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 or gspencer@nycourts.gov.

To be argued Tuesday, November 14, 2017

No. 121 Desrosiers v Perry Ellis Menswear, LLC
No. 122 Vasquez v National Securities Corporation

The question in these putative class actions is whether the named plaintiffs, who settled their own claims without ever seeking class certification, are entitled under CPLR 908 to have notice sent to other potential class members that the lawsuit has been dismissed or discontinued. The statute reads, "A class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs."

Geoffrey Desrosiers, who had worked as an unpaid intern for Perry Ellis Menswear, filed this Labor Law action in 2015 to recover unpaid minimum wages for himself and all similarly situated interns. Without moving for class certification, he settled his personal claim for $4,500 plus costs. Weeks later, after the 60-day period to seek class certification had expired, Perry Ellis moved to dismiss the action based on the settlement. Supreme Court dismissed the suit and denied Desrosiers' motion to notify other class members of the dismissal, observing that the plaintiff was "beyond your time to move to have class certification."

The Appellate Division, First Department reversed and directed Supreme Court to give notice to the putative class. Since a class action suit tolls the statute of limitations for all potential class members, it said, "the putative class retains an interest in the action, and CPLR 908 is not rendered inoperable simply because the time for the individual plaintiff to move for class certification has expired. Notice to the putative class members of the compromise ... is particularly important under the present circumstances, where the limitations period could run on the putative class members' cases following discontinuance of [Desrosiers'] action."

Christopher Vasquez, a former "cold call" broker for National Securities Corp., brought this action in 2014 to recover unpaid minimum wages and overtime for himself and other brokers. After he settled his claim for $21,789.93 plus attorneys' fees and costs, Supreme Court granted a defense motion to dismiss the suit. It granted Vasquez's motion to notify class members that the action would be dismissed, citing Avena v Ford Motor Co. (85 AD2d 149 [1st Dept 1982]), which ruled the notice requirement of CPLR 908 applies prior to class certification.

The Appellate Division, First Department affirmed. Although the Federal Rules of Civil Procedure have been amended to restrict the comparable federal notice requirement to certified class actions, it said, "The legislature, presumably aware of the law as stated in Avena, has not amended CPLR 908 to conform to the federal statute. Although defendant ... raises policy arguments in support of its position, its remedy lies with the legislature and not with this court."

The defendants argue that CPLR 908, by its terms, applies only to class actions, and these suits were pleaded but never certified as class actions. Perry Ellis adds that, even if Desrosiers' claim had gone to trial, it could not have been treated as a class action because the deadline for certification had expired. National Securities says "requiring that notice be distributed to an unidentifiable class is an administrative impossibility," and it argues that Avena should be overturned because it "ignored that resolution of a named-plaintiff's claim pre-certification has no res judicata effect on alleged class members who are free to bring their own lawsuit."

For appellant Perry Ellis: Frank H. Henry, Miami, Florida (305) 981- 4300
For appellant National Securities: Daniel J. Buzzetta, Manhattan (212) 589-4200
For respondents Desrosiers and Vasquez: LaDonna M. Lusher, Manhattan (212) 943-9080

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No. 123 People v Dwight Smith

Dwight Smith and three co-defendants were indicted on murder and related charges stemming from the fatal shooting of Dougal (or Dughal) Mills during a home invasion robbery at his Bronx apartment in May 2007. Smith was arraigned in July 2008. In March 2009, nearly six months after the deadline for prosecution discovery requests under CPL 240.90(1) expired, the prosecutor moved to obtain a saliva sample for DNA testing. Smith's privately retained attorney said he would ask Smith if he would agree to provide the sample, but apparently did not raise the issue with him. Defense counsel appeared in court six weeks later, without Smith present, and asked to be relieved because Smith had not been able to pay him. Supreme Court granted the request, and it also signed an order granting the motion for a saliva sample "on consent."

When Smith appeared in court later on the same day, without counsel, the court told him that his attorney had been relieved, new counsel would be appointed for him, and the request for a DNA sample had been granted. Smith repeatedly objected to giving the sample before he could consult with a lawyer, saying he was unaware of the request, had not spoken with his attorney for two months, and thought he would "probably" oppose the motion. The court told him the issue had been decided and said, "All I want to ask you is to cooperate." Smith continued to ask for an attorney. The court said his former counsel had consented to the sample and his new attorney "is not going to be able to help you in any way of preventing [it] because I issued the order." Smith continued to insist that a lawyer be present, but finally agreed to provide the sample in the courtroom after he was shown the order. He later pled guilty to first-degree manslaughter and burglary in exchange for a prison sentence of 18 years.

