

# *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, September 14, 2016

## **No. 154 People v Ronel Joseph**

In June 2010, at the Greenleaf Deli on the Upper West Side of Manhattan, a surveillance camera recorded Ronel Joseph as he entered the basement through a pair of cellar doors built into the sidewalk. The deli was on the first floor of a seven-story building, and the six upper floors contained apartments. The basement could be reached only through the sidewalk doors outside the deli, and there was no direct access from the basement to any of the residential floors or to the deli itself. After watching Joseph on a video screen as he looked around the basement with a flashlight, a deli employee went outside and locked the sidewalk doors, trapping Joseph until police arrived to arrest him.

Joseph was charged with second-degree burglary under Penal Law § 140.25(2), burglary of a "dwelling," among other counts. He testified at trial that he went into the basement to retrieve his cell phone after dropping it through the open sidewalk doors. He moved to dismiss the burglary charge on the ground that the isolated basement was not a "dwelling" within the meaning of the statute and that there was no proof he intended to commit a crime. Supreme Court denied his motion. Joseph was convicted of second- and third-degree burglary and lesser charges, and sentenced to seven years in prison.

The Appellate Division, First Department affirmed on a 3-2 vote, disagreeing over how to apply the rule restated in People v McCray (23 NY3d 621) that "if a building contains a dwelling, a burglary committed in any part of that building is the burglary of a dwelling; but an exception exists where the building is large and the crime is committed in a place so remote and inaccessible from the living quarters that the special dangers inherent in the burglary of a dwelling do not exist."

The majority in Joseph said, "Although the inaccessibility requirement appears to have been met, the other condition for application of the exception -- namely, that the building in question be 'large' -- has not.... The apartment building in this case cannot be characterized as 'large' within the meaning of McCray. With the residential dwellings located immediately above the store, it cannot be said that there was 'virtually no risk' that the people living in the apartments would not 'even be conscious' of the presence of a burglar who entered the basement through the sidewalk doors (23 NY3d at 627). Thus..., the scenario before us falls within the general rule, not the exception."

The dissenters said "the evidence showed that the basement was entirely sealed off and inaccessible from the residences above," and they argued this was enough to apply the exception to the rule regardless of the building's size. "Here, the burglar was trapped inside a basement vault, which was not connected in any way, internally or externally, with the upper elements of the building.... Consistent with the Court of Appeals' admonition that a conviction for burglary of a dwelling is not authorized where 'the burglar neither comes nor readily can come near to anyone's living quarters' (McCray, 23 NY3d at 628), I would reverse. I would in any event urge the Court to clarify whether the size of the building is a necessary criterion in making the determination as to whether a building constitutes a 'dwelling.'"

For appellant Joseph: Eunice C. Lee, Manhattan (212) 402-4100

For respondent: Manhattan Assistant District Attorney Diane N. Princ (212) 335-9000

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## **No. 155 Justinian Capital SPC v WestLB AG**

Justinian Capital SPC is asking the Court to reinstate its breach of contract and fraud claims against WestLB AG, New York Branch, and a related affiliate of a German bank, for alleged misconduct involving mortgage-backed securities. The lower courts dismissed the suit under New York's champerty statute, Judiciary Law § 489(1), which prohibits investors from acquiring debts or securities "with the intent and for the purpose of bringing an action or proceeding thereon." Justinian argues the champerty defense is precluded by the safe harbor provision in Judiciary Law § 489(2), which exempts from the champerty statute the purchase of securities at "an aggregate purchase price of at least five hundred thousand dollars."

West LB was the sponsor and asset manager for Blue Heron VI and VII, which issued notes that were originally purchased by Deutsche Pfandbriefbank AG (DPAG), a German bank that is not a party to this litigation. The Blue Heron companies collapsed in 2007 during the subprime mortgage crisis. DPAG concluded it had viable claims against WestLB for including mortgage-backed securities in its portfolio, but it did not sue WestLB directly because DPAG depended on financing from the German government, which was a part-owner of WestLB. Justinian, a Cayman Islands company with virtually no assets, entered into an agreement to buy the notes from DPAG for \$1 million in 2010. Justinian did not actually pay any of the \$1 million to DPAG, an event apparently contemplated by the agreement, which provided that DPAG could take the unpaid portion of the sale price out of any recovery obtained from WestLB. The agreement also required Justinian to pay about 85 percent of any recovery on the notes to DPAG and gave DPAG approval power over any settlement with WestLB or sale of the notes to others.

Supreme Court granted WestLB summary judgment dismissing the suit, ruling Justinian's purchase of the notes was champertous. It said, "[I]f the purchase price is not paid -- such as here, where Justinian paid nothing - the safe harbor does not apply."

