# *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 or gspencer@nycourts.gov.**

To be argued Wednesday, January 11, 2017

**No. 10 People v Hao Lin**

Hao Lin was arrested for driving while intoxicated and related charges in Brooklyn in January 2008. A chemical breath test determined that his blood alcohol content was .25 percent. Prior to trial, the officer who administered the breath test -- with an Intoxilyzer 5000 device -- retired out of state and was not available to testify. In place of the operator, the prosecutor offered the testimony of another police officer who was certified to operate the Intoxilyzer 5000 and who videotaped Lin's breath test. Lin objected to admission of the test results unless he could cross-examine the actual operator. Criminal Court overruled the objection and admitted the results based on testimony by the officer who observed the test. Lin was convicted of two counts of DWI and placed on probation for three years.

The Appellate Term, 2nd, 11th and 13th Judicial Districts reversed and remitted the case for a new trial, holding that an "Intoxilyzer 5000 test result printout is testimonial" under Bullcoming v New Mexico (564 US 647 [2011]) and that the testimony of the officer who observed Lin's breath test was not sufficient to permit admission of the result. "In Bullcoming, the Supreme Court rejected, on Confrontation Clause grounds, a state's attempt to admit a laboratory report via the testimony of 'another [laboratory] analyst who was familiar with the laboratory's testing procedures,' because the witness 'had neither participated in nor observed the test on [defendant's] blood sample,'" the Appellate Term said, noting that the necessary qualifications for a substitute witness "remain unclear." It said the officer who testified was "a certified and experienced Intoxilyzer 5000 operator" who observed the entire test, but the officer "admitted that he had not observed whether the Intoxilyzer 5000 simulator temperature display indicated that the temperature during the test was within a proper range for testing. As such a determination is an essential part of the 13-step operational checklist, and the record does not indicate whether the ... device shuts itself down and will not perform the test if the temperature is outside the specified range, we are unable to agree that [the officer] satisfied the Bullcoming standard for the qualifications of a substitute witness, and conclude that defendant's Confrontation Clause rights were violated."

The prosecution argues that Lin's right of confrontation was not violated because, "in contrast to Bullcoming, the witness who testified about the test had personally observed the administration of the test and the results of the test, and he was subject to cross-examination regarding those firsthand observations.... [A]ny alleged deficiencies in his observations may affect the weight or persuasiveness of his testimony regarding the test results, but do not support the conclusion that defendant's right to confront a witness was violated." The prosecution also argues the test result printout is not testimonial. "Because the printout of the Intoxilyzer test results was generated entirely by a machine and did not contain a statement of any witness, the Confrontation Clause did not place any restrictions on the admissibility of that document."

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To be argued Wednesday, January 11, 2017

**No. 11 Lend Lease (US) Construction LMB Inc. v Zurich American Insurance Company**

Extell West 57th Street LLC and Lend Lease (US) Construction LMB Inc., the owner and construction manager of a project to build a 74-story high rise on West 57th Street in Manhattan, obtained identical builder's risk policies covering the project from Zurich American Insurance Company and four other insurers. After Superstorm Sandy in October 2012 severely damaged a tower crane that was affixed to the building for use in the construction, Extell and Lend Lease submitted a $6.5 million claim for damage to the crane and building. The Insurers disclaimed coverage on the grounds that the tower crane was not "covered property" as defined in the policies and that coverage for the crane was expressly precluded by an exclusion for contractor's machinery and equipment. The policies provide that covered property includes "Temporary Works," which they define as, "All scaffolding (including scaffolding erection costs), formwork, falsework, shoring, fences, and temporary buildings or structures, including office and job site trailers, all incidental to the project...." The policies exclude coverage for "[c]ontractor's tools, machinery, plant and equipment including spare parts and accessories..., and property of a similar nature not destined to become a permanent part of the INSURED PROJECT...." Extell and Lend Lease brought this action to compel coverage by the Insurers.

Supreme Court denied summary judgment to all parties, saying, "Among other issues of fact is whether the Tower Crane was intended to become a permanent part of the Project, which is relevant to the applicability of the Contractor's machinery and equipment exclusion."

