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.

WEEK OF MAY 6 - 8, 2014

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

State of New York Court of Appeals

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To be argued Tuesday, May 6, 2014

No. 121 Norex Petroleum Limited v Blavatnik

Norex Petroleum Limited, an oil company based in Alberta, Canada, brought an action in 2002 in U.S. District Court for the Southern District of New York against two Russian nationals living in New York, Leonard Blavatnik and Victor Vekselberg, and several foreign companies allegedly owned or controlled by them. Asserting claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), Norex alleged the defendants misappropriated its majority interest in a Siberian oil field in 2001 -- using armed militiamen and corrupt Russian court proceedings, among other illegal means -- after the fall of the Soviet Union. Norex amended its complaint in 2005 to add BP PLC as a defendant. The federal trial court granted a defense motion to dismiss the suit for lack of subject matter jurisdiction, and the U.S. Court of Appeals for the Second Circuit affirmed. In 2011, when the federal dismissal took effect, Norex brought this action in State Supreme Court in Manhattan, asserting related state law claims against the same defendants.

The defendants moved to dismiss the action as time-barred under CPLR 202, New York's borrowing statute, which requires a nonresident plaintiff to satisfy the statute of limitations of New York and of the foreign jurisdiction where the claims accrued, in this case, Alberta. Alberta law provides a two year limitations period for the claims at issue, and it does not toll the limitations period while a related action is pending in another court. Norex argued its suit was timely under 28 USC § 1367(d), which gives plaintiffs 30 days to re-file related claims in state court after their federal case is dismissed "unless State law provides for a longer tolling period;" and under CPLR 205(a), which gives plaintiffs six months to re-file related claims. Supreme Court granted the motion to dismiss under CPLR 202, finding Alberta's statute of limitations would have expired for most defendants in 2004, two years after Norex filed its federal action.

The Appellate Division, First Department affirmed. It ruled 28 USC § 1367(d), giving plaintiffs 30 days to re-file related claims "unless State law provides for a longer tolling period," did not apply in this case because CPLR 205(a) gives plaintiffs in New York six months. However, it said, "CPLR 205(a) could not save [Norex's] claims in any event, because New York's borrowing statute requires the courts to apply Alberta's limitations period," which provides no toll.

Norex argues its action is timely under 28 USC § 1367(d) and CPLR 205(a), the federal and state savings statutes. It says the lower court's conclusion that 28 USC § 1367(d) does not apply because CPLR 205(a) provides a longer tolling period, even though that toll is not available here, "defies common sense, the plain language and purpose of both statutes, and controlling [state and federal] precedents." It says the limiting phrase in 28 USC § 1367(d), "unless State law provides for a longer tolling period," should apply only when the longer state tolling period is actually available in the particular case.

For appellant Norex: Barry R. Ostrager, Manhattan (212) 455-2000
For respondents Blavatnik et al: Owen C. Pell, Manhattan (212) 819-8200

State of New York Court of Appeals

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To be argued Tuesday, May 6, 2014

No. 107 People v Sidney Wisdom *(papers sealed)*

An intruder shot 66-year-old Amy Donaldson three times in the chest and choked her 4-year-old granddaughter after forcing his way into her Prospect Heights apartment in January 1996. She identified an acquaintance, Sidney Wisdom, as the shooter. Because her injuries prevented her from appearing before the grand jury, the prosecutor obtained court approval to conduct a videotaped examination of Donaldson, but failed to place her under oath before questioning her. When the video was played for the grand jury, the prosecutor realized the error and obtained a court order for a second videotaped examination, which was conducted 15 days after the first. Donaldson was sworn and attested that her previous statements were true, but she was not asked to recount any of her prior testimony. After the second video was shown to the grand jury, it indicted Wisdom on numerous charges.

At trial, Wisdom was convicted of second-degree attempted murder (two counts), first-degree burglary and endangering the welfare of a child, sentenced to an aggregate term of 25 to 50 years. Nearly 10 years later, in 2007, the Appellate Division granted Wisdom's pro se motion for poor person relief and assignment of counsel to perfect his appeal. Among other claims, he argued that the integrity of the grand jury was impaired by the presentation of Donaldson's unsworn testimony, and that the oath administered after that presentation did not cure the defect.

