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.

WEEK OF JANUARY 13 - 15, 2015

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

State of New York Court of Appeals

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To be argued Tuesday, January 13, 2015

No. 13 Matter of Tyrone D. v State of New York *(papers sealed)*

Tyrone D. was convicted of first-degree rape and other charges in 1993 based on a violent sexual assault in the Bronx and was sentenced to 8 to 16 years in prison. As he neared the end of his prison term, the attorney general petitioned for his civil confinement under Mental Hygiene Law article 10. In 2010, Supreme Court in the Bronx found that he was a dangerous sex offender requiring confinement and he was sent to a secure treatment facility in Oneida County. In 2011, when he received an annual notice of his right to petition for discharge, Tyrone checked the box stating that he did not wish to waive his right to seek discharge and he filed the petition in Supreme Court, Oneida County. He later moved to change the venue of his annual review hearing to Manhattan, saying that family members were "willing to assume care and custody of him" if he were released and that it was "burdensome and impossible" for them to travel to Oneida County due to financial and health issues. He said the "vast majority" of potential witnesses lived downstate "and may need to testify [about] the potential for parole, social services," and treatment programs in Manhattan.

Supreme Court denied the motion to move the hearing. It found change of venue is permitted under Mental Hygiene Law § 10.08(e), which states, "At any hearing or trial pursuant to [article 10], the court may change the venue of the trial to any county for good cause, which may include considerations relating to the convenience of the parties or witnesses...." However, it said Tyrone failed to establish good cause for the change because he offered "only general and conclusory allegations" of inconvenience and failed to show his witnesses would be material.

When Tyrone failed to appear for his hearing, the court asked for his status. His counsel said, "Your honor, he's stating he did not want to come to court today." The court said, "So he doesn't want to come and he doesn't want his hearing?" Counsel replied, "Right." The court asked, "Did he sign anything?" Counsel said, "I sent him a letter confirming that." The court deemed Tyrone's refusal to appear to be a waiver of his right to a hearing. It later ordered continued confinement, saying "he is likely to be a danger to others and commit sex offenses."

The Appellate Division, Fourth Department affirmed. It said the change of venue ruling was reviewable "because it 'necessarily affects' the final order," but it ruled the lower court had no authority to change venue for the hearing because the language of section 10.08(e) permits a change of venue only for a trial. It rejected Tyrone's claim that, in refusing to appear at the hearing, he waived only his right to be present and not his right to the hearing itself. "Section 10.09(d) specifically contemplates that an offender may waive the right to petition for discharge, and we conclude that, through counsel, petitioner waived that right."

Tyrone argues that section 10.08(e) allows change of venue for hearings and trials "because restricting the change to a trial only would incorrectly remove the word 'hearing' from the legislation" He also contends he showed good cause to move his hearing to Manhattan. He argues that he was improperly denied his right to a hearing because, although he declined to appear, "there is no indication that by doing so he was choosing to waive such hearing." He says article 10 permits, but does not require, an offender to be present for the hearing to proceed.

For appellant Tyrone D.: John A. Cirando, Syracuse (315) 474-1285
For respondent State: Assistant Solicitor General Laura Etlinger (518) 474-2256

State of New York Court of Appeals

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To be argued Tuesday, January 13, 2015

No. 14 Conason v Megan Holding, LLC

Julie Conason and Geoffrey Bryant entered into a rent-stabilized lease commencing in November 2003 for an apartment in a Manhattan building owned by Megan Holding, LLC. Their initial rent was $1,800 per month and they signed renewal leases at monthly rents of $1,899 in 2005 and $1,956 in 2007. In December 2003, after they occupied the unit, Megan Holding registered the apartment with the State Division of Housing and Community Renewal (DHCR). It listed the prior tenant as Oki Suzuki at a monthly rent of $1,000, and said the tenant before that paid $475 per month. In 2009, Megan Holding brought a summary nonpayment proceeding against Conason and Bryant in Civil Court, and in their answer the tenants alleged harassment, breach of the warranty of habitability and rent overcharges. After trial, Civil Court found Megan Holding had fraudulently listed Suzuki, a nonexistent tenant, as the prior occupant and claimed nonexistent improvements to the apartment to inflate the rent. It awarded the tenants a rent abatement on their warranty of habitability claim.

