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 Tuesday, September 13, 2016

No. 148 Utica Mutual Insurance Company v Style Management Associates, Corp.

During the renovation of a single-family home in Lake Success, two separate fires caused by floor finishing chemicals and sawdust caused property damage on June 23 and 24, 2009. The homeowners' insurer, Utica Mutual Insurance Company, paid their fire damage claims and then brought this subrogation action against Style Management Corp. and its owner, Yosef Sason, and against Zak Baruch and his company, AA Fine Home Builder, Inc., for negligence in handling and disposing of flooring materials. It alleged that the Style defendants were liable as the general contractor for the project. The Style defendants moved for summary judgment dismissing the complaint against them, arguing that they were not the general contractor and that their involvement was limited to obtaining the building permit for Baruch and performing a few days of minor carpentry work that had nothing to do with the flooring. Utica Mutual argued that, because Style Management was named on the building permit as the contractor and Baruch, who was unlicensed paid Sason $5,000 to obtain the permit, there was a triable issue of fact as to whether the Style defendants were the general contractor.

Supreme Court denied Style's motion to dismiss, finding that "there are indeed questions of material fact regarding the role [the Style defendants and Baruch] played in the construction at the subject premises...," including "exactly who was the general contractor...."

The Appellate Division, Second Department reversed on a 3-1 vote and dismissed the complaint against the Style defendants. The court said Style showed that the homeowners "hired the Baruch defendants as the general contractor ... and that the Baruch defendants undertook general contractor duties by coordinating and supervising the project, and hiring and paying subcontractors.... The fact that the building permit ... named Style Management Corp. as the contractor" and Baruch paid Sason "for the use of the name Style Management Corp. on the permit" did not raise a triable question about Style's role. It based its conclusion "on Labor Law personal injury cases, which hold that the mere listing of an entity as the contractor on a work permit, without more, is insufficient to raise a triable issue of fact as to whether that entity is the general contractor on a particular project.... [T]he rule..., which is based on the basic definition of a general contractor as one who ... coordinates and supervises the work and hires and pays subcontractors ... applies equally to this subrogation action.... There is no persuasive reason for having two separate definitions of a general contractor...."

The dissenter said, "The Nassau County Administrative Code ... states that the purpose of requiring home improvement contractors to obtain a home improvement license if to 'safeguard and protect the homeowner against abuses....' When a contractor files for a permit..., as Style Management Corp. did in this case, the contractor is required to present its home improvement license" and obtain "liability insurance to protect against loss ... and provide Workers' Compensation insurance to cover the workers on the job.... The fact that the Style defendants may have abandoned their duty as the licensed home improvement contractor in allowing Zak Baruch..., or someone else, to oversee and safeguard the premises ... should not obviate the responsibilities of the Style defendants as the named contractor, who was carrying the insurance. To hold otherwise would allow the Style defendants to perpetuate a fraud on the Village of Lake Success and circumvent the very purpose of requiring licenses and insurance to protect both consumers and workers."

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For respondent Style: Tracy L. Frankel, Garden City (516) 739-5100

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To be argued Tuesday, September 13, 2016

No. 149 People v Roni Smith
No. 150 People v Keith Fagan

A primary issue here is whether a defendant may be sentenced as a repeat felony offender based on a prior conviction that was obtained in violation of People v Catu (4 NY3d 242 [2005]), which held that, before accepting a guilty plea, courts have a constitutional duty to inform the defendant that the sentence will include a mandatory term of post-release supervision (PRS). CPL 400.15(7)(b) provides, "A previous conviction ... which was obtained in violation of the rights of the defendant under ... the constitution of the United States must not be counted in determining whether the defendant has been subjected to a predicate violent felony conviction."

Roni Smith pled guilty in Manhattan to second-degree weapon possession in 2012. He was sentenced to seven years as a second violent felony offender based on his 2002 conviction of first-degree robbery in a plea proceeding at which there was no mention of PRS. Smith was later returned to court in the 2002 case for a Sparber resentencing pursuant to Correction Law § 601-d, during which he agreed to the minimum term of PRS and did not seek to withdraw his plea.

Keith Fagan pled guilty in the Bronx to first-degree attempted robbery in 2010. He was sentenced to 18 years to life as a persistent violent felony offender based, in part, on his 2000 conviction of first-degree attempted robbery in a plea proceeding at which there was no mention of PRS. Fagan was subsequently resentenced in the 2000 case under Penal Law § 70.85, which allows a court to impose the original prison term "without any term of [PRS], which then shall be deemed a lawful sentence."

Both defendants filed CPL 440.20 motions to set aside their current sentences on the ground that their prior felony convictions, obtained several years before Catu was decided, were unconstitutional and therefore CPL 400.15(7)(b) barred their use as predicates. Supreme Court ultimately held in favor of both defendants. Smith was resentenced to six years in prison as a first felony offender, Fagan was resentenced to 15 years as a second violent felony offender.