The Appellate Division, First Department affirmed. It rejected Justinian's argument that a "promise to pay" at least \$500,000 was sufficient to invoke section 489(2), "since this reading would effectively do away with champerty in New York, a doctrine the legislature chose to sustain in 2004, when it voted to adopt the safe harbor provision." Without "actual payment," it said, "plaintiff cannot avail itself of the safe harbor." It also ruled the purchase of the notes "is champertous since DPAG maintained significant rights in the notes and expected the lion's share of any recovery.... There is every indication that [Justinian] entered into the purchase agreement with the intent of pursuing litigation on DPAG's behalf in exchange for a fee; plaintiff's intent was not to enforce the notes on its own behalf...."

Justinian argues its "promise to pay" was sufficient to invoke the safe harbor provision. Section 489(2) "does not state that the money must have changed hands in order for the safe harbor to apply; it merely requires a purchase price of \$500,000 per note or series of notes. Furthermore, even if the statute had said that the purchaser must 'pay' \$500,000..., it has long been the law that '[t]he word "pay" means to satisfy by other means than cash as well as by cash,' ... including, for example, by promissory note.... [T]he decision below has seriously undermined the Legislature's intent to facilitate New York's role in the trading of distressed debt." It argues its purchase was not champertous because "there is substantial evidence that the assignment did not stir up litigation and that the purpose of the assignment was to enforce a legitimate claim."

For appellant Justinian: James J. Sabella, Manhattan (646) 722-8500

For respondent WestLB: Christopher M. Paparella, Manhattan (212) 837-6000

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**No. 156 People v Luis A. Pabon**

*(papers sealed)*

In November 2012, Luis A. Pabon was indicted on a charge of course of sexual conduct against a child in the first degree for allegedly abusing a Rochester girl in 1998 and 1999, when she was seven years old. The girl first disclosed the abuse in 2012.

Pabon moved to dismiss the indictment as time-barred under CPL 30.10(3)(e), which at the time of the offense provided, "A prosecution for course of sexual conduct in the first degree as defined in [Penal Law § 130.75] ... may be commenced within five years of the commission of the most recent act of sexual conduct." A second provision enacted in the same bill in 1996, CPL 30.10(3)(f), provided, "For purposes of a prosecution involving a sexual offense as defined in [Penal Law article 130] committed against a child less than eighteen years of age..., the period of limitation shall not begin to run until the child has reached the age of eighteen" unless the offense is reported earlier. Pabon argued that only "the specific and more restrictive" five-year limit for course of sexual conduct prosecutions in paragraph (e) applied to him because it "supplanted the broader and more general provisions" of paragraph (f). The prosecutor argued that paragraph (e) established the limitations period for course of sexual conduct prosecutions, and paragraph (f) "is a tolling provision and indicates when the period of limitations set forth in [paragraph (e)] should start to run...."

Supreme Court ruled the indictment was timely. At a bench trial, the court overruled a defense objection to a detective's testimony that Pabon "lied to me" during questioning. Defense counsel said, "He can not reach a conclusion of whether [Pabon is] lying or not.... He is making a judgment which you have to make...." The court replied, "Well, I'm not taking his judgment. I'm listening to his testimony." Pabon was convicted and sentenced to seven years in prison.

The Appellate Division, Fourth Department affirmed in a 4-1 decision, saying the trial court "properly applied CPL 30.10(3)(f), which ... tolls the statute of limitations for sexual offenses committed against a minor until the age of 18...." It said the court erred in allowing the detective to testify that Pabon lied to him, but ruled the error "is harmless because, in a nonjury trial, the court is presumed to be capable of disregarding any improper or unduly prejudicial aspect of the evidence...."

The dissenter argued the indictment was time-barred under the five-year limit in CPL 30.10(3)(e). He said, "[I]f CPL 30.10(3)(f) were applicable to all article 130 offenses," paragraph (e) "would be rendered 'superfluous and ineffective'.... In my view, if the legislature intended the tolling provision of paragraph (f) to apply to course of sexual conduct against a child in the first degree..., it would not have simultaneously enacted paragraph (e), with its specific requirement of a five-year limitation period."

