

***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.

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

Week of January 9 thru January 10, 2018

State of New York Court of Appeals

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To be argued Tuesday, January 9, 2018

No. 11 Connolly v Long Island Power Authority

No. 12 Baumann v Long Island Power Authority

No. 13 Heeran v Long Island Power Authority

About 180 plaintiffs, owners of property on the Rockaway Peninsula in Queens, brought these negligence actions against the Long Island Power Authority (LIPA) and National Grid Electric Services, which operates LIPA's power distribution system under a management services contract, to recover for damage sustained during and after Hurricane Sandy in October 2012. They alleged that salt water from the storm surge caused electrical arcing when it came into contact with live power lines, resulting in fires that damaged their property. They said this danger was foreseeable and, therefore, LIPA and National Grid were negligent in failing to shut off power to the peninsula before or soon after the storm struck.

LIPA and National Grid moved to dismiss the lawsuits based on the doctrine of governmental immunity. Supreme Court denied the motion, ruling the defendants were not entitled to immunity because they were acting in a proprietary capacity in running the electrical grid. It said that "providing electricity to consumers is a proprietary act because electricity has traditionally been supplied by the private sector."

The Appellate Division, Second Department affirmed on a 3-1 vote, noting that the legislature created LIPA to replace a private for-profit utility, the Long Island Lighting Company. It said, "[T]he provision of electricity is properly categorized as a proprietary function. The provision of electricity has traditionally been a private enterprise in this state, and the legislature clearly created LIPA as a public authority to substitute for a private enterprise." That LIPA was responding to a natural disaster did not change its role from a proprietary to a governmental one, the court said. "[T]he functions of electric utilities in the ordinary course of providing electricity and in responding adequately to a hurricane are both part of the proprietary core functions of their business.... [W]e disagree that the magnitude of Hurricane Sandy itself shielded the [defendants] from having to answer in tort for deficiencies in their preparation and response."

The dissenter argued the defendants were entitled to immunity because LIPA was acting primarily in a governmental capacity. "[T]he plaintiffs do not take the position that the electric transmission ... system was inherently dangerous. Instead, the plaintiffs claim that the system was rendered dangerous by the presence of an external threat.... A governmental entity's preparation for a natural disaster or for some other external emergency, and its response during such an event, are generally deemed to be governmental functions.... Such functions are unquestionably 'undertaken for the protection and safety of the public' ... and implicate discretionary policy decisions regarding the management and prioritization of the multifaceted risks posed by the external hazard, along with the utilization of the finite resources available...."

For appellants LIPA and National Grid: David Lazer, Melville (631) 761-0800

For respondents Connolly and Baumann et al: Brian J. Shoot, Manhattan (212) 732-9000

For respondents Heeran et al: Brian J. Isaac, Manhattan (212) 233-8100

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To be argued Tuesday, January 9, 2018

No. 14 Cortlandt Street Recovery Corp. v Bonderman

This action seeks payment of principle and interest on notes issued in public offerings by Hellas Telecommunications Finance and guaranteed by a related Hellas company in 2006. After the Hellas Group defaulted on the notes in 2009, Wilmington Trust Company, as the indenture trustee, and Cortlandt Street Recovery Corp. brought this suit against not only against the Hellas companies, but also against two private equity firms -- Apax Partners and TPG Capital -- and their affiliates and individual principals. Wilmington Trust alleged that the Apax and TPG defendants owned and controlled the Hellas companies and caused them to fraudulently transfer the proceeds of the notes to Apax and TPG, rendering the Hellas companies insolvent and unable to pay the noteholders. Wilmington Trust sued Apax and TPG for breach of contract, on the theory that they were alter egos of the Hellas companies, and also asserted claims for fraudulent conveyance, unlawful corporate distribution, and unjust enrichment.

Apax and TPG moved to dismiss on the ground, among others, that Wilmington Trust lacked standing to maintain the fraudulent conveyance and other non-contractual claims against them as third parties. Wilmington Trust argued that it had standing under section 6.03 of the indenture governing the notes, which states, "If an Event of Default occurs and is continuing, the Trustee may pursue any available remedy to collect the payment of principal, premium, if any, and interest on the Notes."

Supreme Court granted the defense motion to dismiss for lack of standing, holding that "section 6.03 of the indenture does not confer broad authority on [Wilmington] as trustee to institute all actions to enforce the rights of the bondholders but, rather, limits the authority of [the trustee] to commence actions ... for payment 'on the Notes' or 'to enforce the performance of any provision of the Notes or this Indenture.'" The fraudulent conveyance claims "are not claims brought on the notes or for enforcement of the ... notes or indenture.... They are entirely separate claims that challenge the 2005-2006 transaction by which the Apax/TPG entities created the Hellas defendants, caused Hellas Finance to issue the ... notes, and then allegedly made the fraudulent conveyances" to Apax and TPG.