The Appellate Division, Second Department reversed and dismissed the indictment, with leave to resubmit the charges to another grand jury, ruling the integrity of the proceeding was impaired under CPL 210.35(5). "The oath is effective to promote truthful testimony only if the oath is administered before the witness testifies," it said. Due to the failure to swear in Donaldson before her first examination, "the grand jury proceeding 'fail[ed] to conform to the requirements of article one hundred ninety' (CPL 210.35[5]), and "the extent of the deviation from those requirements was so great that dismissal is required.... No evidence in the grand jury, other than in Donaldson's videotaped examinations, inculpated the defendant." It said the second examination did not cure the error. "The testimonial oath is intended to influence the witness while the witness is testifying, in each answer. The belated oath to Donaldson did not serve that purpose, given the failure to restate the content of her first examination.... A finding here that the prosecutor's failure to administer the oath to Donaldson was inconsequential would be tantamount to a conclusion that the testimonial oath is merely an empty exercise."

The prosecution argues the failure to swear in Donaldson for her first examination did not impair the fundamental integrity of the proceeding because it "was corrected by conducting a second videotaped examination," in which "Donaldson took the testimonial oath and swore to the truth of what she had said during the first examination." Contending there was no prejudice to Wisdom, it says, "The evidence before the trial court ... showed that the belated administration of the oath did not have any effect on the substance of Donaldson's grand jury testimony. Donaldson had identified defendant as the assailant immediately after the crime, long before her grand jury testimony," and her "testimony before the grand jury was substantively the same as the testimony Donaldson gave under oath at trial."

For appellant: Brooklyn Assistant District Attorney Ann Bordley (718) 250-2464
For respondent Wisdom: De Nice Powell, Manhattan (212) 693-0085

State of New York Court of Appeals

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To be argued Tuesday, May 6, 2014

No. 108 People v Patricia Fratangelo

Patricia Fratangelo was stopped for speeding in the Town of Ovid, Seneca County, in September 2011, and was given field sobriety tests after the trooper smelled alcohol. The trooper determined that she failed four of the seven tests and arrested her. A breath test conducted about 80 minutes after the stop detected a blood-alcohol content (BAC) of .09 percent. She was charged with common law DWI (VTL § 1192[3]) and DWI per se (VTL § 1192[2]).

At trial in the Town of Ovid Justice Court, Fratangelo testified that she had shared a bottle of wine with three other people during dinner less than an hour before she was stopped. She also presented expert testimony by a pharmacologist, who concluded that, based on the rate at which alcohol is absorbed and on the breath test result, her BAC at the time of the traffic stop would have been .03 to .04 percent. Based on the expert testimony, Fratangelo requested that the judge include in his jury charge on common law DWI a portion of the Criminal Jury Instruction (CJI) that states: "Under our law, evidence that there was less than .08 of one per centum by weight of alcohol in the defendant's blood is prima facie evidence that the defendant was not in an intoxicated condition." The judge refused. Fratangelo was convicted of common law DWI and acquitted of DWI per se.

Seneca County Court affirmed, ruling that the requested CJI charge applies only to chemical test evidence, not expert opinion testimony. "The statutory basis for the presumption is Vehicle & Traffic Law § 1195, which relates to the admissibility of evidence regarding chemical tests," the court said. "Specifically, subsection (2) of § 1195 provides that the presumption arises from 'evidence of blood-alcohol content as determined by such tests'. [Emphasis added (by County Court)]. Thus, any instructions regarding prima facie evidence that can be presented as a result of V&T Section 1195, must be based upon chemical analysis, and not the opinion testimony of a defense expert."

Fratangelo argues she was entitled to the jury charge on the presumption of sobriety because it "is supported by the facts of the case," including her own testimony about when and how much she drank, the trooper's testimony about her BAC reading, and her expert witness's scientific opinion about her BAC at the time she was stopped. She says the word "evidence" in the jury instruction "is not limited to just the machine result. The law recognizes that evidence of any proposition can be either direct evidence, or circumstantial evidence.... Any evidence of a blood alcohol content at the time of operation of a motor vehicle -- based on a test performed at some later time -- is, necessarily, the product of either a presumption (that the blood alcohol content level was the same) or expert opinion (that it was not). Regardless of whether the evidence of blood alcohol content is based on a presumption or on expert opinion testimony, it is still evidence of the defendant's blood alcohol content."

For appellant Fratangelo: James A. Baker, Ithaca (607) 275-0016
For respondent: Seneca County District Attorney Barry L. Porsch (315) 539-1300

State of New York Court of Appeals

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To be argued Tuesday, May 6, 2014

No. 109 Morpheus Capital Advisors LLC v UBS AG

At the height of the financial crisis in September 2008, UBS Real Estate Securities, Inc. (UBSRE) entered into an agreement retaining Morpheus Capital Advisors LLC as its "financial advisor and investment banker" for the sale of UBSRE's student loan assets, which had a face value of $510 million, but had fallen dramatically in value and become illiquid, commonly called "toxic assets." The agreement gave Morpheus the "exclusive right to solicit counterparties for any potential Transaction involving the Student Loan Assets." Upon closing of a deal, the agreement provided that Morpheus would be paid a success fee based on a percentage of the "Transaction Amount," which it "defined as the agreed value of the Student Loan Assets which are transferred or sold to a third party, or in respect to which the risk of first loss is assumed by a third party, in one or a series of transactions."

