State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

January 5 thru 7, 2021

State of New York
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To be argued Tuesday, January 5, 2021 (arguments begin at 2 pm)

No. 1 Freedom Mortgage Corporation v Engel
No. 2 Ditech Financial, LLC v Naidu
No. 3 Vargas v Deutsche Bank National Trust Company
No. 4 Wells Fargo Bank, N.A. v Ferrato

These cases arise from foreclosure actions brought by mortgage holders against defaulting borrowers. Panels of the Appellate Division, First and Second Departments, held in each case that the foreclosures were time-barred. The courts ruled that the six-year limitations period began to run on the entire mortgage balance when the lenders commenced prior foreclosure actions or issued a default letter, actions which accelerated the loans, and that the lenders' voluntary discontinuance of their prior actions did not revoke the loan accelerations that triggered the statute of limitations.

In Case Nos. 1, 2 and 4, lenders filed foreclosure actions that expressly accelerated the loan to make the entire balance due immediately, then discontinued those actions by stipulation after negotiating with the borrowers. They commenced their current foreclosure actions more than six years later and the borrowers moved to dismiss them as untimely. The Appellate Division granted the borrowers' motions and dismissed the actions. In Case No. 4, the First Department said Wells Fargo "failed to affirmatively revoke the acceleration of defendant's mortgage debt, as mere voluntary discontinuance of a foreclosure action is insufficient, in itself, to constitute an affirmative act of revocation." In Case No. 1, the Second Department noted that the stipulation which discontinued the prior foreclosure action "was silent on the issue of the revocation of the election to accelerate, and did not otherwise indicate that [Freedom Mortgage] would accept installment payments from the defendant."

In Case No. 3, a loan servicer sent Juan Vargas a letter in 2008 informing him that he was in default and that his mortgage "will accelerate" if he did not cure the default within 32 days. The servicer commenced a foreclosure action against him in 2009, four days before it received an assignment of the note and mortgage. Deutsche Bank, which was later assigned the mortgage, successfully moved in 2013 to discontinue the 2009 action in order to cure a problem with standing. In 2016, Vargas brought this action against Deutsche Bank to discharge the mortgage, contending his loan had been accelerated for more than six years and any new foreclosure action would be untimely. Supreme Court granted summary judgment to Vargas, declaring the mortgage unenforceable, and the First Department affirmed, ruling the 2008 default letter accelerated the mortgage and triggered the statute of limitations. It said the letter "informed [Vargas] that his debt 'will [be] accelerate[d]' and 'foreclosure proceedings will be initiated' if he failed to cure his default.... We have held that this language constitutes a clear and unequivocal intent to accelerate the loan balance and commence the statute of limitations on the entire mortgage debt." The bank argues that a "letter referring to a potential future event" does not accelerate a loan and, in any event, its discontinuance of the 2009 action "revoked any purported acceleration."

No. 1 For appellant Freedom Mortgage: Brian A. Sutherland, Manhattan (212) 521-5400
For respondent Engel: Anthony R. Filosa, Garden City (516) 228-6666
No. 2 For appellant Ditech Financial: Christina A. Livorsi, Manhattan (212) 297-5800
For respondent Naidu: Holly C. Meyer, Bohemia (631) 750-6886
No. 3 For appellant Deutsche Bank: Patrick Broderick, Manhattan (212) 801-9200
For respondent Vargas: Herbert N. Steinberg, Kew Gardens (718) 263-2922
No. 4 For appellant Wells Fargo: Brian Pantaleo, Manhattan (212) 801-9200
For respondent Ferrato: M. Katherine Sherman, Manhattan (212) 421-8100

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To be argued Wednesday, January 6, 2021 (arguments begin at 2 pm)

