State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

February 9 thru 11, 2021

State of New York
Court of Appeals

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To be argued Tuesday, February 9, 2021 (arguments begin at 2 pm)

No. 11 CIT Bank, N.A. v Schiffman

Pamela Schiffman took out a $326,000 loan in 2008, with the note secured by a mortgage given by her and her husband Jerry Schiffman on their home in Brooklyn. The mortgage was subsequently acquired by CIT Bank and, in October 2014, the Schiffmans executed a loan modification agreement, with both of them listed as "borrower," which increased the balance owed to $406,481.10. The Schiffmans failed to make mortgage payments on or after December 1, 2014, and CIT initiated a foreclosure action in federal court in October 2016.

U.S. District Court granted summary judgment to CIT Bank, rejecting the Schiffmans' arguments that the bank failed to prove that it complied with the pre-foreclosure notice requirements of RPAPL § 1304 and the pre-foreclosure filing requirements of RPAPL § 1306. RPAPL § 1304 requires that lenders give notice by mail to borrowers at least 90 days before commencing legal action against them. Lenders can show compliance with the statute with proof of the actual mailings or with proof that they have a standard office procedure to ensure that notices are properly addressed and mailed. CIT submitted a sworn affidavit from one of its employees which described the bank's standard mailing procedure and said the 90-day notices and addressed envelopes "are created upon default." RPAPL § 1306 requires lenders to file with the superintendent of financial services, within three business days of mailing a section 1304 notice, information about a foreclosure that includes "the name, address, last known telephone number of the borrower, and the amount claimed as due" on the mortgage.

The Schiffmans argued on appeal that CIT's proof of compliance with section 1304 fell short because its affidavit said its notices and envelopes "are created upon default," but the notices purportedly sent to them were dated November 18, 2015, nearly a year after they defaulted. They said this shows that CIT's standard procedure was not followed in their case and, therefore, there is no presumption that their notices were mailed. They also argued that CIT's financial services filing did not comply with section 1306 because it listed only Pamela Schiffman as the borrower and did not mention Jerry Schiffman.

The U.S. Court of Appeals for the Second Circuit, finding that neither the language of the statutes nor prior New York court rulings make clear whether CIT demonstrated its compliance with sections 1304 and 1306, is asking the New York Court of Appeals to resolve the key issues in this case with a pair of certified questions: "(1) Where a foreclosure plaintiff seeks to establish compliance with RPAPL § 1304 through proof of a standard office mailing procedure, and the defendant both denies receipt and seeks to rebut the presumption of receipt by showing that the mailing procedure was not followed, what showing must the defendant make to render inadequate the plaintiff's proof of compliance with § 1304? (2) Where there are multiple borrowers on a single loan, does RPAPL § 1306 require that a lender's filing include information about all borrowers, or does § 1306 require only that a lender's filing include information about one borrower?"

For appellants Schiffman: Samuel Katz, Brooklyn (347) 396-3488
For respondent CIT Bank: Sean Marotta, Manhattan (202) 637-4881

State of New York
Court of Appeals

To be argued Tuesday, February 9, 2021 (arguments begin at 2 pm)

No. 12 Matter of Estate of Youngjohn v Berry Plastics Corporation

Norman Youngjohn injured his arms in a work-related accident at a production facility of his employer, Berry Plastics Corporation, in December 2014, and he applied for workers' compensation benefits. His treating physicians raised the issue of permanency and schedule loss of use (SLU) of both arms, and an independent medical examination was conducted on behalf of Berry Plastics' workers' compensation carrier. The medical experts agreed that Youngjohn had reached maximum medical improvement for both arms, but disagreed about the appropriate SLU percentages. In March 2017, before the issue was resolved, Youngjohn died of a heart attack unrelated to his workplace accident. He left no surviving spouse or dependents.

