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 Wednesday, January 9, 2019

No. 4 Arrowhead Capital Finance, Ltd. v Cheyne Specialty Finance Fund L.P.

Arrowhead Capital Finance, Ltd. brought this action against Cheyne Specialty Finance Fund L.P. and its general partner in June 2014 for alleged breaches of two trust agreements. In December 2015, Supreme Court partially granted Cheyne's motion to dismiss by dismissing all claims except for breach of fiduciary duty and breach of contract.

In May 2016, the court granted Cheyne's request to file a second motion to dismiss, this one based on its claim that Cheyne's attorney, Barry L. Goldin, failed to maintain a New York law office as required by Judiciary Law § 470. Goldin was licensed to practice in New York, but his attorney registration listed an office address in Allentown, Pennsylvania. The complaint Goldin filed for Arrowhead listed his Allentown office address with its telephone and fax numbers, as well as an address at 240 Madison Avenue in Manhattan. Cheyne said the Madison Avenue address "is not an actual law office occupied by him, or, for that matter, anyone else." On the same day that Cheyne obtained permission to file its second motion, the New York firm of Wollmuth Maher & Deutsch LLP filed a notice of appearance as co-counsel for Arrowhead. Goldin argued that any violation of Judiciary Law § 470 was cured by Wollmuth's appearance as co-counsel in this action. He also said the New York office requirement was suspended at the time he filed this action because U.S. District Court had declared section 470 unconstitutional in Schoenefeld v Schneiderman (907 F Supp 2d 252 [ND NY 2011]). The Second Circuit reversed that decision in April 2016 (821 F3d 273), after the New York Court of Appeals held in answer to a certified question that section 470 "requires nonresident attorneys to maintain a physical office in New York" (Schoenefeld v State of New York [25 NY3d 22 (2015)].

Supreme Court granted Cheyne's motion and dismissed the action, without prejudice to commencing a new action. It said, "[T]here is no evidence that Goldin maintained an office or a phone in New York when this action was filed in June 2014.... Receiving mail and documents is insufficient to constitute maintenance of an office." The court rejected rulings of the Second and Third Departments that allow parties to cure a violation of section 470 by obtaining new counsel with a New York office or by filing a pro hac vice application, and applied the First Department's rule "that a court should strike a pleading, without prejudice, where it is filed by an attorney who fails to maintain a local office...."

The Appellate Division, First Department affirmed, saying, "The record supports the court's determination that plaintiff's counsel failed to maintain an in-state office at the time he commenced this action.... Plaintiff's subsequent retention of cocounsel with an in-state office did not cure the violation, since the commencement of the action in violation of Judiciary Law § 470 was a nullity.... [T]he court was not bound by the holding of a federal district court at the time of the commencement of this action that Judiciary Law § 470 was unconstitutional."

Arrowhead says the First Department's "nullity rule" conflicts with Dunn v Eickhoff (35 NY2d 698), which "held a party's representation by a person not even authorized or admitted to practice law [in New York] does not create a 'nullity' or render prior proceedings void." It says the Second and Third Department cases allowing parties to cure a section 470 violation comply with Dunn and reflect "a wiser policy, particularly where (as here) defendant did not seek Judiciary Law § 470 dismissal until several years after complaint filing; extensive proceedings had been had and substantial resources invested by litigants and court; and 'office' compliance had been cured."

For appellant Arrowhead: Barry L. Goldin, Manhattan (646) 569-5526 and Allentown, PA
For respondent Cheyne: Shaimaa Hussein, Manhattan (212) 728-8000

State of New York
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To be argued Wednesday, January 9, 2019

No. 5 People v Michael Thomas

Michael Thomas was adjudicated a youthful offender in 1988 after pleading guilty to two counts of second-degree robbery in Brooklyn. In 1989, he pled guilty in Manhattan to second-degree attempted robbery and in Brooklyn to first-degree attempted robbery. In both of the 1989 cases, his prior youthful offender adjudications were improperly used as prior felony convictions to permit enhanced sentencing as a second felony offender. In 2009 and 2011, his sentences for the 1989 convictions were set aside on the ground that they were improperly based on his youthful offender adjudications, and he was re-sentenced in both cases as a first felony offender.

Meanwhile, in February 1993, Thomas committed another stick-up in Brooklyn and was convicted at a jury trial of third-degree robbery. His prior convictions were used as predicate felonies and he was sentenced as a second felony offender to 3½ to 7 years in prison. In 2013, Thomas moved to vacate his sentence, arguing that his second felony offender status was improperly based on either his 1988 youthful offender adjudications or on a 1989 conviction for which he was not legally sentenced until after the commission of the 1993 robbery. The "sequentiality provision" of the second felony offender statutes, Penal Law §§ 70.04(1)(b)(ii) and 70.06(1)(b)(ii), provide that for a prior felony to serve as a predicate conviction, "Sentence upon such prior conviction must have been imposed before commission of the present felony."

