# *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 Wednesday, April 27, 2016

**No. 77 Matter of Westchester Joint Water Works**

From 2002 to 2010, Westchester Joint Water Works brought these tax certiorari proceedings against the Assessor of the City of Rye to challenge property tax assessments for two adjacent parcels it owns in the city. One of them, designated lot 200-1-9, is located in the Rye Neck Union Free School District (the Rye Neck lot); and the other, lot 200-1-10, is in the Rye City School District. Water Works notified the Rye City School superintendent when it commenced each proceeding, as required by RPTL 708(3), but it did not notify the Rye Neck school superintendent, mistakenly believing both parcels were in the City School District. When Water Works reached a settlement with the City in 2011, its attorney learned he needed consent from the Rye Neck District before it could be approved. The Rye Neck District refused to consent and, instead, moved to intervene and dismiss the proceedings for failure to comply with RPTL 708(3). Water Works opposed the motion and also cross-moved for leave to recommence the proceedings pursuant to CPLR 205(a), in the event the proceedings were dismissed. CPLR 205(a) provides, "If an action is timely commenced and is terminated in any other manner than by ... a failure to obtain personal jurisdiction over the defendant ... or a final judgment upon the merits, the plaintiff ... may commence a new action" within six months.

Supreme Court granted the Rye Neck District's motion to dismiss the proceedings, but denied the City's similar motion, saying Water Works did not show good cause for failing to notify the Rye Neck superintendent. The court denied Water Works' motion to recommence the proceedings under CPLR 205(a) on the ground that its failure to give notice to the Rye Neck District "has prejudiced [the District] permanently, by forever foreclosing it from planning for an eventual judgment in the instant matters by depositing" money in its tax certiorari reserve fund. It said the District could be forced to pay any judgment from its operating budget or a bond issue.

The Appellate Division, Second Department modified by dismissing the proceedings against the City regarding the Rye Neck lot. It said Supreme Court properly dismissed the proceedings against the Rye Neck District, and should have granted the City's motion to dismiss the same proceedings, based on Water Works' conceded lack of good cause for its failure to comply with RPTL 708(3). Holding that Water Works' motion to recommence was properly denied, it said, "Since a dismissal pursuant to RPTL 708(3) operates as a dismissal upon the merits, the relief afforded by CPLR 205(a) is unavailable...."

Water Works argues it is entitled to commence new proceedings under CPLR 205(a) because its failure to notify the Rye Neck District, or to show good cause for the failure, is "unrelated in any substantive way" to the merits of its tax assessment challenge. It says Court of Appeals precedent favors CPLR 205(a) relief when a proceeding is dismissed for reasons unrelated to the merits.

For appellant Westchester Joint Water Works: Stephen Davis, White Plains (914) 946-3700
For intervenor-respondent Rye Neck School District: Marc E. Sharff, Valhalla (914) 741-9870
For respondent Assessor of City of Rye: Darius P. Chafizadeh, White Plains (914) 683-1200

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To be reargued Wednesday, April 27, 2016

**No. 98 People v Scott Barden**

In February 2010, Scott Barden stayed five nights at the Thompson LES Hotel in Manhattan at the expense of a business associate, Anthony Catalfamo, who authorized the hotel in a third-party billing agreement to charge up to $2,300 to his American Express card. He did not give his credit card information to Barden. Although Catalfamo made clear to the hotel that he would not agree to additional charges and wrote on the agreement that he was authorizing "one swipe one charge ONLY!," the hotel did not delete his card information when Barden checked out and the card remained linked to Barden's account on the hotel's computer system. After their business relationship soured a month later, Barden stayed at the hotel for three days in March 2010 and told the staff to charge it to the American Express card on file, which was Catalfamo's. He returned to the hotel at the end of that month, beginning a stay of nearly six weeks, and he continued to tell the staff to bill the charges to the American Express card. Catalfamo discovered the unauthorized charges in mid-April 2010 and American Express notified the hotel it was declining more than $10,000 in charges. The hotel then mistakenly linked Barden's account to the Visa card of another guest, who had the same last name, and Barden told the staff to bill that card. The other guest discovered the charges and Visa notified the hotel it was declining them in mid-May 2010, when the unpaid charges totaled about $50,000 for both cards. The hotel then called the police.

