State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

Week of February 13 and 14, 2018

State of New York Court of Appeals

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To be argued Tuesday, February 13, 2018

No. 29 People v Rafael Perez *(papers sealed)*

Rafael Perez was arrested by police officers investigating a pattern of robberies in the New York City Housing Authority's Castle Hill Houses in the Bronx in October 2005. When they were on the seventh floor, the elevator opened and Perez took one step out, saw the officers, and stepped back in. An officer said, "Can you hold the door, police, hold the door," but Perez "kept pressing" the button to close the door and the elevator ascended. The officers went up the stairs and found Perez in the ninth-floor hallway. One of them identified himself as a police officer and asked Perez if he lived in the building. Perez did not respond, and turned to face the wall with his head down. The officer noticed a bulge in the sleeve covering Perez's right arm, which he was holding stiffly and "straight down" with his hands in his sleeves. He did not respond when asked if he lived in the building or if he had any weapons, and he did not comply when told to show his hands. The officer, who testified that he was concerned for his safety, grabbed Perez's wrist and felt a metal object, then pulled up his sleeve and saw the tip of a machete. When he refused to drop the machete, the officers removed it and arrested him. When they called in the arrest to their sergeant, the officers learned that a man had reported being robbed in the same area earlier that day by two men with a machete, one of whom was dressed like Perez. The victim was brought to the scene for a show-up and identified Perez as one of the robbers. Perez was placed in a police van and an officer asked how he was doing. Perez replied, "I already know I'm going up north.... Just get me a ham sandwich and I'll tell you what you want." About 20 minutes after he arrived at the precinct, sandwich in hand, Perez said, "The other guy you're looking for is in my apartment." Officers did not question him nor read him his Miranda rights.

Supreme Court, finding the stop and frisk were justified, denied Perez's motion to suppress the machete, the showup identification, and his statements to the police. He was convicted of first-degree robbery and sentenced to six years in prison.

The Appellate Division, First Department affirmed on a 3-2 vote, finding the police conduct was justified under People v De Bour (40 NY2d 210 [1976]). Noting "that the building was owned by NYCHA and that the officers had a duty to keep it free of trespassers," the court said "the building's trespass history, together with defendant's apparently panicked attempt to avoid contact with them upon their attempt to enter the elevator," gave the officers "an objective, credible reason under De Bour to follow defendant to the ninth floor and ask him if he lived in the building. The police action that followed was also proper.... [D]efendant's active escape from the presence of the police, coupled with his utter refusal to face the officers or answer their questions, including whether he was armed, created a situation that was 'fraught with tension' ... and thus justified the police intrusion." The officer's concern for his safety was justified by "the bulge he observed" in Perez's sleeve and "all of the attendant circumstances."

The dissenters argued the stop and frisk were not justified because, "from the inception of his encounter with the police, defendant's conduct was consistent with his constitutional right to avoid contact with the police. In addition, the subsequent observation by the police of an otherwise undefined bulge under defendant's sleeve did not furnish the officers with the requisite reasonable suspicion or a basis for believing that [Perez] was armed and potentially dangerous.... [G]iven that defendant actually lived in the building, if he had truthfully answered the police, questioning would have presumably stopped. If a defendant's resistance to answering the police could in itself be relied upon to justify the frisk, then the right to inquire 'would be tantamount to the right to seize, and there would, in fact, be no right "to be let alone." That is not, nor should it be, the law'...."

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State of New York Court of Appeals

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To be argued Tuesday, February 13, 2018

No. 30 Congel v Malfitano

In 1985, Marc Malfitano entered into a partnership with other investors to own and operate the Poughkeepsie Galleria Shopping Center, a mall operated by Pyramid Management Group. In November 2006, when he owned a 3.08 percent interest in the partnership, Malfitano informed the other partners that he had elected to dissolve the partnership due to "a fundamental breakdown in the relationship between and among us as partners." The three members of the partnership's executive committee -- Robert Congel, Bruce Kenan, and James Tuozzolo -- brought this action against Malfitano seeking, among other things, damages for breach of contract and a declaration that he wrongfully dissolved the partnership. Malfitano asserted a counterclaim under Partnership Law § 69, which permits a partner who causes a wrongful dissolution, if the remaining partners continue the partnership's business in the same name, to recover the value of his interest in the partnership less any damages caused to his copartners by the dissolution. He also moved to dismiss the complaint, contending he was free to dissolve the partnership under Partnership Law § 62(1)(b) because the partnership was at will and of indefinite duration.

