appeals

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To be argued Tuesday, October 13, 2009

No. 149 Matter of Walton v New York State Department of Correctional Services

This lawsuit, challenging the collection of fees by the State Department of Correctional Services (DOCS) for collect phone calls made from New York prisons, was brought by three relatives of inmates and two criminal defense organizations, the Office of the Appellate Defender and the New York State Defenders Association, who complain the system imposed exorbitant costs on call recipients. The collect call service, which provides the only means for inmates to speak with a family member, friend or lawyer outside the prison, was operated by MCI under an exclusive services contract from 1996 to 2007. Under the contract, MCI initially paid DOCS 60 percent of gross revenue generated by the system. This commission was reduced to 57.5 percent in 2001.

DOCS and MCI amended the contract in 2003 to establish a new flat rate (a \$3 surcharge plus 16 cents per minute for all calls, local and long distance), but retained the 57.5 percent commission paid to DOCS. When MCI submitted its proposed rate to the Public Service Commission (PSC), the petitioners in this case objected to the rate and the DOCS commission. The PSC concluded it had no jurisdiction to review the portion of the rate attributable to the DOCS commission because DOCS is not a telephone corporation. Considering only the portion of the rate that would be retained by MCI (42.5 percent), the PSC approved the rate change in October 2003.

Petitioners filed this suit in 2004 to prohibit MCI and DOCS from charging more than the 42.5 percent of the rate that was approved by the PSC and to recover phone charges collected in excess of the approved rate. They argued the DOCS commission was an unlawful tax under the State Constitution, effected an unconstitutional taking of their property, and violated their rights to equal protection and free speech, among other things. Lower courts dismissed the suit as time-barred, but the Court of Appeals held the constitutional claims were timely and remitted the case in February 2007 (8 NY3d 186). Since DOCS ceased collecting the commissions in April 2007, pursuant to executive order and subsequent statute, petitioners now seek a refund of the estimated \$60 million in commissions that DOCS received from October 2003 to April 2007.

Supreme Court dismissed the case for failure to state a claim and the Appellate Division, Third Department affirmed, holding the commissions MCI paid to DOCS were not a tax. It said, "Such commissions have been treated as legitimate business expenses paid to gain access to telephone users ... and the fact that a telephone company passes these expenses on to its customers does not transform such commissions into taxes." It said phone charges resulting from the DOCS commissions did not implicate free speech rights because "inmates are not entitled to pay a particular rate for their calls."

Petitioners contend the commissions were an unlawful tax imposed on "family, friends, and lawyers of prisoners" and "used to defray the cost to taxpayers of funding the correctional system as a whole." They argue, "The DOCS surcharge is unauthorized, and unrelated to the cost to DOCS of providing telephone services, [and] for this reason it must be struck down as an unlawful tax." Arguing the commissions violated their First Amendment rights, they say, "The law is clear that telephone communication is protected under freedom of speech and association, and [DOCS] cannot limit the enjoyment of these rights through imposition of an arbitrary financial burden without any legitimate penological purpose."

For appellants Walton et al: Rachel Meeropol, Manhattan (212) 614-6432

For respondent DOCS: Assistant Solicitor General Victor Paladino (518) 473-4321

State of New York Court of Appeals

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To be argued Tuesday, October 13, 2009

No. 150 People v Miguel Alemany

Miguel Alemany, a 31-year-old homeless man, was arrested in November 2005 in Central Park, where he had tried to chase down two female joggers. The first woman escaped and police caught him as he was chasing the second. He told them he was angry that his girlfriend had cheated on him and he went to the park to "have sex with a woman by force." He pleaded guilty to attempted sexual abuse in the first degree and was sentenced to six months' imprisonment and ten years' probation.

At a hearing to determine his risk level pursuant to the Sex Offender Registration Act (SORA), the prosecution recommended that Alemany be categorized as a level two offender (a moderate risk of re-offense) and submitted a Risk Assessment Instrument (RAI) that assessed him 75 points. An RAI score of more than 70 and less than 110 points would place a sex offender in level two. Alemany's RAI included 10 points under risk factor 15 for a post-release living situation that was allegedly inappropriate because it was unclear where he would be living. Defense counsel objected that, under SORA Guidelines, an inappropriate living situation is one that provides "access to victims or a reduced probability of detection" of a new offense, not necessarily homelessness. The prosecution argued that lack of a home and job would make Alemany "hard to locate" and reduce the likelihood of detecting new offenses.