No. 5 Matter of Juarez v New York State Office of Victim Services

Michelle Soriano and Daniel Velez are crime victims who applied for and received compensation awards from the State Office of Victim Services (OVS) in 2016. However, the agency declined to make any award of attorneys' fees for the law firm that represented them in the application process. Soriano, Velez and other petitioners brought this lawsuit against OVS to challenge amended regulations it adopted in January 2016 to limit awards for attorneys' fees to legal costs incurred during "administrative review for reconsideration" of an OVS decision or during "judicial review of the final decision." Prior to the amendments, the regulations provided that claimants had a "right to be represented ... at all stages of a claim" and that OVS "shall approve a reasonable fee commensurate with the services rendered, up to $1,000." The petitioners argued that, in limiting fee awards to administrative appeals and judicial review, OVS exceeded its authority under Executive Law article 22, which created the agency and authorized it to provide financial assistance to crime victims. More specifically, they argued the amended regulations conflict with Executive Law § 626(1), which requires OVS to reimburse crime victims for "out-of-pocket loss" due to unreimbursed medical care and other expenses. The statute says such expenses "shall also include ... the cost of reasonable attorneys' fees for representation before [OVS] and/or before the appellate division upon judicial review not to exceed one thousand dollars."

Supreme Court found OVS did not exceed its authority under article 22, saying "OVS's broad authority to adopt rules governing the approval of attorney's fees for representation before the agency, together with the agency's duty to award only reasonable reimbursement to crime victims, provides a sufficient statutory predicate for excluding attorneys' fees incurred in the preparation and submission of claims...." Holding the amended regulations were not arbitrary or irrational, it said "OVS reasonably could determine that it was an unnecessary use of the limited State funds available for the compensation of crime victims to provide reimbursement to private attorneys for providing essentially the same services made available to claimants at no cost through the State-funded" Victim Assistance Programs (VAPs).

The Appellate Division, Third Department reversed and annulled the amended regulations, finding they conflict with the mandate of section 626(1). It said "we find no authorization in the statute's plain language for OVS to conclude that counsel fees are *never* 'reasonable' during the early stages of a claim and, thus, to categorically exclude awards of counsel fees for such representation in *every* instance." The statute "uses broad, mandatory language in providing that out-of-pocket loss 'shall' include reasonable counsel fees for 'representation,' with no qualifications or limitations other than the $1,000 ceiling." While OVS's funding of VAPs "has likely resulted in significant benefits to many victims," it said, "OVS's internal decisions on how to allocate its resources for assisting victims in preparing claims cannot countermand the statutory language that requires it to include reasonable counsel fees in awards for out-of-pocket loss...."

For appellant OVS: Assistant Solicitor General Owen Demuth (518) 776-2053
For respondents Juarez et al: George F. Carpinello, Albany (518) 434-0600

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To be argued Wednesday, January 6, 2021 (arguments begin at 2 pm)

No. 6 Greene v Esplanade Venture Partnership

Susan Frierson and her two-year-old granddaughter, Greta Devere Greene, were on a walk on Manhattan's Upper West Side in May 2015 when debris fell from the facade of a commercial building and struck them both. The child suffered fatal head injuries and Frierson suffered knee and ankle injuries. Frierson and Greene's estate brought this action for negligence and wrongful death against the building's owner, Esplanade Venture Partnership; a contractor, Blue Prints Engineering, P.C.; and Maqsood Faruqi, an engineer employed by Blue Prints. Nine months later, the plaintiffs moved for permission to add a cause of action for negligent infliction of emotional distress on behalf of Frierson, saying Frierson was "within the 'zone of danger'" when she witnessed the accident that killed her granddaughter and "sustained a severe shock" and "severe mental anguish as a result." The defendants opposed the motion, arguing that Frierson and Greene were not "immediate family" members as required for such a claim under Bovsun v Sanperi (61 NY2d 219 [1984]). In a footnote in Bovsun, the Court of Appeals said "we need not now decide where lie the outer limits of 'the immediate family,'" and it has not since addressed the question of whether a grandparent and grandchild would qualify.

Supreme Court granted the motion to add a claim for negligent infliction of emotional distress. It said Frierson "provided information about her relationship with her Granddaughter which may lead a court or jury to determine that [Frierson was an] immediate family member, which is required to prevail in a third-party claim for negligent infliction of emotional distress. While the cases on this issue in New York have been few, there are cases where third-parties with close familial-like relationship[s] to the negligence victim[s] have prevailed...."

