State of New York Court of Appeals

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JANUARY 14 - 16, 2014 CALENDAR

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 14, 2014

No. 16 Cornell v 360 West 51st Street Realty, LLC

Brenda Cornell is seeking to recover damages for personal injuries allegedly caused by exposure to toxic mold in her midtown Manhattan apartment. Her apartment was located directly above the basement, which sustained water damage from flooding in 2002 and 2003. In July 2003, after a steam pipe broke in her apartment, Cornell noticed a small amount of mold and she developed a rash, shortness of breath, fatigue, disorientation and headaches. The symptoms disappeared after the owner, 360 W. 51st Street Corp., installed a dehumidifier and she washed the area with bleach. In September 2003, 360 W. 51st Street Corp. sold the building to 360 West 51st Street Realty, LLC, and the new owner began renovating the basement a month later. As soon as debris removal began, Cornell developed the same symptoms she had in July, as well as congestion, swollen eyes and a metallic taste in her mouth. Despite taking prescribed allergy medications, the symptoms only subsided when she left the apartment.

Supreme Court dismissed Cornell's claims against the former owner, 360 W. 51st Street Corp., based on Fraser v 301-52 Townhouse Corp. (57 AD3d 416 [2008], in which the First Department affirmed the preclusion of testimony by the plaintiff's expert -- the same expert retained by Cornell -- regarding the effects of mold on health. Fraser found the plaintiff failed to establish at a Frye hearing that the expert's theory that mold causes disease was generally accepted within the relevant scientific community.

The Appellate Division, First Department reversed and reinstated Cornell's complaint. The majority said the lower court "incorrectly interpreted our ruling in Fraser ... as setting forth a categorical rule requiring dismissal of plaintiff's toxic mold claim due to failure to meet the standard of scientific reliability set forth in Frye...." It said the evidence offered by Cornell "easily satisfied" the Frye test. "[A] thorough reading of the studies relied on by plaintiff's expert demonstrate a clear relationship between exposure to mold and respiratory and other symptoms.... Scientists do not report their results in terms of black and white causality, but rather, in terms of the strengths of the associations found. These associations having been found sufficiently strong by the literature as to be indicative of a causal relationship, plaintiff's evidence must be deemed to meet the Frye standard."

The dissenter said, "In my opinion, the plaintiff's expert failed to establish the reliability of his theory under the Frye standard of review.... The majority is persuaded by the 'significant' findings in the two studies relied on by the plaintiff's expert. However, the majority disregards Frye's requirement that those 'significant' findings must be 'generally' accepted. There is nothing in the record nor does the majority address whether these studies that link mold with respiratory illness are 'generally accepted in the relevant scientific community'.... As such, I would not depart from our holding in Fraser."

For appellant 360 W. 51st Street Corp.: Mindy L. Jayne, Manhattan (212) 268-7535
For respondent Cornell: Morrell I. Berkowitz, Manhattan (212) 935-3131

State of New York Court of Appeals

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To be argued Tuesday, January 14, 2014

No. 17 Union Square Park Community Coalition, Inc. v New York City Department of Parks and Recreation

In 2011, New York City completed a partial renovation of 3.6-acre Union Square Park in Manhattan, a project that included renovation of the park's Pavilion. In March 2012, the City entered into a 15-year agreement with Chef Driven Market, LLC, a private, for-profit company, to operate a seasonal restaurant in the Pavilion and a year-round food kiosk nearby "for the use and enjoyment of the general public." The agreement required City approval of the restaurant's operating plans, including menu items and prices, and restricted the types of events that could be held. It also provided that "this License is terminable at will [by the City] at any time; however, such termination shall not be arbitrary and capricious."

The Union Square Park Community Coalition (USCC) and individual park advocates brought this action against the City and Chef Driven Market, contending the agreement violates the public trust doctrine because it alienates dedicated parkland for a non-park purpose without approval from the State Legislature, and because the agreement is a lease, not a license, and so is a per se alienation of parkland even if the proposed restaurant would further a park purpose.