Supreme Court adopted the prosecution's RAI and adjudicated Alemany a level two offender, saying, "I think the fact that the defendant is undomiciled creates a very difficult situation as far as the probability of detection for any violations...."

The Appellate Division, First Department modified the order by reducing Alemany's risk category to level one, holding that he should not have been assessed 10 points under factor 15. It said, "The evidence established that, at most, defendant's future living situation was uncertain in that, although he was described as homeless at the time of his arrest, upon his release [on probation] he was advised to go to the Bellevue men's shelter where he would be assisted by a community organization in trying to find employment. This was insufficient as a matter of law to meet the People's burden of showing, by clear and convincing evidence, that defendant's living situation was inappropriate...."

The prosecution argues that it "did in fact present clear, convincing, and essentially undisputed evidence that defendant would continue to be undomiciled and have no community ties or resources upon his release from incarceration" and that it "compellingly demonstrated that defendant's undomiciled living situation was 'inappropriate' under risk factor 15 of the RAI, and that the hearing court's corresponding 10-point assessment for that factor was richly deserved." It says the Appellate Division's decision "effectively and improperly established a per se rule barring a sex offender with an 'uncertain' living environment from ever being assessed points under risk factor 15."

For appellant: Manhattan Assistant District Attorney Aaron Ginandes (212) 335-9000

For respondent Alemany: Denise Fabiano, Manhattan (212) 577-3917

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To be argued Wednesday, October 14, 2009

No. 178 Matter of Goldstein v New York State Urban Development Corporation

This proceeding challenges the use of eminent domain by the Empire State Development Corporation (ESDC) to take property on the site of the proposed Atlantic Yards project in downtown Brooklyn for development by the Forest City Ratner Companies. The centerpiece of the 22-acre project is construction of an arena for the New Jersey Nets basketball team, owned by Forest City Ratner principal Bruce Ratner. Plans for subsequent stages of the project include construction of 16 towers for office and retail space, more than 5,000 housing units, and community facilities offering health and child care; and creation of eight acres of open space for public use. The New York State Urban Development Corporation, doing business as the ESDC, approved the use of its power of condemnation in December 2006, after determining the project would serve the public purposes of eliminating blight and providing recreational and community facilities, mass transit and infrastructure improvements, affordable housing, job creation, and increased tax revenue.

Petitioners, who live or own businesses on the Atlantic Yards site, initially challenged the taking of their properties in federal court, contending that the primary benefits of the project would accrue to Ratner and that the public purposes cited by ESDC were pretexts for a private taking. The federal action was dismissed for failure to state a viable claim that the condemnations violated the Fifth Amendment (see Goldstein v Pataki, 488 F Supp2d 254 [EDNY 2007], affd 516 F3d 50 [2d Cir 2008]).

Petitioners then commenced this action in August 2008 contending, among other things, that the New York Constitution sets a more restrictive standard for condemnation and that the taking of their properties would violate its Public Use clause (article I, § 7), which states that "private property shall not be taken for public use without just compensation."

The Appellate Division, Second Department upheld ESDC's determination to condemn private property for Atlantic Yards, rejecting the claim that the Public Use clause must be read literally to allow condemnation only where the property "is to be held open for use by all members of the public." It said New York courts "recognized quite early on that some takings, which would benefit private enterprises such as railroad companies, would also inure to the benefit of the public and thus constitute 'public use.'" It said "the literal interpretation of the concept of public use which the petitioners urge us to apply was abandoned long before the United States Supreme Court concluded [in Kelo v City of New London (545 US 469 [2005])] that the use of eminent domain to carry out an economic development plan does not violate the Fifth Amendment to the United States Constitution.."

Petitioners argue, in part, that a narrow interpretation of "public use" is "compelled by the plain meaning of the term, the intent of the New York citizens who first enacted the provision in 1821, and by a raft of decisions from this Court during the 19th and early 20th centuries -- a time considerably closer to its enactment than more modern cases that have been infected by the U.S. Supreme Court's aggressive attempts to render meaningless the comparable provision in the Fifth Amendment." They also argue the ESDC failed "to weigh the public benefit that will be realized by the seizure against the benefit that will accrue to the recipient of [the] property," as required under Aspen Creek Estates, Ltd. v Town of Brookhaven (12 NY3d 735).