The Appellate Division, Second Department reversed in a 3-2 decision, holding that Frierson and her granddaughter were not immediate family members. It cited Trombetta v Conkling (82 NY2d 549 [1993]), in which the Court of Appeals, in holding that a niece could not recover damages for negligent infliction of emotional distress for witnessing the death of her aunt, said, "On firm public policy grounds, we are persuaded that we should not expand the cause of action for emotional injuries to all bystanders who may be able to demonstrate a blood relationship coupled with significant emotional attachment or the equivalent of an intimate, immediate familial bond." The majority ultimately relied on the Second Department's 2005 decision in Jun Chi Guan v Tuscan Dairy Farms (24 AD3d 725), which declined to expand the meaning of "immediate family" to include grandparent and grandchild "absent further direction from the Court of Appeals or the New York State Legislature."

The dissenters argued that "the 'immediate family' requirement should be replaced by a more functional approach that focuses on the nature of the relationship between the bystander and the injured third party. Such an approach will recognize the legitimacy of non-traditional family structures and evolving social practices. A bystander should be entitled to recover if they establish that they are a 'close family member' of the injured third party.... The use of consanguinity as a crude proxy for emotional harm is to sanction the arbitrary and unjust results that will inevitably follow...."

For appellants Greene and Frierson: Ben B. Rubinowitz, Manhattan (212) 943-1090
For respondent Esplanade Venture: Jonathan P. Shaub, Manhattan (212) 599-8200
For respondents Blue Prints and Faruqi: Katherine Herr Solomon, Woodbury (516) 487-5800

State of New York
Court of Appeals

To be argued Wednesday, January 6, 2021 (arguments begin at 2 pm)

No. 7 People v Frederic Badji

Frederic Badji was charged with fourth-degree grand larceny and related crimes for allegedly going on a shopping spree in the spring of 2015 using three credit cards stolen from his supervisor at the headquarters of the Success Academy charter school system in lower Manhattan. Among other things, Badji was accused of charging $677.60 to his supervisor's MasterCard at a Verizon store for a new iPhone and two-year service contract in Badji's name. The prosecution presented no evidence that he had physical possession of the stolen MasterCard, but did provide still images from surveillance video at the Verizon store showing Badji purchasing items at the time of the transaction on his supervisor's MasterCard. It also presented evidence that he used two of his supervisor's American Express cards to purchase more than $1,000 worth of clothing and shoes at other Manhattan retail stores.

At trial, Badji moved to dismiss the grand larceny count that was based on the theft of the MasterCard, arguing proof he possessed the credit card itself, not just the card number, was required for conviction under Penal Law § 155.30. Supreme Court denied the motion, relying on the Appellate Division, First Department decision in People v Barden (117 AD3d 216 [2014]), which said "the Legislature intended intangibles, including credit card numbers, to fall within the ambit" of stolen property. The court later instructed the jury that, for a charge alleging theft of property under section 155.30, "Property means a credit card ... or any number assigned to a credit card...." Badji was convicted of three counts of fourth-degree grand larceny, possession of stolen property and attempted grand larceny, and was sentenced to six months in jail.

The Appellate Division, First Department affirmed. Citing its prior ruling in Barden, it said Badji's "challenge to the sufficiency of his larceny conviction based on his theft of the victim's [MasterCard] is unavailing, notwithstanding the absence of proof that defendant was in possession of the physical credit card when he used intangible credit card information to make purchases." The court also rejected Badji's challenges to the trial court's evidentiary rulings as either unpreserved or harmless error.

Badji argues the evidence is insufficient to support his conviction for theft of the MasterCard without proof that he had physical possession of the card itself. He cites the Second Department's decision in Matter of Luis C. (124 AD3d 109 [2014]), which expressly declined to follow Barden and instead held that a defendant's possession of a stolen debit card number, without proof he possessed the actual card, was not sufficient to support conviction under the grand larceny and possession of stolen property statutes. He also argues that "the trial court's multiple erroneous evidentiary rulings violated [his] due process right to a fair trial."

For appellant Badji: Harold V. Ferguson, Jr., Manhattan (212) 577-3548
For respondent: Manhattan Assistant District Attorney Michael J. Yetter (212) 335-9000

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To be argued Thursday, January 7, 2021 (arguments begin at noon)

No. 8 Doe v Bloomberg, L.P.

