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.

WEEK OF OCTOBER 21 - 23, 2014

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

State of New York Court of Appeals

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To be argued Tuesday, October 21, 2014

No. 201 Matter of Merry-Go-Round Playhouse, Inc. v Assessor of City of Auburn

Merry-Go-Round Playhouse, Inc., a not-for-profit corporation that operates a professional summer musical theater and a year-round youth theater in the Auburn area, purchased two apartment buildings in the City of Auburn in 2011 to house its professional actors and staff. The buildings are not open to the public and Merry-Go-Round receives no rental income from them; it instead provides the housing to actors and staff as part of their compensation. The organization says this is customary for seasonal theaters and, for 40 years before it purchased the buildings, it rented housing for the same purpose. It applied for property tax exemptions for both buildings. When the City denied the applications, Merry-Go-Round brought this Real Property Tax Law (RPTL) article 7 proceeding, seeking a determination that it was entitled to the exemptions under RPTL 420-a(1)(a).

Supreme Court granted summary judgment to Auburn and ruled that Merry-Go-Round did not qualify for the tax exemptions. The court said the organization's operation of the youth theater program supported the conclusion that it was "organized or conducted exclusively for one or more of the exempt purposes," the first requirement under RPTL 420-a(1)(a), but said it "failed to establish that its professional summer stock theater ... is an exempt purpose." Regarding the statute's second requirement, the court said Merry-Go-Round's use of the buildings to house actors and staff was not "necessary and reasonably incidental" to carrying out an exempt purpose because "petitioner's ability to fulfill its intended purposes would not be seriously undermined without its ownership of housing for its seasonal actors and staff."

The Appellate Division, Fourth Department reversed and granted Merry-Go-Round's motion for summary judgment seeking tax exemption for both buildings. It said, "Here, there is no dispute that petitioner ... is organized exclusively for an exempt purpose," in that it "was founded for the purpose of promoting and presenting theatrical arts, i.e., for purposes of education and the moral and mental improvement of men, women and children." The court said Merry-Go-Round also established that "the use of the properties at issue is reasonably incidental to the primary or major purpose of petitioner..., i.e., the properties are intended to house staff and actors who work in petitioner's theaters and to help cultivate petitioner's community amongst its artists."

For appellants Auburn et al: Andrew S. Fusco, Auburn (315) 255-4176
For respondent Merry-Go-Round Playhouse, Inc.: Charles H. Lynch, Jr., Auburn (315) 253-0326

State of New York Court of Appeals

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To be argued Tuesday, October 21, 2014

No. 202 Matter of Maetreum of Cybele, Magna Mater, Inc. v McCoy

Maetreum of Cybele, Magna Mater, Inc. is a not-for-profit religious corporation that owns three acres in the Town of Catskill, Greene County. The property includes a three-story twelve-bedroom house (a former inn), a caretaker's cottage, several outbuildings, and an outdoor temple. Maetreum is the corporate entity for the Cybeline Revival, a pagan faith founded in 1999 by Cathryn Platine that worships the mother goddess, Cybele. Platine and three other women purchased the property in 2002 to provide affordable housing for transsexual women. In 2004, after Platine and two other owners belonging to the religion began practicing their faith on the property, the fourth owner sold her interest to a Cybeline adherent. In 2005, the owners dedicated the property as the home of their religion and transferred the title to Maetreum. Maetreum, which received tax-exempt status from the Internal Revenue Service, applied for a property tax exemption in 2009, 2010, and 2011. Catskill officials denied the applications, and Maetreum brought these RPTL article 7 proceedings to challenge the determinations.

Supreme Court dismissed Maetreum's petitions, saying it failed to demonstrate that the principal uses of the property were in furtherance of its religious mission, as required by RPTL 420-a(1)(a). "Rather..., the court finds that the primary and predominant use of the property was to provide cooperative housing for a small group of individuals, with the religious and charitable uses of the property merely incidental to this residential use.... Here, only a de minimus portion of the Maetreum's property is dedicated to religious activities -- principally those of the property's residents -- and 'personal use' of the 12-bedroom main house predominates over any claimed religious uses." The court said it was "significant that the same small group of individuals who enjoy use and occupancy of the property are, by and large, the same small group who financially support the property and who engage in religious activities thereupon.... The apparent absence of an external congregation also supports the court's finding...."

The Appellate Division, Third Department reversed and granted the petitions, finding that Maetreum demonstrated that it uses the property primarily for its religious and charitable purposes. "The testimony established that the Cybeline Revival stresses communal living among its adherents, as well as providing hospitality and charity to those in need, and the members consider this property the home of their faith.... They also conduct religious and charitable activities throughout the property on a regular basis. Accordingly, petitioner has satisfied the legal requirements in order to receive a real property tax exemption for 2009, 2010 and 2011...."

