

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

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

**NEW YORK STATE COURT OF APPEALS**

**Background Summaries and Attorney Contacts**

**Week of October 20 - 22, 2009**

# *State of New York Court of Appeals*

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Tuesday, October 20, 2009

## **No. 159 Affri v Basch**

Yaakov and Esther Basch hired Avraham Affri to renovate an apartment in their home in Monsey, Rockland County, in April 2004. The work included installing a washer and dryer, and Affri fell from a ladder while installing a dryer vent on the roof, suffering injuries that required several surgeries. Affri brought this personal injury action against the Basches, including a claim under Labor Law § 240(1). The statute imposes liability on property owners who contract for work involving gravity-related risks and fail to provide appropriate safety devices, but a homeowner exemption in the statute precludes strict liability for owners of one- and two-family dwellings who "do not direct or control the work."

The Basches moved for summary judgment dismissing the claim based on the homeowner exemption, arguing that they did not direct or control the work. Although they monitored the progress of the job, asked why work was done in a certain way, and had authority to decide the order of the work and to withhold payment if the quality was not satisfactory, they said they did not discuss with Affri how he would access the roof or install the vent and did not provide him with equipment or materials. Affri used his own ladder, they said, and set it up as he chose. Affri said Yaakov Basch monitored the project daily, asked detailed questions about the manner of the work, and sometimes told him what to do. Affri said the owner changed the plans, which had been drafted by an interior designer, instructing Affri to relocate a bedroom closet, install a second kitchen sink, reduce the width of the stove alcove, widen the front doorway, move the washer and dryer to the bathroom, install a smaller bathroom door, move the bathroom sink, and cut through a support beam, which Affri had recommended against. Affri said Yaakov Basch rejected his recommendation to vent the dryer through the bathroom window and instructed him to vent it through the roof.

Supreme Court denied the motion to dismiss, finding there were unresolved issues of fact regarding "whether defendants' actions and involvement in the work rises to the level of direction and control."

The Appellate Division, Second Department reversed and dismissed the claim, saying Affri failed to raise a triable issue of fact regarding the Basches' direction or control of the work. It said, "The plaintiff demonstrated only that the defendants made aesthetic decisions and exercised general supervision with respect to the project, neither of which deprives them of the benefit of the statutory exemption."

Affri argues the Basches are not entitled to the homeowner exemption, saying "defendants directed plaintiff in detail as to the way in which he performed his work -- indeed, even with regard to the very task that led to his accident, and which he was reluctant to undertake for safety reasons."

For appellant Affri: Brian J. Isaac, Manhattan (212) 233-8100

For respondent Basch et al: Paul E. Svensson, White Plains (914) 385-6000

# *State of New York Court of Appeals*

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Tuesday, October 20, 2009

## **No. 160 Matter of Hausman, Deceased**

Lena Hausman executed a will in October 2000 that divided her residuary estate between her son George Hausman, her daughter Susan Ruth Bersani, and seven of her grandchildren. At that time, she owned commercial property at 1373 56th Street in Brooklyn. A year later, on October 4, 2001, George Hausman executed articles of organization to form 1373 Realty Co. LLC, a limited liability company (LLC), for the purpose of owning, operating, and managing the property. On the same day, George Hausman and Bersani signed an operating agreement, which provided that they were to be the sole members of the LLC. On November 2, 2001, Lena Hausman executed a deed transferring ownership of the 56th Street property to the LLC. The LLC's articles of organization were filed with the Department of State two weeks later, on November 16, 2001. The deed was recorded on December 3, 2001.

Lena Hausman died in June 2002. After her will was admitted to probate, an inter-generational dispute arose over the validity of the deed, with her grandchildren contending that the deed was invalid and that the 56th Street property remained an asset of the estate. George Hausman, as executor of the estate, then filed a petition asking Surrogate's Court to determine whether there had been a valid conveyance of the property.

Surrogate's Court ruled the transfer of the property was valid, concluding that the LLC was a de facto entity when the deed was executed. "The following three things must be demonstrated to have a de facto entity: (1) A law under which the entity may be organized; (2) An attempt to organize the entity, subsequently effectuated; and (3) Exercise of the powers of the entity thereafter," it said, and held that all three requirements were met. Regarding the second requirement, the court said "there was an attempt to organize the entity prior to November 2, 2001, as [George Hausman] and his sister executed the operating agreement of the LLC, and the filing of the articles of organization occurred on November 16, 2001, thus effectuating [their] intention to form the LLC."

