State of New York
Court of Appeals

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To be argued Tuesday, March 12, 2024

No. 29 Lelchook v Societe Generale de Banque au Liban SAL

In this federal case, Ester Lelchook and other plaintiffs are suing for damages on behalf of 22 United States citizens who were injured or killed in rocket attacks launched by the Hizbollah terrorist organization on civilian centers in Israel in 2006. They brought this action under the Anti-Terrorism Act of 1990 (ATA), 18 USC § 2333, against the Lebanese company Societe Generale de Banque au Liban SAL (SGBL) in the Eastern District of New York, claiming SGBL is liable for damages as successor to the Lebanese Canadian Bank (LCB), which is accused of providing extensive financial assistance to Hizbollah in the years leading up to the 2006 attacks. In 2011, SGBL acquired all of LCB's assets and liabilities for $580 million, a transaction the plaintiffs say left LCB insolvent, although it continues to exist for the purpose of defending itself in related litigation. In 2012, the U.S. Court of Appeals for the Second Circuit ruled in parallel litigation that LCB is subject to personal jurisdiction in New York for ATA claims arising from the 2006 attacks. The plaintiffs in this case argue that SGBL inherited LCB's jurisdictional status when it assumed all of LCB's liabilities in 2011.

U.S. District Court granted SGBL's motion to dismiss the suit for lack of personal jurisdiction, saying, "New York courts have held that short of a merger an asset acquisition is not sufficient to impute a target's jurisdictional status on an acquiror.... While SGBL may be liable for any liability it assumed in the [2011 transaction], that does not address whether SGBL is subject to jurisdiction in New York.... Plaintiffs have failed to allege any connection between SGBL and [New York], and have failed to allege that the two companies have merged such that SGBL is merely a continuation of LCB and so SGBL must answer for LCB's purported bad acts in this court."

The Second Circuit said New York law is not clear on this issue, explaining, "On one hand, New York Courts have firmly held that an asset purchase alone is insufficient to confer personal jurisdiction over a successor. On the other hand, New York courts have also held that in some circumstances a successor does inherit its predecessor's jurisdictional status, including when there is a merger. But New York courts have not squarely addressed a situation in which a successor acquires all of a predecessor's assets and liabilities, but does not do so through either a statutory merger or a transaction that meets established standards for a de facto merger."

The Second Circuit is asking this Court to resolve the jurisdictional issue by answering two certified questions: "1. Under New York law, does an entity that acquires all of another entity's liabilities and assets, but does not merge with that entity, inherit the acquired entity's status for purposes of specific personal jurisdiction? 2. In what circumstances will the acquiring entity be subject to specific personal jurisdiction in New York?"

For appellants Lelchook et al: Michael Radine, Manhattan (212) 354-0111
For respondent SGBL: Brian J. Leske, Boston, MA (617) 573-9400

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Court of Appeals

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To be argued Tuesday, March 12, 2024

No. 30 Audthan LLC v Nick & Duke, LLC

In 2013, Audthan LLC entered into a long-term lease with Nick & Duke, LLC for property on 11th Avenue in Manhattan. The lease ran through March 2053 with an option to renew for another 48 years, and included an agreement that Audthan would develop a 58,000-square-foot mixed use building on the site that would revert to Nick & Duke at the end of the lease. Because the New York City Department of Housing Preservation and Development (HPD) had issued a finding of harassment against the property in 2009, barring any development of the site until the harassment finding was cured, the lease required Audthan to negotiate a cure agreement with HPD and required Nick & Duke to cooperate in good faith in effecting a cure. In December 2015, Audthan reached a proposed cure agreement (PCA) with HPD, which included building 15,000 square feet of low income housing on the site, but Nick & Duke refused to approve it. The landlord said it refused to consent because the PCA would require it to allow more low income housing than it had agreed to in the lease. Audthan, which had commenced a breach of contract action against Nick & Duke based on unrelated issues earlier in 2015, amended its complaint to assert a claim that the landlord breached the lease by refusing to approve the cure agreement and it moved for an order requiring the landlord to approve the PCA, which Supreme Court denied. Finally, after more litigation and four termination notices issued by the landlord, Nick & Duke declared in a June 2021 letter to HPD that it "will not, and will never, approve any version of a [cure agreement], because no cure is warranted in light of adjudicated harassment of tenants by" Audthan. In response, Audthan informed Nick & Duke that its declaration constituted a repudiation of the lease and that Audthan was treating the lease as terminated and surrendering possession effective July 30, 2021. It served a third amended complaint, including a breach of contract claim against the landlord based on a theory of repudiation. Supreme Court granted Nick & Duke's motion to dismiss the repudiation claim.

