State of New York Court of Appeals

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WEEK OF FEBRUARY 16 - 18, 2016

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, February 16, 2016

No. 34 Spoleta Construction, LLC v Aspen Insurance UK Limited

Spoleta Construction, the general contractor for a construction project in Rochester, hired Hub-Langie Paving as a subcontractor and, as required by the subcontract, Hub-Langie named Spoleta as an additional insured on its commercial general liability policy from Aspen Insurance UK Limited. A Hub-Langie employee, Shane VanDerwall, was injured on the work site in October 2008. Spoleta did not receive notice of the accident until December 2009, when VanDerwall's attorney informed it in a letter of his intention to file a personal injury action. Spoleta's insurer notified Hub-Langie of the potential claim in January 2010, reminded Hub-Langie of its agreement to defend and indemnify Spoleta, and asked it to notify its own insurer "so that they m[a]y do their own investigation of this claim." Two weeks later, Hub-Langie sent Aspen a notice of claim form regarding VanDerwall's accident and attached the January 2010 letter. VanDerwall commenced his personal injury suit in April 2010, and Spoleta demanded in May 2010 that Aspen defend and indemnify it in VanDerwall's suit. When Aspen disclaimed coverage to Spoleta for untimely notice, Spoleta brought this action for a declaration that Aspen was obligated to provide it with coverage.

Supreme Court granted Aspen's motion to dismiss, saying, "Spoleta failed to provide timely notice of the claim and its demand for coverage as an additional insured."

The Appellate Division, Fourth Department reversed on a 3-2 vote, ruling Spoleta gave Aspen the notice required by its policy, which provides that the insured "must see to it that we are notified as soon as practicable of an 'occurrence' or an offense which may result in a claim." It further provides that when "a claim is made or 'suit' is brought against any insured, you must ... see to it that we receive written notice of the claim or 'suit' as soon as practicable." The court found the December 2009 letter from VanDerwall's attorney was a notice of an "occurrence," not a "claim" under the policy. "We further conclude that the January 2010 letter and form that Hub-Langie sent to [Aspen] at [Spoleta's] request satisfied the insured's duty under the policy to 'see to it' that [Aspen] was notified of the occurrence 'as soon as practicable'.... Inasmuch as the January 2010 letter constituted notice of an 'occurrence,' we conclude that the May 2010 letter constituted notice of a 'claim' or 'suit' based upon VanDerwall's April 15, 2010 commencement of the underlying action."

The dissenters argued Spoleta did not provide timely notice to Aspen of an "occurrence," so the insurer was entitled to disclaim coverage. The January 2010 letter "received by [Aspen] via Hub-Langie did not notify [Aspen] of an occurrence that may result in a claim under the policy. Instead, the letter merely stated that [Spoleta] was seeking defense and indemnification from Hub-Langie pursuant to the indemnification provision of the subcontract. The letter does not indicate that [Spoleta] is seeking coverage directly from [Aspen] as an additional insured..., nor does it ask Hub-Langie to provide notice of any kind to [Aspen] on [Spoleta's] behalf."

For appellant Aspen: Stephanie A. Nashban, Manhattan (212) 232-1300
For respondent Spoleta: Janet P. Ford, Manhattan (212) 487-9700

State of New York Court of Appeals

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To be argued Tuesday, February 16, 2016

No. 35 Yaniveth R. v LTD Realty Co.

Yaniveth R. was born in January 1997 and for the next year her grandmother, Victoria Collazo, took care of her for 10 to 12 hours each weekday at Collazo's Bronx apartment while the child's parents were at work. The apartment was built before 1960, when New York City banned the use of lead-based paint in residences, and some of its paint was cracked or peeling. During a routine medical checkup in 1998, Yaniveth was found to have an elevated blood lead level. The finding triggered inspections by the City Health Department, which found lead paint in Collazo's apartment, but not in the apartment of the child's parents. The department ordered the building's owner, LTD Realty Co., to abate the lead hazard in Collazo's apartment, saying Yaniveth "resides ... and/or spends a significant amount of time" there. LTD ultimately complied with the order. Yaniveth and her mother brought this action against LTD in 2006, claiming the child suffered brain damage and related cognitive and behavioral disorders due to her exposure to lead paint.