The Appellate Division, First Department modified by reinstating Wilmington's complaint. It said section 6.03 of the indenture "confers standing on the trustee to pursue, not only the breach of contract claims, but also the fraudulent conveyance and other ... claims, which seek recovery solely of the amounts due under the notes, for the benefit of all noteholders on a pro rata basis, as a remedy for an alleged injury suffered ratably by all noteholders by reason of their status as noteholders.... Significantly, the trustee does not assert causes of action for fraudulent misrepresentation or other claims seeking recovery for particular injuries unique to individual noteholders, nor does the trustee seek a measure of damages other than the amounts due under the notes." It also found Wilmington sufficiently stated a claim "under a veil-piercing theory, at least at this pre-answer, pre-discovery stage."

For appellant Apax defendants et al: Robert S. Fischler, Manhattan (212) 596-9000

For appellant TPG defendants et al: Paul M. O'Connor III, Manhattan (212) 506-1700

For respondent Wilmington Trust Company: Mark C. Zauderer, Manhattan (212) 412-9500

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To be argued Tuesday, January 9, 2018

No. 15 People v Reginald Wiggins

In May 2008, Reginald Wiggins and codefendant Jamal Armstead confronted a teenage boy in front of multiple witnesses outside of a "sweet sixteen" party in Manhattan, after a girl complained the boy had insulted her. Armstead pointed a gun at the boy and pulled the trigger twice, but it did not fire. Wiggins took the gun and fired one shot, which missed the intended target and killed a 15-year-old bystander. Wiggins, who was 16 years old, and Armstead were charged with murder, attempted murder and weapon possession.

While prosecutors tried to negotiate a cooperation agreement with Armstead to testify against Wiggins, Armstead consented to or requested numerous adjournments, some of them for assignment of a new prosecutor. A fire in the courthouse caused a two week delay. In June 2011, Armstead rejected a cooperation agreement and fired his attorney, and the case was adjourned to 2012. Meanwhile, after more than three years in Rikers Island, Wiggins was involved in a jailhouse fight in October 2011 and was sentenced to four and a half years for assault. Prosecutors decided to try Armstead first on the theory that a conviction might induce him to testify against Wiggins. The first trial in 2012 was disrupted by Hurricane Sandy, resulting in a mistrial. Armstead's second trial ended in a mistrial in 2013. After that -- and after more than 40 adjournments -- Wiggins moved to dismiss the indictment on speedy trial grounds, which was denied. Armstead was acquitted of murder at his third trial in 2014, but the jury deadlocked on the attempted murder counts. In September 2014, with Armstead's fourth trial pending, Wiggins withdrew his second speedy trial motion and pled guilty to first-degree manslaughter in exchange for a 12-year prison sentence.

The Appellate Division, First Department affirmed on a 3-2 vote, rejecting Wiggins' constitutional speedy trial claim. "There is no question that the six-year delay between the shooting in 2008 and defendant's guilty plea in 2014 was 'extraordinary,'" the court said, but it found prosecutors acted in good faith in seeking Armstead's testimony and there was "good cause" for the delay under People v Taranovich (37 NY2d 442). "Whether 'essential' or not, it is clear from the result of the several trials of Armstead that his testimony would, as the People contend, 'significantly enhance the overall nature and quality of the evidence against ... defendant.' The point is made by the fact that Armstead was acquitted on the murder count and that three separate juries were not able to reach a verdict on the two attempted murder counts.... In any event, it is not for the courts to second guess 'the significant amount of discretion that the People must of necessity have' in the prosecution of an indictment..., so long as they act in good faith." It also said Wiggins "has not shown any prejudice as a result of the delay...."

The dissenters said prosecutors did not act in good faith in pursuing Armstead's testimony and never claimed it was essential to their case. "The People's continuation of this tactic for six years, even after [Armstead] repeatedly refused to cooperate, and after the People had taken [him] to trial three times..., was certainly a strategic decision, and ultimately created a tactical advantage for the People.... [I]t is difficult to see how the testimony of a codefendant, who would have much to gain from cooperating, could significantly enhance the People's case when the People had disinterested eyewitnesses available to testify, including the intended target of the shooting." They said it was "likely" the delay was "actually" prejudicial to Wiggins, "since his incarceration would have made it 'difficult for him to participate in his own defense, confer with counsel and contact witnesses'...."

