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 Tuesday, September 8, 2015

No. 122 Nomura Asset Capital Corporation v Cadwalader, Wickersham & Taft, LLP

Nomura Asset Capital Corporation retained Cadwalader, Wickersham & Taft to advise it on legal and tax aspects of its securitization of commercial mortgages in the 1990s, including whether the pools of mortgages qualified for favorable federal tax treatment as real estate mortgage investment conduit (REMIC) trusts. A key requirement for REMIC eligibility is that the mortgaged property must be worth at least 80 percent of the loan. Under REMIC regulations, the value of collateral securing a loan includes land, buildings and improvements, but excludes the intangible assets of an operating business and some equipment. Cadwalader advised Nomura on a 1997 transaction that pooled 156 mortgages totaling $1.8 billion. One of the largest mortgages was a $50 million loan to Doctors Hospital of Hyde Park in Chicago, which would have to be secured by property worth $40 million to qualify for a REMIC trust. Nomura hired an appraiser, who valued the hospital at $68 million using the income capitalization method, which included the hospital's intangible assets. The appraiser valued it at only $40.6 million using the cost approach, which excludes intangibles but includes all equipment. Cadwalader issued an opinion that the mortgages in the trust qualified for REMIC treatment. The firm relied on Nomura's representations and did not review the appraisal for the hospital loan. When shares in the trust were sold to investors, Nomura warranted that each mortgage qualified for REMIC treatment and was secured by property that met the 80 percent test.

When Doctors Hospital went bankrupt and defaulted on its loan in 2000, the trustee sued Nomura in federal court for breach of its warrantees, alleging the hospital loan failed the 80 percent test and was not eligible for REMIC. Nomura settled the suit for $67.5 million, which included repurchase of the loan. Nomura then brought this legal malpractice action against Cadwalader, alleging the law firm failed to provide adequate advice on regulations for REMIC eligibility and failed to perform necessary due diligence before issuing its opinion letter.

Supreme Court denied Cadwalader's summary judgment motion, finding "triable issues of fact with respect to both issues." Among other things, it said a document describing "Deal Highlights" of the hospital loan, which presented the appraiser's various property valuations, "could be viewed as a 'red flag' that this loan needed to be further scrutinized for REMIC-eligibility" before Cadwalader issued its opinion. "On the other hand, a jury might conclude that Cadwalader properly exercised its professional judgment by relying on the business expertise and factual representations of its client...."

The Appellate Division, First Department modified on a 3-1 vote by dismissing the negligent advice claim, citing testimony by a former Nomura vice president that he received proper advice about REMIC eligibility. Regarding due diligence, it rejected Nomura's claim that Cadwalader "had a duty to review all of the underlying appraisals," but said "a jury could reasonably conclude that the 'Deal Highlights' document ... contains warning signs that the Doctors Hospital Loan may not have qualified for REMIC treatment."

The dissenter argued the due diligence claim should also be dismissed, saying the Deal Highlights document "has nothing in it to indicate that the [hospital] loan ... was more likely to be inappropriate [for REMIC treatment] than any of the other 155 loans." He said the appraisal itself "arguably should have alerted an attentive professional to the possible existence of a problem with the loan," but Nomura did not give the appraisal to Cadwalader "because Nomura had not retained Cadwalader to review appraisals of the properties that secured the loans."

For appellant-respondent Cadwalader: David R. Marriot, Manhattan (212) 474-1000
For respondent-appellant Nomura: James T. Potter, Albany (518) 436-0751

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To be argued Tuesday, September 8, 2015

No. 123 People v Anthony Barksdale

In April 2009, two Manhattan police officers were patrolling an apartment building on 129th Street when they saw Anthony Barksdale "just standing" in the lobby. The building's management had enrolled it in the Trespass Affidavit Program, which authorizes the police to conduct patrols to deter trespassing. In response to the officers' questions, Barksdale said he did not live in the building, but was visiting a friend. When he could not provide the name or apartment number of his friend, the officers placed him under arrest and searched him, finding a razor blade in his pocket.

Supreme Court denied his motion to suppress the razor blade, ruling that "because the building is part of the trespass affidavit program," the officers had an "objective credible reason" to ask Barksdale why he was there. The court said his failure to give the name or apartment number of the person he said he was visiting provided probable cause to arrest him for trespassing. Barksdale later pled guilty to third-degree criminal possession of a weapon and was sentenced to two to four years in prison.

The Appellate Division, First Department affirmed, holding that Barksdale's presence "in the lobby of a 'trespass affidavit' building ... gave the officer an 'objective credible reason' to ask defendant whether he lived there, which constituted a level one request for information (see People v Hollman, 79 NY2d 181 ...). The inquiry was not based merely on the reputation of the area, but also on the fact that the building was so prone to trespassing that the landlord had 'request[ed] police assistance in removing intruders'.... Furthermore, the officer's simple inquiry as to whether defendant lived there was the type of minimally intrusive question that a building employee might ask."