LTD moved for summary judgment dismissing the suit, arguing it owed no duty to the child because she did not "reside" at Collazo's apartment within the meaning of Local Law 1, as it then read. The law required owners of multiple dwellings to remove or cover lead paint "in any dwelling unit in which a child or children six (6) years of age and under reside" (Administrative Code of the City of New York § 27-2013[h]). The plaintiffs argued the child did "reside" at Collazo's apartment based on the substantial time she spent there.

Supreme Court granted LTD's motion to dismiss, saying Local Law 1 "requires that the child reside in the apartment" and LTD established that Yaniveth did not. "While counsel correctly states that a person may have more than one residence for venue purposes," it said, citing Matter of Newcomb (192 NY 238 [1908]), "intent is a crucial facet of that analysis ... and the proof presented demonstrates that it remained the intention of both [the child's] mother and Collazo that [the child] return each day to the home she shared with her parents and siblings."

The Appellate Division, First Department affirmed, saying LTD "established prima facie that the infant plaintiff was cared for at the apartment, during the day, but resided elsewhere, with her parents.... In opposition, plaintiffs failed to raise an issue of fact as to the infant's residence at the premises."

The plaintiffs argue that, because the purpose of Local Law 1 is to protect children from lead paint hazards, the word "reside" should be read broadly to include "an apartment in which she spends 50 hours per week under the care of a close relative." The lower courts "improperly added" an intent element and "a requirement that a child must primarily reside in the subject premises. Neither requirement finds support in the plain meaning, text or intent of Local Law 1." They cite Newcomb, which held, "Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires ... an intention to make it one's domicile."

For appellants Yaniveth et al: Alan J. Konigsberg, Manhattan (212) 605-6200
For respondent LTD Realty: Susan Weihs Darlington, Hempstead (516) 538-2500

State of New York Court of Appeals

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To be argued Tuesday, February 16, 2016

No. 36 People v Christian Williams

Christian Williams was arrested in January 2010 for allegedly selling crack cocaine to an undercover officer in Manhattan. In November 2011, he pled guilty to third-degree sale of a controlled substance in exchange for a promised sentence of three years in prison. Neither Supreme Court nor the attorneys realized the sentence was illegal because Williams had a prior violent felony conviction, which made the correct sentencing range 6 to 15 years. The court allowed him to remain free pending sentence and advised him that he could be sentenced to as much as 12 years if he committed another crime, failed to return for sentencing, or failed to cooperate with the Probation Department. Two weeks later, before the promised sentence was imposed, Williams was arrested on a misdemeanor charge of marijuana possession. The District Attorney's Office declined to prosecute him, but the court that had taken his plea held a hearing, found Williams violated his plea agreement by committing the misdemeanor, and sentenced him to an enhanced term of six years in prison.

The Appellate Division, First Department reversed and vacated the plea in a 3-2 decision, ruling his plea "violated due process because it was secured by way of an illegal promise" of a three-year prison term. "[I]t is difficult to understand the dissent's position that defendant's plea was knowing and voluntary when the court itself did not understand that the agreed upon sentence ... was illegal.... While such a challenge must ordinarily be preserved by a motion to withdraw the plea..., this does not apply where the trial court failed to fulfill its obligations to ensure that a plea conformed with due process" by informing the defendant "of the direct consequences of the plea." It said that, "when a defendant enters into an involuntary guilty plea, the constitutional defect lies in the plea itself, and not in the resulting sentence.... In such a scenario, vacatur of the plea is the only remedy since it returns the defendant to his status before the constitutional infirmity took place...."

The dissenters argued Williams' objections to his plea are unpreserved and should not be considered, saying this is not "the 'rare case' where preservation is not required ... because the court failed in its duty to advise the defendant of a direct consequence of entering a guilty plea...." Further, they said, "Where a defendant does not move to withdraw his plea, a sentencing court nevertheless has the inherent power to correct an illegal sentence.... Thus, the illegality of the promised sentence does not, in itself, render a defendant's guilty plea unknowing and involuntary.... Here, defendant was told that he could receive up to 12 years' imprisonment if he failed to comply with the conditions set by the court.... Since defendant violated the conditions of the plea agreement and did not move to withdraw his plea, he was no longer entitled to the three year sentence and cannot argue that the period of imprisonment finally imposed was not within the expected sentencing range of up to 12 years. Because the final sentence was lawful and within the expectations of the parties, defendant's plea did not violate his due process rights."

