

***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.

**NEW YORK STATE COURT OF APPEALS  
Background Summaries and Attorney Contacts**

**Week of April 30 - May 2, 2013**

# *State of New York Court of Appeals*

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To be argued Tuesday, April 30, 2013

## **No. 107 People v Nicholas Sanchez**

A livery cab driver was robbed in December 2004 by two men in the Bronx. The driver identified Nicholas Sanchez as the robber who held a handgun and sat on the right side of the rear seat. He was unable to identify the other robber. Just prior to opening statements, Sanchez's defense attorney told the court he had just learned that his firm, the Legal Aid Society, had been representing another client, Franklin DeJesus, who was investigated by police in connection with this robbery. Defense counsel also said he had learned through "privileged communication" that DeJesus had "some connection" with Elvis Montero, whose fingerprint had been found in the cab where this robbery occurred. Defense counsel conceded that this created "the possibility of potential" for a conflict of interest, but said, "For evidentiary reasons and for just reasons related to common sense, we don't see a need to go into Mr. DeJesus, since there is no physical evidence connecting him to this crime. Therefore, so long as we don't actively go into Mr. DeJesus, we don't see the possibility of a conflict...." In trying the case, defense counsel argued that Montero, not Sanchez, was the gunman in the right-rear seat, but made no reference to DeJesus. The trial court permitted two detectives to testify that Sanchez was the person depicted in photographs the cab's surveillance camera took of the gunman. Sanchez was convicted of first-degree robbery and sentenced to eight years in prison.

The Appellate Division, First Department affirmed in a 4-1 decision, ruling Sanchez was not deprived of effective assistance of counsel by Legal Aid's simultaneous representation of Sanchez and DeJesus. "Although one of the defendant's Legal Aid attorney's testified at the CPL 330.30(3) hearing that counsel thought DeJesus was depicted in the photograph on the driver's side [of the rear seat], the third-party culpability defense, that was focused on Montero only, did not require counsel to implicate DeJesus or otherwise act in a way that was adverse to his interests. For this reason, counsel was correct in telling the court that there was no need to reference DeJesus by name during the trial. There was no conflict between defendant's interests and those of DeJesus. Even if such a conflict existed, it would not have affected the conduct of defendant's defense or operated on counsel's representation of defendant...." The majority said the detectives' testimony identifying Sanchez in the surveillance photos "was properly admitted based on the evidence of their familiarity with defendant from prior occasions."

The dissenter said defense counsel's "decision to overlook the evidence he had already obtained showing some connection between the man investigated by the police [DeJesus] and the man whose latent fingerprints were found in the livery cab [Montero], and to forgo any further pursuit of evidence of a connection between the two men, was itself the inevitable product of the conflict of interest he faced, which clearly affected the conduct of the defense. Rather than proceeding to trial with the understanding that there would be no reference to this other suspect, a nonconflicted attorney would have, at least, sought a recess of the trial to further investigate this suspect for the purpose of building a third-party culpability defense." She also argued that admission of the detectives' identification testimony was improper bolstering.

For appellant Sanchez: Margaret E. Knight, Manhattan (212) 402-4100

For respondent: Bronx Assistant District Attorney Noah J. Chamoy (718) 838-7142

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To be argued Tuesday, April 30, 2013

