

# State of New York Court of Appeals

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## NEW YORK STATE COURT OF APPEALS

### Background Summaries and Attorney Contacts

November 16 thru 18, 2021

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To be argued Tuesday, November 16, 2021

**No. 73 Plymouth Venture Partners, II, L.P. v GTR Source, LLC  
Plymouth Venture Partners, II, L.P. v Capital Merchant Services, LLC**

FutureNet Group, a Michigan corporation, borrowed money in 2017 from two merchant cash advance companies, taking a \$200,000 advance from GTR Source in exchange for \$291,000 of FutureNet's future accounts receivable and taking \$550,000 from Capital Merchant Services (CMS) in exchange for \$780,000 in accounts receivable. Both loan agreements allowed GTR and CMS to receive daily debit payments from FutureNet's account at Comerica Bank in Detroit. In February 2018, when FutureNet could no longer meet its daily payment obligations, GTR and CMS declared defaults, filed affidavits of confession of judgment in New York State court, and each received a valid court judgment. GTR and CMS served restraining notices on Comerica directing it to freeze FutureNet's funds at its Detroit branch. GTR then issued an "execution with notice to garnishee" to a New York City Marshal and directed him to serve it on Comerica through Corporate Creations Network in Rockland County, the bank's designated agent in New York. The Marshal served the execution on Corporate Creations by certified mail and later faxed an amended execution to Comerica's Detroit branch. The bank issued a \$127,000 check to the Marshal, who remitted it to GTR, and GTR then filed a satisfaction of judgment in the state court action. CMS took a similar approach, issuing an "execution with notice to garnishee" to the Rockland County sheriff and directing him to levy on FutureNet's Comerica account by serving it on Corporate Creations, which he did. Comerica then issued a \$322,000 check to the sheriff and he gave it to CMS, covering less than half of CMS's money judgment against FutureNet.

Meanwhile, FutureNet's secured creditors commenced a state court action in Michigan for appointment of a receiver to oversee FutureNet's assets. The receiver, among other things, commenced these federal actions in U.S. District Court for the Southern District of New York, naming GTR and the City Marshal as defendants in one suit and CMS in the other. The receiver did not seek to invalidate the defendants' judgments, but instead contended they were liable for tort damages because their execution and levy were invalid. He argued GTR's execution and levy were invalid because the Marshal served the execution on Corporate Creations in Rockland County, outside his New York City jurisdiction; and CMS's execution and levy were invalid because Corporate Creations was not a proper agent for service under CPLR 5232(a). Thus, he argued, the defendants took FutureNet's property without legal authority.

District Court dismissed the suits in separate proceedings, ruling FutureNet suffered no damages, whether or not the execution and levy were valid, because the alleged conversion resulted in the property being used to satisfy a valid money judgment. The decisions were appealed by two of FutureNet's senior creditors – Plymouth Venture Partners, II and Plymouth Management Company – who were assigned the receiver's claims and substituted as plaintiffs.

The U.S. Court of Appeals for the Second Circuit is asking this Court to resolve the key issues by answering two certified questions: "(1) whether a judgment debtor suffers cognizable damages in tort when its property is seized pursuant to a levy by service of execution that does not comply with the procedural requirements of CPLR 5232(a), even though the seized property is applied to a valid money judgment; and, if so (2) whether the judgment debtor can, under these circumstances, bring a tort claim against either the judgment creditor or the marshal without first seeking relief under CPLR 5240."

For appellant Plymouth: Shane R. Heskin, Manhattan (212) 244-9500

For respondent CMS: Christopher R. Murray, Manhattan (212) 867-5620

For respondent Marshal: Andrew P. Schriever, White Plains (914) 761-1300

For respondent GTR: Ryan K. Cummings, Buffalo (716) 856-4000

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To be argued Tuesday, November 16, 2021

**No. 74 Matter of Hallock**

**No. 75 Matter of Malerba**

Larry Hallock and Mary Malerba, name partners in the Suffolk County law firm Hallock & Malerba, are appealing orders of the Appellate Division, Second Department, which suspended them from the practice of law as reciprocal discipline based on misconduct in a federal court action in 2015 that resulted in the censure, upon consent, of both attorneys. They contend they were denied due process in the state disciplinary proceeding.

