

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 10, 2013

No. 156 Georgitsi Realty, LLC v Penn-Star Insurance Company

In this federal case, Georgitsi Realty is seeking to reinstate its lawsuit against its insurer, Penn-Star Insurance Company, for coverage of damage to its apartment building on Eighth Avenue in Brooklyn. The damage was caused by excavation work on an adjacent parcel for construction of an underground parking garage in 2007. Georgitsi had notified the owner of the parcel and the excavators of the damage the work was causing. Georgitsi also notified the City Department of Buildings, which issued numerous stop work orders and summonses, and obtained a temporary restraining order in State Supreme Court enjoining the excavators from proceeding with the work, but the excavators continued with their project.

Georgitsi notified Penn-Star of its claim for damage caused by the adjacent excavation under the policy's coverage for "vandalism," which the policy defines as "willful and malicious damage to, or destruction of, the described property," i.e., Georgitsi's building. Penn-Star refused on the ground that the excavation damage did not meet the policy's definition of "vandalism." Georgitsi brought this suit against the insurer to compel coverage, and Penn-Star moved for summary judgment to dismiss.

A magistrate judge found that the excavators had not committed vandalism within the meaning of the policy because their actions were directed only to the adjacent parcel, not Georgitsi's building, and that proof of recklessness would not satisfy the malice requirement of the policy as a matter of law. U.S. District Court for the Eastern District of New York adopted the magistrate's recommended ruling and granted summary judgment dismissing the suit.

The U.S. Court of Appeals for the Second Circuit said, "[T]his appeal turns on the unsettled and important question of New York law of whether 'malicious damage' within the meaning of an insurance policy covering vandalism may be found to result from an act not directed at the policyholder's property but causing damage thereto and undertaken with knowing disregard for the policyholder's rights." It is asking this Court to resolve the issue in a certified question: "For purposes of construing a property insurance policy covering acts of vandalism, may malicious damage be found to result from an act not directed specifically at the covered property? If so, what state of mind is required?" The Second Circuit said, "[B]ecause the answer to this question will likely have broad implications for insurance disputes under New York law, we believe that the New York Court of Appeals should have the opportunity to address it."

For appellant Georgitsi: Jack S. Dweck, Manhattan (212) 687-8200

For respondent Penn-Star: Steven Verveniotis, Mineola (516) 741-7676

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To be argued Tuesday, September 10, 2013

No. 157 Sandiford v City of New York Department of Education

(papers sealed)

This human rights case arose in 2005, when Ayodele Sandiford was a school aide at a Brooklyn public school. Sandiford, a lesbian, says the principal, Lowell Coleman, repeatedly made derogatory remarks about gays and lesbians in front of herself, students and teachers, and told her "his church can change people like us for the better." A high school student and a college student who worked with Sandiford in an after-school program complained to Coleman that she had asked the high school student to "hook her up" with the college student and, when the younger woman refused, asked the college student directly for a date. Sandiford denies the incident occurred. Coleman reported the matter to the Department of Education (DOE) and, in March 2005, suspended her without pay pending a determination by DOE's Office of Special Investigation (OSI). Sandiford later complained to various DOE offices about Coleman's treatment of her. In late June 2005, she claims Coleman "berated, belittled and reprimanded" her for making complaints about his conduct. He also told her OSI had substantiated the allegations of misconduct and recommended that she be terminated, which he had decided to do. She filed a grievance with DOE, which reinstated her with loss of two weeks of back pay in a decision that said, "Although inappropriate, the grievant's conduct in this matter did not warrant discharge." The decision was not appealed.

Sandiford brought this action against DOE and Coleman under the New York City and New York State Human Rights Laws, alleging that she was unlawfully discharged because of her sexual orientation and in retaliation for complaining about the principal's conduct. Supreme Court granted DOE's summary judgment motion to dismiss her retaliation claim, but not her discrimination claims.

The Appellate Division, First Department modified the order by reinstating the retaliation claim in a 3-2 decision. It said DOE's "argument that the claims are precluded by the doctrine of collateral estoppel based on implicit findings by the DOE is improperly raised for the first time on appeal.... In any event, the argument is without merit. The record shows that plaintiff did not have a full and fair opportunity to litigate her claims of discrimination in the grievance process. Indeed, her testimony suggests that she had little involvement in the proceedings.... Moreover, plaintiff did not have an opportunity to appeal the grievance decision, as it was the Union's decision whether to proceed further...." It said, "[I]n light of plaintiff's testimony regarding Coleman's comments and conduct, the record did not conclusively establish that defendants would have made the same decision to terminate plaintiff's employment had they not considered plaintiff's sexual orientation."