**No. 108 People v Chester J. Thomas**

*(papers sealed)*

Chester J. Thomas is serving 13 years in prison for his conviction of criminal sexual act in the first degree. The complainant, who was living with Thomas and their three children in Rochester, testified at trial that Thomas forced her to have anal intercourse by threatening her with a box cutter and later beat her with a chain. Defense counsel contended that she fabricated those claims and pointed out that her first written statement to the police, which she signed, did not mention anal rape, the box cutter, or being beaten with a chain. The complainant testified that she did not include those things in her statement because the police officer who was taking it told her "no judge would ever believe that happened because me and Chester Thomas was in an intimate relationship." The prosecutor did not call that police officer as a witness to corroborate her account. In summation, defense counsel argued the complainant did not mention rape in her initial police statement "because it didn't happen," but when he said the officer should have been called as a witness, the court sustained the prosecutor's objection and told the jury to disregard the statement. Defense counsel moved for a mistrial, arguing the court improperly prevented him from discussing the prosecutor's failure to put the officer on the stand. The court denied the motion. It said counsel had been allowed to comment on the officer's absence, but it had precluded counsel from discussing the inferences that should be drawn from the prosecutor's failure to call the officer because the defense had not requested a missing witness instruction.

The Appellate Division, Fourth Department affirmed the judgment. It rejected the trial court's rationale, but said, "In the event that the officer would have merely confirmed the victim's story, such testimony would have been cumulative of the victim's testimony, and the People were not required to call him as a witness.... Moreover, defendant never made an offer of proof with respect to the officer's prospective testimony, and thus there was no good faith basis to comment on the People's failure to call him as a witness...."

Thomas argues, "New York law is clear and well-settled: in summation, a party may point out the failure of the opposing party to call certain witnesses to support a claim..., and may attempt to persuade jurors to draw inferences from the absence of such witnesses.... This Court has also made clear that entitlement to a 'missing witness' instruction is not a prerequisite to a party's ability to urge jurors to draw a negative inference from the opposing party's failure to call certain witnesses...." He also argues that, because the basis for the trial court's ruling was that a missing witness charge must be requested before counsel may argue the adverse inference, appellate review is limited to that issue.

For appellant Thomas: Janet C. Somes, Rochester (585) 753-4329

For respondent: Monroe County Assistant District Attorney Geoffrey Kaeuper (585) 753-4674

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To be argued Tuesday, April 30, 2013

## **No.109 People v Travis Augustine**

On July 18, 2008, Travis Augustine was arrested by the State Police on a bench warrant for violating misdemeanor probation. He was driving a pick-up truck that belonged to Martha Conners, a resident of the Town of Catskill. He also had her debit card and cell phone. He was arraigned on the probation violation charge in Cairo Town Court and was remanded to the Greene County Jail. On July 27, 2008, Conners' son called the State police to report she had been missing for about three weeks, and a trooper questioned Augustine the same day at the jail regarding her whereabouts. On July 28, Conners' body was found buried with her dog on her property in Catskill. She had been shot in the head. On July 29, 2008, State Police investigators questioned Augustine at the jail in the absence of counsel after he waived his Miranda rights.

After Augustine was charged with the murder, he moved to suppress the statements he made on July 27 and July 29 on the ground that the police had violated his indelible right to counsel. He submitted the Cairo Town Court's arraignment memorandum, on which the court had checked the "Yes" box next to "Counsel assigned" and had written in "Public Defenders Office." However, the town justice who arraigned Augustine testified the defendant had told him he "didn't think he needed an attorney ... or wasn't sure that he wanted an attorney," and the justice said he filled out the assigned counsel section so the Public Defender's Office would determine whether Augustine was eligible for assigned counsel. County Court denied the suppression motion, concluding that "no true attorney-client relationship was established" until after the July 27 and 29 interrogations. Augustine was convicted of second-degree murder, aggravated cruelty to animals and possession of stolen property, and was sentenced to an aggregate term of 29 years to life.

The Appellate Division, Third Department affirmed. "Given this equivocal evidence regarding representation [from the suppression hearing], defendant did not meet his burden of showing that he was represented on the probation violation charge at the time of questioning. Even if -- despite evidence to the contrary -- the arraignment memorandum constituted assignment of counsel such that defendant was represented on that charge, there was no proof of entry by counsel. Entry requires 'actual appearance or communication by an attorney'...", the court said. "The proof showed that defendant did not request counsel on the pending charge ... and no one from the Public Defender's office visited defendant at any time prior to the questioning at issue."