Supreme Court denied the City's motion to dismiss the complaint and granted USCC's motion for a preliminary injunction, finding the plaintiffs were likely to succeed in proving the restaurant would not serve a park purpose in view of "the small size and large crowds of Union Square Park; the commercial character of the encircling neighborhood; the plethora of nearby restaurants...; the prominence and importance of the Pavilion...; and the operating hours and prices to be charged by the proposed restaurant." The court also said the agreement "appears to be a lease masquerading as a license, given the long term (15 years); the reason for such a long term (to allow the concessionaire to recoup its initial capital investment); the concessionaire's day-to-day control over the space; and the conditional nature of the revocation clause."

The Appellate Division, First Department reversed, saying, "The seasonal restaurant and holiday market concessions at issue do not violate the public trust doctrine (see generally Friends of Van Cortlandt Park v City of New York, 95 NY2d 623 [2001]), since they are permissible park uses (see 795 Fifth Ave. Corp. v City of New York, 15 NY2d 221 [1965]) and the concession agreements are revocable licenses terminable at will, not leases (see Miller v City of New York, 15 NY2d 34, 38 [1964])."

For appellants USCC et al: Sanford I. Weisburst, Manhattan (212) 849-7000
For respondents City and Chef Driven Market: Deborah A. Brenner, Manhattan (212) 356-0826

State of New York Court of Appeals

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To be argued Tuesday, January 14, 2014

No. 18 People v Adrian P. Thomas
No. 19 People v Paul Aveni

The common issue in these appeals is whether police deceptions during the defendants' interrogations were so coercive as to render their incriminating statements involuntary.

In No. 18, Adrian Thomas and his wife found their four-month-old son Matthew unconscious and breathing irregularly in their Troy apartment in 2008. Thomas stayed with their other children while his wife went to the hospital with Matthew, who had subdural hematomas consistent with severe head trauma. He also had pneumonia and sepsis, a severe systemic infection. Matthew died two days later, but Thomas was unaware of that when police questioned him. The police told him Matthew was alive, but gravely injured, and his doctors needed to know what happened in order to treat him properly. Thomas ultimately said he had thrown the infant forcefully onto a bed three times and unintentionally struck his head against his crib. Thomas was convicted of depraved indifference murder and is serving 25 years to life.

The Appellate Division, Third Department affirmed, saying, "[T]he strategies and tactics employed by the officers during these interviews were not of the character as to induce a false confession and were not so deceptive that they were fundamentally unfair and deprived him of due process.... The officers' repeated misrepresentation that defendant's truthfulness might enable doctors to effectively treat Matthew did not render his statements involuntary, because appealing to his parental concerns did not create a substantial risk that he might falsely incriminate himself."

Among other issues, Thomas argues he should have been allowed to present expert testimony on the relationship between coercive interrogations and false confessions. The trial court precluded the testimony after a Frye hearing, finding the subject was within the ken of the average juror and Thomas did not establish that the principles his expert relied on were accepted in the scientific community. He also argues there was insufficient evidence of depraved indifference murder.

In No. 19, Paul Aveni's girlfriend, Angela Camillo, suffered a fatal overdose in New Rochelle in 2009. Aveni was unaware of her death when police interviewed him hours later, and he initially denied any involvement. A detective told him doctors were working on Camillo and it was "imperative" for them to know what drugs she had taken so they could avoid medications that might cause an adverse reaction. The detective said, "[S]he's okay now but if you lie to me and don't tell me the truth now and they give her medication, it could be a problem." Aveni immediately said he had injected her with heroin and given her Xanax. He was convicted of second-degree burglary, criminally negligent homicide and other charges.

The Appellate Division, Second Department reversed and suppressed Aveni's statements as involuntary, saying the detectives "not only repeatedly deceived the defendant by telling him that Camillo was alive, but implicitly threatened him with a homicide charge by telling the defendant that the consequences of remaining silent would lead to Camillo's death, since the physicians would be unable to treat her, which 'could be a problem' for him. While arguably subtle, the import of the detectives' threat to the defendant was clear: his silence would lead to Camillo's death, and then he could be charged with her homicide."

