State of New York Court of Appeals

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WEEK OF APRIL 28-30, 2015

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

New York State Judicial Institute
84 North Broadway
White Plains, New York

State of New York Court of Appeals

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To be argued Tuesday, April 28, 2015 (arguments begin at noon in White Plains)

No. 74 Matter of McGovern v Mount Pleasant Central School District

The Mount Pleasant Central School District in Westchester County hired Elizabeth McGovern as a probationary special education teacher at Westlake High School in 2008. Her three-year probationary period began on September 1, 2008, and her classroom work was observed by school administrators four times each year. At the end of her probation, on the recommendation of the District's superintendent, the Board of Education denied McGovern tenure and terminated her employment effective June 30, 2011.

McGovern brought this article 78 proceeding to challenge the determination, arguing it was arbitrary, capricious and made in bad faith. She sought reinstatement with tenure and back pay. The School District, among other affirmative defenses, argued that her suit must be dismissed because she failed to file a notice of claim pursuant to Education Law § 3813(1).

Supreme Court reinstated McGovern to probationary status with back pay and ordered the Board of Education to hold a hearing on her claim that she was terminated in bad faith. It ruled she was exempt from the notice requirement because she "is 'seeking mandamus relief through the enforcement of a legal right derived through enactment of a positive law.' When an employee is not entitled to a hearing in connection with his or her discharge, then the remedy is by way of mandamus [] review.... Therefore..., there is no need for a notice of claim in this case, as [McGovern] is exempt, and is not seeking monetary damages outside of back pay and reinstatement to her position." On the merits, the court found "the record indicates that the petitioner did receive many satisfactory evaluations for most of her three-year probationary status. Here, the nature of the differences in the evaluations calls into question whether there may have been an irrational basis."

The Appellate Division, Second Department reversed, ruling McGovern's suit must be dismissed because she failed to file a notice of claim as required by Education Law § 3813(1). "Although the notice of claim requirement does not apply when a litigant seeks only equitable relief..., or commences a proceeding to vindicate a public interest..., here the petitioner seeks damages in the form of back pay as well as equitable relief, and has not commenced this proceeding to vindicate a public interest. Moreover, while a litigant who seeks 'judicial enforcement of a legal right derived through enactment of positive law' is exempt from the notice of claim requirement..., that exemption is inapplicable here...."

McGovern argues she was exempt from the notice of claim requirement "because she sought equitable relief in the form of reinstatement to her position with tenure," and her "request for back pay was merely incidental to her request for equitable relief." She also argues she is exempt "because she sought to enforce her right to tenure, which is a legal right derived through enactment of positive law."

For appellant McGovern: Jason M. Wolf, Bronx (718) 410-0653
For respondent School District: Emily J. Lucas, Harrison (914) 777-1134

State of New York Court of Appeals

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To be argued Tuesday, April 28, 2015 (arguments begin at noon in White Plains)

No. 75 Viviane Etienne Medical Care, P.C. v Country-Wide Ins. Co.

Viviane Etienne Medical Care, P.C., treated Alem Cardenas for injuries he allegedly sustained in an automobile accident in June 2004. Cardenas, who had an automobile liability policy from Country-Wide Insurance Company, assigned his right to collect no-fault benefits to Viviane Etienne. In 2005, Viviane Etienne brought this action against Country-Wide to recover no-fault insurance benefits, asserting that it timely submitted bills and claim forms to the insurer with proper verification, that Country-Wide did not pay or deny its claims within 30 days as required by Insurance Law § 5106(a), and that the claims remained unpaid. Viviane Etienne moved for summary judgment in 2008, submitting bills and verification forms documenting its claims for more than $6,000 for treatment of Cardenas from June through October 2004. It also submitted proof of mailing and attached an affidavit from the president of its billing company, who said he personally mailed the bills to Country-Wide and they were not paid.

Civil Court in Brooklyn denied the summary judgment motion "for failure to establish a prima facie case." Appellate Term for the Second, Eleventh, and Thirteenth Judicial Districts affirmed, saying Viviane Etienne "failed to make the necessary showing that its billing company incorporated plaintiff's medical records into its own and relied upon them" and, thus, "plaintiff's medical records do not meet the test of the business records exception to the hearsay rule."