In October 2008, the Swiss National Bank (SNB) announced plans to strengthen the Swiss financial system with a form of bailout by creating a Stabilization Fund and financing the transfer of illiquid assets from financial institutions to the fund. At the same time, UBSRE's corporate parent, Swiss bank UBS AG, announced it had reached agreement with the SNB to transfer billions of dollars of toxic assets to the Stabilization Fund, including the student loan assets held by UBSRE. Morpheus brought this breach of contract action against UBSRE and its parent, claiming it was entitled to a success fee of nearly $3 million. Supreme Court granted the defendants' motion to dismiss the complaint.

The Appellate Division, First Department modified by reinstating the complaint against UBSRE in a 3-1 decision. Although the agreement granted Morpheus "only an exclusive agency" and no broker was involved in the sale of UBSRE's assets to the Stabilization Fund, the court said, "[S]ince the agreement required UBSRE to give plaintiff the opportunity to solicit a counterparty prior to transferring its assets to the Fund, and since plaintiff pleads a breach of that very term, the complaint states a cause of action for breach of contract." It said, "To the extent that the agreement unambiguously and without limitation contemplates compensation to plaintiff when 'the risk of first loss is assumed by a third party, in one or a series of transactions,' and does not limit compensation to plaintiff only if it introduced such third party to UBSRE, we also find merit to plaintiff's contention that the agreement mandated compensation for any transaction involving UBSRE's toxic assets during the term of the agreement."

The dissenter said, "Under an exclusive agency contract, no liability to pay a commission is incurred where the property is transferred to a purchaser located by the client, without the participation of either the contracting broker or any other.... [T]he brokerage agreement provides for an exclusive agency..., not an exclusive right to sell. A party that enters into an exclusive agency provision with a broker is free to transfer the subject property to a buyer that the seller locates or, as here, independently locates the seller...."

For appellant UBSRE: Kenneth A. Caruso, Manhattan (212) 819-8200
For respondent Morpheus: William B. Pollard, III, Manhattan (212) 418-8600

State of New York Court of Appeals

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To be argued Tuesday, May 6, 2014

No. 110 KeySpan Gas East Corporation v Munich Reinsurance America, Inc.

The Long Island Lighting Company (LILCO), facing possible regulatory action requiring it to clean up soil and water contamination left by its operation of manufactured gas plants on Long Island, including plants in Hempstead and Bay Shore, notified its insurers in the fall of 1994 of the potential environmental damage claims. In response to LILCO's notices, the insurers -- including Munich Reinsurance America, Inc., Century Indemnity Company, and Northern Assurance Company of America -- issued reservation of rights letters that identified LILCO's late notice as a potential defense. In 1995, the State Department of Environmental Conservation directed LILCO to pay for investigation and any necessary remediation of the plant sites, which ultimately resulted in a negotiated consent order. The insurers disclaimed coverage in 1997, after LILCO brought this action for a declaration that the insurers must defend and indemnify it for those costs under excess comprehensive general liability policies they issued from 1953 to 1969. LILCO subsequently assigned its insurance claims to KeySpan Gas East Corporation, a National Grid subsidiary.

Supreme Court granted the insurers' motions for summary judgment declaring they had no duty to indemnify KeySpan and LILCO for environmental damage costs at the Bay Shore site, due to LILCO's failure to provide timely notice as required by the policies. It denied the insurers' motions regarding the Hempstead site, finding there were issues of fact concerning the reasonableness of LILCO's delay. The court rejected LILCO's argument that the insurers waived the defense of untimely notice by not disclaiming coverage before LILCO sued them.

The Appellate Division, First Department modified by denying the insurers' motions as to the Bay Shore site and vacating the declaration. It found, as a matter of law, that LILCO failed to give timely notice of its claims; but it said summary judgment for the insurers "is premature because issues of fact remain as to whether defendants waived their right to disclaim coverage based on late notice." The Insurers' reservation of rights "did not preclude the finding of waiver due to failure to timely issue a disclaimer...," it said. "[I]ssues of fact exist as to whether sufficient information was provided to insurers in 1995 such that their subsequent failure to issue a notice of disclaimer on the grounds of late notice, until raising it as a defense in their answers filed in 1997, resulted in a waiver...."

