State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

January 9 thru January 11, 2024

State of New York
Court of Appeals

To be argued Tuesday, January 9, 2024

No. 1 Tax Equity Now NY LLC v City of New York

Tax Equity Now NY (TENNY), an association of residential property owners and renters in New York City, brought this action against the City and State of New York in 2017, alleging that the City's property tax assessment system violates state tax statutes, federal anti-discrimination law, and the state and federal constitutions by taxing similar properties at different percentages of value. TENNY claimed that tax abatements and caps on assessment increases for certain residential properties and policies favoring condominiums and cooperatives over rental housing adopted in the state's Real Property Tax Law (RPTL) in 1981, during the last comprehensive redrafting of the City's property tax system, "provides for radically different tax treatment of equally valuable properties, depending on the use of the property and the form in which it is owned" in violation of RPTL § 305(2), which provides, "All real property in each assessing unit shall be assessed at a uniform percentage of value." It claimed the provisions impose a disparate impact on predominately minority neighborhoods by taxing owners of rental properties there at higher effective tax rates than owners of condos and co-ops in predominately white neighborhoods in violation of the federal Fair Housing Act. And it claimed the system, in which "similarly valued properties ... are arbitrarily assessed and taxed at amounts bearing no rational basis to their true market value," violates the state and federal equal protection and due process clauses.

Supreme Court denied the City's motion to dismiss the claims against it, finding that TENNY had adequately pleaded those claims. The court dismissed all but TENNY's due process claims against the state.

The Appellate Division, First Department modified by dismissing the entire suit, ruling the complaint failed to state a cause of action on any claim. It further found that the assessment caps, tax abatements and other provisions, adopted to prevent a significant shift of the tax burden from businesses to homeowners and "to protect homeowners from sudden dramatic tax increases which would make continued home ownership more burdensome and unaffordable for many," were not arbitrary or discriminatory and were "rationally related to the achievement of a legitimate governmental purpose."

TENNY argues that its claims were adequately pled and its suit should not have been dismissed at the pleading stage, "thereby cutting off discovery and the opportunity to crystallize the legal principles at issue here." It says its complaint "demonstrates with the City's own data and Defendants' longstanding admissions that the City assesses and taxes properties within the same class at different rates, so that homes worth identical amounts are assessed at wildly disparate amounts and receive dramatically different tax bills. The complaint further shows that the City's minority neighborhoods are assessed and taxed at vastly higher rates than its majority-white neighborhoods...."

For appellant TENNY: Richard P. Bress, Washington, D.C. (202) 637-2200
For respondent City: Assistant Corporation Counsel Edan Burkett (212) 356-2668
For respondent State: Assistant Solicitor General Mark S. Grube (212) 416-8028

State of New York
Court of Appeals

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To be argued Tuesday, January 9, 2024

No. 2 Matter of Clifton Park Apartments, LLC v New York State Div. of Human Rights

CityVision Services, Inc., a non-profit advocate for fair housing, employs "testers" to approach apartment buildings as potential tenants to determine whether they are complying with anti-discrimination laws. In 2016, a CityVision tester called the leasing agent for Pine Ridge II Apartments in Saratoga County, a complex owned by Clifton Park Apartments, LLC. She reported that when she told the agent she would be moving in with her three young daughters, the agent referred her to a different apartment complex. CityVision filed a complaint with the State Division of Human Rights (DHR), alleging that Pine Ridge illegally discriminated against its tester "because of familial status" by "steering" her to a different property upon learning she had three children. DHR investigated and then dismissed the complaint, finding no probable cause to believe Pine Ridge had violated the Human Rights Law.

A short time later, an attorney for Pine Ridge sent a letter to CityVision and the tester saying it considered the complaint "false, fraudulent and libelous;" that it expended employee resources and counsel fees to defend against the allegations and it expected compensation; and if there was no response within 10 days, "we will assume that you do not intend to take responsibility for these actions and will proceed accordingly." CityVision then filed another complaint with DHR, claiming the letter was illegal retaliation for its first complaint.

An administrative law judge (ALJ) found that Pine Ridge engaged in unlawful retaliation, saying it was "difficult to see how [the letter] can be viewed as anything other than a threat" because it "clearly sought damages for the money" Pine Ridge spent as a result of CityVision's first complaint. The ALJ recommended that Pine Ridge be fined $2,500 and ordered to pay $4,775 in damages to CityVision. DHR adopted the ALJ's recommendation as its final order, but amended it to award CityVision $10,988 for attorney's fees.

