State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

November 14 thru November 16, 2017

State of New York Court of Appeals

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To be argued Tuesday, November 14, 2017

No. 121 Desrosiers v Perry Ellis Menswear, LLC
No. 122 Vasquez v National Securities Corporation

The question in these putative class actions is whether the named plaintiffs, who settled their own claims without ever seeking class certification, are entitled under CPLR 908 to have notice sent to other potential class members that the lawsuit has been dismissed or discontinued. The statute reads, "A class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs."

Geoffrey Desrosiers, who had worked as an unpaid intern for Perry Ellis Menswear, filed this Labor Law action in 2015 to recover unpaid minimum wages for himself and all similarly situated interns. Without moving for class certification, he settled his personal claim for $4,500 plus costs. Weeks later, after the 60-day period to seek class certification had expired, Perry Ellis moved to dismiss the action based on the settlement. Supreme Court dismissed the suit and denied Desrosiers' motion to notify other class members of the dismissal, observing that the plaintiff was "beyond your time to move to have class certification."

The Appellate Division, First Department reversed and directed Supreme Court to give notice to the putative class. Since a class action suit tolls the statute of limitations for all potential class members, it said, "the putative class retains an interest in the action, and CPLR 908 is not rendered inoperable simply because the time for the individual plaintiff to move for class certification has expired. Notice to the putative class members of the compromise ... is particularly important under the present circumstances, where the limitations period could run on the putative class members' cases following discontinuance of [Desrosiers'] action."

Christopher Vasquez, a former "cold call" broker for National Securities Corp., brought this action in 2014 to recover unpaid minimum wages and overtime for himself and other brokers. After he settled his claim for $21,789.93 plus attorneys' fees and costs, Supreme Court granted a defense motion to dismiss the suit. It granted Vasquez's motion to notify class members that the action would be dismissed, citing Avena v Ford Motor Co. (85 AD2d 149 [1st Dept 1982]), which ruled the notice requirement of CPLR 908 applies prior to class certification.

The Appellate Division, First Department affirmed. Although the Federal Rules of Civil Procedure have been amended to restrict the comparable federal notice requirement to certified class actions, it said, "The legislature, presumably aware of the law as stated in Avena, has not amended CPLR 908 to conform to the federal statute. Although defendant ... raises policy arguments in support of its position, its remedy lies with the legislature and not with this court."

The defendants argue that CPLR 908, by its terms, applies only to class actions, and these suits were pleaded but never certified as class actions. Perry Ellis adds that, even if Desrosiers' claim had gone to trial, it could not have been treated as a class action because the deadline for certification had expired. National Securities says "requiring that notice be distributed to an unidentifiable class is an administrative impossibility," and it argues that Avena should be overturned because it "ignored that resolution of a named-plaintiff's claim pre-certification has no res judicata effect on alleged class members who are free to bring their own lawsuit."

For appellant Perry Ellis: Frank H. Henry, Miami, Florida (305) 981- 4300
For appellant National Securities: Daniel J. Buzzetta, Manhattan (212) 589-4200
For respondents Desrosiers and Vasquez: LaDonna M. Lusher, Manhattan (212) 943-9080

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To be argued Tuesday, November 14, 2017

No. 123 People v Dwight Smith

Dwight Smith and three co-defendants were indicted on murder and related charges stemming from the fatal shooting of Dougal (or Dughal) Mills during a home invasion robbery at his Bronx apartment in May 2007. Smith was arraigned in July 2008. In March 2009, nearly six months after the deadline for prosecution discovery requests under CPL 240.90(1) expired, the prosecutor moved to obtain a saliva sample for DNA testing. Smith's privately retained attorney said he would ask Smith if he would agree to provide the sample, but apparently did not raise the issue with him. Defense counsel appeared in court six weeks later, without Smith present, and asked to be relieved because Smith had not been able to pay him. Supreme Court granted the request, and it also signed an order granting the motion for a saliva sample "on consent."

