

# 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 Wednesday, June 5, 2019

## **No. 53 Pangea Capital Management, LLC v Lakian**

This federal case involves competing claims to property on Shelter Island in Suffolk County. Andrea and John Lakian bought the house in 2002 for \$4.5 million and spent another \$4 million on improvements. Title to the property was initially placed in John's name alone, but was soon transferred to a trust in which Andrea and John each had a 50 percent interest, John was the sole trustee, but the trust declaration specified that its purposes "are limited to holding the record legal title of the Trust Premises for the benefit of the Beneficiaries." In 2013, Andrea filed for divorce and the couple signed a stipulation of settlement in 2015 that increased Andrea's interest in the property to 62.5 percent plus \$75,000. Manhattan Supreme Court incorporated the stipulation into the judgment of divorce, which was entered in June 2015. Andrea never docketed the judgment in Suffolk County. Meanwhile, in 2012, Pangea Capital Management sued John Lakian, its managing member, accusing him of fraudulently diverting millions of dollars to himself. The dispute was submitted to binding arbitration, which resulted in a confirmation judgment by U.S. District Court awarding \$14.5 million to Pangea in 2016. Pangea docketed the judgment in Suffolk County in November 2016. The Shelter Island property was sold in 2017 and the net proceeds of \$5,039,616 were deposited with the District Court.

Pangea moved for a writ of execution on all of the proceeds. Andrea cross-moved for an order awarding her 62.5 percent plus \$75,000 of the proceeds. The District Court granted Andrea's motion, ruling that Pangea was entitled only to the share of the proceeds that were awarded to John in the divorce judgment. The court awarded \$1,822,671 to Pangea and \$3,237,785 to Andrea.

On appeal, Pangea argued that its interest in the property has priority over the interest awarded to Andrea in the divorce judgment because Pangea docketed its judgment in the county where the property was located and Andrea did not. If so, it said Andrea would be entitled only to whatever interest she had in the property before the divorce. Pangea also contended that, prior to the divorce, Andrea had no interest in the property that would take priority over liens held by John's creditors because the nature of the trust entailed that John remained the absolute owner of the trust with regard to his creditors.

The U.S. Court of Appeals for the Second Circuit is asking this Court to resolve the key issues of New York law in a pair of certified questions. The first question asks, "If an entered divorce judgment grants a spouse an interest in real property pursuant to [Domestic Relations Law §] 236, and the spouse does not docket the divorce judgment in the county where the property is located, is the spouse's interest subject to attachment by a subsequent judgment creditor that has docketed its judgment and seeks to execute against the property?" The second question, if necessary, asks, "If a settlor creates a trust solely for the purpose of holding title to property for the benefit of himself and another beneficiary, and the settlor retains the unfettered right to revoke the trust, does the settlor remain the absolute owner of the trust property relative to his creditors, or is the trust property conveyed to the beneficiaries?"

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For respondent Andrea Lakian: Judith R. Richman, Manhattan (212) 687-1425

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## No. 54 People v Arthur W. Ellis, Jr.

Arthur Ellis, Jr., a convicted sex offender living in Ticonderoga, was arrested in 2015 for allegedly failing to register or verify as a sex offender under the Sex Offender Registration Act. Six weeks earlier he had filed his Annual Address Verification Form with the Division of Criminal Justice Services (DCJS), in which he disclosed his internet service provider, email address, and screen names. Ellis was indicted on one felony count of violating Correction Law § 168-f(4) by failing to disclose his Facebook account to DCJS. The statute provides, “Any sex offender shall register with the division no later than ten calendar days after any change of address, internet accounts with internet access providers belonging to such offender [and] internet identifiers that such offender uses....” Ellis moved to dismiss the indictment, arguing that section 168-f(4) did not require him to register his Facebook account and that he complied with the statute by disclosing his email address and screen names.

Essex County Court denied his motion, citing the definition of “internet identifiers” in Correction Law § 168-a(18), which states, “‘Internet identifiers’ means electronic mail addresses and designations used for the purposes of chat, instant messaging, social networking or other similar internet communication.” The court said, “Facebook is a social networking site, and thus the defendant’s identifier for his Facebook account falls within the requirements of Correction Law § 168-f(4).” After the ruling, Ellis pled guilty to the charge and was sentenced to time served and a three-year conditional discharge.

