State of New York Court of Appeals

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WEEK OF SEPTEMBER 16 and 17, 2015

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 Wednesday, September 16, 2015

No. 139 Matter of Carver v State of New York

Walter E. Carver, who received public assistance from the State Office of Temporary and Disability Assistance (OTDA) from 1993 to 2000, was required to participate in the New York City Work Experience Program (WEP). He was assigned to work for the City at Coney Island Hospital and then the Staten Island Ferry Terminal, performing maintenance duties 35 hours per week. In 2007, seven years after he stopped receiving public assistance benefits, he won a $10,000 New York State Lottery prize. OTDA intercepted $5,000 of his prize money as partial reimbursement for his past benefits pursuant to Social Services Law § 131-r, which requires lottery winners who received public assistance during the prior ten years to repay OTDA up to half the amount of their winnings. Carver objected that he had repaid any debt by working through WEP in exchange for his benefits. OTDA rejected his administrative appeal, saying, "Work experience is not 'employment' and the amount of public assistance that an individual receives is not 'wages.'"

Carver brought this article 78 proceeding against OTDA claiming, among other things, that the repayment of past benefits from his lottery prize reduced the wage rate for his WEP job below the minimum wage in violation of the Federal Fair Labor Standards Act (FLSA). Supreme Court dismissed the claim, finding Carver was not an employee who received "wages" at his WEP assignment and, thus, the federal minimum wage law did not apply to him.

The Appellate Division, Second Department reinstated the FLSA claim, holding Carver "was an employee within the meaning of the FLSA." It relied on United States v City of New York (359 F3d 83), in which the Second Circuit applied the "economic reality" test and ruled that welfare recipients who are required to participate in WEP in exchange for their benefits are "employees" within the meaning of Title VII of the Civil Rights Act of 1964 and entitled to its protections against racial and sexual harassment. The Appellate Division said the ruling was "persuasive" and, by the same reasoning, WEP participants are employees under the FLSA.

On remittal, Supreme Court ruled "any forfeiture of [Carver's] lottery winnings would ... result in a federal wage violation" because he "would have been paid less than the applicable federal minimum wage for the work he performed" in WEP. In a contingent settlement, the parties agreed OTDA would return the $5,000 to Carver and pay $100,000 in attorney's fees unless OTDA prevails on its appeal.

OTDA argues, "As this Court concluded in [Brukhman v Giuliani (94 NY2d 387)], public assistance recipients participating in government administered work experience programs are recipients of government assistance, not government employees. The monetary grants that such persons receive are based on statutory criteria of economic need, rather than on the number of hours they participate in a work experience program. And their grants are not subject to the federal, state, or local taxes that apply to wage income."

For appellant State OTDA: Assistant Solicitor General Valerie Figueredo (212) 416-8019
For respondent Carver: Susan C. Antos, Albany (518) 935-2845

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To be argued Wednesday, September 16, 2015

No. 140 People v Michael Sans

Michael Sans was arrested for possession of a gravity knife on Avenue U in Brooklyn in May 2011 and was charged in a misdemeanor complaint with criminal possession of a weapon in the fourth degree. In the accusatory instrument, the arresting officer (deponent) said he "observed the defendant in possession of a gravity knife, in that the deponent observed the defendant remove a knife from the defendant's pocket, and that the deponent recovered said knife from the defendant. Deponent further states that the deponent tested the above-referenced knife and determined that it was a gravity knife, in that it opens with centrifugal force and locks automatically in place." Sans pled guilty to the weapon charge at his arraignment and was sentenced to time served.

On appeal, Sans argued that the misdemeanor complaint was facially insufficient under People v Dreyden (15 NY3d 100), which said a complaint "must allege 'facts of an evidentiary character' ... demonstrating 'reasonable cause' to believe the defendant committed the crime charged.... An arresting officer should, at the very least, explain briefly, with reference to his training and experience, how he or she formed the belief that the object observed in defendant's possession was a gravity knife." Penal Law § 265.00(5) defines a gravity knife as "any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device."