Augustine argues the "contemporaneously written assignment of counsel" on his arraignment memorandum "was an actual assignment of counsel," saying the Town Court "was obligated to do so" by court rules requiring assignment of counsel at arraignment before a defendant is remanded to jail. He argues that "entry of counsel" is only required for retained counsel "to provide an objective baseline for reviewing when the relationship was formed." This is not necessary for assigned counsel because "an objective measure" of when the representation began "is the court's order." He also argues the July 27 questioning violated his Miranda rights.

For appellant Augustine: Matthew C. Hug, Troy (518) 283-3288

For respondent Greene County District Attorney: Hannah E.C. Moore, Albany (518) 432-1100

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To be argued Wednesday, May 1, 2013

## **No. 110 Matter of Roth v City of Syracuse**

Norman E. Roth and his real estate companies brought these proceedings under Real Property Tax Law article 7 to challenge tax assessments for tax years 2001 through 2004 on five houses that he rents to college students in the University Hill area of Syracuse. Roth contended, among other things, that the assessments were excessive because the City failed to consider the cost of remediation of lead paint. He cited Matter of Commerce Holding Corp. v Board of Assessors of Town of Babylon (88 NY2d 724 [1996]), which said, "Because environmental contamination can depress a parcel's true value, ... it must be considered in assessing real property tax." The prior owners of the houses did not disclose that they contained lead paint when Roth purchased them in the 1970s, and he did not have them tested for lead paint until 2008, when he hired a testing firm that found lead paint and lead contamination at all five properties. He obtained cost estimates from contractors to remedy the lead paint (\$221,750) and to renovate the houses after remediation (\$242,347), but did not hire them.

Supreme Court denied Roth's petition after a trial, finding that lead paint "only becomes hazardous when it starts to deteriorate, flake, chip or peel." It also found that Roth "has taken no steps to have the lead paint removed" and "is not required by federal, state or local law to remove [it]." The court said Roth failed to prove the properties were "contaminated" because he "introduced no evidence at trial demonstrating that [they] contained deteriorating, flaking, chipping or peeling lead, lead dust ... or any other alleged hazardous substances" during the 2001 to 2004 tax years. "While an inference may be drawn that lead based paint existed in the properties during the taxable status dates, because of the subsequent test in 2008 and the fact that lead based paint is no longer manufactured, no such inference may be drawn as to the condition of the paint three to seven years earlier based upon the tests performed." The Appellate Division, Fourth Department affirmed.

Roth argues that Supreme Court imposed "onerous burdens on petitioners not recognized in Commerce Holding or any precedent.... Commerce Holding and a wealth of authority requires that all 'environmental contamination' be considered in tax assessments," but Supreme Court "required petitioners to demonstrate that the subject properties not only contained 'environmental contamination' in the form of lead paint, but that the condition of the lead paint was a health 'hazard' that required 'remediation.'" He argues the court imposed another "requirement on petitioners -- not imposed in Commerce Holding or its progeny -- to demonstrate that they had a legal obligation, or had agreed, to remediate the lead paint ... before they could obtain a reduction in tax assessment."

For appellants Roth et al: Alan J. Pierce, Syracuse (315) 565-4500

For respondent Syracuse: John A. Cirando, Syracuse (315) 474-1285

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To be argued Wednesday, May 1, 2013

## **No. 111 People v Thomas Lee**

Thomas Lee and a co-defendant were charged with stealing jewelry and electronic equipment from the Manhattan apartment of Yin Poy "Nicky" Louie and Louie's wife, Joan Feng Lan Lee, in June 2008. At trial, Joan Lee testified in Cantonese through an official court interpreter, who disclosed that he was acquainted with the witness and was a "friend" of her husband, Louie, who had helped his late father secure bank loans for his real estate business. The translator said he also knew Louie had been "a prominent member" of a Chinatown gang in the 1970s and 80s who "served federal time." Over defense objections, Supreme Court allowed the interpreter to translate Joan Lee's testimony, saying he was a long-time court employee who "has taken an oath to interpret." After her testimony, the court found there "was no issue whatsoever about the translation and its appropriateness," saying "I assume" there were others in the courtroom who knew Cantonese and would have spoken up. Thomas Lee was convicted of second-degree burglary and third-degree grand larceny and sentenced to 10 years in prison.

