

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, November 18, 2014

No. 222 People v On Sight Mobile Opticians

On Sight Mobile Opticians, Inc. was charged with violating Brookhaven Town Code § 57A-11, which prohibits commercial advertising on public property, by placing five signs advertising its business along public roads in 2011. On Sight moved to dismiss the charges on constitutional grounds, arguing that section 57A-11 and the entire sign ordinance, chapter 57A of the Town Code, violated the First Amendment.

District Court denied the motion, saying, "The restrictions imposed are not predicated on the content of speech, but are based on aesthetics, business interests and traffic safety. The ordinances are narrowly tailored with respect to content and they accomplish legitimate governmental interests. Brookhaven Town Code Chapter 57A as written is clearly not invalid." On Sight then pled guilty and appealed.

Appellate Term, 9th and 10th Judicial Districts, reversed and dismissed the charges. It ruled section 57A-11 is not unconstitutionally vague, but said, "While the section of chapter 57A defendant violated, considered in isolation, represents a constitutional exercise of the Town's zoning authority, considered as a whole, chapter 57A unconstitutionally favors commercial speech over noncommercial speech.... [C]hapter 57A's language of limitation ('only the following signs' are 'permitted' or 'allowed') can only be construed as imposing broad restrictions on noncommercial speech that is not 'political.' Chapter 57A permits commercial advertising in every zoning district aside from public lands and roads, and bars noncommercial speech in most contexts in which commercial speech is allowed." It also ruled the unconstitutional provisions could not be severed. "In light of the ubiquitous use of the language of limitation ... and the relative absence of media of expression for noncommercial speech, it is impossible to sever so much of chapter 57A as permits 'commercial favoritism' while retaining the remainder. The chapter's provisions are so closely interwoven that removing them wholesale would render the regulatory scheme incoherent and would amount to a judicial rewriting of a legislative scheme, which the courts do not favor...."

Brookhaven argues that any challenge to the constitutionality of other sections of the sign code "is no defense to On Sight's violation of section 57A-11 of the Town Code," which is valid. On Sight's "sole resistance to the Town's prosecution of its admitted code violations has been its misplaced constitutional challenge to provisions of the Town Code that it was *not* charged with violating, based upon alleged impacts on noncommercial speech in which it has *no interest*," the Town says, arguing that On Sight was without capacity to challenge those sections. It also argues that any invalid Code provisions are severable. "Section 57A-11 ... is a stand-alone provision which has limited relationship to the other, purely regulatory provisions of the Town sign ordinance. Unlike the sections of chapter 57A challenged by On Sight, section 57A-11 has its own independent declaration of legislative purpose, grounded in the Town's constitutional right to manage and protect its own property.... Even were other provisions of the Code marred by some constitutional defect, there can be no question that the Town Board would wish for the prohibition against the placement of any private signs on *public property* to stand."

For appellant Brookhaven: Jonathan Sinnreich, Central Islip (631) 650-1200

For respondent On Sight Mobile Opticians: Raymond Negrón, Mount Sinai (631) 928-3244

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No. 223 Rigano v Vibar Construction, Inc. (Proceeding No. 1)

Vibar Construction Corp. v Fawn Builders, Inc. (Proceeding No. 2)

George Vignogna, the sole owner of Vibar Construction Corp., and Nicholas Rigano, the sole owner of Fawn Builders, Inc., were longtime business partners in real estate development in Westchester County. Their last joint project included development of a parcel purchased by Fawn Builders in Pound Ridge, and Vibar built an access road to that parcel and other lots. In 2010, alleging that Rigano and Fawn Builders failed to compensate it for the cost of the access road, Vibar filed a notice of mechanic's lien which stated that the owner of the property subject to the lien was Fawn Builders. It also identified itself as Vibar Construction, Inc., instead of Corp. Rigano commenced Proceeding No. 1 pursuant to Lien Law § 19(6) to summarily discharge the mechanic's lien on the ground that he, not Fawn Builders, was the actual owner of the parcel. He said Fawn Builders transferred the parcel to him in 2007 and he attached a copy of the deed. Among other defects, Rigano argued that "Vibar Construction, Inc. does not exist." Vibar then commenced Proceeding No. 2 pursuant to Lien Law § 12-a(2) to amend the notice of lien nunc pro tunc to reflect that Rigano, not Fawn Builders, owned the property subject to the lien and that lienor's name was Vibar Construction Corp., not Inc.