The Appellate Term: 2nd, 11th and 13th Judicial Districts affirmed, finding no jurisdictional defect in the complaint. It said, given "'a reasonable, not overly technical reading'" of the complaint, "the 'fair implication' ... of its averments supports, or tends to support, the charge of criminal possession of a weapon in the fourth degree. The arresting officer's conclusion that the object he observed in defendant's possession was, in fact, a gravity knife, was based on his personal handling and testing of the knife (cf. Dreyden, 15 NY3d 100)."

Sans argues the complaint was jurisdictionally defective because it charged him with possessing a gravity knife "based solely on the assertion that a police officer tested the knife and that the blade opened with centrifugal force and locked automatically in place. It contained no factual allegations of an evidentiary character that the blade actually 'locked in place by means of a button, spring, lever or other device,' as specified by [Penal Law] § 265.00(5), and stated only conclusory allegations with respect to how the blade was tested and opened. In addition, it failed to indicate that the officer had any training or experience in the identification of gravity knives."

For appellant Sans: Denise Fabiano, Manhattan (212) 577-3917
For respondent: Brooklyn Assistant District Attorney Allison Ageyeva (718) 250-3003

State of New York Court of Appeals

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To be argued Wednesday, September 16, 2015

No. 141 People v Thomas Barnes

Thomas Barnes was arrested for trespassing in the lobby of a New York City Housing Authority apartment building in 2011. He was charged in a misdemeanor information with criminal trespass in the second and third degrees. In his deposition in support of the charges, the arresting officer said he "observed [Barnes] inside the lobby of the dwelling beyond the vestibule and ... beyond a posted sign which read, 'No Trespassing.'" The officer said he determined Barnes was neither a tenant of the building, because he provided a different address, nor an invited guest, because he "was unable to provide the identity of a resident of whom defendant was an invited guest." Barnes pled guilty the next day to criminal trespass in the second degree and was sentenced to time served.

On appeal, Barnes argued that criminal trespass in the second degree (Penal Law § 140.15), which occurs when a defendant "knowingly enters or remains unlawfully in a dwelling," does not apply to the common areas of public housing projects because they are public property. He also argued the misdemeanor information was jurisdictionally defective because it did not contain factual allegations establishing that the lobby was not open to the public.

The Appellate Term, First Department affirmed, saying, "Inasmuch as the common areas of a restricted access Housing Authority building can be shown, upon proper proof, to be open only to building residents and their invitees, and not the general public..., we reject defendant's sweeping contention that the proscriptions of the second-degree criminal trespass statute can never be applied to conduct occurring in such areas." It also said the factual allegations of the misdemeanor information -- that Barnes was seen in the lobby beyond a "No Trespassing" sign and that he was not a resident or invited guest -- "were sufficient, for pleading purposes, to establish that the lobby area was part of the dwelling ... and that defendant knowingly entered or remained unlawfully therein...."

Barnes argues, "Where a public property is concerned, a person is licensed and privileged to be on such property unless such license is lawfully withdrawn. Indeed, in 1992, the Legislature recognized that, because a public housing project is 'public property,' the existing trespass laws -- which included the second-degree criminal trespass statute at issue here -- were inapplicable to such properties." He contends that provisions of the third-degree trespass statute, enacted "to address the public property 'loop hole,'" are the only trespassing laws that apply to common areas of public housing. He also argues the misdemeanor information did not sufficiently "allege that the lobby of the public housing project was not open to the public or that appellant knew that it was not open to the public."