The Appellate Division, First Department affirmed, ruling that the relationship between the interpreter and the burglary victims did not require a new trial. "[I]t has been termed the better practice to avoid appointing a friend or relative of a party or witness as interpreter' (Matter of James L., 143 AD2d 533...)," the court said. "However, here the court and defense counsel thoroughly questioned the court interpreter about any possibility of bias, and there is no reason to believe that defendant was prejudiced by the use of this interpreter. Unlike the complainant's son who interpreted for his mother in James L., the interpreter here was not a private citizen appointed as an ad hoc interpreter, but a career court employee who was presumably well aware of his duty to translate testimony verbatim and accurately. Furthermore, the interpreter knew nothing of the facts of this case and there was substantial corroborating evidence through the testimony of another witness and video surveillance films."

Thomas Lee argues, "Given the personal relationship between the interpreter and one of the complaining witnesses, the trial court erred in allowing [him] to translate [Joan Lee's] testimony without first inquiring into the availability of a disinterested interpreter. The court's failure to properly monitor the accuracy of [the interpreter's] translation highlighted the difficulties in detecting and measuring the extent of prejudice to criminal defendants once a biased interpreter is appointed. Thus, this Court should articulate a rule that ... where a trial court is confronted with a potentially biased interpreter, such an interpreter should not be appointed unless and until the court determines that no unbiased interpreter is available; if an unbiased interpreter cannot be found, the court must strongly admonish the interpreter regarding the duty to interpret accurately or ensure that there is some other measure in place to evaluate the accuracy of the translation." He also contends the trial court's Sandoval ruling "was excessive and overwhelmingly prejudicial."

For appellant Lee: Arminda B. Bepko, Manhattan (212) 225-2000

For respondent: Manhattan Assistant District Attorney John B.F. Martin (212) 335-9000

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## **No. 112 People v Timothy Williams**

During a Manhattan buy-and-bust operation in June 2007, an undercover officer joined a couple who approached Timothy Williams and asked him if anyone was "out." Williams left briefly, then returned and told them to go around the corner, where they found a woman selling crack cocaine. The officer bought two \$10 bags. The woman was arrested at the scene and Williams was arrested a few blocks away.

At Williams' trial, the deliberating jury sent several notes requesting clarification and instruction. The judge responded to one note, asking for "clarification of what it means to be 'in concert,'" without any clear indication in the record that he first disclosed it to and discussed it with counsel. When the jurors sent another note asking for a written definition of acting-in-concert, the judge, with the consent of both attorneys, sent a court officer to "tell them no written instructions allowed. The court will tell them about in concert as often as they need to hear it." Williams was convicted of two drug sale charges and sentenced to 7½ years in prison.

The Appellate Division, First Department affirmed. Regarding the first note, it said, "Defendant did not provide a record sufficient to permit review of his claim that the court failed to disclose the contents of a jury note to defense counsel. The record, including the recorded colloquy on a similar note received a short time later, warrants an inference that in an unrecorded conversation, defense counsel was apprised of the contents of the note in question...." Regarding the second note, it said the trial court "lawfully directed a court officer to perform the ministerial act of informing the jury that the court would not provide written instructions...." The Appellate Division ruled that Williams' request for an agency instruction was properly denied because his behavior "was clearly that of a steerer" for the drug seller.

Williams argues that the trial court, in its response to both notes, violated the requirements of CPL 310.30 and committed mode of proceedings errors under People v O'Rama (78 NY2d 270) and People v Tabb (13 NY3d 852). He says the record "fails to demonstrate that the court communicated the content of a substantive jury note" and consulted defense counsel before responding to the first note. Regarding the second note, he says the court "improperly delegated a judicial function to a court officer in response to a substantive jury inquiry." He also argues he was entitled to a jury instruction on the agency defense because "there was ample evidence to support the inference that [he] was acting as an agent of the buyers."