Barksdale argues that "a building's mere enrollment in the Trespass Affidavit Program (TAP) does not provide the police with an objective, credible reason to initiate a De Bour level one request for information of anyone encountered simply standing in the lobby." He "did not act in a strange or suspicious manner" and there "was nothing distinguishing [him] from any other resident of the building as his demeanor was calm and unaffected." He says, "While enrollment in the TAP authorizes the police to enter the premises, it can neither diminish an individual's right to be free from unreasonable search and seizure nor relieve the People of their burden in the suppression hearing of going forward with evidence of the legality of the police conduct. Moreover, upholding the intrusion in this case would subject all individuals in TAP buildings -- residents, guests, temporary refugees from the weather -- to indiscriminate police inquiry."

For appellant Barksdale: Jan Hoth, Manhattan (212) 577-2523
For respondent: Manhattan Assistant District Attorney Sheila L. Bautista (212) 335-9000

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To be argued Tuesday, September 8, 2015

No. 124 Matter of Linares v Evans

Jorge Linares was serving 16 2/3 to 40 years in prison for rape and sexual abuse of a child in Suffolk County when he appeared for his first parole hearing in November 2011. He asked the Parole Board whether his application would be evaluated pursuant to 2011 amendments to Executive Law § 259-c(4), which required the Board to replace its former "guidelines" with "written procedures for its use in making parole decisions," which "shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board [and] the likelihood of success of such persons upon release." The Board did not respond to Linares' inquiry and it denied his parole application without considering a risk and needs assessment instrument known as the COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) system. Parole Board Chair Andrea Evans had issued a memorandum in October 2011 directing Board members to include consideration of COMPAS risk and needs assessments in future deliberations, but the Board did not adopt regulations implementing the Executive Law amendments until July 2014.

Linares brought this article 78 proceeding to challenge the Board's denial of his parole application, arguing that it failed to comply with the amended Executive Law § 259-c(4), among other things. Supreme Court dismissed his suit, ruling the Board complied with the Executive Law amendments based on the "promulgation" of the Evans memorandum "as well as the record as a whole."

The Appellate Division, Third Department reversed and directed the Board to give Linares a new hearing. The court did not grant his request for parole release, but it said he "is entitled to a new parole hearing due to the Board's failure to use a 'COMPAS Risk and Needs Assessment' instrument, which is a document created and intended to bring the Board into compliance with recent amendments to Executive Law § 259-c(4)...."

Linares says the Parole Board "has failed to establish written procedures required by 2011 legislation that abolished the 1978 parole release guidelines and replaced them with a new scheme based on risk and needs principles to measure a parole candidate's relative risk of reoffending," arguing that neither the Evans memo nor the 2014 regulations comply with the statute. Under the regulations, he says, "board members are free to dismiss COMPAS results out of hand without revealing that they are doing so or explaining why.... Petitioner simply asks that the Board be directed to comply with the enabling legislation and to otherwise give detailed reasons for determinations that run counter to COMPAS' empirically-based results ... so that courts can subject parole release denials to rationality review."

The Parole Board has moved to dismiss Linares' appeal as moot, given its adoption of implementing regulations in July 2014. It has also moved to strike his brief "because it is permeated by issues that are entirely outside the scope of this proceeding."

For appellant Linares: Alfred O'Connor, Albany (518) 465-3524
For respondent Evans (Parole Board): Assistant Solicitor General Kate Nepveu (518) 776-2016

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To be argued Tuesday, September 8, 2015

No. 179 People v Jennifer Jorgensen

Jennifer Jorgensen was seven or eight months pregnant in May 2008, when she allegedly drove recklessly on Whiskey Road in Suffolk County and collided head-on with another car. The occupants of the other vehicle, Robert and Mary Kelly, were killed. Jorgensen's baby was delivered alive by emergency Caesarean section less than two hours after the accident, but died six days later.

In June 2009, she was indicted on charges of aggravated vehicular homicide, manslaughter in the second degree, driving under the combined influence of drugs and alcohol, and endangering the welfare of a child. Supreme Court dismissed the child endangerment charge on the ground the statute "does not apply to unborn children." Jorgensen's first trial ended with a hung jury. At her second trial, she was acquitted of two counts of second-degree manslaughter relating to the deaths of the Kellys, aggravated vehicular homicide, and driving under the influence. She was convicted of only one count of second-degree manslaughter for recklessly causing the death of her daughter. Jorgensen was sentenced to three to nine years in prison, which has been stayed pending appeal.