The Appellate Division, Second Department modified in a 3-2 decision and granted summary judgment to Viviane Etienne on all of its claims but one (a $139 claim that Country-Wide timely denied). The majority held that where an insurer fails to timely deny a claim for no-fault benefits, the plaintiff is not required to establish the merits of its claim as part of its prima facie burden on a summary judgment motion. In such a case, "the plaintiff makes a prima facie showing of entitlement to judgment as a matter of law by submitting evidence ... that the prescribed statutory billing forms were mailed to and received by the defendant insurer, which failed to either pay or deny the claim within the prescribed 30-day period." It overruled its 2008 decision in Art of Healing Medicine, P.C. v Travelers Home & Mar. Ins. Co. (55 AD3d 644) to the extent it "imposes a 'business record' requirement obliging the plaintiff to establish the truth or the merits of the plaintiff's claim."

The dissenters said, "There is nothing in the no-fault provisions of the Insurance Law, its implementing regulations, or the applicable case law that permits a party seeking no-fault benefits to recover reimbursement for economic loss without affirmatively establishing the merits of its claim pursuant to Insurance Law § 5102(a)(1) and (b). Neither the Court of Appeals nor this Court has ever previously held that a plaintiff's prima facie burden is diminished or otherwise altered by an insurer's failure to comply with the relevant time periods set forth in the regulatory framework of the No-Fault Law."

For appellant Country-Wide: Thomas Torto, Manhattan (212) 532-5881
For respondent Viviane Etienne: David M. Gottlieb, Brooklyn (718) 438-1200

State of New York Court of Appeals

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To be argued Tuesday, April 28, 2015 (arguments begin at noon in White Plains)

No. 76 People v Richard Gonzalez

Richard Gonzalez was arrested for possession of a gravity knife in a Manhattan subway station in April 2011. Police said he began shouting obscenities and gesticulating at a sergeant and two officers when he stepped off a train, accusing them of blocking a stairway to the upper platform. They said Gonzalez continued to swear at them as he went up the stairs and the sergeant followed, intending to issue him a summons for disorderly conduct. The sergeant spotted the handle of a knife in his back pocket. It was a "Husky" brand utility knife that Gonzalez had purchased at Home Depot for his work as a maintenance man. The sergeant determined that it operated as a gravity knife by flicking his wrist to snap the blade open and lock it in place. He was indicted on a charge of third-degree criminal possession of a weapon under Penal Law § 265.02(1).

At trial, in response to a note from the jury, Supreme Court instructed jurors that, in order to convict, they need only find that Gonzalez knowingly possessed the knife, not that he knew it was a gravity knife. Defense counsel objected that jurors should be told "the defendant has to know that he possessed an instrument having [the] characteristics of a gravity knife," but the court replied that the statute imposes strict liability and that it was bound by First Department precedent. Gonzalez was convicted and sentenced to 3½ to 7 years in prison.

The Appellate Division, First Department affirmed, saying, "The court properly instructed the jury that the knowledge element would be satisfied by proof establishing defendant's knowledge that he possessed a knife in general, and did not require proof of defendant's knowledge that the knife met the statutory definition of a gravity knife...." It said Gonzalez's motion to suppress the knife was properly denied because the police had probable cause to arrest him for disorderly conduct. "At the very least, defendant recklessly created a risk of 'public inconvenience, annoyance, or alarm' ... in a crowded subway station by loudly and angrily cursing police officers, violently waving his arms, screaming at passersby to complain of the police officers' conduct, and forcing subway riders to get out of his way."

Gonzalez argues he was deprived of due process by the court's instruction that his conviction did not require proof that he knew he possessed an illegal gravity knife. He was convicted and sentenced "simply because the jury found he possessed, while on his way to work, a common workman's utility knife that he bought legally and openly at Home Depot in 2009...," he says. "Possessing such a knife for innocent purposes could hardly be considered 'extraordinary and unusual,' as it would be for a true 'per se' weapon.... Nothing in its outward appearance would put the possessor on notice of potential regulation, nor was Home Depot required to provide notice to the tens of thousands of customers to whom it had sold the knives that the District Attorney's office began to criminalize in June 2010." He also argues the police search was illegal "as there is no basis ... for characterizing [his] actions as 'disorderly conduct,' nor can the police actions rationally be characterized as merely a level one or two DeBour stop."