For appellant Williams: Laura Lieberman Cohen, Manhattan (212) 577-3621

For respondent: Manhattan Assistant District Attorney Daniel R. Alonso (212) 335-9000

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To be argued Wednesday, May 1, 2013

## **No. 113 J.P. Morgan Securities Inc. v Vigilant Insurance Co.**

In 2006, the Securities and Exchange Commission (SEC) began a civil enforcement action against affiliates of The Bear Stearns Companies, alleging they facilitated illegal late trading and deceptive market timing for certain customers, predominantly large hedge funds, enabling them to earn hundreds of millions of dollars at the expense of mutual fund shareholders from 1999 to 2003. Bear Stearns refuted the charges, saying it played a passive role in processing its customers' trades and did not receive any special benefit from the trades, which generated only \$16.9 million in fees and commissions. Bear Stearns negotiated a settlement and consented to a March 2006 SEC order, "solely for the purpose of" SEC proceedings "and without admitting or denying the findings," in which it agreed to pay "disgorgement" of \$160 million and civil penalties of \$90 million. The SEC order censured Bear Stearns for "willfully" violating securities laws and ordered it to cease and desist. The New York Stock Exchange (NYSE) issued an order with nearly identical findings, and its sanction was satisfied by Bear Stearns' payment to the SEC.

Bear Stearns sought coverage of the \$160 million disgorgement payment from its primary insurer, Vigilant Insurance Co., and six excess insurance carriers. It asserted that \$140 million of the negotiated disgorgement represented the profits its customers made on the illegal trades and the remaining \$20 million was an estimate "on the high side" of the fees and commissions it received. The professional liability policies covered any "Loss" Bear Stearns incurred as a result of "any Wrongful Act." The term "Loss" includes compensatory damages and settlements, but not "fines or penalties imposed by law" or costs that are legally uninsurable. The policies also exclude claims based on Bear Stearns "gaining in fact any personal profit or advantage to which [it] was not legally entitled." When the insurers disclaimed coverage on the ground that the disgorgement was not an insurable loss or was excluded from coverage, Bear Stearns and two of its J.P. Morgan affiliates filed this breach of contract action. The insurers moved to dismiss.

Supreme Court denied the motion, saying the SEC order "does not contain an explicit finding that Bear Stearns directly obtained ill-gotten gains or profited by facilitating these trading practices," and thus does not establish that the disgorgement was excluded from coverage.

The Appellate Division, First Department reversed and dismissed the suit, saying "disgorgement of ill-gotten gains ... does not constitute an insurable loss. The public policy rationale for this rule is that the deterrent effect of a disgorgement action would be greatly undermined if wrongdoers were permitted to shift the cost ... to an insurer." It said Bear Stearns' settlement offer and the SEC and NYSE orders "are not reasonably susceptible to any interpretation other than that Bear Stearns knowingly and intentionally facilitated illegal late trading for preferred customers, and that the relief provisions of the SEC order required disgorgement of funds gained through that illegal activity."

Bear Stearns argues the disgorgement is a covered loss because it "neither received ill-gotten gains nor was unjustly enriched.... [T]he SEC claimed the power to force Bear Stearns to pay amounts allegedly received by its customers.... It was the assertion of that power ... that accounted for the payment agreed to here." It says, "The Appellate Division contravened New York public policy when it held that coverage for Bear Stearns' loss should be nullified, whether or not the loss constituted the return of Bear Stearns' own ill-gotten gain, to preserve the deterrent effect of " disgorgement. The court also erred, it says, "when it found Bear Stearns 'guilty' of willful misconduct notwithstanding that there had been no trial, no adjudication of any kind, and no admission by Bear Stearns...."