For appellant: Manhattan Assistant District Attorney Beth Fisch Cohen (212) 335-9000
For respondent Williams: Anita Aboagye-Agyeman, Manhattan (212) 577-3517

State of New York Court of Appeals

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To be argued Tuesday, February 16, 2016

No. 37 People v Marcellus Johnson

Marcellus Johnson was arrested on robbery and larceny charges in September 2011 for allegedly stealing a wallet, cell phone and debit card from a drunken tourist in Manhattan. Unable to make bail, he was held at Rikers Island awaiting trial for nearly four months and made dozens of telephone calls to friends and relatives, in some of which he discussed details of the crimes. His calls were recorded pursuant to an Operations Order of the City Department of Correction (DOC), which requires recording and retention of all calls made by and to inmates, except privileged calls to attorneys, clergy or treating physicians and calls to certain government agencies. Near the telephones are posted notices that read, "Inmate telephone conversations are subject to electronic monitoring and/or recording in accordance with department policy. An inmate's use of institutional telephones constitutes consent to this monitoring and/or recording." Permission for DOC personnel to listen to the calls is generally limited to situations involving threats to institutional security or criminal behavior, but the order includes a procedure for providing copies of the recorded calls at the request of prosecutors and police agencies.

The prosecutor in Johnson's case obtained recordings of his phone calls from DOC. Johnson moved to bar the prosecutor from introducing or referring to his recorded conversations, arguing that their release exceeded DOC's authority, that any consent by him did not apply to use of the recordings by prosecutors, and that his indelible right to counsel would be undermined. His defense attorney said, "If disclosure of the defendant's calls to his prosecutor reflects a policy of routine approval of such prosecutorial requests, then DOC has made itself the 'ears' of the prosecution and has injected itself into the criminal process in a way that violates the defendant's Sixth Amendment Right to Counsel."

Supreme Court denied the motion, saying, "I cannot conclude that the Department of Corrections is an agent of the police department and is responsible for obtaining incriminating evidence against the defendant. So, I'm going to deny your motion to preclude on the [right to counsel] issue." Nine of the recordings were played for the jury. Johnson was convicted of third-degree robbery, fourth-degree grand larceny and possession of stolen property. He was sentenced to 3½ to 7 years in prison.

The Appellate Division, First Department affirmed. "The court properly admitted portions of telephone calls made by defendant from Rikers Island that were routinely recorded by the Department of Correction. These calls were clearly admissible, notwithstanding that defendant's right to counsel had attached...," it said. "We have considered and rejected defendant's remaining claims regarding the recorded calls."

For appellant Johnson: Stanley E. Neustadter, Manhattan (212) 790-0410
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, February 17, 2016

No. 39 Matter of Perlbinder Holdings, LLC v Srinivasan

Perlbinder Holdings owns five adjacent lots on Second Avenue near the Manhattan entrance to the Midtown Tunnel, and on its building facing 37th Street it had an illuminated advertising sign that was a legal, non-conforming use. The City Department of Buildings (DOB) ordered it to demolish the vacant building with the wall sign in 2008, and Perlbinder obtained a DOB permit to erect a freestanding structure to hold a replacement sign on adjacent lots at Second Avenue and 36th Street. However, when Perlbinder applied for a permit to install the new sign -- a double-sided, illuminated sign -- DOB objected based on the sign's location, height and surface area. Perlbinder sought reconsideration, and Manhattan Building Commissioner Chris Santulli approved the new sign permit in October 2008. In 2010, after Perlbinder installed the sign, DOB audited its prior permits and found Perlbinder's sign was not lawfully approved. DOB revoked the sign structure permit in 2010 and revoked the installation permit in 2011.

Perlbinder appealed to the Board of Standards and Appeals (BSA) and argued, in part, that it built the new sign in good-faith reliance on Santulli's approval of its permit in 2008. It did not apply for a variance. BSA upheld DOB's revocations, finding the new sign was in a different position and location and was more non-compliant with zoning than the original. BSA did not consider Perlbinder's claim of good faith, saying "the doctrine [is] limited to zoning variance applications" and "the courts have not extended the principle to interpretive appeal cases." Perlbinder brought this article 78 proceeding to annul the decision and reinstate the sign permits.

