

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 Thursday, April 21, 2022 (arguments begin at 2 pm)

No. 45 Batavia Townhouses, Ltd. v Council of Churches Housing Development Fund Company, Inc.

Council of Churches Housing Development Fund Company (Council), a non-for-profit corporation, borrowed \$4.7 million in 1971 to develop and operate Birchwood Village Apartments, an affordable housing complex in Batavia. Council defaulted on the loan in 1979 and, in order to bring in a cash infusion from private investors, it formed Batavia Townhouses, Ltd. (the Partnership) with itself as general partner and two limited partners: Arlington Housing Corp. and Batavia Investors, Ltd. The Partnership bought Birchwood Village from Council in 1979 for \$5.5 million and executed a wraparound mortgage in that amount in favor of Council. From 1979 to 2012, the Partnership used income from Birchwood to make payments to Council on the wraparound mortgage, and Council used those funds to pay off its original loan, which was fully satisfied in February 2012. The Partnership's wraparound mortgage, the only remaining encumbrance on Birchwood, matured on March 1, 2012. The Partnership made no further payments on that debt for the next seven years, and Council did not foreclose. Relations between the partners deteriorated in 2018 and in February 2019, as an effort by the limited partners to remove Council as managing general partner was in litigation, Council directed the Partnership to resume making payments on the wraparound mortgage without the consent of the limited partners. The Partnership made a total of \$330,000 in such payments to Council.

In May 2019, the limited partners brought this derivative action on behalf of the Partnership against Council seeking a declaration that the wraparound mortgage was unenforceable because the six year limitations period for foreclosure expired in March 2018. Council responded that the statute of limitations had been tolled under General Obligations Law §§ 17-101 and/or 17-105 because the Partnership's annual financial statements and tax returns for 2012 to 2018 listed the mortgage as an outstanding liability. Section 17-101 provides that an "acknowledgment" of a contractual debt is "competent evidence of a new or continuing contract" that tolls the limitations period for commencing actions "other than an action for the recovery of real property." Section 17-105(1) states, "A waiver of the expiration of the time limited for commencement of an action to foreclose a mortgage of real property ... or a promise to pay the mortgage debt ... is effective ... to make the time limited for commencement of the action run from the date of the waiver or promise."

Supreme Court granted the Partnership's motion to cancel the wraparound mortgage, finding that foreclosure was time barred, and ordered Council to return all mortgage payments it had received from the Partnership since February 2019.

The Appellate Division, Fourth Department affirmed, ruling that only section 17-105 applies here based on the "plain language" and legislative history of the statutes. While the "mere 'acknowledgment'" provision of section 17-101 applies "to all types of contractual debts," section 17-105 "was enacted specifically to address the waiver of the statute of limitations applicable to mortgage debt and ... provided that an express promise to pay such debt ... would be sufficient to revive the otherwise expired statute of limitations." It said the Partnership's financial statements and tax returns could not revive the limitations period because they "do not constitute an express promise to pay the mortgage debt."

Council argues that sections 17-101 and 17-105 both apply to mortgage foreclosures based on Petito v Piffath (85 NY2d 1), which considered both statutes in concluding that a time-barred foreclosure had not been revived. Council also contends that "acknowledgment" of a mortgage debt is sufficient to toll the limitations period under either statute because a promise to pay should be inferred from the acknowledgment.

For appellant Council of Churches: William E. Brueckner, Rochester (585) 546-2500

For respondent Batavia Townhouses: Steven D. Gordon, Washington, D.C. (202) 457-7038

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No. 46 **People v Dashawn Deverow**

Dashawn Deverow and a co-defendant, Jamane Yarbrough, were charged with murder after they fired into a group of people, including members of the “40 Boys” gang, who were gathered in front of an apartment building in Far Rockaway, Queens, in December 2012. A bullet fired by Yarbrough struck and killed 17-year-old Xavier Granville. Deverow raised a justification defense, claiming that the 40 Boys fired first and that he and Yarbrough returned their fire in self defense.

Raeqwon Moton, a prosecution witness who was the only eyewitness to testify at trial, said Deverow and Yarbrough fired the first shots. Moton testified that he had walked his girlfriend, Resha Johnson, to her home across the street from the gathering and, just after they parted, he encountered Deverow and Yarbrough, whom he knew. Moments later, a car skidded to a stop and Deverow and Yarbrough drew handguns, he said. When he began to run he heard two shots behind him, looked back, and saw Deverow and Yarbrough shooting into the gathering of people, Moton said. Deverow sought to call Johnson as a witness to contradict Moton’s account. She was prepared to testify that she was not with Moton on the day of the shooting and that she lived about a mile away from the scene, not across the street. The prosecution objected that Johnson’s proffered testimony would improperly impeach Moton on a collateral matter, the circumstances that led to his eyewitness testimony, and not on what he saw of the shooting. Supreme Court precluded Johnson’s testimony. Deverow was convicted of second-degree murder and weapon possession.