For appellant Gonzalez: Robert S. Dean, Manhattan (212) 577-2523
For respondent: Manhattan Assistant District Attorney Malancha Chanda (212) 335-9000

State of New York Court of Appeals

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To be argued Tuesday, April 28, 2015 (arguments begin at noon in White Plains)

No. 77 People v Ricky A. Lynch

In June 2009, Ricky A. Lynch (Lynch) obtained a non-driver identification card from a state Department of Motor Vehicles (DMV) office in Suffolk County by submitting a fraudulent application, on which he used the name, birth date, and social security number of his son, Ricky A. Lynch, Jr. In November 2009, when Lynch was stopped for a traffic infraction in Westchester County, he gave the police officer the fraudulent ID card with his son's name and birth date. He was arrested for possession of a forged instrument, among other things. Lynch pled guilty to a misdemeanor charge of criminal possession of a forged instrument in the third degree in Rye City Court and was sentenced to 90 days in the Westchester County jail. When he returned to Suffolk County in 2010 -- after his son discovered Lynch's fraudulent use of his identity and reported the matter to the Suffolk County Police Department -- Lynch was arrested on forgery charges based on his possession and submission of the false application for a DMV ID card.

Lynch moved to dismiss the charges on double jeopardy grounds under CPL 40.20, which generally prohibits separate prosecutions "for two offenses based upon the same act or criminal transaction...." Supreme Court denied the motion, saying Lynch "was found in Westchester County with the alleged fruits of his forgery, an alleged forged identity card,"and pled guilty. "The defendant is not charged in Suffolk County with possession of the identity card and thus the 'res' of the crime is a completely different instrument. Although related, the alleged crimes in Suffolk were complete with the defendant filing his application. That the defendant possessed the fruits of that crime [in Westchester] is a separate and distinct act which is not subject to a defense of double jeopardy...." Lynch was convicted of second-degree criminal possession of a forged instrument and first-degree counts of identity theft and offering a false instrument for filing. He was sentenced to 3½ to 7 years in prison.

The Appellate Division, Second Department affirmed, finding there was no statutory double jeopardy violation. "The crimes for which the defendant was prosecuted in Suffolk County were not based upon the same criminal transaction as the crime for which he was prosecuted in Westchester County.... The Westchester County prosecution involved a separate offense, which arose out of the defendant's possession of a different forged instrument than the one at issue in the Suffolk County prosecution."

Lynch argues the Suffolk County charges should have been dismissed under CPL 40.20. "[T]he act of completing and presenting the [application] to obtain the Non-Driver ID Card, using a false identification when completing the [application], presenting the false identification in order to obtain the Non-Motorist ID card, as well as the subsequent possession of the ID card, are so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture."

For appellant Lynch: Edward Smith, Central Islip (631) 853-5212
For respondent: Suffolk County Assistant District Attorney Ronnie Jane Lamm (631) 852-2500

State of New York Court of Appeals

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To be argued Wednesday, April 29, 2015 (arguments begin at noon in White Plains)

No. 78 People v Rasaun Sanders

Rasaun Sanders was arrested with three other men for the fatal stabbing of 16-year-old Douglas Williams during an alleged gang assault in Mount Vernon in May 2009. Sanders initially denied any involvement in the crime during his interrogation at police headquarters. After an hour or two, an FBI agent entered the interview room and told Sanders that he could be prosecuted federally if he had been involved in the homicide and that he might be a candidate for the death penalty. At some point after the agent left the room, Sanders admitted that he stabbed Williams and he made a videotaped confession. He later moved to suppress his incriminating statements on the ground they were coerced by the threat of death.

Westchester County Court denied the suppression motion. Regarding the FBI agent's mention of the death penalty, the court said, "That is not the gentlest nudge the court has ever heard, that is true. But the court does not feel that in the context of the overall interview that it rose to the level of being coercive." It said Sanders had been read his Miranda rights and "had incrementally been changing his stance with respect to his involvement in the case over the course of time," it said, and the FBI agent's interaction with Sanders "was fairly brief" and "did not ... immediately trigger a lengthy dialogue or discourse regarding the death penalty...."

On the eve of trial, Sanders accepted an offer to plead guilty to first-degree charges of manslaughter and gang assault in exchange for a sentence of 20 years in prison. At the plea proceeding, the prosecutor asked Sanders if he understood that, as a condition of his plea, he was waiving the right to appeal his conviction and sentence to "the Appellate Division, Second Department;" if he had discussed the waiver with his attorney; and if he was voluntarily waiving his right to appeal. Sanders answered "yes" to all three questions.