The insurers argue, "The decision below applies a rule requiring all insurers to make a coverage determination 'as soon as reasonably possible,' or forfeit their rights to deny coverage. No such duty exists at common law." The rule "is derived from a statutory standard prescribed for *one particular category* of insurance claims, i.e., accidental death and bodily injury claims, for policy reasons specific to those claims." They say, "Under the common-law rules that properly govern this case, LILCO's late notice ... warrants a judgment of non-coverage.... The insurers did not intentionally waive their rights to deny coverage based on late notice, and LILCO ... cannot argue that it was prejudiced by any delay in the coverage denial."

For appellants Munich Reinsurance et al: Jonathan D. Hacker, Washington, DC (202) 383-5300
For respondent KeySpan: Jay T. Smith, Manhattan (212) 841-1000

State of New York Court of Appeals

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To be argued Wednesday, May 7, 2014

No. 111 People v Jamel Walston

Jamel Walston was charged with murder for the fatal shooting of Bertrand Jocelyn outside the Sumner Houses in Brooklyn in July 2008. In statements to the police, Walston said a friend was in a fistfight with Jocelyn and when Jocelyn gained the upper hand and began beating his friend, Walston fired a revolver at Jocelyn's legs at a distance of about 15 feet. Jocelyn was struck five times in the head, torso and thigh. Walston denied that he intended to kill Jocelyn and said he meant to shoot him only in the legs.

At trial, Supreme Court granted defense counsel's request to submit first-degree manslaughter to the jury as a lesser included offense of second-degree murder. During deliberations, the jury sent a note asking for a readback: "Power Point -- Judges directions on Manslaughter/Murder in the Second Degree (Intent)". The court told the attorneys, "They want the Judge's directions on manslaughter and murder in the second degree," but the court did not mention the word "intent." The court then re-read its instructions on murder and manslaughter. In response to a subsequent note from the jury, the court gave instructions on intent. The jury acquitted Walston of murder and convicted him of first-degree manslaughter and second-degree criminal possession of a weapon. He was sentenced to 20 years in prison.

The Appellate Division, Second Department affirmed, finding Walston did not preserve his claim that the trial court failed to afford him meaningful notice of a jury note and committed a mode of proceedings error under People v O'Rama (78 NY2d 270) by paraphrasing the jury's note without mentioning that it specified "intent." The Appellate Division also found that his attorney's failure to request submission of second-degree manslaughter did not deprive him of effective assistance of counsel "because there is no reasonable view of the evidence that would have supported a finding that the defendant acted recklessly in repeatedly shooting the victim."

Walston argues, "The court's failure to reveal the exact contents of the note deprived appellant of meaningful notice under [CPL] 310.30, prevented defense counsel from participating meaningfully in this critical stage of the trial, violated his right to due process, and constituted a mode of proceedings error." He says, "Had counsel known the full contents of the note, he could have provided input on an appropriate response..., for example, suggesting that the court read the detailed intent instruction it had given during the final charge." He also contends he was deprived of effective assistance of counsel.

The prosecution argues, "[I]n light of the presumption of regularity, it is presumed that the trial court complied with the requirements of [CPL] 310.30 by showing the note to defense counsel, and the record does not contain substantial evidence to overcome that presumption. Thus, the record does not show that the court did, in fact, fail to disclose to defense counsel the exact content of the jury's note."

For appellant Walston: Kendra L. Hutchinson, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Rhea A. Grob (718) 250-2480

State of New York Court of Appeals

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To be argued Wednesday, May 7, 2014

No. 112 Quadrant Structured Products Co., Ltd. v Vertin

This Delaware case stems from a dispute among investors in Athilon Capital Corp. (Athilon), a Delaware corporation formed in 2004 to sell credit default swaps to large financial institutions. To finance its operations, Athilon raised $600 million by issuing securities covered by two identical trust indentures governed by New York law, one created in 2004 between Athilon and Deutsche Bank Trust Company Americas as indenture trustee, and one created in 2005 between Athilon and The Bank of New York as indenture trustee. The securities included $350 million in senior subordinated notes, $200 million in subordinated notes, and $50 million in junior notes. After the financial crisis of 2008 disrupted Athilon's business, EBF & Associates, LP acquired a large position in Athilon's junior notes at a significant discount. In 2010, EBF acquired all of Athilon's equity and replaced its board of directors. Quadrant Structured Products Co., Ltd. acquired a share of Athilon's senior and subordinated notes in 2011, then brought this action in the Delaware Court of Chancery against Athilon and its board of directors, EBF and an EBF affiliate, Athilon Structured Investment Advisors, alleging that Athilon's board, installed by EBF, is pursuing risky strategies designed to benefit EBF and its affiliates at the expense of other classes of note holders.