For appellants Bear Stearns et al: John H. Gross, Manhattan (212) 969-3000

For respondents Vigilant et al: Joseph G. Finnerty III, Manhattan (212) 335-4500

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To be argued Thursday, May 2, 2013

## **No. 114 People v Kenneth Padilla**

In June 2008, Kenneth Padilla was arrested in Manhattan for drunk driving after police spotted his Lexus SUV parked at a fire hydrant and obstructing traffic. An officer testified that Padilla was sitting in the driver's seat with the engine running, while Padilla's girlfriend testified that she had been driving and Padilla was standing outside the vehicle, reaching in through the driver's window to retrieve her cell phone when the police arrived. The police impounded the vehicle and, during an inventory search, found a loaded revolver in a compartment beneath a stereo system installed in the trunk. Padilla was then charged with possession of a weapon. He moved to suppress the evidence on the ground the inventory search was improperly conducted.

At the suppression hearing, the officer who conducted the search said that, as a "courtesy," he gave two garbage bags containing Padilla's belongings to Padilla's sister, who was a Transit Authority police officer. He said he inventoried some, but not all of those items. In the trunk, the officer found speakers and an amplifier that "basically filled up the entire space," and he spent 45 minutes to an hour disassembling and removing the stereo system. The officer said it had to be removed and inventoried because it was not original equipment. With the equipment removed, he was able to open the spare tire compartment, where he found the gun in a leather bag. The officer said he searched other compartments for drugs, but found none.

Supreme Court denied the suppression motion, saying the officer "violated provisions of the Patrol Guide in giving items to the Defendant's sister and not keeping a complete record of them," but those actions did not implicate rules that guard against pretextual searches. It said the speakers were properly removed because they were "not an original part of the automobile and would not have been accepted by the police pound." Padilla's first trial ended with a hung jury. At his second trial, he was acquitted of driving while intoxicated, but convicted of second-degree criminal possession of a weapon and was sentenced to seven years in prison.

The Appellate Division, First Department affirmed. "The search produced a 'meaningful inventory list'..., even though the searching officer did not record every item he released to defendant's sister..., and we do not find there were any deficiencies of any kind that would warrant suppression of the revolver," it said. "Regardless of whether the officer suspected that contraband might be present, there was no evidence that the search was conducted as a ruse to discover incriminating evidence."

Padilla argues the inventory search was improper because the officer "admitted that he was searching ... for contraband. Indeed, photographs of the appellant's vehicle ... showed that the back seats had been torn open during the police search. In addition..., the searching officer exercised discretion by turning over numerous personal belongings from the vehicle to the appellant's sister" and "made no attempt to itemize the property he found in the vehicle and therefore failed to prepare a meaningful inventory of the vehicle's contents." He also argues there was insufficient evidence that he knew the gun was concealed in his trunk and that prosecutorial misconduct deprived him of due process.

For appellant Padilla: Randall D. Unger, Bayside (718) 279-4500

For respondent: Manhattan Assistant District Attorney Matthew T. Murphy (212) 335-9000

# *State of New York Court of Appeals*

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To be argued Thursday, May 2, 2013

## **No. 115 Altshuler Shaham Provident Funds, Ltd. v GML Tower LLC**

In March 2007, Altshuler Shaham Provident Funds, Ltd., entered into an agreement to lend GML Tower LLC \$10 million, consisting of \$5.5 million to refinance a prior mortgage and \$4.5 million to finance construction work on two GML properties: a residential tower and a former department store that were part of the Hotel Syracuse complex in downtown Syracuse. The parties modified the loan agreement in May 2007 and again in March 2008. Altshuler never filed the original loan agreement or the two modifications with the county clerk. Altshuler transferred the loan funds to GML in a series of installments from May 2007 to March 2008. In March 2008, Altshuler filed with the clerk its mortgage increase, modification and spreader agreement with GML to secure the \$10 million loan. The contractor on the tower project, The Hayner Hoyt Corporation, and several unpaid subcontractors began filing mechanic's liens against the tower property in September 2008. The project was not completed and GML defaulted on the loans.