The Appellate Division, Second Department affirmed on a 3-1 vote, finding that he waived his right to appeal the denial of his motion to suppress the confession. The colloquy advising him of his right to appeal to the Appellate Division resulted in a valid waiver, it said. "While the words 'higher court' were not used in this instance..., reference was made to the Appellate Division, Second Department, which is a higher court, and the one to which the defendant would have had the right to appeal directly had he not waived his right to appeal. There is no distinction between the two references."

The dissenter argued the waiver was invalid because "[n]either the prosecutor nor the plea court explained to the defendant the nature of his right to appeal" and, while he was informed of his right to appeal to the Appellate Division, "there is no indication ... that, from these terms, the defendant understood the nature of the rights he was surrendering by waiving his right to appeal.... The concept of a 'higher court' is much more understandable to a person lacking legal training than is a reference to the Appellate Division, Second Department. To a nonlawyer, the words 'Appellate Division, Second Department' are simply jargon." She also argued the confession was coerced and should have been suppressed. "The defendant was threatened, by the FBI agent, with the possibility of death. This threat was used to overcome the defendant's will, which is so 'fundamentally unfair as to deny due process'...."

For appellant Sanders: Mark Diamond, Manhattan (917) 660-8758
For respondent: Westchester County Assistant District Attorney Jennifer Spencer (914) 995-3497

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To be argued Wednesday, April 29, 2015 (arguments begin at noon in White Plains)

No. 79 Deleon v New York City Sanitation Department

Alex Irrizarry Deleon brought this personal injury action against the City of New York, its Sanitation Department, and the driver of a City-owned street sweeper that struck the rear of Deleon's Jeep in the Bronx in October 2010. The City moved for summary judgment dismissing the suit, arguing the street sweeper was a "hazard vehicle" that was not subject to ordinary negligence under Vehicle & Traffic Law § 1103(b), which limits the liability of owners and operators of "hazard vehicles" to cases where they are operated with reckless disregard for the safety of others.

Supreme Court granted the City's motion to dismiss, finding the street sweeper "was a 'hazard vehicle' engaged in street sweeping at the time of the accident under VTL 1103(b)...." The court said there was "no evidence of any recklessness by the operator of the sweeper."

The Appellate Division, First Department reinstated Deleon's lawsuit in a 4-1 decision, ruling the reckless disregard standard in Vehicle and Traffic Law § 1103(b) did not apply to the street sweeper in this case, which is therefore governed by the ordinary negligence standard. "At the time of the accident, in 2010, Vehicle and Traffic Law § 1103(b) was superceded by Rules of the City of New York Department of Transportation [34 RCNY 4-02(d)(1)(iii)], which excepted street sweepers ... from compliance with traffic rules to the limited extent of making such turns and proceeding in such directions as were necessary to perform their operations.... While subparagraph (iv) contained a broader exception, expressly invoking Vehicle and Traffic Law § 1103, we find that subparagraph (iv) did not include street sweepers because that would have rendered subparagraph (iii) redundant and meaningless. Indeed, when 34 RCNY 4-02 was amended, in 2013, the City Council explained in its 'Statement of Basis and Purpose' that the effect of the adopted rule would be 'that operators of [City street sweepers] will now be subject to the general exemption set forth in subparagraph (iv) of that same subsection' (emphasis added) -- a strong indication that they were not so subject before then."

The dissenter argued that the reckless disregard standard applied "because Vehicle and Traffic Law § 1103 was incorporated by [34 RCNY] § 4-02(d)(1)(iv) as it existed at the time of the parties' accident.... The majority's contrary position is apparently based on an erroneous interpretation of the then existing 34 RCNY 4-02(d)(!)(iii)," which "merely provided that an operator of" a sweeper, plow or similar vehicle "'may make such turns as are necessary and proceed in the direction required to complete his/her cleaning, snow removal or sand spreading operations....'" He said, "There is no contradiction between sections 4-02(d)(1)(iii) and 4-02(d)(1)(iv).... [S]ection 4-02(d)(1)(iv) expressly adopted a reckless disregard standard while section 4-02(d)(1)(iii) provided for no standard at all. Therefore, there is no basis for the majority's conclusion that section 4-02(d)(1)(iii) would be rendered meaningless by an application of the section 4-02(d)(1)(iv) standard to the operation of street sweepers."