Supreme Court initially granted Vibar's petition in Proceeding No. 2 to amend the notice of lien to correct the names of the parcel's owner and of the lienor, finding the original notice "substantially complied with the Lien Law."

The court later granted Rigano's motion for reargument, vacated its prior order, and granted Rigano's petition in Proceeding No. 1 to summarily discharge the mechanic's lien. "While a failure to state the true owner or a misdescription of the true owner will not affect the validity of a notice of lien (see Lien Law [9][7]), it has been held, at least in the Second Department, that a misidentification of the true owner is a jurisdictional defect which cannot be cured by an amendment nunc pro tunc (Tri-State Sol-Aire Corp. v Lakeville Pace Mechanical, Inc., 221 AD2d 519...).... PM Contracting Company v 32 AA Associates, LLC, 4 AD3d 198, a First Department case..., appears to be inconsistent with the Second Department cases cited above," the court said, but observed that it was "constrained to follow the Second Department. Here, the notice totally misidentifies the owner as of the date it was filed. Whether or not Vibar knew or should have known of the misidentification is irrelevant."

The Appellate Division, Second Department affirmed, saying the lower court "properly discharged the mechanic's lien and denied [Vibar's] petition to amend the notice of lien." It said the notice "completely misidentified the true owner of the subject premises as of the date it was filed. Thus, the mechanic's lien was jurisdictionally defective and was properly discharged...."

Vibar argues it should be allowed to amend its notice because it "substantially complied" with Lien Law § 9 "when it named Fawn Builders, Inc., the original owner of the subject property, in its mechanic's lien rather than ... Rigano, the actual owner." It says the First Department's decision "represents the correct view of the intent ... of the Lien Law and of the requirement that it be liberally construed to achieve its purposes" and "also recognizes the reality that ... a lienor, often proceeding without the benefit of counsel, may not have had a full opportunity to ascertain who is the true owner of the subject property, and pressed to comply with the short statute of limitations..., files a mechanic's lien which is not a model of precision."

For appellant Vibar: Jeffrey Rizzo, Bronx (718) 618-7509

For respondent Rigano: John Brian Macreery, Katonah (914) 232-8174

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No. 224 Matter of State of New York v Michael M.

(papers sealed)

Michael M. pled guilty in 1997 to felony sexual abuse charges involving two girls under the age of 12 and was sentenced to a maximum of 11 years in prison. In 2008, after he reached the maximum term, the Attorney General's office filed a petition under Mental Hygiene Law article 10 for an order authorizing civil management. He was confined at a psychiatric facility for two years while he litigated the validity of the petition. Supreme Court ruled in his favor in 2010 and dismissed the petition, and Michael M. was released from custody without supervision. Although the Appellate Division reversed and reinstated the petition, he remained free in Buffalo without supervision for a year and a half pending his article 10 hearing. During that time, he got a job, rented an apartment, became engaged to be married, and had no contact with the criminal justice system. When the hearing was held in 2011, Supreme Court found he suffered from a mental abnormality (pedophilia) that predisposed him to commit sex offenses, but also found he was capable of living in the community under strict and intensive supervision and treatment (SIST) based on his positive conduct while free. The court issued a civil management order, set the conditions of SIST, and placed him under supervision of the Department of Corrections and Community Supervision. Within a month, he was fired when his employer learned he was a sex offender from newspaper stories about his article 10 proceedings, he was evicted when he was unable to pay his rent, he lost his fiancée and the State filed this petition -- based on alleged violations of his SIST conditions -- to revoke SIST and confine him at a secure treatment facility under Mental Hygiene Law § 10.11(d).