Youngjohn's estate and Berry's carrier subsequently stipulated to SLU percentages for both arms; but the estate contended it was entitled to the entire amount of Youngjohn's compensation award, while the carrier argued that it was required to pay only the 113.2 weeks of SLU benefits that had accrued from the date of the accident to Youngjohn's death. Workers' Compensation Law (WCL) § 33 generally provides that when an injured worker who was owed "any compensation" under the WCL dies without a surviving spouse or dependents, the remaining benefits are payable to his or her estate. However, in the case of SLU awards under the same circumstances, WCL § 15(4)(d) provides that remaining SLU benefits be paid to the deceased's estate "in an amount not exceeding reasonable funeral expenses." Youngjohn's estate argued that under 2009 amendments to WCL §§ 15(3)(u) and 25(1)(b), which authorized full payment of SLU awards in one lump sum at the request of the injured worker, Youngjohn's entire SLU award accrued at the time of his accident and must be paid to his estate.

A Workers' Compensation Law Judge agreed with the estate, held that Youngjohn was entitled to 335.8 weeks of benefits, and ordered the carrier to pay the full SLU award of $206,532.46, less payments already made, to the estate. The Workers' Compensation Board modified the decision, ruling that WCL § 15(4)(d) limited the SLU award payable to the estate "to reasonable funeral expenses in an amount up to $10,500."

The Appellate Division, Third Department modified by ruling the estate was entitled to SLU benefits that "accrued up to the time of decedent's death," but not to the full amount of the SLU award. It said "the 2009 statutory amendments did not alter the long-standing rule that, where an injured employee dies without leaving a surviving spouse ... or dependent, only that portion of the employee's SLU award that had accrued at the time of the death is payable to the estate, along with reasonable funeral expenses.... Nor did, as claimant contends, the amendments alter the rate at which an SLU award accrues to an injured employee who is posthumously awarded SLU benefits. Absent clear statutory language or an indication of statutory intent, we cannot conclude that, in granting the option of a lump-sum payment, the Legislature intended for the employee's estate to collect any portion of the posthumous SLU award that had not accrued prior to death."

For appellant Estate: Stephen A. Segar, Rochester (585) 475-1100
For respondent Berry Plastics: Cory A. DeCresenza, Syracuse (315) 413-5400

State of New York
Court of Appeals

To be argued Tuesday, February 9, 2021 (arguments begin at 2 pm)

No. 13 Matter of People Care Inc. v City of New York Human Resources Administration

The question raised in this appeal is whether New York City's Human Resources Administration (HRA) has the authority to audit and recoup payments made under the Health Care Reform Act (HCRA) from personal care service companies such as People Care Inc., which provide home care workers to assist elderly or disabled Medicaid recipients with feeding, bathing, administration of medications and other activities. HRA has for many years administered the Medicaid program in the city under authority delegated by the state Department of Health, and in 2001 it entered into a contract with People Care to provide home care services using general Medicaid funds. The contract gave HRA the right to audit People Care and recoup unspent or misspent funds. In 2002, the State Legislature enacted Public Health Law § 2807-v (1)(bb), which amended HCRA to create a Worker Recruitment and Retention Program to increase the pay of home care workers by using money from the state's tobacco control and insurance initiatives pool to cover "adjustments to Medicaid rates of payment for personal care services." The statute gave DOH audit and recoupment authority over providers funded through HCRA. The state agency's memorandum of understanding (MOU) with HRA for the new program did not address any audit and recoupment authority for HRA. After an audit HRA completed in 2008, it demanded that People Care repay nearly $7 million in unspent HCRA funds the company received in 2003 and 2004.

People Care brought this suit to challenge the determination, contending HRA lacked authority to audit and recoup HCRA funds. Supreme Court dismissed the suit, but the Appellate Division, First Department reinstated the petition and remanded the case to further develop the record. On remand, Supreme Court granted People Care's petition to annul HRA's decision.

The Appellate Division, First Department affirmed on a 3-2 vote, finding HRA had no authority to audit or recoup HCRA funds from People Care. While HRA had broad authority under its contract with People Care to audit and recoup Medicaid funds, the majority said, Public Health Law § 2807-v(1)(bb) authorizes DOH "to audit each [personal care] provider to ensure compliance with the [HCRA] and recoup" misspent funds. "[N]either [the statute] nor the MOU between DOH and HRA ... contains any language delegating DOH's auditing and recoupment authority to HRA or any other agency." It said references to Medicaid rate adjustments in the HCRA statute and the MOU "do not compel the conclusion that HCRA funds are to be treated as general Medicaid funds earmarked for a special purpose."