No. 18 For appellant Thomas: Jerome K. Frost, Troy (518) 283-3000
For respondent: Rensselaer County Asst. District Attorney Kelly L. Egan (518) 270-4040
No. 19 For appellant: Westchester County Asst. Dist. Attorney Raffaelina Gianfrancesco (914) 995-3496
For respondent Aveni: David B. Weisfuse, White Plains (914) 286-3400

State of New York Court of Appeals

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To be argued Tuesday, January 14, 2014

No. 20 People v Gunther J. Flinn

Gunther Flinn was charged with assaulting and seriously injuring Jordan Culbertson in Alexandria Bay, Jefferson County, in July 2006. He agreed to a plea bargain, pleading guilty to second-degree attempted murder in exchange for a sentence of six years in prison. After the judgment was reversed on appeal, on the ground that coercive statements by the County Court judge rendered the plea involuntary, Flinn rejected the same plea offer and went to trial.

At a sidebar conference during jury selection, a conference Flinn did not attend, his attorney waived Flinn's right to be present at sidebar conferences. Defense counsel said, "Mr. Flinn is remaining at counsel table. I have discussed with him that he has the right to come up here during these discussions at the bench, and he has waived that right." County Court replied, "All right. Thank you." Defense counsel said, "I assume that would be without prejudice to accompany us?," and the court said, "He can change his mind any time." Flinn did not attend any sidebar conferences during jury selection. He was convicted of second-degree attempted murder, first and second-degree assault, among other charges, and was sentenced to an aggregate term of 15 years in prison.

The Appellate Division, Fourth Department affirmed, rejecting his claim that his Antommarchi right to attend sidebar conferences with jurors was violated. "The right to be present during sidebar questioning of prospective jurors regarding matters of bias or prejudice may be waived, provided that the waiver is voluntary, knowing and intelligent...," it said. "Here, we conclude that defendant's failure to attend sidebar conferences after being fully informed of the right to do so constitutes a valid waiver of that right...." The court also rejected Flinn's claim that he was unconstitutionally punished for exercising his right to a trial, saying there was no evidence "that the court was motivated by 'retaliation or vindictiveness' in sentencing defendant following the trial...."

Flinn argues that any waiver of his Antommarchi rights by his defense attorney was invalid because it was not made in his presence and it was never placed on the record or reiterated in his presence. He says there was no implied waiver by him because the trial judge never informed him that he had "the absolute right" to attend bench conferences concerning juror bias. Flinn also argues that his sentence, "two and a half times longer than the plea offer prior to trial," impermissibly penalized him for exercising his right to trial.

For appellant Flinn: Martin P. McCarthy, II, Rochester (585) 262-5130
For respondent: Jefferson County Assistant District Attorney Patricia L. Dziuba (315) 785-3053

State of New York Court of Appeals

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To be argued Wednesday, January 15, 2014

No. 21 Country-Wide Insurance Company v Preferred Trucking Services Corp.

Filippo Gallina was injured in September 2006 in a construction accident caused by a truck owned by Preferred Trucking Services Corp. and operated by Carlos Arias, a Preferred employee. Preferred and Arias were insured by Country-Wide Insurance Company under a policy that required them to "[c]ooperate with us" in investigating and defending against claims. Country-Wide began investigating Gallina's personal injury claim in February 2007 and made repeated efforts, without success, to obtain the cooperation of Arias and Preferred's president, Andrew Markos. Due to their lack of response, the insurer closed its investigative file in May 2007. It issued a disclaimer of indemnity in October 2007, based in part on their lack of cooperation, but still assumed their defense against Gallina's lawsuit and resumed its efforts to obtain cooperation. After Country-Wide made multiple calls and visits to his home, Arias agreed in August 2008 to participate in a deposition, but the insurer was unable to get him to agree to a schedule and in October 2008 Arias told it that he did not care about the deposition. A Country-Wide investigator reached Preferred's president by phone in October 2007, and Markos asked him to call back to set up a meeting. Country-Wide made repeated calls and visits to his office and home addresses though July 2008, but Markos did not respond or communicate further with the insurer. In November 2008, Country-Wide issued a complete disclaimer of coverage based on non-cooperation and said it would no longer provide a defense. Gallina and his wife ultimately won a $2.55 million judgment against Preferred and Arias.

Country-Wide sought a judgment declaring it is not obligated to defend and indemnify Preferred. Supreme Court granted Gallina's motion for summary judgment declaring that Country-Wide's disclaimers were untimely and the insurer is obligated to indemnify Preferred up to the policy limit of $500,000. The court said, "The undisputed evidence is that after Country-Wide reached Markos in October 2007, he failed to respond to any of [its] attempts to obtain his cooperation.... It was or should have been clear, as of July 2008 when Country-Wide last attempted to contact Markos, that he would not participate in the defense. However, Country-Wide does not offer any explanation for its delay of four months, until November 2008, in issuing the second disclaimer."

