State of New York Court of Appeals

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To be argued Wednesday, February 18, 2015

No. 44 Beardslee v Inflection Energy, LLC

Beginning in 2001, Walter and Elizabeth Beardslee and more than 30 other Tioga County landowners signed oil and gas leases now held by Inflection Energy, LLC, Victory Energy Corporation and MegaEnergy, Inc. For a nominal annual fee, and a right to royalties on the sale of any gas or oil extracted from their properties, the Energy Companies acquired rights to explore and drill for gas and oil. Each of the leases contains an identical "habendum clause" governing duration, which states, "It is agreed that this lease shall remain in force for a primary term of FIVE (5) years ... and as long thereafter as the said land is operated by Lessee in the production of oil or gas." Each lease also contains a "*force majeure* clause," which states, "If and when drilling ... [is] delayed or interrupted ... as a result of some order, rule, regulation ... or necessity of the government, or as the result of any other cause whatsoever beyond the control of Lessee, the time of such delay or interruption shall not be counted against Lessee, anything in this lease to the contrary notwithstanding."

In 2008, the Governor directed the Department of Environmental Conservation to update its generic environmental impact statement on conventional drilling to consider the potential impacts of new techniques, particulary high-volume hydraulic fracturing (HVHF or fracking) and horizontal drilling. The state has not issued any fracking permits since that time.

The Landowners filed this federal action in the Northern District of New York in 2012, complaining the leases rendered their properties unmarketable and seeking a declaration that the leases had expired. They moved for summary judgment, arguing the Energy Companies drilled no wells on their land and, therefore, the leases expired after five years. The Companies cross-moved for summary judgment, arguing the Governor's 2008 order was a de facto moratorium on fracking that prevented them from using the only "commercially viable" method of drilling. They said this was a *force majeure* event that extends the leases until the moratorium is lifted, whenever that might be.

U.S. District Court granted summary judgment to the Landowners and declared the leases expired, finding the *force majeure* clause was not triggered by the moratorium and did not extend the leases. Although the Companies could not use fracking techniques, the moratorium did not "frustrate the purpose of the leases" because they could drill with conventional methods, the court said, and "mere impracticality" was not enough to trigger the *force majeure* clause.

The U.S. Court of Appeals for the Second Circuit is asking this Court to resolve the key issues in a pair of certified questions: "1. Under New York Law, and in the context of an oil and gas lease, did the State's Moratorium amount to a *force majeure* event? 2. If so, does the *force majeure* clause modify the habendum clause and extend the primary terms of the leases?"

For appellant Energy Companies (Inflection et al): Thomas S. West, Albany (518) 641-0500
For respondent Landowners (Beardslee et al): Peter H. Bouman, Binghamton (607) 723-9511

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To be argued Wednesday, February 18, 2015

No. 45 People v Clemon Jones

Charged with possessing counterfeit currency in Monroe County, Clemon Jones was convicted in 2007 of two counts of criminal possession of a forged instrument in the second degree. The prosecution sought to have him adjudicated a persistent felony offender under Penal Law § 70.10 based on two sets of convictions: his 1995 conviction in New York on felony drug sale and possession charges; and his 1991 conviction in Florida on federal felony charges of making a false statement on a Bureau of Alcohol, Tobacco and Firearms form and of being a convicted felon possessing a firearm. Jones had been sentenced to 18 months in prison in the federal firearms case. County Court found he was a persistent felony offender based, in part, on the prior federal convictions and sentenced him to 15 years to life in prison.

In 2009, Jones filed a CPL 440.20 motion to vacate his sentence as a persistent felony offender, arguing the federal convictions did not qualify as predicate felonies under the statute because those crimes would not have been felonies under New York Law. County Court denied the motion.

The Appellate Division, Fourth Department affirmed, holding that Jones was properly adjudicated a persistent felony offender. Penal Law § 70.10(1)(b) defines "a previous felony conviction" as "a conviction of a felony in this state, or of a crime in any other jurisdiction, provided ... that a sentence to a term of imprisonment in excess of one year, or a sentence to death, was imposed therefor...." Since Jones was sentenced to a term of 18 months in the federal case, the court said, "under the plain language of the statute, the federal convictions qualify as 'previous felony conviction[s]," under section 70.10. It rejected his argument that the statute should be read to require that foreign felonies must have a New York equivalent, as the second felony offender law (Penal Law § 70.06) requires. "The persistent felony offender statute ... contains no language requiring that the underlying out-of-state conviction be for a crime that would constitute a felony in New York.... Further, the legislative history ... reflects that the drafters specifically considered and rejected the contention advanced by defendant...."

Jones argues, "The anomaly that exists in the definition of a predicate felony in Penal Law § 70.06, which mandates that a predicate criminal conviction have a New York equivalent, and Penal Law § 70.10, which does not, is arbitrary, capricious, and can create the unfair and nonsensical result of an individual being eligible for Persistent Felony Offender status..., but not being eligible for Second Felony Offender status. While the enhancement of a sentence [for repeat offenders] is a legitimate State purpose, the difference between the statutes does not, and only serves to breed inequality...." He cites rulings from other Appellate Division departments that foreign felonies must have New York equivalents in order to be used as predicate offenses under section 70.10.