The dissenters said, "Although neither People Care nor the majority takes issue with HRA's contractual authority to audit and recoup Medicaid funds generally, they argue that the HCRA funds are somehow different from those Medicaid funds governed by the contract.... HRA has persuasively shown that the HCRA funds are merely a subset of the contractual Medicaid funds.... The statute contains no language that vests the power to audit and recoup HCRA funds exclusively with DOH. Nor does the statute prohibit local social services districts, like HRA, from conducting their own audits and recoupment proceedings under existing contracts."

For appellant HRA: Assistant Corporation Counsel Eric Lee (212) 356-4053
For respondent People Care: Thomas J. Fleming, Manhattan (212) 451-2300

State of New York
Court of Appeals

To be argued Wednesday, February 10, 2021 (arguments begin at 2 pm)

No. 14 Herkimer County Industrial Development Agency v Village of Herkimer

In 1988, the Herkimer County Industrial Development Agency (HCIDA) entered into an agreement with a local manufacturer, H.M. Quackenbush, to issue tax-free bonds to finance an expansion of Quackenbush's metal plating and finishing plant in the Village of Herkimer. As part of the transaction, HCIDA took title to Quackenbush's industrial property in the Village and leased it back to the company. Quackenbush continued to operate the factory – using water supplied by the Village of Herkimer – until the company filed for bankruptcy in 2005, leaving the Village's last two years of water rent bills unpaid. The Village included the unpaid water rents in its property tax levies for 2004 and 2005. HCIDA brought this action to declare the tax levies void on the ground that it is tax-exempt. After the tax lien was cancelled in the course of prior litigation, the Village billed HCIDA for the unpaid water charges and asserted a counterclaim that HCIDA was liable for the water rents as owner of the former Quackenbush site.

Supreme Court ultimately granted the Village summary judgment on its counterclaim, ruling that HCIDA was the title owner of the property and, therefore, liable for the water charges.

The Appellate Division, Fourth Department affirmed on the issue of HCIDA's liability in a 3-2 decision. The majority said the Village's water regulations "provide for the imposition of liability on property owners for water consumed on such property and supplied by the Village.... [W]e conclude that HCIDA assented to the Village supplying water to the tenant for use in the facility at a time when the existing law imposed liability on property owners for municipal water service, thereby giving rise to an implied contract for such service between HCIDA and the Village.... [T]he imposition of such liability does not violate common-law principles, nor do the regulations require the property owner to pay the debt of another.... Additionally, unlike the dissent, we do not read the language of the counterclaim so narrowly as to foreclose reliance on the underlying legal theory by which the regulations function to impose liability on HCIDA."

The dissenters said, "[T]he majority strays outside the four corners of the answer and grants a judgment to [the Village] on its counterclaim based on a theory of liability that the Village did not assert therein. Moreover, the majority's analysis conflates in rem liability with personal liability, does not address the principles of contractual privity raised by [HCIDA], and effectively permits a single municipality to rewrite – to its own advantage – the foundational rules governing the enforcement of contracts." They said, "The majority's analysis makes a compelling case for imposing in rem liability against the property at issue, but that is not what the Village sought in its counterclaim. Rather, the Village alleged only ... personal and direct liability against the IDA to recover a debt for which the IDA never contracted. We are constrained by the language of the counterclaim, and we are not free to grant judgment on a theory not pleaded or argued below."