Supreme Court denied Malfitano's motion to dismiss. By separate order, the court granted the plaintiffs' motion for summary judgment on their wrongful dissolution and breach of contract claims, saying "there is no provision in the partnership agreement for dissolution to be instigated unilaterally by one partner." The Appellate Division, Second Department affirmed those rulings, saying Malfitano's motion to dismiss was properly denied because the partnership was not at will. "While the partnership agreement does not specify a time limit, the parties nevertheless expressed their intention that the duration of the partnership was to be limited by providing that it shall dissolve upon an election of a majority of the partners," and thus it provided for a "definite term" within the meaning of section 62(1)(b). It said the plaintiffs were entitled to summary judgment because they demonstrated that Malfitano dissolved the partnership in violation of the agreement.

At the trial on damages, the parties stipulated that Malfitano's interest in the partnership was worth $4,850,000 at the time of the dissolution. Supreme Court reduced the value of his interest by $727,500 for goodwill; a 35 percent marketability discount of $1,442,875; $1,596,157 in damages for the plaintiff's counsel and expert fees; and prejudgment interest. It directed the plaintiffs to pay Malfitano the remaining $857,165 for his interest. It refused to apply a minority discount to reflect his lack of control of the business, saying New York law does not permit it.

The Appellate Division modified the judgment, ruling that a 66 percent minority discount should be applied to Malfitano's interest. Relying on Anastos v Sable (443 Mass 146), a decision of the Supreme Judicial Court of Massachusetts, it said "the partnership remains a going concern, and [Malfitano] has no right to compel a liquidation sale of the partnership's shopping mall and receive a proportionate share of the liquidation value of that asset. Under these circumstances, a minority discount may properly be applied to account for [Malfitano's] lack of control in the partnership as a going concern." When the minority discount was applied, Malfitano was required to pay the plaintiffs $911,288.

Malfitano argues he did not wrongfully dissolve the partnership because his action was authorized by Partnership Law § 62(1)(b), since the partnership agreement lacked a definite term. He says the Appellate Division erred in failing to apply the definition of the phrase as construed in Gelman v Buehler (20 NY3d 534). He argues that the application of a minority discount, as well as the marketability and goodwill discounts, against his interest in the partnership "was not supported by precedent or the public policy of this state." And he says the award of counsel fees as damages "was improper since the partnership agreement did not authorize such an award in a breach of contract action, nor did any statute or court rule."

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For respondents Congel et al: Caitlin J. Halligan, Manhattan (212) 351-4000

State of New York Court of Appeals

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To be argued Tuesday, February 13, 2018

No. 31 Kolchins v Evolution Markets, Inc.

Andrew Kolchins began working for Evolution Markets, Inc., an international finance firm, in 2005. His employment was continued with a three-year contract in 2006, and again in 2009 with a three-year contract expiring on August 31, 2012. On June 15, 2012, as the end of the 2009 contract drew near, Evolution CEO Andrew Ertel told Kolchins in an email, "The terms of our offer are the same terms of your existing contract (other than a clarification around the issue of departed members of the team), and include: 3 year term[;] $200,000 base salary[;] $750,000 sign on bonus...[;] $750,000 per year minimum cash compensation[;] production bonus pool of 55% of net earnings of [renewable energy] desk. Any further questions, let me know but u do have your existing contract." On July 16, 2012, Kolchins responded, "I accept, pls send contract." Ertel immediately replied, "Mazel, looking forward to another great run." On July 20, 2012, Evolution's general counsel emailed Kolchin a "clean and marked draft" of the new contract, which he said included two "substantive changes" from the 2009 contract. The first added a "clawback" provision requiring Kolchins to repay his most recent sign on bonus if he quit without good reason or was fired for cause; the other involved "clarifying language regarding the retention of desk employee bonuses" for employees who had departed. Kolchins and the counsel continued to email back and forth about those issues and others, including what compensation he would be paid for a post-employment period when he was subject to a non-compete clause. The parties never signed a new contract and on September 1, 2012, the day after the 2009 contract expired, Evolution advised Kolchins that his employment "has ceased effective today."

Kolchins brought this breach of contract action against Evolution, arguing that his email exchange with Ertel constituted a binding agreement to extend the 2009 contract. Supreme Court denied Evolution's motion pursuant to CPLR 3211(a)(1) to dismiss the action based on documentary evidence.

