

NEW YORK COURT OF APPEALS ROUNDUP

BANKRUPTCY CASE INVOLVING RENT-STABILIZED LEASE

ROY L. REARDON AND WILLIAM T. RUSSELL JR. *

SIMPSON THACHER & BARTLETT LLP

December 17, 2014

The Court of Appeals will resume hearing appeals on Jan. 6, 2015. It is possible, if not likely, the court will only have five sitting judges at that time. Judge Victoria A. Graffeo's term expired in November, and the State Senate has not yet passed on the nomination by the governor of Justice Leslie Stein of the Third Department as Graffeo's successor. The Senate has announced it will not consider Stein's nomination until the new year. The other unfilled seat will result from Judge Robert S. Smith's departure from the court on Dec. 31, 2014. His successor will be nominated by the governor from a list of seven potential candidates given to him by the Commission on Judicial Nomination on Dec. 1, 2014. The court is likely to be back at full strength sometime in January 2015.

In this month's column we discuss cases addressing the reach of New York's long-arm jurisdiction statute and the question of whether a rent-stabilized lease represents a public benefit that is protected in a personal bankruptcy proceeding. In addition, we discuss a case in which the court affirmed the reversal of the first conviction for a hate crime murder involving a transgender victim. The court did so on the basis of the inconsistency of the verdict and provided that the People, if so inclined, could submit the hate crime charge to a new grand jury.

Long-Arm Jurisdiction

In [*Paterno v. Laser Spine Institute*](#), the court ruled that the actions of a Florida surgical facility and its doctors in treating a New York resident did not rise to the level of "conducting business" in New York sufficient to satisfy the long-arm jurisdiction provisions of CPLR 302(a)(1) despite their repeated contact with the plaintiff in New York through telephone calls, faxes, email and the Internet.

Plaintiff suffered from severe back pain and in May 2008 clicked on an Internet advertisement for a Tampa Fla., surgical facility, Laser Spine Institute (LSI). Plaintiff viewed a five-minute video presentation on LSI, and subsequently communicated with LSI by telephone and email to learn more about possible surgical procedures it offered that could address his back pain. He then sent LSI magnetic resonance imaging (MRI) films of his back in order to obtain LSI's assessment of his condition.

LSI reviewed the films and sent Plaintiff, via email, a letter with its doctors' professional evaluation of the MRI films and some preliminary surgical treatment recommendations. Plaintiff had several additional communications via email with LSI to finalize the arrangements for his surgery and sent LSI copies of his

* **Roy L. Reardon and William T. Russell Jr.** are partners at *Simpson Thacher & Bartlett LLP*.

bloodwork results. He also arranged for an LSI doctor to speak with his New York-based doctor about the proposed surgery.

Plaintiff flew down to Tampa on June 6 and underwent surgeries on June 9 and 11, returning home to New York on June 12. Plaintiff remained in significant pain upon his return. He remained in daily contact with LSI, and LSI physicians called in prescriptions for pain medication to New York pharmacies. When plaintiff remained in serious pain in mid-July, he underwent another MRI in New York and arranged for his New York doctor to have a further telephone discussion with LSI.

Plaintiff flew to Tampa on August 6 for a third back surgery at LSI and returned home to New York shortly thereafter. Plaintiff remained in daily contact with LSI via telephone, email and text messages for the next three months. When his condition still did not improve, LSI offered to fly him back to Tampa—at LSI's expense—for a fourth procedure. Plaintiff, instead, had an operation performed in New York by a doctor unaffiliated with LSI and then commenced a medical malpractice action against LSI and several of its doctors in Westchester County Supreme Court.

Defendants moved to dismiss for lack of personal jurisdiction. Supreme Court granted the motion, finding that Defendants did not transact business within the state sufficient for jurisdiction pursuant to CPLR 302(a)(1), and the Appellate Division, Second Department affirmed in a split 3-2 decision.

The court affirmed the Second Department's ruling in a unanimous opinion written by Judge Jenny Rivera. The court examined the requirements of CPLR 302(a)(1) which provides for personal jurisdiction over defendants who transact business in New York through purposeful activities that have a substantial relationship with the claim asserted. The Court noted that it has in the past recognized long-arm jurisdiction pursuant to CPLR 302(a)(1) over non-domiciliaries based on their use of telephonic and electronic communications to seek out and initiate contact with prospective clients or customers in New York, solicit business in New York, and establish a continuing relationship in the state.

Plaintiff argued that the repeated and sustained contact he had with LSI, its active solicitation of him as a patient and its use of a website to provide information to prospective patients more than satisfied this requirement. The court disagreed and noted that it is the content and quality of a defendant's contacts with plaintiff rather than the sheer quantity of contacts that matter for purposes of long-arm jurisdiction. In this instance, it was plaintiff who reached out to LSI initially. While he did so after viewing LSI's website, the court characterized the site as a passive website that did not provide for direct interaction through online registration or purchase of services.