For appellant Pabon: Brian Shiffrin, Rochester (585) 423-8290

For respondent: Monroe County Assistant District Attorney Robert J. Shoemaker (585) 753-4810

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## **No. 157 People v Roy S. Kangas**

Roy S. Kangas was arrested for drunk driving in the City of Rome in July 2012 after registering a blood alcohol level of 0.19 in a breathalyzer test. To establish a foundation for admission of the blood alcohol evidence at his trial in Rome City Court, the prosecutor submitted, as exhibit 7, an electronic record of analysis of the simulator solution used in the breathalyzer, with a certification digitally signed by a supervisor at the State Police Forensic Identification Center (SPFIC), and, as exhibit 8, calibration and maintenance records for the breathalyzer itself, with certifications from a supervisor at the Division of Criminal Justice Services DCJS. With both exhibits, the prosecutor submitted certifications from the Oneida County Sheriff's Department that the records were made and kept by the Sheriff's Department. Kangas objected that the exhibits were records of state agencies, not the Sheriff's Department; that the certifications by the state agencies were photocopies, nor originals; and that the electronic records from SPFIC did not include an affidavit describing "the manner or method by which tampering or degradation of the reproduction is prevented," as provided in CPLR 4539(b). City Court admitted the exhibits into evidence under the business records exception to the hearsay rule. Kangas was convicted of a misdemeanor count of driving while intoxicated.

On appeal, County Court affirmed. Although both exhibits were improperly certified as business records of the Sheriff's Department, the court said, the records were admissible under CPLR 4518 based on the additional certifications provided by DCJS and SPFIC. It held that CPLR 4539(b), requiring verification that a "reproduction" is tamper-proof, does not apply to the electronic records for the simulator solution because the statute governs the admissibility of records of private entities, not government agencies such as DCJS and SPFIC; and because the statute addresses "'reproductions' of business records that were originally in documentary form," not "electronic records" like those of SPFIC "which were created by electronic means and which contained electronic signatures from the very outset of their existence...."

Kangas argues the electronic records of the simulator solution were improperly admitted because the SPFIC certification "fails to provide any details" about how they were handled to prevent tampering or degradation. State Technology Law § 306 provides that "an electronic record or electronic signature may be admitted into evidence pursuant to the provisions of [CPLR article 45] including, but not limited to [CPLR 4539]," which he says required an affidavit describing how "tampering or degradation of the reproduction is prevented." He says there is nothing in the language of CPLR 4539(b) that would limit its reach to private entities or to images of documents that were originally in hard copy. Kangas also contends both exhibits were improperly admitted based on "false certifications" by the Sheriff's Department and that admission of the DCJS records with photocopied certifications violated the best evidence rule.

For appellant Kangas: Mark C. Curley, Rome (315) 336-1410

For respondent: Oneida County Assistant District Attorney Steven G. Cox (315) 798-5766

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## **No. 158 Pink v Rome Youth Hockey Association, Inc.**

Raymond Pink attended a Bantam hockey game sponsored by the Rome Youth Hockey Association (RYHA) in November 2006, and a fight broke out among spectators as the game ended. When Pink sought to intervene, he was punched in the head by Matthew Ricci, who later pled guilty to third-degree assault. Witnesses gave differing accounts of the temper and conduct of the crowd, with some saying hostilities rose as the game went on. Pink and his wife brought this personal injury action against RYHA, which had rented the arena from the City of Rome, among other defendants.

Supreme Court denied RYHA's motion for summary judgment dismissing the suit, rejecting its argument that the incident was unforeseeable because there had been no prior fights among spectators at its games. The court said Pink "asserts that it was the increase in tensions between [spectators who started the fight] that, essentially, put [RYHA] on notice of [the] need to enforce [its] so-called 'No Tolerance' policy," which provided for removal of "parents/spectators" for "inappropriate" or "destructive" behavior. "[T]here is evidence that tensions between [spectators] were escalating throughout the game and that they may have been warned by a referee to tone things down, thus creating a question of fact as to whether [RYHA] may have violated a duty [it] assumed."

The Appellate Division, Fourth Department affirmed in a 4-1 decision. "[T]here is an issue of fact whether the duty of RYHA to plaintiffs included the duty to protect plaintiffs from Ricci's conduct..." it said. "'Foreseeability ... determines the scope of [a] duty once it is determined to exist' ... and, given the hostile environment in the arena before the fight, there is an issue of fact whether RYHA knew or should have known of the likelihood of the fight.... Here, the tensions in the stands built throughout the game such that we conclude that a trier of fact should determine whether RYHA had a duty to intercede and protect plaintiff..."

The dissenter said, "Here, there is no evidence that there were any prior fights among spectators at a youth hockey game involving teams from RYHA. In fact, plaintiffs have not cited a single instance in New York State history in which a spectator was injured during a fight at a youth hockey game. Thus..., it was not foreseeable that a spectator would be assaulted by another spectator ... and RYHA therefore had no duty to protect plaintiff from being assaulted." Regarding the escalating "tensions in the stands," he said there was no evidence "that any representative from RYHA was in the arena at the time so as to put RYHA on notice that a fight could ensue, and in any event by that time it would have been too late to arrange for security personnel to intervene."

For appellant RYHA: Matthew J. Kelly, Albany (518) 464-1300

For respondent Pink: Andrew W. Kirby, Latham (518) 533-1050