State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Tuesday, October 15, 2013

No. 191 Cruz v TD Bank, N.A.
Martinez v Capital One Bank, N.A.

These federal cases arose in 2009 and 2010, when TD Bank and Capital One Bank notified four of their account holders -- the plaintiffs here -- that their accounts had been frozen pursuant to restraints served by third-party creditors. The plaintiffs, whose accounts ranged in size from about $340 to about $3,800, filed these putative class actions alleging the banks restrained their accounts and charged them fees in violation of CPLR Article 52, as amended by enactment of the Exempt Income Protection Act (EIPA) in 2008.

CPLR Article 52 governs the enforcement and collection of money judgments in New York. EIPA permits judgment debtors to retain access to certain exempt funds in their bank accounts. According to the State Senate sponsor's memorandum, the purpose of EIPA was to protect a baseline amount of income to "ensure that money judgments do not render working New Yorkers unable to care for their or their families' most basic needs." EIPA prohibits the restraint of a specified minimum amount of funds in a debtor's account; requires banks to provide account holders with copies of restraining notices, disclosures of exempt funds and forms for claiming exemptions; and prohibits banks from charging fees to debtors whose accounts are exempt from restraint.

The plaintiffs claim the banks failed to provide them with the required notices and forms, improperly restrained exempt funds in their accounts, and charged them fees -- including overdraft fees for checks that bounced after their accounts were frozen, all in violation of EIPA. In separate proceedings, U.S. District Court for the Southern District of New York dismissed both suits, concluding that EIPA does not provide judgment debtors with a private right of action against their banks for violations of the statute's procedural requirements.

The U.S. Court of Appeals for the Second Circuit said the appeals "turn on unsettled and important questions of New York law.... EIPA does not explicitly state that judgment debtors have a private right of action against their banks, and no New York court has decided whether judgment debtors have such a right against banks that fail to comply with EIPA's procedural guarantees." It is asking this Court to resolve the issue in a pair of certified questions: "*first*, whether judgment debtors have a private right of action for money damages and injunctive relief against banks that violate EIPA's procedural requirements; and *second*, whether judgment debtors can seek money damages and injunctive relief against banks that violate EIPA in special proceedings prescribed by CPLR Article 52 and, if so, whether those special proceedings are the exclusive mechanism for such relief or whether judgment debtors may also seek relief in a plenary action."

For appellants Cruz and Martinez et al: G. Oliver Koppell, Manhattan (212) 867-3838
For respondent TD Bank: Alexander D. Bono, Philadelphia, PA (215) 979-1000
For respondent Capital One Bank: Robert Plotkin, Manhattan (212) 548-7098

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To be argued Tuesday, October 15, 2013

No. 192 People v Akiva Daniel Abraham

In April 2009, about two weeks after Akiva Daniel Abraham acquired an abandoned nightclub called Saratoga Winners in the Albany County town of Colonie, the building was destroyed by fire. He had insured the building for $475,000, the amount of a mortgage he had taken out through a limited liability company controlled by Abraham and his father, although the company did not provide any funds for the purchase. Abraham said he did not know the cause of the fire when he notified his insurer of the loss. Investigators learned that he had purchased substantial quantities of an accelerant found at the scene and they discovered empty containers for the accelerant at his home.

Abraham was indicted on charges of third-degree arson, second-degree insurance fraud, and first-degree reckless endangerment. His first trial ended with a hung jury. At his second trial, the jury acquitted him of arson and reckless endangerment, but convicted him of insurance fraud. He was sentenced to 4 to 12 years in prison.

The Appellate Division, Third Department affirmed, finding that "the jury could have rationally concluded from this evidence that defendant committed insurance fraud by concealing the cause of the fire...." It rejected Abraham's argument that, because the prosecution relied on the theory that he acted alone in starting the fire, his acquittal on the arson count rendered the guilty verdict on insurance fraud repugnant. "Insurance fraud ... requires only a showing 'that defendant intentionally concealed the cause of the fire on [his] insurance claim,' not that he was personally responsible for starting the blaze...," the court said. "Supreme Court's jury charge reflected this distinction, and a 'repugnancy analysis requires that we review the elements of the offenses as charged to the jury without regard to the proof that was actually presented at trial'.... Inasmuch as 'there is a possible theory under which a split verdict could be legally permissible, it cannot be repugnant'...."