The Appellate Division, Third Department reversed and dismissed the indictment. “[W]e conclude that the social media website or application – be it Facebook or any other social networking website or application – does not constitute a ‘designation[] used for the purposes of chat, instant messaging, social networking or other similar [I]nternet communication’ (Correction Law § 168-a[18]),” the court said. “An Internet identifier is not the social networking website or application itself; rather, it is how someone identifies himself or herself when accessing a social networking account, whether it be with an electronic mail address or some other name or title, such as a screen name or user name. Defendant’s failure to disclose his use of Facebook is not a crime, rendering the indictment jurisdictionally defective....”

The prosecution argues that Facebook is an “internet identifier” that sex offenders must register with DCJS. “Pursuant to Correction Law 168-a(18): an ‘Internet Identifier’ means electronic mail addresses and designations used for the purpose of chat, instant messaging, social networking or similar internet communication. Clearly, this definition includes Facebook as it can be used to ‘chat,’ ‘instant message’ and its main purpose is for ‘social networking.’” The prosecution contends that its reading of the statute is supported by the legislative history.

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For respondent Ellis: Noreen McCarthy, Keene Valley (518) 626-1272

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## No. 55 People v Derrick Ulett

In March 2008, Ruben Alexandre was fatally shot in front of 48 St. Paul's Place in Brooklyn. Two eyewitnesses identified Derrick Ulett as the gunman, but one of them admitted at trial that she might have been mistaken in her identification. The other, Rashawn Cream, was a childhood friend of the victim and Ulett, and he testified that he was talking with Alexandre when Ulett shot him at close range. However, Cream said nothing to investigators at the time. Ten months later, when he was facing robbery and drug sale charges, Cream spoke to a prosecutor and identified Ulett as the shooter for the first time. He received a favorable plea deal, but testified that he received no benefit for testifying against Ulett. A third witness testified that he saw Ulett, who lived nearby, walking toward the scene shortly before the shooting and running away after the gunfire. A security camera in the lobby of the building recorded the shooting through glass doors and windows facing the street. Police recovered the video recording, but prosecutors did not introduce it into evidence or disclose it to the defense. A prosecutor told the jury in summation that there was no video of the shooting. Ulett was convicted of second-degree murder and sentenced to 20 years to life in prison.

Three years later, in response to a Freedom of Information Law request, the district attorney's office turned over the video to Ulett's appellate counsel. Ulett filed a CPL 440.10 motion to vacate his conviction, arguing that the prosecution deprived him of his rights to due process and a fair trial and violated its duty under Brady v Maryland (373 US 83), which requires prosecutors to disclose exculpatory material, including impeachment evidence. Ulett's trial attorney testified at a hearing that, had the recording been disclosed, she would have used inconsistencies between the video and trial testimony to impeach Cream, to investigate other potential eyewitnesses, and to support the defense theory that Ulett was not the shooter.

Supreme Court denied the motion, saying the video would most likely not have enabled the defense to locate additional witnesses and that "each of the defendant's alternative theories [about the shooter] are highly speculative and are not supported by a reasonable viewing of the surveillance tape." It said the tape "could have been used to support an argument that Mr. Cream was mistaken, or perhaps even lying, about who was at the crime scene before and after the shooting.... Based on the discrepancy between Mr. Cream's trial testimony and what appeared on the surveillance tape, trial counsel could have made a cogent argument at trial that Mr. Cream's identification had been impeached...." However, it found pre-trial disclosure of the tape would not have changed the verdict, saying "the limited impeachment value of the surveillance tape as to Mr. Cream's testimony is far outweighed by the corroborative details contained in the exhibit."

The Appellate Division, Second Department affirmed. It said Ulett "failed to show a reasonable probability that the result would have been different had the video been disclosed prior to trial, particularly in light of the very limited view provided in the video of the events occurring outside the building."

Ulett argues, "In this already weak identification case, the People's suppression of a video of the shooting – which revealed a previously unknown eyewitness, contradicted key aspects of the People's star witness's account, and provided a concrete, alternative argument supported by the medical evidence that someone other than appellant shot the deceased – made it reasonably probable that the verdict would have been different had the video been timely disclosed."

For appellant Ulett: Leila Hull, Manhattan (212) 693-0085

For respondent: Brooklyn Assistant District Attorney Ruth E. Ross (718) 250-2529