For appellant HCIDA: Charles W. Malcomb, Buffalo (716) 856-4000
For respondent Village of Herkimer: Michael J. Longstreet, Fayetteville (315) 422-9295

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To be argued Wednesday, February 10, 2021 (arguments begin at 2 pm)

No. 15 People v Marina Viviani
No. 16 People v Justin Hope
No. 17 People v Nicole Hodgdon

These appeals turn on whether a statute may give an unelected Special Prosecutor authority concurrent to the power of county district attorneys to prosecute abuse and neglect crimes committed against a certain class of vulnerable persons without violating the State Constitution. In 2012, the State Legislature enacted the Protection of People with Special Needs Act to enhance protections for people "with disabilities or other life circumstances that make them vulnerable" to abuse or neglect in residential facilities and programs supervised by state agencies. Among other things, the Act created the Justice Center for the Protection of People with Special Needs and requires it to employ a Special Prosecutor, appointed by the Governor, to investigate and prosecute criminal offenses involving abuse or neglect of vulnerable persons by employees of certain types of facilities. Executive Law § 552 authorizes the Special Prosecutor to "exercise all the powers and perform all the duties" of a district attorney in such proceedings, but it also states that nothing in the statute "shall interfere with the ability of district attorneys at any time to receive complaints [and] investigate and prosecute any suspected abuse or neglect."

In these unrelated cases, the Special Prosecutor's office obtained indictments from Albany County grand juries charging all three defendants – employees of state-supervised facilities – with committing sex crimes against vulnerable persons in their care. Trial courts dismissed all three indictments based on the dissenting opinion in People v Davidson (27 NY3d 1083 [2016]), which said the Legislature cannot grant to an appointed Special Prosecutor in the executive branch powers conferred on elected district attorneys by the State Constitution.

The Appellate Division, Third Department affirmed, agreeing with the Davidson dissent that "the Legislature may not grant independent, 'concurrent authority with district attorneys' to prosecute individuals accused of crimes against vulnerable persons.... As a constitutional officer, chosen by election..., a district attorney possesses prosecutorial authority, the essential characteristic of which has been defined as 'the discretionary power to determine whom, whether and how to prosecute'.... The Legislature has no authority to transfer any essential function of a district attorney 'to a different officer chosen in a different manner.'" However, it also agreed "with the dissent in Davidson that the Act may be construed to maintain its constitutionality" by reading it to require the Special Prosecutor to obtain "the knowing, written consent of a local district attorney" to prosecute a case, and agreement by the district attorney "to retain ultimate responsibility for the prosecution." It said the Special Prosecutor had neither knowing consent nor supervision by the district attorney in these cases.

The Justice Center argues "the Act fully comports with the Constitution's allocation of prosecutorial power" among the district attorneys, attorney general and governor, whose constitutional duty to "take care that the laws are faithfully executed" gives him "broad prosecutorial authority" which the Legislature may authorize him to delegate to the Special Prosecutor. It says the Act's "grant of concurrent authority to the Special Prosecutor does not strip the district attorneys of any essential attribute of their offices," since it expressly prohibits interference with their power to investigate and prosecute any crime.

For appellant Justice Center: Caitlin Halligan, Manhattan (212) 390-9000
For respondent Viviani: Michael S. Pollok, Red Hook (845) 758-3676
For respondent Hope: Lee C. Kindlon, Albany (518) 434-1493
For respondent Hodgdon: James R. Bartosik, Jr., Albany (518) 447-7150
For intervenor-respondent Attorney General: Solicitor General Barbara D. Underwood (212) 416-8022

State of New York
Court of Appeals

To be argued Thursday, February 11, 2021 (arguments begin at noon)

No. 18 Toussaint v Port Authority of New York and New Jersey

Curby Toussaint was injured while working on the World Trade Center construction site in 2014 when he was struck from behind by a power buggy, which is generally used to carry newly mixed concrete from the truck to the site of the pour. Toussaint was working with a rebar bending machine when another worker drove up with the power buggy and climbed down from it. Toussaint said an operating engineer, James Melvin, began joking with the driver, then "jumped on it, and he lost control of the buggy, fell off the buggy, and it smashed me." He said Melvin apologized and explained he had been "horse playing." Melvin testified that he had been assigned to maintain cranes in another area of the work site that day, that he had never received any training on power buggies and had never used one, and had not been assigned to operate this one. He said he decided to move the buggy "because it was in the middle of the road." Toussaint brought this suit against the Port Authority of New York and New Jersey as the owner of the work site, asserting a claim under Labor Law § 241(6) premised on an alleged violation of Industrial Code (12 NYCRR) § 23-9.9(a). The code provision states, "Assigned operator. No person other than a trained and competent operator designated by the employer shall operate a power buggy."