The Appellate Division, Second Department reversed and held the transfer was invalid. It agreed with the lower court that "the de facto corporation doctrine is equally applicable to limited liability companies," but it said Hausman failed to meet the second requirement for establishing that the LLC was a de facto entity at the time it accepted the deed. It said, "[T]here is no evidence that an attempt to file the articles of organization [with the Department of State] was made prior to the execution of the deed on November 2, 2001. In the absence of a colorable attempt to comply with the statute governing the organization of limited liability companies by filing, we cannot find that the LLC was a de facto entity capable of taking title on the date the deed was executed."

For appellant George Hausman: Norman A. Olch, Manhattan (212) 964-6171

For respondents Simon et al: Ezra Huber, Mineola (516) 739-0300

# *State of New York Court of Appeals*

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Tuesday, October 20, 2009

**No. 161 Lee v Astoria Generating Company, L.P.**

-----  
**Astoria Generating Company, L.P. v Elliott Turbomachinery Co., Inc.**

James D. Lee was employed as a millwright by Elliott Turbomachinery Co., Inc. in April 2001, when he was injured in a fall while working on a barge-mounted turbine at the Gowanus Gas Turbine electric generating facility in Upper New York Bay in Brooklyn. He brought this personal injury suit, including strict liability claims under Labor Law §§ 240(1) and 241(6), against the owners of the facility, Astoria Generating Company, L.P. and Orion Power New York GP, Inc. and related companies (collectively Astoria/Orion). The owners, in turn, brought a third-party action for indemnification against his employer and Elliott Company (collectively Elliott). The viability of Lee's claims depends primarily on whether the barge on which he was working is a "vessel" under the federal Longshore and Harbor Workers Compensation Act (LHWCA), which limits the liability of ship owners to their actual negligence.

The turbines of the Gowanus power station are housed on four barges, each measuring 80 by 200 feet, that float in the navigable waters of the Gowanus Canal. The barges are attached to piers by means of a clamping system that allows them to rise and fall with the tides. They are connected to New York City water pipes and they are connected to the power grid by transmission lines that run from the barges to a Con Ed substation on adjacent land. Two of the barges were moved to Astoria, Queens for three months in 1996, to provide power during a temporary shortage, but they have otherwise remained in place except for periodic maintenance, about once a decade, when they are put into drydock.

Supreme Court concluded that the barge "qualifies as a vessel" and, therefore, Lee's state law claims were preempted by the LHWCA. It dismissed Lee's complaint against Astoria/Orion and the owners' third-party complaint against Elliott. The court relied on Stewart v Dutra Construction Co. (543 US 481), in which the U.S. Supreme Court held that a craft "used, or capable of being used, as a means of transportation on water" is a "vessel" under the LHWCA.

The Appellate Division, First Department reversed in a 4-1 decision, reinstated Lee's Labor Law claims, and granted summary judgment to Lee on the issue of liability on his section 240(1) claim. Concluding that the barge is not a vessel, the majority said, "[T]he turbine facility, whose sole purpose is to provide electrical power..., is permanently moored, serves no ancillary maritime purpose, and was not intended to operate as a vessel in navigation. The facility receives its utilities from shore, and ... provides power via lines that run from the barge to the Con Ed substation. The facility is not self-propelled, and was designed and intended to be a power plant, not a means of water transportation or maritime commerce." Alternatively, the court held that even if the barge were a vessel, federal maritime law would not preempt the state law claims based on Cammon v City of New York (95 NY2d 583).

The dissenter argued the barge was a vessel because its use "as a means of transportation on water is plainly a practical possibility, as the barge is detached from its moorings and moved by tug to drydock for maintenance about once every 10 years. Moreover, the barge can be moved to provide power at other locations when necessary." He expressed "a more profound disagreement" with the majority's holding that Lee's state law claims would not be preempted even if the barge were a vessel, saying Cammon involved a claim against a landowner, not a vessel owner.