The dissenters argued the discrimination claims should be dismissed as well as the retaliation claim. They said Sandiford "did not challenge a grievance decision which concluded that she had engaged in inappropriate conduct with a 16-year-old female student, yet now argues that her termination was based on her sexual orientation.... [W]ell-established precedent upholds termination of educators for sexually inappropriate behavior towards a student -- regardless of their sexual orientation. In focusing on the principal's alleged defamatory remarks, the majority gives no weight to the fact that the misconduct charges ... were investigated and substantiated by" DOE, which "then recommended that the principal terminate plaintiff."

For appellants BOE et al: Assistant Corporation Counsel Mordecai Newman (212) 788-1025

For respondent Sandiford: Colleen M. Meenan, Manhattan (212) 226-7334

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No. 158 People v Patrick A. Asaro

Patrick Asaro was arrested in November 2008 after a fatal collision on Guymard Turnpike in Orange County. The prosecution alleged that he was driving at a high rate of speed, crossed the center line on a curve, and struck an oncoming car driven by Brian Stevens, who was killed. Five passengers in the cars were seriously injured, as was Asaro. Although witnesses said Asaro had been drinking at a party earlier in the evening, a State Police lab test found no alcohol in his blood. It found a trace amount of the active ingredient in marijuana, but a follow-up test by another lab found none. A State Police accident reconstruction expert concluded that Asaro was traveling at least 94 miles per hour at the time of the collision, but he was unable to produce his notes and calculations because they were lost before the trial.

The jury acquitted Asaro of driving while ability impaired, but convicted him of second-degree manslaughter under Penal Law § 125.15(1) (recklessly causes the death of another person), second- and third-degree assault, reckless endangerment and reckless driving. County Court denied his motion to set aside the verdict as repugnant and not supported by sufficient evidence. "Since the crime of Manslaughter in the Second Degree and Driving While Ability Impaired have no essential elements in common, an acquittal of one is not repugnant to a conviction on the other...", it said. "The court finds that the jury verdict was not repugnant inasmuch as the jury concluded that defendant's reckless conduct was not based on his intoxication but on other facts relating to the manner in which he operated the vehicle." Asaro was sentenced to three to ten years on the manslaughter count.

The Appellate Division, Second Department affirmed, finding the verdict was not repugnant and was supported by legally sufficient evidence. It said, "The defendant was aware of, and consciously disregarded, a substantial and unjustifiable risk that his actions would cause the death of another, such that his conduct was reckless, and not merely negligent, or the result of carelessness, lack of foresight, or skill..." Regarding the accident reconstruction expert's lost notes and calculations, it said the trial court's "determination to give an adverse witness charge, rather than striking the expert's testimony, was a provident exercise of discretion..."

Asaro says the prosecution's theory, as stated in the bill of particulars, was that he was speeding and crossed over the center line while impaired. "The failure of the People to prove each of the elements set forth in their bill of particulars ... rendered the proof of recklessness insufficient to sustain the charges of manslaughter and reckless assault. The verdict was also rendered repugnant as the defendant was found not guilty of the charge of driving while impaired and the 'impairment' was one of three indicia of recklessness set forth in the bill of particulars ..., which identified impairment as an element to be proven to sustain the manslaughter and reckless assault charges upon which the defendant was found guilty by the jury." Among other things, he also argues the accident expert's testimony was improperly admitted "in the absence of disclosure of underlying scientific computations of speed."

For appellant Asaro: Benjamin Ostrer, Chester (845) 469-7577

For respondent: Orange County Asst. District Attorney Robert H. Middlemiss (845) 291-2050

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No. 159 People v Carlos Santiago, Jr.

(papers sealed)

Carlos Santiago, Jr. was convicted of first-degree sexual abuse and second-degree unlawful imprisonment after a jury trial, at which the victim testified he had restrained her in his basement in Rochester and subjected her to sexual contact by forcible compulsion on September 30, 2007. The prosecution sought to have him sentenced as a second felony offender under Penal Law § 70.06(1)(b)(i), based on his prior conviction in Pennsylvania of third-degree murder. Santiago committed the Pennsylvania crime in January 1992, when he was 15 years old.