In June 2011, Conason and Bryant brought this action against Megan Holding and its principal owner, Emmanuel Ku, in Supreme Court to recover the rent overcharges, treble damages, and attorneys' fees, alleging the landlord fraudulently registered a fictitious tenant with DHCR to inflate their legal regulated rent. They argued Ku was liable because he abused the corporate form by intermingling the assets of Megan Holding and other companies with his personal assets. The plaintiffs moved for summary judgment based on the collateral estoppel effect of Civil Court's findings of fraud. The defendants moved to dismiss the suit as time-barred, arguing the rent overcharge claim accrued from the first overcharge in 2003 and the claim was not asserted until 2009, after the four-year statute of limitations (CPLR 213-a) expired.

Supreme Court granted plaintiffs summary judgment on liability, finding defendants were collaterally estopped from contesting the fraud allegations, and it ordered a hearing to determine the amount of damages, including treble damages and attorneys' fees. It said the suit was not time-barred, but damages would be limited to the four years prior to the assertion of the overcharge claim in Civil Court in 2009. The plaintiffs could pierce the corporate veil to hold Ku individually liable, it said, because they "established that Ku is the owner of 99% of Megan, that Megan fraudulently set a rent for [their] apartment, and that plaintiffs were financially injured thereby."

The Appellate Division, First Department affirmed, rejecting the statute of limitations defense. Citing M/O Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin. (15 NY3d 358) and Thornton v Baron (5 NY3d 175), it said "'an unscrupulous landlord ... could register a wholly fictitious, exorbitant rent and, as long as the fraud is not discovered for four years, render that rent unchallengeable'[]. We thus hold that the four-year statute of limitations is not a bar in a rent overcharge claim where there is significant evidence of fraud on the record...."

Megan Holding and Ku argue all of the claims are time-barred and the First Department's ruling is "an outright judicial repeal" of the statute of limitations. "In sum, CPLR 213-a is clear. The [plaintiffs'] claims were not timely filed and neither common-law fraud nor a judge-made fraud exception to the statute can change that fact. There is no allegation or proof that the [defendants] prevented the [plaintiffs] from timely filing their claim and there is no other justification given for the failure to timely file."

For appellants Megan Holding and Ku: Umar A. Sheikh, White Plains (914) 368-4525
For respondents Conason and Bryant: James B. Fishman, Manhattan (212) 897-5840

State of New York Court of Appeals

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To be argued Tuesday, January 13, 2015

No. 15 People v Matthew Keschner
No. 16 People v Aron Goldman

Matthew Keschner and Aron Goldman were charged with participating in a no-fault insurance fraud scheme in Manhattan from 2002 to 2006. The operation was devised and controlled by Gregory Vinarsky, who employed runners to solicit patients at the scenes of car accidents and employed medical professionals -- including Goldman, an internist, and Keschner, a chiropractor -- to provide diagnosis and treatment. Prosecutors presented evidence that Vinarsky and his alleged accomplices used medical clinics to fraudulently bill no-fault insurers for reimbursement of unnecessary medical tests, procedures and equipment on behalf of accident victims. Most of the tests and procedures were performed at a clinic on St. Nicholas Avenue in Washington Heights rented by Vinarsky, although Goldman was listed as owner of the clinic.

Goldman and Keschner were tried jointly, with Vinarsky testifying against them under a cooperation agreement, and they were convicted of enterprise corruption (Penal Law art 460) and related offenses. Goldman was sentenced to 2½ to 7½ years in prison and an $800,000 fine, Keschner to 1½ to 4½ years and a $750,000 fine. Among other arguments on appeal, they contended there was insufficient evidence to establish the "continuity of existence" element of enterprise corruption (Penal Law § 460.10[3]) because the criminal enterprise could not continue to function without Vinarsky.