When Smith appeared in court later on the same day, without counsel, the court told him that his attorney had been relieved, new counsel would be appointed for him, and the request for a DNA sample had been granted. Smith repeatedly objected to giving the sample before he could consult with a lawyer, saying he was unaware of the request, had not spoken with his attorney for two months, and thought he would "probably" oppose the motion. The court told him the issue had been decided and said, "All I want to ask you is to cooperate." Smith continued to ask for an attorney. The court said his former counsel had consented to the sample and his new attorney "is not going to be able to help you in any way of preventing [it] because I issued the order." Smith continued to insist that a lawyer be present, but finally agreed to provide the sample in the courtroom after he was shown the order. He later pled guilty to first-degree manslaughter and burglary in exchange for a prison sentence of 18 years.

The Appellate Division, First Department reversed on a 3-2 vote, vacated the plea, and dismissed the indictment with permission to re-present charges to another grand jury. Supreme Court violated Smith's right to counsel when it "pressured [him] into giving a buccal swab for DNA testing, incorrectly advised him that he had no arguments against the prosecutor's untimely discovery, and ignored defendant's explicit and repeated requests for a lawyer during the critical pretrial stage of the proceedings," it said. The discovery proceedings "were 'critical' within the meaning of the law. The DNA test fundamentally changed the outcome of the case, undermining defendant's plea bargaining posture and his chances for acquittal.... [His] protests put the court on notice that defendant had never communicated with his former attorney about the issue, nor did he wish to consent to the test."

The dissenters said, "[T]he salient fact here is that prior to the time the defendant claims he was unconstitutionally without counsel, the motion to compel the saliva sample had already been considered by the court and a decision made, granting the motion 'on consent'.... [T]here is no basis to hold that counsel must be present for the physical administration of the already-ordered collection of a saliva sample; nor is there a basis to view the actual collection of the sample as a 'critical stage' of the proceedings...." They also said the majority erred in dismissing the indictment because "the alleged violation does not taint or call the validity of the indictment into question."

For appellant: Bronx Assistant District Attorney Ramandeep Singh (718) 838-7201
For respondent Smith: Matthew Bova, Manhattan (212) 577-2523 ext. 543

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To be argued Tuesday, November 14, 2017

No. 39 Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, National Association v Nomura Credit & Capital, Inc. (and three other actions)

These cases stem from four residential mortgage-backed securities transactions sponsored by Nomura Credit & Capital, Inc. in 2006 and 2007. Nomura sold the loans through mortgage loan purchase agreements (MLPA) to an affiliate, which transferred them to four trusts pursuant to pooling and servicing agreements (PSA) and sold interests in the pooled loans to investors. In section 7 of each MLPA, Nomura warranted that the statements and reports it furnished in connection with the transactions "do not contain any untrue statement of material fact or omit to state a material fact necessary to make the statements contained therein not misleading." In section 8, Nomura made specific representations regarding the quality of the mortgage loans. Section 9(a) of the MLPAs provides that, upon discovery "of a breach of any of the representations ... contained in Section 8," Nomura must cure the breach or repurchase the affected loan at the purchase price; and section 9(c) states that Nomura's obligation to cure or repurchase defective loans "constitute the sole remedies of the Purchaser against the Seller respecting ... a breach of the representations ... contained in Section 8." The PSAs contain similar "sole remedies" language regarding breaches of representations "set forth in ... Section 8" of the MLPA. In 2012, with investors claiming breaches of Nomura's warranties affected thousands of the pooled loans, HSBC Bank USA, as trustee of the four trusts, brought these actions seeking repurchase of the loans by Nomura or damages for its breach of that obligation, and damages for its alleged violation of the No Untrue Statement provision.