For appellants Goldstein et al: Matthew D. Brinckerhoff, Manhattan (212) 763-5000
For respondent ESDC: Philip E. Karmel, Manhattan (212) 541-2000

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To be argued Wednesday, October 14, 2009

No. 151 Matter of Gillen v Conkling

Thomas Gillen, a Melville resident who is in the business of purchasing at public auction the tax liens of delinquent taxpayers, purchased tax liens on three properties at an auction conducted by Nassau County Treasurer Steven Conkling in February 2006. He paid \$350,102.31 for the third lien, which covered 2005 taxes on a parcel in the Town of Hempstead. Two weeks later, Gillen delivered to Conkling a \$101,087.96 check for 2004 property taxes owed on the parcel encumbered by the third lien and asked the Treasurer to "pyramid" the payment on his existing lien. The practice of "pyramiding" permits a lien holder to pay subsequent taxes accruing on the property, or to pay tax liens on the same parcel that were previously sold to other buyers, and have the amount of the payment added to the amount of his lien. Conkling refused the payment because the delinquent 2004 taxes on the parcel had never been sold.

Gillen brought this article 78 proceeding to, among other things, compel Conkling to accept the tax payment for the 2004 taxes and credit the amount to his existing lien. He cited Nassau County Administrative Code § 5-49.0, which states, in part, that a tax lien holder "may pay to the County treasurer ... any older taxes that are a lien on such property." Conkling contended the statute did not apply to the 2004 taxes because they were not a lien, arguing that unpaid taxes do not become a lien until they are sold by the Treasurer. Supreme Court rejected Gillen's claim relating to his third lien and the Appellate Division, Second Department affirmed, saying the Treasurer was not required to accept Gillen's payment of 2004 taxes "which had not been reduced to a lien."

Gillen relies on Nassau County Administrative Code § 5-15.0, which states that property taxes "shall be and become liens on the real estate affected thereby and shall be construed and deemed to be charged thereon on the respective days when they become due and payable and shall remain such liens until paid." In light of this, he argues, the 2004 taxes "were a lien on the property from the moment they were due" and, therefore, section 5-49.0 requires the Treasurer to accept and pyramid his payment.

Conkling argues, in part, that the issue is moot because the new owner of the property has paid off all outstanding taxes, including the 2004 taxes that Gillen sought to pay.

For appellant Gillen: Kenneth Cooperstein, Centerport (631) 754-7777

For respondent Conkling: Gil Nahmias, Mineola (516) 571-3042

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To be argued Wednesday, October 14, 2009

No. 152 People v Michael J. Brown

papers sealed

When a nine-year-old girl was sexually assaulted by a stranger on the roof of a Queens apartment building in August 1993, she was treated at a hospital and a sexual assault evidence kit was prepared, but the kit was stored instead of tested. It was finally tested in August 2002, when it was given to the Bode Technology Group as part of the Police Department's DNA backlog project. The private laboratory identified male DNA in the samples, analyzed them, and sent the data to the Office of the Chief Medical Examiner (OCME), which entered the perpetrator's DNA profile into the FBI's CODIS database. A DNA sample had been taken from Michael J. Brown in June 2002, while he was imprisoned in Maryland on an armed robbery conviction, and authorities there matched it with the DNA profile from the Queens case in February 2003. Brown was indicted for the Queens assault in July 2003, a month short of ten years after the crime occurred.

Defense counsel moved to dismiss all charges on the ground that the five-year statute of limitations had expired. Supreme Court denied the motion, ruling that the prosecution was entitled to the five-year extension of the limitations period provided in CPL 30.10(4)(a)(ii) for cases in which the defendant's whereabouts "were continuously unknown and continuously unascertainable by the exercise of reasonable diligence." At trial, the court admitted into evidence as business records the DNA reports produced from the rape kit, rejecting the defendant's objection that he was entitled to cross-examine an employee of Bode, the lab that produced the reports. Instead, the reports were admitted through the testimony of an OCME forensic biologist. Brown was convicted of two counts of first-degree sodomy and other charges and was sentenced to 12½ to 25 years in prison.

