State of New York
Court of Appeals

To be argued Wednesday, May 1, 2019

No. 39 Andrew Carothers, M.C., P.C. v Progressive Insurance Company

In 2004, radiologist Andrew Carothers formed a professional service corporation -- Andrew Carothers, M.D., P.C. (ACMDPC) -- to perform MRI scans at three clinics in Brooklyn, Queens and the Bronx. ACMDPC leased all three MRI facilities, as well as the medical and office equipment used in them, from Hillel Sher. In 2005 and 2006, ACMDPC performed about 38,000 MRI scans, most of them for patients who were allegedly injured in car accidents. The patients assigned their right to first-party no-fault insurance benefits to ACMDPC, which billed insurance companies for payment. ACMDPC went out of business in 2006 after insurers stopped paying the claims; it also filed thousands of Civil Court collection actions against the insurers, including Progressive Insurance Company.

The insurers raised a defense of fraudulent incorporation under State Farm Mut. Auto. Ins. Co. v Mallela (4 NY3d 313 [2005]), which held that under the no-fault insurance law insurers may withhold payment for medical services provided by a professional corporation which has been "fraudulently incorporated" to allow nonphysicians to share in its ownership and control. The insurers alleged that Dr. Carothers was merely a nominal owner of ACMDPC, which was actually owned and controlled by its landlord, Sher, and its executive secretary, Irina Vayman, who were not physicians. In pre-trial depositions, Sher and Vayman invoked their Fifth Amendment privilege against self-incrimination in response to virtually all questions. At trial, insurers called expert witnesses who testified that ACMDPC's profits were funneled to Sher and Vayman through inflated equipment lease payments to a company owned by Sher, and through Vayman's transfers of funds to her personal accounts. The evidence also showed Dr. Carothers had little involvement in managing ACMDPC. After the parties agreed that Sher and Vayman were not available to testify at the trial, Civil Court permitted the defense to read their deposition testimony to the jury and instructed jurors that they could draw an adverse inference against ACMDPC based on their invocation of the Fifth Amendment. The court refused to charge the jury that the insurers were required to prove the traditional elements of common-law fraud. Instead, it said that for the defense of fraudulent incorporation, the insurers must prove that Sher and/or Vayman were de facto owners or exercised substantial control over ACMDPC. To find de facto ownership, it said jurors must find that Sher and/or Vayman exercised dominion and control over ACMDPC and its assets, and that they shared risks, expenses, and interests in its profits and losses. To find control, the court said jurors must find that Sher and/or Vayman had a significant role in the guidance, management, and direction of ACMDPC. The jury held that the insurers proved by clear and convincing evidence that ACMDPC was fraudulently incorporated, and Civil Court dismissed ACMDPC's complaint.

The Appellate Term affirmed on a 2-1 vote, ruling the jury was properly instructed on the fraudulent incorporation defense. It said "the essence of the defense in [Mallela], as here, was the provider's 'lack of eligibility,' which does not require a finding of fraud or fraudulent intent, but rather, addresses the actual operation and control of a medical professional corporation by unlicensed individuals." It ruled the trial court erred in admitting the depositions of Sher and Vayman, but the majority said the error was harmless; the dissenter said it required a new trial.

The Appellate Division, Second Department affirmed, saying "the jury charge on fraudulent incorporation, read as a whole, adequately conveyed the correct legal principles articulated by the Court of Appeals in Mallela.... [T]he charge properly focused the jury on the question of whether Carothers was a mere nominal owner of [ACMDPC], and if, in actuality, nonphysicians Sher and Vayman owned or controlled [it] such that the profits were funneled to them."

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State of New York
Court of Appeals

To be argued Wednesday, May 1, 2019

No. 40 Matter of Jordan v New York City Housing Authority

Eileen Jordan had been working for 12 years at the New York City Housing Authority (NYCHA) in Caretaker positions, as a janitor and a truck driver, when she suffered a work-related injury and took a leave of absence in July 2011. Eleven months later, NYCHA advised her that she would be subject to termination "upon a total of 12 months absence from work." In August 2012, NYCHA notified Jordan that she was terminated because she had been "absent for a total of one year by reason of disability." NYCHA further advised her that she could "request reinstatement" to her Caretaker title within one year after the termination of her disability.

In 2014, after undergoing two surgeries, Jordan applied for medical reinstatement pursuant to Civil Service Law § 71. The statute states, "Where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease..., he or she shall be entitled to a leave of absence for at least one year.... Such employee may, within one year after the termination of such disability, make application" for a medical examination and, if certified as physically and mentally fit, "he or she shall be reinstated to his or her former position, if vacant, or to a vacancy in a similar position.... If no appropriate vacancy shall exist..., the name of such person shall be placed upon a preferred list for his or her former position, and he or she shall be eligible for reinstatement from such preferred list for a period of four years. In the event that such person is reinstated to a position in a grade lower than that of his or her former position, his or her name shall be placed on the preferred eligible list for his or her former position or any similar position."