The defendants moved to dismiss on the ground Quadrant's claims are barred by the no-action clause in the trust indenture, which states, "No holder of any Security shall have any right by virtue or by availing of any provision of this Indenture to institute any action or proceeding at law or in equity or in bankruptcy or otherwise upon or under or with respect to this Indenture..., or for any other remedy hereunder, unless such holder previously shall have given to the Trustee written notice of default," among other conditions. It is undisputed that Quadrant did not comply with those conditions.

The Court of Chancery dismissed the suit. On appeal, the Delaware Supreme Court remanded the case with instructions to analyze "the significance (if any) under New York law of the differences between the no-action clauses" that bar remedies "with respect to this Indenture or the Securities," and the no-action clause in this case, which bars remedies "with respect to this Indenture," but makes no reference to remedies pertaining to securities. The Court of Chancery concluded that the Athilon no-action clause bars enforcement only of contractual claims arising under the indenture, and that Quadrant's claims as a note holder should be reinstated.

In a certified question, the Delaware Supreme Court is asking the New York Court of Appeals to determine "whether, under New York law, the absence of any reference in the no-action clause to 'the Securities' precludes enforcement only of contractual claims arising under the Indenture, or whether the clause also precludes enforcement of all common law and statutory claims that security holders as a group may have." It also asks whether the Court of Chancery's conclusion in its Report on Remand is a correct application of New York law.

For appellant Quadrant: Sabin Willett, Boston, MA (617) 951-8000
For respondents Athilon et al: Kathleen M. Sullivan, Manhattan (212) 849-7000

State of New York Court of Appeals

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To be argued Wednesday, May 7, 2014

No. 113 Hamilton v Miller
No. 114 Giles v Yi

Christopher Hamilton and Shawn Giles brought these actions seeking damages from landlords for injuries they allegedly sustained as a result of exposure to lead-based paint in apartments rented by their families in Rochester when they were children. The plaintiffs claimed they suffered neurological damage and related cognitive and behavioral problems, but disclosed no medical diagnoses linking their injuries to lead exposure. Prior to conducting independent medical examinations (IMEs) under CPLR 3121, six defendant landlords moved, pursuant to 22 NYCRR 202.17, to compel the plaintiffs to produce any medical reports diagnosing them with the alleged injuries and causally relating those injuries to lead exposure.

Supreme Court granted the defense motions, ordering the plaintiffs to produce medical reports diagnosing their injuries and linking them to lead, "or Plaintiff[s] shall be precluded from introducing any proof concerning injuries alleged to have been sustained." The court said it would be "fundamentally unfair and contrary to the spirit and intent of the medical report disclosure rules" in 22 NYCRR 202.17 "to force defendants to conduct IMEs in a vacuum." In Hamilton, it also rejected the plaintiff's request that it take judicial notice of 42 USC § 4851, the congressional findings underlying the Residential Lead-Based Paint Hazard Reduction Act of 1992, saying the statute did not apply to the issues in his case.

The Appellate Division, Fourth Department affirmed both orders. In a 4-1 ruling in Giles, it said Supreme Court "did not abuse its broad discretion" in ordering the plaintiff to produce a diagnosis linking his injuries to lead. "Although the dissent is correct that CPLR 3121 and 22 NYCRR 202.17 to not require the disclosure directed in this case, they likewise do not preclude"it, and the order is not "unduly burdensome." Where the records produced by a plaintiff "contain no proof of medical causation..., it is not an abuse of discretion for a trial court to determine that 'defendants should not be put to the time, expense and effort of [conducting an IME] without the benefit of [a] report [or reports] linking the symptoms or conditions of plaintiff to defendants' alleged negligence'...." It said, "[T]he purpose of CPLR 3121(a) is to afford the examining party the 'opportunity to present a competing assessment'" of the plaintiff's condition, "which presumes that the examining party has received from the plaintiff medical reports concerning the plaintiff's claimed injuries and theory of causation...."

The dissenter said the order "imposes unduly burdensome obligations not contemplated by 22 NYCRR 202.17.... [F]or plaintiff to succeed at trial, he will likely need to retain an expert to review his medical records and render the type of causation opinion contemplated by the majority. However, nothing in the language of 22 NYCRR 202.17 requires plaintiff to make such a disclosure, which is tantamount to an expert disclosure, at this early stage of litigation." The regulation "requires only the disclosure of 'medical reports of those medical providers who have previously treated or examined the party seeking recovery'.... In my view, an expert witness retained to render an opinion as to causation solely for purposes of litigation is not a 'medical provider' as that term is commonly understood...," and the regulation requires disclosure of "only the reports of medical providers who have 'previously treated or examine'" the plaintiff.