The Appellate Division, Second Department affirmed, saying prosecutors were entitled to the extended statute of limitations because Brown's "whereabouts were continuously unknown and continuously unascertainable by the exercise of reasonable diligence until the defendant's DNA profile from the sexual assault evidence kit was matched to DNA evidence taken from the defendant pursuant to a subsequent incarceration...." It also ruled that admission of the DNA reports did not violate his Sixth Amendment right to confront his accusers under Crawford v Washington (541 US 36).

Brown argues the extended limitations period should not have been invoked because the victim's trial testimony, including statements that her assailant had asked about her "Uncle Sol" and "numerous" other relatives by name, "made clear that the police could have identified appellant soon after the crime had they employed reasonable diligence." Regarding the DNA evidence, he argues, "The People's failure to produce any witness with first-hand knowledge of Bode's actions, through whom the defense could explore the reliability of the testing it performed, denied appellant his right to confront the witnesses against him."

For appellant Brown: Steven R. Bernhard, Manhattan (212) 693-0085

For respondent: Queens Assistant District Attorney William H. Branigan (718) 286-6652

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To be argued Wednesday, October 14, 2009

No. 153 Snyder v Bronfman

Edgar M. Bronfman, Jr., has been chairman and chief executive officer of Warner Music Group since 2004, when a consortium of private investors controlled by Bronfman bought the company for \$2.6 billion. Richard E. Snyder, the former chairman and CEO of Simon & Schuster, is asking the Court to reinstate his suit for more than \$100 million in damages from Bronfman as compensation for his contributions to the deal.

Snyder did not have a written agreement with Bronfman, but alleged in his complaint that in December 2001 Bronfman asked him "to work together with him in an enterprise they could control and operate as a 'platform' for significant expansion through strategic acquisitions and financial investments, preferably in the media industry." Bronfman allegedly said Snyder would serve as his "experienced right hand," "sounding board," "principal advisor," and "consigliere," and would receive a "fair and equitable" share from any consummated deal. Snyder says a handshake sealed their agreement on what he describes as a joint venture. He says he was given an office in Bronfman's suite and spent the next two years working with Bronfman to find a media company to acquire. After several failed attempts, including one to acquire the Columbia House Company, Snyder alleges that he learned a rumored merger of BMG and Warner Music was in trouble and proposed to Bronfman that they pursue Warner Music. Snyder alleges that he helped secure the equity financing and debt financing for the deal; helped obtain Warner Music's financial information; invested \$1.3 million of his own funds in the deal through Bronfman's company; and participated, at Bronfman's request, in planning for cost-cutting at Warner Music after the acquisition. He says that he "conceived the entire transaction, set the process in motion, and deserved to be compensated on that basis," but received nothing.

Snyder filed this suit against Bronfman in 2007, including claims for unjust enrichment and quantum meruit, and Bronfman moved to dismiss on the ground that the alleged oral agreement was void under the statute of frauds. The statute, General Obligations Law § 5-701(a)(10), bars enforcement of oral agreements "to pay compensation for services rendered in ... negotiating the purchase ... of any ... business opportunity...."

Supreme Court denied the motion to dismiss the unjust enrichment and quantum meruit claims, concluding the statute of frauds did not apply at the pre-discovery stage of the litigation. It said Snyder's complaint alleged that he "acted as more than just an intermediary or finder, and was given a broad role on behalf of the alleged joint venture.... These allegations, when taken as true, allege that plaintiff functioned as more than just a broker assisting defendant in a limited and transitory manner to find a company the latter could acquire and run."

The Appellate Division, First Department reversed and dismissed the claims, holding they were barred by the statute of frauds because "the crux of [his] claim is that he provided 'know-how' and 'know-who' in connection with the acquisition of Warner Music Group." It said Snyder "cannot avoid the bar of the statute by alleging that he acted as a principal" in the deal because "nothing in the text of the statute suggests that it applies to claims for compensation advanced by all persons other than those who claim to be or can be characterized as principals or partners...."

For appellant Snyder: Paul Shechtman, Manhattan (212) 223-0200

For respondent Bronfman: Orin Snyder, Manhattan (212) 351-4000

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To be argued Wednesday, October 14, 2009

No. 154 Vintage, LLC v Laws Construction Corp.