For appellants Astoria/Orion: Deborah F. Peters, Great Neck (516) 487-5800

For appellant Elliott: Curt J. Schiner, Manhattan (212) 964-6611

For respondent Lee: Paul T. Hofmann, Manhattan (212) 465-8840

# *State of New York Court of Appeals*

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Tuesday, October 20, 2009

**No. 162 People v Daniel Colon**

**No. 163 People v Anthony Ortiz**

In December 1989, several men in a van fired into two parked cars on the Lower East Side of Manhattan, killing Orlando Martin and Frank Morales and wounding two other men. Daniel Colon and Anthony Ortiz became suspects the following spring, when a probationer named Anibal Vera was arrested for possession of crack cocaine in March 1990 and told police he could provide information about the killings if he was "cut loose." Vera ultimately told police that Colon had described the shootings to him, saying the victims were rival drug dealers whom Colon, Ortiz, and their companions wanted to eliminate. Colon and Ortiz were arrested in October 1990, and Vera was a key prosecution witness at their joint trial in 1993. It was disclosed at trial that, in exchange for Vera's testimony, he was allowed to plead to disorderly conduct on the drug charge and avoid jail for violating probation. He testified that he received no other benefits, a statement the prosecutor repeated during summation. Colon and Ortiz were each convicted of two counts of second-degree murder and sentenced to 50 years to life in prison.

In 2003, working from his cell, Colon obtained sworn statements from Vera that he had received additional, undisclosed benefits prior to his testimony at the murder trial. Vera said the prosecutor took no action against him for his possession of a firearm or his continued use and sale of drugs, agreed to relocate his grandparents when he expressed concern about their safety, and intervened on his behalf in a subsequent drug case. Defendants moved to vacate their convictions. At the hearing on the motion, prosecutors found undisclosed notes of their interviews with two witnesses in March 1990 in which four other potential suspects were named.

Supreme Court denied the defendants' motions, finding the undisclosed benefits were not given in exchange for Vera's testimony and, therefore, were not Brady material that must be disclosed to the defense. It said there was no reasonable possibility that disclosure of the notes would have altered the outcome of the trial.

The Appellate Division, First Department affirmed. It said the prosecutor's failure to disclose her role in relocating Vera's grandparents, and her failure to correct Vera's testimony that he received no other benefits, were improper, but it found "no reasonable possibility that the undisclosed information, the incorrect testimony and the prosecutor's comments during summation affected the verdict." It said the interview notes "contained layers of hearsay, not apparently admissible under any hearsay exceptions..., and there is no basis other than speculation upon which to conclude that, if disclosed, they might have led to admissible exculpatory evidence."

The defendants argue the prosecution's "failure to correct, and affirmative use of Vera's testimony denying any receipt of undisclosed benefits" violated their "due process right not to be convicted upon false or misleading evidence or argument." They also say this failure "to disclose evidence contradicting their principal witness's testimony denying that he had any reason to testify favorably for the People" violated Brady and Vilardi. Regarding the interview notes, they argue that "there is a reasonable possibility that defense counsel, at the time of trial, would have been able to use the investigative leads the People withheld to obtain admissible evidence that would have affected the outcome of the trial."

For appellant Colon: Joel B. Rudin, Manhattan (212) 752-7600

For appellant Ortiz: Harold V. Ferguson, Jr., Manhattan (212) 577-3548

For respondent: Manhattan Assistant District Attorney Patrick J. Hynes (212) 335-9000

# *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 Wednesday, October 21, 2009

## **No. 165 People v Brian Henderson**

Inmate Pablo Pastrana suffered multiple puncture wounds and lacerations during a fight in the day room of his cell block at Rikers Island in March 2003. Two correction officers testified at trial that they saw inmate Brian Henderson pull a metal object from his sleeve and make slashing and stabbing motions toward Pastrana. Pastrana himself testified for the defense, saying that he was assaulted by three or four Hispanic inmates and that Henderson, who is black, was not one of his attackers.

Pastrana, a member of the Latin Kings, also denied suggestions made by the prosecutor during cross-examination that Henderson had intimidated him into testifying for the defense, saying, "No. I'm not scared. If you been checking through all your paperwork, you will see how long I been locked up. If you seen my institutional record, when I'm in the Bing, I got assault on staff, I got fighting. I'm not going to be scared of him." During summation, the prosecutor told the jury, "This case is about [Henderson's] arrogance and thinking that no one would be here to testify ... against him. He got the victim to testify for him." After the court sustained a defense objection, the prosecutor continued, "You don't always need a shank to exercise power over another person.... It's a small community. It's a small world." Henderson was convicted of attempted assault in the first degree and sentenced as a persistent violent felony offender to 16 years to life in prison.