The Appellate Division, First Department affirmed in a 4-1 decision, saying the email evidence "does not utterly refute plaintiff's factual allegations that the parties reached an agreement on the material terms of a contract renewal...." Ertel's June 15, 2012 email to Kolchins "was not merely an incident in 'preliminary negotiations,' but an actual offer for the renewal of the 2009 employment agreement. Not only did Ertel characterize it as an offer that was made under 'the same terms [as the] existing contract,' but he specified the material terms of the employment contract: the period of employment, the yearly base salary, the sign on bonus, the minimum yearly compensation, and the production bonus.... Inasmuch as there was nothing unclear, ambiguous or equivocal" about Kolchins' response, "it appears to constitute an effective acceptance."

The dissenter said the breach of contract claim should be dismissed "in light of the undisputed documentary evidence demonstrating that, when the parties broke off their negotiations for a possible extension of plaintiff's employment, they were unable to agree on certain terms that both sides regarded as essential.... They were consciously deadlocked on these matters, and neither side would give way. As a matter of law, this failure to agree on essential terms is fatal to plaintiff's attempt to enforce any alleged agreement to extend his employment, 'not because of lack of definiteness, but because of lack of assent'...."

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For respondent Kolchins: Jyotin Hamid, Manhattan (212) 909-6000

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To be argued Wednesday, February 14, 2018

No. 32 Rodriguez v City of New York

Carlos Rodriguez, a New York City sanitation worker, was injured in January 2011 at a garage in Manhattan, where he and two co-workers had been assigned to equip sanitation trucks with tire chains and snow plows. While his co-workers backed another truck into a service bay, one driving the truck and the other guiding him from the rear, Rodriguez was walking toward the garage past a car parked behind the truck. When the guide signaled the truck to stop, the driver hit the brake and skidded on ice into the parked car, knocking it into Rodriguez and pinning him against a stack of tires. A sanitation safety officer prepared a report on the accident and recommended disciplinary action for the co-workers, finding they "failed to use the highest degree of attention." The report did not address Rodriguez's actions. Rodriguez brought this personal injury action against the City, contending the negligence of his co-workers was the cause of the accident. The City argued, among other things, that Rodriguez was at fault for walking behind a truck that was backing up.

Supreme Court denied Rodriguez's motion for partial summary judgment on the issue of liability. Even if the City's negligence were established, the court said, "the question of [Rodriguez's] comparative fault must be resolved at trial."

The Appellate Division, First Department affirmed in a 3-2 decision. It said the "vexing" question of "whether a plaintiff seeking summary judgment on the issue of liability must establish, as a matter of law, that he or she is free from comparative fault..., has spawned conflicting decisions between the judicial departments, as well as inconsistent decisions by different panels within this department." The majority said that, rather than grant summary judgment on a defendant's liability and then consider the plaintiff's comparative fault in the damages phase of the trial, "the fairer, and therefore the proper way to proceed" is to have the jury consider the negligence of both parties together at a trial on liability. This "gives both parties a fair opportunity to present their evidence in a unified manner in order to give the jury a complete picture of the incident, the facts of which it must determine."

The dissenters said a plaintiff who can establish the defendant's negligence should not have the burden of disproving his own comparative negligence on a motion for summary judgment. "The affirmative defense of comparative negligence is a partial defense that does not bar a plaintiff's recovery, but merely reduces the amount of damages in proportion to the plaintiff's culpable conduct.... In this case, where plaintiff met his prima facie burden of establishing defendant's negligence..., and defendant failed to raise triable issues of fact with respect to its own negligence, but successfully raised triable issues of fact as to comparative negligence on the part of plaintiff, I would grant plaintiff's motion for partial summary judgment on the issue of [the City's] liability ... and remand for a jury to determine ... the percentage of liability attributable to each party" and the total amount of damages. "This result is warranted by the comparative fault provisions of the CPLR, the case law, the Pattern Jury Instructions, and the record evidence."

For appellant Rodriguez: Joshua D. Kelner, Manhattan (212) 425-0700
For respondent City: Assistant Corporation Counsel Tahirih M. Sadrieh (212) 356-0847

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To be argued Wednesday, February 14, 2018

No. 33 Somereve v Plaza Construction Corp.

Michael Somereve was employed as a foreman by Town Masonry Corp. in August 2011, when he was injured on a Brooklyn construction site where a school was being built. He was using a prime mover, a small forklift, to hoist a 1500-pound load of bricks onto a scaffold where bricklayers were working above him. Somereve stood on a platform on the back of the machine to operate it and, when a co-worker on top of the scaffold signaled that the forks with the load were clear of the scaffold, he began to raise the pallet of bricks. When the load was about five feet off the ground, the prime mover flipped forward and ejected Somereve from the operator's platform. He was catapulted up against the ceiling, then fell to the concrete floor.