For appellants Hamilton and Giles: Mo Athari, Utica (315) 733-9820
For respondents Musinger and Singer (No. 113): Thomas E. Reidy, Rochester (585) 454-0700
For respondent Miller (No. 113): Stanley J. Sliwa (submitted), Buffalo (716) 853-2050
For respondent Breen (No. 114): Gary H. Abelson, Rochester (585) 295-4400
For respondent Yi (No. 114): William Wingertzahn, White Plains (914) 323-7000

State of New York Court of Appeals

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To be argued Wednesday, May 7, 2014

No. 115 Matter of O'Neill v Pfau

The president of the Suffolk County Court Employees Association, Thomas P. O'Neill, and four court officers assigned to Suffolk County courts, brought this article 78 proceeding to challenge aspects of a statewide reclassification of court security job titles adopted by then-Chief Administrative Judge Ann Pfau in 2004. In January 2004, the chief administrative judge (CAJ) abolished the position of Court Officer (JG-16) by administrative order and replaced it with the new position of NYS Court Officer (JG-17). In calculating the salaries of the affected court officers, the CAJ treated the new title as a reclassification pursuant to Judiciary Law § 37(5) instead of a reallocation pursuant to Judiciary Law § 37(3)(c). The petitioners allege this deprived them of a continuous service credit they would have received in a reallocation and that the CAJ's determination lacked a rational basis. On April 7, 2004, affected officers received their first paychecks reflecting the salary increase to JG-17, but no continuous service credit. In December 2004, the CAJ increased the pay grade of NYS Court Officers from JG-17 to JG-18, retroactive to January 2004. The petitioners allege that by making the increase in judicial grade retroactive rather than prospective, the CAJ arbitrarily and capriciously denied them a reallocation benefit to which they were entitled pursuant to Judiciary Law § 37(11).

Supreme Court ruled in favor of the court officers and remitted the matter to the CAJ to recalculate the salaries of affected officers assigned to Suffolk County. Regarding the January 2004 order, the court found the CAJ had no rational basis for treating the change in the court officer title as a reclassification instead of a reallocation of positions. "A comparison of the relevant title standards demonstrates that the Court Officers' duties and responsibilities are sufficiently similar so that a reclassification was not justified," it said. Regarding the December 2004 order, it said retroactive application of the pay grade increase "appears to be inconsistent with the intendment of the governing statutory language."

The Appellate Division, Second Department modified by deleting the provision directing the CAJ to recalculate the salaries of officers assigned to the new job title under the January 2004 order. It ruled the officers' claim for continuous service credit was time-barred. The officers "were affected by the January Order" when "they received their first paychecks reflecting the JG-17 pay rate -- but not the continuous service credit -- on April 7, 2004," and they did not file their suit until July 2005, after the four-month limitations period expired. It said, "Contrary to the petitioners' contention, the December Order did not 'constitute the sort of "fresh, complete and unlimited examination into the merits" as would suffice to revive the Statute of Limitations'...." As for the retroactive pay raise to JG-18 in the December Order, the court said, "[R]egardless of whether the [CAJ] has such authority, the petitioners came forward with evidence that they were financially harmed by the retroactive salary adjustment, and established that no rational basis for retroactivity appears in the record."

For appellants-respondents O'Neill et al: David Schlachter, Uniondale (516) 522-2540
For respondent-appellant Pfau (CAJ): Lee Alan Adlerstein, Manhattan (212) 428-2150

State of New York Court of Appeals

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To be argued Thursday, May 8, 2014

No. 119 Lynch v City of New York

New York City is appealing an order that declared it in violation of Retirement and Social Security Law § 480(b)(i) and (ii) for failing to pay a portion of employee pension contributions on behalf of police and firefighters in tier 3 of the City's pension system. Since 1963, the City has made such payments for police and firefighters in tiers 1 and 2 under the "increased-take-home-pay" (ITHP) program pursuant to Administrative Code §§ 13-226 and 13-326. Retirement benefits for tiers 1 and 2 include a pension component and an annuity component, and ITHP covered a portion of the members' annuity contributions. In 1974, the temporary ITHP benefit was extended and recodified as Retirement and Social Security Law § 480, which applied to "[a]ny program under which an employer in a public retirement system ... assumes all or part of the contribution which would otherwise be made by its employees toward retirement...." ITHP was made permanent in 2009, with the City's ITHP contribution rate set at 5 percent of salary. Since July 1, 2009, the City has placed newly hired police and firefighters into the tier 3 retirement plan. Tier 3 provides a pension benefit, but has no annuity component. In 2010, Patrick Lynch, as president of the Patrolmen's Benevolent Association, brought this suit against the City, alleging that its failure to make ITHP contributions for tier 3 members violated section 480, among other things. The Captain's Endowment Association and the Uniformed Fire Officers' Association subsequently joined the suit.