The Appellate Division, First Department affirmed in a 4-1 decision, finding the verdict "was based on more than legally sufficient evidence." The majority said, "Defendant was convicted on the basis of the eyewitness testimony of two correction officers who both observed him stabbing a fellow inmate. The jury had substantial grounds to credit these officers, and to reject the testimony of defendant's witness, the inmate-victim who vaguely claimed that the attack was by three Hispanic inmates whom he could not identify...." It said, "Defendant's right to a fair trial was not violated by the prosecutor's cross-examination of the inmate-victim or by remarks made in the course of summation. The questions and comments relating to the victim's failure to identify defendant as the perpetrator were proper attacks on his credibility."

The dissenter argued that the prosecution's "unfounded comments and insinuations about the intimidation of the victim substantially prejudiced the defendant." He said, "This is a case where the People ignored the victim's testimony that the defendant was not his assailant, and suggested, without any evidentiary basis, that the victim was lying because he had been intimidated by the defendant. When the victim denied any intimidation, the People then argued that the victim's denials meant that he had, in fact, been intimidated. The victim's denials therefore became the People's evidence-in-chief on the issue of witness intimidation." He said, "[T]here simply was no evidence of record that the defendant intimidated the victim and, therefore, no good faith basis to question the victim's credibility."

For appellant Henderson: Marsha W. Yee, Manhattan (212) 402-4100

For respondent: Bronx Assistant District Attorney Rither Alabre (718) 590-2156

# *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 Wednesday, October 21, 2009

## **No. 164 People v Simon Samandarov**

In December 2003, Simon Samandarov and his brother went out with Alik Pinhasov and his cousin, Boris Pinhasov, for an evening of dinner and heavy drinking that ended badly in Rego Park, Queens. Alik Pinhasov was shot in the buttocks and grazed on the back by a .22 caliber pistol. Jose Ramirez, who lived in an apartment overlooking the scene, heard the gunshots, went to the window and saw four men -- one lying on the ground, two holding him up, and the fourth, who turned out to be Samandarov, pacing back and forth in a long black coat and holding a gun. Police arrived as they were trying to put the injured man into a car. Officers searched all four and recovered the pistol from Samandarov's coat pocket. Alik Pinhasov later told the officers that Samandarov had shot him. Samandarov was convicted of second-degree attempted murder and other charges in February 2005 and was sentenced to 20 years in prison.

Samandarov filed a CPL 440.10 motion to vacate his conviction based on an alleged Rosario violation involving police interviews with Ramirez, a key prosecution witness who had testified at trial that police interviewed him only once. In support of the motion, Samandarov submitted a sworn affidavit from Ramirez, dated December 14, 2005, in which Ramirez said he was interviewed by police on three occasions and each time a detective took notes, only one set of which was given to the defense. Prosecutors argued in opposition that there was no Rosario violation because the alleged notes from two undisclosed interviews did not exist. They submitted a new affidavit from Ramirez, dated November 13, 2006, in which he disavowed the affidavit he had executed on behalf of Samandarov and stated that he had been interviewed just once by police. He also said that, shortly before the trial, he was interviewed by the prosecutor and others from her office "approximately" twice and no notes were taken.

Supreme Court denied the motion without a hearing, saying, Ramirez's second affidavit "conforms with his trial testimony and is corroborated, as well, by [the prosecutor's] affidavit, as well as those of the detective and paralegal ... who accompanied her.... [I]n light of Ramirez' recantation and the People's substantial evidentiary showing, defendant has failed to raise an issue of fact as to the existence of the alleged Rosario materials." Even if undisclosed police notes did exist, it said, there was no reasonable possibility that the nondisclosure altered the outcome of the trial because Ramirez "was not crucial to the prosecution's case." It said, "Ramirez did not actually see the shooting itself, but only its aftermath," while "defendant was accused by the victim himself and arrested at the crime scene" with the gun. The Appellate Division, Second Department affirmed.