For appellant Jones: John A. Cirando, Syracuse (315) 474-1285
For respondent: Monroe County Assistant District Attorney Geoffrey Kaeuper (585) 753-4674

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To be argued Wednesday, February 18, 2015

No. 46 Faison v Lewis

This case stems from a family dispute over ownership of a house at 1900 Bergen Street in Brooklyn. Dorothy Lewis and her brother, Percy Lee Gogins, Jr., each inherited a one-half interest in the property as tenants in common when their mother died in 1996. In May 2000, Dorothy Lewis conveyed her one-half interest to her daughter Tonya Lewis by quitclaim deed. In December 2000, a correction deed was executed, purportedly adding Gogins to the quitclaim deed as an additional grantor and conveying his one-half interest in the property to Tonya Lewis. Gogins died in 2001 and his wife was appointed administrator of his estate. In 2002, Gogins's daughter Dorothy Faison brought an action on behalf of his estate against Dorothy and Tonya Lewis, alleging they had forged the correction deed. The suit was dismissed for lack of capacity to maintain the action because Faison was not the estate administrator. In 2009, Tonya Lewis borrowed $269,332 from Bank of America, which she secured with a mortgage on the disputed property.

In July 2010, Faison was appointed administrator of her father's estate. A month later, she brought this action against the Bank of America and others, including the Lewises, alleging the correction deed was a forgery. She sought an order declaring the 2000 correction deed and the Bank's 2009 mortgage null and void. Supreme Court granted the Bank's motion to dismiss the suit as time-barred.

The Appellate Division, Second Department affirmed so much of the order as dismissed the complaint against the Bank of America as untimely. The court ruled the statute of limitations for a fraud cause of action, which requires that the action be commenced within six years after the fraudulent act or within two years after its discovery, applies to a cause of action alleging forgery. "Here, the forgery allegedly occurred in 2000, and the plaintiff's own filing in an earlier action showed that she knew of the alleged fraud by 2003," it said. "Thus, she was required to commence an action by 2006 at the latest, whereas this action was commenced in 2010."

Faison argues that "a deed to real property, void from inception for forgery, cannot become effective against the true owner of the property through the mere passage of time; and ... therefore, the statute of limitations cannot bar an action to declare the nullity of a forged deed." She says, "In giving effect to the Forged Deed, the [Appellate Division] Order is inconsistent with the long-settled principle that a forged instrument is void and entirely without effect from inception. It is also in direct conflict with this Court's holding in Riverside Syndicate, Inc. v Munroe [10 NY3d 18 (2008)] that a statute of limitation can never operate to give effect to a void instrument by barring actions for a declaration of its nullity."

For appellant Faison: David Gordon, Harrison (914) 381-4848
For respondent Bank of America: Liezl Irene Pangilinan, Manhattan (212) 594-8515

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To be argued Wednesday, February 18, 2015

No. 47 People v Dennis Ford *(papers sealed)*

Dennis Ford was charged with robbing and sexually abusing a female cab driver in Brooklyn in 2009. He pled guilty to first-degree sexual abuse and was sentenced to three years in prison. While in prison, Ford was charged with about 20 disciplinary violations and was placed in the Special Housing Unit, which prevented him from attending recommended programs including sex offender treatment. As he neared his release date, the New York Board of Examiners of Sex Offenders prepared a risk level recommendation and assessed 100 points against him based on the nature of his offense, criminal history and his misconduct while confined, among other things. This would make him a presumptive level two offender, with a moderate risk of reoffending, under the Sex Offender Registration Act (SORA).

Supreme Court designated Ford a level three (high risk) sex offender after assessing an additional 15 points against him under risk factor 12, "acceptance of responsibility: not accepted responsibility/refused or expelled from treatment." It said, "[W]ith respect to acceptance of responsibility, in fact I am going to assess him the 15 points for that as well. And I'm not double counting. I know he got assessed for his conduct [in prison], but ... I am basing this upon him putting himself into a situation where he ends up in special housing and, therefore, cannot receive treatment.... At the time he's being released from prison, he hasn't had one minute of sex counseling as a result of his conduct in prison. So, therefore ... I am making the determination that the spirit of risk factor 12 is that he received treatment and if he does something to prevent that from happening, then he should ... accept the consequence of it."

The Appellate Division, Second Department affirmed, saying, "The Supreme Court properly considered the defendant's lengthy disciplinary record while incarcerated, which prevented him from participating in a sex offender treatment program, as evidence of a refusal of treatment...."

Ford argues Supreme Court erred in assessing points under risk factor 12 because he never refused nor was expelled from sex offender treatment and, therefore, he should be reclassified as a level two offender. He says the court's analysis was "in direct contradiction to the purpose of these points as explained ... in the Risk Assessment Guidelines -- the Board assesses these points only for the *refusal* to take sex offender treatment or the *expulsion* from treatment, because such behavior is evidence of 'the offender's continued denial and his unwillingness to alter his behavior'.... [A]ssessing these points, not for the refusal of sex offender treatment but for the inability to be scheduled for it was unwarranted, particularly because appellant had already been punished for that same prison misconduct by losing his 'good time' and by receiving points under risk factor 13" for his disciplinary violations.

For appellant Ford: Michael C. Taglieri, Manhattan (212) 330-4139
For respondent: Brooklyn Assistant District Attorney Anthea H. Bruffee (718) 250-2475