Supreme Court denied Thomas's motion, ruling that "the original sentence date controls for the purpose of establishing predicate felony status." After the Appellate Division, Second Department decided People v Esquiled (121 AD3d 807 [2014]), holding that a prior conviction may not serve as a predicate felony if a "lawful sentence on that conviction was not imposed until after the instant crimes were committed," Thomas filed a second motion to vacate his sentence in 2015. Supreme Court granted the new motion and re-sentenced Thomas as a first felony offender to 2⅓ to 7 years in prison.

The Appellate Division, Second Department affirmed, saying Supreme Court "providently exercised its discretion in granting the defendant's second motion to vacate his sentence because the defendant established good cause for the second motion and the second motion had merit (see CPL 440.20[3] [and] Esquiled ...)."

The prosecution argues, "More than fifteen years after defendant was sentenced as a second felony offender in this case, defendant's sentences on his underlying predicate felony convictions were corrected at resentencing proceedings.... In light of the plain language of New York's second felony offender statutes, the legislative intent underlying those statutes, and Court of Appeals precedent interpreting those statutes, defendant is a second felony offender, because the original sentencing date, not the resentencing date, is the controlling date for determining whether a prior felony conviction qualifies as a predicate felony conviction."

For appellant: Brooklyn Assistant District Attorney Jean M. Joyce (718) 250-3383
For respondent Thomas: Melissa S. Horlick, Manhattan (212) 693-0085

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To be argued Wednesday, January 9, 2019

No. 6 & 7 U.S. Bank National Association v DLJ Mortgage Capital, Inc. (and other actions)

These breach of contract actions arise from residential mortgage-backed securities transactions sponsored by DLJ Mortgage Capital, Inc. prior to the 2008 financial crisis. DLJ placed thousands of residential mortgages with a principal value of nearly $4 billion into four trusts, which sold certificates representing interests in the mortgages to investors. U.S. Bank National Association, suing in its capacity as trustee of the trusts, alleges in each case that DLJ breached its representations and warranties about the quality of the mortgages and is obligated under the trust agreements to repurchase underperforming loans.

In No. 6, involving three of the trusts, the actions were originally commenced by the Federal Housing Finance Agency (FHFA) as conservator for Freddie Mac, an investor in the trusts. Due to a trust provision that strictly limits suits by the investors, FHFA lacked standing to sue and it substituted U.S. Bank as plaintiff. Supreme Court dismissed the suit with prejudice, barring U.S. Bank from refiling it.

The Appellate Division, First Department affirmed, saying, "Generally, actions dismissed on standing grounds may be refiled pursuant to CPLR 205(a).... However, here, the trustee is not entitled to refile the claims under CPLR 205(a), because it is not a 'plaintiff' under that statute.... Moreover, the trustee may not rely on relation-back (CPLR 203[f]) to save its refiled claims, because there was no 'valid preexisting action' to relate back to.... Because the trustee cannot benefit from either CPLR 203(f) or 205(a), the refiled claims are time-barred on standing grounds."

In No. 7, Supreme Court granted DLJ's motion to dismiss the suit without prejudice to refiling. It found the action was timely commenced, but ruled that because "the backstop provision expressly conditions DLJ's repurchase obligation on notice to both DLJ, as Seller, and Ameriquest, as Originator, it imposes conditions precedent to suit." U.S. Bank failed to serve a repurchase demand on Ameriquest prior to suing DLJ, "rendering the summons with notice defective."

The Appellate Division, First Department affirmed. It said U.S. Bank "did not meet the condition precedent to enforcement of [DLJ's] secondary 'backstop' repurchase obligation, which required that the trustee first provide notice of the alleged breaches to defendant Ameriquest Mortgage Company, and allow a 90-day cure period to expire. Under these circumstances, the trustee's timely claims were properly dismissed without prejudice to refiling pursuant to CPLR 205(a)...."

No. 6 For appellant U.S. Bank: Hector Torres, Manhattan (212) 506-1700
For respondent DLJ: Robert Loeb, Washington, DC (202 339-8400
No. 7 For appellant DLJ: Barry S. Levin, Manhattan (212) 506-5000
For respondent U.S. Bank: Philippe Selendy, Manhattan (212) 390-9000