The Appellate Division, First Department affirmed, rejecting the insurer's argument that it had no basis for disclaiming coverage until it was clear that Arias, the truck driver, would not cooperate. It said Country-Wide's "diligent conduct prior to the disclaimer, in attempting to secure the cooperation of both [Markos and Arias], shows that [the insurer] believed both had knowledge or information pertaining to the accident and the underlying litigation, and belies [its] representation that its sole concern was with the testimony of the operator of the truck."

Country-Wide argues it would have been premature to disclaim coverage of Preferred in July 2008, when it became clear that Markos would not cooperate, because it was "still seeking in good faith" the cooperation of Arias, Preferred's employee, who had personal knowledge of the accident and "could effectively bind Preferred" under a theory of vicarious liability.

For appellant Country-Wide: Thomas Torto, Manhattan (212) 532-5881
For respondents Filippo and Sherri Gallina: Alexander J. Wulwick, Manhattan (212) 732-6566

State of New York Court of Appeals

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To be argued Wednesday, January 15, 2014

No. 22 People v Cheryl Santiago

On the morning of October 24, 2007, Cheryl Santiago found her 21-month-old stepdaughter dead on her cot in the family's apartment in Wappingers Falls, Dutchess County. Santiago told State Police investigators that on the previous night, as she was putting the child to bed, she had placed her hand over the girl's mouth for 30 seconds to a minute to quiet her because she would not go to sleep. At trial, doctors testified that it would have taken four to six minutes for the infant to suffocate, that an autopsy did not reveal any evidence of asphyxiation by smothering and that, if not for Santiago's statements, they would have classified the child's cause of death as undetermined. The jury convicted Santiago of second-degree murder.

The Appellate Division, Second Department reduced the conviction to second-degree manslaughter. The court found Santiago's motion to suppress her statements was properly denied and her confession was sufficiently corroborated by independent evidence, but it ruled her conviction for intentional murder was against the weight of the evidence. "Initially, we find that an acquittal would not have been unreasonable," it said. "Furthermore, while we find that the evidence, properly weighed, proves beyond a reasonable doubt that the defendant placed her hand over the victim's mouth and nose, and that this act caused the infant's death, it does not prove beyond a reasonable doubt that it was her conscious objective to kill the infant victim.... The evidence supports a finding that the defendant acted recklessly in covering the infant victim's nose and mouth in a misguided effort to quiet the victim in order for her to sleep, but not as a part of a calculated effort to kill the infant victim." The court did not explicitly address Santiago's ineffective assistance of counsel claim.

Santiago argues her trial counsel was ineffective, saying perhaps the "most egregious" of his missteps was his failure to object to a slide show at the end of the prosecutor's summation that lasted six minutes, reflecting the time it would have taken the child to suffocate. The slides, depicting a post-mortem photograph of the dead infant, were changed at 30-second intervals with each slide fading more and more to white. The last slide was pure white with no image. Some slides noted the lapsed time or bore a caption, including "struggle ends" and "brain death occurs." The prosecutor remained silent while the slides were shown to the jury. Santiago says the slides "had no relevance to the issues of the case, did not support the prosecutor's arguments, irreparably tainted jury deliberations and deprived [her] of a fair trial." Among other claims, she argues there was insufficient corroboration of her statements to the police.

For appellant Santiago: Malvina Nathanson, Manhattan (212) 608-6771
For respondent: Dutchess County Assistant District Attorney Kirsten Rappleyea (845) 486-2300

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To be argued Wednesday, January 15, 2014

No. 23 People v Josefina Jimenez

Josefina Jimenez and Alberto Sanchez were arrested for criminal trespass in May 2008, when six police officers responding to a radio call of a burglary in progress at a Bronx apartment building found them in the lobby. The superintendent signaled that they should be stopped and they were unable to explain their reason for being in the building. One of the arresting officers removed Jimenez's purse from her shoulder and, feeling a weight, opened it and found a loaded handgun. Jimenez was then charged with weapon possession.