For Town of Catskill appellants: Daniel G. Vincelette, Albany (518) 608-6569
For respondent Maetrum of Cybele: Deborah Schneer, Kingston (845) 658-7578

State of New York Court of Appeals

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To be argued Tuesday, October 21, 2014

No. 197 Kimso Apartments, LLC v Gandhi

In the 1990s, Mahesh Gandhi and two partners, Arlington Filler and Darshan Shah, formed Kimso Apartments and other corporations to purchase apartment buildings on Staten Island. In 1997, the corporations made shareholder loans of $2.97 million to each of the partners which were to be paid back over 30 years. The partnership broke up acrimoniously in 2001, Filler and Shah removed Gandhi as daily manager of the corporations, and the former partners filed several lawsuits against each other. Gandhi stopped making payments on his loan in August 2001. In 2002, the estranged partners entered into a settlement of all their litigation. Under its terms, Gandhi sold his interest in the corporations to Filler and Shah for $1.648 million, to be paid in 120 monthly installments of $20,000. The settlement contained a broad release provision through which the parties discharged each other from any and all claims.

In 2003, Kimso and other corporations filed this action seeking a declaration that the amount Gandhi allegedly owed on his shareholder loan could be offset against the amount owed to him under the settlement for his interest in the corporations. In September 2004, the corporations ceased making monthly payments to Gandhi under the settlement agreement. In 2005, Gandhi filed an amended answer asserting 18 counterclaims, but he did not assert a claim for back payments under the settlement. At trial in November 2010, a plaintiff's attorney questioned Gandhi about his negotiations with Filler and Shah over the buy-out provision in the settlement and submitted the agreement into evidence, and Gandhi later testified about the payments he was promised under the settlement. At the end of the trial, Gandhi moved to conform his pleadings to the proof to assert a counterclaim for payments due for his buy-out under the settlement.

Supreme Court held the broad release in the settlement agreement extinguished Gandhi's obligation to repay his shareholder loan; and it granted his request to conform the pleadings to the proof, saying his claim for payments owed him under the settlement "has been an intrinsic counterclaim since the onset of this litigation." It said, "Plaintiffs claim that they were entitled to withhold payments under the Settlement Agreement because they were entitled to payment under the Notes [for the shareholder loan].... The inverse of that argument would then state that if this court does not find the Corporations are entitled to repayment under the Notes, the Settlement Agreement payments must be due. Based upon this logic, the issue of the past due Settlement Agreement payments was present in the litigation from the very start ... and thus amendment of the answer is not prejudicial." It awarded Gandhi $2,186,787, including interest.

The Appellate Division, Second Department modified by denying Gandhi's motion to conform his pleadings to the proof to assert the counterclaim for payments due under the settlement, saying the trial court "improvidently exercised its discretion." It said, "[I]n view of [Gandhi's] extensive delay in moving to assert his counterclaim, his lack of a reasonable excuse for the delay..., and the fact that he was fully aware of the facts underlying the amendment sought during the entire time this action was pending, the trial court should have denied his application as barred by the doctrine of laches.... The belated amendment of [Gandhi's] answer prejudiced the plaintiff corporations, since they had no opportunity to present defenses to the counterclaim."

For appellant Gandhi: Eli Feit, Manhattan (212) 685-7600
For respondents Filler and Shah: Robert A. Spolzino, White Plains (914) 323-7000

State of New York Court of Appeals

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To be argued Tuesday, October 21, 2014

No. 198 People v Costandino Argyris
No. 199 People v John A. DiSalvo
No. 210 People v Eric R. Johnson

The primary issue in these appeals is whether information given to police by anonymous callers was sufficiently reliable to provide the reasonable suspicion necessary to justify stopping a vehicle.

Costandino Argyris and John DiSalvo were arrested in Queens in 2007, after an anonymous caller told a 911 operator that he had just seen four "big bully white guys" get into a new black Mustang at a particular intersection in Astoria. The caller said one of the men put a "big gun" in the back of the car, provided the license plate number, and said a gray van was traveling with the Mustang. An officer stopped the Mustang a short time later and, after additional officers arrived, arrested the men at gunpoint. DiSalvo had a revolver in his waist band. Argyris was wearing a bulletproof vest and had a blackjack and switchblade in his pockets. Officers found a .38 caliber handgun under the driver's seat and a box of 9-millimeter ammunition on the back seat. After Supreme Court denied their motions to suppress, the defendants pled guilty to multiple weapon possession charges. DiSalvo was sentenced to 6 years in prison and Argyris to 3½ years.

The Appellate Division, Second Department affirmed, saying in Argyris that the police had reasonable suspicion to stop the Mustang "based on the description of the vehicle and its license plate number..., and the observation of the Mustang in close geographical and temporal proximity to the scene where the defendant was first observed.... [T]he report of the 911 caller, which was based on the contemporaneous observation of conduct that was not concealed, was sufficiently corroborated to provide reasonable suspicion for the stop...."