The Appellate Division, Third Department annulled DHR's order and dismissed the complaint, saying the evidence did not support a finding that Clifton Park Apartments "took adverse action against CityVision" as required for a retaliation claim under the Human Rights Law. It said the attorney's letter "simply stated his view that the allegations of discrimination against his client were false, and that Pine Ridge intended to seek compensation for the costs incurred in defending those false allegations. There was no evidence that petitioners took any additional actions against CityVision. We cannot conclude that ... the mere sending of the letter rose to the level of retaliation. That is, there was no showing that the letter had any 'materially adverse effect' upon CityVision, nor was it 'of sufficient magnitude to permit a finding of intimidation, coercion, threats or interference.'"

DHR argues, "The Third Department exceeded its extremely narrow judicial review authority and instead substituted its judgment for that of the Division regarding the question of fact of whether respondents' threatening letter constituted a retaliatory adverse action." It says the court's decision "that discounted the threat is an error of law that will have a chilling effect on the willingness of persons who believe they are victims of discrimination to come forward with their charges."

For appellant DHR: Toni Ann Hollifield, Bronx (718) 741-8398
For respondent Clifton Park Apartments: Michael J. Hutter, Jr., Albany (518) 720-6188

State of New York
Court of Appeals

To be argued Tuesday, January 9, 2024

No. 12 People v Danny Novas

Danny Novas had been drinking with friends at a bar in upper Manhattan in February 2018 and left at about 3 am to drive them back to his apartment. It was dark and raining; elevated train tracks and double-parked cars along 10th Avenue limited visibility. Maximo Gomez, intoxicated and wearing dark clothing, left the bar at around the same time and ran across the avenue mid-block to hail a cab. Novas's right front bumper struck Gomez's left lower leg, breaking both bones. Gomez also struck the side-view mirror and fell to the street. Novas continued driving. He told his front-seat passenger that Gomez had slapped his side-view mirror and she pushed it back into place. His three passengers said they did not see or feel any impact.

Novas was convicted of a felony charge of leaving the scene of an accident without reporting under Vehicle and Traffic Law (VTL) § 600(2)(a), which requires proof that a driver left the scene while "knowing or having cause to know that personal injury has been caused to another person."

Supreme Court granted Novas's motion to set aside the verdict, finding there was insufficient evidence to prove Novas knew or had cause to know that he had injured Gomez. The court said, "Gomez's testimony supports the view that Gomez got knocked over as Novas drove by, but his description of the accident does not give any basis for inferring that Novas must have seen Gomez get hit and fall. By Gomez's own account, he ran across the street mid-block in the rain, dressed in dark clothing, had a blood alcohol level far above the threshold of intoxication, came into contact with a side view mirror, and the driver kept going as if nothing had happened. Gomez' account establishes no factual basis for an inference that Novas knew he had caused physical injury to a person because nothing he says happened would have been seen by an ordinary driver." Pedestrians "often slap side view mirrors, side view mirrors move easily, and no driver assumes that he may have caused physical injury to a pedestrian merely because some pedestrian has slapped and moved the mirror."

The Appellate Division reversed, reinstated the verdict and remitted for sentencing, saying there was sufficient evidence that Novas "knew or had 'cause to know' that personal injury had been caused to the victim. Testimony established that defendant knew, at least, that he was involved in an incident during which a pedestrian came into contact with his white Mercedes GLA.... Medical records established that [Gomez] sustained comminuted fractures to the left leg which indicated significant force.... [S]hortly after the contact, defendant asked the front passenger 'to push back out' the side view mirror and asked his passengers whether they felt anything or felt the car stop.... [W]hile the surveillance video introduced at trial does not depict the actual accident, it does show [Gomez] running into the street and a white car pass through the frame without stopping. Individuals are then seen running toward where [Gomez] had run. The totality of the evidence leads to the inference that defendant saw [Gomez] and felt the impact when he hit him.... Finally..., defendant's statements falsely denying to police that anything happened on his way home from a café or that he had been drinking suggest that he knew he hit someone, causing injury, and sought to conceal that fact."

For appellant Novas: Andrew Stambouldis, Manhattan (212) 909-6000
For respondent: Manhattan Assistant District Attorney Rachel Bond (212) 335-9000

State of New York
Court of Appeals

To be argued Tuesday, January 9, 2024

No. 4 People ex rel. Rankin v Brann

In September 2020, Tyrone Waller was charged with two counts of criminal possession of a weapon in the second degree (a "qualifying offense" for bail) and lesser crimes. He was released after posting $10,000 bail. He was arrested three more times for violent felony offenses while out on bail: in July 2021 in Queens for first- and second-degree robbery; in August 2021 in Brooklyn for possession of a loaded weapon; and in September 2021 in Queens for second-degree assault. In October 2021, Queens prosecutors applied to Supreme Court to revoke his $10,000 bail and remand him into custody "for good cause shown," under CPL 530.60(1), based on his subsequent violent felony arrests. Waller argued that CPL 530.60(2)(a) applied to the prosecution's request, requiring the court to hold an evidentiary hearing to determine whether there was "reasonable cause" to believe that he had committed the subsequent offenses.