The Appellate Division, First Department affirmed on a 3-2 vote, saying, "Because the landlord's refusal to sign the PCA in 2021 was for the same reason it refused to sign the PCA in 2015, the June 4, 2021 statement that it would absolutely refuse to sign 'any' cure agreement is merely an extension of the same breach alleged in 2015. If the landlord is found not to have breached the lease in 2015, then its actions in 2021 do not constitute a separate breach of the lease, much less a repudiation. Moreover, because a party cannot repudiate a contract it has already breached, if the landlord is found to have breached the lease in 2015, there can be no repudiation in 2021...."

The dissenters said that "where an obligation is ongoing or serial in nature, a *subsequent* material breach can support a claim on a theory of repudiation notwithstanding earlier claims for partial breach.... [T]he tenant plausibly alleges that the landlord's unequivocal statement in its June 4, 2021 letter that it 'will not, and will never, approve any version of a' cure agreement was the point at which the tenant was denied the benefits of the lease. Stated differently, this unequivocal statement in the 2021 letter was different in kind from the earlier alleged conduct, and the tenant indeed alleges that the 2021 statement was a separate material breach" of the lease.

For appellant-respondent Audthan: Elan R. Dobbs, Manhattan (212) 953-6000
For respondent-appellant Nick & Duke: Jeffrey Turkel, Manhattan (212) 867-6000

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To be argued Tuesday, March 12, 2024

No. 31 Matter of Aaron Manor Rehabilitation and Nursing Center, LLC, v Zucker

Aaron Manor Rehabilitation and Nursing Center and more than 100 other for-profit nursing homes filed this suit against state Health Commissioner Howard A. Zucker to challenge his department's implementation of a 2020 amendment that eliminated a portion of the Medicaid payments for-profit facilities had been receiving for capital costs. The Commissioner previously had discretion to include a "residual equity reimbursement factor" in Medicaid payments to nursing homes that had exceeded their "useful facility life" of 40 years. On April 3, 2020, the legislature amended Public Health Law § 2808(20)(d) to provide, "Notwithstanding any contrary provision of law..., for rate periods on and after April [1, 2020], there shall be no payment factor for residual equity reimbursement in the capital cost component of Medicaid rates of payment for services provided by residential health care facilities." In August 2020, the Department of Health (DOH) notified the nursing homes of the elimination of residual equity reimbursements and informed them that their new reduced payments would apply retroactively to April 2020.

The nursing homes contended that DOH's application of the new rates was "improperly retroactive" in violation of Public Health Law § 2807(7), which requires DOH to notify facilities of new rates "at least [60] days prior to the beginning of an established rate period for which the rate is to become effective." They also argued, among other things, that DOH's reduction of their Medicaid payments violated Public Health Law § 2807(3), which requires it to determine whether new rates "are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities."

Supreme Court granted summary judgment to the nursing homes on the retroactivity issue, barring enforcement of the reduced rates as of April1, 2020. It said the "notwithstanding" clause of section 2808(20)(d) did not invalidate the 60-day notice requirement. The court dismissed the facilities' challenges to prospective application of the new rates.

The Appellate Division, Third Department affirmed, saying Public Health Law § 2808(20)(d) involves "the normal ratemaking process. Here, the Legislature elected to eliminate reimbursement of residual equity expenses for rate periods on and after April 1, 2020. There is no direct evidence or language that the Legislature intended a retroactive application of the ratemaking process." "[R]etroactive ratemaking is impermissible under Public Health Law § 2807(7)" and none of the statutory exceptions apply, it said, and because "the retroactive application of the rate would run counter to the 'general purpose of the prospective rate system[, which is] to permit [nursing homes] to conduct their operations in full reliance upon the rates certified by the commissioner'..., we find that retroactive enforcement of the equity elimination clause is not permitted."

DOH argues the Legislature clearly expressed its intent to eliminate the residual equity payments retroactively by mandating "elimination of the payment factor beginning two days before the statute was passed – a circumstance that on its face necessitated retroactive application of the statute;" and by directing immediate elimination of the payments "notwithstanding any contrary provision of law," which overrode the 60-day notice requirement. It says the Appellate Division decision "frustrates the statute's purpose, because it has prevented [DOH] from recouping millions of dollars in savings intended by the Legislature when it mandated the retroactive removal of the residual equity [payments] – an estimated $173 million through the end of 2022, with an additional $97.2 million estimated to be lost" in 2023.

For appellants Zucker (DOH) et al: Assistant Solicitor General Kate H. Nepveu (518) 776-2016
For cross-appellants Aaron Manor et al: F. Paul Greene, Rochester (585) 232-6500

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To be argued Tuesday, March 12, 2024

No. 32 Alcantara v Annucci

This lawsuit against state prison officials was filed in 2016 by Richard Alcantara and five other sex offenders who were held in a residential treatment facility (RTF) at the medium security Fishkill Correctional Facility after serving their prison sentences because they were unable to find housing that complied with the Sexual Assault Reform Act (SARA), which prohibited them from residing within 1,000 feet of a school. They claimed, among other things, that the Fishkill RTF failed to provide adequate educational and vocational programming – both within and outside of the Fishkill prison grounds – as required by the Correction Law.