The Appellate Division, First Department modified in a 3-2 decision by granting summary judgment to the Insurers and declaring they had no obligation to cover the loss. The majority, finding the policy language unambiguous, said, "The tower crane was integral, not 'incidental to the project,' and therefore does not fall within the definition of Temporary Works" as a temporary structure. The crane "was integral and indispensable, not incidental, to the construction of the 74-story high-rise, which could not have been built without it." Even if the crane could be considered a temporary structure under the definition of covered property, it said, coverage would be precluded by the exclusion for contractor's equipment. "Notably, the tower crane was provided ... pursuant to a contract that characterizes it as 'heavy equipment.' The tower crane is assembled when the project starts, disassembled and completely removed when the project is complete, and then moved to the next job. Thus..., the tower crane is ... contractor's machinery or equipment that is excluded from coverage."

The dissenters argued "the crane is a 'temporary structure' within the meaning of the definition of 'temporary works.'" They said, "[T]he 'temporary works' definition should be construed as comprising all of the items that are specifically mentioned, in addition to any similar, unmentioned temporary structures that are 'incidental to the project'.... [T]he crane was 'incidental' to the project, notwithstanding its critical role in erecting the structure. I accept plaintiffs' definition of the term 'incidental,' meaning appurtenant to something else that is primary, but still necessary to that primary thing." They said the exclusion for contractor's equipment should not be enforced because it is "so broad" it would "render coverage for temporary works illusory" and "unfairly deprive[] plaintiffs of the benefit of their bargain."

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For appellant Extell: Richard J. Lambert, Manhattan (212) 688-1900
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To be argued Wednesday, January 11, 2017

**No. 12 People v Fernando Maldonado**

Fernando Maldonado had been the first president of the 242 South Second Street Housing Development Fund Corporation (HDFC) when New York City converted his Brooklyn apartment building to a low-income cooperative and sold it to its tenants in 1985, but he was no longer a resident of the building in 2007, when he began holding himself out as the building's owner and president of the HDFC. He put up posters to that effect and sent letters to residents promising improvements and telling them to contact him about building management issues. He showed the building to prospective buyers, although it was not for sale, and he put his name on the building's water service account, which building managers switched back to HDFC's name the next day. After HDFC obtained a Department of Buildings (DOB) permit to perform roof repairs, Maldonado sent the agency a letter asserting he had not authorized the work and DOB issued a stop-work order, which was lifted 10 months later. In 2008, Maldonado executed and filed with the City Register a quitclaim deed that purported to transfer ownership of the building from HDFC to himself and HDFC. He also applied for a construction loan secured by a mortgage on the building. The lender ultimately rejected his loan application.

Maldonado was convicted of first-degree grand larceny by false pretenses and possession of a forged instrument, based on his execution and filing of a deed to the building; and attempted first-degree grand larceny, based on his pursuit of a loan secured by a mortgage on the building. He was sentenced to concurrent terms of three to nine years in prison on the larceny counts. The Appellate Division, Second Department affirmed.

Maldonado says his grand larceny conviction must be reversed because he never exercised "dominion and control over the building" and "the owners did not transfer the property, or any funds relating to the property, to Mr. Maldonado or another in reliance on any of his misrepresentations -- a necessary element of larceny by false pretenses." He says his "efforts to convince the residents that he was its 'owner' were ignored and his vexatious actions were countered at every step by the Board. He never gained a legal interest in the building because the document he filed, a homemade 'quitclaim' deed..., was void ab initio and conveyed nothing.... [T]he mere appearance of a transfer is not sufficient under the larceny statute to constitute a completed crime." He argues for reversal on the forgery count because "when a person signs his own name there has been no forgery;"and on the attempted grand larceny count because the lender "was never 'dangerously close' to issuing an actual loan and thus Mr. Maldonado was never 'dangerously close' to receiving any money."

The prosecution argues Maldonado's claims are unpreserved and, in any case, meritless. "[L]arceny is committed even where only a purported transfer of property occurs...," it says. Even though "a forged deed is void ab initio," Maldonado committed grand larceny "because, by filing the forged deed with the City Register, defendant unlawfully brought about through false pretenses a purported transfer of the ownership of the property, or of a legal interest therein, to himself."

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