Samandarov argues the trial court erred in denying his motion without a hearing "to ascertain which version of Mr. Ramirez' sworn statements, if any, should be credited." "The record is clear that Ramirez gave three separate and irreconcilable accounts, each under oath, of who in law enforcement visited him in connection with what, if anything, he witnessed on the night of" the shooting, he says, arguing that the conflicting affidavits raise an issue of material fact requiring a hearing. He also contends Ramirez was "crucial" to the prosecution and so there was a reasonable possibility that nondisclosure of the alleged notes would have affected the verdict. "The sole disinterested, uninvolved eyewitness to the shooting was Jose Ramirez," he says. "He was the only disinterested witness who put a gun in Samandarov's hand.... His testimony was clear, precise, and damning."

For appellant Samandarov: Ronald L. Kuby, Manhattan (212) 529-0223

For respondent: Queens Assistant District Attorney Laura T. Ross (718) 286-7033

# *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 Wednesday, October 21, 2009

**No. 166 People v Matthew Sanchez**

**No. 167 People v Larry Mynin**

These appeals focus on the definition of gang assault in the second degree, which requires that a defendant have "intent to cause physical injury to another person" and be "aided by two or more other persons actually present." The common issue is whether a defendant can be convicted of gang assault if the persons who "aided" him did not share his intent to cause physical injury. The lower courts held in both cases that the statute does not require proof of intent on the part of persons who aided the defendant.

Case No. 166 stems from a fight outside of a Manhattan pub at about 4 a.m. on January 1, 2005. Matthew Sanchez and two friends, Nenad Jurlina and Anthony Amitrano, were pursued when they left the bar by the owner, Liam McCormack, and his friend, off-duty detective Herbert Griffin. In the resulting brawl, Griffin suffered serious head injuries that were allegedly inflicted by Sanchez and Jurlina while Amitrano fought with McCormack. Sanchez and Jurlina were convicted of second-degree gang assault. Amitrano was acquitted of that charge and convicted of misdemeanor assault on McCormack, which did not require proof of intent to injure. Sanchez is serving a six-year prison term.

In Case No. 167, Larry Mynin and three associates attempted to buy \$1,600 worth of marijuana from Darnell Moore in a street transaction in upper Manhattan in August 2005. Moore handed Mynin a bag of fake marijuana and, when Moore refused Mynin's demand to return the money, Mynin and his companions began fighting with Moore and trying to push him into their car. During the struggle, a gun went off and Moore was fatally wounded. Mynin was convicted of second-degree gang assault and sentenced to ten years in prison. All three of his companions were acquitted.

In both cases, the trial court instructed the jury that a defendant could be found guilty of gang assault if he intended to injure the victim and was aided by two or more others who were actually present, regardless of whether they intended to cause physical injury.

The Appellate Division, First Department affirmed both convictions. Relying on a Second Department decision construing similar language in the second-degree robbery statute, which applies where a defendant forcibly steals property while "aided by another person actually present," the First Department said in Sanchez, "[W]e are persuaded by the decisions that have held that a person may be found to have 'aided' another person's commission of an offense even if the aiding person did not have the intent required to be found guilty of participating in that offense." Therefore, it said, the jury was correctly instructed that the acquittal of one or more co-defendants on gang assault charges would not require acquittal of the defendant.

Sanchez and Mynin cite a Third Department interpretation of the robbery statute, which said the "aggravating element of being aided by one actually present requires some evidence of a shared intent to forcibly steal." Sanchez says, "Although the case law is hardly clear or consistent, the statute, as written, permits of only one interpretation: that 'aid' is used in its classic, statutory sense, to connote an accomplice who shares the mental culpability of the principal."

No. 166 For appellant Sanchez: Nathan Z. Dershowitz, Manhattan (212) 889-4009

For respondent: Manhattan Assistant District Attorney Gina Mignola (212) 335-9000