It was only after plaintiff contacted LSI that LSI responded with additional information and, accordingly, Plaintiff had not established that LSI and the other defendants affirmatively availed themselves of the privilege of conducting activities in New York. The court also refused to consider any of the contacts or communications after the July and August surgeries since those subsequent contacts did not serve as the basis for the underlying malpractice claim.

The court noted that given changes in technology, it is no longer uncommon for patients to seek and obtain treatment from out-of-state medical professionals or to continue to communicate with them after the treatment. The court was therefore concerned that a ruling in favor of plaintiff here would set a precedent for almost limitless jurisdiction over medical providers who treat New York patients in other states. Accordingly, while the court did not hold that telephonic, electronic and Internet communications can never give rise to

personal jurisdiction in New York, the court makes it clear in *Paterno* that CPLR 302(a)(1) requires some sort of active solicitation beyond a passive website.

Rent-Stabilized Lease

In [*Santiago-Monteverde v. Pereira*](#), the court addressed an issue of first impression and ruled, in response to a question certified from the U.S. Court of Appeals for the Second Circuit, that a tenant's interest in her rent-stabilized lease was a public assistance benefit and therefore exempt from her bankruptcy estate.

Mary Veronica Santiago-Monteverde lives in a rent-stabilized apartment in New York City. When her husband died in June 2011, she was unable to pay her outstanding credit card debt and filed a Chapter 7 bankruptcy petition in the U.S. Bankruptcy Court for the Southern District of New York. She continued to pay her rent during the bankruptcy proceedings, and her Chapter 7 petition listed her rent-stabilized lease as a standard unexpired lease. Her landlord approached the Chapter 7 trustee appointed for Santiago-Monteverde's bankruptcy estate and offered to buy out Santiago-Monteverde's interest in the lease.

When Santiago-Monteverde learned of this, she amended her Chapter 7 petition to list the value of her lease as personal property that was exempt from her bankruptcy estate pursuant to Debtor and Creditor Law §282(2) as a "local public assistance benefit." Section 522(b) of the U.S. Bankruptcy Code permits a debtor to exempt certain property from the bankruptcy estate and provides a list of property that may be exempt. It also permits individual states to create their own list of exemptions. New York's list of exemptions for personal bankruptcies is set forth in DCL §282 and includes, inter alia, "a social security benefit, unemployment compensation or a local public assistance benefit." Accordingly, the practical effect of listing the rent-stabilized lease as an exempt public assistance benefit is that the Chapter 7 trustee would no longer be able to sell Santiago-Monteverde's interest in the lease to satisfy her outstanding debts.

The Bankruptcy Court granted the trustee's motion to strike the exemption on the grounds that the lease interest did not constitute a "local public assistance benefit" within the meaning of the Debtor and Creditor Law. The district court affirmed, and Santiago-Monteverde appealed to the Second Circuit. The Second Circuit determined that the case involved an open issue of New York law and certified the question to the court.

In an opinion by Judge Sheila Abdus-Salaam joined by Chief Judge Jonathan Lippman and Judges Graffeo, Rivera and Eugene Pigott, the court found that a debtor's interest in a rent-stabilized lease was a local public assistance benefit that could be exempted from the debtor's bankruptcy estate. Abdus-Salaam found that New York City's rent-stabilization program has all the characteristics of a local public assistance benefit. She noted that the program had been created to address a housing emergency in the city by preserving affordable housing for low-income, working poor and middle class residents. It provides assistance to a specific segment of the population that could not otherwise afford to live in New York City and provides specific benefits to a targeted group of tenants. The benefits include protection from rent increases, lease renewal rights, and succession rights for family members.

The court rejected the trustee's argument that the other benefits enumerated in DCL §282 all involve periodic payments to the beneficiary and found that such payments are not a prerequisite to a benefit constituting a form of public assistance. The court noted that the statute itself uses the broader term "benefit" rather than limiting its reach specifically to "payments."

The court also rejected the trustee's argument that a public assistance benefit must be subsidized by the government like Social Security or unemployment compensation. The court explained that, while rent-stabilization laws do not provide a benefit paid for by the government, they do provide a benefit conferred by the government and analogized the situation to the Medicare system. Although the government does, to some extent, contribute to the cost of medical care for Medicare recipients, Medicare is also a regulatory program that regulates the amount doctors can charge for their services in the same way that rent-stabilization laws regulate the amount of rent that can be charged by landlords.