The Appellate Division, First Department affirmed. It said in Smith, "Because a conviction obtained in violation of Catu implicates rights under the federal Constitution as well as the state constitution..., the court properly ... vacated [defendant's] sentence as a second violent felony offender on the ground that his 2002 conviction could not be counted as a predicate felony under CPL 400.15(7)(b)." Although the 2002 conviction pre-dated Catu, it said "the rule of law announced in Catu applies retroactively to pre-Catu convictions...."

The prosecutors argue the prior convictions may serve as predicate felonies because Catu was decided on state constitutional grounds and CPL 400.15(7)(b) only bars the use of convictions obtained in violation of federal constitutional rights. They say Catu "established a new rule that cannot be applied retroactively. They also argue Smith "explicitly waived any Catu challenge to ... his 2002 guilty plea at his Sparber resentencing," and "the PRS defect" in Fagan's 2000 plea "was cured by [his] subsequent resentencing pursuant to Penal Law § 70.85."

No. 149 For appellant: Manhattan Assistant District Attorney Dana Poole (212) 335-9000
For respondent Smith: David J. Klem, Manhattan (212) 577-2523 ext. 527
No. 150 For appellant: Bronx Assistant District Attorney Justin J. Braun (718) 838-7111
For respondent Fagan: Barbara Zolot, Manhattan (212) 577-2523

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To be argued Tuesday, September 13, 2016

No. 151 Pullman v Silverman

David Pullman had been a patient of Dr. David Silverman for about 12 years when, in January 2007, the Manhattan physician prescribed Lipitor to reduce Pullman's cholesterol level. Nearly a month later, Pullman called Silverman to report he had stopped taking Lipitor because he was feeling chest discomfort, especially while running. Silverman also prescribed Azithromycin, a macrolide antibiotic, when Pullman complained of flu symptoms. In March 2007, Pullman was hospitalized after a near-fainting episode and was diagnosed with atrioventricular (AV) heart block, an impairment of the electrical impulses that control the heartbeat. He ultimately had a pacemaker implanted. Pullman brought this malpractice action against Silverman, alleging that the doctor's negligent administration of Lipitor, alone or in combination with Azithromycin, caused cardiac arrhythmia which progressed to AV heart block.

Silverman moved for summary judgment dismissing the suit and submitted an affidavit from an expert who said there were no epidemiological studies linking Lipitor, other statins, or Azithromycin to AV heart block. Pullman submitted affidavits from four experts who, relying on anecdotal case studies, opined that his heart condition was caused by the prescribed drugs based on the relatively brief time between his taking the drugs and the onset of his symptoms, their knowledge of the interactions between the drugs, and their view that he had no other risk factors for heart block.

Supreme Court denied the motion. "There are clear questions as to whether Dr. Silverman should have prescribed" the drugs for Pullman, it said, but the plaintiff's experts failed to establish that the drugs were the proximate cause of his AV heart block.

The Appellate Division, First Department affirmed, noting that "New York courts permit expert testimony based on scientific principles, procedures or theories only after they have gained general acceptance in the relevant scientific field" as determined under the Frye test. It said Pullman "failed to submit evidence sufficient to raise a triable issue of fact that his expert's opinions were generally accepted in the medical community. Although plaintiff submitted numerous articles in medical literature concerning adverse reactions to Lipitor and Azithromycin, none of the articles linked [AV] heart block to the drugs prescribed by defendant. Biological plausibility and convergence in time between the administration of the drugs and the AV heart block diagnosis are insufficient, where no scientific evidence of causation was provided. '[O]bservational studies or case reports are not generally accepted in the scientific community on questions of causation'...."

Pullman argues his expert evidence "established questions of fact ... as to whether the administration of Lipitor and Azithromycin caused plaintiff's third degree AV heart block, based on medical science, accepted chemical and pharmacological principles, plaintiff's physical condition, and the temporal relationship between the onset of symptoms and the commencement of the regimen, combined with plaintiff's lack of prior cardiac lesions or problems.... [T]he absence of peer reviewed articles precisely on point goes only to the weight of the testimony and should not result in dismissal of the complaint on this record...."

For appellant Pullman: Brian J. Isaac, Manhattan (212) 233-8100
For respondent Silverman: Elliott J. Zucker, Manhattan (212) 593-6700

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To be argued Tuesday, September 13, 2016

No. 152 Matter of Cortorreal v Annucci

Rafael Cortorreal was an inmate at the Sing Sing Correctional Facility in August 2012, when he was charged with violating two disciplinary rules: drug possession and smuggling. A correction officer found two bags of marijuana hidden in a basement, and a confidential informant said Cortorreal had hidden them. He was found guilty after a hearing, but the Department of Corrections and Community Supervision administratively reversed the determination and ordered a new hearing. Cortorreal asked that 10 inmates be called to testify at his second hearing. One testified by telephone and one could not be found in the DOCCS database. The other eight signed refusal forms and, as the basis for their refusal, marked the pre-printed phrase "I do not want to be involved." Five of them added that they knew nothing about the incident, but three inmates said nothing further.