Eric Johnson was arrested for driving while intoxicated in Ontario County in 2011, after a 911 dispatcher relayed a report from an anonymous caller about a "sick or intoxicated" driver to a Yates County sheriff's deputy. The caller provided a description of the driver's blue BMW, its location and its plate number. The deputy crossed into Ontario County before spotting the BMW, followed it until Johnson made a "hasty" turn, then stopped him to determine if he was intoxicated. An Ontario County deputy made the arrest. Johnson pled guilty to a misdemeanor DWI charge after Naples Town Court denied his motion to suppress.

Ontario County Court affirmed, saying, "The 911 call, together with the traffic infraction provided [the Yates County deputy] with more than a hunch ... and therefore, the deputy possessed the requisite reasonable suspicion to stop the vehicle."

The defendants argue these anonymous tips could not provide reasonable suspicion because the police did not have enough information to judge the reliability of the 911 callers or the basis of the callers' knowledge. Johnson says the identity of the tipster was unknown and the deputy offered no testimony "that the caller personally observed the purported operation of the motor vehicle or that the information was reasonably current." Argyris and DiSalvo argue it was unreasonable for police to rely on the anonymous tip "in the absence of a scintilla of 'predictive' information," and they say "nothing in the information provided by the informant offered the slightest assurance that he was not making this up."

198 & 199: For appellants Argyris & DiSalvo: Steven R. Kartagener, Manhattan (212) 732-9600
For respondent Queens District Attorney: Donna Aldea (718) 286-6100
210: For appellant Johnson: Edward L. Fiandach, Rochester (585) 244-8910
For respondent: Ontario County Assistant District Attorney Jeffrey L. Taylor (585) 396-4010

State of New York Court of Appeals

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To be argued Wednesday, October 22, 2014

No. 200 Branic International Realty Corp. v Pitt

Branic International Realty Corp., the owner of a single room occupancy (SRO) rent-stabilized hotel on the Upper West Side of Manhattan, entered into an agreement with the New York City Human Resources Administration (HRA) in 2003. HRA agreed to rent as many as 134 rooms in the hotel as emergency housing for its homeless clients and to pay a nightly rate of $65 per room. HRA placed Phillip Pitt at the hotel in January 2003 and paid the rent for him directly to Branic until April 2007, when it notified Branic that it was cancelling his placement. HRA temporarily ceased paying for Pitt's room that month, but he continued to live there without paying rent. In June 2007, Branic commenced this licensee holdover proceeding to evict Pitt. Pitt moved to dismiss the proceeding on the ground he was a "permanent tenant" entitled to continued occupancy under the Rent Stabilization Code (RSC).

Civil Court granted Pitt's motion for summary judgment and dismissed the proceeding, finding Pitt was protected from eviction as a "permanent tenant" of the hotel under RSC § 2520.6(j). It rejected Branic's argument that Pitt was not tenant under the RSC because it had no landlord-tenant relationship with him, since Pitt had no obligation to pay rent. "In defining who is a permanent hotel tenant, the Code does not refer to who must pay rent," the court said. "The Code considers tenants permanent if they reside continuously in a hotel as a primary residence for six months."

Appellate Term, First Department reversed and awarded possession of the room to Branic. Since HRA placed Pitt at the hotel and paid the rent, he had "no express or implied landlord-tenant relationship" with Branic, it said. "Therefore, [Pitt] was merely a licensee of HRA..., not a 'permanent tenant' entitled to the protections afforded by [section 2520.6(j)]. Since [Pitt's] license was revoked and he has no right to continued possession..., [Branic's] cross motion for summary judgment on its claim for possession should have been granted."

The Appellate Division, First Department reversed and dismissed the proceeding. "A plain reading of RSC § 2520.6(j) reveals that the only requirement to be a 'permanent tenant' is six months or more of continuous residence in a particular hotel building." While Pitt would not qualify as a "tenant" under RSC § 2520.6(d) because he lacked a landlord-tenant relationship, it said, "RSC §2520.6(j) states that 'reference in this code to "tenant" shall include permanent tenant with respect to hotels.' This language indicates that ... a hotel's permanent tenant is nonetheless afforded the rent stabilization protections under the RSC." Although "housing accommodations ... leased by ... any municipality" are exempt from the RSC under section 2520.11(b), the court said Branic's agreement with HRA "cannot be construed as a lease" due to "the absence of essential terms such as the precise number of rooms to be occupied and paid for by HRA." Pitt voluntarily vacated the room in July 2012, but the court said this case "affects a large number of New Yorkers who declare permanent tenancy in a SRO" and, thus, "presents an exception to the mootness doctrine."