Supreme Court denied her motion to suppress the gun, finding it was the result of a valid warrantless search incident to arrest based on exigent circumstances, specifically, the safety of the officers. Based on testimony by two officers that the purse was searched before Jimenez was handcuffed, the court said the police "did not have exclusive control of the defendant or her purse at the time they were securing" the purse and the gun.

At trial, Jimenez moved to reopen the suppression hearing after the officer who actually conducted the search testified that she did not search the bag until after Jimenez had been handcuffed and frisked. The trial court denied the motion, finding that exigent circumstances still existed "whether or not she actually was handcuffed." Jimenez was convicted of criminal possession of a weapon in the second degree and criminal trespass and was sentenced to three and a half years in prison.

The Appellate Division, First Department affirmed, saying, "The bag was large enough to contain a weapon and was within defendant's grabbable area at the time of her arrest.... Moreover, the police did not have exclusive control of the bag. The surrounding circumstances here support a reasonable belief in the existence of an exigency justifying a search of the bag, even though the officers did not explicitly testify at the suppression hearing that they feared for their safety." The trial court properly refused to reopen the suppression hearing based on the officer's trial testimony that she searched the bag after Jimenez was handcuffed, the Appellate Division said, because the search "would still have been lawful under the additional facts revealed at trial."

Jimenez argues the lower courts erred in finding the search justified based on the situation at the time of her arrest rather than the time of the search. She cites Arizona v Gant (553 US 332 [2009]), which held the validity of a search incident to arrest depends on the circumstances at the time of the search. In her case, Jimenez says, "The arresting officer was sufficiently unconcerned about the threat appellant posed that she simply placed the pocketbook on the ground while she completed the arrest procedure. Finally, by the time of the search, once appellant had been frisked and handcuffed and was standing there, completely cooperative in the presence of six police officers, there was certainly no exigency to justify the warrantless intrusion."

For appellant Jimenez: Richard Joselson, Manhattan (212) 577-3451
For respondent: Bronx Assistant District Attorney Noah J. Chamoy (718) 838-7142

State of New York Court of Appeals

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To be argued Wednesday, January 15, 2014

No. 24 Melcher v Greenberg Traurig, LLP

James L. Melcher is asking the Court to reinstate his damages claim for attorney deceit under Judiciary Law § 487 against Greenberg Traurig, LLP and a partner in the firm, Leslie D. Corwin. Melcher's claim arises from their defense of Apollo Medical Fund Management and its principal, Brandon Fradd, in a prior action Melcher brought to recover his membership share of profits under Apollo's operating agreement. Melcher alleges Corwin told him and his attorney at a January 27, 2004 meeting that his rights to a share of Apollo's profits had been diminished by a 1998 amendment to the agreement and that he had confirmed the authenticity of the amendment with Jack Governale, the lawyer who was said to have drafted it. Days after the meeting, according to Melcher's complaint, Fradd told Corwin he had accidentally set fire to the two-page amendment while making tea, destroying the first page and singeing the second. Melcher moved to compel production of the signed original of the amendment and, on February 17, 2004, Greenberg and Corwin moved to dismiss the suit against Apollo based on the amendment. In a March 20, 2004 letter to Supreme Court, Melcher's attorney accused Fradd, Greenberg and Corwin of "concealment of material facts" and "misleading representations" regarding the amendment, including its partial destruction. Melcher contends he first learned the amendment was a "back-dated forgery" when Governale was deposed on December 7, 2005 and denied drafting the amendment or having any knowledge of it.

Melcher commenced this action against Greenberg and Corwin on June 25, 2007. Supreme Court, applying a three-year statute of limitations, denied the defendants' motion to dismiss the lawsuit as time-barred.

The Appellate Division, First Department reversed and dismissed the suit on a 3-2 vote. The majority said the March 20, 2004 letter by Melcher's counsel demonstrates that he knew of Greenberg's and Corwin's "alleged deceit concerning Fradd's destruction of the purported amendment more than three years before this action was commenced." It said, "Corwin's concealment from the court of information regarding the claimed incineration of the purported document upon which he based his clients' motion to dismiss the Apollo Management complaint was actionable under [Judiciary Law § 487].... This action is time-barred by reason of plaintiff's admitted awareness of the alleged concealment for more than three years before he filed suit."