Supreme Court ruled that CPL 530.60(1) applied and remanded Waller into custody without a hearing or the submission of any evidence. The court said the legislature intended that subdivision 2 of CPL 530.60 apply, and require a hearing before revoking bail, where the underlying offense did not qualify for bail because "the legislature was concerned about defendants being held on non-qualifying offenses and wanted to do away with cash bail for what it viewed as less serious offenses." If such a defendant committed a subsequent crime, it said, "subdivision 2 allowed for a mechanism to hold a hearing so that bail could be considered in those circumstances." But the court said subdivision 2 "does not take away any of the power of the court to set bail or to modify bail with respect to qualifying offenses" without a hearing under subdivision 1. Waller then filed this habeas corpus petition at the Appellate Division, Second Department.

The Appellate Division held that subdivision 2 applied and remitted the matter for a hearing based on the history and "unambiguous language" of CPL 530.60(2), which states that whenever "a defendant charged with the commission of a felony is at liberty as a result of an order of ... bail ... it shall be grounds for revoking such order that the court finds reasonable cause to believe the defendant committed one or more ... violent felony offenses." The Appellate Division said "CPL 530.60(2)(a) clearly applies to the circumstances here. Since the People applied for remand on the sole basis that [Waller] was accused of committing violent felony offenses while at liberty on the underlying felony charges, the court was required to apply the standard in CPL 530.60(2)(a) and to conduct the hearing mandated in CPL 530.60(2)(c)."

For appellant Brann: Queens Assistant District Attorney Danielle M. O'Boyle (718) 286-5869
For respondent Tyrone Waller: Arielle Reid, Manhattan (212) 577-3300

State of New York
Court of Appeals

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To be argued Tuesday, January 9, 2024

No. 5 Matter of Brookdale Physicians' Dialysis Associates, Inc. v Department of Finance of the City of New York

The New York City Department of Finance (DOF) is appealing a decision that requires it to reinstate a property tax exemption for a two-story Brooklyn building owned by the Samuel and Bertha Schulman Institute for Nursing and Rehabilitation Fund (Schulman Fund), a not-for-profit corporation that provides funding for two other non-profits, Brookdale Hospital Medical Center and the Schulman and Schachne Institute for Nursing and Rehabilitation (Nursing Institute). Since 1996, the Schulman Fund has leased the first floor and basement of its building to Brookdale Physicians' Dialysis Associates (Brookdale Dialysis), a for-profit corporation that is staffed by physicians and other employees of Brookdale Hospital and pays the hospital a fee for the staffing. Brookdale Dialysis also pays for and provides all dialysis services for patients at the hospital and Nursing Institute. The lease required Brookdale Dialysis to pay 60.9 percent of any property taxes that "become payable" and, when DOF revoked the building's tax exemption for the 2015-16 tax year, the company applied to DOF to reinstate it pursuant to Real Property Tax Law (RPTL) 420-a, which provides a tax exemption for property owned by a charitable organization and "used exclusively" for its charitable purposes. DOF denied the application, saying the building was not eligible for the exemption because the Schulman Fund was making a profit through its rental income under the lease and Brookdale Dialysis was profiting by operating its for-profit business in a tax-exempt building. Brookdale Dialysis and the Schulman Fund brought this proceeding to annul the determination.

Supreme Court annulled DOF's decision to revoke the tax exemption and the Appellate Division, First Department affirmed, saying the lower court "correctly determined that the building owned by [the Schulman Fund] and used for the provision of a critical healthcare service qualifies for tax-exempt status, notwithstanding the for-profit status of the provider of the service." The Appellate Division said the three non-profits "participate in an arrangement by which Brookdale Dialysis renders a critical healthcare service ... to Brookdale Hospital and the Nursing Institute at little to no direct cost to the non-profit entities. Although the non-profit entities received an ostensible financial benefit, and Schulman's rent receipts exceed its building maintenance expenses, no benefit exists because Schulman placed the profit back into its healthcare-provider affiliates. The provision of dialysis services for Brookdale Hospital and Nursing Institute patients qualifies the building for tax-exempt status, because it is 'reasonably incident' to Schulman's purpose of funding and supporting its healthcare affiliates...."

The DOF argues, "The decision of the Appellate Division directly contravenes the plain language of [RPTL] 420-a, Court of Appeals precedent, and the mandate of the Legislature to construe 420-a tax exemptions strictly and narrowly because it has improperly granted a tax exemption to a not-for-profit entity that does not use or occupy the building, but instead leases it to a for-profit dialysis center which uses the exempt property for its own pecuniary gain."

