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 or gspencer@nycourts.gov.

To be argued Thursday, October 15, 2020 (arguments begin at 11 a.m.)

No. 80 Sutton 58 Associates LLC v Pilevsky

In June 2015, Sutton 58 Associates LLC loaned $147.25 million to BH Sutton Mezz LLC and its subsidiary Sutton 58 Owner LLC (the Borrowers) to build a tower at Sutton Place and 58th Street in Manhattan. The loan agreements included provisions in which the Borrowers agreed not to file a petition for bankruptcy, not to have assets or businesses unrelated to the tower project, and "to remain a special purpose bankruptcy remote entity," among other things. When the loans matured in January 2016, the Borrowers defaulted and Sutton 58 Associates sought to foreclose on the tower project and conduct a secured party sale. To prevent this, the Borrowers filed voluntary bankruptcy petitions in U.S. Bankruptcy Court for the Southern District of New York in February and April 2016. The Bankruptcy Court ultimately approved a liquidation plan through which the project site was sold to the lender at auction in December 2016.

In September 2016, Sutton 58 Associates (the lender) brought this action for tortious interference with the loan agreements in State Supreme Court against Prime Alliance Group, LTD., Sutton Opportunity LLC, and the owners of the companies, Philip Pilevsky and his two sons, "for willfully causing the borrowers to breach their contractual obligations to plaintiff." It claims the defendants "conspired" with the Borrowers to frustrate its contractual rights by facilitating their bankruptcy filings, in part by Prime Alliance loaning $50,000 to Sutton Mezz in February 2016 to retain bankruptcy counsel. It says a separate act of interference occurred around the same time, when Sutton Opportunity transferred three co-op apartments in Lynbrook to Sutton 58 Owner, allegedly to avoid the obstacles that can arise for single-asset real estate companies seeking bankruptcy protection. It claims the "scheme has required plaintiff to incur substantial attorney's fees and costs, and the Project – rather than being put up for auction in February 2016 – was left undeveloped and at a standstill in a falling real estate market." The site was rezoned in 2017, it says, and as a result the project "was indefinitely suspended."

The defendants moved to dismiss the action on the ground it was preempted by the U.S. Bankruptcy Code. Supreme Court denied the motion, saying, "There's no federal preemption here.... This case does not involve the bankruptcy itself. It involves separate contractual agreements which [defendants] clearly knew about and were involved in.... [O]n this record, there is a good chance they aided and abetted in these breaches and were involved in tortious interference."

The Appellate Division, First Department reversed and dismissed the action. "Plaintiff's claims, in which the sole damages plaintiff claims are losses resulting from the delay of a real estate project due to the bankruptcy filing of two nonparty entities, are preempted by federal law," it said, citing Astor Holdings, Inc. v Roski (325 F Supp 2d 251), which held that "no authorized proceeding in bankruptcy can be ... used as the basis for the assertion of a tort claim in state court against any defendant."

For appellant Sutton 58 Associates: Ronald S. Greenberg, Manhattan (212) 715-9100
For respondents Pilevsky et al: Robert S. Smith, Manhattan (212) 833-1100

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To be argued Thursday, October 15, 2020 (arguments begin at 11 a.m.)

No. 40 The Trustees of Columbia University v D'Agostino Supermarkets, Inc.

D'Agostino Supermarkets, Inc. entered into a lease with The Trustees of Columbia University to rent space for a supermarket in a university-owned building in Manhattan beginning in August 2003. The 15-year lease was to expire in August 2018. D'Agostino stopped paying rent in 2016 due to financial difficulties and it asked Columbia to release it from the final two years of the lease. In May 2016, when D'Agostino's arrears totaled nearly $262,000, the parties entered into a Surrender Agreement which required D'Agostino to make two surrender payments of $43,000 each followed by 11 monthly payments of $15,977.43. The Surrender Agreement provided that if D'Agostino failed to make any of the payments within five days after receiving a past due notice, the aggregate amount of all fixed rent, additional rent and other charges owed under the original lease would immediately become due and payable. D'Agostino made the two surrender payments, but failed to make the monthly payments. Columbia re-let the store property to another tenant in June 2016 and then filed this breach of contract action against D'Agostino in November 2016, seeking fixed rent of $1,029,969.54 plus interest, as well as $295,000 in additional rent and charges.