The dissenters said the March 20, 2004 letter did not trigger the statute of limitations because it "did not accuse the defendants of collusion or deceit under Judiciary Law § 487," but instead "only accused Fradd and Apollo Management of concealment in connection with an already submitted motion to dismiss and merely accused the defendants of omissions to the court in connection therewith." Melcher's claim is based on Corwin's alleged violation of section 487 on January 27, 2004, when he allegedly told Melcher about the amendment, the dissenters said. Melcher "did not become aware of this alleged deception until December 7, 2005, when Governale was deposed. Therefore, it was not until this date, when all the facts necessary to a cause of action ... were known that plaintiff's cause of action accrued."

For appellant Melcher: James T. Potter, Albany (518) 436-0751
For respondents Greenberg Traurig et al: Roy L. Reardon, Manhattan (212) 455-2000

State of New York Court of Appeals

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To be argued Wednesday, January 15, 2014

No. 25 QBE Insurance Corporation v Jinx-Proof Inc.

This insurance dispute arises from a 2007 altercation at the Beauty Bar, on East 14th Street in Manhattan, between customer Vera Hendrix and Garrett Alarcon, a security guard employed by the bar's owner, Jinx-Proof Inc. Hendrix filed a personal injury suit against Jinx-Proof and Alarcon, alleging claims for assault as well as for violation of the Dram Shop Act and negligent hiring and supervision. Jinx-Proof's general liability policy from QBE Insurance Corporation contained an assault and battery exclusion, and the insurer sent a "reservation of rights" letter in January 2008 informing Jinx-Proof that it would not defend or indemnify it "for the assault and battery allegations." In February 2008, QBE sent another letter to Jinx-Proof, stating, "[W]e are defending this matter under the Liquor Liability portion of the [policy], and under strict reservation of rights for allegations of Assault and Battery. Your policy excludes coverage for assault and battery claims." After Supreme Court dismissed the negligence and Dram Shop claims in April 2010, leaving only the assault claims pending, QBE brought this action for a judgment declaring it is not obligated to defend Jinx-Proof.

Supreme Court granted summary judgment to QBE. It said the insurer's reservation of rights letters "clearly denied" coverage for assault and battery claims and served "as effective written notices of disclaimer."

The Appellate Division, First Department modified by declaring that QBE was not obligated to defend Jinx-Proof, and otherwise affirmed on a 4-1 vote. In one concurrence for the majority, two justices said that until the potentially covered claims in the personal injury action were dismissed, "QBE was obligated to defend the entire action" and "had no choice ... but to reserve its right to invoke the assault-and-battery exclusion at such future time as it might become entitled to do so. Once the potentially covered claims were dismissed, QBE had no further obligations" to cover the remaining claims, "all of which fall within the exclusion, which QBE had timely invoked upon tender of the claim." In a separate concurrence, two justices said the reservation of rights letters "apprised the insured in no uncertain terms that coverage was barred by the assault and battery exclusion contained in the policy."

The dissenter said, "[N]either of plaintiff's admitted reservation of rights letters, which contain contradictory and confusing language, can be construed as an unequivocal and unambiguous disclaimer of coverage. Because plaintiff failed to timely disclaim coverage based on its policy exclusion, it should be obligated to defend Jinx-Proof in the underlying action."

For appellant Jinx-Proof: John M. Denby, Smithtown (631) 724-8833
For respondent QBE: Anthony M. Napoli, White Plains (914) 428-1438

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To be argued Thursday, January 16, 2014

No. 26 Matter of Gaied v New York State Tax Appeals Tribunal

John Gaied lived in New Jersey and operated two automotive repair shops in Staten Island in 1999, when he bought a three-unit apartment building in the same neighborhood as his businesses. In 2006, after an audit, the State Department of Taxation and Finance determined he was a statutory resident of New York under Tax Law § 605(b)(1)(B), which applies to an out-of-state taxpayer who, among other things, "maintains a permanent place of abode in this state." The Department issued him a notice of deficiency of New York State and City income taxes totaling $253,062 plus interest for tax years 2001 through 2003. Gaied challenged the assessment, arguing that he bought the apartment building as a residence for his elderly parents and as an investment, and that he did not maintain a permanent place of abode there. An Administrative Law Judge (ALJ) upheld the assessment.