For appellant Barnes: Laura Boyd, Manhattan (212) 577-3571
For respondent: Manhattan Assistant District Attorney Sheila O'Shea (212) 335-9000

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To be argued Wednesday, September 16, 2015

No. 142 Matter of Texeira v Fischer *(papers sealed)*

George Texeira was an inmate at the Upstate Correctional Facility in 2012, when he was charged with violating numerous prison disciplinary rules months earlier while he was housed at the Attica Correctional Facility. The charges included smuggling, threatening to injure two other inmates, and impersonating a third inmate. Texeira pled not guilty and asked to have all three inmates named in his misbehavior report appear as witnesses at his disciplinary hearing. Two of them agreed to testify, but the third -- one of the inmates Texeira allegedly threatened -- refused to appear. That inmate signed a refusal form and gave as his reason, "I was never at Upstate ever. I came here from Attica!" He had been transferred from Attica to the Elmira Correctional Facility. Contending that the inmate appeared to be confused or misinformed about the nature of his requested testimony, Texeira asked the hearing officer to contact him and clarify that the request was for his testimony about events at Attica, not Upstate. The hearing officer agreed to have the inmate "re-interviewed," but there is no indication in the record that he took any steps to follow up. The hearing officer found Texeira guilty of all charges and imposed a penalty of 24 months in the Special Housing Unit and loss of 24 months of good time credit.

Supreme Court annulled the disciplinary determination, finding that Texeira's right to call a witness "was clearly violated;" but it denied his request to expunge all references to the disposition from his records and, instead, remitted the matter to the Department of Corrections and Community Supervision (DOCCS) for a new hearing. "An outright denial of a witness by a hearing officer without any good-faith reason provided or a lack of any effort to obtain a requested witness's testimony constitutes a constitutional violation requiring expungement...," it said. "However, where a good-faith reason for the denial appears on the record any violation amounts to a regulatory violation and remittal is the appropriate remedy. In [Texeira's] case, a reason for the refusal was provided."

The Appellate Division, Third Department affirmed, saying remittal for a new hearing was appropriate because "the record confirms that the Hearing Officer made some, albeit insufficient, effort to obtain petitioner's witness and did not deny the witness outright 'without a stated good-faith reason'.... Accordingly, this error constituted a violation of petitioner's regulatory right set forth in 7 NYCRR 254.5, thus 'requiring annulment of the determination but not mandating expungement'...."

Texeira argues that the proper remedy for violation of an inmate's right to call a witness is expungement, not remittal for a new hearing, and that the "distinction between a 'constitutional' and a 'regulatory' right to witnesses is a false one." He says, "In [Matter of Barnes v LeFevre] (69 NY2d 649), this Court made clear the nature of the right itself -- the denial of a witness -- takes precedence and is what mandates expungement, not the purported source of that right.... The constitutional right to call witnesses and the regulatory right to call witnesses are simply one and the same.... A violation of one will be a violation of the other." The right to call witnesses "derives in the first instance from the Constitution and is merely echoed in the state regulation."

For appellant Texeira: Michael E. Cassidy, Plattsburgh (518) 561-3088
For respondent Fischer (DOCCS): Assistant Solicitor General Martin A. Hotvet (518) 776-2048

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To be argued Wednesday, September 16, 2015

No. 143 Tipaldo v Lynn

In August 1996, John Tipaldo was promoted to Acting Assistant Commissioner for Planning in New York City's Department of Transportation (DOT). In November 1996, he told his immediate supervisors that DOT Commissioner Christopher Lynn and First Deputy Commissioner Richard Malchow violated City bidding rules by purchasing $6,000 worth of "Don't Honk" signs from a company owned by an acquaintance, then used back-dated documents to cover up the violation. One or two days later, he reported the matter to the DOT Inspector General of the Department of Investigation (DOI). He did not mention his concerns to Lynn or Malchow. After he was demoted in February 1997, Tipaldo brought this action against Lynn, Malchow and the City under Civil Service Law § 75-b, the "whistleblower's statute," alleging they had retaliated against him. In 1998, the DOI issued a report on its investigation, which found Tipaldo "suffered an adverse personnel action taken in retaliation for his having reported to the [DOI] information concerning conduct which he knew or reasonably believed to involve an abuse of authority" by City officials. It recommended he be reinstated, but he was not.

Supreme Court granted summary judgment to the City defendants and dismissed the suit, ruling Tipaldo's claim was barred by his failure to first report the alleged violation's to DOT's "appointing authority," as required by Civil Service Law § 75-b.