Barden was convicted of first-degree identity theft and fourth-degree criminal possession of stolen property, both based on the charges made to Catalfamo's American Express account, and two misdemeanor counts of theft of services. He was sentenced to concurrent terms of 2⅓ to 7 years for identity theft and 1⅓ to 4 years for possession of stolen property.

The Appellate Division, First Department vacated the identity theft conviction, for lack of proof that Barden ever assumed Catalfamo's identity, and otherwise affirmed. It rejected the argument that the stolen property statute (Penal Law § 165.45[2]) applies only to possession of a tangible credit card, not to an intangible credit card number. "[T]he mention of 'tangible property' in [Penal Law §] 10.00(8) cannot strictly apply to criminal possession of stolen property, because to do so would thwart the legislative intent to criminalize the knowing possession of certain types of intangible stolen property," including "any ... computer data, computer program" or "thing of value" under Penal Law § 155.00, it said. "It is irrelevant whether defendant had physical or constructive possession of a tangible credit card, because he had access to the full value of Catalfamo's account as if he had possessed the credit card itself."

Barden argues that, "for purposes of the stolen property statute, 'credit card' is defined as an actual, physical card, and not merely its number. Moreover, the law requires possession of 'tangible' property; the unlawful possession of personal identifying information, such as a credit card number, is a separate chargeable offense, but it is not criminal possession of stolen property." Even if possession of the card number could suffice, he says, he "never even knew the credit card number, and certainly did not possess it."

For appellant Barden: Richard M. Greenberg, Manhattan (212) 402-4100
For respondent: Manhattan Assistant District Attorney David M. Cohn (212) 335-9000

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To be argued Wednesday, April 27, 2016

**No. 78 People v Baasil Reynolds**

Baasil Reynolds was arrested in December 2008 for threatening his father and half-sister with a knife in their Manhattan apartment. After spending six months in pretrial detention, he agreed to a plea bargain in which he pled guilty to felony weapon possession and misdemeanor menacing with an opportunity to later withdraw his felony plea and substitute a plea to misdemeanor weapon possession, if he met certain conditions. First, he would have to serve six more months in jail, then spend a year on release without being arrested or violating orders of protection issued for his father and half-sister. If he did not comply, he would be sentenced to two to four years in prison on the felony.

Reynolds was released from jail in December 2009, after serving the six additional months, and Supreme Court adjourned his sentencing to December 2010. In October 2010, he was arrested for possession of mace and pled guilty to a misdemeanor. Rather than sentence him on the felony as provided in the plea deal, the court extended the no-arrest condition for six more months. In June 2011, on the day he was scheduled to finally withdraw his felony plea and receive a sentence of time served on a misdemeanor count, Reynolds got into an altercation on a basketball court and was arrested for assault, though he was not charged. He argued, at a hearing held pursuant to People v Outley (80 NY2d 702), that there was no "legitimate basis" for his arrest because the complainant had maliciously lodged false charges against him. The court found there was "a sufficient basis" for the arrest based on the arresting officer's testimony that the complainant was bleeding through his hospital bandages and identified Reynolds as his attacker. In August 2011, the court ruled Reynolds had violated the no-arrest condition of his plea deal and sentenced him to two to four years, with credit for the year he had already served.

The Appellate Division, First Department affirmed, ruling that Reynolds' guilty plea was not conditioned on an illegal sentence. "Regardless of what the court may have intended, and regardless of the merits of this arrangement, the period of presentencing detention was not part of the sentence," it said. "As a matter of law, the only sentence was the undisputedly legal sentence imposed on August 23, 2011, against which all prior detention was credited. The presentencing detention was based, instead, on a securing order" which was not reviewable. It also ruled the lower court properly determined that Reynolds violated the no-arrest condition, saying he "has not established that the hearing court employed a different standard from the 'legitimate basis for the arrest' standard set forth in Outley...."

