

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, June 1, 2011

No. 127 Matter of World Trade Center Bombing Litigation Steering Committee v The Port Authority of New York and New Jersey

This case arises from the bombing of the World Trade Center in 1993, when terrorists drove a rental van laden with explosives into the public parking garage beneath the twin towers. They parked the van, lit a fuse and got safely away before the blast, which killed six people, injured hundreds more and caused extensive damage. After the bombing, 648 plaintiffs filed 174 negligence actions against the Port Authority of New York and New Jersey, as owner of the World Trade Center, claiming their injuries and economic losses were caused by the Port Authority's alleged breach of its proprietary duty to maintain its premises in a reasonably safe condition. Most of the actions were consolidated for discovery and a trial on liability, and a Steering Committee was formed to oversee the litigation on behalf of the plaintiffs.

Discovery revealed that concerns about the parking garage had been raised since 1984, when the Port Authority police superintendent said in a terrorism assessment that the parking areas "are accessible to the public and are highly susceptible to car bombings." In 1985, an outside consultant concluded a bombing attempt was "probable," warned that "the WTC is highly vulnerable through the parking lot," and recommended screening entering vehicles for explosives. Also in 1985, an internal report by the Authority's Office of Special Planning warned, "Parking for 2,000 vehicles in the underground areas presents an enormous opportunity ... for terrorists to park an explosive filled vehicle that could affect vulnerable areas." It recommended eliminating all public parking, or at least staffing entrances to the lots and conducting random vehicle searches. In 1986, another consultant echoed these concerns and recommendations, which were rejected by the Port Authority.

At the trial on liability, the jury found the Authority had been negligent and its negligence was a substantial factor in allowing the bombing to occur. It apportioned 68% of the fault to the Authority and 32% to the terrorists. Supreme Court denied the Authority's motion to set aside the verdict or to reduce its share of the fault.

The Appellate Division, First Department affirmed. Rejecting the Authority's claim of governmental immunity, it said "the gravamen of this action is not that defendant failed properly to allocate government services to the public at large, but that it failed in its capacity as a commercial landlord to meet its basic proprietary obligation ... to secure its premises ... against foreseeable criminal intrusion." It said the risk of a bombing was foreseeable, based on the Authority's own reports, and the jury "fairly concluded" that it failed to discharge its duty as a landlord because the rejected security improvements would not have been unduly onerous "in light of the magnitude of the harm sought to be avoided." It said the jury's apportionment of liability was "based on a fair interpretation of the evidence."

In the damages phase, respondent Antonio Ruiz won a \$595,750 judgment. Linda Nash, who won a \$5.46 million judgment for brain injuries, also opposes the Port Authority's appeal.

The Port Authority argues that, in denying it immunity, "the courts below disregarded the clear mandates of this Court shielding discretionary governmental decisions from liability and have allowed, even encouraged, the use of tort law to second-guess these considered policy choices." Contending it did not breach its proprietary duty, it says, "Earlier premises liability cases established that private landlords must take only 'minimal measures' to prevent foreseeable criminal intrusions. The Port Authority's counterterrorism measures easily surpassed that standard." Regarding its share of liability, it says, "Holding the Port Authority more than twice as culpable as the actual terrorists is *per se* unreasonable and undermines confidence in our system of justice."

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For respondents Ruiz and Steering Committee: Victor A. Kovner, Manhattan (212) 489-8231

For respondent Nash: Louis A. Mangone, Manhattan (954) 661-7082

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No. 117 McCarthy v Turner Construction, Inc.

John McCarthy, an electrician, was injured in March 2005, when he fell from a ladder while working on a construction site in Times Square. He brought a personal injury action against the building's owners, Boston Properties, Inc. and Times Square Tower Associates, LLC, and against the general contractor, John Gallin & Son, Inc. Gallin impleaded its wiring subcontractor, which impleaded its own subcontractor, Samuels Datacom, LLC. Samuels was McCarthy's employer. Gallin had been hired as construction manager by a tenant of the building, non-party Ann Taylor, Inc.