For appellant Branic: Ronald J. Rosenberg, Garden City (516) 747-7400
For respondent Pitt: Martha A. Weithman, Manhattan (212) 799-9638

State of New York Court of Appeals

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To be argued Wednesday, October 22, 2014

No. 195 Motelson v Ford Motor Company

In July 2000, Steven Motelson was driving home to Staten Island in a 1998 Ford Explorer with four passengers when he lost control of the vehicle in Goshen, Orange County. His adult son Gary Motelson was in the front seat, and Gary's sons Brian and Evan Motelson sat in the rear with a family friend. The SUV accelerated, swerved, and rolled over nearly four times, coming to rest on its side with its roof partially collapsed. Steven died at the scene and Brian died the next day. The other passengers survived. Gary brought this action against Ford Motor Company, which manufactured the vehicle, and Ford Motor Credit Company, which leased it to Steven, alleging that Ford had been negligent in designing the roof support system. Among other claims, the suit sought damages for Gary and Evan for severe emotional distress, on the theory that they were in the "zone of danger" when they witnessed the fatal injuries of Steven and Brian.

At trial, Gary and Evan presented testimony of their treating psychiatrists that they suffered extreme emotional distress due to the accident -- resulting in posttraumatic stress disorder, depression, and other mental conditions -- and testimony of an economist about the cost of their future psychiatric treatment. Ford did not cross-examine the witnesses or offer rebuttal testimony. The jury found Ford was negligent in designing the roof and the defect was a substantial factor in causing Steven's death, but it awarded no damages to Gary or Evan.

Supreme Court, among other things, granted the motion of Gary and Evan to set aside the verdict to the extent of ordering a new trial on "zone of danger" damages unless Ford agreed to awards of $3.2 million to Gary and $5.5 million to Evan. It said the plaintiffs "not only witnessed their father and grandfather's head crushed under the roof, but also feared that their own lives were in peril as they were under the same roof which the jury found was defective and negligently designed. They were injured physically and emotionally from the same position of peril.... Gary and Evan Motelson were within the 'zone of danger' and can recover for the emotional distress resulting from it.... The defendants chose not to question the psychiatrists appearing for either [plaintiff], nor did the defendants present any contrary evidence."

The Appellate Division, Second Department modified by reversing the order for a new trial on zone of danger damages and dismissing the suit. "The issue of whether Gary Motelson and Evan Motelson suffered emotional distress because they were placed in Steven Motelson's zone of danger ... was not submitted to the jury," it said. "The jury was instructed that, if it found that the plaintiffs were entitled to recover from the defendants, it 'must also include in [the] verdict damages for any mental suffering; emotional, psychological injuries. These are subsumed ... into the pain and suffering questions' (see 1B NY PJI3d 2:284). However, no separate causes of action sounding in infliction of emotional distress or zone-of-danger damages resulting from Steven Motelson's injuries and death were submitted to the jury. The verdict sheet asked whether the negligent design of the roof was 'a substantial factor in causing Steven Motelson's injuries and death,' and not whether that defect caused injuries to any other plaintiff."

For the Motelson appellants: Brian J. Isaac, Manhattan (212) 233-8100
For respondent Ford Motor : Wendy Lumish, Miami, FL (305) 530-0050
For respondent Ford Motor Credit: Joanna M. Topping, White Plains (914) 323-7000

State of New York Court of Appeals

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To be argued Wednesday, October 22, 2014

No. 196 Sue/Perior Concrete & Paving, Inc. v Lewiston Golf Course Corporation

Lewiston Golf Course Corporation (LGCC) was formed under the laws of the Seneca Nation of Indians in 2007 to develop and operate a golf course on a 250-acre parcel in the Town of Lewiston as an amenity to the Seneca Casino and Hotel in Niagara Falls. LGCC is a subsidiary of Seneca Niagara Falls Gaming Corporation (SNFGC), which is a subsidiary of Seneca Gaming Corporation (SGC), which is owned by the Seneca Nation. SNFGC conveyed the parcel to LGCC and, in August 2007, LGCC contracted with Sue/Perior Concrete & Paving, Inc. to build an 18-hole golf course and related facilities for $12.7 million. LGCC received more than $1 million in tax breaks for the project through the Niagara County Industrial Development Agency (NCIDA). The project was completed in December 2009, a year later than planned, and Sue/Perior claimed it was owed an additional $4.1 million for extra work and delay-related damages. When LGCC refused to pay, Sue/Perior filed a mechanic's lien against the property and brought this action for foreclosure of the lien and for breach of contract, among other things. LGCC moved to dismiss on sovereign immunity grounds.

Supreme Court denied the motion, ruling LGCC was not entitled to sovereign immunity as an "arm" of the Seneca Nation under the factors identified in Matter of Ransom v St. Regis Mohawk Educ. & Community Fund (86 NY2d 553). "Though LGCC did satisfy some of the basic factors..., LGCC was not specifically established to enhance the health, education and welfare of the Nation, which function is generally reserved for a governmental agency." It was created "to construct and operate a championship level golf course to promote tourism in the Niagara region," the court said.