The Appellate Division, First Department reversed on a 3-2 vote, vacated the plea, and dismissed the indictment with permission to re-present charges to another grand jury. Supreme Court violated Smith's right to counsel when it "pressured [him] into giving a buccal swab for DNA testing, incorrectly advised him that he had no arguments against the prosecutor's untimely discovery, and ignored defendant's explicit and repeated requests for a lawyer during the critical pretrial stage of the proceedings," it said. The discovery proceedings "were 'critical' within the meaning of the law. The DNA test fundamentally changed the outcome of the case, undermining defendant's plea bargaining posture and his chances for acquittal.... [His] protests put the court on notice that defendant had never communicated with his former attorney about the issue, nor did he wish to consent to the test."

The dissenters said, "[T]he salient fact here is that prior to the time the defendant claims he was unconstitutionally without counsel, the motion to compel the saliva sample had already been considered by the court and a decision made, granting the motion 'on consent'.... [T]here is no basis to hold that counsel must be present for the physical administration of the already-ordered collection of a saliva sample; nor is there a basis to view the actual collection of the sample as a 'critical stage' of the proceedings...." They also said the majority erred in dismissing the indictment because "the alleged violation does not taint or call the validity of the indictment into question."

For appellant: Bronx Assistant District Attorney Ramandeep Singh (718) 838-7201
For respondent Smith: Matthew Bova, Manhattan (212) 577-2523 ext. 543

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To be argued Tuesday, November 14, 2017

No. 39 Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, National Association v Nomura Credit & Capital, Inc. (and three other actions)

These cases stem from four residential mortgage-backed securities transactions sponsored by Nomura Credit & Capital, Inc. in 2006 and 2007. Nomura sold the loans through mortgage loan purchase agreements (MLPA) to an affiliate, which transferred them to four trusts pursuant to pooling and servicing agreements (PSA) and sold interests in the pooled loans to investors. In section 7 of each MLPA, Nomura warranted that the statements and reports it furnished in connection with the transactions "do not contain any untrue statement of material fact or omit to state a material fact necessary to make the statements contained therein not misleading." In section 8, Nomura made specific representations regarding the quality of the mortgage loans. Section 9(a) of the MLPAs provides that, upon discovery "of a breach of any of the representations ... contained in Section 8," Nomura must cure the breach or repurchase the affected loan at the purchase price; and section 9(c) states that Nomura's obligation to cure or repurchase defective loans "constitute the sole remedies of the Purchaser against the Seller respecting ... a breach of the representations ... contained in Section 8." The PSAs contain similar "sole remedies" language regarding breaches of representations "set forth in ... Section 8" of the MLPA. In 2012, with investors claiming breaches of Nomura's warranties affected thousands of the pooled loans, HSBC Bank USA, as trustee of the four trusts, brought these actions seeking repurchase of the loans by Nomura or damages for its breach of that obligation, and damages for its alleged violation of the No Untrue Statement provision.

Supreme Court denied Nomura's motion to dismiss claims based on its repurchase obligation, but dismissed claims for damages under the No Untrue Statement provision, saying "the relief available to plaintiff is limited by the sole remedy provision ... to specific performance of the repurchase protocol, or if loans cannot be repurchased, to damages consistent with its terms." The court relied on its prior ruling in a related action against Nomura, which said, "The complaint does not allege any breach of the No Untrue Statement provision that was not also a breach of the Mortgage Representations to which the sole remedy provisions apply.... [T]he sole remedy provision establishing the repurchase protocol for breaches of Mortgage Representations would be rendered meaningless if the duplicative representations in the Mortgage Loan Schedule were not subject to that protocol, and could support an independent breach of the No Untrue Statement provision."

The Appellate Division, First Department modified by reinstating the claims for breach of the No Untrue Statement provision in section 7 of the MLPA. It said, "By its plain language, section 9(c) says that "[t]he obligations of the Seller [Nomura] ... to cure or repurchase a defective Mortgage Loan ... constitute the sole remedies of the Purchaser against the Seller *respecting a missing document or a breach of the representations and warranties contained in Section 8*" (emphasis added)." It said, "Had these 'very sophisticated parties' desired to have the sole remedy provisions apply to both section 8 and section 7 breaches, 'they certainly could have included such language in the contracts. They did not do so....' In any event, section 13 of the MLPA provides that remedies are cumulative."

For appellant Nomura Credit & Capital: Joseph J. Frank, Manhattan (212) 848-4000
For respondent HSBC Bank, as trustee: Michael S. Shuster, Manhattan (646) 837-5151