

**STATE OF NEW YORK
SUPREME COURT, APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT**

Summaries of Cases

to be Argued on

March 21, 2016

Albany Law School

J. DEVINE, J. EGAN JR., J.P. GARRY, J. LYNCH, J. CLARK

These summaries are provided as a courtesy to the public attending this Court session. They are not intended to address the legal issues raised in a particular case and are distributed for background purposes only.

521606 - WFE Ventures, Inc. v Mills

Defendant Frederick A. Mills and his spouse owned a 100-acre parcel in Essex County. In early 2006, they posted an advertisement in a local real estate publication to sell the property, which was zoned for 20 residential lots. Plaintiff, through its representative, Peter Coffrin, responded to the advertisement. Mills informed Coffrin that he was in discussions with the Adirondack Park Agency (hereinafter APA) about a zoning issue regarding two of the property's 20 lots. The parties subsequently entered into an option agreement for plaintiff's purchase of the parcel at a price of \$2 million. Under the terms of the agreement, plaintiff was to pay defendants \$200,000 in consideration for the option and the option was to expire on May 31, 2007. Notably, failure to exercise the option prior to its expiration permitted defendants to retain the \$200,000. In July 2006, Coffrin submitted an application to the APA to authorize the use of the property for 20 lots. The APA, however, declined to authorize 20 lots, reducing the number to 17. In April 2007, Coffrin contacted Mills to renegotiate a new purchase agreement. Continuing for about a month, the parties discussed modifications to the purchase price and extensions of the option agreement. The option agreement expired by its terms, however, without the parties having reached any new agreement. Coffrin and Mills remained in contact about the property until August 2007; however, in June 2007, defendants executed a contract for the sale of the property with a third party at the purchase price of \$1,850,000.

Plaintiff commenced this action alleging breach of contract, fraud in the inducement and unjust enrichment. Defendants moved for summary judgment dismissing the complaint, which Supreme Court granted as to the unjust enrichment claim alone. After trial, the jury returned a verdict in favor of plaintiff and awarded damages of \$200,000. Defendants moved to set aside the jury's verdict as against the weight of the evidence and to dismiss the complaint, which motion Supreme Court granted. Plaintiff now appeals.

521848 - Matter of Brusio v County of Clinton

While working as a registered nurse in 2005 at Champlain Valley Physicians Hospital (hereinafter CVPH), petitioner medicated two residents without documenting the medications in the residents' records. A number of CVPH employees, including petitioner, were subsequently investigated and charged because large amounts of narcotic medications were unaccounted for at the hospital. As a result, petitioner left her employment at CVPH to work as a private nurse. In June 2008, petitioner accepted a job at the Clinton County Nursing Home. Two months later, the Office of the Professions formally disciplined petitioner for the incident at CVPH; petitioner consented to a one-year stayed suspension, a one-year probation period and a \$500 fine.

In 2010, the nursing home implemented a corporate compliance plan which required, among other things, the nursing home to check employees against the list of excluded providers kept by the Office of the Medicaid Inspector General (hereinafter OMIG). As a result, the nursing home discovered that petitioner was an excluded provider whose license was not in good standing with OMIG and, thus, unable to treat residents who receive Medicaid. The nursing home reported the situation to OMIG and repaid over \$44,000 in Medicaid funding. OMIG also informed respondent Wendie Bishop, the nursing home's administrator, that the nursing home could not pay petitioner from Medicaid funds. The nursing home subsequently charged petitioner, pursuant to Civil Service Law § 75, for incompetence for being an excluded provider. The parties then entered into a settlement agreement, which, among other things, required petitioner to take a two-month leave of absence and to apply to OMIG to be reinstated as a Medicaid provider. Petitioner subsequently resolved the issue and returned to work.

In November 2012, Bishop placed petitioner on administrative leave while the nursing home investigated possible performance issues with petitioner. The following month, Bishop brought 12 charges against petitioner, pursuant to Civil Service Law § 75,

for 28 specific acts of alleged misconduct and incompetence. A Hearing Officer subsequently found, among other things, that petitioner was guilty of 18 of the 28 specifications and recommended terminating her employment. In his determination dated July 15, 2013, respondent Michael Zurlo, the Clinton County Administrator, stated that Bishop "delegated [him] as the appointing authority" in petitioner's disciplinary proceeding and that he accepted the Hearing Officer's findings and recommendation and, thus, terminated petitioner's employment. Petitioner then commenced this CPLR article 78 proceeding seeking, among other things, to annul Zurlo's determination. After respondents joined issue and moved to dismiss the petition, Supreme Court, among other things, transferred the proceeding to this Court.

521850 - Matter of Brusio v Clinton County

At a Civil Service Law § 75 hearing regarding charges of misconduct, petitioner attempted to enter a "Medication and Treatment Misadventures Form," which the nursing home uses to identify and correct errors in medicating or treating residents, and an attached medication prescription into evidence. As a result, in April 2013, Bishop brought two additional charges based on three specific acts of misconduct and incompetence against petitioner; these new charges alleged, among other things, that petitioner violated the federal Health Insurance Portability and Accountability Act and knowingly possessed a stolen misadventures form. The Hearing Officer subsequently found, among other things, that petitioner was guilty of the three additional specifications and recommended terminating petitioner's employment. In July 2015, Bishop delegated the authority to review the hearing record and to act on the charges to respondent Michael Zurlo, the Clinton County Administrator, because of her role in both investigating the charges and testifying at the hearing. That same day, Zurlo accepted the Hearing Officer's findings and recommendation and terminated petitioner's employment. Petitioner then commenced this CPLR article 78 proceeding seeking, among other things,

to annul Zurlo's determination. After respondents joined issue, Supreme Court, among other things, dismissed both specifications of the first April 2013 charge as untimely and transferred the remaining charge to this Court.