For appellant Dept. of Finance: Asst. Corporation Counsel Adam C. Dembrow (212) 356-2112
For respondent Brookdale Dialysis: Menachem J. Kastner, Manhattan (212) 509-9400

State of New York
Court of Appeals

To be argued Wednesday, January 10, 2024

No. 10 People v Darryl Watts

Darryl Watts, a 52-year-old Bronx resident with a long history of mental illness, assaulted a 66-year-old woman in the middle of a populated street in July 2011. He tackled her to the ground, kicked and punched her, and tried to remove her clothes and rape her. Neighbors intervened and held him until police arrived. Six days after his arrest, a court found him mentally incompetent for trial and, six months later, he was again declared unfit. Watts was found fit to proceed to trial in July 2012 and he was finally arraigned on sexual abuse and assault charges. However, he was declared unfit for trial in April 2013, a finding that was reaffirmed after competency examinations in November 2013, 2014, 2015, and 2016. He was eventually found fit to proceed and pled guilty in February 2017 to first-degree sexual abuse and second-degree assault. Watts was sentenced to six years in prison, most of which he had already served in custody of the Commissioner for Mental Health.

Watts was required to register as a sex offender upon release in 2017 and the Board of Examiners of Sex Offenders prepared a risk assessment instrument that made him a presumptive level two moderate risk offender. At the time of his Sex Offender Registration Act (SORA) hearing, after Watts was released to a psychiatric facility under a civil commitment order, his attorney asked the court to hold a competency hearing before proceeding. Defense counsel said his mental condition had deteriorated and she had "grave concerns" about his ability to understand the nature of the proceedings; and she argued it would violate his right to due process if the SORA hearing were held when he was not competent to participate.

Supreme Court denied the request for a competency hearing based on the Appellate Division, Second Department decision in People v Parris (153 AD3d 68), which held that due process did not require a competency exam before a SORA hearing. Supreme Court said "SORA proceedings are civil in nature" and the statute "is not designed to impose punishment but to prevent future crimes." It said "defendant's due process rights are well preserved" through notice of the proceedings, representation by counsel, and discovery; and observed that there is "an elevated proof requirement by the state of clear and convincing evidence. The court classified Watts a level two offender, denying the defense request for a downward departure to level one.

The Appellate Division, First Department affirmed, citing Parris and saying SORA "does not provide for a competency examination prior to a classification hearing, and due process does not require one.... We also agree with the Second Department that, 'if, and when, the defendant is mentally competent to understand the nature of the SORA proceeding, a de novo SORA risk assessment hearing may be held' with 'the burden ... remain[ing] with the People at the subsequent hearing'...."

Watts argues, "Holding a [SORA] hearing when a registrant is incompetent violates society's basic norms of fundamental fairness and decency," as well as his due process rights. "SORA places profound requirements and burdens on registrants. As a result, SORA registrants have a constitutionally protected liberty interest in not having to register under an erroneous risk level."

For appellant Watts: Rachel L. Pecker, Manhattan (212) 577-3384
For respondent: Bronx Assistant District Attorney Joshua P. Weiss (718) 838-6229

State of New York
Court of Appeals

To be argued Wednesday, January 10, 2024

No. 8 People v Nathaniel Boone
No. 9 People v Albert Cotto

In separate cases, Nathaniel Boone and Albert Cotto were convicted in the Bronx of sex crimes involving children. Boone pled guilty in 2011 to multiple counts of course of sexual conduct against a child and was sentenced to 12 years in prison. Cotto pled guilty in 2006 to first-degree sexual abuse and was sentenced to 10 years. Under the Sex Offender Registration Act (SORA), both men were required to register as offenders upon release.

SORA requires a court to determine a sex offender's risk level 30 days "prior to discharge, parole or release" (Correction Law § 168-n[2]); and requires an offender to register at least ten days "prior to discharge, parole, release to post-release supervision or release from any state or local correctional facility, hospital or institution where he or she was confined or committed" (Correction Law § 168-f[1][a]). However, as they neared the end of their prison terms, both men faced the possibility of further civil confinement at an Office of Mental Hygiene (OMH) facility under Mental Hygiene Law (MHL) article 10. The Department of Corrections and Community Supervision (DOCCS) filed a civil commitment petition against Boone to determine whether he should be confined under article 10; and it released him to the custody of OMH at the St. Lawrence Psychiatric Hospital in 2019. DOCCS notified Cotto that it had referred his case to a "Case Review Team" to evaluate whether an article 10 civil commitment proceeding should be brought against him.

Boone and Cotto each asked Supreme Court to adjourn the SORA hearings that would determine their risk level classifications, arguing that SORA required the courts to adjudicate their risk level 30 days prior to their release into the community, not prior to their transfer from prison to a secure psychiatric facility. Supreme Court denied their requests for adjournment and designated them risk level three offenders.