For appellants City et al: Assistant Corporation Counsel Elizabeth I. Freedman (212) 356-0836
For respondent Deleon: David L. Scher, Manhattan (212) 736-5300

State of New York Court of Appeals

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To be argued Wednesday, April 29, 2015 (arguments begin at noon in White Plains)

No. 80 Matter of Shannon

Edna Shannon, a Westchester County resident, was admitted to Eastchester Rehabilitation & Health Care Center, a skilled nursing facility, in 2005. Supreme Court found her to be incapacitated in 2009 and appointed Family Service Society of Yonkers as guardian to handle her financial affairs. In June 2010, Eastchester filed a $164,000 claim with Family Service Society for services it provided to Shannon that were not covered by Medicaid, but it did not reduce its claim to a judgment. In September 2010, the Westchester County Department of Social Services (DSS) informed Family Service Society that Shannon owed it $166,000 for Medicaid benefits and, in January 2011, DSS informed the guardian that the amount had grown to $192,000, but it did not ask for payment at that time. Shannon died in December 2011 at age 87. When Family Service Society commenced this proceeding to settle its final account as guardian, Eastchester (seeking $223,000) and DSS (seeking $272,000) each contended they had the superior claim to the remaining assets in Shannon's estate, which were insufficient to pay either claim in full.

Supreme Court ruled that DSS was entitled to priority for its lien pursuant to Social Services Law § 104, which makes a welfare agency with a Medicaid lien a "preferred creditor." It said, "[T]he failure of Eastchester to reduce its claim to Judgment ... is fatal to its claim as a general creditor," and it ordered the guardian to pay the $179,599 remaining in the estate to DSS.

The Appellate Division, First Department reversed in a 3-1 decision, holding that, "since Eastchester's claim arose before Shannon's death, and [Mental Hygiene Law §] 81.44(d) allows the guardian to retain assets to secure known claims, Eastchester's claim has priority over that of DSS, which arose after Shannon's death.... Eastchester's claim accrued during [Shannon's] lifetime ... with no competing creditors. Thus, Eastchester should have been paid before any funds passed to the estate. DSS, as a preferred creditor..., had a priority claim only against the estate.... [I]t was irrelevant that Eastchester had not reduced its lien to a judgment, which would have given it priority over competing creditors, because DSS had no viable competing claim against Shannon's guardianship account. Contrary to the dissent, nothing in Mental Hygiene Law § 81.44(d) and (e) 'limit[s] the guardian's right to retain property equal in value only to [its administrative] expenses...,'" but instead "authorizes the guardian to pay off any known claims."

The dissenter argued DSS has priority. "Mental Hygiene Law § 81.44 ... is designed for the limited purpose of paying expenses incurred in administration of the guardianship.... [S]ubdivisions (d) and (e), when read together..., limit the guardian's right to retain property equal in value only to [its administrative] expenses.... Inasmuch as Eastchester's claim for services was unrelated to the administration of the decedent's guardianship, the guardian could not retain the funds to pay the claim...; rather, the guardian was required to turn the funds remaining ... over to ... the decedent's estate.... [A]s to the decedent's estate, Eastchester merely stands as a general creditor whose claim is subordinate to that of DSS...."

For appellant Westchester County DSS: Eileen Campbell O'Brien, White Plains (914) 995-4194
For respondent Eastchester: Sarah C. Lichtenstein, Lake Success (516) 328-2300

State of New York Court of Appeals

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To be argued Wednesday, April 29, 2015 (arguments begin at noon in White Plains)

No. 81 Matter of Delroy S. *(papers sealed)*

Delroy S. was 11 years old in July 2011, when he was arrested for stabbing an 11-year-old neighbor during a fistfight in the Bronx. When police officers arrived at the scene, they said, Delroy's 27-year-old sister told them he "was being bullied" by the victim, got into a fight and stabbed him. She led two officers to her family's apartment, where Delroy had gone. When they saw how "very small" Delroy was, one of the officers asked him what happened," without first reading his Miranda rights or asking to speak with a parent. They said he replied, "in sum and substance, 'The kid was bullying me. I went to get my brother for help, but I couldn't find him so I grabbed a knife. I went back out and we started fighting again so I stabbed him.'"