Abraham argues the evidence was legally insufficient to establish that he knowingly submitted a false statement to his insurer concealing that the fire was intentionally set. "Here, the only evidence of Appellant committing a fraudulent act (knowing with the intent to defraud) would have been evidence that he intentionally damaged the property with fire or knew that the fire was caused by arson. Since the jury here was unwilling to find that Appellant intentionally damaged the property with fire, and no other theory was presented by the Prosecution, nor charged in the indictment, the conviction for insurance fraud in the second degree must, accordingly, be reversed."

For appellant Abraham: Jonathan S. Fishbein, Delmar (518) 439-1480
For respondent: Albany County Assistant District Attorney Christopher D. Horn (518) 487-5460

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To be argued Tuesday, October 15, 2013

No. 178 Matter of Flamenbaum, Deceased

The estate of Holocaust survivor Riven Flamenbaum is appealing an order requiring it to return an ancient gold tablet to the Vorderasiatisches Museum in Berlin. The small inscribed tablet was excavated before World War I by German archaeologists, who found it in the foundation of the Ishtar Temple, a ziggurat in the Assyrian city of Ashtur, in what is now northern Iraq. The tablet, which describes the construction of the temple more than 3,200 years ago, was put on display in the Vorderasiatisches Museum in 1934. At the outbreak of World War II in 1939, the tablet was placed in storage along with other antiquities and works of art for safekeeping. In 1945, when the museum's artifacts were inventoried at the end of the war, the tablet was missing.

Flamenbaum. a resident of Great Neck, died in 2003. The executor of the estate, his daughter Hannah Flamenbaum, made no specific mention of the tablet in her accounting filed in 2006. A son, Israel Flamenbaum, filed objections to the accounting and informed the museum that the tablet was in the possession of the estate. The museum filed a notice of appearance and claim with the Surrogate's Court seeking to recover the tablet.

Surrogate's Court found the museum established that it had a superior right of possession to the tablet, but held that its claim was barred by the doctrine of laches. It said the museum failed to "investigate or attempt to recover the tablet from the time it was discovered absent from the museum in 1945 until the present action was commenced in 2006" and it found this "lack of due diligence was unreasonable" and was prejudicial to the estate. "As a result of the museum's inexplicable failure to report the tablet as stolen, or take any other steps toward recovery, diligent good faith purchasers over the course of more than 60 years were not given notice of a blemish in the title. That, coupled with the fact that Riven Flamenbaum's death has forever foreclosed his ability to testify as to when and where he obtained the tablet, has severely prejudiced the estate's ability to defend the museum's related claim to the tablet."

The Appellate Division, Second Department reversed, ruling the museum established that it had legal title and a superior right to possession of the tablet, and the executor failed to establish an affirmative defense based on laches. When Israel Flamenbaum told the museum the estate had the tablet in 2006, the court said, it "was the first time since 1945 the museum had direct knowledge of the tablet's whereabouts." It said, "The executor's contention that the museum failed to exercise reasonable diligence by not reporting the tablet stolen to law enforcement authorities or listing it on an international stolen art registry is not ... dispositive. The executor's argument that, had the museum taken such steps, the tablet would have surfaced earlier, is mere conjecture and, moreover, is not supported by expert or other evidence."

For appellant Flamenbaum: Steven R. Schlesinger, Garden City (516) 746-8000
For respondent Vorderasiatisches Museum: Raymond J. Dowd, Manhattan (212) 682-8811

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To be argued Tuesday, October 15, 2013

No. 194 Matter of State of New York v Nelson D. *(papers sealed)*

Nelson D., a mentally retarded sex offender, was convicted in 2002 of first-degree sexual abuse and sentenced to three years in prison. Shortly after his release, he violated the conditions of his post-release supervision and was returned to prison based on his guilty plea to public lewdness. In October 2007, as he was nearing release from custody, the Attorney General filed a petition for civil management under Mental Hygiene Law article 10.