The Tax Appeals Tribunal initially reversed the ALJ's decision, but on reargument, the Tribunal reversed itself and upheld the assessment, with one member dissenting. The majority said, "We reject [Gaied's] argument that the [apartment building] was not a permanent place of abode because it was maintained for his parents and he would only stay there at their request to care for his father. As we have stated previously, '[t]here is no requirement that the petitioner actually dwell in the abode, but simply that he maintain it'...."

The dissenter said that, while Gaied maintained the first-floor apartment for his parents and he "had property rights to the building itself, he did not maintain a 'permanent' dwelling because he neither had unfettered access to, nor resided at the [building] during the time at issue." He concluded, "[P]roperty rights are not determinative of permanence, and I would hold that [Gaied] has adduced sufficient evidence to prove that the first floor apartment ... was not his permanent place of abode."

The Appellate Division, Third Department confirmed the determination in a 3-2 decision. The majority said there was substantial evidence to support the Tribunal's determination that Gaied "failed to establish that he kept the apartment exclusively for his parents, and did not prove that he held the property solely for investment purposes" and, thus, that he "maintained a permanent place of abode in New York as that term has been construed and applied under the applicable statute...."

The dissenters said, "Maintaining a dwelling does not necessarily equate to living or residing in such dwelling." They argued that Gaied "demonstrated by clear and convincing evidence that, during the relevant years, he did not live in the dwelling nor did he have any personal residential interest in that Staten Island property" and, therefore, the determination was "irrational and unreasonable."

For appellant Gaied: Timothy P. Noonan, Albany (518) 465-2333
For respondent Tax Commissioner: Asst. Solicitor General Robert M. Goldfarb (518) 473-6053

State of New York Court of Appeals

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To be argued Thursday, January 16, 2014

No. 27 Landauer Limited v Joe Monani Fish Co., Inc.

Landauer Limited, a British company, supplied frozen seafood to Joe Monani Fish Co., Inc., a New York seafood wholesaler, pursuant to a series of contracts in 2007. Each contract provided that "the Courts of England ... shall have exclusive jurisdiction over all disputes which may arise out of this contract." In 2009, Landauer brought a breach of contract action against Monani in the English High Court, alleging nonpayment of its invoices, and served the complaint on Monani's bookkeeper in New York. Monani did not appear in the English action and the court issued a default judgment against it for $368,755.49 plus interest.

Landauer brought this action against Monani in New York to enforce the English judgment and moved for summary judgment in lieu of complaint. Monani opposed the motion, asserting that it was never properly served in the English action and that its bookkeeper was not authorized to accept service of process, although its counsel acknowledged in a letter to Supreme Court that Monani's president was informed of the English action before the default judgment was entered.

Supreme Court denied Landauer's motion and dismissed the action for lack of personal jurisdiction after a traverse hearing, finding that Landauer failed to establish that it properly served Monani in the English action pursuant to CPLR 311(a)(1).

The Appellate Division, First Department affirmed, ruling that Landauer failed to show that it properly served papers in the English action on Monani. It said Landauer's "process servers did not have a reasonable basis for believing that the individuals served were authorized to accept service of process on defendant's behalf...." The court did not address whether Monani had actual notice of the English action.

Landauer argues that, regardless of whether its service of process on Monani was in "technical" compliance with CPLR 311, the English default judgment is enforceable in this action under John Galliano, S.A. v Stallion, Inc. (15 NY3d 75) because Monani agreed by contract to submit disputes to the jurisdiction of the English court and it had actual notice of the English action in time to defend itself.

For appellant Landauer: Diane Westwood Wilson, Manhattan (212) 710-3900
For respondent Monani: N. Ari Weisbrot, Manhattan (212) 878-7900

State of New York Court of Appeals

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To be argued Thursday, January 16, 2014

No. 28 People v Nature G. Finch

Nature G. Finch was arrested three times for trespassing on property of the Parkside Commons housing complex in Syracuse in April and May of 2009. On the last occasion, he was also charged with resisting arrest for attempting to walk away and refusing to place his hands behind his back to be handcuffed. On the date of each arrest, he was at Parkside as an invited guest of tenant Calleasha Bradley, his girlfriend and the mother of his infant son, with whom he often stayed. Parkside was posted with "no trespassing" signs, the property manager had told Finch that he was permitted to be on the property only when he was with Bradley and his son, and police had warned him that he would be arrested for trespass if he was found at Parkside. He was convicted in Syracuse City Court of two counts of third-degree criminal trespass and one of resisting arrest. He was sentenced to 12 months in jail for resisting arrest and consecutive terms of 90 days on each of the trespass counts.

