

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 Wednesday, May 29, 2013

No. 127 EBC I, Inc. v Goldman, Sachs & Co.

(papers sealed)

In May 1999, Goldman, Sachs & Co. served as lead underwriter for the initial public offering (IPO) of common stock of eToys Inc. (now known as EBC I, Inc.), a web-based retailer of children's products. The IPO price was set at \$20 per share. On the first day of trading, share prices reached as high as \$85 and closed at \$76.56. eToys stock fell to near \$25 by the end of 1999 and continued to fall through 2000, as did the company's operating capital.

When eToys declared bankruptcy in March 2001, the Bankruptcy Court appointed a committee of unsecured creditors, which brought this action against Goldman. The committee claimed Goldman deliberately underpriced eToys shares so it could profit by selling its own eToys stock at a much higher price after the IPO and by taking "kickbacks" from favored customers to whom it had allocated shares in the IPO, thereby diverting capital that should have gone to eToys. Among other claims, the committee alleged that eToys relied on Goldman's expertise in pricing the IPO and that Goldman breached a fiduciary duty by failing to disclose the incentive it had to underprice the IPO or disclose its profit-sharing arrangements with other clients.

Supreme Court partially granted Goldman's motion to dismiss the complaint for failure to state a cause of action, but refused to dismiss the claim for breach of fiduciary duty. The Appellate Division, First Department agreed the claim for breach of fiduciary duty was properly pleaded. In 2005, this Court upheld that portion of the ruling in EBC I, Inc. v Goldman, Sachs & Co. (5 NY3d 11), holding that "a cause of action for breach of fiduciary duty may survive, for pleading purposes, where the complaining party sets forth allegations that, apart from the terms of the contract, the underwriter and issuer created a relationship of higher trust than would arise from the underwriting agreement alone."

After discovery, Supreme Court granted Goldman's motion for summary judgment dismissing the claims for breach of fiduciary duty and fraud. "Plaintiff properly pleaded an advisory relationship independent of the underwriting agreement," it said, citing EBC I (5 NY3d at 20). "However, the facts belie the pleadings."

The Appellate Division affirmed on a 4-1 vote, saying "the underwriting agreement was negotiated at arm's length" and Goldman's discounted price for eToys stock "is an express term of the negotiated agreement... Absent fraud..., the undisputed arm's length negotiation of the offering price negates plaintiff's claim that it was the subject of advice given by Goldman Sachs as a fiduciary." Citing evidence that the parties' relationship was adversarial, it said "a fiduciary relationship cannot have been created between parties who have been adversaries throughout their transaction." Noting that eToys "did not separately compensate" Goldman for "advisory services," it said, "Advice alone ... is not enough to impose a fiduciary duty."

The dissenter argued, "[T]he majority's analysis essentially hinges solely on the language of the agreement, which concededly does not set forth a fiduciary relationship. This analysis runs afoul of the Court of Appeals' recognition that an advisory relationship independent of the underwriting agreement would be demonstrated upon proof that 'eToys was induced to and did repose confidence in Goldman Sachs' knowledge and expertise to advise it as to a fair IPO price and engage in honest dealings with eToys' best interest in mind' (5 NY3d at 20). Because the record presents proof on this very subject, the majority improperly engages in issue determining rather than issue finding when it concludes as a matter of law that there was no fiduciary relationship."

For appellant EBC I (creditors committee): John H. Reichman, Manhattan (212) 909-9500

For respondent Goldman Sachs: Penny Shane, Manhattan (212) 558-4000

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No. 123 Matter of Cunningham v New York State Department of Labor

Michael A. Cunningham, former Director of Staff and Organizational Development for the State Department of Labor (DOL), is challenging his termination for misconduct based, in part, on evidence from a global positioning system (GPS) tracking device that was placed on his personal vehicle without a warrant in 2008. He argues that warrantless use of the GPS device was an illegal search under the State Constitution.

Suspecting Cunningham was falsifying time records and travel vouchers, DOL first had an investigator try to tail him when he left his office, but he spotted the tail. DOL referred the matter to the Office of the Inspector General (OIG), which subpoenaed his E-Z Pass records and, without a warrant, placed a GPS tracker on his car while it was parked in a lot near his Albany office. OIG replaced the device twice and recorded the car's movements for 30 days, from June 3 to July 3, 2008. At his disciplinary hearing, Cunningham moved to suppress the GPS evidence as the fruit of an unconstitutional search. The Hearing Officer denied the motion, sustained 11 charges of misconduct and recommended termination, a report the Commissioner of Labor adopted.