The Appellate Division, Fourth Department upheld the ruling. While courts have held SGC and SNFGC have sovereign immunity as arms of the Seneca Nation, it said the "more important" Ransom factors support the denial of immunity to LGCC. The Seneca Council's "own statements reflect that the purpose of LGCC -- to develop a golf course as an 'amenity' to the Nation's gaming operations -- is several steps removed from the purposes of tribal government, e.g., 'promoting tribal welfare, alleviating unemployment, [and] providing money for tribal programs'.... The documents LGCC submitted to NCIDA further indicate that the central purpose of the golf course project was not to provide funds for traditional governmental programs," but instead "to serve as a regional economic engine." Among other factors weighing against immunity, it said, "(1) LGCC generates its own revenue; (2) there is no evidence in the record ... that a suit against LGCC would impact the Nation's fiscal resources; and (3) LGCC does not have binding authority over the Nation's funds." Unlike SGC and SNFGC, "LGCC was intended to function as a regular business entity, with profits, losses, and legal and tax obligations applicable to any other business operated outside the confines of an Indian reservation by a non-native entity."

LGCC argues that it "is virtually identical in purpose and structure" to SGC and SNFGC, which "have consistently been held by other courts ... to possess sovereign immunity.... When creating LGCC, the Tribal Council emphasized the governmental purposes to be served, stating in LGCC's Charter that 'the economic success of the Nation's gaming operations is vitally important to the economy of the Nation and the general welfare of its members,' and that 'the Nation has found it to be in the best interests of the Nation and its gaming operations to develop and operate a golf course [in] Lewiston'.... LGCC's Charter provides that it is a 'governmental instrumentality' and 'subordinate arm' of the Seneca Nation 'entitled to all of the privileges and immunities of the Nation,' and expressly states that LGCC is entitled 'to enjoy the sovereign immunity of the Nation, to the same extent as the Nation.'"

For appellant Lewiston Golf Course: Edmund C. Goodman, Portland, Oregon (503) 242-1745
For respondent Sue/Perior Concrete & Paving: Gregory P. Photiadis, Buffalo (716) 855-1111

State of New York Court of Appeals

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To be argued Wednesday, October 22, 2014

No. 203 Strauss Painting, Inc. v Mt. Hawley Insurance Company

Manual Mayo was injured on September 16, 2008 while working on a renovation project for the Metropolitan Opera Association (the Met) at Lincoln Center. Mayo brought a personal injury action against the Met two months later and, on December 5, 2008, the Met notified its contractor, Strauss Painting, Inc., of the lawsuit and demanded a defense and indemnification. On December 29, 2008, the Met's insurer sent a letter to Strauss demanding a defense and indemnification for the Met. On January 13, 2009, Strauss's insurance broker sent a notice of occurrence to Strauss's commercial general liability insurer, Mt. Hawley Insurance Company. On February 3 and March 4, 2009, Mt. Hawley wrote to the Met's insurer seeking information to determine whether the Met was an additional insured under the Mt. Hawley policy and when the Met first had notice of Mayo's injury. After the Met filed a third-party complaint against Strauss in the Mayo action seeking a defense and indemnification, Strauss brought this action against Mt. Hawley and the Met on March 12, 2009, seeking a declaration that Mt. Hawley was required to defend and indemnify Strauss in the Mayo action. On June 16, 2010, the Met filed cross claims against Mt. Hawley in this action, seeking a declaration that it was an additional insured under Mt. Hawley's policy and was entitled to a defense and indemnification in the Mayo action.

Supreme Court granted the Met's summary judgment motion and ruled Mt. Hawley must defend and indemnify the Met in the Mayo action. Even if Strauss's renovation contract did not expressly require it to name the Met as an additional insured, the court said, "it is indisputable that the Mt. Hawley policy ... does contain an 'additional insured endorsement' that, in turn, names the Met as an additional insured against 'liability for "bodily injury" ... caused, in whole or in part, by ... the acts or omissions of those acting on your behalf....'" It found "the Met's three/four-month delay in notifying Mt. Hawley [of Mayo's suit] was unreasonable," but said Mt. Hawley failed to provide the Met with a notice of disclaimer. "The ... February 3 and March 4 [letters] ... are insufficient in that they did not definitively disclaim coverage, but rather reserved Mt. Hawley's right to disclaim coverage." The court granted Mt. Hawley's motion to dismiss Strauss's complaint, saying "a notice of disclaimer was issued by Mt. Hawley as to Strauss, denying coverage, due to untimely notice of the Mayo occurrence."

The Appellate Division, First Department modified by, among other things, deleting a portion of Supreme Court's amended order that conditioned Mt. Hawley's duty to indemnify the Met upon a finding of negligence by Strauss. "The additional insured endorsement speaks in terms of 'acts or omissions,' not negligence." The Appellate Division said Mt. Hawley was obligated to provide coverage to the Met based on the language of Strauss's contract with the Met and of Mt. Hawley's liability policy. It said Strauss was not entitled to coverage in the Mayo action because its "notice of the accident to Mt. Hawley was untimely as a matter of law, and Mt. Hawley timely disclaimed coverage on that ground."