104523 - People v Wright

In September 2010, defendant and various codefendants were arrested after an investigation by, among others, the Attorney General's Organized Crime Task Force (hereinafter OCTF), for, among other things, conspiring to possess and sell heroin in and around the Capital District, including the City of Albany. As part of a narcotics trafficking investigation against the Bloods street gang, OCTF investigators obtained eavesdropping warrants on numerous telephones, recorded voluminous telephone conversations and captured text messages between defendant and certain codefendants, surveilled the gang's alleged drug-selling enterprise over the course of approximately five months and, ultimately, arrested defendant for his alleged involvement therein.

A grand jury ultimately handed up a 195-count sealed indictment which charged defendant with one count each of enterprise corruption, attempted criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the third degree, criminal sale of a controlled substance in the second degree, attempted murder in the second degree, conspiracy in the second degree and 20 counts of criminal sale of a controlled substance in the third degree. Following a jury trial, defendant was convicted of one count each of enterprise corruption, attempted criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the third degree, criminal sale of a controlled substance in the second degree, conspiracy in the second degree and 17 counts of criminal sale of a controlled substance in the third degree. He was thereafter sentenced to an aggregate prison term of 141½ years. Defendant now appeals.

519946 - Lucas v Otsego County Sheriff

In January 2011, plaintiff was arrested for, among other crimes, criminal possession of marihuana in the first degree. Justin Lucas, plaintiff's brother, posted \$50,000 cash bail in order to release plaintiff from the Otsego County Jail, upon which he received a bail receipt dated January 13, 2011. On the same day, Town Court ordered plaintiff to be held without bail. On January 14, 2011, a narcotics detection-trained canine inspected the cash bail and alerted officers of a positive narcotic search. On January 19, 2011, the Otsego County Sheriff's Department transferred the money to the Drug Enforcement Administration (hereinafter DEA), which seized the bail money, pursuant to 21 USC § 881, as part of a criminal investigation. Plaintiff later pleaded guilty and Lucas assigned his interest in the bail money to plaintiff. Thereafter, plaintiff, who had attempted to retrieve the bail money, learned that the bail money had been seized and forfeited, pursuant to 19 USC § 1609, by way of an administrative forfeiture proceeding.

On October 18, 2012, plaintiff commenced this action asserting, as is relevant herein, that defendant Richard J. Delvin Jr., the Otsego County Sheriff, and defendant Michael F. Ten Eyck, a senior investigator employed by the Otsego County Sheriff's Office, deprived him of a vested due process right in violation of the State and Federal Constitutions in contravention of 42 USC § 1983. Specifically, plaintiff contended that defendants did not have statutory authority to seize the bail money and turn it over to the DEA . Plaintiff's complaint requested, among other relief, return of the \$50,000 of seized bail money, in addition to accrued interest, \$1 million in consequential monetary damages, punitive damages and counsel fees. After defendants filed a verified answer asserting, among other affirmative defenses, that plaintiff had failed to state a cause of action upon which relief could be granted, they subsequently moved to dismiss the complaint against them, pursuant to CPLR 3211 and 3212. In response, plaintiff cross-moved for summary judgment. Supreme Court thereafter granted defendants'

motion and dismissed the complaint against them finding, among other things, that the 42 USC § 1983 action failed to allege that Delvin had any personal involvement, that Ten Eyck's action of transferring the bail money to the DEA did not violate any clearly established law and, moreover, that defendants were entitled to qualified immunity. Plaintiff appeals.

106581 - People v Miles

Defendant pleaded guilty to attempted burglary in the second degree in full satisfaction of a six-count indictment. Before he was sentenced, defendant hired new counsel and moved to withdraw his plea. County Court denied the motion and sentenced defendant, as a second felony offender, to the agreed-upon sentence of four years in prison, followed by five years of postrelease supervision. Defendant appeals, contending that his plea was not knowing, voluntary and intelligent, that County Court failed to conduct an adequate inquiry into the allegations he raised in his motion, and that he received the ineffective assistance of counsel in connection with that motion.

521851 - Costello v Pizzeria Uno of Albany, Inc.

In 2011, plaintiff Barbara A. Costello visited defendant's restaurant with two of her coworkers. As they were being escorted to their table, plaintiff tripped and fell, thereby injuring her foot. Costello and her spouse, suing derivatively, commenced a negligence action against defendant, asserting that defendant's failure to maintain its restaurant in a reasonably safe condition caused her injury. After defendant joined issue, plaintiffs moved for summary judgment on the issue of liability and defendant cross-moved for summary judgment dismissing the complaint. Supreme Court granted defendant's cross motion and denied plaintiffs' motion. Plaintiffs appeal.

520808 - Matter of Schmitt v Connolly

Petitioner was issued a pistol permit in 1987. In 2012, petitioner filed an application to amend his pistol permit. After conducting a hearing, Supreme Court revoked petitioner's pistol permit, concluding that there was "good cause" for doing so based on the allegation by petitioner's former spouse that, in March 2008, petitioner brandished his gun while they were in the midst of a heated argument and told her that he would give her something to call the police about. Various orders of protection were subsequently issued against petitioner for the protection of his family in 2008 stemming from this allegation. Petitioner then commenced this CPLR article 78 proceeding in this Court to review Supreme Court's determination. Petitioner argues, among other things, that his former spouse's statements contained in a police report and an application for an order of protection are hearsay and, further, that he was denied due process because Supreme Court did not inform him that the court was going to rely on those two documents, which were not part of the record.