Deverow made a CPL 330.30 motion to set aside the verdict, arguing that the preclusion of Johnson’s testimony and other alleged evidentiary errors deprived him of his right to present a defense. Supreme Court denied the motion, saying the trial court “properly excluded extrinsic evidence ... that pertained to collateral matters,” including Johnson’s testimony, because it was “an attempt to impeach Mr. Moton’s credibility on the issue of his whereabouts prior to the shooting (as opposed to the shooting itself).” The court said, “His testimony was clear that he was no longer with Ms. Johnson when he witnessed the shooting.”

The Appellate Division, Second Department affirmed Deverow’s conviction, but reduced his sentence to 17 years to life in prison. The court generally rejected his “contention that certain of the Supreme Court’s evidentiary rulings violated his right to present a defense,” but it did not directly address the preclusion of Johnson’s testimony.

Deverow argues that “the court precluded the defense from calling [Moton’s] former girlfriend, who would have denied that she was with him moments before the shooting or at all that night, nor near the scene of the crime. Such testimony went directly to the eyewitness’s credibility on whether he witnessed and could accurately recall the shooting, and was not collateral.” Among other claims, he argues the court improperly “excluded three 911 calls from disinterested witnesses” that “were relevant, as reports of a chaotic scene with multiple shooters supported appellant’s fear that he was being fired upon and acted in self-defense.”

For appellant Deverow: Alice R. B. Cullina, Manhattan (212) 693-0085 ext. 234

For respondent: Queens Assistant District Attorney Nancy Fitzpatrick Talcott (718) 286-6696

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No. 51 People v Luis A. Rodriguez

Luis Rodriguez, a 43-year-old high school volleyball coach, was accused of engaging in sexual text message conversations in October and November of 2014 with a 15-year-old female student who was a member of his team. In the texts, Rodriguez described sexual acts he wished to perform with the girl, asked her to send him nude photographs of herself, and sent her a video of himself masturbating, among other things. The conversations ended when the girl's boyfriend discovered the text messages, locked himself in a room with her phone, and took a series of screenshots of the texts. He also sent texts to Rodriguez from her phone, threatening him and demanding money. He came out of the room and assaulted the complainant "to teach her a lesson," and he showed the screenshots to the police when he was arrested for the assault a short time later. The complainant later testified that she deleted all of the messages as soon as she recovered her phone from the boyfriend, but she told the police they were stored in her iCloud account and gave them her password.

At trial, Supreme Court admitted five of the screenshots into evidence based largely on the complainant's testimony that they were accurate copies of messages she received from Rodriguez. Rodriguez was convicted of two felonies – attempted use of a child in a sexual performance and first-degree disseminating indecent material to a minor – and a misdemeanor of endangering the welfare of a child. He was sentenced to two to six years in prison.

The Appellate Division, Second Department reversed on a 3-2 vote, ruling the screenshots were improperly admitted. It said "the text messages themselves were insufficient to establish the defendant's identity as their author.... Nor was the complainant's testimony, standing alone, sufficient to establish this disputed fact, particularly since ... part of the conversation depicted by the subject screenshots allegedly took place while the complainant's unlocked phone was in the possession of her former boyfriend, who had locked himself in a separate room and was texting the defendant...." While the police had the complainant's iCloud password, the court said the prosecution "offered no evidence that the police ever checked either the defendant's phone or the complainant's iCloud account to determine the identity of the participants in the conversation. Under these circumstances, the admission into evidence of the disputed screenshots – all of which were taken by the former boyfriend – was error."

The dissenters said "the People's evidence established that more than 200 communications, which included text messages and telephone calls, were sent between cellular telephone numbers identified as belonging to the defendant and the complainant. The complainant identified the subject screenshots as being text messages the defendant sent to her cellular phone on November 7, 2014. She described, in detail, the criminal events at issue and identified the defendant as the actor/perpetrator who sent the subject messages." This evidence "was sufficient to provide a proper foundation for admission of these screenshots ... and to authenticate the same.... The fact that the complainant's former boyfriend took the screenshots ... does not warrant a different result. The credibility of witnesses and any alleged motive to alter evidence properly go to the weight [of the evidence] ... rather than admissibility."

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For respondent Rodriguez: Samuel Barr, Manhattan (212) 693-0085 ext. 261