The Appellate Division, First Department affirmed. It said a "criminal enterprise" as defined in Penal Law § 460.10(3) need not be "so structured as to permit it to continue its existence without the involvement of one or more key participants" because "the statute expressly requires only 'a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents'..., not criminal 'participants'...." It said Vinarsky's enterprise "embraced more than one clinic, extended over a period of years, and involved a succession of patients" who were used "to facilitate the fraudulent billing of insurers, which paid some $6 million for services allegedly provided by the St. Nicholas clinic. Thus, the jury was warranted in concluding that the criminal enterprise had a continuity that extended beyond any individual patient or transaction."

The defendants argue, in part, that prosecutors failed to prove the "continuity of existence" element of enterprise corruption because Vinarsky was indispensable to the scheme. "Logic dictates that an enterprise devised and controlled by one individual -- who alone possesses the wherewithal to run it -- also does not come within [the statute's] purview," Keschner says. "Regardless of the minions who may also participate under the individual's direction, the entity effectively constitutes an enterprise of one -- rendered a nullity without its all-controlling leader." Goldman says the Appellate Division "rejected the thoughtful decisions of a host of justices and neutered one of the statute's main protections -- the requirement that an enterprise have a 'continuity of existence,' which this Court has described as 'constancy and capacity exceeding the individual crimes committed under the association's auspices."

For appellant Keschner: Susan H. Salomon, Manhattan (212) 577-2523 ext. 518
For appellant Goldman: Matthew S. Hellman, Washington, DC (202) 639-6000
For respondent: Manhattan Assistant District Attorney Susan Axelrod (212) 335-9000

State of New York Court of Appeals

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To be argued Wednesday, January 14, 2015

No. 11 People v Adam Crowder

Adam Crowder, facing burglary and criminal mischief charges in Schenectady County Court in 2011, was offered a plea bargain that would permit him to plead guilty to a reduced charge of attempted burglary in the second degree and receive a sentence of two years in prison. The court also informed him that the prison term would be followed by a period of postrelease supervision (PRS) ranging from one and a half to three years. However, when Crowder entered his guilty plea three days later, the court made no mention of PRS. After Crowder failed twice to appear for sentencing, the court sentenced him in absentia to an enhanced prison term of five years followed by three years of PRS. The court later confirmed the sentence in Crowder's presence.

Crowder appealed, arguing that his conviction must be vacated under People v Catu (4 NY3d 242) because County Court failed to advise him of his PRS term at the time of his plea. Catu held that a court's failure to advise a defendant of a statutorily-required term of PRS renders a guilty plea involuntary.

The Appellate Division, Third Department affirmed Crowder's conviction, finding that his Catu claim was unpreserved. "Although the court omitted mention of postrelease supervision during the plea colloquy, defendant was aware of that component of the sentence prior to entering his plea, as the court had advised him of it during a previous appearance where the plea offer was described, defense counsel was present when the court imposed a sentence on defendant in absentia that included such a term, and the court mentioned the term of postrelease supervision at the outset of the confirmation hearing," it said. "Because defendant was aware of and advised that the court intended to impose a term of postrelease supervision despite not having mentioned it during the plea colloquy, but he did not object on that ground to raise the issue when it could have been addressed before the sentence was confirmed, the issue is not preserved for appellate review...."

Crowder argues, "The issue in this case is not of preservation but instead of voluntariness." He urges the Court to adopt a "bright line rule" that "the direct consequences of [a defendant's] plea should be clearly and unequivocally stated at the time of the plea" and a court's failure to do so "should result in a vacating of the plea.... To parse otherwise could lead to an untold number of factually different scenarios that render any rule ineffective." He says, "In this case, while the defendant was made aware of a range of possible post-release supervision sentences days prior to the plea, there was no mention of any post-release supervision during the actual plea. If the lower court decision is allowed to stand, it could invite other attempts to move further away from what was once a central concept."

For appellant Crowder: Lee Kindlon, Albany (518) 434-1493
For respondent Schenectady County District Attorney: Counsel Gerald A. Dwyer (518) 388-4364

State of New York Court of Appeals

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To be argued Wednesday, January 14, 2015

No. 18 Graham Court Owner's Corp. v Taylor

In 2004, Kyle Taylor entered into an unregulated lease for a Manhattan apartment owned by Graham Court Owner's Corp. Five months later, Taylor filed a rent overcharge complaint which resulted, in January 2007, in a ruling that the apartment was rent-regulated and Taylor was overcharged. Graham Court terminated the lease in May 2007, alleging that Taylor violated the lease by making improvements without prior written consent, then commenced this summary holdover proceeding to obtain possession of the apartment and "legal fees in the amount of $3,000." In his answer, Taylor asserted a defense of retaliatory eviction under Real Property Law § 223-b and counterclaims for attorneys' fees and damages.