The Appellate Division, Second Department affirmed. Jorgensen did not raise a claim that she could not legally be convicted of manslaughter for the death of a child who was injured in utero. The court rejected her arguments that she was denied due process and a fair trial when the prosecutor introduced evidence of prescription drugs she was given for anxiety during her pregnancy and by the prosecutor's comments in summation.

In this appeal, both sides cite the Penal Law definitions of "homicide" and "person" in support of their arguments that Jorgensen could, or could not, be criminally liable for recklessly injuring her unborn child when the child died of those injuries after being born alive. Penal Law § 125.00 states, "Homicide means conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four weeks under circumstances constituting murder, manslaughter in the first [or second] degree, criminally negligent homicide, abortion in the first degree or self-abortion in the first degree." Penal Law § 125.05(1) states, "'Person,' when referring to the victim of a homicide, means a human being who has been born and is alive."

Jorgensen argues she was improperly convicted under Penal Law § 125.15(1), which says a person is guilty of second-degree manslaughter when "[h]e recklessly causes the death of another person," because her child had not been born and was not a "person" within the meaning of Penal Law § 125.05(1) at the time she "supposedly engaged in that reckless conduct." Had she not consented to the C-section and her child died in utero, she "could not have been prosecuted for anything related to the death of her unborn baby.... [S]he is now being prosecuted for the failed attempt to save the baby's life."

The prosecution argues that, because the child "was born alive, she was a person as defined under New York State law.... If it had been Mr. Kelly who caused the crash" and injured the fetus, "who later was born and died from the injuries sustained in utero, Mr. Kelly would be guilty for the death of [the child].... [S]ince the Penal Law does not specifically exempt a mother from liability for her acts which recklessly cause the death of a baby due to injuries sustained in utero, Jorgensen can be guilty of recklessly causing the death of her child."

For appellant Jorgensen: Richard E. Mischel, Manhattan (212) 425-5191
For respondent: Suffolk County Assistant District Attorney Karla Lato (631) 852-2500

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To be argued Tuesday, September 8, 2015

No. 180 People v Jose Martinez Baxin *(papers sealed)*

Jose Martinez Baxin was arrested in 2001 for sexually abusing a 10-year-old girl on three occasions in Manhattan over a two-month period. Charged with multiple counts of first-degree sodomy and first-degree sexual abuse, he absconded before trial. After Baxin was recaptured in 2008 he pled guilty, in full satisfaction of the indictment, to a single count of first-degree sodomy based on one incident. He was sentenced to five years in prison.

Prior to his release, the Board of Examiners of Sex Offenders recommended that Baxin be assessed 85 points on the risk assessment scale, which would classify him as a level two offender under the Sex Offender Registration Act (SORA). The board assessed him 20 points under risk factor four for engaging in a "continuing course of sexual misconduct," which was enough to raise him from a level one risk of re-offending to level two.

At his SORA hearing, Baxin objected to the 20-point assessment for a continuing course of misconduct on the ground that his conviction did not support it, since he pled guilty to only one criminal act. The prosecutor argued the assessment for continuing misconduct was supported by the grand jury minutes, Baxin's confession and the indictment. Supreme Court, after obtaining the grand jury minutes from the prosecutor, refused to disclose them to the defense. The court adopted the board's recommendation and adjudicated Baxin a level two sexually violent offender, finding the grand jury minutes, confession and indictment supported the assessment for continuing misconduct.

The Appellate Division, First Department affirmed, rejecting Baxin's claim that the hearing court denied him due process when it relied on grand jury minutes it refused to let him see. "Although in assessing points under the risk factor for continuing course of sexual misconduct, the court relied in part on grand jury minutes that were not disclosed to defendant, there was no violation of due process under the circumstances of this case, and a new hearing is not required. The grand jury minutes were cumulative to other evidence, establishing the same risk factor, that was fully disclosed to defendant, and defendant has not established that he was prejudiced...."

Baxin argues, "Defendants in SORA hearings have a significant liberty interest in avoiding the stigmatization, reduced employability, and other adverse consequences that the registration and notification requirements may cause" and are entitled to "the minimum procedural protections enumerated by the courts and ... State Legislature," including the right to counsel and "extensive pre-hearing discovery of relevant materials.... [D]espite Mr. Baxin's clear constitutional and statutory right to have discovery of the evidence presented against him..., the hearing court elected to rely upon grand jury testimony that it refused to disclose.... This withholding of evidence ... violated not only Mr. Baxin's statutory and due process rights to pre-hearing discovery, but his right to be represented by counsel -- where counsel had no opportunity to rebut the unseen evidence -- as well as to know the basis of the court's decision and to have a meaningful appeal...."

For appellant Baxin: Julia Busetti, Manhattan (212) 577-2523 ext. 530
For respondent: Manhattan Assistant District Attorney Brian R. Pouliot (212) 335-9000