The Corporation Counsel's Office filed a juvenile delinquency petition in Bronx Family Court alleging that Delroy was guilty of acts that, if committed by an adult, would constitute assault in the second degree and criminal possession of a weapon, among other things. Delroy raised a defense of justification, saying he acted in self defense, and moved to suppress his statement to the police on the ground it was obtained in violation of his constitutional rights. Family Court denied his motion and, after a fact-finding hearing, adjudicated Delroy a juvenile delinquent and placed him on probation for 18 months.

The Appellate Division, First Department upheld the determination. "The court should have suppressed [Delroy's] statement on the ground that it was the product of custodial interrogation without Miranda warnings," it said. However, the court found the error was harmless beyond a reasonable doubt. "Independent of the statement, which added little to the presentment agency's case, there was overwhelming evidence that both established appellant's guilt of the assault and weapon charges and disproved his justification defense. In what began as a fistfight, appellant stabbed his unarmed opponent in the back at a time when appellant clearly had the ability to retreat safely rather than using deadly physical force."

Delroy argues the error was not harmless "because (1) the prosecution itself demonstrated the importance of the statement by choosing to introduce it in its case-in-chief...; (2) an improperly admitted incriminating statement made by the accused will almost always be harmful; (3) as drastically shortened and summarized by the testifying police officer, Delroy's statement did not indicate that the stabbing was in self defense and thus was prejudicially misleading...; and (4) the evidence was not overwhelming on the justification issue given that the bigger complainant, who was accompanied by a gang of youths, was the initial aggressor and used deadly physical force, attempting to strangle Delroy, right before Delroy stabbed" him once.

For appellant Delroy S.: Raymond E. Rogers, Manhattan (212) 577-3544
For respondent NYC Corporation Counsel: Michael J. Pastor, Manhattan (212) 356-0838

State of New York Court of Appeals

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To be argued Wednesday, April 29, 2015 (arguments begin at noon in White Plains)

No. 82 People ex rel. Bourlaye T. v Connolly *(papers sealed)*

In 1988, while visiting Staten Island from his home in Ivory Coast, Bourlaye T. was convicted of second-degree attempted murder, first-degree rape, sexual abuse and other crimes and was sentenced to 12 to 36 years in prison. In March 2012, as he neared his conditional release date, he was placed in custody of U.S. Immigration and Customs Enforcement (ICE) for deportation. Instead of deporting him, ICE released Bourlaye into the community on December 7, 2012, apparently without notice to the state Department of Corrections and Community Supervision (DOCCS). He reported to the Staten Island parole office and stayed at his approved residence, where parole officers arrested him five days later, on December 12, and took him to Fishkill Correctional Facility.

On January 9, 2013, Bourlaye filed this petition for a writ of habeas corpus against William J. Connolly, Fishkill's superintendent, alleging his arrest and confinement violated due process. On the same day, the state attorney general filed a petition for civil management of Bourlaye as a "detained sex offender" under Mental Hygiene Law article 10. On January 29, 2013, Supreme Court issued an order finding probable cause to believe Bourlaye should be confined pending trial in the article 10 proceeding.

Supreme Court denied Bourlaye's habeas corpus petition. It said "any alleged unlawful detention" between December 12, 2012 and January 29, 2013, "was rendered moot" by the January 29 probable cause order, "which provided an independent basis" for his confinement.

The Appellate Division, Second Department affirmed, saying, "Even if [Bourlaye's] detention were unlawful at the time the article 10 proceeding was commenced," his habeas corpus petition was properly denied. "[T]he probable cause order issued in the article 10 proceeding provided an independent basis for the confinement of the petitioner pending the outcome of that proceeding.... The petitioner's contention that the article 10 proceeding was 'jurisdictionally flawed' because he did not meet the definition of a 'detained sex offender' is without merit. Not only was the petitioner under parole supervision at the time the article 10 proceeding was commenced..., he was actually imprisoned.... [T]he statutory language of article 10 does not distinguish between lawfully and unlawfully detained sex offenders...."

Bourlaye argues that he "was living at his assigned homeless shelter and complying with the terms of his parole supervision" when he was "illegally" arrested, "without cause to believe he committed a crime or violated the conditions of his release, and without affording him any of the process to which he was constitutionally and statutorily entitled. The State's intentional, illegal deprivation of [his] liberty failed to confer upon the Supreme Court jurisdiction to adjudicate the Mental Hygiene Law article 10 petition for [his] civil management. Because his arrest was unlawful, and because the article 10 proceeding was a nullity, Bourlaye T. must be released from DOCCS custody so that he can enter ICE custody and be deported."