Supreme Court granted partial summary judgment to both sides, ruling that education and rehabilitation programs within the Fishkill facility were adequate under the law, but the educational, vocational and reintegration opportunities offered outside the facility were not. The court said the Department of Corrections and Community Supervision (DOCCS) demonstrated "that the programs offered to RTF [residents] within the facility or on facility grounds are at least minimally adequate and do not violate DOCCS's obligations under the Correction Law," noting that residents participate in tailoring a rehabilitation program, are given a paid prison work assignment, and may also be assigned to educational programming for college or high school equivalency courses." But it declared that "DOCCS is failing to comply with its obligations ... to provide community-based programming and educational, vocational and employment opportunities in the communities outside the Fishkill Correctional Facility environs." It said Correction Law §§ 2(6) and 73(1) and (2) "reflect an unmistakable legislative intent to provide community-based programming for RTF [residents] in furtherance of the statutory objective to help them reintegrate into the community;" but the record "is clear and unequivocal that RTF [residents] are not permitted to leave facility grounds for employment and the vast majority of [them] have absolutely no opportunity for community-based 'employment, educational and training opportunities.'"

The Appellate Division, Third Department dismissed the entire complaint, reversing the judgment that DOCCs was required to provide programs outside the prison and failed to do so. It said "nothing in Correction Law § 73(2) or (3) states specifically where the opportunities provided in a rehabilitation program ... must be located. In other words, there is no statutory mandate providing that DOCCS's obligations under Correction Law § 73 be outside the confines of Fishkill.... Although it would seem that the purposes behind a rehabilitative program would be served by having such program or employment, training or education take place in the actual community and outside of an RTF, DOCCS is best suited to make this determination given its 'leeway to design its RTF programs and facilities'...."

For appellants Alcantara et al: Matthew Freimuth, Manhattan (212) 728-8000
For respondents Annucci et al: Assistant Solicitor General Blair J. Greenwald (212) 416-6102

State of New York
Court of Appeals

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To be argued Tuesday, March 12, 2024

No. 33 People v Melvin Baez

Melvin Baez was stopped by police in Queens for driving while using his cell phone in February 2014, and was then arrested on suspicion of driving while under the influence of marijuana. During the arrest and search of his person, Officer Shuyi Lin recovered a torn plastic bag that had fallen from Baez's jacket pocket to the ground. A white substance in the bag was tested by the police laboratory and found to be cocaine.

Baez, who represented himself at his bench trial on drug charges, challenged the legal sufficiency of the chain of custody of the drug evidence based on the varied descriptions of it provided by police officers and the lab technician who had custody of the evidence. The second arresting officer, Mark Lewis, described it in the arrest report as one bag of crack cocaine, in the felony complaint as two bags of crack that weighed more than four ounces, and in the property voucher as two clear plastic bags each containing nine grams of crack. Officer Lin testified at trial that when she recovered the torn plastic bag during the arrest some of the contents were spilling out, so she put it into a latex glove, placed it in a narcotics envelope and left it at the precinct, telling Officer Lewis where to find it when he returned. Officer Lewis said he found the envelope where he was told it would be and put it into a manilla narcotics envelope, which he sealed and locked in the precinct's narcotics safe. The lab technician testified that the evidence envelope she received was in a "signed and sealed condition" and contained an undamaged Ziploc bag of cocaine weighing 5.35 grams and a second undamaged Ziploc holding 45 glassine bags and some residue, which she did not test.

Supreme Court dismissed Baez's motion to dismiss the indictment without discussing his specific allegations. The court convicted him of criminal possession of a controlled substance in the fourth degree and sentenced him to seven years in prison.

The Appellate Division, Second Department affirmed. "Viewing the evidence in the light most favorable to the prosecution..., we find that it was legally sufficient to establish the chain of custody of certain drugs after they were recovered and vouchered into police custody. The testimony of the police witnesses provided '"reasonable assurances of the identity and unchanged condition" of the evidence,'" it said, citing <u>People v Julian</u> (41 NY2d 340 [1977]).

Baez relies heavily on <u>Julian</u>, which held that in a "white powder" case such as this, the prosecution "must establish, first, that the evidence is identical to that involved in the crime; and, second, that it has not been tampered with." He argues that "in light of the contradictory accounts" and descriptions of the weight and packaging of the drug evidence, "the People failed to provide reasonable assurances that the substance [the police lab] tested and analyzed was the same substance that Officer Lin allegedly recovered in this case."

For appellant Baez: Harold V. Ferguson, Jr., Manhattan (212) 577-3548
For respondent: Queens Assistant District Attorney Christopher J. Blira-Koessler (718) 286-6000