Supreme Court dismissed the suit, saying BSA's determination was rational and the double-sided sign "could not properly be considered a replacement" for the wall sign. Regarding the claim of good-faith reliance, it said case law "made plain that estoppel is not available against an agency even when correction of its prior erroneous determination leads to harsh results."

The Appellate Division, First Department reversed and remanded for BSA to determine whether Perlbinder is entitled to a variance, saying BSA erred in concluding it could not consider Perlbinder's good faith. It said NY City Charter § 666(7) "provides that in determining ... appeals, BSA may 'vary ... any rule or regulation or the provisions of any law relating to the construction ... of buildings or structures ... where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the law, so that the spirit of the law shall be observed, public safety secured and substantial justice done'.... BSA failed to appropriately address this charter provision, despite a request by [Perlbinder]. Indeed, to the extent [Perlbinder] sought relief based on its good-faith reliance, [its] appeal before BSA was, in effect, a request for a variance." The court said, "The record establishes as a matter of law that [Perlbinder] relied in good faith upon the 2008 determination."

The City argues the Appellate Division erred in construing Perlbinder's appeal as a variance request and remanding for BSA to consider Perlbinder's good-faith reliance under City Charter § 666(7), and also in deciding the issue of good-faith reliance rather than leaving that to BSA in the first instance. Perlbinder argues it is entitled to maintain its sign as of right, without remand to BSA for a variance, due to its good-faith reliance on DOB permits approved in 2008.

For appellant-respondent Perlbinder: Howard Grun, Manhattan (212) 687-1700
For respondent-appellant City: Assistant Corporation Counsel Jane L. Gordon (212) 356-0846

State of New York Court of Appeals

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To be argued Wednesday, February 17, 2016

No. 40 Matter of Kenneth S. *(papers sealed)*

In this juvenile delinquency case, Kenneth S. moved to suppress physical evidence -- an air pistol with a magazine capacity of 6 BBs -- found during a warrantless search of his backpack in October 2012. Two police officers testified that they approached Kenneth, a 15-year-old Bronx resident, when they saw him walking with a friend in Manhattan during school hours. Officer Sergio Merino said a partner had previously arrested him for robbery. Merino said Kenneth told him he had left school early to attend a program, but admitted that his mother thought he was in school, so Merino decided to take him to the precinct and call his mother. When Kenneth's pack bumped the police car, Merino said it made "a noise that I thought sounded like when my gun hits the car." Kenneth denied there was anything dangerous in his pack. He removed the pack at the request of Merino, who handed it to Officer James Diaz. Diaz said he immediately "felt the handle of a firearm" and told Merino to handcuff Kenneth. Merino ordered him to put his hands behind his back, but he kept them on the hood of the car, saying "how he can't go back. He just got out. The judge is going to be mad at him." As Diaz helped Merino finish handcuffing him, Kenneth's friend began cursing at them and other bystanders joined in. The officers placed Kenneth in the back seat and Merino sat next to him, trying to hold the bag away from Kenneth's side. Merino said he looked into the bag "as soon as I got in the car," then removed the BB gun at the precinct.

Family Court denied the motion to suppress, finding the officers "had the authority to detain" Kenneth when he admitted he was truant. It said "the escalating circumstances, especially [Kenneth's] repeated denials of there being anything in the bag after the bag had clearly made a metal sounding noise clunking against the police car," justified seizure of the bag and recovery of the BB gun. Kenneth then admitted to possession of the air pistol. The court determined he was a juvenile delinquent and placed him on probation for 18 months.

The Appellate Division, First Department affirmed, saying, "The police lawfully detained [Kenneth] as a suspected truant" and "lawfully patted down" his pack based on the "distinctive metallic sound" it made hitting the car. "The warrantless search of the bag, after [Kenneth] had been handcuffed and placed in the police car, was justified by close spatial and temporal proximity, as well as by exigent circumstances...," including "the fact that [he] resisted arrest, the officers' knowledge that [he] was on probation in connection with a past robbery..., the officers' high level of certainty that the bag actually contained a weapon, and the danger of [Kenneth] reaching the bag, despite being handcuffed, while seated ... next to the officer who had the bag."