For appellant Wiggins: Ben A. Schatz, Manhattan (212) 577-2523 ext 544

For respondent: Manhattan Assistant District Attorney Sabrina Margret Bierer (212) 335-9000

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To be argued Wednesday, January 10, 2018

No. 16 Paramount Pictures Corporation v Allianz Risk Transfer AG

In 2004, Allianz Risk Transfer AG and three other defendants (collectively, "investors") began investing in the production and distribution of motion pictures by Paramount Pictures Corporation. They made their investments through Melrose Investors LLC and all of the investors were bound by a subscription agreement in which, under one provision, they waived any and all claims against Paramount and, under a second provision, agreed not to sue Paramount. In 2008, the investors sued Paramount in Federal District Court to recoup losses on their investments, alleging that Paramount acted fraudulently in its foreign distribution of the films. Paramount raised an affirmative defense that the claims were barred by the waiver provision of the subscription agreement. Paramount did not raise an affirmative defense based on the covenant not to sue, nor did it assert a counterclaim that the investors breached this covenant. U.S. District Court ruled in favor of Paramount, holding the investors had expressly waived their claims in the subscription agreement. The court also found that Paramount did not act fraudulently or intend to mislead the investors.

Paramount then brought this state court action against the investors based on their alleged breach of the covenant not to sue, seeking to recover \$8 million in attorneys' fees and expenses it incurred in the federal litigation. The investors moved to dismiss the suit as barred by the doctrine of res judicata. They contended that, because rule 13(a) of the Federal Rules of Civil Procedure (FRCP) imposes a compulsory counterclaim requirement on parties in federal court, Paramount was required to raise the breach of the covenant not to sue as a counterclaim in the federal action. Since Paramount did not, they say, it is barred from raising the claim in this state court action. Paramount argued FRCP 13(a) does not apply to state court cases in New York.

Supreme Court denied the motion to dismiss, refusing to apply the compulsory counterclaim requirement of FRCP 13(a). "This State has a permissive counterclaim rule that was enacted by the legislature....," it said. "There's been no case, no State case at all that I have seen that indicates that this Court ... should apply 13A. That would require me to ignore CPLR 3011 in terms of the permissive counterclaims and that would not be proper."

The Appellate Division, First Department reversed and dismissed the suit, holding that FRCP 13(a) applies here and bars Paramount's claim that the investors breached their covenant not to sue. It acknowledged that "New York's permissive counterclaim rule would save it from the traditional bar of res judicata" and that "there is no binding precedent which holds that state courts must apply" the federal compulsory counterclaim rule. However, relying on a federal District Court decision and "dicta" from the Court of Appeals, it concluded "that the later assertion in a state court action of a contention that constituted a compulsory counterclaim [under FRCP 13(a)] in a prior federal action between the same parties is barred under the doctrine of res judicata...."

For appellant Paramount: Richard B. Kendall, Los Angeles, CA (310) 556-2700
For respondents Allianz et al: James A. Janowitz, Manhattan (212) 421-4100

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To be argued Wednesday, January 10, 2018

No. 17 People v Dennis O'Kane

Dennis O'Kane was charged with 14 misdemeanors for allegedly stalking and harassing his former landlord in Albany for nearly two years after she evicted him in May 2011. The charges included four counts of aggravated harassment in the second degree, two counts of stalking in the fourth degree, and eight counts of criminal contempt in the second degree based on alleged violations of three orders of protection.

To help the jury distinguish between the various charges, Albany City Court added to the verdict sheet a summary of the factual allegations and the dates relating to each count. Under one count the court wrote, "calling approximately 36 times and sending approximately 13 emails;" under a second count it wrote, "calling, emails, and leaving package of personal items;" and under a third it wrote, "calling approximately 90 times, emailing approximately 15 times, and sending a sympathy card." Defense counsel and the prosecutor consented to use of the annotated verdict sheet at the charge conference. O'Kane was convicted of 12 charges and acquitted of two counts of contempt. He was sentenced to two years in jail. On appeal, O'Kane argued that he was deprived of effective assistance of counsel on various grounds, but he raised no issues relating to the annotated verdict sheet.