No. 167 For appellant Mynin: Alexis Agathocleous, Manhattan (212) 402-4100

For respondent: Manhattan Assistant District Attorney Mark Dwyer (212) 335-9000

# *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 Wednesday, October 21, 2009

## **No. 168 People v Collier Gillyard**

Collier Gillyard was charged with impersonating a police officer and other crimes as a result of two incidents in Manhattan in 2005. The first occurred on November 10, after Gillyard and the complainant had sex in the video booths of an adult bookstore near the Port Authority Bus Terminal. The complainant said Gillyard pulled out a badge, said he was a police officer and took him outside, where Gillyard showed him a pair of handcuffs and threatened to arrest him if he did not pay Gillyard \$400. The complainant went with Gillyard to an ATM, withdrew \$400, and gave it to Gillyard. The second incident occurred a month later, on December 13, when Gillyard pulled up beside a taxi, displayed a badge through his side window and motioned the driver to pull over. Gillyard, wearing a badge around his neck, and an accomplice approached the driver and accused him of drunk driving. Two actual police officers came upon the scene, arrested Gillyard and his accomplice, and recovered a second badge and a pair of fake handcuffs from their vehicle. On January 23, 2006, while Gillyard was awaiting trial at Rikers Island, a guard found a universal Smith and Wesson handcuff key in his pocket during a search. Gillyard pleaded guilty to promoting prison contraband and was sentenced to 30 days.

At trial for the two criminal impersonation incidents, Supreme Court allowed the prosecutor to introduce evidence of the handcuff key that was taken from Gillyard at Rikers Island, rejecting a defense objection that this violated People v Molineux (168 NY 264), which limits the admission of evidence of uncharged crimes. Gillyard was convicted of robbery in the second degree, criminal impersonation in the first and second degrees, and grand larceny and was sentenced to nine years in prison.

The Appellate Division, First Department affirmed, ruling that the handcuff key was properly admitted. "Defendant's possession of the key demonstrated his access to and familiarity with handcuffs, which were involved in both crimes..." it said. "The lapse of time was not so great as to render this evidence excessively remote.... Even if viewed as evidence of an uncharged crime, its probative value exceeded its prejudicial effect, which was minimized by the court's limiting instructions."

Gillyard contends he is entitled to a new trial, arguing that Supreme Court "admitted uncharged misconduct evidence under a so-called 'familiarity and access' exception to the Molineux rule when, in fact, no such exception exists. Even if such an exception were to exist, the evidence in question was so different in nature and recovered at a time so long after the commission of the crimes in question that it had no relevance other than to suggest, impermissibly, a propensity to commit crimes."

For appellant Gillyard: Steven F. Molo, Manhattan (212) 848-4000

For respondent: Manhattan Assistant District Attorney Britta Gilmore (212) 335-9000

# *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 22, 2009

## **No. 169 Matter of Hargett v Town of Ticonderoga**

The Ticonderoga Town Board approved an application by the town highway superintendent in 2006 to commence an eminent domain proceeding under the Highway Law to condemn property owned by Georgia Hargett for a new road that would connect an existing town road to state-owned woodlands. After a public hearing, the highway superintendent issued a determination pursuant to EDPL article 2, explaining that improved access to the state woodlands would increase recreational opportunities and make the Town more attractive to tourists. Before any further steps were taken to transfer title to the property to the Town, Hargett challenged the determination in an EDPL 207 proceeding at the Appellate Division, Third Department. In December 2006, the Third Department ruled the highway superintendent had exceeded his authority by condemning Hargett's property for purposes unrelated to his position.

Hargett then commenced this action against the Town and the highway superintendent under EDPL 702(B), seeking reimbursement for her legal costs and disbursements in successfully contesting the condemnation. The statute states, "In the event that the procedure to acquire such property is abandoned by the condemnor, or a court of competent jurisdiction determines that the condemnor was not legally authorized to acquire the property ... the condemnor shall be obligated to reimburse the condemnee."

Supreme Court granted the Town's motion for summary judgment and dismissed the complaint. It said that, if it had jurisdiction to decide the matter, it was bound by the Second Department's ruling in Matter of 49 WB LLC v Village of Haverstraw (44 AD3d 226 [2007]), which held that reimbursement under EDPL 702(B) is only available where the condemnor acquired title or was in the process of acquiring title by way of petition and acquisition maps. The Second Department, observing that EDPL 103(A) defines "acquisition" as "the act of vesting of title" to real property through eminent domain, said, "The 'acquisition procedure' of EDPL 702(B) that permits an award of fees under circumstances of abandonment or lack of authority is therefore a reference to the 'second step' of eminent domain, when the condemnor seeks to vest title in condemned property" under EDPL article 4. Since Ticonderoga's condemnation of Hargett's property had not progressed beyond the "first step" of eminent domain under EDPL article 2, Supreme Court ruled she could not recover under EDPL 702(B).