Supreme Court denied Nomura's motion to dismiss claims based on its repurchase obligation, but dismissed claims for damages under the No Untrue Statement provision, saying "the relief available to plaintiff is limited by the sole remedy provision ... to specific performance of the repurchase protocol, or if loans cannot be repurchased, to damages consistent with its terms." The court relied on its prior ruling in a related action against Nomura, which said, "The complaint does not allege any breach of the No Untrue Statement provision that was not also a breach of the Mortgage Representations to which the sole remedy provisions apply.... [T]he sole remedy provision establishing the repurchase protocol for breaches of Mortgage Representations would be rendered meaningless if the duplicative representations in the Mortgage Loan Schedule were not subject to that protocol, and could support an independent breach of the No Untrue Statement provision."

The Appellate Division, First Department modified by reinstating the claims for breach of the No Untrue Statement provision in section 7 of the MLPA. It said, "By its plain language, section 9(c) says that "[t]he obligations of the Seller [Nomura] ... to cure or repurchase a defective Mortgage Loan ... constitute the sole remedies of the Purchaser against the Seller *respecting a missing document or a breach of the representations and warranties contained in Section 8*" (emphasis added)." It said, "Had these 'very sophisticated parties' desired to have the sole remedy provisions apply to both section 8 and section 7 breaches, 'they certainly could have included such language in the contracts. They did not do so....' In any event, section 13 of the MLPA provides that remedies are cumulative."

For appellant Nomura Credit & Capital: Joseph J. Frank, Manhattan (212) 848-4000
For respondent HSBC Bank, as trustee: Michael S. Shuster, Manhattan (646) 837-5151

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To be argued Wednesday, November 15, 2017

No. 124 Global Reinsurance Corporation of America v Century Indemnity Co.

Century Indemnity Co. provided general liability insurance to Caterpillar Tractor Company for many years under policies that obligated it to pay up to $1 million per occurrence for third-party claims against Caterpillar and, in addition, to reimburse Caterpillar for its legal defense expenses. From 1971 to 1980, Century obtained reinsurance from Global Reinsurance Corporation of America to cover part of that risk under a series of nine reinsurance certificates, which require Century to cover the first $500,000 of liability under the Caterpillar policy. The "Reinsurance Accepted" section of the certificates require Global to cover half of the excess liability, or up to $250,000 of the next $500,000. The certificates also provide, "All claims involving this reinsurance, when settled by [Century], shall be binding on [Global], who shall be bound to pay its proportion of such settlements, and in addition thereto..., [Global's] proportion of expenses ... incurred by [Century] in the investigation and settlement of claims or suits."

Beginning in 1988, thousands of lawsuits alleging asbestos-related injuries were filed against Caterpillar, triggering Century's liability policies. When Century sought reimbursement from Global for a share of its payments to Caterpillar, the companies disagreed about the liability limits set by the reinsurance certificates. Global brought this action against Century in federal court, arguing that the "Reinsurance Accepted" section places a $250,000 cap on the amount it can be required to pay for both losses due to claims and litigation expenses. Century argued that the limit applies only to indemnity losses and that Global must pay its share of litigation expenses in any amount. Global said Century has paid more than $60 million to Caterpillar and has agreed to pay another $30.5 million. Global said only about 10 percent of that cost represents losses on claims and the other 90 percent represents expenses.

U.S. District Court ruled in favor of Global, holding that Global's "total liability for both loss and expenses is capped at the dollar amount stated in the 'Reinsurance Accepted' section of each certificate," or $250,000. It relied on decisions of the U.S. Court of Appeals for the Second Circuit in Bellefonte Reinsurance Co. v Aetna Casualty & Surety Co. (903 F2d 910 [1990]) and Unigard Security Insurance Co. v North River Insurance Co. (4 F3d 1049 [1993]).