Supreme Court granted summary judgment on liability to McCarthy, finding the owners and Gallin were vicariously liable for his injuries under Labor Law § 240(1). It also found that "Gallin had no supervisory authority over Samuels's work," that "Gallin did not provide any tools or ladders to the subcontractors who worked at the site," and that it had not been negligent. The owners and Gallin ultimately settled McCarthy's claim for \$1.6 million, with the owners paying \$800,000 and Gallin paying \$800,000.

Boston Properties and Times Square Tower then moved for summary judgment on their claim for common-law indemnification against Gallin, based largely on Gallin's contract with Ann Taylor. The contract provided, "The Contractor [Gallin] shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures for coordinating all portions of the Work under the Contract...."

Supreme Court denied the motion and dismissed the owners' claim, saying they failed to establish that Gallin "had direct control over the work giving rise to the injury." It said, "A contract for construction work with a general contractor or construction manager is not, in itself, sufficient to establish that the general contractor or construction manager actually supervised or had direct control over the injured plaintiff's work, when the general contractor or construction manager has contracted the plaintiff's work to a subcontractor."

The Appellate Division, First Department affirmed, saying, "While the owners, whose liability for plaintiff's injuries was purely statutory, were entitled to contribution or indemnification from the party responsible for the injuries..., Gallin neither was negligent nor directly supervised and controlled plaintiff's work...."

Boston Properties and Times Square Tower argue they are entitled to indemnification, whether or not Gallin actually supervised McCarthy's work, due to its contractual authority to do so. They say, "[A]s between Owners and Gallin, only Gallin, by virtue of the fact that it had the authority to control the means and methods of plaintiff's work and institute safety precautions to protect workers, stood in the position to take any steps to protect plaintiff and prevent the accident." They argue, "As a matter of sound public policy, this Court should hold that common-law indemnification may be granted upon a showing that the indemnitor either was actually negligent or that it had the authority to direct, control or supervise the injury producing work."

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No. 128 NML Capital v Republic of Argentina

In 1998, the Republic of Argentina issued a series of bonds called Floating Rate Accrual Notes (FRANs), which bore interest at a floating rate. The FRANs Certificate provided that the bonds would mature on April 10, 2005, and required Argentina "to pay interest thereon ... every six months in arrears on April 10 and October 10 in each year ... at the rate set forth below, until the principal hereof is paid or made available for payment." The interest rate for each six-month period was determined by a formula designed to make the rates reflect changes in Argentina's relative creditworthiness over time. Prior to October 2001, the annual interest rates ranged from 9% to 14.4%. However, after Argentina suffered a severe economic collapse and announced in December 2001 that it would no longer make payments on its external debt, including the FRANs, the interest rates began to soar, reaching 50.526% (or an annual rate of 101.5%) for the six-month period preceding the FRANs' maturity date. This default also triggered a contractual right of investors to accelerate the FRANs and declare the principal due and payable immediately. NML Capital accelerated the maturity of \$32 million of the \$102 million in FRANs principal it held, but most investors did not.

NML Capital, Montreux Partners and five other investment companies, which purchased interests in the FRANs at a steep discount in the secondary market, brought this action in federal court in Manhattan to recover principal and interest owed on the FRANs. They claim that together they own \$289,738,000 in FRANs debt.

U.S. District Court awarded the plaintiffs summary judgment on Argentina's liability under the FRANs. The court subsequently held the plaintiffs were entitled to interest at the final contract rate, the 50.526% rate for the six-month period preceding maturity, on unpaid principal after the FRANs matured in April 2005. It further held that, except for the FRANs that were accelerated by NML Capital, the plaintiffs were entitled under CPLR § 5001(a) to statutory interest at 9% on unpaid interest after the FRANs matured.