For appellant-respondent Strauss Painting: Richard Janowitz, Mineola (646) 522-4141
For respondent-appellant Mt. Hawley Insurance: Clifton S. Elgarten, Manhattan (212) 223-4000
For respondent Metropolitan Opera Assoc.: William J. Mitchell, Albertson (516) 294-5433

State of New York Court of Appeals

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To be argued Wednesday, October 22, 2014

No. 216 Sierra v 4401 Sunset Park, LLC

4401 Sunset Park, LLC, the owner of a Brooklyn apartment building, and Sierra Realty Corp., its managing agent, entered into an agreement with LM Interiors Contracting, LLC in 2008 to perform renovations in the building. The contract required LM Interiors to maintain commercial general liability (CGL) insurance and to name 4401 Sunset and Sierra Realty as additional insureds on the policy, which LM Interiors obtained from Scottsdale Insurance Company. On August 18, 2008, an employee of LM Interiors, Juan Sierra, was seriously injured at the work site while using a table saw. LM Interiors immediately notified 4401 Sunset of the accident, but did not notify Scottsdale. In November 2008, the injured worker brought a personal injury action against 4401 Sunset and Sierra Realty, and LM Interiors contacted the broker for its Scottsdale policy and filled out a claim form. On January 6, 2009, the primary insurer of 4401 Sunset and Sierra Realty, Greater New York Insurance Company (GNY), wrote to Scottsdale, tendering a claim for defense and indemnification of 4401 Sunset and Sierra Realty in the personal injury action. On February 2, 2009, Scottsdale responded with a letter to GNY disclaiming coverage on the ground it had received late notice of the accident. Scottsdale did not send the letter to 4401 Sunset or Sierra Realty, who brought a third-party action against Scottsdale for a declaration that it was required to provide coverage for them.

In Supreme Court, 4401 Sunset and Sierra Realty moved for summary judgment, arguing that Scottsdale did not properly disclaim coverage because it sent the disclaimer only to GNY, not to them. The court granted the motion and declared that Scottsdale was obligated to defend and indemnify them.

The Appellate Division, Second Department affirmed. It said, "Where a primary insurer, in this case GNY, tenders a claim for a defense and indemnification to an insurer, in this case Scottsdale, which issued a certificate of insurance to the parties, indicating that they are additional insureds, that insurer must comply with the disclaimer requirements of Insurance Law § 3420(d)(2) by providing written notice of disclaimer of coverage to the additional insureds.... The failure of Scottsdale to provide written notice of disclaimer to 4401 and Sierra Realty rendered the disclaimer of coverage ineffective against them.... Under the circumstances of this case, GNY was not the real party in interest, such that the notice of disclaimer to GNY would be rendered effective as against 4401 and Sierra Realty."

Scottsdale argues that it "complied with [section] 3420(d) when it responded to GNY directly in a timely manner, without copying 4401 or Sierra Realty. Indeed, by virtue of the insurance contract between them, GNY became 4401 and Sierra Realty's agent as to all matters related to Mr. Sierra's claim.... Inasmuch as notice to an agent constitutes notice to a principal, Scottsdale's disclaimer complies" with the statute. It also says its disclaimer was valid because GNY, "which is contractually obligated to indemnify 4401 and Sierra Realty, is the real party in interest" since "it bears the overwhelming majority, if not all, the financial exposure for 4401 and Sierra Realty's liability."

For appellant Scottsdale Insurance: Matthew Lerner, Albany (518) 463-5400
For respondents 4401 Sunset Park & Sierra Realty: Corey Reichardt, Manhattan (212) 374-9101

State of New York Court of Appeals

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To be argued Thursday, October 23, 2014

No. 204 People v Kelvin Spears *(papers sealed)*

Kelvin Spears was charged with first-degree sexual abuse, a class D felony, for allegedly subjecting a girl under the age of eleven to sexual contact at his home in Rochester in December 2008. At his arraignment on February 6, 2009, bail was set at $10,000 and he remained in jail for more than three months. On May 19, 2009, when the prosecutor failed to appear for a suppression hearing, Supreme Court adjourned it and the hearing was never held. At his third appearance, on May 22, the prosecutor offered a plea bargain in which Spears would plead guilty to a misdemeanor charge of second-degree sexual abuse in return for his immediate release and a sentence of six years of probation. Spears accepted the offer after discussing it with his attorney and his girlfriend. In the plea colloquy, he admitted that he touched the girl's vagina through her clothing, but did not say whether it was accidental or for the purpose of sexual gratification.

At his sentencing on July 31, 2009, defense counsel sought an adjournment to discuss a potential motion to vacate the plea. The court denied the motion, then asked if there was any reason sentence should not be imposed. Spears replied, "Um -- yes. I want an adjournment so I can look at my legal options. This is a very big decision at this point in time. I was unable to contact [defense counsel] here to address some of these things." The court said, "Based on what you've said and the statement that you made when you pled guilty, your request is denied." When defense counsel again sought an adjournment, the court said counsel and Spears "had an opportunity to tell me the basis for the request. Nothing has been said except that it was a big decision. Not enough." The court imposed the promised sentence.