The Third Department rejected the Second Department's "narrow reading" of the statute, reinstated Hargett's action and awarded her summary judgment on the issue of liability, saying she "is entitled to reimbursement for her reasonable costs and expenses related to all portions of the acquisition procedure." The Third Department said, "[I]n providing for costs and counsel fees after 'a court of competent jurisdiction determines that the condemnor was not legally authorized to acquire the property,' EDPL 702(B) can only be authorizing an award of such costs and fees related to a decision by the Appellate Division under EDPL 207. In fact, counsel fees related to the value of the property -- the only substantial question in the second step -- are provided for in a separate statute, EDPL 701."

For appellant Town et al: John D. Aspland, Jr., Glens Falls (518) 745-1400  
For respondent Hargett: Darrell W. Harp, Clifton Park (518) 371-4836

# *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 22, 2009

**No. 170 People v Phillip Riback**

*papers sealed*

Dr. Phillip Riback, a pediatric neurologist in the Town of Colonie, was charged with multiple counts alleging that he had sexual contact with 14 of his young male patients during medical examinations between 1997 and November 2002. The boys, ranging in age from 7 to 18 when the incidents occurred, described a variety of conduct that occurred for the most part after they had been left alone with Riback. They said he tickled, hugged or kissed them, wrestled with them, held them up by the ankles, or played a "controlled spitting game" in which a child would sit on him, let saliva droop down toward him and then suck it back up. During some of these activities, they said, Riback would touch their genitals, usually over clothing. Riback did not testify, but defense counsel maintained that his behavior was designed to create a rapport with his young patients and put them at ease. The defense emphasized the boys' lengthy delays in reporting the conduct, ranging from 8 to 37 months, and argued that their complaints of sexual contact were the product of suggestive and coercive questioning by police and parents. Over a defense objection, the trial court allowed the prosecutor to present expert testimony by a psychologist to explain the terms "pedophile," "sexual fetish," and "ephebophilia," and the prosecutor referred to Riback as a pedophile in his summation.

Riback was convicted of 12 felony charges, including one count of first-degree sodomy and nine counts of first-degree sexual abuse, and 16 misdemeanors. County Court sentenced him to 48 years in prison.

The Appellate Division, Third Department reduced the sentence to 20 years, but otherwise affirmed in a 4-1 decision, rejecting Riback's claim that the expert's testimony and the prosecutor's summation deprived him of a fair trial. The majority said "certain remarks exceeded the bounds of fair advocacy" during the prosecutor's summation, but found the remarks "were fair comment on the properly admitted expert testimony and on the defense summation. Essentially, the prosecutor was arguing that defendant's conduct, as described by the testifying patients, was consistent with the definition of the sexual disorder of pedophilia and undertaken for the purpose of sexual gratification. We do not find that these limited remarks or any other aspects of the summation sidetracked the jury from the issue of defendant's guilt or innocence, were irrelevant to the crimes charged ... or rose to the level of depriving defendant of a fair trial."

The dissenter argued the prosecution expert should not have been permitted to describe the terms "sexual fetish" and "pedophilia." He said, "This mistake by County Court then rose to the level of reversible error when the prosecutor, in the course of his passionate summation, twice referred to defendant as a pedophile and said that this was why defendant was having sex with young boys in his office and could not stop. I disagree with County Court's ruling that allowed these terms to even be explained to the jury and, when such extremely prejudicial testimony was allowed to become the opinion and central theme of the prosecutor in his summation, the prosecutor transformed [the expert's] improper explanations into his own improper expert opinion."

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

For respondent: Albany County District Attorney Brett M. Knowles (518) 487-5460

# *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 22, 2009

## **No. 171 Riverside South Planning Corporation v CRP/Extell Riverside, L.P.**

In the early 1990s, in order to gain public support for the 76-acre Riverside South development on the west side of Manhattan, Donald Trump agreed to a scaled-back plan that included environmental sustainability and design criteria for the buildings and called for parks, open space and public arts programs. In 1993, Trump entered into a four-page letter agreement with a group of civic and environmental organizations that formalized those design principles and formed the Riverside South Planning Corporation (RSPC) to oversee the planning, design and construction of Riverside South in accordance with those principles. A paragraph on the third page of the agreement provided for the dissolution of the RSPC under certain conditions, but stated that Trump's obligations regarding building design and park maintenance and restrictions on major modifications and rezoning "shall survive the dissolution of RSPC." The paragraph concluded, "The agreements contained herein shall continue for ten (10) years...." In the next paragraph, Trump agreed to require subsequent purchasers to abide by the agreements in the letter "so long as the Special Permits remain in effect."