Supreme Court granted the petition and adjudicated Michael M. a dangerous sex offender requiring confinement, but also criticized the State's treatment of him. It said the "primary basis" for the petition was his late arrival for a counseling session on a day when his parole officer and therapists scheduled back-to-back appointments without leaving him time to get from the first appointment to the counselor's office. The second violation was based on his discharge from a jobs program for failing to complete enough employment applications, which the court attributed to an "attitudinal thing'.... It is clear that the parole officer and therapists were put off by [him]. The animus projected toward [him] throughout this proceeding literally was pooling on the courtroom floor." It said Michael M. is a pedophile who "needs treatment to continue recognizing and controlling his impulses. The Court believes Parole and Mid-Erie [Treatment Services] will never allow this to happen.... I must, accordingly, find in the absence of the positive improvements in [his] life, before SIST, that he is now a dangerous sex offender" who "is a danger to others to commit sex offenders if not confined.... This case, however, must be viewed for what it is -- an indictment of the regimen of [SIST] as contemplated by article 10."

The Appellate Division, Fourth Department affirmed, saying Michael M.'s constitutional and statutory claims were unpreserved and, in any event, there was no evidence the State "failed to fulfill its treatment responsibilities or violated [his] due process rights." It also rejected his claim that the State was required to "refute the possibility of a less restrictive placement."

Michael M. argues his confinement violates due process because "it failed to appropriately balance the severity of [his] conduct (e.g. being late) with the risk at hand.... Any technical violations of SIST conditions, without evidence of clinical significance, should never be sufficient to justify loss of liberty...." He also argues, "The least restrictive alternative doctrine should apply to sex offender civil management."

For appellant Michael M.: Margot S. Bennett, Buffalo (716) 845-3650

For respondent State: Assistant Solicitor General Frank Brady (518) 486-4502

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No. 205 People v Graham Reid

Graham Reid was stopped by police in Harlem in 2009 after officers saw him repeatedly weave across the double yellow center lines and make a turn without signaling. Officer Jacob Merino testified at the suppression hearing that he saw two plastic cups in the center console of Reid's car, his eyes appeared to be watery, his clothing was disheveled, and the car smelled of alcohol. He asked Reid if he had been drinking and Reid replied he had a beer after work about 13 hours earlier. Officer Merino had him step out of the car and asked if he had any weapons. When Reid said no, the officer patted him down, felt a hard object in his jacket pocket, and pulled out a switchblade knife. The officer acknowledged that he had not intended to arrest Reid until he found the switchblade. In a search at the precinct, officers recovered two bags of heroin. A breath test showed Reid had no alcohol in his bloodstream.

Supreme Court denied Reid's motion to suppress the evidence, ruling Officer Merino recovered the knife during a valid search incident to arrest. The court said the officer "had no reason to believe that [Reid] had a weapon. There was no bulge. He did nothing to indicate that he was armed." But it found the roadside frisk was legal because the officer had probable cause to arrest Reid for drunk driving, although no arrest had yet been made. Reid pled guilty to third-degree criminal possession of a weapon and was sentenced to two to four years in prison.

The Appellate Division, First Department affirmed, saying, "Because ... we find that at the time of the pat down the officer actually had probable cause to arrest defendant for driving while intoxicated, the search was permissible and the fruits of the resulting full search were admissible." Merino's observations -- including the smell of alcohol, watery eyes and disheveled clothing -- provided probable cause, it said. "This probable cause to arrest defendant for [DWI] existed regardless of whether, at the moment of searching defendant, Merino intended to make an arrest on those grounds.... [W]e conclude that, even if the police are incorrect in their assessment of the particular crime that gives them grounds to conduct the search, or if they incorrectly assess the level of police activity that is justified by their knowledge, where the facts create probable cause to arrest, a search must be permissible."

Reid argues that probable cause alone cannot justify a warrantless search of a person who has not been arrested, and says the lower court rulings in this case conflict with decisions of the New York Court of Appeals and U.S. Supreme Court. "For more than thirty years, this Court has consistently held that the *ability* to effect a lawful arrest (*i.e.*, probable cause) does not suffice to justify a warrantless search, and has consistently limited application of the search-incident-to-arrest doctrine to the context of actual arrests." He says, "The rule adopted by the Appellate Division ... presents a significant risk of abuse, and would infringe impermissibly on citizens' rights to be secure in their persons and free from unreasonable searches and seizures. It would allow police officers, once probable cause to arrest has arisen, a free option to undertake purely exploratory searches even for the most minor offenses."

For appellant Reid: Antonio J. Perez-Marques, Manhattan (212) 450-4000

For respondent: Manhattan Assistant District Attorney Richard Nahas (212) 335-9000