

# *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](mailto:gspencer@nycourts.gov).

To be argued Thursday, January 4, 2018 (arguments begin at noon)

## **No. 8 Dormitory Authority of the State of New York v Samson Construction Co.**

In 2001, New York City entered into an agreement with the Dormitory Authority of the State of New York (DASNY) to manage and finance the design and construction of a \$240 million, 15-story forensic laboratory for the Office of the Chief Medical Examiner on the Bellevue Hospital Campus in Manhattan. DASNY contracted with Perkins Eastman Architects, P.C. to design the project and with Samson Construction Co. to conduct excavation and foundation work. From 2002 to 2004, pile driving and other foundation work at the site caused an adjacent Bellevue building to settle; damaged nearby streets, water mains and sewer lines; and delayed the project by more than 18 months. DASNY and the City brought this breach of contract and negligence action against Perkins, among others, seeking \$37 million in damages.

Supreme Court granted Perkins' summary judgment motion to dismiss the claims by the City, which was not a party to the architectural services contract, because the contract did not expressly provide that the City was a third-party beneficiary of the contract. However, the court denied Perkins' motion to dismiss DASNY's negligence claim as duplicative of its breach of contract claim. It said architects and other professionals "may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties."

The Appellate Division, First Department modified by reinstating the City's breach of contract claim, saying the City had raised an issue of fact as to whether it was an intended third-party beneficiary of the contract. It said, "The contract expressly states that a city agency will operate the DNA laboratory, and the City retained control over various aspects of the project, including participation in and approval of the design of the building, the budget for the project, the selection of contractors, including Perkins, and the construction of the building." It agreed with the lower court that DASNY can proceed with its negligence claim, saying "there is a factual question whether Perkins assumed an independent legal duty as an architect to perform its work in a manner consistent with the generally accepted standard of professional care in its industry.... There are issues of fact whether the project was so affected with the public interest that Perkins's failure to comply with the relevant professional standards could result in catastrophic consequences...."

In a partial dissent, one justice said the negligence claim should be dismissed as duplicative "because plaintiffs are 'essentially seeking enforcement of the bargain'.... DASNY's allegations of a mere breach of duty of care do not transform its breach of contract claim into a tort claim.... [N]o 'catastrophic' harm is or could be alleged in this case. The settling of the building took place gradually over a couple of years and never posed a serious threat to the public's safety. Nor were emergency safety measures or repairs required."

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For respondents City and DASNY: Asst. Corporation Counsel Kathy Chang Park (212) 356-0855

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**No. 9 People v Douglas McCain**

**No. 10 People v Albert Edward**

In separate cases, these defendants pled guilty to criminal possession of a weapon in the fourth degree, under Penal Law § 265.01(2), after they were found to be carrying knives. The arresting officers reported in the misdemeanor complaints that the defendants said they had the knives for "protection." The statute requires proof that a defendant possessed a weapon "with intent to use the same unlawfully against another." The defendants argue that their statements of intent to use the weapons legally, for self-defense, do not support the statutory element of unlawful intent, rendering the complaints jurisdictionally defective.

Douglas McCain was arrested in Queens in March 2013, when a police officer saw a "razor knife" clipped to the outside of his pants pocket. He told the officer, "It's for my protection. At least I'm not carrying a gun." After his plea, he was sentenced to time served.

The Appellate Term for the 2nd, 11th and 13th Judicial Districts affirmed based, in part, on Penal Law § 265.15(4), which provides that possession of an instrument "designed, made or adapted for use primarily as a weapon, is presumptive evidence of intent to use the same unlawfully against another." The court said, "Furthermore, defendant's admission that he intended to use the knife as a weapon by itself supports the charge" and his "untested claim that his anticipated use would be justified does not render the accusatory instrument defective, since the issue of whether he had intended to use the knife solely in self-defense is a trial issue...."

Albert Edward was arrested for trespassing in the lobby of a Manhattan public housing project in July 2012. When the officer searched him and found a box cutter, Edward said, "I use it on the train for protection." He was charged with three trespassing counts, but pled guilty only to the weapon charge and was sentenced to 10 days in jail.

The Appellate Term, First Department affirmed, saying Edward's "own statement that he carried the box cutter 'for protection,' 'effectively manifested that he himself considered it a weapon of significance to the police and not an innocent utilitarian utensil'...." The presumption of unlawful intent in Penal Law § 265.15(4) could apply to the facts alleged, it said, and his "untested claim that he would not use the box cutter unless absolutely necessary to lawfully defend himself does not render the weapon possession charge defective. While justification may excuse the unlawful use of a weapon, it does not excuse the unlawful possession of it...."

The defendants argue that their knives "did not qualify as a 'dangerous knife' or any other 'dangerous instrument' governed by the presumption of unlawful intent" in Penal Law § 265.15(4); and the facts alleged, including their statements that they carried the knives for protection, "did not establish that [they] intended to use [them] unlawfully against another person." They say the statements were the only evidence of their intent, and it was evidence of lawful intent. Noting that Penal Law § 265.01(2) applies to some items "that are not per se weapons," Edward says, "It is critical that the facts alleged in the accusatory instrument establish the element of unlawful intent, as the possessor's criminal intent is what converts an object of ordinary use into a dangerous weapon."

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