Supreme Court denied the Port Authority's motion to dismiss the Labor Law § 241(6) claim, rejecting its argument that the Industrial Code provision was too general to support the claim. The court also found there was a question of fact about whether Melvin was acting within the scope of his employment when he moved the buggy.

The Appellate Division, First Department modified in a 3-2 decision by searching the record and granting summary judgment to Toussaint on the issue of liability. It said, "The requirement that a designated person operate a power buggy is 'self-executing in the sense that [it] may be implemented without regard to external considerations such as rules and regulations, contracts or custom and usage'.... We have held that similarly worded provisions of the Industrial Code are sufficiently specific to support a Labor Law § 241(6) claim.... We agree with the dissent that the regulation's requirement that a 'trained and competent operator ... shall' operate the power buggy is general, as it lacks a specific requirement or standard of conduct.... However, since the term 'designated person' has been held to be specific, 12 NYCRR 23-9.9(a) is a proper predicate for a claim under Labor Law § 241(6)." It concluded, "It is undisputed that [Melvin] was not 'designated by the employer' to operate the power buggy ... and his operation of [it] was a proximate cause of plaintiff's injuries."

The dissenters argued the claim should be dismissed, relying on a prior First Department decision that found another Industrial Code provision "which, in almost identical language to that in section 23-9.9(a), requires that '[a]ll power-operated equipment ... shall be operated only by trained, designated persons,' was only a 'mere general safety standard that is insufficiently specific to give rise to a nondelegable duty under [Labor Law § 241(6)].... I conclude that Industrial Code § 23-9.9(a) is insufficiently specific to support a claim under" the statute. They said, "To impose liability under these circumstances, and on these facts..., would potentially expose a defendant to liability any time an unauthorized person on his own initiative or even a trespasser moved such an item of equipment and caused injuries, an outcome not within the scope of the statute and inconsistent with our precedent."

For appellant Port Authority: Andrew W. Dean, Manhattan (212) 651-7500
For respondent Toussaint: Brian J. Shoot, Manhattan (212) 732-9000

State of New York
Court of Appeals

To be argued Thursday, February 11, 2021 (arguments begin at noon)

No. 19 People v Daria N. Epakchi

Daria Epakchi, a 17-year-old probationary driver, was charged with failing to stop at a stop sign in the Town of Huntington, Suffolk County, in September 2013. She pled not guilty on the back of the ticket (a simplified traffic information) and requested a supporting deposition from the complaining officer, which was not provided. Epakchi moved to dismiss the simplified information, arguing that she was entitled to the officer's deposition under CPL 100.25 and that the failure to comply rendered the information facially insufficient under CPL 100.40(2). District Court dismissed the charge. On the same day, the Suffolk County Traffic and Parking Violations Agency filed a new simplified information charging Epakchi with the same traffic violation based on the same incident, this time with the officer's deposition attached.

District Court denied Epakchi's motion to dismiss the new simplified information based on the Court of Appeals' 1991 decision in People v Nuccio (78 NY2d 102), which allowed prosecutors to pursue charges in a local criminal court after a prior simplified information, charging the same offenses, had been dismissed for failure to provide supporting depositions required by CPL 100.25. The Court held there was no statutory bar to "reprosecution for nonfelony charges when the information is dismissed for legal insufficiency." District Court subsequently found Epakchi guilty of the stop sign violation and imposed a fine and fees.

The Appellate Term for the 9th and 10th Judicial Districts reversed "as a matter of discretion in the interest of justice" and dismissed the new information based on its own precedents beginning with People v Aucello (146 Misc 2d 417 [1990]), which require a showing of "special circumstances" for reprosecution in such cases. It said, "This court has consistently reversed judgments of conviction, as a matter of discretion in the interest of justice, where, absent special circumstances warranting the reprosecution of a defendant, the People proceeded to trial on a refiled accusatory instrument, after an earlier simplified traffic information, charging the same offense based upon the same incident, had been dismissed for failure to serve the defendant with a requested supporting deposition.... No special circumstances have been shown to exist in this case to warrant defendant's reprosecution. A ruling to the contrary 'would defeat the very purpose of CPL 100.40(2), disregard the interest of judicial economy, and erode the confidence of the public in the criminal justice system'...."