The Appellate Division, First Department affirmed in both cases. In Boone, it said, "The court providently exercised its discretion in declining to grant an indefinite adjournment of defendant's sex offender classification hearing based on the pendency of an article 10 civil commitment proceeding." In Cotto, it said, "The timing of the adjudication was consistent with Correction Law § 168-n and the requirements of due process."

Boone and Cotto argue that they were entitled to the adjournments because SORA confers jurisdiction on a court to make a risk level determination at the time of an offender's release into the community and, with article 10 civil commitment proceedings against them, their release was clearly not imminent. They say that holding their SORA hearings "prematurely" violated their due process rights, as well as the language and purpose of SORA.

For appellant Boone: Nicole P. Geoglis, Manhattan (212) 577-2523 ext. 545
For appellant Cotto: Natalie Rea, Manhattan (212) 577-3403
For respondent: Bronx Assistant District Attorney Shane Magnetti (718) 664-1290

State of New York
Court of Appeals

To be argued Wednesday, January 10, 2024

No. 6 Petroleos de Venezuela S.A. v MUFG Union Bank, N.A.

In 2016, Petroleos de Venezuela S.A. (PDVSA), Venezuela's state-owned oil company, offered a bond swap in which its noteholders could exchange unsecured notes due in 2017 for new notes due in 2020 and secured by a 50.1 percent controlling interest in CITGO Holding, Inc., a PDVSA subsidiary. The governing documents for the transaction contained a choice-of-law provision specifying that they were to be governed by New York law. Venezuelan President Nicolas Maduro controlled PDVSA's Board of Directors; but the country's National Assembly asserted its constitutional authority to approve "national public interest contracts" and, in 2016, it passed two resolutions rejecting the plan to pledge control of CITGO. Despite this, PDVSA executed the bond swap and issued the CITGO-secured debt. Maduro was re-elected in a tainted election in 2018. After the United States instead recognized National Assembly President Juan Guaido as Venezuela's interim President in 2019, Guaido appointed a rival Board of Directors for PDVSA, but it had no control over the company inside Venezuela.

When PDVSA defaulted on the 2020 notes in late 2019, Guaido's Board brought this action in federal court in New York against MUFG Union Bank, as trustee for the creditors, and collateral agent GLAS Americas LLC, seeking a declaration that the notes and governing documents were invalid because the National Assembly never approved the bond swap. The plaintiff-Board argued that, under the act-of-state doctrine, the National Assembly's resolutions addressing the bond swap were sovereign acts that rendered the transaction void under Venezuelan law. They further argued that Venezuelan law governed the case based on New York Uniform Commercial Code § 8-110(a)(1), which provides that "the validity of a security" is governed by the "local law of the issuer's jurisdiction." The defendant-creditors counterclaimed for a declaration that the notes and governing documents were enforceable and for breach of contract, among other claims.

U.S. District Court granted the creditors' motion for summary judgment, ruling that the 2020 notes and governing documents were valid, that a default had occurred, and awarding them $1.9 billion in unpaid principal and interest. It held the act-of-state doctrine did not apply because the National Assembly's resolutions did not expressly void the bond swap and the Assembly's decision to withhold its approval for the swap was a decision not to act rather than an official state action. It further held that New York Law governed the dispute, rejecting the argument that section 8-110(a)(1) required application of Venezuelan law.

The U.S. Court of Appeals for the Second Circuit is asking this Court to resolve key issues in the case by answering three certified questions: "1. Given [PDVSA's] argument that the Governing Documents are invalid and unenforceable for lack of approval by the National Assembly, does New York Uniform Commercial Code § 8-110(a)(1) require that the validity of the Governing Documents be determined under the Law of Venezuela, 'the local law of the issuer's jurisdiction'? 2. Does any principle of New York common law require that a New York court apply Venezuelan substantive law rather than New York substantive law in determining the validity of the Governing Documents? 3. Are the Governing Documents valid under New York law, notwithstanding [PDVSA's] arguments regarding Venezuelan law?"

For appellants PDVSA et al: Igor V. Timofeyev, Washington, DC (202) 551-1700
For respondents MUFG and GLAS et al: Jonathan H. Hurwitz, Manhattan (212) 373-3000

State of New York
Court of Appeals

To be argued Wednesday, January 10, 2024

No. 7 Consolidated Restaurant Operations, Inc. v Westport Insurance Corporation

Consolidated Restaurant Operations, Inc. (CRO), which owns and operates dozens of restaurants across the United States and abroad, purchased an "all-risk" commercial property insurance policy from Westport Insurance in July 2019, months before the World Health Organization declared COVID-19 a global pandemic. The policy set a $50 million per-occurrence limit and insured against "all risks of direct physical loss or damage to insured property." It also insured against business interruption losses "directly resulting from direct physical loss or damage" to insured property. After the pandemic declaration, CRO was forced to shut down or sharply curtail its restaurant operations to comply with government restrictions on nonessential businesses, and it filed a claim with Westport for tens of millions of dollars in lost revenue. Westport disclaimed coverage on the ground that the "actual or threatened presence" of the COVID-19 virus "does not constitute physical loss or damage to the property." COR brought this breach of contract action against its insurer, and Westport moved to dismiss for failure to state a cause of action.