The Appellate Division, Fourth Department affirmed. It said Supreme Court's "single reference to the right to appeal is insufficient to establish that the court engaged the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice...," but it found "the court did not abuse its discretion in denying his request for an adjournment at sentencing.... Additionally, defendant failed to preserve for our review his contention that the plea colloquy was factually insufficient inasmuch as he failed to move to withdraw his plea of guilty or to vacate the judgment of conviction on that ground...."

Spears argues, "[T]he basic fundamental right to the assistance of counsel was at stake and a brief adjournment -- even one or two days -- would have served to protect that right and allow Mr. Spears to proceed with a motion to withdraw his guilty plea with the guidance and assistance of counsel. Because there was no overriding competing interest at stake, nor prejudice to the People, the court's refusal to grant the adjournment was an abuse of discretion as a matter of law (see People v Spears, 64 NY2d 698)."

For appellant Spears: Janet C. Somes, Rochester (585) 753-4329
For respondent: Monroe County Assistant District Attorney Erin Tubbs (585) 753-4535

State of New York Court of Appeals

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To be argued Thursday, October 23, 2014

No. 206 People v Terrell Allen (*papers sealed)*

Terrell Allen, convicted of murder and attempted murder, argues the attempted murder charge was duplicitous because it encompassed two separate offenses, or the murder and attempted murder counts were multiplicitous because they were based on a single continuing course of conduct.

Allen and an accomplice were charged with fatally shooting Kevin Macklin in front of his Queens home in June 2008. Witnesses testified that Allen fired a shot at Macklin, but missed, then fired again and struck him in the head. The prosecution also presented evidence that Allen, during an encounter on the street ten minutes earlier, tried to shoot Macklin from behind, but the gun jammed and did not fire. The first count of the indictment charged both defendants with second-degree murder, alleging they "caused the death of Kevin Macklin, by luring him off the front steps of his home and shooting him." The second count charged Allen alone with second-degree attempted murder, alleging he "attempted to cause the death of Kevin Macklin by discharging a loaded firearm at and in his direction" on the same date, but it did not specify the time or place where the incident occurred.

Before trial, Allen moved to dismiss the murder and attempted murder counts as multiplicitous, arguing that both were based on the two shots fired at Macklin's home and, therefore, the counts "encompass either the same conduct or a single continuing offense." Supreme Court denied the motion. Allen was convicted of all counts and was sentenced to consecutive terms of 25 years to life for murder and 25 years for attempted murder.

The Appellate Division, Second Department modified by directing that the sentences run concurrently, and otherwise affirmed. "'An indictment is duplicitous when a single count charges more than one offense'.... In contrast, an indictment is multiplicitous 'when a single offense is charged in more than one count'...," the court said. "Here, the murder and attempted murder counts of the indictment were not multiplicitous.... Furthermore, the defendant's contention that the evidence at trial impermissibly resulted in his conviction on duplicitous counts is unpreserved for appellate review...." It said the trial court erred in denying Allen's motion to suppress a lineup identification, but found the error harmless.

Allen argues the attempted murder count was duplicitous because neither the prosecutor nor the trial court made clear whether it was based on the first encounter with Macklin, when the gun failed to discharge, or on the second encounter at Macklin's house, when the gunman fired and missed, then fired the fatal shot. "Because some jurors may have convicted based upon the first encounter and some the second, the verdict is duplicitous...." He says, "Where duplicity of a count is not apparent on the face of the indictment, but only develops at trial, the error implicates the mode of proceedings and does not need to be preserved for appellate review. In such a situation, the defendant is not given any pre-trial notice of a second theory, and hence cannot adequately prepare his defense."

For appellant Allen: Angie Louie, Manhattan (212) 577-3415
For respondent: Queens Assistant District Attorney Nancy Fitzpatrick Talcott (718) 286-6696

State of New York Court of Appeals

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To be argued Thursday, October 23, 2014

No. 207 D.T. v Rich (*papers sealed)*

The Ulster County Department of Social Services placed D.T., a neglected 13-year-old girl, at a residential facility operated by Saint Cabrini Home, Inc., in the Town of Esopus. In January 2007, D.T. left her cottage at the facility without permission at about 10 p.m. and walked to nearby Route 9W. A staff member saw her leave and tried to follow her while notifying others. Several staff members and the on-duty administrator found D.T. on the shoulder of Route 9W, but she refused their requests to return with them and moved away when they approached her. After staff members tried and failed to block her path, they watched as D.T. crossed the road twice and then walked to the middle of the road, where she stayed for one to five minutes before she was struck by a vehicle driven by Irwin Rich.

D.T. brought this personal injury action against Saint Cabrini as well as the driver, alleging the facility failed to provide proper supervision. Supreme Court granted Saint Cabrini's motion for summary judgment dismissing the complaint against it.