Civil Court dismissed the holdover proceeding, finding that Taylor had obtained consent for the improvements and that Graham Court commenced the proceeding in retaliation for his successful overcharge claim. It awarded attorneys' fees to Taylor pursuant to section 223-b. The Appellate Term, First Department modified by reversing the award of attorneys' fees and otherwise affirmed. It rejected Taylor's alternative claim that he was entitled to attorneys' fees under Real Property Law § 234, which states that when a lease provides for a landlord's recovery of attorneys' fees resulting from a tenant's failure to perform any covenant under a lease, a reciprocal covenant "shall be implied" for the landlord to pay attorneys' fees incurred by the tenant "in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease."

Taylor appealed, arguing that paragraph 15 of his lease triggered the landlord's implied obligation to pay attorneys' fees under section 234. Paragraph 15 states that, if a tenant defaults, the landlord may cancel the lease, "use eviction or other lawsuit method to take back the Apartment," and re-rent the apartment. It also states, "Any rent received by Landlord for the re-renting shall be used first to pay Landlord's expenses..., including ... reasonable legal fees...."

In a 3-2 decision, the Appellate Division, First Department modified by granting Taylor's claim for attorneys' fees under section 234. "We interpret the remedial scheme of paragraph 15 to permit the landlord, in the event of a lease default by the tenant, to cancel the lease and regain possession of the premises via the means of a summary holdover proceeding, and then recoup the attorneys' fee incurred in the litigation by re-renting the premises.... Paragraph 15, thus, literally fits within the language of" section 234. It said, "[W]e concur with the Second Department in holding that the type of lease clause at issue here is sufficient 'to trigger the implied covenant in the tenant's favor'" under section 234.

The dissenters argued, "[U]nder the reciprocal provisions of [section] 234, a tenant may recover attorneys' fees only where the lease provides for the landlord's recovery of such fees (a) in an action or special proceeding or (b) as additional rent. Neither situation is present here.... Nothing in [paragraph 15] provides for tenant's payment of attorneys' fees. The language merely provides for an offset of rents collected in the event of a reletting. Therefore, Real Property Law § 234 is inapplicable."

For appellant Graham Court: Nativ Winiarsky, Manhattan (212) 869-5030
For respondent Taylor: Mark H. Bierman, Manhattan (212) 232-2055

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To be argued Wednesday, January 14, 2015

No. 19 Front, Inc. v Khalil

After working for eight years as director of engineering for Front, Inc., a design and consulting firm, Philip Khalil resigned in March 2011 to join one of Front's competitors, Eckersley O'Callaghan Ltd. (EOC). Front accused him of taking its confidential and proprietary information and using it to divert work for Apple Inc., including a project for the Apple Store on Broadway in Manhattan, from Front to Khalil and EOC. Front retained attorney Jeffrey A. Kimmel and his law firm, Meister Seelig & Fein LLP, to pursue the matter. In April 2011, Kimmel wrote to Khalil to address, among other things, "your recent attempt to steal Front's confidential and proprietary information" and "the illegal competing side business that you conducted" for Front's competitors while employed by Front, and accused Khalil, a British citizen, of violating the terms of his resident alien status and professional codes of conduct. Kimmel also wrote to EOC, enclosing his letter to Khalil and charging that Khalil "conspired with [EOC] to breach his fiduciary duty to Front and engaged in other illicit activities."

In October 2011, Front brought this action against Khalil and EOC alleging misappropriation of trade secrets, civil conspiracy, and unfair competition. Khalil brought a third-party action against Kimmel and his law firm, asserting claims for libel and tortious interference with business relations. Kimmel and his firm moved to dismiss the third-party complaint for failure to state a cause of action, claiming the attorney's statements in the letters to Khalil and EOC were entitled to an absolute privilege because they were made in preparation for litigation. Khalil argued the statements were not protected by an absolute privilege because they were made before the judicial proceeding was commenced.