Supreme Court granted Westport's motion to dismiss and declared that CRO's alleged losses "are not covered by the insurance policy" because there were no allegations of "direct physical loss or damage" to CRO's property.

The Appellate Division, First Department affirmed, rejecting CRO's argument that the policy term "physical" damage is ambiguous. Citing state and federal precedents, it said "in order for there to be 'direct' 'physical' damage or loss to property, there must be 'some physical problem with the covered property,' not just the mere loss of use.... The property must be changed, damaged or affected in some tangible way, making it different from what it was before the claimed event occurred." The court said CRO "fails to identify any physical change, transformation or difference in any of its property. While it vaguely refers to 'fomites' in the surfaces of its restaurants, and states the virus infiltrated the premises, it fails to identify ... a single item that it had to replace, anything that changed, or that was actually damaged at any of its properties. Nothing stopped working."

CRO argues its complaint should not have been dismissed because it "alleged in detail that it suffered 'direct physical loss or damage' under" the Westport policy when the COVID-19 virus "permeated and attached to its insured restaurants, thereby tangibly altering the air and surfaces therein, and severely impairing their functionality." It says it "reasonably expected that its losses would be covered" by the policy because its all-risks coverage was broad and "unlike many policyholders, CRO purchased a policy without a standard exclusion for losses caused by a virus." CRO says the First Department "improperly narrowed the scope of coverage by adding the words 'tangible' and 'demonstrable' to the Policy" and requiring "tangible, demonstrable 'damage'" to trigger coverage.

For appellant Consolidated Restaurant Operations: Robin L. Cohen, Manhattan (212) 584-1890
For respondent Westport Insurance: Aidan M. McCormack, Manhattan (212) 335-4500

State of New York
Court of Appeals

To be argued Thursday, January 11, 2024

No. 11 Bazdaric v Almah Partners LLC

Srecko Bazdaric, a commercial painter, was injured while working on a renovation project in lower Manhattan in August 2019. He had been assigned to paint the walls and ceilings around an escalator. Heavy-duty plastic sheeting had been placed on the steps of the escalator to protect it from paint spatters. Bazdaric slipped on the plastic sheeting and fell backward, striking his head, back, neck and shoulder on the escalator steps and a large bucket of paint. He brought this action against the contractors and owners of the project to recover for his injuries under Labor Law § 241(6), which requires employers to "provide reasonable and adequate protection and safety" for workers and to comply with safety regulations of the Department of Labor.

Supreme Court granted Bazdaric's motion for summary judgment based on violations of two Industrial Code regulations. Section 23-1.7(d) states, "Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing." The court said the plastic sheeting clearly "was a slippery condition." It also found a violation of section 23-1.7(e)(1), which states, "All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping."

The Appellate Division, First Department reversed and dismissed the suit on a 3-2 vote. It found Bazdaric could not recover under Industrial Code § 23-1.7(d), prohibiting slipping hazards, because the plastic sheeting "does not constitute a foreign substance under the regulation.... Sensibly interpreted, the heavy-duty plastic covering is not similar in nature to the foreign substances listed in the regulation, i.e., ice, snow, water or grease.... Further, it is not disputed that the covering was intentionally placed on the escalator to protect it from paint. In other words, the covering was part of the staging conditions of the area plaintiff was tasked with painting, making it integral to his work" and barring his recovery. It found the defendants were not liable for a tripping hazard under section 23-1.7(e)(1) for the same reason, "namely that the plastic covering was an integral part of the work being performed," and also because "the escalator was not serving as a 'passageway' but rather was a work area."

The dissenters said, "The majority interprets a statute designed to protect workers' safety in a way that imperils workers' safety." The plastic sheeting "was 'intentionally placed' to protect the escalator from paint spots. However, it provided no protection to the painter. To the contrary: the plastic sheeting introduced to the worksite a slippery condition that caused plaintiff's injuries.... As the plastic sheeting was a physical material not normally present on an escalator, it constitutes a 'foreign substance'" under section 23-1.7(d). They said the defendants were also liable for a tripping hazard under section 23-1.7(e)(1) because "the plastic sheeting was a condition in a 'passageway' that 'could cause tripping.'" They argued that "the integral to the work defense" did not apply because "[t]he unsafe plastic covering was not a necessary part of the structure, it was not a condition that Bazdaric was charged with removing or installing, and it was not specially designed and required for the task at hand.... I do not see how plastic sheeting can possibly be considered integral to the work where the uncontroverted evidence demonstrates that it was dangerously unsuited for the work."