The Appellate Division, Third Department confirmed the determination in a 3-2 decision. "Although the GPS evidence ... would have likely been excluded from a criminal trial under [*People v Weaver* (12 NY3d 433)], the standard for using or excluding evidence at administrative proceedings is not controlled by criminal law...", it said. "A search conducted by a public employer investigating work-related misconduct of one of its employees is judged by the standard of reasonableness under all the circumstances, both as to the inception and scope of the intrusion...." The majority said, "To establish a pattern of serious misconduct (i.e., repeatedly submitting false time records and not a mere isolated incident), it was necessary to obtain pertinent and credible information over a period of time. Obtaining such information for one month was not unreasonable in the context of a noncriminal proceeding involving a high-level state employee with a history of discipline problems who had recently thwarted efforts to follow him in his nonwork-related ventures during work hours."

The dissenters argued that use of the tracker was an unconstitutional search. "We wholly agree -- given petitioner's past misconduct and the difficulty in obtaining evidence by traditional methods -- that the use of a GPS device was warranted at inception. In our view, however, the scope of its use was so broad and intrusive as to defy a finding of reasonableness. [DOL's] valid interest in petitioner's whereabouts extended only to the hours of his workday, yet the device placed on [his] personal vehicle collected data 24 hours a day, seven days a week. Petitioner's movements were tracked for over a month, including during a week-long family vacation. Further, because we feel that deterring this type of intrusive conduct outweighs the detrimental impact on the process of determining the truth -- especially given that non-GPS evidence was amassed against petitioner sufficient to sustain other, multiple charges -- the evidence should have been suppressed at his hearing...."

For appellant Cunningham: Corey Stoughton, Manhattan (212) 607-3300

For respondent Department of Labor: Asst. Solicitor General Kate H. Nepveu (518) 473-6085

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To be argued Wednesday, May 29, 2013

No. 129 People v Jean Cantave

Jean Cantave was charged with assault for pushing and biting a man during an argument at Cantave's used car lot in Queens in November 2007. Cantave raised a defense of justification, intending to testify that the complainant had struck him with a handgun. At a pre-trial Sandoval hearing, Supreme Court ruled that, if Cantave testified, the prosecutor could cross-examine him about the underlying facts of an unrelated rape conviction, which was then pending on direct appeal at the Appellate Division. He did not take the stand. The court also precluded Cantave from introducing a recording of his call to 911, in which he said a man had hit him with a gun and was still at the scene. The court found the call was "not contemporaneous with the events." Cantave was convicted of third-degree assault and sentenced to a year in jail. The Appellate Division subsequently reversed the rape conviction and ordered a new trial, which resulted in acquittal of the rape charge.

The Appellate Division, Second Department affirmed the assault conviction, holding that his challenge to the Sandoval ruling was not preserved and, in any event, the ruling "was not an improvident exercise of discretion.... The defendant's felony [rape] conviction was relevant to the issue of his credibility because it demonstrated his willingness to put his own interests above those of society...." The court said the 911 call was properly excluded because it did not fall under the "excited utterance" or "present sense impression" exceptions to the hearsay rule.

Cantave argues the Sandoval ruling "violated his Fifth Amendment privilege against self-incrimination [in the rape case] and due process right to testify at his [assault] trial" by allowing, if he took the stand, the prosecutor "to cross-examine him about the underlying facts of a conviction that was then pending on direct appeal." Citing People v Betts (70 NY2d 289), which held that allowing the prosecution to question a defendant's credibility "through the use of cross-examination concerning an unrelated pending criminal charge would unduly compromise" both rights, he argues Betts should apply equally to a pending appeal of a criminal conviction as to a pending criminal charge. He says the risk of self-incrimination for him was "not remote or merely theoretical," since a new trial was later ordered in his rape case. Cantave also argues that his 911 call was improperly excluded.

For appellant Cantave: DeNice Powell, Manhattan (212) 693-0085

For respondent: Queens Assistant District Attorney William H. Branigan (718) 286-6652

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To be argued Wednesday, May 29, 2013

No. 130 People v Tawond Leach

In March 2008, shots were fired at three people in a vehicle parked on DeKalb Avenue in Brooklyn. The vehicle was damaged, but no one was injured. Two of the occupants told the police that Tawond Leach and his brother were the shooters, that Tawond Leach had fired a silver revolver, and that he lived in an apartment across the street. The apartment belonged to Leach's grandmother and he was living there in his own room. The officers entered the apartment and arrested Leach and his brother when they arrived minutes later. The grandmother arrived shortly after the arrests. She later testified that an officer took her to a spare bedroom and pointed to a silver handgun, saying "Look what I found." She testified that she did not give her consent to search the apartment until after the officers found the gun. She also said that, while Leach was living with her in his own bedroom, she had the only key to the apartment.