Somereve brought this Scaffold Law action against Plaza Construction Corp., the general contractor for the project, under Labor Law § 240(1). Plaza's project superintendent said in a deposition that he arrived at the scene shortly after the accident and found nothing wrong with the prime mover, which was placed back into service. Plaza subpoenaed two Town Masonry employees to provide depositions -- a laborer who was a potential eyewitness, and a supervisor who said in an affidavit that, after the accident, he found nothing to indicate that the prime mover malfunctioned or was overloaded. Before the depositions could proceed, Somereve moved for summary judgment on Plaza's liability. Supreme Court granted the motion.

The Appellate Division, First Department affirmed on a 3-2 vote, ruling that "the failure to provide a proper hoisting device to protect plaintiff violated Labor Law § 240(1)." "Plaintiff was using the prime mover to hoist a load; if the prime mover pitched forward due to the force of gravity, it failed to offer adequate protection and Labor Law § 240(1) applies.... Similarly, if the accident occurred because either the prime mover or scaffold could not support the weight of the brick load, the accident also resulted from the application of the force of gravity to the load during the hoisting operation, and Labor Law § 240(1) applies...." It said "no further discovery or depositions are necessary" because, even if they could "shed light" on the defense theories that Somereve might have overloaded the prime mover or mishandled the hoisting operation, "the testimony would at most touch on the issue of comparative negligence, which is not a defense to a Labor Law § 240(1) claim...." It said, "[T]here is no viable argument that plaintiff was the sole proximate cause of this accident. The record presents no evidence that plaintiff failed or refused to use an available safety device or that he disregarded a supervisor's instructions...."

The dissenters said "summary judgment was prematurely awarded" and criticized the majority's "conclusory reasoning that because the accident involved the use of a safety device enumerated under Labor Law § 240(1), and the worker was injured while operating the device, the worker is entitled to recover for his injuries. In this case, no defect in the [prime mover] is identified. Nor was the platform of the machine from which the worker fell a type of elevation risk requiring protection against the hazard represented by the force of gravity. More significantly, the evidence raises a factual issue as to whether plaintiff's injuries were caused solely by his own negligent operation of the machine. Finally, plaintiff could not give an explanation as to how the incident occurred and there are at least two identified witnesses to the occurrence who were subpoenaed but have not yet been deposed and are in a position to shed light on how it occurred." They said the evidence of Somereve's negligence does not raise an issue of comparative fault, but instead "raises an issue as to whether plaintiff was the sole proximate cause of the accident which would preclude liability under Labor Law § 240(1)...."

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To be argued Wednesday, February 14, 2018

No. 34 People v Teri W. *(papers sealed)*

Teri W. was a 17-year-old runaway in December 2010, when she was arrested on charges that she had participated with her boyfriend in a sexual assault on a 15-year-old girl in Manhattan. Teri pled guilty to one felony count of first-degree sexual abuse in exchange for a promise that she would be given youthful offender status and sentenced to ten years of probation. At her sentencing, Supreme Court vacated the conviction, adjudicated her a youthful offender, and imposed the promised ten-year term of probation.

On appeal, Teri argued that her sentence was illegal under Penal Law § 60.02(2), which provides, "If sentence is to be imposed upon a youthful offender finding which has been substituted for a conviction for any felony, the court must impose a sentence authorized to be imposed upon a person convicted of an E felony." At the time of her offense, Penal Law § 65.00(3)(a)(i) provided, "For a felony, other than a class A-II felony or a class B [drug] felony ... or a sexual assault, the period of probation shall be five years." Based on these statutes, she contended that her ten-year term was twice the maximum probationary sentence allowed for a youthful offender.

The Appellate Division, First Department affirmed, saying the lower court "lawfully imposed a 10-year term of probation rather than a five-year term." It cited its 2003 decision in People v Gray (2 AD3d 275), which said, "The period of probation for a 'felony sexual assault'" under Penal Law § 65.00(3)(a)(iii), "whose definition includes the class E felony of rape in the third degree..., was increased to 10 years in 2001; there is no exception for those who have been adjudicated youthful offenders."

Teri argues that the maximum probationary term authorized in her case is five years because the language of Penal Law § 60.02(2), the statute that governs the sentencing of youthful offenders, applies to "any felony" and makes no distinction in sentencing based on the classification of the underlying felony. "The Legislature's decision to continue to omit any reference to the classification of the substituted felony in Penal Law § 60.02(2) provides dispositive evidence that the Legislature elected to leave a single, unclassified E felony sentencing scheme in place for youthful offenders, rather than one that varies depending on the classification of the substituted felony," she says.

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For respondent: Manhattan Assistant District Attorney Lee M. Pollack (212) 335-9000