For appellant Bazdaric: Brian Isaac, Manhattan (212) 532-1116
For respondents Almah Partners et al: Scott A. Korenbaum, Manhattan (212) 587-0018

State of New York
Court of Appeals

To be argued Thursday, January 11, 2024

No. 3 People v Gonzalo Aguilar

Gonzalo Aguilar was charged with murder and assault after fatally stabbing one man and slashing the neck of another during a late night brawl outside a Manhattan nightclub in March 2000. Aguilar raised a justification defense at trial, testifying that he and his friend were fighting with as many as six other young men and, when he was struck from behind in the side of his head, he pulled out his knife and began swinging it around in self defense. Supreme Court charged the jury on justification. It also instructed jurors that Aguilar "is an interested witness because he stands to gain or lose directly as a result of the outcome of this case. You should not reject his testimony merely because of his interest. However, his interest in the outcome of the case is one factor for you to consider when you evaluate his credibility." During its deliberations, the jury sent a note asking the court to re-read "All Definitions discussed: Murder II. Manslaughter I, Depraved Murder II, etc" The court repeated its instructions on the elements of the crimes. It denied a defense request to also repeat its instruction on justification, saying "they didn't ask for that." Aguilar was convicted of second-degree murder, attempted murder, and first-degree assault. He was sentenced to 25 years to life in prison.

The Appellate Division, First Department affirmed, saying, "The court responded meaningfully to a note from the deliberating jury ... by rereading its instructions on the elements of the offenses submitted to the jury, without mentioning the defense of justification.... The jury did not ask for reinstruction on justification, which was not included in the elements of the crimes, or for 'definitions' of anything but the crimes." It said Aguilar did not object to the trial court's "interested witness charge," and so failed to preserve his argument that it violated his right to due process and the presumption of innocence for appellate review. In the alternative, it held that "the interested witness charge was not constitutionally deficient."

Aguilar argues the trial court "erred in refusing to recharge justification in response to the jury's note seeking to rehear 'all definitions discussed.'" He says the court treated the jury request as more open-ended by rereading its charge on all submitted offenses, "including counts that had not been specifically listed in the note," as well as "its definitions of intent, serious physical injury, recklessness, attempt, dangerous instrument..., and the difference between intent and motive.... Indeed, the only part of the court's instructions that was not reread was its justification charge – no less of a 'definition' than those concepts." This response "unduly emphasized the prosecution's theory of the case while disregarding the defense claim of self-defense" and "was so unbalanced it cannot be considered meaningful." He contends his claim that the interested witness charge violated due process and the presumption of innocence is "reviewable by this Court because any objection would have been futile."

For appellant Aguilar: Jan Hoth, Manhattan (212) 577-2523
For respondent: Manhattan Assistant District Attorney Stephen J. Kress (212) 335-9000

State of New York
Court of Appeals

To be argued Thursday, January 11, 2024

No. 13 People v Fernando Ramirez

In November 2017, a red light camera in Suffolk County recorded Fernando Ramirez's blue Subaru speeding through a steady red light and colliding with an oncoming vehicle, killing its passenger and injuring its driver. Ramirez, who had a suspended license and a pending DWI charge in Queens County, was also injured and had a BAC level of .19 percent.

Prior to jury selection for his trial in 2021, Ramirez's attorney objected to proceeding with voir dire while COVID-19 precautions were in place. The potential jurors wore masks and clear face shields and they were widely spaced around the courtroom. They were instructed to lower their masks while they were personally questioned, but continued to wear their face shields. The other potential jurors wore their masks when they were not being personally questioned. Defense counsel asked County Court to delay the trial until the safety procedures were no longer required, saying, "I would point out ... that the case of People v Antommarchi [80 NY2d 247] says that I have the right to see every grimace, every smile, every frown of a potential juror and actually selected juror, and under the current circumstances there's just no way that I could do that." The court denied the request, saying, "The jurors are given face screens, which you can see their faces so that won't be a problem. This is the fourth trial that I've conducted post-COVID, and we haven't had a problem yet with respect to those objections that you're making." Ramirez was ultimately convicted of aggravated vehicular homicide, second-degree manslaughter, and multiple counts of driving while intoxicated and related charges. He was sentenced to 12 ½ to 25 years in prison.