Westway Industries and Laws Construction Corp. formed a joint venture (Westway/Laws) in 2000 to serve as general contractor for construction of a golf course at Ferry Point Park in the Bronx. Vintage LLC, a consulting company specializing in golf course construction, had sought out the contractors at the request of J. Pierre Gagne, the project manager for the golf course developer, and Gagne insisted at a February 2000 meeting that Westway and Laws must participate together on the project. On April 27, 2000, the president of Vintage entered into two contracts for compensation for its services in introducing "the general contractor" to Gagne. Both contracts stated that they were "by and between Westway Industries and/or Su-Z Inc. and/or Laws Construction Corp., hereinafter referred to as the (general contractor) and Vintage.... The acceptance of this agreement by a principal of Westway Industries, Inc. and/or Su-Z, Inc. and/or Laws Construction Corp., shall validate a contractual document with Vintage, LLC as set forth hereinabove." Only the president of Westway signed on behalf of the general contractor.

In August, 2000, the golf course developer awarded the general contract to the Westway/Laws joint venture. Westway/Laws then executed a \$10 million performance bond and a \$5 million payment bond with United States Fidelity and Guaranty Company (USF&G) as surety. Westway went out of business in 2001 and was released from the construction contract. Vintage performed the duties required under the two contracts it signed on April 27, 2000, but it was never paid.

In 2002, Vintage brought this breach of contract action against Laws, the Westway/Laws joint venture, and USF&G, among others. Laws argued at trial that the joint venture did not exist at the time the April 27 contracts were signed and that they were binding only on Westway. Vintage argued the joint venture was formed prior to that date and cited, among other things, a letter sent on March 3, 2000 by the president of Laws to Gagne -- under letterhead for "Westway Industries, Inc./Laws Construction Corp. A Joint Venture" -- summing up their prior "agreement" that Westway/Laws would be the general contractor.

The jury ruled for Vintage, finding that the joint venture did exist when the contracts were signed and that the parties to the agreements intended to bind the joint venture. Vintage was awarded \$1.5 million in damages, plus interest, against Laws, Westway/Laws, and USF&G.

Supreme Court denied a defense motion to set aside the verdict due to insufficient evidence that Vintage had contracted with the joint venture. The court cited the March 3, 2000 letter, with joint venture letterhead, and Gagne's trial testimony that the developer "would not deal with Westway, but would deal only with Westway/Laws."

The Appellate Division, First Department reversed, saying that "there was insufficient evidence from which the jury could have determined that a joint venture had been formed as of the date plaintiff claims to have entered into two contracts with that venture." It also said the trial court should have provided a jury charge "containing all the elements of a joint venture...."

For appellant Vintage: Philip C. Pinsky, Syracuse (315) 446-2384

For respondent Laws Construction et al: Stanley S. Zinner, White Plains (914) 948-4800

State of New York Court of Appeals

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To be argued Thursday, October 15, 2009

No. 155 Matter of Singer, Deceased

Brooklyn Rabbi Joseph Singer died in March 2004 survived by a daughter, Vivian Singer, and a son, Alexander Singer. His will named Vivian as executor and Alexander as alternate executor "because my daughter and my son do not get along." Rabbi Singer left the bulk of his assets to Vivian -- including his house, personal property, and \$200,000 -- "in recognition of [Vivian's] unusual dedication to Grantor and for taking care of Grantor." The rabbi left \$15,000 to each of Alexander's two sons and provided that the remainder of his estate would be divided equally between Vivian and Alexander. The will also contained two in terrorem clauses, a specific clause directed at Alexander and a general one providing that any beneficiary who should "in any manner, directly or indirectly, contest, object to or oppose, or attempt to contest, object to or oppose, the probate of or validity of this will" would forfeit his interest in the estate.

In a probate proceeding of a will containing an in terrorem clause, EPTL 3-3.5(b) and SCPA 1404(4) permit beneficiaries to conduct preliminary examinations of the executors and proponents of the will, the draftsman, and the attesting witnesses without forfeiting their right to inherit. When Rabbi Singer's will was offered for probate, Alexander took depositions from Vivian as executor, the attorney who drafted the will, the attesting witnesses, and from Joseph Katz, the rabbi's longtime attorney and the draftsman of his seven prior wills. After taking the depositions, Alexander did not file any objections to the will nor contest its validity in any other way. Vivian subsequently brought this proceeding for a declaration that Alexander had violated the in terrorem clauses by deposing Katz and had thereby forfeited his interest in the estate.