Onondaga County Court reversed the trespass convictions, but affirmed the conviction for resisting arrest. It said there was insufficient evidence to sustain the trespass convictions because "Mr. Finch was clearly an invited guest of Ms. Bradley and was therefore licensed or privileged to be in" Parkside, and the trespass convictions "were clearly predicated ... upon the erroneous belief that an arbitrary order or notice by the landlord and/or the police was superior to the inherent right of a tenant to invite guests to her apartment." However, the court ruled there was sufficient evidence that Finch resisted an "authorized arrest" in violation of Penal Law § 205.30. It found the "arresting officer had probable cause to believe ... the defendant was not 'licensed or privileged' to be" at Parkside, "believing that he was in or upon the property in violation of the landlord's order. Additionally, the police officer had arrested the defendant on two prior occasions ... and had personally indicated to him that he was not authorized to be on the property." For an arrest to be authorized, the court said, "the officer need only possess probable cause or reasonable cause to believe that a crime has been committed. There is no requirement that he possess facts that would establish beyond a reasonable doubt that the underlying crime was actually committed."

Finch argues, "The charge of resisting arrest was insufficient as a matter of law because police knew that Mr. Finch was an invitee of a tenant, his trespass arrest was for being at the tenant's apartment complex, and the only basis for that arrest was a police stay-away order to Mr. Finch that police had no authority to issue." "Probable cause to arrest exists if facts and circumstances known to the arresting officer would lead a reasonable person **possessing the officer's expertise** to conclude that it is more probable than not that [a] suspect has committed or is committing a crime," he says, and police expertise "includes a presumed knowledge as to what does and does not constitute a crime.... [T]he police officer's good faith is irrelevant where the known facts still provide insufficient legal proof of the underlying charge. That precludes any finding of probable cause for the initial arrest regardless of the sincerity of [the] officer's belief, and mandates dismissal of the resisting arrest charge...."

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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, January 16, 2014

No. 13 People v Christopher Martinez
No. 14 People v Selbin Martinez

Two men in ski masks, one with a handgun and the other with a baseball bat, attempted to rob Armando Irizarry and his son in a hallway of their Bronx apartment building in July 2009. Irizarry said he fought them off with a weapon of his own, a cue ball in a sock, which he used to strike one of them on the head. Later that day, he told police officers that the perpetrators were Christopher and Selbin Martinez, brothers who had lived in the same building for several years. Selbin Martinez had a fresh cut on his head when he was arrested.

At a joint trial, Irizarry testified that he recognized Selbin Martinez by his slim build and "the way he walks," and that he saw part of his face when his ski mask shifted during the struggle. He testified that he recognized Christopher Martinez by the "awkward" way he moved backwards when threatened with the cue ball. A police witness, who was the first to interview Irizarry about the perpetrators, said on cross-examination that he made handwritten notes on the interview. When the prosecutor acknowledged that the officer's notes could not be located, the defense asked Supreme Court to instruct the jury that it could draw an adverse inference from the missing Rosario material. The court refused. Selbin Martinez was convicted of second-degree attempted robbery and sentenced to four and a half years in prison. Christopher Martinez was convicted of third-degree attempted robbery and sentenced to one to three years.

The Appellate Division, First Department affirmed. "The court properly exercised its discretion in declining to deliver an adverse inference charge relating to the loss of the original handwritten version of a police report. There was no evidence of bad faith on the part of the People or prejudice to defendant...," it said in denying Christopher Martinez's appeal.

The defendants argue that the trial court was required to impose at least the "limited sanction" of an adverse inference charge for the failure to preserve the officer's notes. Christopher Martinez says the defendants "suffered sufficient prejudice under the controlling standard set forth in People v Wallace [76 NY2d 953], People v Martinez [71 NY2d 937] and People v Joseph [86 NY2d 565], since the lost Rosario material 'would have been helpful' or 'might have provided useful additional support' to the defense."

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