Margaret Doe was a 22-year-old recent college graduate when she began working as a temporary employee in the marketing department of Bloomberg L.P. in September 2012, selling newsletter subscriptions. In December 2016, she brought this action for sexual harassment and sex discrimination against Bloomberg L.P.; against Michael Bloomberg, the company's majority owner and CEO; and against Nicholas Ferris, who was global business director of the Bloomberg Brief Newsletter Division and the plaintiff's direct supervisor. Most of her allegations involved Ferris, who she said began making unwanted advances toward her shortly after her employment began, including inappropriate touching and offensive emails and messages. She said Ferris raped her twice when she was intoxicated in 2013. As for Bloomberg, the owner, she alleged that his leadership created a hostile work environment for women at the company and fostered a culture of sexual harassment and discrimination by supervisors.

Supreme Court initially granted Michael Bloomberg's motion to dismiss the complaint against him personally on the ground that the alleged acts of harassment "do not directly involve Mr. Bloomberg as an individual." However, on reargument, the court found the plaintiff had sufficiently stated claims against him as an employer under the New York City Human Rights Law (City HRL), which imposes strict liability on an "employer" for the discriminatory acts of the employer's managers and supervisors (Administrative Code section 8-107[13][b][1]).

The Appellate Division, First Department reversed on a 3-2 vote and dismissed the City HRL claim, saying her allegations were insufficient because "they fail to connect Mr. Bloomberg in any way to the specific discriminatory conduct allegedly committed by Mr. Ferris." While neither the statute nor its legislative history define the term "employer," the majority ruled that "in order to hold an individual owner or officer of a corporate employer, in addition to the separately charged corporate employer, strictly liable under section 8-107(13)(b)(1)..., a plaintiff must allege that the individual has an ownership interest or has the power to do more than carry out personnel decisions made by others *and* must allege that the individual encouraged, condoned or approved the specific conduct which gave rise to the claim.... [H]olding an individual owner or officer of a corporate employer liable under the City HRL as an employer, without even an allegation that the individual participated, in some way, in the specific conduct that gave rise to the claim, would have the effect of imposing strict liability on every individual owner or high-ranking executive of any business in New York City."

The dissenters argue an individual is an "employer" under the City HRL or the State Human Rights Law (State HRL) if they have an ownership interest in the organization or the power to make personnel decisions. "Once someone is determined to be an 'employer,' a court must then turn to the question of liability under the relevant statute, i.e., whether an employer has 'encouraged, condoned or approved' the underlying discriminatory conduct so as to be liable under the State HRL; or whether the employee in question (here, Ferris) has 'exercised managerial or supervisory control' so as to render Bloomberg strictly liable under the City HRL.... The majority collapses these two distinct requirements, in effect holding that only someone who 'encourages, condones or approves' is an 'employer'.... Under the City HRL, plaintiff is required only to allege that Bloomberg is an individual with an ownership interest and/or someone with the power to do more than carry out the personnel decisions of others, and that Ferris exercised managerial or supervisory authority over plaintiff, which the complaint alleges."

For appellant Doe: Niall Macgiollabhui, Manhattan (646) 850-7516
For respondent Bloomberg: Elise M. Bloom, Manhattan (212) 969-3000

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To be argued Thursday, January 7, 2021 (arguments begin at noon)

No. 9 People v Tyrone Gordon

In 2015, Suffolk County police officers executed a warrant that authorized them to search "the entire premises" of Tyrone Gordon's home in Coram, and they found incriminating evidence in two vehicles on the property. They recovered a loaded handgun from an inoperable and unregistered Chevrolet sedan that was sitting in Gordon's backyard and recovered heroin and drug paraphernalia from a registered Nissan Maxima that was parked in his driveway. Gordon moved to suppress the evidence on the ground that the car searches exceeded the scope of the warrant, which made no mention of any vehicles. The prosecutor argued that authority to search "the entire premises" included any cars located on the premises.

Supreme Court granted the motion to suppress the evidence seized from both vehicles based on People v Sciacca (45 NY2d 122 [1978]), which states, "It is clear that a warrant to search a building does not include authority to search vehicles at the premises." Supreme Court said, "[U]ntil clarified or overruled, the Court of Appeals holding in Sciacca requires that a search of a vehicle should be separately delineated with particularized probable cause.... However, a review of the affidavit for the warrant does not establish that the vehicles had any involvement with the crime nor [are] there any specific statements made about the vehicles.... Alternatively, as to the 2000 Chevy, the Second Department recently held [in People v Velez (138 AD3d 1041)] that 'the search of the shed [in the backyard] exceeded the scope of the warrant, which authorized the search of the defendant's residence and yard only'.... It would appear that an unregistered vehicle in the backyard was a storage place, as a shed, sufficient to require a particularized warrant."