Surrogate's Court concluded that Alexander had violated the in terrorem clauses and revoked his bequest, saying, "An attorney who prepared a prior will for a decedent is not listed under SCPA § 1404(4) as a deponent who may be examined without triggering an in terrorem clause." In deposing Katz, it said, Alexander's "conduct reached further than the statute allows" and was contrary to the intent of the testator, Rabbi Singer. The court also said, "A beneficiary need not file objections to violate an in terrorem clause." The Appellate Division, Second Department affirmed, saying, "The in terrorem clause prohibited an 'attempt to contest' the will 'in any manner'" and Alexander's deposition of the rabbi's "prior attorney was not protected under the safe harbor provisions set forth in EPTL 3-3.5 and SCPA 1404...."

Singer argues the lower courts erred in construing the statutes "not merely as 'safe harbors,' as the Legislature intended, but as absolute limitations on the actions which a beneficiary might take in determining whether to contest a will containing an in terrorem clause." He says, "The decision is contrary to the twin policy objectives of EPTL § 3-3.5(b)(3)(D) and SCPA § 1404(4): (a) to permit will beneficiaries to obtain sufficient information to enable them to make informed decisions whether to pursue a contest, and (b) to insure that wills which are truly worthy of contest are not admitted to probate." He also argues an in terrorem clause is not violated if no objections are filed.

For appellant Alexander Singer: Gary B. Freidman, Manhattan (212) 818-9600
For respondent Vivian Singer: Jack M. Kint, Jr., Manhattan (646) 827-2237

State of New York Court of Appeals

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To be argued Thursday, October 15, 2009

No. 156 People v Everton D. Simms

Everton D. Simms was charged with stealing cash and a cell phone at gunpoint from two people in Brooklyn in July 2005. At his trial, the jury announced a guilty verdict on two counts of robbery in the first degree, but when the judge polled the jury, juror number ten responded, "Well, it is my verdict, although I feel like I was pressured to make that decision." The judge sent the other jurors out of the courtroom and asked juror ten what she meant by pressure, solely to determine if the pressure was part of deliberations or came from outside the jury room. Although he told the juror he did not want to discuss what occurred in the jury room, she responded, "Well, I meant pressured by the fact that everyone is standing up, yelling at me, why can't you see it that way, why can't you see it that way? Everyone is yelling like that. After eight hours of that you have to give in." When the juror made clear she was referring to what occurred inside the jury room, the court accepted the verdict and denied the defendant's mistrial motion.

Supreme Court denied defendant's subsequent motion to set aside the verdict, saying "pressure placed by fellow jurors on other jurors does not provide a legal basis for vacating a verdict. Simms was sentenced to nine years in prison.

The Appellate Division, Second Department reversed on a 3-1 vote and ordered a new trial, saying the trial judge failed to conduct a sufficient inquiry to establish that juror number ten agreed with the guilty verdict, in view of her statement that "after eight hours of [yelling] you have to give in." The majority said, "Since this response effectively undercut the juror's initial assertion that the verdict was hers, the Supreme Court should not have accepted the verdict.... Contrary to the conclusion reached by our dissenting colleague, we do not see the verdict at issue here as the acceptable product of the normal interaction of jurors during deliberations."

The dissenter said, "There is no allegation that the juror in question was improperly influenced by any forces outside of the jury room or due to her personal obligations or commitments. Moreover, the juror never stated that she did not vote 'guilty' or that she did not believe the defendant was guilty beyond a reasonable doubt.... Indeed, the juror specifically stated that '[guilty] is my verdict,' and thus the verdict was unanimous...." He said "the juror's explanation of how she felt pressure within the jury room amounted to little more than comment upon 'the tenor of deliberations,' and therefore did not provide a basis to reject the verdict...."

For appellant: Brooklyn Assistant District Attorney Lori Glachman (718) 250-4943

For respondent Simms: Warren S. Landau, Manhattan (212) 693-0085

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To be argued Thursday, October 15, 2009

No. 157 Matter of Vomero v City of New York

GAC Catering, Inc. paid \$275,000 in September 2003 to purchase a one-family house at Otis Avenue and Hylan Boulevard in Staten Island, across the street from its catering hall. The property was zoned for residential use, but GAC demolished the house and applied to the New York City Department of Buildings for a permit to erect a two-story commercial building to house a photography and video studio. When the application was denied, GAC applied to the Board of Standards and Appeals (BSA) for a use variance on the ground of unnecessary hardship. The BSA granted the variance, determining that, due to unique physical conditions, residential use of the lot would not enable the owner to realize a reasonable return, and that, due to commercial development in nearby areas, commercial use of the lot would not affect the character of the neighborhood. Edward J. Vomero, who lives next door to GAC's lot, brought this article 78 proceeding to vacate the variance, alleging that GAC failed to prove unnecessary hardship and that any hardship was self-created.