Altshuler brought this action against GML to foreclose on its properties, and against Hayner Hoyt and the subcontractors (including Syracuse Merit Electric and L.A. Painting, Inc.) that had mechanic's liens on the properties. The contractors moved for summary judgment, seeking a determination that their liens had priority over Altshuler's mortgage under Lien Law § 22. They argued Altshuler violated the statute by failing to file the original loan agreement.

Supreme Court granted the contractors' motions and declared that their liens had priority. It said Altshuler's March 2007 loan agreement "on its face comports with the definition of a building loan contract" and, consequently, the lender's failure to file it with the county clerk violated Lien Law § 22, which imposes a "subordination penalty" for failure to file. It rejected Altshuler's alternative argument that it was entitled to priority for the \$5.5 million of the loan funds that was used to purchase the property. The court ruled that if a lender fails to comply with the Lien Law, "its entire mortgage, including the part securing loan proceeds advanced for the purchase of the property, would become subordinate to any subsequently filed mechanic's liens." The Appellate Division, Fourth Department affirmed without opinion.

Supreme Court subsequently awarded Altshuler a judgment of \$10 million in its foreclosure action. GML's property brought \$1.4 million at the foreclosure sale, considerably less than the amount of the mechanic's liens, leaving Altshuler with no recovery.

Altshuler argues, in part, that the "2008 consolidated mortgage was recorded pursuant to the 2008 amended commitment and not pursuant to the 2007 commitment," and that the "2008 consolidated mortgage is not a building loan mortgage under Lien Law § 22 because it was not made pursuant to a building loan contract providing for future advances and expressly requiring use of the mortgage proceeds for improvements to real property." Even if the \$4.5 million building loan is subject to subordination under Lien Law § 22, the lender says, there is no basis for extending that penalty to the \$5.5 million used to buy the property.

For appellant Altshuler: Bruce H. Lederman, Manhattan (212) 564-9800

For respondent Hayner Hoyt: Timothy M. Bittel, Cleveland, Ohio (216) 621-0150

For respondent Syracuse Merit: Jordan R. Pavlus, Syracuse (315) 474-6448

For respondent L.A. Painting: Thomas P. Givas, Syracuse (315) 472-4481

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**No. 116 People v Robert Mitchell**

**No. 117 People v Josue Deliser**

In these otherwise unrelated cases, the defendants' pro se motions to withdraw their guilty pleas were summarily denied. Both defendants argue that statements their assigned counsels made in response to their motions were adverse to their interests and deprived them of effective assistance of counsel.

Robert Mitchell pled guilty in 2007 to two counts of second-degree murder arising from the 1996 robbery and murder of Esteban Martinez and Linda Leon in the Bronx. Mitchell, who faced a minimum sentence of 80 years to life if convicted at trial, was promised concurrent terms of 25 years to life. He moved to withdraw his plea on the ground he had been coerced by his attorney. After announcing that it would appoint new defense counsel, Supreme Court asked Mitchell's current counsel if he wanted to respond to his client's allegations. The attorney expressly denied that he in any way coerced the plea from Mitchell. The court then relieved the defender and adjourned the hearing. Mitchell appeared with new counsel at the rescheduled hearing, and the court denied his motion to withdraw his plea.

The Appellate Division, First Department affirmed, saying that before the court denied his motion to withdraw his plea, it "properly exercised its discretion" and "afforded defendant a full opportunity to present his claims both orally and in writing, and with the assistance of newly appointed counsel." The court said his claim of ineffective assistance "was conclusory, unsubstantiated and contradicted by the record."