In 1994, Trump sold Riverside South to Hudson Waterfront Associates, L.P., in which he held an interest, but not control. In 2005, CRP/Extell Riverside, L.P. and CRP/Extell Parcel 1, L.P. (collectively Extell) purchased an interest in Riverside South from Hudson Waterfront and executed an Assignment and Assumption Agreement in which it assumed "all of the duties, obligations and liabilities of Assignor" under the 1993 agreement.

RSPC brought this breach of contract action against Extell in 2007, claiming Extell was proceeding with development in violation of the 1993 agreement. Extell moved to dismiss the complaint, arguing that it was not bound by the 1993 agreement because the 10-year "sunset provision" had expired. Supreme Court denied the motion, finding that the 1993 agreement was ambiguous because "it is unclear whether the 'sunset provision' applies to the entire agreement or only to those obligations recited in the paragraph in which the provision is embedded."

The Appellate Division, First Department reversed and dismissed the complaint in a 3-2 decision. The majority said a "plain reading" of the sunset provision "makes clear that 10 years is the maximum term of the contract," regardless of where in the agreement it was placed. It said, "[N]othing about the sunset provision's express language supports the contention that the 1993 Agreement's obligations regarding the Design Guidelines and other environmental considerations would expire at the end of 10 years if Trump were the developer, but continue in perpetuity for any other subsequent developer."

The dissenters said the majority "finds no ambiguity only by overfocusing on a single sentence," the sunset provision itself. "However, once the entire contract is taken into account, the contract can be read to apply the 10-year limitation only to certain of Trump's obligations." They said the majority did not address what would happen to prior design agreements. "It would undermine design agreements RSPC made with Trump or HWA during the 10-year period for Extell to fail to abide by those decisions. This would render the 1993 Agreement a complete nullity."

For appellant RSPC: Max R. Shulman, Manhattan (212) 474-1000

For respondent Extell: Richard H. Dolan, Manhattan (212) 344-5400

# *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 22, 2009

## **No. 172 People v George Davis**

George Davis was arrested in a buy-and-bust operation in Upper Manhattan in March 2005. An undercover officer said he approached Davis outside of a known drug building and asked for two bags of crack. The officer said Davis asked for \$60 and went inside, then quickly re-emerged with the crack and handed it over. When he was arrested two blocks away, he did not have money or drugs. He was subsequently indicted on one count of criminal sale of a controlled substance in the third degree.

Davis raised an agency defense at trial, testifying that the officer had told him he was having difficulty buying drugs in the neighborhood because he was Caucasian, and that Davis agreed to facilitate the purchase. Davis said he took the officer's money, knocked on the door, gave the cash to the seller and received two bags of crack, which he gave to the officer. Davis said the officer had promised "to look out for me," but did not give him drugs or money.

After Supreme Court agreed to charge the jury on the agency defense, defense counsel asked the court to also submit criminal possession of a controlled substance in the seventh degree as a lesser included offense. Counsel said, "I would ask you to consider the fact that with agency, the defendant denies making the sale, but admits transferring drugs. He simply admits to possession, and that therefore, in my opinion, makes that particular charge lie." The court denied the request. Davis was convicted as charged and sentenced to 4½ years in prison.

The Appellate Division, First Department affirmed, ruling the trial court did not err in refusing to submit seventh-degree possession as a lesser included offense of the drug sale charge. "[A] person who knows where drugs may be purchased but has no possessory interest in them may direct a buyer to the source of the drugs and make a profit on the ensuing sale by acting as a middleman without ever coming into actual possession of the drugs," it said, and therefore "it is not impossible in all circumstances" to commit the greater offense of drug sale without at the same time committing the lesser offense of possession. It said any new exception to the definition of "lesser included offense" should be left to the Court of Appeals.

Davis argues, "When criminal sale of a controlled substance is considered in conjunction with the agency defense, simple possession is a lesser included offense. Under the Glover test, it is impossible to commit the greater offense -- the combined criminal sale/agency offense -- without also, at the same time, committing the lesser offense of simple possession."

For appellant Davis: Sara Gurwitch, Manhattan (212) 402-4100

For respondent: Manhattan Assistant District Attorney Vincent Rivelles (212) 335-9000