The law firm was representing Sheri Luscier in a personal injury action in the Southern District of New York when Oleg Smolyar, who was of counsel to the firm, filed an affidavit (the “Luscier Affidavit”) on behalf of the client in U.S. District Court. After Luscier denied on the stand that she had ever seen or signed the affidavit, the court directed Hallock and Malerba to file a declaration explaining the circumstances surrounding the preparation and execution of the Luscier Affidavit, which it later called “a sham filing of no evidentiary worth.” Hallock filed an “Attorney’s Affidavit” signed by Smolyar, which falsely stated that Smolyar had read the Luscier Affidavit to Luscier, that she commented on it, and that her requested changes were incorporated into the final version. Smolyar ultimately recanted the Attorney’s Affidavit, saying it falsely described the circumstances surrounding the Luscier Affidavit. Smolyar testified the Attorney’s Affidavit was drafted by Hallock, who directed him to “just cut, paste and sign.” The District Court imposed a \$9,000 sanction on Smolyar and the law firm, and after further proceedings censured Hallock and Malerba.

In the New York disciplinary proceedings, the Grievance Committee for the Tenth Judicial District asked the Appellate Division to impose reciprocal discipline “based upon the findings of professional misconduct” underlying the federal court censures. The court suspended Hallock for one year, saying, “While [Hallock] admits that he failed to supervise Smolyar, we find that [his] misconduct extended beyond a mere failure to supervise. The District Court sanctioned [Hallock] and his firm, finding that [he] was a ‘direct participant in the preparation and filing of the ‘Attorney’s Affidavit,’” which was designed to cover up the initial wrongdoing. Failure by attorneys to adhere to basic standards of honesty in their representations to the courts seriously compromises the ability of the courts to render the appropriate disposition in matters brought before them.” The court suspended Malerba for six months, saying, “Not only did [Malerba] assist in the submission of the Luscier Affidavit, but she subsequently assisted in the submission of a second filing to cover up the fraudulent filing. Although less culpable than her law partner..., we find that [her] dishonest conduct merits a suspension from the practice of law.”

Hallock and Malerba argue the Appellate Division denied them due process by relying on evidence adduced in its disciplinary proceeding against Smolyar without giving them notice and an opportunity to impeach the evidence. Contending the U.S. District Court “confined its findings to failure to supervise,” they argue the imposition of reciprocal discipline violated due process because the Appellate Division “expanded its findings sua sponte to include intentional dishonesty and imposed a harsher sanction” than the District Court without giving them notice and an opportunity to be heard.

For appellants Hallock and Malerba: Deborah A. Scalise, Scarsdale (914) 725-2801

For respondent Grievance Committee: Rona I. Kugler, Hauppauge (631) 231-3775

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To be argued Wednesday, November 17, 2021

## No. 35 People v William A. Wilkins

William Wilkins and a codefendant, Kesean McKenzie-Smith, were charged with robbing or attempting to rob six people who were waiting in line for a Rochester store to open in August 2012. One of the victims, Montre Bradley, resisted and was fatally shot during the struggle. Both defendants were convicted at a joint trial of felony murder and of robbery and attempted robbery in the first degree. Wilkins is serving an aggregate prison term of 40 years to life.

On appeal, Wilkins argued he was entitled to a new trial because the trial court violated the rule in People v Antommarchi (80 NY2d 247 [1992]) by conducting sidebar conferences with prospective jurors in his absence. At one of the sidebars the trial judge excused the prospective juror for cause; and at another sidebar the defense counsel for McKenzie-Smith used a peremptory challenge to dismiss the prospective juror. Wilkins also contended the trial court erred by instructing the jury, without any request from him, that it was to draw no adverse inference from his failure to testify and that it was to draw no unfavorable inferences from the fact that Wilkins was in custody.

The Appellate Division, Fourth Department affirmed Wilkins's convictions in a 4-1 decision. Regarding the sidebar conferences, the majority said reversal is not required where "the defendant's presence could not have afforded him or her any meaningful opportunity to affect the outcome..., such as where a prospective juror is excused for cause" by the trial judge. It said the same held true for the other sidebar, where the codefendant's attorney used a peremptory challenge to the second prospective juror. It said "the record establishes that the court directed each defense counsel to independently exercise peremptory challenges, without input from the other defense counsel," and "that defense counsel for the codefendant exercised his peremptory challenges before defense counsel for [Wilkins]," demonstrating that the second juror was challenged "before [Wilkins's] defense counsel had any opportunity to consider whether to challenge that prospective juror. Thus..., under the circumstances of this case, [Wilkins] could not 'have provided valuable input..., or indeed any input, regarding the peremptory challenge of that prospective juror.'" The court said the trial judge's unrequested jury instructions to draw no adverse inferences were harmless errors because "the jury is presumed to have followed that instruction'...."