Supreme Court denied Columbia's summary judgment motion, saying "the liquidated damages clause of the Surrender Agreement constitutes an impermissible penalty" that cannot be enforced. Instead of the $1.3 million sought by Columbia, the court awarded it $175,751.73, the remaining amount due under the Surrender Agreement. It said Columbia's "damages at the time of the Surrender Agreement were ascertainable. The Surrender Agreement's liquidated damages clause, which is not related in any way to the total amount due under the Surrender Agreement, was therefore plainly a penalty aimed at ensuring D'Agostino's performance via threat of an outsized damages award." Columbia's proper remedy was payment of "the agreed upon sum for the Monthly Surrender Payments, which will put ... Columbia in the exact position it would have been had D'Agostino fully performed under the Surrender Agreement."

The Appellate Division, First Department affirmed, saying "damages at the time of the Surrender Agreement were ascertainable. Columbia's attempt to enforce the liquidated damages provision sought to 'secure performance by threat of a large payment rather than to provide a reasonable assessment of probable damages'...." It also ruled the provision "is unenforceable as 'unreasonable and confiscatory,' since it would result in an award 7½ times the amount that Columbia would have received if the Surrender Agreement had been fully performed...."

Columbia argues the Surrender Agreement, "which was negotiated by sophisticated commercial parties represented by counsel..., bears none of the hallmarks of a penalty. The Agreement was designed to realign the parties' rights under the Lease to account for the risks both parties faced as a result of [D'Agostino's] default under the Lease and [its] request to be relieved of its past and future financial obligations under the Lease prior to its expiration, not to coerce compliance. Further, the University's actual damages are neither disproportional to the amount ultimately owed under the Agreement, nor were the damages capable of being ascertained at the time the Agreement was executed."

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For respondent D'Agostino: Bruce H. Lederman, Manhattan (212) 564-9800

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To be argued Thursday, October 15, 2020 (arguments begin at 11 a.m.)

No. 81 People v Benito Lendof-Gonzalez

Benito Lendof-Gonzalez was arrested on felony domestic violence charges brought by his wife and was remanded to the Niagara County Jail in April 2016. About three weeks later, he passed a note to the inmate in an adjacent cell, Michael Shepherd, offering to "give you a house ... if you do two things for me." He explained in subsequent notes that he wanted Shepherd to kill his wife and her mother, who was a witness in the domestic violence case, by injecting them with heroin mixed with poison at his wife's house in Lockport. He also asked Shepherd to take his two sons from the house and give them to a friend. After Shepherd agreed, Lendof-Gonzalez told him when to kill the women, how to arrange the crime scene, and told him where to find a spare key to his wife's house. He also gave him a map of where to take his sons. Lendof-Gonzalez had known Shepherd was soon to be released on bail and was facing eviction from his home in Niagara Falls. Shepherd, who was being held on charges of petit larceny and attempting to smuggle cigarettes into the jail, immediately informed authorities of Lendof-Gonzalez's proposal, handed over the notes, and agreed to cooperate with investigators. The two men continued to pass notes about the plan and discussed it in person and by phone after Shepherd was released. Two days later, Shepherd told Lendof-Gonzalez that he had killed the women.

Lendof-Gonzalez was charged with two counts of first-degree attempted murder (murder-for-hire), two counts of second-degree attempted murder, and one of second-degree criminal solicitation. At trial, he moved to dismiss the attempted murder counts on the ground that the prosecution presented insufficient evidence under Penal Law § 110.00, which requires proof a defendant engaged in conduct that "tends to effect the commission of such crime." County Court denied the motion, although it said the issue of legal sufficiency was "dangerously close." The jury found Lendof-Gonzalez guilty on all counts.

The Appellate Division, Fourth Department modified the judgment by reversing all four attempted murder convictions. It said the evidence "establishes only that defendant planned the crimes, discussed them with the inmate in the next cell and with that inmate's girlfriend, and exchanged notes about them. Thus, inasmuch as '"several contingencies stood between the agreement in the [jail] and the contemplated crime[s]," defendant[] did not come "very near" to accomplishment of the intended crime[s]'.... Where, as here, the evidence fails to establish that defendant took any action that brought the crime close to completion, no matter how slight..., the evidence is not legally sufficient to support a conviction of attempt to commit that crime...."

The prosecution argues the defendant engaged in "conduct that came dangerously near completion of the murders.... Promising to deed a house to Shepherd, writing a fake suicide note, showing the suicide note to Shepherd so he could memorize it and make the wife write it out, telling Shepherd where the key was hidden to get into the house if it was locked, providing Shepherd with a map and a location to take the children after the crime, all constitute more than mere planning for murder. They are acts taken by defendant towards completion of the crime.... The only single contingency was Shepherd being true to his word to defendant and executing the crime."

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