On appeal, the Second Circuit found it was unclear whether Bellefonte and Unigard were correctly decided, and it is asking this Court to resolve the key issue of New York law with a certified question: "Does the decision of the New York Court of Appeals in Excess Insurance Co. v Factory Mutual Insurance Co., 3 NY3d 577 ... (2004), impose either a rule of construction, or a strong presumption, that a per occurrence liability cap in a reinsurance contract limits the total reinsurance available under the contract to the amount of the cap regardless of whether the underlying policy is understood to cover expenses such as, for instance, defense costs?"

For appellant Century Indemnity: Jonathan D. Hacker, Washington, D.C. (202) 383-5300
For respondent Global Reinsurance: David C. Frederick, Washington, D.C. (202) 326-7900

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To be argued Wednesday, November 15, 2017

No. 125 Matter of Terranova v Lehr Construction Co.

Joseph Terranova was employed by Lehr Construction Co. in July 2009, when he tripped on a raised floor tile at work and injured his right knee. He applied for workers' compensation benefits and, in July 2010, he was awarded benefits for a work-related injury. In May 2011, an orthopedist examined him and reported that he had a 10 percent schedule loss of use of his right leg, but no other compensation was awarded at that time. Meanwhile, Terranova brought a negligence action against the contractor that installed the defective floor tile. The suit was settled for $173,500 in March 2012. Lehr's workers' compensation carrier, New Hampshire Insurance Co., consented to the settlement and agreed to accept $14,018.75 in satisfaction of its lien under Workers' Compensation Law § 29(1), which entitled it to recoup the cost of benefits it had already paid to Terranova minus its equitable share of litigation expenses that he incurred to obtain the settlement. The statute also entitled the insurer to a credit against its future compensation payments, but the parties did not agree on whether a share of litigation expenses would be apportioned against the insurer based on those future credits. Both parties reserved their rights under Burns v Varriale (9 NY3d 207), which applies where the value of future compensation benefits are speculative and an insurer's equitable share of litigation costs cannot be accurately assessed at the time of a third-party recovery. Burns said that "if a claimant does not receive benefits for death, total disability or schedule loss of use, the carrier's future benefit cannot be quantified by actuarial or other reliable means," and the carrier can instead be required to make periodic payments for its share of litigation costs as future benefits accrue.

After further proceedings, the Workers' Compensation Board ruled in April 2014 that Terranova suffered a 10 percent schedule loss of use of his leg, but held that no further compensation payments would be due because Terranova's settlement exceeded the amount of his award. The Board subsequently determined that Terranova was not entitled to ongoing payments for litigation expenses under Burns because he received a schedule loss of use award, and thus his case was one of "those classes of cases to which [Matter of Kelly v State Ins. Fund (60 NY2d 131)] continues to apply (total disability, death benefits, and schedule loss of use)." Under Kelly, an insurer's share of litigation costs based on past and future benefits is assessed at the time of a third-party recovery.

The Appellate Division, Third Department affirmed, finding Terranova was not entitled to ongoing payments for litigation expenses. It said Kelly "controls the apportionment of the carrier's equitable share of litigation expenses in a case such as this where claimant has obtained a schedule loss of use award."

Terranova argues his case is governed by Burns because the Board had not determined that he suffered a schedule loss of use of his leg nor set the amount and duration of his award until two years after the third-party settlement. He says "the decision below permitted the carrier to take full credit for [his] net third-party recovery while contributing nothing to the litigation expense incurred by [him] in securing that recovery. The court below erroneously focused on the character of the compensation award as a 'schedule loss,' rather than the fact that it was undetermined and thus speculative at the time the third-party action was settled."