The dissenter said the judgment should be reversed due to the Antommarchi violation at the second sidebar, where Wilkins was not present when his codefendant's attorney struck a juror with a peremptory challenge. Citing CPL 270.25(3), which provides that multiple defendants in a joint trial share the defense allotment of peremptory challenges and a challenge is allowed only "if a majority of the defendants join in such challenge," he said "the record is wholly devoid of support for the majority's conclusion that the court directed defense counsel to proceed in disregard of the requirements of CPL 270.25(3)... [G]iven the 'presumption of regularity [that] attaches to judicial proceedings' ... and the lack of any evidence that the court deviated from the procedure set forth in CPL 270.25(3), I conclude that CPL 270.25(3) was being followed at the time of the relevant sidebar conference and that the assent of both [Wilkins] and the codefendant was therefore needed to use any of their joint peremptory strikes." Since Wilkins "could have provided his defense counsel with some 'valuable input' during the relevant sidebar conference from which he was absent," the Antommarchi violation requires reversal, he said.

For appellant Wilkins: Brian Shiffrin, Rochester (585) 423-8290

For respondent: Monroe County Assistant District Attorney Scott Myles (585) 753-4541

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To be argued Wednesday, November 17, 2021

## No. 76 Estate of Kainer v UBS AG

This action stems from a dispute among purported heirs of Margaret Kainer over ownership rights to a Degas painting, “Danseuses,” which the Nazis confiscated along with the rest of her art collection soon after they took power and sold at a forced auction in 1935. Kainer spent the war as a refugee in Switzerland and then moved to France, where she died in 1968 without children or a will. Supreme Court dismissed the suit on the ground of forum non conveniens without first determining whether it had personal jurisdiction over the defendants.

The identity of the rightful heirs to Kainer’s estate has been extensively litigated in Europe in actions involving Norbert Stiftung (“Foundation”), a Swiss foundation claiming to be the heir pursuant to a German “certificate of partial inheritance” issued in 1972; two Swiss localities that base their claimed status as sole legal heirs on a Swiss certificate of inheritance issued in 2003; and the plaintiffs in this action – Kainer’s estate and 11 purported heirs -- who claim the estate passed to them through intestacy, as confirmed by a French certificate of inheritance issued in 2012.

Christie’s, a New York auction house, contacted the Foundation in 2009 to facilitate a sale of the painting by a Japanese gallery. Because the painting was listed as stolen, it could not be sold unless its heirs released any claims to it. The Foundation renounced its rights in a Restitution Settlement Agreement with the gallery in exchange for a share of the sale proceeds. Christie’s sold the painting at public auction in New York for \$10.7 million in 2009.

In 2013, after they became aware of the sale, Kainer’s estate and its heirs brought this action for conversion and unjust enrichment against the Foundation and UBS AG, a Swiss bank that allegedly created the Foundation, among other defendants. The Foundation and UBS moved to dismiss the suit on the grounds of forum non conveniens and lack of personal jurisdiction.

Supreme Court declined to address the jurisdiction issue based on the U.S. Supreme Court’s 2007 decision in Sinochem Int’l Co. v Malaysia Int’l Shipping Corp. (549 US 422), which ruled a district court “may dispose of an action by a forum non conveniens dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant.” The state court then found New York is an inconvenient forum, saying that “to determine the parties’ status and rights as heirs ... would potentially require application of the laws of France, Switzerland, and Germany” and that the issue was already the subject of proceedings brought by the plaintiffs in Switzerland against the Foundation and the Swiss localities.

The Appellate Division, First Department affirmed, citing Sinochem and saying, “As it could not readily determine, without allowing significant discovery, that it had personal jurisdiction over all the defendants, the motion court properly considered the defendants’ arguments that New York is an inconvenient forum.” It also agreed the dismissal was proper, noting the “significant” burden on a New York court to choose between and apply foreign estate laws to determine the lawful heirs, “the very issue that is already being litigated abroad.”

The plaintiffs argue the lower courts were required to first decide the question of jurisdiction under this Court’s 1980 decision in Ehrlich-Bober & Co. v University of Houston (49 NY2d 574), which said the doctrine of forum non conveniens “has no application unless the court has obtained in personam jurisdiction of the parties.” They say the lower courts also erred in finding New York is an inconvenient forum, including their failure to consider “the strong public interest in providing justice to victims of the Holocaust” under New York law and the federal Holocaust Expropriated Art Recovery Act of 2016.