Supreme Court granted Kimmel's motion to dismiss the third-party complaint, concluding the letters to Khalil and EOC were absolutely privileged. "While the letter ... may well have been rambling and inartful, it clearly relates to the litigation initiated by Front" and "the demands made in the letters ... substantially reflect the causes of action and relief requested" in the main action, it said. "The fact that the litigation was not initiated until approximately six months after the letters were sent does not alter the court's conclusion."

The Appellate Division, First Department upheld the dismissal of Khalil's libel claims, holding that "an absolute privilege attaches to the statements made by [Front's] counsel in the April 2011 letters, because they were issued in the context of 'prospective litigation'...." It further found that "the third-party complaint and the documentary evidence fail, absent the libel claims, to allege the 'malice' or use of 'improper or illegal means' required to state a cause of action for tortious interference with business relations...."

Khalil argues, "The First Department's holding that absolute privilege attaches to statements made in the context of 'prospective litigation' is clearly erroneous, disregards essential policy and equitable considerations, contradicts prior case law on this issue," and conflicts with precedent in the Second and Third Departments. He says, "No reasoning was advanced for the notion that an attorney should be afforded absolute immunity for libelous statements made outside the ambit of judicial proceedings, and under essentially undefined circumstances."

For appellant Khalil: Neil G. Marantz, Rye (914) 925-6700
For respondents Kimmel et al: Lisa L. Shrewsberry, Hawthorne (914) 347-2600

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To be argued Thursday, January 15, 2015

No. 21 Platek v Town of Hamburg

When a water main ruptured and flooded their home in the Town of Hamburg in 2010, Frederick and Mary Platek sought coverage under their homeowner policy from Allstate Indemnity Company. Allstate disclaimed coverage based on a policy exclusion, "item 4," which provides that Allstate does not cover losses "caused by: ... 4. Water ... on or below the surface of the ground, regardless of its source. This includes water ... which exerts pressure on, or flows, seeps or leaks through any part of the residence." The Plateks sued Allstate for breach of contract, citing an exception to the exclusion in Allstate's policy which states, "We do cover sudden and accidental direct physical loss caused by fire, explosion or theft resulting from items 1 through 4 listed above." They argued the exception applies because their losses were caused by an "explosion" of the water main. Supreme Court granted summary judgment to the Plateks.

The Appellate Division, Fourth Department upheld the award of summary judgment on liability in a 3-2 decision. Because the parties offered conflicting interpretations of the exclusion, and the court found both interpretations were reasonable, it concluded that the exception is ambiguous and thus should be construed in favor of the insureds. It said the plaintiffs "submitted evidence ... sufficient to establish as a matter of law that there was an 'explosion' of the water main abutting their property caused by the build up of pressure therein; that the pressure in the water main 'result[ed] from' the conditions set forth in item 4, i.e., '[w]ater ... below the surface of the ground'; and that the explosion of the water main caused 'sudden and accidental direct physical loss' to plaintiffs' property."

The dissenters argued the language of the policy is "clear and unambiguous" and does not cover the Plateks' water damage. "In our view, the exception should not be construed as intending to create coverage for water intrusion inasmuch as such a reading of the exception would supplant the water loss exclusion.... Rather, we agree with Allstate that the exception is properly characterized as an 'ensuing loss provision,' excluding from coverage any initial loss to the insured's property caused by '[w]ater ... on or below the surface of the ground,' but covering secondary or ensuing loss caused by fire, explosion or theft that occurs as the result of an excluded water event...."