Mitchell argues that because he "advanced a potentially valid claim of ineffective assistance of counsel," and his newly appointed counsel at the final hearing "added specific and troubling allegations concerning prior counsel's ineffectiveness," Supreme Court "erred in summarily denying his motion ... without any meaningful inquiry." He also says the court "elicited self-serving statements" from his first attorney "that were clearly adverse to his client" while that attorney was still representing him. "Because his own attorney advocated against him, Mr. Mitchell was deprived of the effective assistance of conflict-free counsel."

Josue Deliser, who was accused of two crimes in Brooklyn -- a stabbing in 2006 and a gunpoint robbery in 2007 -- with a sentencing exposure of about 50 years, pled guilty to second-degree attempted murder and first-degree robbery in exchange for a promise of two concurrent 10-year terms. When Deliser moved to withdraw the plea on the ground his attorney had coerced him, the attorney defended his handling of the case and said "...I think they were two strong cases against him and I think he made a knowing plea and I think it was in his best interest." Without appointing new defense counsel, Supreme Court denied the motion. The Appellate Division, Second Department affirmed.

Deliser argues he "was 'represented' by an attorney who not only failed to act in a representative capacity but who, in effect, became a witness against his client." When the court denied his motion without assigning new conflict-free counsel "at this critical stage of the proceedings," he says, "appellant was effectively without the representation to which he was constitutionally entitled." Arguing there was no conflict, the prosecution says, "[A]dvocating for withdrawal of defendant's guilty pleas would not have been a plausible defense strategy because there was no reason to believe [the motion] could have succeeded, and because ... withdrawal of the pleas would not have been in defendant's best interests, given the likelihood of a significantly higher sentence...."

No. 116 For appellant Mitchell: Rebekah J Pazmiño, Manhattan (212) 402-4100

For respondent: Bronx Assistant District Attorney Richard J. Ramsay (718) 838-6693

No. 117 For appellant Deliser: Winston McIntosh, Manhattan (212) 693-0085

For respondent: Brooklyn Assistant District Attorney Diane R. Eisner (718) 250-2489

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To be argued Thursday, May 2, 2013

## **No. 118 Manhattan Telecommunications Corporation v H&A Locksmith, Inc.**

Manhattan Telecommunications Corporation (d/b/a MetTel) brought this breach of contract action against Manhattan locksmith Ariq Vanunu and more than a dozen of his business entities in January 2008, alleging they had failed to pay nearly \$150,000 owed under a contract for telephone services with MetTel. When Vanunu did not appear, MetTel moved for a default judgment in April 2008. Supreme Court ordered additional service of the motion on Vanunu, which MetTel completed in May 2008. The court granted the default motion in June 2008, and the final judgment was entered in November 2008. Vanunu moved to vacate the default judgment in November 2009.

Supreme Court denied Vanunu's motion to vacate, saying, "[S]omeone who is served, sometime I would say after the first of the year in 2008 and waits until sometime in October or November of 2009 to do anything about it, is not someone who should ... have the opportunity to, at this later date, proffer a claim of a meritorious defense."

The Appellate Division, First Department reversed and granted the motion to vacate. "[T]he complaint does not allege that [Vanunu] was a party to the contract individually, so as to bind him to its terms," the court said. "Some proof of liability is ... required to satisfy the court as to the prima facie validity of ... [an] uncontested cause of action'..., and here [MetTel] failed to provide the motion court with evidence that [Vanunu] was personally liable for the stated claims. Accordingly, the default judgment was a nullity...."

MetTel argues that its complaint is not defective because it identifies Vanunu individually as a defendant and "then details the causes of action against all defendants," including the allegation that, "Pursuant to a written agreement, [MetTel] provided telephone service to Defendants." It says the Appellate Division ruling "rested on *no* case that held that when a complaint names more than one defendant, the complaint is a *nullity* if it does not set forth each allegation of the complaint individually against each defendant." MetTel also argues that New York law "requires a showing of excusable neglect in order to vacate a default" and that the Appellate Division "improperly vacated" the judgment "on grounds that [Vanunu] had never raised" in the lower courts.

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