The Traffic and Parking Violations Agency argues that, under Nuccio, it may refile the same charge after dismissal of the original traffic information without showing special circumstances. It says the special circumstances requirement "is an undefined, capricious and arbitrary standard that is not supported by statute or case law." It concludes,"No matter how the Appellate Term characterizes its decision ... in this case, clearly such decision is based purely upon principles of law and is thus properly reviewable by this Court."

Epakchi argues, "This ... Court lacks jurisdiction to review the Appellate Term's order reversing the judgment of conviction..., since such reversal was made 'as a matter of discretion in the interest of justice,'" and so "the jurisdictional predicate of CPL 450.90(2)(a) is not satisfied."

For appellant Suffolk TPV Agency: Justin W. Smiloff, Hauppauge (631) 853-8059
For respondent Epakchi: David A. Day, Glen Cove (516) 466-6065

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To be argued Thursday, February 11, 2021 (arguments begin at noon)

No. 20 People v Leslie K. Olds

Leslie K. Olds was charged with misdemeanor counts of forcible touching and endangering the welfare of a child in 2013 based on an incident involving a 15-year-old girl in the Town of Lewiston, Niagara County. At a non-jury trial in Town Court, he was convicted of forcible touching and acquitted of child endangerment. Olds was sentenced to three years of probation and, due to the nature of his conviction, he was required to register as a Level 1 sex offender under the Sex Offender Registration Act (SORA). He appealed to Niagara County Court, which reversed his conviction on the ground that he did not waive his right to a jury trial. On remand, Olds pled guilty to endangering the welfare of a child, a conviction that did not require registration as a sex offender. An updated pre-sentence investigation (PSI) recommended incarceration for several reasons, including its view that Olds did not comply with sex offender treatment during his vacated term of probation and failed to show remorse. Town Court, without mentioning facts presented in the PSI, sentenced Olds to the maximum term of one year in jail.

Olds appealed, arguing that his sentence to a jail term (instead of probation), a term imposed after his prior successful appeal, raised a presumption of vindictiveness and violated his right to due process. The prosecution argued that the one-year jail sentence was not more severe than the initial sentence of probation with the requirement that Olds register as a sex offender, so the presumption of vindictiveness did not apply.

Niagara County Court affirmed the sentence, saying, "Neither party has provided any authority for the proposition that a one-year local jail sentence is 'harsher' than a sentence of probation and sex offender registration. The comparison between the two sentences seems to be the proverbial 'apples and oranges' argument. This court has handled numerous 'sex offender" cases and recognizes that defense attorneys frequently attempt to gain pleas for clients that do not involve sex offender registration. On the other hand, incarceration is a complete deprivation of liberty. Under the circumstances, where Defendant appealed from a judgment convicting him following a non-jury trial with a sentence of probation and sex offender registration, there was a possibility that success on the appeal ultimately could place Defendant in the position he now faces. This court does not believe that the newly imposed sentence is vindictive as a matter of law. Nor is there any evidence in the record that the sentencing court was vindictive...." The court also said Olds failed to preserve the issue for appeal.

Olds argues that "the presumption of a vindictive sentence cannot be reasonably questioned nor overcome.... Here, appellant spared the People and the victim from going through a retrial yet was given the maximum sentence." He says County Court "equated the original imposition of the SORA determination with the full deprivation of liberty effected by the subsequent term of incarceration. However, this Court has made clear that 'SORA requirements, unlike postrelease supervision, are not part of the punishment imposed by the judge; rather, SORA registration and risk-level determinations are nonpenal consequences that result from the fact of conviction for certain crimes'.... Therefore, it cannot reasonably be said that a sentence of incarceration is NOT harsher than one of probation and a SORA determination."

For appellant Olds: Michael S. Deal, Buffalo (716) 853-9555 ext. 533
For respondent Niagara County District Attorney: Laura T. Jordan, Lockport (716) 439-7085