Supreme Court granted Vomero's petition and vacated the variance, finding the BSA lacked a substantial basis for its determination. Since GAC was aware of the zoning restrictions when it bought the property, the court said any hardship was self-created. It said the assessed value of the lot had increased to at least \$384,000 as of April 2005 and a contractor had offered to buy the property for residential development "at a sum that represented a 50% profit for GAC." It also found nothing unique about the property.

The Appellate Division, Second Department reversed on a 3-2 vote, finding the BSA determination had a rational basis and was not an abuse of discretion." The BSA found that other properties, similar in characteristics and location to the GAC lot, had "unique physical conditions" that would raise "practical difficulties or unnecessary hardship" with conforming uses, the majority said, and there "is nothing in the record to support the conclusion that there is any substantial difference between the property at issue here and those other properties." It said BSA's finding that residential use of the lot would not produce a reasonable return "was not arbitrary and capricious, despite the presence of countervailing evidence, which was not conclusive." It said the fact that GAC was aware of the restrictions when it bought the lot "did not, by itself, constitute a self-created hardship."

The dissenters said "the BSA's finding that the hardship was not self-created, which was not even necessary to grant the application, is so contraindicated by the record that such finding is illustrative of the arbitrary nature of the BSA's actions." They said there was no proof of hardship since "uncontroverted evidence" showed that the lot, if sold for residential use, would yield a "significant" profit to GAC. "The alleged hardship suffered by GAC is unique to its use of the catering hall across the street, because GAC felt it needed to add a photography component to the catering hall." they said. "A finding of unique hardship, however, must be based upon the uniqueness of the land causing the plight, and not the uniqueness of the plight of the owner."

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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, October 15, 2009

No. 158 Dinardo v City of New York

Zelinda Antoinette Dinardo was a special education teacher at Fiorello LaGuardia School in the Bronx on March 25, 1999, when she was injured while trying to protect one of her fourth-grade students from attack by another ten-year-old student who had a history of aggressive behavior. The problem student had been assigned to her class in September 1998 and became increasingly disruptive, turning more violent toward his classmates and threatening Dinardo and an art teacher. In December 1998, he was suspended for a week for bringing a knife to school. Dinardo urged her supervisors to have the student transferred to another program for the safety of her classroom, a procedure known as a type 3 referral, and in January 1999, on her supervisors' instructions, she began keeping notes on the student's behavior to document the request. The referral request was submitted to the Board of Education on February 12, 1999. While it was pending, Dinardo testified, she told her supervisors that she was increasingly concerned about safety and wanted to quit, and in response they told her to "hang in there because something was being done to have [the student] placed or removed."

Supreme Court denied the Board's trial motion to dismiss, finding that "there are enough facts to go to the jury with regard to whether there was a duty owed by the agents of the [Board] with regard to the safety not only of the teacher, but of anybody else that happened to have been in that situation." The jury awarded Dinardo \$500,000 for her injuries.

The Appellate Division, First Department affirmed on a 3-2 vote, saying, "Accepting plaintiff's evidence as true and according her the benefit of every favorable inference that may be drawn therefrom..., a jury could have rationally concluded that a special relationship existed between plaintiff and the Board..." The majority said, "Although no express promise was made to plaintiff by any agents of the Board, there is no requirement that the promise to protect be explicit.... The jury ... had a rational basis for finding that plaintiff justifiably relied on the Board's affirmative undertaking, given the assurances she received from her local administrators."

The dissenters argued the evidence was "legally insufficient to establish that [the Board] assumed a special duty to plaintiff," saying she failed to establish reliance. "The vague statement that something was being done could not have lulled plaintiff into a false sense of security, particularly because she was acutely aware of this student's presence in the classroom and his disruptive propensity right up to the time of the subject incident. Further..., plaintiff knew from experience that it could take up to 60 days to process a type 3 referral."

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