The Appellate Division, Third Department affirmed on a 3-2 vote. "In a group home such as defendant's where the institution is essentially stepping into the shoes of the missing parent, the institution has a duty to provide the degree of care and supervision that a reasonable parent would provide...," the court said. "Plaintiff had previously made unauthorized exits, but she had willingly returned without incident or injury.... Defendant presented proof that its staff followed established protocols by monitoring plaintiff's movements and calmly talking to her so as to minimize the possibility of the situation escalating.... In her brief, plaintiff speculates that defendant's employees should have physically removed her from the road but, shortly thereafter, indicates that the employees should have stayed farther away from her. However, our review of the record reveals no proof that defendant's protocols were deficient or that defendant acted improperly."

The dissenters argued that D.T. was entitled to a trial. "The question of reasonableness is almost always one for the jury..., and we find no basis to depart from that general rule here.... [W]e are of the opinion that there is a factual issue as to whether the actions of defendant's employees were reasonable and whether a parent of ordinary prudence in similar circumstances would have employed more aggressive or different means to protect plaintiff. It is simply not enough for defendant to demonstrate that its staff followed established protocols in the absence of any evidence that such protocols were reasonable and appropriate under the circumstances. For example, defendant has offered no evidence to show how its protocols were developed or the basis for adopting them. In the absence of any independent criterion against which to assess the reasonableness of defendant's protocols, we disagree with the majority's conclusion that the burden ever shifted to plaintiff to prove otherwise."

For appellant D.T.: Derek J. Spada, Kingston (845) 338-8884
For respondent Saint Cabrini Home: Barbara D. Goldberg, Manhattan (212) 697-3122

State of New York Court of Appeals

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To be argued Thursday, October 23, 2014

No. 208 People v Julian Silva
No. 209 People v Pamela Hanson

These defendants -- in otherwise unrelated cases -- argue they were deprived of a fair trial by Supreme Court's failure to disclose and respond to jury notes requesting read-backs during deliberations. In both cases, the notes were marked as court exhibits about an hour before the jury announced it had reached a verdict, but the notes are not mentioned in the trial transcripts.

Julian Silva was charged with selling a kilogram of cocaine to a drug ring operating at the Dyckman Houses in Manhattan in 2008. At trial, the jury sent a note, marked "Court Exhibit No. 2" at 10:30 a.m., which said, "We the jury request the wire transcript mentioning the gun. And judge['s] instructions on count #3 -- weapon possession." The jury's next note, at 11:40 a.m., said, "We have reached a verdict on all counts." This was the only note mentioned on the record, when the trial court read it aloud. Silva was convicted of first-degree criminal sale of a controlled substance and lesser charges and was sentenced to 24 years in prison.

Pamela Hanson was charged with fatally stabbing David Diaz in a Brooklyn hotel room in 2007 and stealing his wallet. The jury sent a note, marked Court Exhibit No. 3 at 1:04 p.m., which said, "Crime Scene Pictures and Lineup." Another note, marked Court Exhibit No. 4 at 1:05 p.m., said, "First Det. Statement." A third note, marked Court Exhibit No. 5 at 1:21 p.m., said, "To clear up the first note, we would like to hear Det. Moss direct examination." At 2:12 p.m., a final note informed the court, "We reached a verdict." The judge announced that the jury had reached a verdict, but made no mention of the prior notes on the record. Hanson was convicted of second-degree murder and larceny and was sentenced to 23 years to life.

The Appellate Division affirmed, the First Department in Silva and the Second Department in Hanson, rejecting defense claims that the trial courts violated People v O'Rama (78 NY2d 270 [1991] and CPL 310.30 by failing to read the notes into the record, discuss their contents with counsel, or respond to the jurors' requests. Both panels said the claim was not reviewable because there was no evidence the trial judges actually received the notes. The First Department said, "The record is insufficient to establish any basis for reversal regarding a jury note that was marked as an exhibit, because the note did not result in a response by the court or any other mention in the transcript. Indeed, on this record, it is impossible to determine if the note was presented to the judge or if the jury reached a verdict without the judge being aware they had submitted the note."

The defendants argue the trial judges committed mode of proceedings errors under O'Rama by failing to notify counsel of the requested read-backs and failing to respond in any way to the requests, and they say the Appellate Division's analysis is illogical. Silva says "it was the trial court's very failure to address the note ... that *caused* the lack of mention of the note in the record. In other words, the 'lack of an adequate record' *is itself* the error; it was the court's responsibility to *make* that record, and it failed to do so." They also argue that defense counsel cannot make a record of a note they do not know exists.

No. 208 For appellant Silva: John R. Lewis, Sleepy Hollow (914) 332-8629
For respondent: Manhattan Assistant District Attorney Susan Axelrod (212) 335-9000
No. 209 For appellant Hanson: Steven R. Bernhard, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Rhea A. Grob (718) 250-2480