The Appellate Division, Second Department affirmed, rejecting Ramirez's claim that the trial court's COVID precautions "deprived him of the ability to meaningfully participate in jury selection. While a defendant has the right to participate in jury selection..., which is generally understood to include an 'opportunity "to assess the jurors' facial expressions, demeanor and other subliminal responses as well as the manner and tone of their verbal replies so as to detect any indication of bias or hostility"'..., the record here does not support the notion that either face coverings, or spacing due to social distancing, interfered with, or deprived, the defendant of the ability to observe potential jurors, or to otherwise assess their facial expressions and demeanor during voir dire...." It also rejected Ramirez's claim that he was deprived of a fair trial because the victim's widow was crying during the prosecutor's opening statement.

Ramirez argues "the voir dire process is more than just a question-and-answer session; and the interactions that inform whether the parties request a potential juror's disqualification for cause – and whether the court grants that request – are more than purely verbal. In fact, studies have shown that between 60 and 70 percent of communication is nonverbal. By paying attention to theses nonverbal cues, lawyers can uncover the underlying opinions, feeling and biases of potential jurors...." He says County Court "failed to narrowly tailor the interest in stemming the spread of COVID-19 thereby causing undue prejudice to the defendant's right to a fair and impartial jury.... [T]here is no way to know what grimaces or smiles were expressed by members of the jury panel during the jury selection process. Prejudice should therefore be presumed."

For appellant Ramirez: Felice B. Milani, Riverhead (631) 852-1650
For respondent: Suffolk County Assistant District Attorney Rosalind C. Gray (631) 852-2469

State of New York
Court of Appeals

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No. 14 People v Jayquaine Seignious

Jayquaine Seignious accosted multiple female students outside of New York University's Lipton Hall dormitory late one night in October 2016. He came up behind two students and touched them near their buttocks, then threw one of them against a parked car. She got away and both students ran into Lipton Hall. He confronted a third student in the middle of the street as she walked toward the dorm, grabbed her by the neck with one hand and slid the other under her dress, groping her breasts, buttocks and vagina. An NYU security officer heard her screams and shouted at Seignious to let her go. She broke free and ran into the dorm. Seignious remained outside, flailing his arms and following people, then grabbed another student by the arm. She broke free and entered the dorm and he followed her inside, confronting students in the vestibule and then struggling with the security officer in a restricted area of the lobby. He grabbed the arm of another woman before more officers arrived and took him outside, where he was arrested by the police.

Among other crimes, Seignious was charged with second-degree burglary as "a sexually motivated felony" under Penal Law § 130.91, which applies to a defendant who "commits a specified offense," such as burglary, assault, or kidnapping – "for the purpose ... of his or her own direct sexual gratification." At a mid-trial charge conference, the prosecutor asked the court to submit second-degree burglary – which requires only that the defendant unlawfully entered a dwelling to commit a crime of any kind – as a lesser-included offense of sexually motivated burglary. Supreme Court granted the request over the defense objection that prosecutors had "explicitly limited their theory of the crime" to a sexually motivated burglary, thus depriving him of notice that they might also pursue an ordinary burglary theory. The jury acquitted Seignious of the sexually motivated burglary count and convicted him of second-degree burglary, first-degree sexual abuse, and lesser counts. He was sentenced to 13 years in prison.

The Appellate Division, First Department modified by dismissing the second-degree burglary count, which left him with a 7-year sentence. It acknowledged that second-degree burglary satisfied the requirements for submission as a lesser-included offense under CPL 300.50(2) because "the jury could have come to the rational conclusion that defendant intended to harass and menace people in the building, in a way that was not necessarily for his own sexual gratification. However, the court improperly charged the lesser-included offense because the People, through the way they presented their case, deprived defendant of notice of the possibility that the jury would be asked to consider a lesser-included." It said the prosecution "focused only on the theory that defendant entered the dorm to satisfy his own sexual urges," and thereby "so constricted their theory of the case that a defendant would be lulled into defending against that crime only, and not any potential lesser included crimes."

The prosecution argues that, because all elements of CPL 300.50 were satisfied as the Appellate Division found, the statute required the trial court to submit ordinary burglary as a lesser-included offense. It further argues that charging burglary as a sexually motivated felony gives notice to a defendant of the underlying ordinary burglary, since the prosecution must prove both that the defendant committed a burglary and the "additional component" of sexual motivation. It says its efforts to prove the sexual motive did not "renounce any reliance on the theory" that Seignious committed an ordinary burglary. Such a result "would effectively nullify CPL 300.50, which exists precisely to allow the submission of a lesser-included offense even though the prosecutor has been pursuing a greater offense."

For appellant: Manhattan Assistant District Attorney Franklin R. Guenthner (212) 335-9000
For respondent Seignious: Jan Hoth, Manhattan (212) 577-2523