Kenneth argues, in part, "The police may not conduct a warrantless search of a bag after reducing it to their exclusive control so that it is not within a handcuffed suspect's grabbable area.... It was not realistically possible for the handcuffed juvenile to have overpowered Officer Merino, reached across him into the bag, and removed the gun." He also says the BB gun must be suppressed as the fruit of an illegal truancy detention because the police "may not arrest a juvenile and take him to the precinct for being a truant" under Education Law § 3213(2)(a), which states that officials making truancy arrests "shall forthwith place the minor so arrested" at an educational facility.

For appellant Kenneth S.: Raymond E. Rogers, Manhattan (212) 577-3544
For respondent Corporation Counsel: Asst. Corporation Counsel Ronald E. Sternberg (212) 356-0840

State of New York Court of Appeals

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To be argued Wednesday, February 17, 2016

No. 41 Matter of Springer v Board of Education of the City School District of the City of New York

Grant Springer, a tenured teacher of catering at the Food and Finance High School in Manhattan for nine years, resigned in January 2011 to pursue a career as a corporate chef. He soon decided to return to teaching and was hired to teach catering in October 2011 by the principal of the Wadleigh Secondary School for the Performing and Visual Arts in Manhattan. Springer did not apply to withdraw his resignation under Chancellor's Regulation C-205(29), which states that tenured teachers who resign "shall, remain tenured and, upon written request, be permitted to withdraw such resignation subject only to medical examination and the approval of the Chancellor, provided that reinstatement is made on or before the opening of school in September next following five years after the effective date of resignation."

The principal was replaced during the school year and the new principal informed Springer in April 2012 that he did not have tenure. He then submitted to the Board of Education a written request to withdraw his resignation, but was told his request was too late and would not be processed. He received an unsatisfactory performance rating in May 2012 and the new principal terminated him as a probationary teacher in June 2012. Springer brought this article 78 proceeding against the Board of Education to challenge his termination.

Supreme Court granted the Board's motion to dismiss the suit as premature "for failure to exhaust administrative remedies."

The Appellate Division, First Department affirmed. "There is no question that [Springer] failed to comply with the ... Chancellor's Regulation Nos. C-205 (28) and (29), which govern withdrawal of a resignation and restoration to tenure," it said. "Hence, when [he] was rehired by a principal, his tenure was not ipso facto restored. We reject [Springer's] contention that his tenure was constructively restored by his rehiring."

Springer argues he "never lost tenure" under the language of C-205(29), which states that a resigning teacher shall remain tenured, so "it was unnecessary for his tenure to be restored." He says he properly withdrew his resignation when he submitted his request in April 2012, within the five-year limit, and each time he applied for a teaching job in the district. He also argues the Board violated his due process rights, as a tenured teacher, when he was dismissed without a just cause hearing under Education Law § 3020-a.

For appellant Springer: Maria Elena Gonzalez, Manhattan (212) 533-6300
For respondent Board of Education: Assistant Corporation Counsel Devin Slack (212) 356-0817

State of New York Court of Appeals

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To be argued Wednesday, February 17, 2016

No. 47 People v Reginald Powell *(papers sealed)*

Reginald Powell was charged with murdering Jennifer Katz in her home in the Village of Mamaroneck in December 2010, after he was stopped by police for a traffic infraction in Manhattan while driving her car and tried, unsuccessfully, to escape on foot. He told the police he had found the body of a friend in her bedroom closet several days earlier, was afraid he would be accused of the crime because he was on parole, and so he fled in her car after taking some of her jewelry. He denied having sexual relations with the victim. He made similar statements to detectives from Mamaroneck, and told them his brother Warren Powell had lived with Katz for about five years, ending the previous spring. DNA tests matched Reginald Powell to samples from the victim's body, underwear and bedding, and excluded his brother.

The trial court admitted cell phone evidence from the prosecution that Warren Powell had been in the vicinity of the victim's home at around the estimated time of the murder and evidence that he had access to the home. When the defense sought to present evidence that Katz had named Warren Powell as the beneficiary of her $500,000 life insurance policy to show that he might have had motive to kill her and to "lay a foundation[] in case I want to make a third party accusation," the court refused to admit it because the defendant had not actually accused his brother. It said, "[T]hat is an essential element of third-party culpability[,] you actually have to accuse somebody. Instead, what we're saying is it might have been Warren Powell..., we are not saying he did it, but who knows, the defendant didn't do it...." Noting the "tenuous link of an insurance policy which may or may not have been known" to Warren Powell, the court said, "At the moment there is insufficient evidence to permit this" under the balancing test in People v Primo (96 NY2d 351). Reginald Powell was convicted of first-degree murder and other crimes, and was sentenced to life without parole.