For appellant Bourlaye T.: Ana Vuk-Pavlovic, Mineola (516) 746-4373
For respondent Connolly (State): Assistant Solicitor General Jason Harrow (212) 416-8025

State of New York Court of Appeals

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To be argued Thursday, April 30, 2015 (arguments begin at noon in White Plains)

No. 83 Aurora Loan Services, LLC v Taylor

Aurora Loan Services brought this action in May 2010 to foreclose a mortgage on property owned by Monique and Leonard Taylor in Mount Vernon, alleging they defaulted on their loan payments. The Taylors moved for summary judgment dismissing the complaint, arguing that Aurora lacked standing. Aurora cross-moved for summary judgment and, in support, submitted an affidavit from the legal liaison of its sub-servicer stating that "the original Note has been in the custody of [Aurora] and in its present condition since May 20, 2010," days before Aurora commenced the action.

Supreme Court granted Aurora's cross motion, without opinion, and appointed a referee to compute the amount the Taylors owed on the note. The court subsequently confirmed the referee's report and issued a judgment of foreclosure and sale.

The Appellate Division, Second Department upheld the order granting summary judgment to Aurora. It said the plaintiff "established ... its standing as the holder of the note and mortgage by demonstrating that the note was physically delivered to it prior to the commencement of this action. Specifically, an affidavit submitted by the plaintiff established that it obtained physical possession of the original note ... on May 20, 2010, four days before the action was commenced.... It can reasonably be inferred from these averments that physical delivery of the note was made to the plaintiff by Deutsche Bank Trust Company Americas, and since the exact delivery date was provided, there is no further detail necessary for the plaintiff to establish standing. The [Taylors] offered no evidence to contradict those factual averments...." However, it rejected the report of the referee, who adopted Aurora's calculation of the amount due without a hearing, and remitted the matter for further proceedings.

The dissenter argued that Aurora "did not submit sufficient evidence to demonstrate that it had standing to commence the instant action.... A bare statement from the plaintiff's servicing agent that the original note was in the possession of the plaintiff as of commencement of the action is not sufficient to establish standing as a matter of law, if no 'factual details' are given with respect to the physical delivery of the note." "'The affidavit from the plaintiff's [sub-] servicing agent did not give any factual details of a physical delivery of the note and, thus, failed to establish that the plaintiff had physical possession of the note prior to commencing this action'...," she said, quoting HSBC Bank USA v Hernandez (92 AD3d 843).

For appellant Taylors: Jeffrey Herzberg, Hauppauge (631) 265-2133
For respondent Aurora Loan: Martin C. Bryce, Jr., Philadelphia, PA (215) 665-8500

State of New York Court of Appeals

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To be argued Thursday, April 30, 2015 (arguments begin at noon in White Plains)

No. 84 Flushing Savings Bank, FSB v Bitar

In 2011, Flushing Savings Bank obtained a foreclosure judgment against Pierre Bitar after he defaulted on a commercial mortgage on property in Brooklyn. The Bank purchased the mortgaged premises at public auction for $125,000. According to the referee's report of sale, Bitar owed the Bank $793,725 at the time of the auction. The Bank moved for a $318,725 deficiency judgment against Bitar under RPAPL 1371, which permits a mortgage lender in a foreclosure action to seek a judgment against the borrower for the debt owed "less the market value as determined by the court or the sale price of the property whichever shall be higher." In support of its motion, the Bank submitted an affidavit from a certified appraiser who determined the fair market value of the mortgaged property was $475,000. The appraiser said he personally inspected the property and considered comparable sales, condition of the neighborhood, market trends and other criteria in determining fair market value.

Supreme Court denied the Bank's motion for a deficiency judgment, saying it failed to provide prima facie proof establishing the value of the property. The Bank "has failed to submit any appraisal, certified or uncertified. Rather, plaintiff relies exclusively upon its appraiser's conclusory four-paragraph affidavit which does not contain any specific information regarding how he reached his fair market value determination." The appraiser provided no information about the condition of the building and neighborhood, or about the comparable sales and market trends he reviewed, the court said. "In short, the only specific details set forth in the appraiser's affidavit regarding the premises are its address and the fair market value figure."