The Appellate Division, First Department reversed, reinstated the suit and granted partial summary judgment on liability to Tipaldo. Because Lynn and Malchow were DOT's appointing authority, "reporting the violation to them would have been futile," the court said, and Tipaldo's "good faith efforts in the manner and timing of his reporting, first informally to his immediate supervisors, and then soon thereafter to the [DOI]," satisfied the statute's reporting requirement. After a nonjury trial, Supreme Court awarded Tipaldo $175,000 in back pay, but it denied his claim for prejudgment interest, saying neither Civil Service Law § 75-b nor Labor Law § 740 "makes any provision for interest" on back pay.

The Appellate Division modified by ordering the City to reinstate Tipaldo and remanded the case for Supreme Court to recalculate his back pay based on the calculations of his economics expert. It also ruled he was entitled to prejudgment interest based on cases interpreting the Human Rights Law, which does not expressly provide for it, but in which courts have found a legislative intent to provide prejudgment interest. "Like the Human Rights Law, Civil Service Law § 75-b has the goal of remediating adverse employment actions which, if allowed, would undermine an important public policy, that is, encouraging public employees to expose fraud, waste and other squandering of the public fisc. It makes no sense that the Legislature would have intended victims of employment discrimination to be made 'whole' through an award of prejudgment interest, but not whistleblowers like plaintiff." Tipaldo was ultimately awarded $388,243 in back pay, $274,478 in interest, and $153,506.81 in attorney's fees and costs.

For appellants Lynn et al: Assistant Corporation Counsel Marta Ross (212) 356-0857
For respondent Tipaldo: Brian J. Isaac, Manhattan (212) 233-8100

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To be argued Thursday, September 17, 2015

No. 144 Hutchinson v Sheridan Hill House Corp.
No. 145 Zelichenko v 301 Oriental Boulevard, LLC
No. 146 Adler v QPI-VIII, LLC

In these unrelated trip-and-fall cases, the primary issue is whether the Appellate Division improperly resolved material questions of fact in finding the sidewalk and stairway defects that allegedly caused the accidents were trivial, and therefore not actionable, as a matter of law. The plaintiffs say the question whether these alleged defects created a dangerous condition should be resolved by a jury.

Leonard Hutchinson was injured in 2009, when he tripped and fell on a sidewalk in front of a Bronx group home owned by Sheridan Hill House Corp. He said his foot caught on a metal object protruding from the sidewalk. Sheridan said the object was five-eighths of an inch in diameter and rose less than one-quarter inch above the surface, but Hutchinson's expert estimated it was twice as big around. Supreme Court dismissed the suit on summary judgment.

The Appellate Division, First Department affirmed on a 3-2 vote, saying Sheridan proved the metal object "protruded only about three-sixteenths of an inch above the surface. This minor height differential alone is insufficient to establish the existence of a dangerous or defective condition.... Plaintiff has not come forward with any evidence to show that this trivial defect could have been 'a trap or snare by reason of its location, adverse weather or lighting conditions....'" The dissenters said there is no rule that a defect must be of a minimum dimension to be actionable and the issue should generally be left to a jury, citing Trincere v County of Suffolk (90 NY2d 976). They said, "[A]n issue of fact remains as to whether the protruding piece of metal may be characterized as a trap or a snare such as could, without warning, snag a passerby's shoe."

In 2010, Matvey Zelichenko was descending a staircase in the lobby of a Brooklyn apartment building owned by 301 Oriental Boulevard, LLC, when he stepped on a stair with a chip -- 3¼ inches wide by ½ inch deep -- missing from its nosing. He said his leg twisted and he fell, breaking both bones in his lower right leg. Supreme Court denied Oriental's motion for summary judgment, saying there was a question of fact whether "the alleged defect was de minimis." The Appellate Division, Second Department reversed and dismissed the suit. Noting the size and location of the chip, "almost entirely on the edge ... and not on the walking surface," it found the defect "was trivial" and "did not possess the characteristics of a trap or nuisance."

