

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.

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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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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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