State of New York
Court of Appeals

To be argued Wednesday, January 4, 2023

No. 4 Bank of America N.A. v Kessler

In September 2009, Andrew Kessler obtained a $590,302 loan secured by a mortgage on property in Croton-on-Hudson. Alleging that he defaulted on the mortgage in September 2013, Bank of America (the mortgage holder) mailed a 90-day notice to Kessler one month later pursuant to Real Property Actions and Proceedings Law (RPAPL) 1304. The statute requires lenders, at least 90 days before they foreclose on a borrower's principal residence, to send them a notice informing them of a default and warning they could lose their home to foreclosure if they don't cure the default. The statute specifies the exact language that must be used in the notice, including information about housing counselors and other resources that would be available to assist and advise struggling debtors. RPAPL 1304(2), the focus of this case, requires lenders to mail the notice "in a separate envelope from any other mailing or notice." The notice Bank of America sent to Kessler consisted of six pages of the statutorily required language and a seventh page with the heading "Important Disclosures" containing additional information, in English and Spanish, about protections and benefits available to borrowers in bankruptcy and to members of the military. The bank commenced this foreclosure action in March 2014.

Supreme Court denied the bank's motion for summary judgment and granted Kessler's cross motion to dismiss the complaint, finding the bank violated the "separate envelope" requirement of RPAPL 1304(2). "[A]s it is undisputed that plaintiff provided additional information in the envelope along with the statutorily required information, this court finds that plaintiff did not strictly comply with RPAPL § 1304 and thus, a condition precedent to the foreclosure action was not met," it said.

The Appellate Division, Second Department affirmed on a 3-1 vote, saying "the language of the statute is clear, precise, and unambiguous" and "'contains specific, mandatory language in keeping with the underlying purpose of [the Home Equity Theft Prevention Act] to afford greater protections to homeowners confronted with foreclosure.'" It said, "[W]e hold that inclusion of any material in the separate envelope sent to the borrower under RPAPL 1304 that is not expressly delineated in these provisions constitutes a violation of the separate envelope requirement of RPAPL 1304(2). This strict approach precluding any additional material in the same envelope as the requisite RPAPL 1304 notices not only comports with the statutory language, it also provides clarity as a bright-line rule to plaintiff lenders and 'promotes stability and predictability' ... in foreclosure proceedings." It said a more "flexible standard," requiring a court to determine whether additional material included in the notice envelope was "relevant, helpful, or prejudicial to the borrower," would be "unworkable."

The dissenter said the additional material in the notice envelope addressing the rights of debtors in bankruptcy or in military service "did not violate any of the content provisions" of RPAPL 1303. "Nor did the additional language frustrate the statute's overarching purpose or intent. Since the additional language was relevant to, and in fact clarified, the warnings and instructions mandated by the statute, it did not constitute a separate 'mailing or notice'..., and was properly included in '[t]he notice[] required by this section. In the absence of an explicit prohibition against such additional language in a valid RPAPL 1304(1) notice, the statute should not be extended beyond its plain language in a manner that renders every inconsequential addition fatal."

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State of New York
Court of Appeals

To be argued Wednesday, January 4, 2023

No. 5 Matter of State of New York v NYS Public Employment Relations Board

The State Department of Civil Service (DCS) announced in 2009 that, for the first time in at least 10 years, it would begin charging applicants fees to take the civil service promotional and transitional examinations. Public sector unions – including the Civil Service Employees Association (CSEA), District Council 37, and New York State Correctional Officers and Police Benevolent Association (NYSCOPBA) – filed an improper practice charge with the Public Employment Relations Board (PERB), contending DCS violated the Taylor Law by imposing the fees without collective bargaining. The State responded, in part, that the exam fees were not a term or condition of employment subject to bargaining. It cited Civil Service Law § 50(5)(a), which provides that "Every applicant for examination ... shall pay a fee to" DCS, and subsection (b), which authorizes DCS "to waive application fees ... or to establish a uniform schedule of reasonable fees different from those prescribed in" subsection (a).