Maureen Adler fractured her knee in 2010, when she fell down a stairway in her Queens apartment building owned by QPI-VIII, LLC. She said she tripped on "a big clump" in the middle of a step that had been painted over. Supreme Court denied QPI's summary judgment motion, saying "the bare statement by [QPI's] attorney" that the alleged defect was trivial "is unsupported by any evidence in the record." The Second Department reversed and dismissed the suit. It said photographs submitted by QPI, along with Adler's deposition testimony that they accurately depicted the step and the "clump," "established that the alleged defect was trivial as a matter of law."

No. 144 For appellant Hutchinson: Brian J. Isaac, Manhattan (212) 233-8100
For respondent Sheridan: Kevin J. O'Donnell, Hackensack, NJ (201) 488-6655
No. 145 For appellant Zelichenko: David M. Schwarz, Manhattan (212) 986-7353
For respondent Oriental: Lisa L. Gokhulsingh, Manhattan (212) 655-5000
No. 146 For appellant Adler: Georgette Hamboussi, Brooklyn (718) 787-4470
For respondents QPI et al: Joseph Horowitz, Jericho (516) 822-8900

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To be argued Thursday, September 17, 2015

No. 147 People v Christopher E. Walker

Christopher Walker was charged with murder for fatally stabbing Bobby Simmons in Rochester in May 2007. Walker's girlfriend and his brother, Antonio Rutledge, had been walking by Simmons' house and got into an argument with him, which escalated into a fight on his porch. Prosecution witnesses said the fight was underway when Walker arrived at the scene. Walker's ex-wife testified as a defense witness that she saw Simmons hitting Rutledge with a hammer and she went up the street to tell Walker. Walker testified that he grabbed a kitchen knife, ran down the street to stop the fight, and saw Simmons striking his brother on the head with a hammer. Walker said he ran onto the porch to intervene and, when Simmons swung the hammer at him, he stabbed Simmons in the side of the chest.

Supreme Court agreed to instruct the jury on the defense of justification, but denied Walker's request to omit the initial aggressor rule. The court generally followed the language of the Criminal Jury Instructions on the rule, saying, "[T]he defendant would not be justified [in using deadly physical force] if he was the initial aggressor. Initial aggressor means the person who first attacks or threatens to attack. That is the first person who uses or threatens the imminent use of offensive physical force." It then added in further explanation, "Where there is a reasonable view of the evidence that the defendant initiates non-deadly offensive force and is met with deadly physical force, the defendant may be justified in the use of defensive deadly physical force and that in such cases the term initial aggressor is properly defined as the first person in the encounter to use deadly physical force." The jury acquitted Walker of murder, but convicted him of first-degree manslaughter. He was sentenced to 25 years in prison.

The Appellate Division, Fourth Department affirmed, saying, "The use of the 'initial aggressor' language is warranted where, as here, there is an issue of fact whether defendant was the first person to use deadly physical force in the encounter.... With that language, 'the court's justification charge adequately conveyed to the jury that defendant could be justified in the use of deadly physical force to defend himself [or another] against deadly physical force initiated by' the victim.... Furthermore, the court's justification instruction, viewed as a whole, properly stated 'the material legal principles applicable to the particular case, and, so far as practicable, explain[ed] the application of the law to the facts'...."

Walker argues the jury charge, relating to self-defense in "a one-on-one confrontation," did not properly explain the law of justification as it applies to his claim that he acted in defense of his brother, especially since he arrived after the fight was well underway. "It was likely that the jury would harbor a reasonable doubt that Mr. Walker acted reasonably to defend his brother" and he "would therefore be entitled to an acquittal.... However, under the erroneous charge given by the trial court, the jury could well have concluded that Mr. Walker's actions made him the initial aggressor based only on his physical contact with Mr. Simmons" and that the justification defense was not available to him.

For appellant Walker: Timothy W. Hoover, Buffalo (716) 504-5754
For respondent: Monroe County Sr. Asst. District Attorney Geoffrey Kaeuper (585) 753-4674