For appellant Terranova: Robert E. Grey, Farmingdale (516) 249-1342
For respondent New Hampshire Insurance: J. Evan Perigoe, Manhattan (212) 227-0347
For respondent Workers' Compensation Bd.: Asst. Solicitor Genl. Patrick Woods (518) 776-2020

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To be argued Wednesday, November 15, 2017

No. 126 B.F. v Reproductive Medicine Associates of New York, LLP
No. 127 Dennehy v Copperman

These medical malpractice actions were brought separately by couples seeking damages for "wrongful birth." The couples were treated for infertility by Dr. Alan Copperman at Reproductive Medicine Associates of New York (RMA), and underwent in vitro fertilization using donated eggs. Both couples allege that RMA and Copperman negligently failed to test the egg donors for a chromosomal abnormality known as "fragile X," which can produce intellectual disability and other injuries, until after their children were born. When tests were conducted months after the births, the donors were found to be fragile X carriers and a child born to each couple had the full fragile X mutation.

RMA and Copperman moved to dismiss both lawsuits as untimely under CPLR 214-a, which requires that a medical malpractice claim be filed within two and a half years "of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure." The outcome depends on whether the limitations period began to run when the defendants ended their treatment of the plaintiffs or when the children were born. In Case No. 126, embryos produced by the donated eggs were implanted in January 2009, RMA discharged the mother to the care of her own obstetrician in March 2009, and she gave birth in September 2009. The suit was filed in December 2011. In Case No. 127, the embryos were implanted in August 2008, RMA discharged the mother in September 2008, and she gave birth in April 2009. The suit was filed in October 2011. Supreme Court denied motions to dismiss both suits.

The Appellate Division, First Department affirmed, ruling the suits were timely because a wrongful birth claim "accrues upon the birth of the impaired child." For a wrongful birth, "'the parents' legally cognizable injury is the increased financial obligation' of raising an impaired child...," it said. "Only if there is a live birth will the injury be suffered. Thus, until there is a live birth, the existence of a cognizable legal injury that will support a wrongful birth cause of action cannot even be alleged.... Without legally cognizable damages, there is no legal right to relief, and 'the Statute of Limitations cannot run until there is a legal right to relief'...."

The defendants argue that the limitations period began to run on the date they last treated each plaintiff and expired before the suits were filed, and that any new exceptions to CPLR 214-a must be enacted by the Legislature. RMA says the Appellate Division decision "creates a distinct 'discovery rule' for 'wrongful birth'" actions. "Uninterrupted precedent, however, instructs that only the Legislature may properly engraft a new 'discovery' exception onto the malpractice statute of limitations," and the Legislature has "consistently rejected" such a rule.

For appellant Reproductive Medicine Associates: Caryn L. Lilling, Woodbury (516) 487-5800
For appellant Copperman: Nancy Ledy-Gurren, Manhattan (212) 593-6700
For respondent B.F.: Wendy R. Fleishman, Manhattan (212) 355-9500
For respondent Dennehy: James N. LiCalzi, Manhattan (212) 233-8100

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To be argued Thursday, November 16, 2017

No. 128 Matter of The Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan; Matter of Wright v New York State Department of Health

In December 2014, the State Department of Health (DOH) approved an application by Jewish Home Lifecare, Manhattan, to build a 20-story nursing home adjacent to an elementary school, P.S. 163, on Manhattan's Upper West Side. The school has about 600 students between the ages of 3 and 11. After an environmental review, DOH concluded that mitigation measures it imposed would reduce exposure to toxic dust, noise, and other construction impacts to acceptable levels. It said measures in the Remedial Action Plan (RAP) and Construction Health and Safety Plan (CHASP) to limit exposure to airborne lead dust, which included wetting exposed soil and air monitoring, would ensure that lead levels did not exceed federal standards. Two groups -- parents and teachers of students at the school led by The Friends of P.S. 163; and residents of four nearby apartment buildings -- brought these actions to challenge DOH's determination, arguing it did not comply with the State Environmental Quality Review Act (SEQRA).