The Appellate Division, Second Department affirmed, saying, "Since the search warrant did not particularize that a search of the vehicles was permitted..., and since probable cause to search those vehicles had not been established in the application for the search warrant..., we agree with the court's determination to grant suppression of the evidence seized from the vehicles."

The prosecution argues, "In New York the curtilage of a house has always been considered part of the house. When a search warrant is issued for a place or premises, the police may search anywhere the subject matter of the warrant could be found, including closed containers within the home. A vehicle parked within the curtilage is a closed container within the area considered part of the home. The term 'premises' – which is the broadest designation of an allowable search permitted in CPL § 690.15 – should, at a minimum, refer to a house and its curtilage, and should include containers such as vehicles parked with the curtilage." The prosecution says the suppression rulings here conflict with the Third Department's decision in People v Powers (173 AD2d 886), which held that a warrant to search a garage permitted the search of a car in the garage.

For appellant: Suffolk County Assistant District Attorney Guy Arcidiacono (631) 852-2500
For respondent Gordon: Jonathan Manley, Hauppauge (631) 317-0765

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To be argued Thursday, January 7, 2021 (arguments begin at noon)

No. 10 People v Drury Duval

Based on sealed testimony of a detective and a confidential informant in 2012, officers obtained a warrant to search for and seize "any and all firearms" and related items in a Bronx building "located at: [XXXX] EAST 211th STREET, A PRIVATE RESIDENCE CLEARLY MARKED [XXXX]." Officers seized a .45 caliber handgun, ammunition, a stun gun and other items they found on the third floor of the building, where Drury Duval resided, and he was charged with weapon possession and related crimes. Duval moved to suppress the contraband, contending the warrant was defective because it did not specify which part of the building was to be searched. Defense counsel said in a sworn affirmation that the building was divided into three separate residences, with Duval living on the third floor, an unrelated family on the second floor, and Duval's mother (the building owner) living on the first floor. Counsel submitted several documents in support, including an entry from the City Department of Housing Preservation and Development's website which showed the building was registered as having three units. To refute Duval's claim that the building contained three separate apartments, the prosecutor submitted the sealed warrant application materials for in camera review by the court.

Supreme Court denied the motion, saying the warrant and application "sufficiently specified the premises to be searched." It declined to disclose the warrant application materials because "the informant's life ... would be jeopardized by disclosure" of his identity. Duval pled guilty to third-degree weapon possession and was sentenced to two to four years in prison.

The Appellate Division, First Department affirmed on a 3-2 vote, saying, "On its face, the warrant was sufficiently specific as to the place to be searched, because it stated the address and described the premises as a 'private residence,' which to all appearances it was. The testimony describing the execution of the warrant as well as the nature of defendant's residence therein makes clear that the house was defendant's family home regardless of any reference in city tax records indicating different legal units. This was sufficient to authorize a search of the entire house. Since the warrant herein was sufficiently particularized and not overbroad on its face, as was the case in [Groh v Ramirez (540 US 551)], the court could refute defendant's claim with additional materials in support of the warrant application, including the in camera materials.... [T]he suppression court ... reasonably determined that the building in fact did not consist of multiple discrete units...."

The dissenters argued the evidence should be suppressed "because the search warrant did not specify which apartment in the three-unit building was to be searched..., and that deficiency was not cured by reference to any other documents that could properly have been considered by the court.... To the extent that the majority relies on documents that were part of the sealed warrant materials, under Groh, neither the motion court nor this court may consider those in determining the warrant's constitutionality, since they were not incorporated by reference into the warrant.... Since the motion court could not consider the warrant application materials, and the People presented no facts in their opposition papers to rebut defendant's prima facie showing that the warrant lacked sufficient specificity, the suppression motion should have been granted."

For appellant Duval: Hunter Haney, Manhattan (212) 577-2523
For respondent: Bronx Assistant District Attorney Paul A. Andersen (718) 838-6667