For appellant Allstate Indemnity Co.: Robert H. King, Jr., Chicago, IL (312) 876-8000
For respondent Plateks: Patrick J. Mackey, Buffalo (716) 849-1333

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To be argued Thursday, January 15, 2015

No. 22 Matter of Manouel v Board of Assessors

Mehran and Sepideh Manouel, owners of a single-family home in Great Neck, sought to challenge their property tax assessment through a small claims assessment review (SCAR) proceeding in 2010. They did not reside in the house; it was occupied by Mehran Manouel's mother, who did not pay rent. At the hearing, Nassau County objected that the Manouels did not qualify for the SCAR program under the Real Property Tax Law, which requires that a property be "improved by a one, two or three family owner-occupied structure used exclusively for residential purposes" (RPTL 730[1][b][i]). The hearing officer denied the Manouels' petition for SCAR review on the ground the house was not owner-occupied, saying "SCAR jurisdiction does not extend to properties occupied by family members."

The Manouels brought this article 78 proceeding against the County, arguing that a house qualifies as owner-occupied when a relative lives in it rent-free. They said the purpose of the owner-occupancy requirement was to exclude income-producing properties from the SCAR program. Supreme Court dismissed the suit, finding the hearing officer's determination was not arbitrary and capricious. The Manouels provided no evidence that the mother's occupancy was temporary, it said, and "the hearing officer rationally applied an actual owner occupancy rather than income production [test]."

The Appellate Division, Second Department affirmed. "Where statutory language is clear and unambiguous, a reviewing court may not depart from its plain meaning...," it said. "In this case, pursuant to the plain meaning of RPTL 730(1)(b)(i), the owners did not reside at the property." It distinguished Matter of Masters v Board of Assessors (188 AD2d 471), in which the Second Department found a property qualified for SCAR where the house was for sale and the owner allowed his father-in-law to live in it rent-free until it sold. Here, the court said, "there is no evidence that the mother's residence at the property was temporary."

The Manouels argue that small claims assessment review is remedial in nature -- "designed to afford speedy and inexpensive relief to homeowners seeking review of their property tax assessments " -- and it should be liberally construed in order to carry out the legislative purpose of sparing homeowners the time and expense of conventional tax certiorari proceedings. They say, "Although the subject property herein is not, strictly speaking, occupied by the owner, the close familial relationship between the owners and occupant, coupled with the fact that there is no rent charged for the use of the premises, should satisfy a broad definition of the words 'owner-occupied.'"

For appellant Manouels: Christopher P. Byrnes, Mineola (516) 742-7430
For respondent Nassau County: Martin Valk, Mineola (516) 571-3015

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To be argued Thursday, January 15, 2015

No. 23 Matter of Dunn, an Attorney

Albany attorney Jill A. Dunn represented a family trust set up by David Smith, a partner in the investment firm McGinn, Smith & Co., when the U.S. Securities and Exchange Commission (SEC) brought a civil enforcement action against the firm and its principals in U.S. District Court for the Northern District of New York in 2010. The trust intervened in the SEC action to lift a temporary restraining order that froze its assets and, in the course of that litigation, an issue arose regarding the existence of a private annuity agreement that governed assets of the trust. On September 3, 2010, Dunn filed an affidavit with the court denying that she had any knowledge of the annuity agreement prior to July 27, 2010. On November 15, 2010, she filed a corrective affidavit stating that she had recently discovered a July 21, 2010 email containing references to the annuity agreement and that her prior affidavit was incorrect.

A federal magistrate judge granted the SEC's motion to sanction Dunn for the false statements in her September 3 affidavit. The court ordered her to disgorge to the trust $5,355 in legal fees she had received, admonished her for "deliberately filing a false declaration," and referred the matter to the Committee on Professional Standards for the Third Judicial Department. Based on the magistrate's decision, the Committee charged Dunn with engaging "in fraudulent conduct prejudicial to the administration of justice adversely reflecting on her fitness as a lawyer by making false statements under oath in written declarations filed in federal court."

The U.S. Court of Appeals for the Second Circuit dismissed Dunn's appeal of the sanction order for lack of jurisdiction, finding the order was not a final determination and, thus, was not appealable. It said she must wait until the underlying SEC action ended before she could appeal. The Committee then moved at the Appellate Division, Third Department for an order declaring there were no factual issues and finding Dunn guilty of misconduct. It argued the magistrate's findings should be given preclusive effect under the doctrine of collateral estoppel. Dunn argued collateral estoppel should not apply because she had not yet been able to appeal the magistrate's decision and, therefore, did not have a full and fair opportunity to contest it.