The Appellate Division, Second Department affirmed. Regarding the life insurance policy, it said, "The Supreme Court properly precluded the defendant from presenting evidence of third-party culpability, since the proposed evidence was based on mere speculation...." It also rejected Powell's claims that the trial court did not provide a "meaningful" response to a jury note seeking clarification of the element of intent on the murder count, and that it improperly considered uncharged crimes in imposing sentence.

Reginald Powell argues, "The evidence established Warren Powell had an opportunity which was not remote in time or place to commit the crime. The trial court's exclusion of evidence of motive based on financial gain or jealousy which was relevant to the jury's determination of reasonable doubt denied appellant's constitutional right to present a complete defense." He says the Primo standard for admitting evidence of third-party guilt "is unduly burdensome for a defendant" and should be changed to "include inquiry as to whether the proffered evidence could create a reasonable doubt as to the defendant's guilt."

For appellant Powell: Salvatore A. Gaetani, White Plains (914) 286-3400
For respondent: Westchester County Assistant District Attorney Maria I. Wager (914) 995-3497

State of New York Court of Appeals

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To be argued Thursday, February 18, 2016

No. 42 PAF-PAR LLC v Silberberg

In July 2006, several limited liability companies controlled by Michael Silberberg and Berel Karniol borrowed $13 million from CAD Funding LLC, a loan secured by mortgages on property the borrowers owned in the Syracuse area. As further security, Silberberg and Karniol executed a guaranty in which they "absolutely, irrevocably and unconditionally guarantee[d] to Lender ... the payment and performance of the Guaranteed Obligations," which were defined to include the borrowers' obligation under the "Loan Documents." Article II of the Guaranty provides that "Guarantor's obligations ... shall not be released, diminished, impaired, reduced or adversely affected by ... modification, alteration or rearrangement ... of the Guaranteed Obligations, Note [or] Loan Documents...."

Sometime after the borrowers paid off $1 million of the loan in December 2008, CAD allegedly sold the loan to PAF-PAR LLC. The borrowers did not satisfy the remainder of the loan by its maturity date of July 15, 2009, but nine days later they entered into a Loan Modification and Extension Agreement in which PAF-PAR forgave $2 million of the loan and the borrowers made another $1 million payment. The borrowers paid off the remaining loan amount of $9 million by the new maturity date of September 30, 2009, and PAF-PAR issued a payoff letter and released the borrowers' collateral. PAF-PAR then demanded payment under the guaranty from Silberberg and Karniol of the $2 million it had forgiven. Silberberg and Karniol refused, contending the borrowers' full payment of the modified loan satisfied their obligations under the guaranty. PAF-PAR brought this action for payment of the $2 million, contending the loan modification did not reduce the liability of the guarantors for the full amount of the original $13 million loan.

Supreme Court dismissed the suit, saying PAF-PAR "cannot establish the existence of a debt for the very simple reason that the debt was discharged pursuant to the terms of the loan modification agreement." Regarding article II of the guaranty, it said "those provisions apply only to the guarant[y] obligations[,] which is defined in the guarant[y] as all of borrowers' obligations under the loan documents which include the modifications." A guarantor's liability "accrues only after a default," it said, and while "here we had initial default by the borrowers," full payment of the modified loan "remedied the default" and the guaranty was not triggered.

The Appellate Division, First Department affirmed, rejecting PAF-PAR's claim that the guaranty for the original loan amount is enforceable because article II says it cannot be "diminished" or "reduced" by "modifications." The court said, "[T]his language cannot operate to make the guarantor liable for more than what the primary obligor was obligated to pay and did pay." It also said there was no default because the borrowers paid the modified amount in full.

PAF-PAR argues the guaranty is "a stand-alone 'primary' obligation" that promises "to 'jointly and severally' and 'absolutely and unconditionally' repay the lender's $13 million in loaned funds, regardless of any later note modifications or loan forbearance as between the borrower and the lender." It says the Appellate Division improperly converted "the independent loan guaranty from a primary obligation into 'a contract of secondary liability' that necessarily follows later modifications to the note."