The Appellate Division, Second Department affirmed, finding the appraiser's opinion "conclusory." It said he "did not describe the subject premises or the results of his inspection and failed to append any of the evidence of comparable sales and market data upon which he relied in arriving at his opinion. Nor did the [Bank] submit an actual appraisal report. The Supreme Court was entitled to reject the opinion of the plaintiff's appraiser as without probative value in light of the lack of evidentiary foundation set forth in his affidavit...."

The Bank argues the lower courts violated RPAPL 1371(2) by denying its motion for a deficiency judgment without making a finding of fair market value. "The unrebutted affidavit of the appraiser was sufficient to establish the fair market value of the property...," it says. "Moreover, because of the statutory mandate to determine fair market value, even if the Appraiser's Affidavit was an insufficient basis on which to determine fair market value, the Supreme Court was required to direct a hearing be conducted or direct the submission of additional proofs so that the court could determine the Property's fair market value. The failure to do so was an improvident exercise of discretion and should not have been sustained...."

Bitar has not participated in appeals. The state Attorney General, as amicus curiae, argues that, where a lender fails to satisfy its initial obligation to make a prima facie showing of fair market value, "a trial court has the discretion to deny the movant the opportunity to cure that flagrant defect in order to induce compliance with the statute."

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For Attorney General, amicus curiae: Asst. Solicitor General Mark H. Shawhan (212) 416-6325

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, April 30, 2015 (arguments begin at noon in White Plains)

No. 85 ACE Securities Corp. v DB Structured Products, Inc.

DB Structured Products, Inc. (DBSP) purchased 8,800 residential mortgages, which were pooled, placed in a trust, and securitized through the sale of more than $500 million in certificates to investors in 2006. In a Mortgage Loan Purchase Agreement (MLPA), executed on March 28, 2006, DBSP made representations and warranties regarding the quality of the mortgage loans. The MLPA and a Pooling and Servicing Agreement (PSA) require that DBSP be notified of a breach of any of its warranties and gives it 60 days to cure the breach. If the breach cannot be cured, DBSP is required to repurchase the affected loan or substitute a qualified loan within 90 days of receiving notice. The agreements provide that the trustee -- HSBC Bank USA, National Association -- may not sue or demand that DBSP repurchase a defective loan until the cure period expires.

Two certificate holders (investors in the trust) filed this breach of contract action against DBSP on March 28, 2012. HSBC, as trustee, was later substituted as the plaintiff. In September 2012, the trustee filed a complaint alleging that an investigation by an independent firm found breaches of DBSP's warranties for all but one of the 697 mortgage loans it reviewed, including overstatement of borrower's incomes and understatement of their existing debts. It said DBSP refused to cure the breaches or repurchase any of the defective loans. DBSP moved to dismiss the suit, arguing the six-year statute of limitations had expired because the claim accrued when the MLPA and PSA were executed in 2006. The trustee argued the claim did not accrue until DBSP breached its repurchase obligations in 2012.

Supreme Court denied DBSP's motion to dismiss, saying "DBSP does not breach the PSA and the claim for the breach does not accrue until DBSP fails to timely cure or repurchase a loan.... Under the PSA, DBSP has no duty to ensure that the Representations are true..., the only contractual wrong that DBSP could commit is failure to abide by" the Repurchase Protocol. The court concluded, "DBSP commits an independent breach of the PSA each time it fails to abide by and fulfill its obligations under the Repurchase Protocol, and 'each breach may begin the running of the statute [of limitations] anew'...."

The Appellate Division, First Department reversed and dismissed the suit as untimely, saying "the claims accrued on the closing date of the MLPA, March 28, 2006, when any breach of the representations and warranties contained therein occurred.... The certificate holders commenced an action on behalf of the trust ... on March 28, 2012, the last day of the limitations period. However, defendant had not received notice of the alleged breach until February 8, 2012. Thus, the 60- and 90-day periods for cure and repurchase had not yet elapsed. The certificate holders' failure to comply with a condition precedent to commencing suit rendered their summons with notice a nullity.... In any event, the certificate holders lacked standing to commence the action on behalf of the trust."

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For respondent DB Structured Products: David J. Woll, Manhattan (212) 455-2000