An administrative law judge ultimately ordered the State to negotiate the fee issue with the unions and PERB upheld the ruling, saying DCS's prior policy of not charging fees for the exams was an "economic benefit" afforded to workers that it could not unilaterally take away without negotiation. PERB said section 50(5) "contains no express prohibition on bargaining" and did not "expressly vest the employer with such unilateral discretion" as to "foreclose negotiation." The State brought this proceeding to annul the decision.

The Appellate Division, Third Department confirmed PERB's determination, saying the application fees were a term or condition of employment because "the employees at issue received an economic benefit by not having to pay an application fee promotional examinations," and the employees "had a reasonable expectation that the practice of not charging fees would continue." The court said section 50(5) "contains no express prohibition on the bargaining of application fees.... The statute also gives [DCS] discretion to charge or abolish fees..., and, therefore, is not 'so unequivocal a directive to take certain action that it leaves no room for bargaining'...."

The State argues that application fees are not terms and conditions of employment that must be negotiated because they are "neither salary nor wages" nor other conditions of an applicant's current job, but instead are paid by applicants "to sit for examination to demonstrate fitness for a future, not yet realized, employment position." It contends that "the plain language" of section 50(5) "demonstrates the Legislature's intention that the determination of the appropriate examination application fee be placed in the hands of [DCS,] the agency statutorily required to administer the merit and fitness system mandated under the NYS Constitution." While unions could "demand" negotiation of the fees, the State says such negotiation cannot be mandatory under the statute.

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State of New York
Court of Appeals

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No. 6 People v Michael Myers

In October 2015, a Buick collided in a Syracuse intersection with a car driven by Dominic Lobasco, who was fatally injured. The driver of the Buick left the scene without reporting it. Syracuse police found the Buick the same night about a mile away and determined that it was owned by Dudley Harris, a cousin of defendant Michael Myers, but Myers was not directly linked to the hit-and-run until investigators heard his voice on a recorded phone call in February 2016. An inmate at the Onondaga County Justice Center placed the call to Harris, who made it a three-way call by patching in Artel Clark, whose phone was subject to an eavesdropping warrant for a drug investigation by the state Attorney General's Office. Clark handed his phone to Myers and, when Harris mentioned the collision and told him Lobasco had died, Myers responded, "I don't got nothing to do with that, he ran the red light." Investigators conducting the attorney general's wiretap alerted the Syracuse Police to the call and local officers obtained a copy of the call from the county jail, which had a policy of recording all inmate calls.

After he was charged, Myers moved to preclude prosecutors from using the recorded call at trial on the ground that they failed to comply with the notice requirement of CPL 700.70, which states, "The contents of any intercepted communication, or evidence derived therefrom, may not be received in evidence or otherwise disclosed upon a trial of a defendant unless the people, within fifteen days after arraignment and before the commencement of the trial, furnish the defendant with a copy of the eavesdropping warrant."

County Court ruled CPL 700.70 did not apply and denied the motion, saying "the recorded telephone calls from the Justice Center are not 'intercepted communications' because the sender and receiver of calls made from the Justice Center consent to the intentional overhearing and/or recording of the telephonic communication." Myers was convicted of leaving the scene of an incident resulting in death without reporting. He was sentenced to 2⅓ to 7 years.

The Appellate Division, Fourth Department affirmed. "The definition of an intercepted communication does not include a communication that is recorded with the consent of one of the parties thereto...," it said. "Here, the inmate who placed the call was aware that the call was being monitored and recorded by the Onondaga County Justice Center, and the call was thus recorded with his implied consent.... Therefore, no warrant was required to record that conversation..., and the People were not required to comply with CPL 700.70 before using the recording at defendant's trial."

Myers argues, "The call recorded by the Attorney General's wiretap on Artell Clarke's phone fits squarely within the definition of 'intercepted communication' under CPL 700.05(3)," and it was the wiretap recording that "'alerted' the prosecution team to the Justice Center recording" and "was the source and means of identifying the parties to Mr. Myers's intercepted conversation" in the jail recording. "Thus, the Justice Center evidence was derived from – or obtained because of – the wiretap.... The Justice Center recording accordingly fits squarely within the plain language meaning of 'evidence derived' from the wiretap" under CPL 700.70, so the notice requirement should apply.

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