For appellant PAF-PAR: William Charron, Manhattan (212) 421-4100
For respondents Silberberg and Karniol: Vincent J. Syracuse, Manhattan (212) 508-6700

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To be argued Thursday, February 18, 2016

No. 43 Matter of Ranco Sand and Stone Corp. v Vecchio

Ranco Sand and Stone Corp. bought a 2.16-acre parcel at 154 Old Northport Road in Kings Park, Town of Smithtown, in 1992. In 2002, Ranco petitioned the Town to rezone the property from residential to heavy industrial use. The Town Planning Board held a hearing on the application in November 2002, and recommended that the Town Board approve the rezoning with conditions in March 2004. The Town took no further action on Ranco's application for more than five years, until August 2009, when the Town Board issued a positive declaration under the State Environmental Quality Review Act (SEQRA), finding the proposed rezoning "may have a significant effect on the environment" and requiring Ranco to prepare a draft environmental impact statement (DEIS). Ranco brought this article 78 proceeding to annul the Town's determination as arbitrary and capricious. In support, it pointed out that an adjacent 3.36-acre parcel it also controls was rezoned from residential to heavy industrial use without any SEQRA review to settle litigation against the Town in 2002. It has been leasing both properties as if they were a single parcel to a school bus company, which uses them for parking and repair of its vehicles. Ranco argued, in part, that because no formal environmental review was required for rezoning of the adjacent parcel, none should be required for its current application.

Supreme Court dismissed the suit. "[T]he Town Board's SEQRA determination is not yet ripe for judicial review...," it said. "A lead agency's SEQRA review obligations are not considered complete until it issues a SEQRA findings statement...."

The Appellate Division, Second Department affirmed. It said Matter of Gordon v Rush (100 NY2d 236) "recognized that there may be circumstances in which the issuance of a positive declaration requiring property owners to prepare and submit a DEIS itself inflicts actual injury and constitutes a final administrative action ripe for judicial review," but "a number of factors distinguish this matter, and indeed perhaps the typical case," from Gordon. "Here, while the parties settled their dispute in the prior action as to the adjacent parcel without a SEQRA positive declaration..., the instant case involves a different parcel...." Further, it said, "Ranco has not already been subject to a review process coordinated by multiple governmental agencies. The Town Board did not previously forgo an opportunity to be heard in any such process.... [T]here has not been a prior determination that a DEIS is not warranted [and] a sufficient record has yet to be established on this matter." Ranco's expense in preparing a DEIS, "substantial though it may be, is not sufficient ... to require us to conclude that the matter is ripe for judicial review...," it said. "Here, the issuance of the positive declaration appears to be the initial step in the process for these parties, albeit several years after the application for rezoning was submitted."

Ranco argues that the Town's decision to require a DEIS "merely so [Ranco's] long-standing and long-tolerated use is in accord with the proper zoning category" is ripe for review under Gordon because the environmental study "is of no benefit to the Town and a great expense and injury to [Ranco]." It also contends the Town's delay in issuing the positive declaration "is a denial of due process."

For appellant Ranco: Leonard J. Shore, Commack (631) 543-5800
For respondents Town of Smithtown et al: John M. Denby, Smithtown (631) 724-8833

State of New York Court of Appeals

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To be argued Thursday, February 18, 2016

No. 44 Chanko v American Broadcasting Companies, Inc.

This case stems from an episode of "NY Med," an ABC television series set at The New York and Presbyterian Hospital in Manhattan that filmed members of the hospital's staff as they treated actual patients. The episode, which first aired in August 2012, included a segment about the treatment of Mark S. Chanko, who was brought to the emergency room in critical condition in April 2011 after he was hit by a truck while crossing the street near his home on the Upper East Side. His image is blurred and he is not identified, but he is heard early in the segment asking "Did you speak to my wife?" and complaining of pain. He went into cardiac arrest three times before he was declared dead. The segment focused on Dr. Sebastian Schubl, a surgical resident, as he diagnosed Chanko's condition, organized a team to treat him, called the time of death and -- accompanied by a social worker -- informed his family of his death. Family members were neither seen nor heard on the program. They also were not informed of the filming and did not consent to it. They learned of it 16 months later when the episode was broadcast. Chanko's estate, his widow and his children brought this action against the hospital, Schubl and American Broadcasting Companies, Inc., seeking damages for violation of physician-patient confidentiality and intentional infliction of emotional distress, among other things.

