

# *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, September 6, 2012

## **No. 160 Bentoria Holdings, Inc. v Travelers Indemnity Company**

Bentoria Holdings, Inc., the owner of a building at 521 Court Street in Brooklyn, is seeking to compel its insurer, Travelers Indemnity Company, to cover property damage allegedly caused by improper excavation of soil for a construction project on an adjacent lot in 2008. Travelers disclaimed coverage based on the "earth movement" exclusion in its policy, which provided that it would not pay for loss or damage caused by earthquake, landslide, mine subsidence, or by "[e]arth sinking..., rising or shifting ... whether naturally occurring or due to manmade or other artificial causes." Bentoria brought this action against Travelers to compel it to provide coverage under the policy, along with claims against the owner and contractors involved in the construction next door.

Supreme Court denied Travelers' motion for summary judgement dismissing the complaint against it or, alternatively, to sever the insurance claims, without a written opinion.

The Appellate Division, Second Department affirmed, saying Travelers did not prove the earth movement exclusion applied to damage caused by excavation. It said, "Excavation was not expressly set forth in the exclusion, while other, less common causes of earth movement were.... Travelers failed to establish, prima facie, that the facts of this case, which allegedly involves the excavation of earth from a lot adjacent to the plaintiff's building, fall squarely within the language of the exclusion, which expressly defines earth movement as '[e]arth sinking, ... rising or shifting'.... Thus, notwithstanding the fact that the exclusion here refers to earth movement caused by 'man made' or 'artificial' causes, we conclude that Travelers failed to demonstrate, prima facie, that the express terms of the exclusion clearly and unambiguously establish that the loss at issue here was not covered by the policy."

Travelers argues, "The exclusion unambiguously bars coverage of any loss caused, in whole or in part, by the sinking, rising or shifting of earth -- regardless of what caused the earth movement (e.g., even if precipitated by manmade events). There is no reasonable reading of this provision that would render it inapplicable to earth movement due to excavation." It says the phrase extending the exclusion to "manmade or other artificial causes" was added in response to a Court ruling that a prior version of the exclusion did not apply to excavation. Travelers says, "[T]he exclusion applies to the present loss even though it does not expressly reference 'excavation.' To hold otherwise rewrites the provision's plain language and, contrary to rules of construction, adopts an interpretation that renders it meaningless."

For appellant Travelers: Stephen M. Lazare, Manhattan (212) 758-9300  
For respondent Bentoria: John V. Decolator, Garden City (516) 578-8212

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## **No. 161 People v Delroy Colville**

Delroy Colville was charged with second-degree murder for fatally stabbing Gregory Gardner in October 2004 during an altercation outside his apartment in a single room occupancy building in Brooklyn. Colville told police that Gardner struck him in the head repeatedly with a heavy glass ashtray and he picked up the knife to defend himself. After the evidence portion of the trial, Colville's attorney asked the court to submit first and second-degree manslaughter to the jury as lesser-included offenses of murder. He said he explained to Colville that this would give the jury "leeway" to reach a compromise verdict on manslaughter, which would carry much less prison time than murder. Defense counsel withdrew his request after further discussion with his client, saying Colville had decided -- against his advice -- that the manslaughter offenses should not be submitted to the jury because he believed the evidence showed he did not intend to kill Gardner. Colville was convicted of second-degree murder and sentenced to 22 years in prison.

The Appellate Division, Second Department affirmed, rejecting Colville's claim that he was deprived of effective assistance of counsel when his attorney acceded to his wish that he withdraw his request for lesser-included offenses. The court said he received effective assistance regardless of whether the decision is a fundamental one, which must be made by the defendant, or a strategic one that is left to counsel. "If fundamental, then [Colville] made the ultimate decision," it said. "If strategic, counsel's representation was not objectively unreasonable or less than meaningful merely because, after fully consulting with the defendant, he did not overrule the defendant's decision that lesser-included offenses should not be submitted to the jury.... Had there been no disagreement, counsel's decision to seek the submission of lesser-included offenses, or not, could be justified as a strategic decision of a reasonably competent attorney...." It said Colville "decided to disregard counsel's advice and pursue an all-or-nothing strategy, and counsel acceded to that decision. It is not for this court to pass upon the wisdom of the defendant's decision...."