Supreme Court granted partial summary judgment for the Unions, declaring the City violated section 480 by failing to make ITHP contributions for tier 3 members. It dismissed the Unions' other claims, including one for conversion.

The Appellate Division, First Department, on a 3-1 vote, affirmed the declaration that the City is in violation of section 480. It also reinstated the conversion claim and granted judgment against the City on liability. "Unlike Administrative Code § 13-226," which created the ITHP benefit, Retirement and Social Security Law § 480, which extended ITHP in 1974, "makes no reference to any 'annuity contribution,'" it said. "By its own language, section 480 is not restricted to tier 1 or 2, or to annuity contributions. Rather, it applies to '[a]ny program' under which a government employer makes a 'contribution which would otherwise be made by its employees toward retirement'.... [T]he plain language indicates a legislative policy to apply ITHP to any government employee, regardless of pension tier...."

The dissenter argued that all the Unions' claims should be dismissed. He said the decision gives to tier 3 members an ITHP "benefit that, as enacted in the 1960s and 1970s..., applies only to tiers 1 and 2 of the retirement system. In a nutshell, the operative language creating the ITHP benefit (a reduction of annuity contributions) cannot be applied to tier 3 members, whose retirement plan lacks any annuity component.... [T]he majority takes the 1974 law that extended the preexisting ITHP benefit to tier 1 and 2 employees and applies it to police officers and firefighters hired in 2009 or later, who belong to the entirely dissimilar tier 3...."

For appellant City: Assistant Corporation Counsel Keith M. Snow (212) 356-2600
For respondents Lynch and PBA: James M. McGuire, Manhattan (212) 698-3500
For respondents Hagan and Richter: Philip H. Seelig, Manhattan (212) 766-0600

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 Thursday, May 8, 2014

No. 116 Matter of Antwaine T. *(papers sealed)*

In November 2010, 15-year-old Antwaine T. was arrested in Brooklyn for possessing a machete. He was charged with weapon possession and with juvenile delinquency under Penal Law § 265.05, which states, "It shall be unlawful for any person under the age of sixteen to possess ... any dangerous knife...." In support of the delinquency petition, the Corporation Counsel's Office attached a sworn statement by the arresting officer, who said that at about 11:23 p.m. "... I was working in my official capacity as a police officer, when I recovered a machete from the Respondent. The blade of the machete was approximately 14 inches in length..... Later, the Respondent's mother informed me that the Respondent ... is 15 years old. The Respondent's mother also provided me with a photocopy of the Respondent's birth certificate, which confirmed this information."

In Family Court, Antwaine ultimately admitted to unlawful possession of a dangerous knife by a person under the age of 16. The court adjudicated him a juvenile delinquent and placed him on probation. On appeal, he argued the delinquency petition must be dismissed for facial insufficiency because it "failed to allege any facts to establish that the knife [he] possessed ... was a 'dangerous knife' under Matter of Jamie D., 59 NY2d 589 (1983)."

The Appellate Division, Second Department reversed, ruling the petition was facially insufficient to support the charge "because it did not contain allegations which, if true, would have established that the knife he possessed was a 'dangerous knife'" under Penal Law § 265.05. "The supporting deposition merely described the unmodified, utilitarian knife which [Antwaine] possessed, and contained no allegations as to the 'circumstances of its possession,' so as to 'permit a finding that on the occasion of its possession it was essentially a weapon rather than a utensil,'" the court said, quoting Jamie D.

The Corporation Counsel's Office argues the petition was sufficient to establish the elements of the charge because a machete on an urban street is inherently dangerous. "As to whether the weapon itself constituted a 'dangerous knife,' the police officer described it in his deposition as 'a machete,' the blade of which was 'approximately 14 inches in length,'" it says. "Moreover, the police officer recovered this inherently dangerous knife from Antwaine T. ... late at night on the streets of the Bedford-Stuyvesant neighborhood in Brooklyn." It says the First Department, in People v Campos (93 AD3d 581), "held that a machete may be found to be a 'dangerous knife' when, *inter alia*, it is possessed 'at a time and place where its use for a lawful purpose such as agriculture was highly unlikely.'"

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State of New York Court of Appeals

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To be argued Thursday, May 8, 2014

No. 117 People v Anner Rivera

After a gun fight in Red Hook, Brooklyn, in October 2007, Anner Rivera was charged with fatally shooting Andres Garcia and firing at two of Garcia's companions, who escaped. Rivera raised a justification defense, testifying that Garcia shot his friend five or six times and fired more than twice at him before he returned fire.