For appellants Estate et al: Geri S. Krauss, Manhattan (914) 949-9100

For appellants UBS et al: Marshall R. King, Manhattan (212) 351-4000

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To be argued Wednesday, November 17, 2021

## No. 77 People v Michael Lamb

Michael Lamb ran a prostitution ring in Manhattan and northern New Jersey from 2013 to 2015, recruiting sex workers and soliciting customers through internet advertisements. He was arrested in September 2015 after an investigation by the Manhattan District Attorney's Office, which found evidence that he attempted to coerce Jasmine C., an 18-year-old high school senior in East Orange, New Jersey, to work for him as a prostitute. She met Lamb in his apartment in Newark to discuss what she thought was a catering job. She refused to work for him, but submitted to his demand that she pose for nude photos when he threatened that he had a gun. Lamb emailed Jasmine over the next three days, threatening to release the photos and to cause her physical harm if she did not agree to work for him, which she continued to refuse. All of Lamb's coercive conduct toward her occurred in New Jersey, not in New York.

In addition to promoting prostitution, Lamb was charged with sex trafficking under Penal Law § 230.34, a class B felony that applies to a defendant who "intentionally advances or profits from prostitution by: ... 5. using force or engaging in any scheme, plan or pattern to compel or induce the person being patronized to engage in ... prostitution activity by means of" threatening to "cause physical injury" or to "expose a secret" that would subject the victim "to hatred, contempt or ridicule," among other things.

Supreme Court concluded that Penal Law § 230.34 created separate elements for sex trafficking, the first requiring proof that the defendant advanced or profited from prostitution and the second requiring proof that he engaged in coercive or threatening conduct toward a trafficking victim. It instructed the jury that it could find New York had geographical jurisdiction over the charges if it found the prosecution proved Lamb "advanced or profited from prostitution" in New York, establishing the first element. Answering a jury question, the court said the first element "is not specific to anyone," unlike the element involving coercive conduct. The jury found New York had jurisdiction and convicted Lamb of two counts of sex trafficking and one of promoting prostitution. He was sentenced to 6 to 18 years in prison.

The Appellate Division, First Department affirmed. "The court correctly concluded that jurisdiction was established because the People had proven that defendant advanced or profited from prostitution in New York..., notwithstanding that the threatening conduct against a particular person occurred in New Jersey, because the statute does not require that a defendant advance or profit from the prostitution of the specific victim who was threatened," it said, citing People v Giordano (87 NY2d 441). It said, "At a minimum, defendant advanced prostitution in New York by advertising prostitution services online, while engaging in threatening conduct, albeit in New Jersey, involving the particular victim."

Lamb argues that, "because the core criminal conduct of sex trafficking is coercive conduct directed against the person trafficked, and all such conduct here occurred in New Jersey, New York lacked jurisdiction to prosecute him for sex trafficking." He also argues the trial court erred "when it instructed the jury that it could find Lamb committed sex trafficking in New York, if he advanced or profited from prostitution in New York, even if those actions were unrelated to the women he allegedly trafficked."

For appellant Lamb: Mark W. Zeno, Manhattan (212) 577-2523 ext. 505

For respondent: Manhattan Assistant District Attorney John T. Hughes (212) 335-9000

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To be argued Thursday, November 18, 2021 (arguments begin at noon)

**No. 78 Anderson v Anderson**

**No. 79 Matter of Koegel**

The issue raised by these appeals – one stemming from a divorce action and the other from a contested estate proceeding – is whether a defective acknowledgment of a nuptial agreement can be cured after the fact and, if so, how it can be cured.

In No. 78, Candy and Jack Anderson, when they married in 2011, drafted a nuptial agreement delineating the parties' property rights and support obligations if the marriage were to be dissolved. Candy signed it a month after the marriage. It is unclear when Jack signed it, but his signature was not acknowledged before a notary until May 2018. A month later he filed for divorce and sought a judgment that incorporated the nuptial agreement. Candy brought this action to set the agreement aside, contending it was invalid because Jack's signature was not acknowledged contemporaneously and, at the time it was finally acknowledged, the parties did not mutually reaffirm the agreement.

Supreme Court denied Candy's motion for summary judgment setting the agreement aside, holding that so long as Jack's signature "was later properly acknowledged," the agreement was valid without a need for reaffirmation by the parties to cure the defect.

The Appellate Division, Fourth Department reversed on a 3-2 vote and set the agreement aside, citing *Galetta v Galetta* (21 NY3d 186). It said, "[W]hen an acknowledgment is missing from a nuptial agreement, an acknowledgment and a reaffirmation by the parties is required to cure the defect. To hold otherwise would permit a spouse to act unilaterally ... at some later date" and "to choose, based on circumstances that may have changed in ways unanticipated by the other spouse..., whether to acknowledge the agreement and make it enforceable or to leave it unacknowledged and defective." The dissenters said Domestic Relations Law § 236(B)(3) does not impose "a contemporaneous acknowledgment or reaffirmation requirement." Because the agreement "was already properly acknowledged by the time its validity was required to be evaluated – i.e., when the matrimonial action was commenced –" it was enforceable.