Colville argues, "By deferring to appellant's desire to have no lesser included offenses submitted to the jury, despite defense counsel's clearly-stated professional opinion to the contrary, the court denied appellant the benefit of counsel's expert tactical judgment, and therefore his constitutional rights to counsel and due process." He says, "To find that appellant is stuck with the decision he made here out of inexperience, confusion, and apparent incomprehension of the tactical considerations involved would deny him the very protection to which he was entitled by the right to counsel and the related due process right to a fair trial." He also argues the trial court deprived him of a fair trial by refusing to instruct the jury that he had no duty to retreat from Gardner if it found Colville was in his "dwelling."

For appellant Colville: Lynn W. L. Fahey, Manhattan (212) 693-0085

For respondent: Brooklyn Assistant District Attorney Anthea H. Bruffee (718) 250-2475

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## **No. 162 Sigmund Strauss, Inc. v East 149th Corp.**

In 2006, Sigmund Strauss, Inc. negotiated agreements with Robert and Teresa Rodriguez, sole owners of Windsor Brands, Ltd. and Twinkle Import Co. to merge their businesses and operate out of premises that Windsor had been leasing in the Bronx. The agreements provided for Strauss to purchase the assets of Windsor and Twinkle, which would then be dissolved, and for the Rodriguezes to purchase a one-third interest in Strauss, among other things. Although the agreements were never signed, the parties began performing pursuant to their terms: the Rodriguezes helped Strauss move into Windsor's building, Twinkle ceased operation, and the Rodriguezes and their employees became employees of Strauss. A dispute soon arose, the deal fell apart, and in June 2006 Strauss changed the locks on the building and removed the Rodriguezes from the payroll.

Strauss filed this action against the Rodriguezes and the landlord, seeking a declaration that it was entitled to sole possession of the premises. In their answer, the Rodriguezes counterclaimed against Strauss for fraud and conversion. Supreme Court dismissed the counterclaims in August 2007, saying the Rodriguezes' allegations "make out a claim only [for] breach of contract -- that the Strauss parties merely failed to perform their end of the bargain and pay the agreed-upon price," and thus were insufficient to support claims of fraud or conversion. The Rodriguezes moved for leave to amend their answer and to assert claims for breach of contract. The court denied the motion as untimely in February 2008. After a bench trial, Supreme Court ruled Strauss was the lawful tenant of the premises. The Rodriguezes appealed, seeking to review the August 2007 and February 2008 orders that dismissed their counterclaims and denied their motion to amend and assert claims for breach of contract.

The Appellate Division, First Department affirmed, saying that although the Rodriguezes "appear not to have received appropriate compensation for their business as a result of the failed merger, we conclude that the appeal from the judgment does not bring up for review the prior orders. Pursuant to CPLR 5501(a)(1), an appeal from a final judgment brings up for review 'any non-final judgment or order which necessarily affects the final judgment.'" It found the August 2007 and February 2008 orders did not "necessarily affect" the judgment in this case because, if they were reversed, the Rodriguezes' "claims would be reinstated and they would be permitted to pursue a claim for breach of contract. However, the judgment which declared that Strauss was entitled to possession of the leased premises would still stand." The court also denied the Rodriguezes' motion for enlargement of time to perfect their direct appeal of the February 2008 order. "The critical fact is that [their] right to appeal the prior order terminated when the final judgment was entered," it said, citing Matter of Aho (39 NY2d 241).

The Rodriguezes argue the August 2007 and February 2008 orders were reviewable because they necessarily affected the final judgment. They say, "As a consequence of these two interlocutory orders, the Rodriguezes were precluded from raising these breach of contract claims at trial and attaining an adjudication on the merits which would have been memorialized in the final judgment, but for the errors." They argue the Appellate Division's ruling that their right to direct appeal of the prior orders had terminated "is intellectually inconsistent, traps litigants in an inescapable web of circular reasoning and distorts the interrelationship between CPLR 5501" and Aho, leaving them without "any appellate review" of their breach of contract claims.

For appellant Rodriguezes et al: Scott T. Horn, Manhattan (212) 425-5191  
For respondent Strauss: Barry A. Cozier, Manhattan (212) 446-5093

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## **No. 163 Town of Oyster Bay v Kirkland**

In 1993, the Town of Oyster Bay amended its Zoning Code to create a new "Golden Age District" for construction of below-market housing developments for senior citizens. Preference was given first to applicants who lived in the school district where the project was located, then to residents of the Town, to parents of school district and Town residents, and finally to Nassau County residents. In 2004, Oyster Bay created another zoning district for the development of below-market housing for first-time home buyers, called "Next Generation" housing. Preference for these homes was given to Town residents and their children.