Supreme Court denied Leach's motion to suppress the gun, ruling that he lacked standing to challenge the search. The court said Leach did not live in the spare room where the gun was found, there was no evidence that he used or "even went into" the spare room and, thus, he failed to show that "he had an expectation of privacy in a room that wasn't his." Leach was convicted of two counts of first-degree attempted assault, second-degree weapon possession, and reckless endangerment. He was sentenced to six years in prison.

The Appellate Division, Second Department affirmed, holding that exigent circumstances justified the officers' entry into the apartment without a warrant and that Leach "had no standing to object to the search that uncovered the silver revolver because he had no reasonable expectation of privacy in the guest room of his grandmother's apartment."

Leach argues the issue of standing should be governed by "the analysis set forth in the Supreme Court's recent decision in United States v Jones [132 S Ct 945 (2012)], under which the relevant inquiry is simply whether the police entered his home for the purpose of obtaining information. As the police unquestionably did just that, Mr. Leach had standing to challenge the search." He says he has standing even if the "reasonable expectation of privacy" standard applies, since he had unrestricted access to the spare bedroom. He cites People v Love (152 AD2d 925 [4th Dept 1989]), which held that a defendant who lived in the basement of his family's house and "had free access to the entire house, had a reasonable expectation of privacy" in the upstairs rooms where evidence was seized.

For appellant Leach: Yvonne Shivers, Manhattan (212) 480-4000

For respondent: Brooklyn Assistant District Attorney Thomas M. Ross (718) 250-2534

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To be argued Wednesday, May 29, 2013

No. 131 People v Reece Rudolph

(papers sealed)

Reece Rudolph was 17 years old in February 2008, when he was charged with possession of heroin with intent to sell in the Town of Queensbury, Warren County. He pled guilty under a negotiated agreement to one count of criminal possession of a controlled substance in the third degree, in satisfaction of a five-count indictment, and entered into a cooperation agreement with the district attorney. County Court ordered a pre-sentence investigation, which found Rudolph showed little remorse. "Due to his age, it is doubtful he has any comprehension of the magnitude of the decisions he has made. This includes his cooperation with officials and his choice to sell drugs," the report said, concluding prison was "appropriate given the severity of the crime." It said Rudolph appeared to be eligible for youthful offender status, but made no recommendation.

Prior to sentencing, neither Rudolph nor his attorney asked for youthful offender treatment and County Court did not consider, on the record, whether Rudolph should be granted youthful offender status. The court sentenced him as an adult to five years in prison. On appeal, Rudolph argued the court failed to comply with CPL 720.20(1), which provides, "Upon conviction of an eligible youth, the court must order a pre-sentence investigation... After receipt of a written report of the investigation and at the time of pronouncing sentence the court must determine whether or not the eligible youth is a youthful offender."

The Appellate Division, Third Department affirmed, saying, "It is clear from the record that at the time defendant entered into the negotiated plea agreement, he was aware that it did not include youthful offender treatment." The court said, "Defendant subsequently waived his right to be considered for youthful offender treatment by failing to make a request for such consideration.... Under such circumstances, County Court was not required to address the issue at sentencing...."

The Court of Appeals held in People v McGowen (42 NY2d 905 [1977]) that where a defendant "made no assertion at the time of sentence that he was entitled to an adjudication of his youthful offender status, his right thereto was waived." Rudolph argues McGowen "was wrongly decided" and asks the Court to reconsider it, saying "the plain language" of CPL 720.20 mandates that "at the time of pronouncing sentence **the court must determine whether or not the eligible youth is a youthful offender.**" He contends this requirement cannot be waived or bargained away, and the failure of County Court "to independently make such determination renders the sentence herein unlawful." McGowen "has created a trap for defendants," he says, and has created a situation "where the parties must argue ineffective assistance of counsel" when their trial attorney fails to request youthful offender adjudication at sentencing.

For appellant Rudolph: Jack H. Weiner, Chatham (518) 392-2426

For respondent: Warren County Assistant District Attorney Emilee B. Davenport (518) 761-6405