County Court raised the issue on its own and reversed the conviction, saying, "The verdict sheet is replete with extraneous, and highly inflammatory information.... [I]t is manifest that the cited annotations on the verdict sheet were not authorized by CPL 310.20, and constitutes reversible error." The court said it was "mindful of the fact that defense counsel consented" to the verdict sheet and that "consent can be deemed a waiver of the CPL 310.20(2) violation," but it concluded the annotations were "a fundamental defect impairing defendant's right to a fair trial, akin to a mode of proceedings error requiring reversal...." It also found that defense counsel's consent "evidences ineffective assistance of counsel at its worst," since "the extensive annotations on the verdict sheet effectively marshalled and bolstered the People's proof."

The prosecution argues that defense counsel's consent to the annotated verdict sheet constituted a waiver of the appellate issue which deprived County Court of interest of justice jurisdiction to review it. "That consent constituted a waiver because it was an affirmative abandonment of a legal right by the defendant.... Here, there was discussion between the trial court and the parties regarding the verdict sheet, and the defendant agreed to its use.... That established full consent.... The verdict sheet annotations ... do not constitute a mode of proceedings error and may be waived by the defendant through consent, as every court that has considered the issue has found -- including this one...." It argues the defendant failed to preserve the issue by objection at trial and abandoned the issue by failing to raise it on appeal. It also contends the annotations were neither inflammatory nor bolstering, and defense counsel was not ineffective in consenting to them.

For appellant: Albany County Assistant District Attorney Christopher D. Horn (518) 487-5460
For respondent O'Kane: Paul R. Edwards, Albany (518) 462-2200

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To be argued Wednesday, January 10, 2018

No. 18 People v Joseph Sposito

(papers sealed)

Joseph Sposito was charged with rape and criminal sexual act in the first degree for allegedly having vaginal and anal intercourse with a woman who was physically helpless due to alcohol consumption and, thus, incapable of consent. The incident occurred in October 2010 when, after a night of heavy drinking in Albany, Sposito and the complainant went with several others to sleep at a friend's house in the Town of Colonie. The complainant told the police that she had no memory of what happened after they left the last bar until she woke up in a bathroom, naked and covered in blood, with Sposito trying to make her wash off in the shower. She ran into the street screaming for help. During a videotaped interrogation at the Colonie police station, Sposito repeatedly told officers that the complainant was conscious and walking on her own after they left the bar, that she consented to sex, and that they were talking to each other while having sex. However, near the end of the tape, he agreed with them that she did not respond when he knocked on her bedroom door and that he heard only a "murmur" or "noise" when he asked if he could get into her bed.

Prior to trial, Sposito's attorney moved for a Huntley hearing to seek suppression of the videotape on the ground it was obtained in violation of his Miranda rights. County Court granted the hearing, but defense counsel withdrew his motion before it was held, waiving his right to challenge the tape. The prosecutor played the tape for the jury at trial. Sposito was convicted of the charges and sentenced to 20 years in prison. The court denied, without a hearing, his CPL 440.30(1-a) motion for post-verdict DNA testing and his CPL 440.10 motion to vacate the conviction due to ineffective assistance of counsel.

The Appellate Division, Third Department affirmed the conviction, saying Sposito failed to establish on his direct appeal that he received ineffective assistance of counsel because he did not "demonstrate the absence of a legitimate strategy for counsel's decision not to seek suppression" of the videotape. It said, "[H]aving reviewed the video, in which defendant repeatedly professed his innocence and gave a narrative for the events in question largely consistent with what he eventually testified to at trial, we cannot say that defendant established that it was objectively unreasonable for counsel to have watched the video and concluded that it was more favorable than unfavorable to defendant." The court also affirmed the denial of post-verdict DNA testing, saying that even if a test showed the complainant had intercourse with someone else hours before Sposito, this "would not have shown the victim to be any less physically helpless during the sexual encounter." It reversed the denial of Sposito's post-verdict motion on his ineffective assistance of counsel claim and remitted the matter for a hearing.

Sposito argues he was denied effective assistance of counsel "by his attorney's waiver of the suppression hearing he had been granted." He says the motion "was clearly meritorious" and, "in view of the devastating impact of the video" of his statements that the complainant did not respond to his request for consent, "there could be no strategic or other legitimate explanation for counsel's decision to waive the Huntley hearing. He also argues he was entitled to post-verdict DNA testing because proof that another man had intercourse with the complainant before he did "would have provided an alternative explanation for her anal injuries, which furnished the only proof of the anal sex needed to sustain defendant's Criminal Sexual Act conviction. And it would have stripped the People of their argument that the nature of [her] injuries was inconsistent with conscious consent."

For appellant Sposito: Donna Aldea, Garden City (516) 745-1500

For respondent: Albany County Assistant District Attorney Michael C. Wetmore (518) 487-5460