Defense counsel argued that the Pennsylvania murder could not be used as a predicate felony because of Santiago's age at the time it occurred. "He was a minor," she said. "Had he been in New York, he would have been entitled, I believe, to a YO [youthful offender adjudication], which, of course, he didn't get in Pennsylvania." The prosecutor responded that YO status "is not mandatory, especially given the nature of the previous conviction." County Court sentenced Santiago as a second felony offender to seven years in prison.

The Appellate Division, Fourth Department rejected his challenge to the sentence as unpreserved, saying he failed to contend before the sentencing court that the Pennsylvania conviction would not constitute a conviction in New York because "a 15-year-old could not be convicted in New York of manslaughter in the second degree, one of the offenses encompassed by the Pennsylvania conviction of murder in the third degree."

Contending his sentence is illegal, Santiago argues that the Pennsylvania murder may not be used as a predicate offense because, if he had committed it in New York, he would not have been convicted of a crime at all due to his age. "While a defendant may be convicted of Pennsylvania's murder in the third degree for an act he committed as a fifteen year old, a defendant may not, by reason of infancy, be convicted in New York of manslaughter in the second degree or criminally negligent homicide for conduct committed as a fifteen year old." He says his claim "is reviewable as a question of law, either as preserved or under the illegal sentence preservation exception."

For appellant Santiago: Drew R. DuBrin, Rochester (585) 753-4947

For respondent: Monroe County Assistant District Attorney Geoffrey Kaeuper (585) 753-4674

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No. 160 Merrill Lynch, Pierce, Fenner & Smith Incorporated v Global Strat, Inc.

After the collapse of Bear Stearns in March 2008, Merrill Lynch, Pierce, Fenner & Smith brought this action for fraudulent conveyance, breach of contract, and breach of fiduciary duty against four foreign investors -- Ezequiel, Raymond, Albert and Scarlett Nasser -- and five corporate entities the Nassers used to carry out their investments. Merrill Lynch alleged that the Nassers lost heavily on Bear Stearns, running up a deficit of more than \$68 million in Merrill Lynch accounts held in the names of their corporate entities, and then wrongfully transferred funds out of those accounts to avoid paying down the deficit. The individual Nasser defendants moved to dismiss for lack of personal jurisdiction. In September 2008, Merrill Lynch began serving notices of discovery. In December 2008, Supreme Court stayed discovery relating to claims against the Nassers individually, pending resolution of their motion to dismiss, but required them to comply with discovery relating to claims against their corporations.

Merrill Lynch complained at a series of conferences in January and February 2009 that the defendants were not complying with their discovery obligations. The court told defense counsel, "If there is not a full and accurate and detailed response [to discovery demands], that will be it. I will ... enter a judgment in this case, I am telling you that right now.... [T]his case will be over as far as the liability aspect of the case, we'll take an inquest on damages and it will be over." The court later referred the issue to a special referee. In March 2010, the referee issued a report finding that the Nassers failed to comply with discovery demands related to claims against their corporations. Supreme Court confirmed the report and, after an inquest, entered a \$99 million default judgment against the Nassers. The same court subsequently dismissed the claims against Albert Nasser for lack of personal jurisdiction.

The Appellate Division, First Department reinstated the claims against Albert Nasser and otherwise affirmed. "The Nassers' repeated failure to comply with discovery deadlines or offer a reasonable excuse for their noncompliance with discovery requests, as well as their counsel's misrepresentations in open court as to the cause of one of their violations, give rise to an inference of willful and contumacious conduct warranting the entry of judgment against them..." it said. "The Nassers were appropriately warned that judgment would be entered against them if their discovery responses were found by the Special Referee to be noncompliant with plaintiffs' requests..."

The Nassers argue that Merrill Lynch failed to demonstrate that any noncompliance with discovery was willful, that they "in fact complied" with the discovery demands, and that the "record does not support the Appellate Division's inference of willful, contumacious and bad faith conduct sufficient to warrant [CPLR] § 3126(3) sanctions and entry of judgment." Even if some sanction were warranted, they say, "a \$99 million default judgment was grossly excessive." They also argue that Albert Nasser is not subject to New York jurisdiction.

For Nasser appellants: Charles B. Manuel, Jr., Manhattan (212) 244-4111

For respondent Merrill Lynch: Kenneth I. Schacter, Manhattan (212) 705-7000