In No. 79, William and Irene Koegel signed a prenuptial agreement prior to their marriage in 1984 which stated that "each of the parties hereto agrees to make no claim as surviving spouse to any part of the estate of the other." The agreement contained separate acknowledgments for each signature, the husband's notarized by his law partner and the wife's notarized by her personal attorney, but neither acknowledgment attested to whether the signer was known to the notary. After William died in 2014, Irene served notice on the estate's Executor, William's son, that she was exercising her right of election to take her spousal share of the estate. The Executor brought this action to invalidate the notice of election based on the prenuptial agreement, and Irene moved to dismiss the suit on the ground that defective acknowledgments rendered the agreement "invalid and unenforceable pursuant to *Galetta*." The Executor submitted affidavits from both notaries, who said the signers did not need to present identification because they were "well known" to the notaries. The Executor said this cured any defect.

Surrogate's Court denied Irene's motion to dismiss and the Appellate Division, Second Department affirmed. It said the notaries' affidavits "specifically stated that each observed the document being signed, took the acknowledgment in question, and personally knew the individual signer signing before him. In so doing, the defect in the acknowledgment was cured in order to give vitality to the expressed intent of the parties set forth in the prenuptial agreement."

No. 78 For appellant Jack Anderson: Lyle T. Hajdu, Lakewood (716) 488-1178

For respondent Candy Anderson: Barbara A. Kilbridge, Buffalo (716) 881-1192

No. 79 For appellant Irene Koegel: Andrew D. Himmel, Manhattan (212) 631-0200

For respondent Executor: Susan Phillips Read, West Sand Lake (518) 248-0037

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To be argued Thursday, November 18, 2021 (arguments begin at noon)

## No. 80 People v Sharon Lashley

Sharon Lashley pled guilty to second-degree criminal possession of a forged instrument in Manhattan, admitting that on April 1, 2016, she opened a credit card account at a store in Harlem with a forged New Jersey driver's licence and used the card to buy \$4,783 worth of merchandise. Seeking to have her adjudicated a second felony offender, the prosecution filed a predicate felony statement alleging that Lashley was previously convicted of felony drug possession and that she was sentenced for the drug conviction on May 10, 2005, but it contained no information about any period of incarceration she might have served. In order to serve as a predicate felony under the Penal Law, the sentence for the prior drug crime must have been imposed no more than 10 years before Lashley committed the current forgery crime, with the 10-year period extended (or tolled) by any time she spent in incarceration. Because Lashley was sentenced for the drug crime nearly 11 years before she committed the current offense, CPL 400.21(2) required the prosecution to include any periods of incarceration in the predicate felony statement. Although the prosecution's failure to do so violated the statute and rendered the statement facially insufficient, neither Lashley nor her defense counsel objected to the statement at sentencing. Supreme Court sentenced her as a second felony offender to 3 ½ to 7 years.

Lashley argued on appeal that she was improperly sentenced as a second felony offender because the predicate felony statement did not allege any tolling by incarceration that would bring the 11-year-old prior felony within the 10-year limit allowed by the Penal Law. She said she could raise the claim despite her failure to object because she was challenging an illegal sentence, which does not require preservation. The prosecution argued her claim was unpreserved, saying the preservation exception for illegal sentences did not apply because she was contesting the sentencing procedure and not the substance of the sentence.

The Appellate Division, First Department modified by vacating the second felony offender adjudication and remanding the case for resentencing. "Defendant's challenge to the facial sufficiency of the predicate felony offender statement does not require preservation (see People v Soto, 138 AD3d 533 [1<sup>st</sup> Dept 2016]...), it said. "Nothing in the record demonstrates a sufficient tolling period to support the predicate felony statement submitted by the People. Therefore, the People's failure to include this information in the predicate felony statement cannot be deemed harmless (see id. at 534). Lashley was subsequently resentenced to two to four years in prison.

The prosecution argues that, under People v Samms (95 NY2d 52), "a sentencing claim must be preserved unless 1) the claim alleged that the sentence was 'substantively illegal' – meaning that the sentence could not have been imposed even if all the procedural requirements for imposing it had been followed; and 2) the substantive illegality of the sentence was evident on the face of the appellate record." It says Lashley's claim "did not satisfy either criterion."

For appellant: Manhattan Assistant District Attorney Michael D. Tarbutton (212) 335-9000  
For respondent Lashley: Allison N. Kahl, Manhattan (212) 577-2523