Supreme Court vacated DOH's approval and directed it to reconsider the impacts of noise and lead dust on the students next door. It said DOH "did not address the particular adverse effects of elevated noise levels on children's learning abilities or performance in school," nor "take a sufficiently hard look at additional noise mitigation measures." Noting "the severe and lasting consequences to children of lead exposure," the court said "the circumstances here, involving young children at a school very close to the construction site, present extraordinary and uniquely difficult challenges.... Given the special concerns here, DOH's determination that containment measures, such as a tent, were not warranted because the RAP and CHASP were sufficient to control and measure dust levels, does not demonstrate that DOH took a hard enough look at all relevant mitigation measures or made a reasoned elaboration for its failure to consider containment measures."

The Appellate Division, First Department reversed on a 3-1 vote, finding DOH "took the requisite 'hard look'" at the project's noise impact. It said SEQRA "'does not require an agency to impose every conceivable mitigation measure, or any particular one. Rather, in accordance with its balancing philosophy, SEQRA requires the imposition of mitigation measures only "to the maximum extent practicable" "consistent with social, economic and other essential considerations"....'" It said, "DOH reasonably relied on federal standards ... in determining what measures to employ to mitigate the possibility of off-site migration of lead-bearing dust.... Its mitigation measures reflect its considered judgment and meets the required 'hard look' under SEQRA. In short, we find that [Supreme Court] erroneously 'substituted its analysis for the expertise of the lead agency' simply because the agency rejected what the court considered to be better measures in mitigation."

The dissenter said, in part, "[T]he majority fails to acknowledge that DOH failed to comply with the [City Environmental Quality Review] Technical Manual, which requires ... that a public health analysis consider the potential for exposure to contamination by vulnerable populations, including children. A striking example of its failure to do so is that the RAP requires that ... construction workers wear protective clothing but there is no comparable protection for the children attending school next to the construction site."

For appellants Friends of P.S. 163 et al: Matthew R. Shahabian, Manhattan (212) 506-5000
For appellants Wright et al: John R. Low-Beer, Brooklyn (718) 744-5245
For respondent Jewish Home Lifecare: Henry M. Greenberg, Manhattan (212) 801-9200
For respondent Dept. of Health: Assistant Solicitor General Ester Murdukhayeva (212) 416-6279

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To be argued Thursday, November 16, 2017

No. 129 Matter of Lisa T. v King E.T. *(papers sealed)*

Lisa T. and her ex-husband, King E.T., have one son, who was born in July 2010; and they "have been embroiled in a multitude of bitter legal disputes," according to Family Court, having filed 24 family offense, custody, and violation petitions since 2012. In December 2012, Lisa filed a family offense petition alleging that King had committed second-degree harassment by sending her threatening and harassing emails and text messages. The court issued her a temporary order of protection that directed King not to contact her at work and, at other times, to contact her only "in the event of an emergency regarding the child or visitation arrangements."

The temporary order was repeatedly extended until July 2015 when, after a hearing, Family Court dismissed the family offense petition, finding King did not commit second-degree harassment because he "did not send the subject e-mails with the intention of harassing, annoying, or alarming" his former wife. "[T]here appear to be no threats, other than implied court action." However, the court found that King had twice willfully violated the temporary orders of protection "by sending the mother a communication that did not relate to an emergency regarding the child or visitation arrangements." Based on those violations, the court issued a final one-year order of protection that directed King not to contact Lisa "except as necessary to arrange visitation."

The Appellate Division, First Department affirmed on a 4-1 vote, rejecting the dissenter's argument that Family Court lacked jurisdiction to issue the final order of protection after it found that King had not committed a family offense. The majority said Family Court Act § 846-a permits a court "to issue a new order of protection if the respondent is 'brought before the court for failure to obey [a] ... temporary order of protection issued pursuant to this act ... and if, after a hearing, the court is satisfied by competent proof that the respondent has willfully failed to obey ... such order.'" It said, "The Family Court adhered to the prescribed procedure and did not exceed its jurisdiction by issuing this final order of protection.... Family Court Act § 846-a does not require a finding of the commission of a family offense.... [W]e read Family Court Act § 846-a as prescribing the remedies available to the court when a respondent violates a temporary order of protection, which is what is at issue here."