Supreme Court dismissed the claim for breach of doctor-patient confidentiality against ABC "because it does not provide health related services and there is no doctor-patient relationship." However, it said, "Plaintiffs have stated a potentially meritorious cause of action for the infliction of emotional distress against ABC." It refused to dismiss either claim against the hospital and Schubl.

The Appellate Division, First Department reversed and dismissed all of the remaining claims. "Defendants' conduct in producing and televising a show depicting the medical care provided at defendant hospital that included a pixilated image of plaintiffs' decedent, who was not identified, was not so extreme and outrageous as to support a claim for intentional infliction of emotional distress...," it said. "Nor can plaintiffs maintain an action against defendant doctor or defendant hospital for breach of the duty not to disclose personal information, since no such information regarding plaintiffs' decedent was disclosed...."

The Chankos argue their claims should be reinstated. "The complaint plainly alleges that the doctor and the hospital breached patient confidentiality when they let the television crew into the operating room to film the diagnosis and treatment of a patient.... A breach of physician-patient confidentiality does not evaporate because the television company to which the unauthorized disclosure is made limits the amount of confidential information it shows the public." They say, "The record also shows that the conduct here is so shocking to our sense of decency and propriety that a claim of infliction of emotional distress is stated."

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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.

To be argued Thursday, February 18, 2016

No. 45 People v Joel Nelson

Joel Nelson was charged with fatally shooting Leo Walton and attempting to kill Mark Maldonado inside the victims' Brooklyn apartment in March 2008. Maldonado told police, and testified at trial, that Nelson was angry with him for not bailing him out of jail after a shoplifting arrest. Maldonado said he invited Nelson into the apartment, served him a drink and went to his bedroom, where he heard three shots fired. He said Nelson then kicked his door open and shot him four times. Walton died of three gunshots to the back of his head. Nelson told police in written and videotaped statements that Maldonado fired at him first, but struck Walton instead. Nelson said he then pulled his own gun, followed Maldonado to his room and fired four rounds. He raised a justification defense at trial.

Prior to the prosecutor's summation, Nelson's attorney told the trial court that "three members of the Walton family are sitting with shirts saying 'Leo Walton,' the deceased's photo, and it says 'Remembering Leo Walton' in clear view of the jury, and I would ask that either they change their shirts or -- it's really trying to inflame the jury...." The court refused, saying, "I see nothing prejudicial or impacting the defendant. The family members of the deceased are being seated quietly, innocuously in the audience. They have not drawn attention to themselves nor ... to the shirts...." It questioned the timing of the request and said "... I am not going to instruct them to do anything." Defense counsel said, "I don't believe that anybody has worn those shirts before today." The court replied, "You're incorrect, counsel.... I'm finding as a matter of fact that one of the females has worn this shirt for at least three court dates...." Nelson was convicted and sentenced to consecutive terms of 25 years to life for second-degree murder and 25 years for first-degree assault.

The Appellate Division, Second Department affirmed on a 3-1 vote, rejecting Nelson's claim that he was deprived of a fair trial by the court's refusal to have the Walton family cover or remove their T-shirts. It said a trial court "has a constitutional duty to monitor the atmosphere of the courtroom to ensure that the jury is not exposed to spectator conduct that poses a coercive threat to the jury's ability to remain impartial" and "must act immediately to minimize its impact on the jury.... The trial court's failure to adhere to such a course in this case is troubling, as is the indication in the record that it was aware of the subject T-shirts three days before defense counsel raised the issue...." However, it declined to adopt a per se rule requiring reversal "whenever a spectator brings a depiction of a deceased victim into a courtroom," and it upheld the court's determination "that the spectator conduct did not threaten the ability of the jury to remain impartial" based on findings that the shirts were not "inflammatory," the Walton family did not "draw the jury's attention to the T-shirts," and their shirts were not entirely visible because they sat in the second row and wore "other garments over them."

The dissenter agreed with Nelson that "this display was a highly prejudicial, and ultimately successful, attempt to elicit sympathy for Walton and inflame the passions of the jury." He said "the memorial T-shirts worn by several members of the victim's family..., in view of the jury, presented '"an unacceptable risk ... of impermissible factors coming into play"' in the jury's verdict...," and deprived Nelson of his right to a fair trial.

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