The U.S. Court of Appeals for the Second Circuit is asking this Court to determine whether the plaintiffs are entitled to statutory interest on unpaid post-maturity or post-acceleration interest under New York law. It asks, "Is a bond provision requiring the issuer of the bond to make, on dates certain, bi-annual interest payments on principal 'until the principal hereof is paid' properly construed as an obligation to pay interest for so long as the principal is outstanding, including after the date of maturity" or "after acceleration?" If so, it asks, "does that obligation provide a valid basis for awarding statutory interest under N.Y. CPLR § 5001(a) on post-maturity or post-acceleration interest payments that came due but were never paid?"

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No. 129 People v Benito Acevedo

No. 130 People v Dionis Collado

After these defendants were adjudicated predicate felony offenders, the sentences imposed on their prior felonies were vacated due to the trial courts' failure to pronounce the required term of post-release supervision (PRS). The Manhattan District Attorney is appealing the Appellate Division, First Department's conclusion that, because the defendants were resentenced on the prior felonies after the commission of their second felonies, the prior crimes no longer qualified as predicate felony offenses.

Benito Acevedo was convicted of second-degree attempted robbery in 2001 and sentenced to four years in prison, but the sentencing court did not mention PRS. In January 2006, he was arrested in a buy-and-bust operation in Manhattan, and he was convicted of criminal sale and possession of heroin. Based on his 2001 conviction of a violent felony, he was sentenced to six years on the drug counts as a second felony drug offender. In 2008, Acevedo filed a CPL 440.20 motion for resentencing on the 2001 conviction, saying the sentence was illegal under People v Sparber (10 NY3d 457 [2008]) because the judge did not mention PRS. Supreme Court granted the motion and resentenced him to the original four-year term. He then filed a CPL 440.20 motion to vacate his adjudication as a second felony offender in the 2006 drug case and to be resentenced as a first felony offender. The court denied the motion, rejecting his claim that the 2001 conviction was not a valid predicate felony due to his resentencing.

Dionis Collado was convicted of second-degree attempted robbery in 2000 and sentenced to two years in prison, but the judge did not mention PRS. In December 2004, he was arrested for an armed robbery in Manhattan. He was convicted of two counts of second-degree robbery in 2005 and, based on his 2000 conviction, he was sentenced to eight years as a second violent felony offender. The Court of Appeals remitted the 2005 case for resentencing under Sparber, and Collado filed a CPL 440.20 motion for resentencing on his 2000 conviction. In 2009, Supreme Court resentenced him on the 2000 conviction to the original two-year prison term and the minimum term of PRS. The same court resentenced him on the 2005 conviction as a second violent felony offender to eight years in prison and five years of PRS, ruling the resentencing on the 2000 conviction did not preclude its use as a predicate felony for sentencing on the 2005 conviction.

The First Department reversed both courts in a pair of 4-1 decisions. In Acevedo, it said adjudication as a second felony offender "requires a predicate conviction of a felony, as provided in Penal Law § 70.06..., which 'uses the imposition of sentence, not the date of conviction, as the criterion of predicate status'.... Under the statute, the predicate sentence 'must have been imposed before commission of the present felony' (Penal Law § 70.06[1][b][ii])." It said the lower court's view that failure to pronounce a term of PRS is merely a procedural error "is inconsistent with the Court of Appeals' holding [in Sparber] that where a defendant's right to hear sentence pronounced against him is violated, the only available remedy is to vacate the sentence and remand the matter for resentencing.... By definition, vacating a sentence has the legal effect of annulling it, i.e., rendering it void."

The dissenter argued that failure to impose PRS at sentencing on the prior convictions is "an easily correctable error" that "did not render that sentence unlawful so as to negate its validity as a prior felony conviction as of that date." Noting that the convictions were never vacated, he said in Acevedo, "...I am at a loss to understand why the court's oversight on a ministerial detail precludes a finding that [defendant] is a predicate felon after he committed another felony."

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