The Appellate Division granted the Committee's motion and found Dunn guilty of professional misconduct based on the magistrate's sanction order. It said the factual issues decided by the magistrate were identical to the issues in the disciplinary proceeding and Dunn "was allowed and availed herself of a full opportunity to contest the allegations." It held that "the appellate status of the Magistrate Judge's order does not preclude the application of collateral estoppel." After a hearing on mitigation, the court found censure was the appropriate discipline in view of Dunn's "otherwise unblemished disciplinary record, and her commendable professional reputation...."

Dunn argues collateral estoppel was improperly applied to preclude her from contesting the Committee's factual allegations because the magistrate's order was not appealable. "This Court's precedents consistently hold that only *final* orders and judgments -- orders and judgments that have been appealed or could have been appealed but were not -- may be given collateral estoppel effect in subsequent proceedings. Since the magistrate judge's decision is not appealable until the conclusion of the underlying civil case..., it should not have been given collateral estoppel effect."

For appellant Dunn: Benjamin Zelermyer, White Plains (914) 761-4200
For respondent Committee on Professional Standards: Michael G. Gaynor, Albany (518) 285-8350

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To be argued Thursday, January 15, 2015

No. 24 Matter of Solla v Berlin

This appeal of a counsel fee award stems from a September 2010 decision by the New York City Human Resources Administration (HRA) to reduce the monthly shelter allowance of Luz Solla, a Brooklyn resident, from $1,391 to $1,182. Solla challenged the reduction at a fair hearing before the State Office of Temporary and Disability Assistance (OTDA), which ordered HRA to retroactively restore Solla's benefits in November 2010. Solla's attorney notified OTDA in March 2011 that the benefits had not been restored and asked the agency to enforce its order. OTDA replied that HRA "has taken appropriate action to comply" and OTDA considered the matter "satisfactorily resolved." In May 2011, when her benefits were still not restored, Solla brought this article 78 proceeding against both agencies, seeking enforcement of OTDA's order and an award of attorneys' fees under the state's Equal Access to Justice Act (EAJA). Two weeks later, HRA retroactively restored Solla's benefits.

New York's EAJA (CPLR article 86) provides that "a court shall award to a prevailing party ... fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust." It defines "prevailing party" as "a plaintiff or petitioner in the civil action against the state who prevails in whole or in substantial part where such party and the state prevail upon separate issues."

Supreme Court dismissed Solla's suit as moot, and it denied her application for attorneys' fees on the ground she was not a prevailing party because she did not obtain an enforceable judgment. It rejected her argument that she was entitled to counsel fees under the "catalyst theory" because her suit was not moot when filed and was only rendered moot when the agencies restored her benefits as a result of the filing. While Solla's lawsuit "appears undoubtedly to have been the catalyst for [HRA's] compliance," it said, she was not entitled to fees under Auguste v Hammons (285 AD2d 417 [1st Dept 2001]), which adopted the U.S. Supreme Court's reasoning in Buckhannon Board & Care Home v West Virginia Dept. of Health & Human Resources (532 US 598 [2001]) to reject the catalyst theory.

The Appellate Division, First Department reversed on a 4-1 vote, granted the application for counsel fees and remanded for a hearing on the amount of the fees. Rejecting Auguste, it found the catalyst theory was necessary to achieve the legislative intent behind the EAJA. Without it, "aggrieved but impecunious parties would be hard-pressed to find qualified attorneys to commence cases for them, since they would have no assurance of being compensated. It would be inconsistent with the laudatory goals of the State EAJA to interpret the legislation as depriving plaintiffs of attorneys' fees simply because the State decided to concede its position."

The dissenter said the majority "advanced no compelling reason" to overturn Auguste. He argued, "[T]he adoption of the catalyst theory constitutes a policy decision aimed not at harmonizing the competing interests of the EAJA but at giving precedence to an essentially open-ended method of encouraging actions against municipal agencies and their treasuries. This is not the function of the judiciary."

For appellant OTDA: Cecelia C. Chang, Special Counsel to Solicitor General (212) 416-8808
For respondent Solla: Peter A. Kempner, Brooklyn (718) 237-5574