The dissenter argued, "Upon a finding of willful violation of a 'lawful' order of protection, the Family Court may 'make a new order of protection in accordance with section eight hundred forty-two' (Family Ct Act § 846-a). As the reference in this provision to section 842 suggests, since the Family Court only has jurisdiction to issue a final order of protection where a petition alleges that a family offense has been committed and the allegations in the petition are proved (Family Ct Act §§ 812, 841, 842...)..., section 846-a must be read to provide that the Family Court may only issue a final order of protection under this section upon a finding that the respondent willfully violated a final order of protection issued upon a finding that a family offense was committed, or a finding that the respondent's violation of a temporary ... or a final order of protection constituted a family offense."

For appellant King E.T.: Richard L. Herzfeld, Manhattan (212) 818-9019
For respondent Lisa T.: Randall S. Carmel, Jericho (603) 313-1951

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To be argued Thursday, November 16, 2017

No. 130 Prometheus Realty Corp. v New York City Water Board

In April 2016, after the New York City Water Board proposed a 2.1 percent rate increase for customers in 2017 to close a $76 million budget gap, the City announced that it would forgo rental payments owed by the Board for leasing the City-owned water system through fiscal year 2020. The Board adopted the City's recommendation that it use the savings to provide a one-time credit of $183 to class one property owners of one-, two-, and three-family homes in 2017, totaling about $122 million; and to provide rate mitigation for all water and sewer customers over the term of the rate schedule through 2020, totaling about $988 million.

The Rent Stabilization Association and three corporate landlords filed this suit to annul the Board's action, arguing that adoption of the 2.1 percent rate increase and the one-time credits was arbitrary and capricious. Supreme Court annulled the Board's resolution and enjoined it from implementing the rate increase and the credits for class one customers.

The Appellate Division, First Department affirmed in a 3-1 decision, ruling that "the one-time credit adopted for some, but not all, water customers at the same time the Water Board needed to increase overall water rates to fund a projected budget shortfall for that particular year, has no rational basis.... There is no factual basis to conclude ... that class one property owners have been more financially burdened by paying water bills than other classes of users.... The Water Board claims that a rational basis derives from the fact that class one property owners clearly include 'seniors and low or moderate income homeowners.' It is equally clear, however, that class one includes owners of luxury brownstones and other high value dwellings in the City; just as it should be clear that class two properties consist of other types of residential buildings ... also occupied by seniors and persons of low or moderate income, none of which derive any benefit ... from this credit." It said, "The Water Board's justification for the [rate] increase as necessary to ensure funding for the costs of repairing or replacing existing portions of the City's water and sewer system, while consistent with its mission statement and statutory mandate, is irreconcilable with [its] implementation of a credit if the Water Board still needed funds to balance its books for the year."

The dissenter argued that the Board's adoption of the rate increase and the credit was not arbitrary or capricious, saying, "[T]he record reflects that the credit was approved for the purpose of providing expedited financial relief to class 1 property owners, including financially overburdened lower and middle-class homeowners, many of whom are seniors, who had been disproportionately and adversely affected by the rise in water rates in recent years.... [T]he credit furthers the economic and public policy goal of providing financial relief to the low and middle-income homeowners comprising many, if not most, of the class 1 property owners" and "is consistent with the Board's mission to 'proactively consider [] the optimal level [of rates] ... and sustainable provision of high-quality service at a fair price for our customers'...." Regarding the rate increase, she cited the Board's explanation that it would be "an increase in the base rates not only in FY 2017, but over the course of four fiscal years to FY 2020, during which the consumption of City water is expected to further decline.... In the absence of a rate increase, this decline would result in a reduction of needed revenues."

For appellants Prometheus et al: Michael Berengarten, Manhattan (212) 592-1400
For City respondents: Assistant Corporation Counsel Melanie T. West (212) 356-0842