Reynolds argues his plea "was invalid because it was premised on an illegal pre-sentence condition" that he serve six months in jail before he was sentenced. He says "the Appellate Division improperly avoided deciding the legality of the plea agreement ... by mischaracterizing the nature of the claim." He also argues Supreme Court erroneously applied a probable cause standard at the Outley hearing, instead of the legitimate basis for arrest standard, "because it focused only on whether the police had authority to arrest [him] rather than the sole disputed issue of whether the complainant maliciously and baselessly lodged the charges."

For appellant Reynolds: Michael S. Woodruff, Manhattan (212) 402-4100
For respondent: Manhattan Assistant District Attorney Vincent Rivellese (212) 335-9000

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To be argued Wednesday, April 27, 2016

**No. 5 Red Zone LLC v Cadwalader, Wickersham & Taft LLP**

In 2005, Cadwalader, Wickersham & Taft represented Red Zone LLC in connection with its effort to gain control of the board of directors of Six Flags, Inc, the amusement park chain, or a controlling share of its stock. UBS Securities LLC provided financial services to Red Zone, which agreed to pay UBS a fee of $10 million if Red Zone gained control of Six Flags. Red Zone's managing member, Washington Redskins owner Daniel Snyder, later reached an oral agreement with UBS to limit the fee to $2 million if Red Zone took control of Six Flags' board, but did not obtain a majority of its stock. At Red Zone's request, Cadwalader prepared a side letter agreement that was intended to memorialize the oral agreement capping UBS's fee. Red Zone gained control of the Six Flags board, but not its stock, by end of 2005 and paid $2 million to UBS. Cadwalader provided no further advice to Red Zone regarding Six Flags.

In 2007, UBS sued Red Zone for breach of contract, demanding the remaining $8 million of its original fee. Cadwalader did not defend Red Zone in the action, but consulted with Red Zone and its defense counsel throughout the litigation. The Appellate Division, First Department granted summary judgment to UBS in 2010, saying Red Zone's claim that the side letter drafted by Cadwalader capped UBS's fee at $2 million "is belied by a reading of the document itself."

Red Zone brought this legal malpractice action against Cadwalader, alleging the law firm was negligent in preparing the side letter. Cadwalader replied that Red Zone's claim was barred by the statute of limitations, since the suit was filed more than five years after the side letter was drafted, and barred by the doctrine of comparative negligence, among other things. The law firm later sought to amend its answer to assert the defense of assumption of risk, based largely on an affidavit from a Cadwalader partner who said he warned Snyder that the side letter "did not expressly provide a 'cap' on UBS's fee" and advised him not to sign it. Supreme Court denied Cadwalader's motion to amend its answer, in part because the partner's affidavit "starkly contradicts" his prior deposition testimony in the UBS suit. The court ultimately granted summary judgment to Red Zone and awarded it $17.2 million in damages.

The First Department affirmed, saying Cadwalader's attempt to add an assumption of risk defense was properly rejected because the partner's affidavit "directly contradicts his earlier deposition testimony in the UBS litigation that the side agreement unambiguously capped [Red Zone's] fees...." The continuous representation doctrine tolled the statute of limitations because Cadwalader "provided legal advice throughout the UBS litigation from 2007 through late 2010.... In doing so, defendant apparently sought to rectify its earlier alleged malpractice...." The side letter "was intended to cap UBS's fees at $2 million," it said. "Given our prior finding in the UBS litigation that the side agreement failed to do just that..., summary judgment is warranted."

Cadwalader argues the lower courts "disregarded admissible evidence" that it "advised Red Zone as to the risks" of the side letter, "drew inferences in favor of Red Zone," and "over-extended the rule about disregarding contradictory testimony." It says the First Department misapplied the continuous representation doctrine, in part because Red Zone did not show there was a "mutual understanding" of a need for further representation by Red Zone.

For appellant Cadwalader: David R. Marriott, Manhattan (212) 474-1000
For respondent Red Zone: Jeffrey A. Jannuzzo, Manhattan (212) 932-8524