Judge Robert S. Smith issued a dissent, joined by Judge Susan Phillips Read, in which he argued that the majority grossly misread the Debtor and Creditor Law and ignored the common understanding of public assistance or "welfare." He noted that many government programs provide assistance to specific segments of the population—including minimum wage laws, antidiscrimination laws and workplace safety regulations—but they are clearly not forms of public assistance under the Debtor and Creditor Law.

The issue of rent-stabilization is one of great interest to landlords and to tenant advocacy groups. It remains to be seen whether, and to what extent, the court's finding that rights under a rent-stabilized lease are a form of public assistance will affect other aspects of the rent-stabilization program.

Hate Crime Conviction

In [*People v. DeLee*](#) the defendant was indicted for second-degree murder as a hate crime (Penal Law §§125.25[1]), 485.05[1][a], second-degree murder (Penal Law §125.25[1]) and third-degree criminal weapon possession (Penal Law §265.02[1]). Defendant was charged with killing the victim, a young man dressed as a woman and known to be homosexual. The case went to trial in Onondaga County and the trial judge, without objection from the People or defendant, charged the jury as to the lesser included offenses of manslaughter in the first degree as a hate crime, manslaughter in the second degree as a hate crime, manslaughter in the first degree and manslaughter in the second degree.

The jury found defendant guilty of manslaughter in the first degree as a hate crime and of the weapon's charge. It acquitted defendant on all the remaining charges, except for manslaughter in the second-degree as a hate crime, which was not reached by the jury as a result of its verdict on the more serious charge.

After the verdict, but before the jury was discharged, defense counsel advised the court out of the presence of the jury and after it had been polled, that defendant needed to raise a motion to vacate the conviction on the charge of manslaughter in the first degree as a hate crime as the result of the inconsistency between the jury convicting defendant on that charge but acquitting him on the charge of manslaughter in the first-degree.

The trial judge indicated he understood defense counsel's position, but discharged the jury after eliciting from them that they had acquitted defendant of manslaughter in the second degree and did not ask them to further consider their verdict. Prior to sentencing, defense counsel moved to set aside the verdict as repugnant based upon the inconsistency defendant had raised with the court after the verdict. The motion was denied without an explanation by the trial court, and defendant appealed.

The Appellate Division, Fourth Department, in a Memorandum Opinion, with one justice dissenting, concluded that defense counsel had preserved his inconsistency/repugnancy claim before the jury was discharged by the trial judge and explained that "by acquitting the defendant of manslaughter in the first-degree, the jury necessarily found that the People failed to prove beyond a reasonable doubt at least one

element of manslaughter in the first-degree. To find defendant guilty of manslaughter in the first-degree as a hate crime, however, the jury must have found that the People proved beyond a reasonable doubt all the elements of manslaughter in the first-degree, plus the added element that defendant selected the victim due to his sexual orientation. It therefore follows that the verdict is inconsistent."

The Appellate Division modified the judgment on the law and reversed defendant's conviction for first-degree manslaughter as a hate crime and dismissed that charge, but otherwise affirmed, leaving only the weapons charge conviction intact. The People appealed by permission.

Judge Read, for a unanimous court, with Judge Abdus-Salaam in a concurring opinion, affirmed the Appellate Division with an extraordinary modification. The court affirmed that the verdict was absolutely inconsistent and therefore repugnant, relying upon its prior holdings in [People v. Tucker](#), 55 NY2d 1 (1981) and [People v. Muhammad](#), 17 NY3d 532 (2011), and modified the order of the Appellate Division, by granting the People, if so inclined, leave to resubmit a charge against defendant of manslaughter in the first degree as a hate crime to another grand jury.

The court was faced with the travesty of having to provide defendant with an effective acquittal on the hate crime charge after he had been found guilty by the jury. In seeking a remedy to address this situation, the court held that the trial court—once it had been alerted to the inconsistency—was obligated to explain it to the jury and "direct them to reconsider their decision." The trial court failed to do so.

Moreover, the court found no constitutional or statutory provision that mandated dismissal for a repugnancy error and that New York repugnancy jurisprudence provided defendants with greater protection than required under the federal Constitution. The court then persuasively urged that permitting, at the People's option, the resubmission to a new grand jury of only the charge of first-degree manslaughter as a hate crime against defendant and not the manslaughter charge as to which defendant was acquitted struck a "reasonable balance."

The concurring opinion of Abdus-Salaam presented a constructive way in which a trial court may properly instruct a jury to avoid further repugnant verdicts. She proposed that an ordinary (non-hate) crime be charged as a lesser included offense to the equivalent hate crime and the jury be instructed that if it convicts the defendants on the greater offense that it "will not consider" the lesser offense. This seems to be a good solution to prevent this situation from arising in the future.

This article is reprinted with permission from the December 17, 2014 issue of New York Law Journal. © 2014 Incisive Media US Properties, LLC. Further duplication without permission is prohibited. All rights reserved.