The hearing officer told Cortorreal that he had not personally verified that the eight inmates refused to testify. Cortorreal told the hearing officer that one of those inmates, Brian Blackman, shortly after the first hearing signed an affidavit in which he said a correction officer had pressured him to refuse to testify on Cortorreal's behalf at that hearing and to say on the refusal form, "I don't know nothing." The hearing officer entered Blackman's affidavit into the record and summoned the correction sergeant who had asked Blackman if he would testify at the second hearing. The sergeant testified that Blackman said he knew nothing about the hidden marijuana and said nothing about being coerced out of testifying at the first hearing. The sergeant testified that neither he nor anyone in his presence pressured Blackman not to testify. The hearing officer did not interview Blackman himself or the correction officer Blackman accused of coercion. The hearing officer found Cortorreal guilty of both charges and imposed a penalty of 12 months in the Special Housing Unit.

Supreme Court denied Cortorreal's petition to overturn the determination. The Appellate Division, Third Department affirmed, saying, "Inasmuch as the requested witnesses had not previously agreed to testify and each signed a witness refusal form indicating the reason for the refusal, [Cortorreal's] right to present witnesses was adequately protected...."

Cortorreal argues, "An allegation that a witness in a prison disciplinary hearing has been coerced by staff to refrain from testifying in a substantially related proceeding requires meaningful, personal inquiry by the hearing officer into the allegation." He says the hearing officer's failure to interview Blackman personally about the alleged coercion, or to inquire into any effect it may have had on his willingness to testify at the second hearing, violated his right to call witnesses. He also argues that a hearing officer's obligation to ascertain the reason for an inmate's refusal to testify "is not contingent upon whether a requested inmate witness initially agrees to testify prior to refusing to do so."

For appellant Cortorreal: Matthew McGowan, Albany (518) 438-8046
For respondent DOCCS: Deputy Solicitor General Andrea Oser (518) 776-2029

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To be argued Tuesday, September 13, 2016

No. 153 Villar v Howard *(papers sealed)*

While being held in pre-trial detention at the Erie County Correctional Facility in January 2010, Adam Villar was sexually assaulted twice on consecutive days by another inmate in the shower area of the Nova Unit. He brought this personal injury action against Erie County Sheriff Timothy Howard, alleging the sheriff breached his duty to protect Villar from the foreseeable harm of assault by other inmates, that the sheriff had been negligent in training and supervising deputy sheriffs and other employees at the jail, and that he was vicariously liable for the negligence of deputies and other jail employees. Villar said the sheriff was aware of the risks faced by inmates based on a report on an investigation of the jail by the Civil Rights Division of the U.S. Department of Justice (DOJ), which was submitted to the Erie County executive with a copy to Sheriff Howard in July 2009; and on a lawsuit brought by DOJ in September 2009 against the county and Sheriff Howard for failure to remedy the deficiencies cited in the report, including "a failure to protect inmates vulnerable to sexual abuse by other inmates."

Supreme Court granted Howard's motion to dismiss Villar's suit for failure to file a timely notice of claim and failure to state a cause of action. "Plaintiff was required to serve a notice of claim on the County pursuant to [General Municipal] Law § 50-e because his action is solely against an officer of the County and the County is statutorily obligated to indemnify that officer," it said, finding the notice requirement was triggered by a 1985 resolution of the County Legislature in which it agreed to indemnify the sheriff in return for payment of $1. The court also ruled the sheriff was not directly or vicariously liable to Villar, saying, "While it may be the case ... that the sheriff is charged with administering the jail pursuant to [Correction] Law § 500-c, his carrying out that mandate necessitates developing and instituting policies and procedures as well as hiring and training personnel, all ... discretionary activities."

The Appellate Division, Fourth Department modified by reinstating claims alleging the sheriff violated a duty of care to protect Villar from foreseeable harm and that he was negligent in training and supervising deputies. "Service of a notice of claim upon a public corporation is not required for an action against a county officer ... unless the county 'has a statutory obligation to indemnify such person ...' and, here, Erie County has no statutory obligation to indemnify defendant...," it said. "We further conclude that the court erred in determining that defendant owed no duty of care to plaintiff. Pursuant to Correction Law § 500-c, a sheriff has a 'duty to "receive and safely keep" prisoners in the jail....' A sheriff may also be held liable for negligent training and supervision of the deputy sheriffs who worked in the jail.... [T]he issue whether defendant's alleged acts of negligence 'were discretionary and thus immune from liability is a factual question which cannot be determined at the pleading stage'...." It said the sheriff could not be held vicariously liable for the negligence of his deputies.

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