In January 2009, the State Division of Human Rights (DHR) filed an administrative complaint against Oyster Bay and other parties, charging them with discrimination in housing on the basis of race, color and national origin. DHR alleged that, due to existing racial segregation in the Town, reserving housing for the children and parents of current residents would likely result in discrimination against potential minority purchasers. DHR alleged that, in adopting and administering housing programs with such residency preferences, the Town was aiding and abetting discrimination in violation of Executive Law § 296(6). Before DHR completed its investigation or issued any determination, the Town brought this action against DHR and its commissioner for a declaratory judgment that the agency was acting beyond its authority and for an injunction barring it from pursuing the complaint. The Town contended, among other things, that the complaint was void because it constituted reverse discrimination, that DHR lacked authority to file the complaint on its own initiative, and that the Town was not subject to the Human Rights Law provisions it was charged with violating. Supreme Court granted DHR's motion to dismiss the suit, in part for failure to exhaust administrative remedies.

The Appellate Division, Second Department affirmed. It said that, while constitutional challenges may be maintained without exhausting administrative remedies, the Town's reverse discrimination claim "does not facially challenge the constitutionality of the Human Rights Law or any specific provisions thereof, but challenges the possible application of the charged provisions to the housing programs at issue, and requires resolution of factual issues at the administrative level." It said DHR's authority to initiate complaints has "been upheld by statute and case law," and it ruled the Town's claim that it is not subject to the provisions it is charged with violating was properly dismissed for failure to exhaust administrative remedies because it "goes to the merits of any future finding that the Town's actions violated the charged provisions."

Oyster Bay argues, "[T]here are no questions of fact remaining in the instant case, as evidenced by the grant of summary judgment below; thus, the constitutional questions whether the DHR is engaged in reverse discrimination in violation of the Town's 'liberty' right to due process of law and its residents' right to 'equal protection' should be answered by this Court in the affirmative and, concomitantly, [the Court] should rule that the Town's argument constitutes an exception to the exhaustion doctrine."

For appellant Oyster Bay: Joseph D. Giaimo, Kew Gardens (718) 261-6200  
For respondent DHR: Michael K. Swirsky, Bronx (718) 741-8398

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## **No. 164 Custodi v Town of Amherst**

Robin Custodi was injured in July 2007 while rollerblading on Countryside Lane in the Town of Amherst, Erie County. She testified at her deposition that an ice cream truck was stopped on her side of the street and she rollerbladed up a driveway and onto the sidewalk. After the truck pulled away, she tried to get back to the street by going down a driveway owned by Peter and Susan Muffoletto, but fell at the bottom and broke her hip. Custodi alleges that she tripped over a two-inch lip at the end of the driveway where it met the "C curb," a shallow gutter running along the side of the street. She and her husband brought this negligence suit against the Muffolettos, claiming the driveway lip was a dangerous condition that caused her accident.

Supreme Court granted the Muffolettos' motion for summary judgment dismissing the suit based on the doctrine of primary assumption of the risk. It said Custodi "was well aware of all of the risks associated with the activity of rollerblading on streets and sidewalks.... The lip which she may have struck was clearly open and obvious and there to be seen had she looked."

The Appellate Division, Fourth Department reversed and reinstated the complaint in a 3-2 decision. The evidence "established that plaintiff was an experienced rollerblader and that she was aware that tripping and falling are risks inherent in the activity, which are increased when rollerblading on uneven surfaces such as sidewalks," it said. However, the evidence also showed "that plaintiff had not rollerbladed on Countryside Lane prior to the date of the accident, that she did not observe the height differential between defendants' driveway apron and the curb prior to falling and that, in her prior rollerblading experience, she had not encountered a height differential of similar dimension. Thus, it cannot be said that the height differential between defendants' driveway apron and the curb was a 'known, apparent or reasonably foreseeable consequence []' of rollerblading on a paved roadway, sidewalk, or driveway..., nor can it be said 'that plaintiff was aware of the [height differential] and the resultant risk' presented thereby.... To the contrary, we conclude that the height differential ... 'created a dangerous condition over and above the usual dangers that are inherent in the sport' of rollerblading...."

The dissenters said, "Here, given plaintiff's advanced skill level with respect to rollerblading and the choice of plaintiff to rollerblade on a surface that she knew to be uneven and bumpy, we conclude that she 'assumed the risks inherent in the sport of roller[blading], as well as those arising from the open and obvious condition of the [sidewalk and driveway] on which [she] was traveling'...."

For appellants Muffoletto: Joel B. Schechter, Buffalo (716) 852-3540

For respondent Custodi: Robert J. Maranto, Jr., Buffalo (716) 842-2200