At the end of the second day of jury deliberations, a juror asked to speak to the judge. At the suggestion of the prosecutor and defense counsel, the judge spoke with the juror on the record in his robing room, with only the court reporter present. The juror sought to pursue the jury's prior request for guidance about when a defendant is considered to be in imminent danger. He said, "I just want to know by the law, when can we be considered to deem defendant, I guess, responsible? That's the big issue with some of us." The judge replied, "That's understandable, but I can't, there is no legal definition other than what I've given you. All the rest depends on an interpretation of the evidence, as I said, in the courtroom. This is a fact question for you to determine what the facts are from the evidence and make your determination. There is no help I can give you." After more discussion in a similar vein, the judge returned to the courtroom and told the attorneys, "I indicated that what I told him in court is exactly what I have to tell him now, that this is a fact question to be determined by the jury itself. And he asked me would tomorrow be the last day and I said I couldn't tell him and that was it." Realizing the defendant was not present, the judge had Rivera brought in and repeated the report he had just given the attorneys. The judge said they could request a read-back of his conversation with the juror, but no one did.

The jury acquitted Rivera of murder and manslaughter, but convicted him of criminal possession of a weapon in the second degree. He was sentenced to 12 years in prison.

The Appellate Division, Second Department reversed and ordered a new trial on weapon possession. It said Supreme Court "erred when it received and answered a series of questions from a juror ... outside the presence of the defendant, defense counsel, the prosecutor, and the other jurors," in violation of Rivera's constitutional and statutory rights to be present. "The juror's questions ... were not purely ministerial as they directly related to the substantive legal and factual issues of the trial.... Since the error affects 'the organization of the court or the mode of proceedings prescribed by law'..., preservation is not required, and the issue of law is presented for review 'even though counsel may have consented to the procedure'...."

The prosecution argues the trial court "substantially cured any violation of defendant's right to be present because, by explaining to defendant and his attorney what had happened in their absence, and by informing them that they could hear a readback of the court's discussion with the juror, the court gave defendant an opportunity to provide input regarding the instruction at a time when any appropriate further instruction could have been given." It says, "[T]he 'mode of proceedings' exception to the preservation requirement does not apply to defendant's claim, because the trial court substantially cured the alleged error"

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State of New York Court of Appeals

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To be argued Thursday, May 8, 2014

No. 118 People v Lionel McCray

In October 2009, Lionel McCray was accused of entering two commercial areas housed in the Hilton Times Square Hotel in Manhattan: the hotel's employee locker room, where he fled when confronted by a cook; and Madame Tussaud's Wax Museum, where security cameras showed him placing electronic equipment into boxes. He left the building with televisions, computer monitors and other equipment in two boxes on a hand truck, all taken from the museum. Two hotel security officials followed him and flagged down a police officer, who made the arrest. McCray was indicted on two counts of second-degree burglary under Penal Law § 140.25(2), burglary of a "dwelling."

Before trial, defense counsel moved to dismiss the charges on the ground they "only apply to a dwelling and those areas that are not open to the public," while his charges were based on illegal entry into public areas of the building, "and there was no way to get from these lobby areas, these areas that were open to the public[,] into the Hilton Hotel, which is a dwelling...." The prosecutor responded, "If the commercial establishment is within the confines of the exterior walls of the residential location, then the commercial establishment is, for purposes of burglary in the second degree, considered residential." Defense counsel renewed the motion at the close of testimony. Supreme Court denied the motion. McCray was convicted of both counts and sentenced to consecutive terms of 7½ years, for an aggregate term of 15 years.

The Appellate Division, First Department affirmed the convictions "based on his entries into a hotel's employee locker room and a museum located in the same building as the hotel. Each location constituted a dwelling within the meaning of the burglary statute. A building is a dwelling if it is 'usually occupied by a person lodging therein at night' (Penal Law § 140.00[3]). Where, as here, 'a building consists of two or more units separately secured or occupied, each unit shall be deemed both a separate building in itself and part of the main building' (Penal Law § 140.00[2] ...). It is of no consequence that the employee locker room of the hotel was not used for residential purposes.... Similarly, the museum, which was 'under the same roof' as the hotel, is a dwelling irrespective of whether there was 'internal communication' between the two...."

McCray argues his convictions should be reduced to third-degree burglary because "unlawful entry into the public commercial portion of a multi-use high-rise structure is not an entry into a 'dwelling' for purposes of an aggravated charge of burglary in the second degree where there was no evidence that defendant intruded into the unconnected and severed residential area of the building, which, in any event, was not readily accessible from the commercial portion...." He also argues that imposition of consecutive sentences was illegal because his conduct "was all part of a single criminal scheme."

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