NYCHA responded that Jordan was not eligible for reinstatement because she had held "a labor class Caretaker" position. It said the reinstatement rights in section 71 "only extended to employees who had civil service status prior to their resignation in accordance with civil service law." Jordan and her union brought this article 78 proceeding to challenge the determination.

Supreme Court granted Jordan's petition to order NYCHA to conduct a medical exam and, if fit, reinstate her. It said NYCHA's interpretation that labor class employees were meant to be excluded from section 71 "is arbitrary and capricious" and contrary to the statutory text.

The Appellate Division, First Department affirmed, saying, "NYCHA's argument that [section] 71 does not apply to labor class employees is contradicted by the plain language of the statute, which, by its terms, applies broadly to 'employee[s],' an undefined term. We 'cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit because the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended'.... Indeed, elsewhere in article V of the statute, the legislature included terms that limited protections to certain classes of employee...."

NYCHA argues section 71 does not apply to labor class workers, who are at will employees with no right to object to their termination. The statute's reinstatement rights "obviate the need for competitive class employees to re-take a civil service examination and undergo the appointment process to obtain employment in the same competitive class titles. Labor class employees, however, can be hired without taking a civil service examination...." It says the lower court decisions create "a scenario where a labor class employee could be reinstated under Section 71 -- and terminated the next day. The Legislature surely did not intend for such an absurdity to occur...." NYCHA says "the inclusion of the phrases 'preferred eligible list' and 'preferred list' in Section 71 clearly signify the Legislature's intention to exclude the labor class." Eligible lists "are composed based on competitive examination ratings" and, because labor class workers are not hired through competitive examination, there is no method for placing them on eligible lists.

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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 Wednesday, May 1, 2019

No. 41 Matter of Kosmider v Whitney

A month after the November 2015 general election, the chair of the Essex County Democratic Committee, Bethany Kosmider, asked the Essex County Board of Elections for copies of the electronic ballot images recorded by the voting machines it had used in the election. The machines scan images of the paper ballots as they are fed through and store the images randomly on flash drives to preserve ballot secrecy, while the paper ballots are placed in a secure box. The board's two commissioners deadlocked on the request, with Democratic Commissioner Mark Whitney arguing the ballot images were accessible under the Freedom of Information Law (FOIL) and Republican Commissioner Allison McGahay arguing that a court order was required. They referred the request to the Essex County Attorney, Daniel T. Manning, who denied it on the ground that the records were exempt from FOIL because a court order would be required for disclosure of ballot images under Election Law § 3-222(2). The then-chairman of the Essex County Board of Supervisors, now succeeded by Randy Preston, upheld the decision on appeal.

Supreme Court annulled the determination and ordered the images released to Kosmider under FOIL, finding they were not exempted from disclosure by Election Law § 3-222. Section 3-222(1) states, "Except as hereinafter provided, removable memory cards or other similar electronic media shall remain sealed against reuse until such time as the information stored on such media has been preserved...," as by copying it to a hard drive or other more permanent storage media. "Provided, however, that the information stored on such electronic media ... may be examined upon the order of any court...." Section 3-222(2) states, "Voted ballots shall be preserved for two years after such election and the packages thereof may be opened and the contents examined only upon order of a court...."

The Appellate Division, Third Department affirmed on a 3-2 vote. Two justices in the majority said the requirement of obtaining a court order to inspect electronic images in section 3-222(1) "applies only *prior* to preservation" of the images and does not restrict access to them "once the preservation process is complete and the information has been permanently stored." At that point, the ballot images "may be accessed through normal FOIL procedures." They said subdivision (2), requiring that "voted ballots" be preserved for two years and that "the packages thereof may be opened" and examined only with a court order, "applies solely to paper ballots" and does not govern this FOIL dispute over digital images. A third justice concurred, saying the statute "does not create a FOIL exemption given that it does not concern the confidentiality of voted ballots," but instead "concerns the preservation of them." She said it is not necessary to decide whether subdivision (2) applies only to paper ballots or to digital images as well because its "requirement that a party obtain a court order to access the voted ballots applies only in the two years following the election," so a court order would no longer be required.

The dissenters argued that "access to the copies of the electronic ballot images is governed exclusively by Election Law 3-222 and, therefore, they are exempt from disclosure under" FOIL. A court order granting access is always required. Section 3-222 "orders preservation of original ballots and permits examination thereof only for the purpose of resolving election disputes or as evidence in criminal prosecution of crimes related to an election," they said. Because Kosmider did not show "that access was being sought for a permissible purpose," she could not obtain a court order and her petition should be dismissed. Once ballot images have been preserved as required by subdivision (1), they said, "access to such images is governed by subdivision (2) because the preserved images are merely electronic copies of the voted ballots," and it would be "illogical" to disclose the images "without a court order when a court order is required to view the actual paper ballots."

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