A jury found Nelson D. suffers from a "mental abnormality," and Supreme Court held a hearing to determine the appropriate form of civil management. The State sought a finding that Nelson D. is a "dangerous sex offender requiring confinement" at a secure treatment facility. Nelson D. sought a finding that he is "a sex offender requiring strict and intensive supervision and treatment" (SIST), and assignment to a group home. The court found that "the State has failed to establish by clear and convincing evidence that [Nelson D.] is a dangerous sex offender requiring confinement," instead ruled that he is "a sex offender requiring a regimen" of SIST pursuant to Mental Hygiene Law § 10.11, and placed him in the care of the Office for People with Developmental Disorders (OPWDD). The State sought inpatient placement of Nelson D. at Valley Ridge Center for Intensive Treatment. Nelson D. filed a motion to compel the State to find a community placement, contending placement at Valley Ridge would constitute "confinement" in a secure facility and would be illegal under the SIST statute.

Supreme Court denied the motion based on section 10.11(a)(1), which provides that a court shall determine the conditions of SIST, "including 'specification of residence or type of residence'.... Thus, as the statute expressly states, the court may specify where [Nelson D.] resides as a condition of SIST." The court said, "While respondent will have restrictions placed on his personal liberty, he would, no doubt, suffer some restraints on liberty even if placed in a community group home."

The Appellate Division, First Department affirmed, saying the order placing Nelson D. in residential treatment at Valley Ridge "was permissible under Mental Hygiene Law § 10.11, which prescribes conditions of supervision, including specification of residence and type of residence, that may be imposed as part of SIST. Because the SIST regimen imposed was authorized under Mental Hygiene Law article 10, [Nelson D.'s] substantive due process rights were not offended...."

Nelson D. argues the lower courts "improperly conflated the two dispositions under Article 10 -- confinement and SIST in the community -- and misconstrued 'residence or type of residence' to permit confinement, even when the State failed to meet its burden to prove confinement. By confining Nelson D. under the auspices of Article 10, notwithstanding its own determination that Nelson D. was *not* a 'dangerous sex offender requiring confinement,' the trial court violated Nelson D.'s due process rights." He says, "By authorizing OPWDD confinement as a SIST condition, the trial court created a new mechanism of involuntary commitment that bypasses all of New York's civil commitment statutes, thereby depriving Nelson D. of the constitutional safeguards contained in those inpatient statutes."

For appellant Nelson D.: Diane Goldstein Temkin, Manhattan (646) 386-5891
For respondent State: Assistant Solicitor General Leslie B. Dubeck (212) 416-6390

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To be argued Tuesday, October 15, 2013

No. 195 DeVito v Feliciano

In February 2006, Theresa DeVito was riding in a car in Manhattan when it was struck by a van owned by Paragon Cable Manhattan and driven by Dennis Feliciano. DeVito sued Feliciano and Paragon, alleging that she had suffered a compression fracture of a vertebra and a nasal fracture. After the defendants were found to be negligent as a matter of law, a jury trial was held on proximate cause and damages.

DeVito called two physicians as expert witnesses, both of whom testified that they believed the 2006 accident was the cause of her injuries. Defense counsel, contending the fractures did not result from the accident, cross-examined both of the plaintiff's experts. Although the defendants had two physicians conduct independent medical examinations of DeVito prior to trial, they did not call either physician to testify. DeVito asked Supreme Court to deliver a missing witness charge based on the defendants' failure to call their examining physicians to the stand, which would permit the jury to infer that their testimony would have been unfavorable to the defendants.

Supreme Court denied the request, concluding that the testimony of the defendants' physicians would have been cumulative to that of DeVito's expert witnesses. The jury found that the 2006 accident was not a substantial factor in causing DeVito's injuries, and Supreme Court dismissed the complaint. The Appellate Division, First Department affirmed, saying the trial court did not "err in declining to provide a missing witness charge since plaintiff did not satisfy the elements that are a prerequisite for receiving the charge," which include a showing that the testimony of the missing witness would have been material and noncumulative.

DeVito argues that, "since lack of proximate cause was the defendants' only substantive defense, and plaintiff's experts testified that the accident was a cause of the injuries," she was entitled to have the jury "advised that it could draw an inference against defendants" based on their failure to call their own experts to the stand. She says the "testimony of defendants' physicians would not have been cumulative because in that event plaintiff would be entitled to a directed verdict on the issue of causation."

For appellant DeVito: Brian J. Isaac, Manhattan (212) 233-8100
For respondents Feliciano and Paragon Cable: Michael H. Gottlieb, Bronx (718) 665-1700