

NEW YORK COURT OF APPEALS ROUNDUP:

COURT DECIDES CLERGY SEXUAL ABUSE, DOMESTIC PARTNER BENEFITS AND FELONY MURDER CASES

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The Court of Appeals' decision in two clergy sexual abuse cases made clear that, absent facts satisfying the traditional basis for equitable estoppel, any relief from the statute of limitations in such cases must come from the Legislature. The Court's decision in a case arising out of Mayor Michael R. Bloomberg's refusal to implement a domestic partner benefits law involved not only the validity of that statute, but also topical questions of importance – when the executive objects to a law passed by the legislature, is he free to ignore it until ordered by the judiciary to comply; and what is the role of courts in such a scenario. And the Court's decision in a pair of criminal cases clarified which crimes are lesser included offenses of first-degree intentional felony murder, resolving a difference within the Appellate Division. This month we discuss these decisions.

Clergy Abuse SOL

Zumpano v. Quinn and *Estate of Boyle v. Smith* presented the Court with the most distressing pair of cases it has recently been required to confront. An explanation of their factual underpinning was not necessary because both cases presented only the legal issue of whether the defendants should be equitably estopped from invoking the statute of limitations defense to claims by the plaintiffs that they had been sexually abused by members of the clergy, for which those clergymen, their Church superiors and the Roman Catholic Dioceses to which they belonged should be held responsible. In both cases, the plaintiffs conceded that the applicable statutes of limitations periods had expired. In one opinion by Judge Carmen Beauchamp Ciparick, the Court affirmed the orders of the Appellate Divisions dismissing the complaints on the grounds that the actions were time-barred. Judge George Bundy Smith dissented in part in *Boyle*; Judge Susan Phillips Read took no part in either case.

The complaints alleged numerous causes of action, including sexual abuse, battery, breach of fiduciary duty, and negligent retention and/or supervision. The defendants

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moved to dismiss on the basis that the statutes of limitation had expired, and plaintiffs sought to invoke the doctrine of equitable estoppel. Zumpano also sought to avoid the defense of the statute of limitations on the grounds that his mental disability, caused by defendants, resulted in a tolling of the limitations period under CPLR 208. The abuse alleged in both cases ended many years before the lawsuits were brought in 2002 and 2003.

While the Court reaffirmed the doctrine of equitable estoppel where it would be unjust to allow a defendant to assert a statute of limitations defense, it explained that in order to invoke the doctrine, the delay between the accrual of the cause of action and the commencement of the suit must be caused by the defendants' wrongdoing. Here, the Court concluded, there was no allegation of any specific misrepresentation or deceptive conduct sufficient to invoke equitable estoppel.

Plaintiffs also claimed the existence of a fiduciary relationship with defendants that required disclosure of the pattern of abuse and its concealment. The Court found it unnecessary to determine whether such a relationship existed because plaintiffs were fully aware that they were sexually abused, knew their abusers, and knew the abusers' relationship to the Church hierarchy. Accordingly, the acts of defendants did not contribute to the delay in bringing suit. Moreover, the Court concluded, there was no basis for finding a fiduciary duty to exist after plaintiffs reached adulthood, which was more than a decade before the suits had been started.

As to Zumpano's claim of mental disability, the Court concluded that his conduct showed he had no continuous disability preventing him from asserting his rights.

Finally, the Court took comfort in the fact that other jurisdictions had reached similar resolutions of the issues presented and observed that plaintiffs were left to action by the Legislature if relief from the statute of limitations were to be given.

Judge George Bundy Smith, while agreeing with the majority in Boyle that the allegations in the complaint were not specific enough to invoke equitable estoppel, concluded that leave to plead should be given to plaintiffs to spell out their claims with the requisite specificity.

Domestic Partner Benefits

Two distinct and interesting issues were presented in *Matter of Council of the City of New York v. Bloomberg*: whether New York City's Equal Benefits Law ("EBL") was preempted by State and federal statute, and whether that question should even be resolved in the Article 78 proceeding. The Court, in an opinion by Judge Robert S. Smith, held that the statute's validity had properly been raised in the action. It proceeded to rule that General Municipal Law § 103 and ERISA both preempted the EBL, which prohibited the City from entering into contracts with any entity that did not extend the employment benefits given to spouses of employees to registered domestic partners of employees.

The EBL had been enacted over Mayor Bloomberg's veto. The Mayor commenced an action seeking to have the law declared invalid on preemption and other grounds, and moved for a temporary restraining order against its enforcement, which motion was denied. The Mayor thereafter stated that he would comply with the State law and City Charter provisions that, he asserted, rendered the EBL invalid. Said another way, the Mayor announced that he would simply not comply with the disputed statute.

The City Council responded with its own suit, an Article 78 proceeding to compel the Mayor and City to implement and enforce the EBL. The Mayor raised as a defense the alleged invalidity of the statute, based upon the same arguments he was advancing in his declaratory judgment action.

Separation of Powers

As a threshold matter, the Court of Appeals had to contend with the Council's argument that the validity of a legislative enactment cannot be decided in an Article 78 proceeding. It was on this issue that the Court divided. Judge Albert M. Rosenblatt authored a dissent in which Chief Judge Judith S. Kaye and Judge Carmen Beauchamp Ciparick concurred. To the dissent, the question was not merely one of procedure, but of constitutional dimension.

The dissenters argued that the Mayor, by refusing to abide by duly enacted legislation -- even after his TRO was denied -- and forcing the Council to seek judicial relief to have such enactment take effect, up-ended the roles of the three branches of government. By entertaining the Mayor's challenges to the EBL raised as a defense to a mandamus request rather than requiring the Mayor to litigate those challenges in a declaratory judgment action, the dissent maintained, the Court effectively condoned the Mayor's course of action. And whereas a heavy burden usually is imposed upon parties seeking to overturn legislative enactments, resolving the Mayor's objections in the Article 78 proceeding shifted the burden to the Council to establish that the statute was valid.

As the majority pointed out, however, the dissent stopped short of saying that an order should be entered in the present proceeding directing the Mayor to enforce the statute pending resolution of the declaratory judgment action. The dissent instead stated merely that the Court should reverse the Appellate Division's order, which had found the EBL invalid and dismissed the Council's petition. Because they believed that the validity of the statute was not properly considered in the case, the dissenters did not reach the preemption issue.

The majority, however, held that the Mayor was entitled to raise the defense of illegality in the Article 78 proceeding, relying upon the rule that courts never grant mandamus to compel performance of an illegal act. If courts were not permitted to consider a statute's validity in this situation, they would be put in the "unacceptable position" of possibly directing compliance with an unconstitutional law. The Court characterized as "circular" the dissent's argument that an executive must implement duly enacted laws, reasoning that laws outside of the legislature's authority are not "duly enacted."

Preemption

The General Municipal Law provides that contracts for public works must be awarded to the “lowest responsible bidder.” Its purpose is financial, and also to prevent favoritism, fraud and corruption. By excluding responsible bidders from the process on the basis of factors not directly related to the cost and efficiency of contract performance, the Court found, the EBL would circumvent these objectives. The Court ruled that, “[t]he provision of equal benefits for domestic partners and spouses may be a desirable end, but it is not one that New York City is free to pursue by departing from the requirements of the competitive bidding statute.” Thus, the City Council had not met its burden of demonstrating a “clear legal right” (the mandamus standard) to have the statute enforced.

Although it would seem unnecessary in light of its State law ruling, the Court proceeded to address the issue of federal preemption. Consistent with the rulings of two District Courts that had addressed whether similar statutes were preempted by ERISA, the Court of Appeals held that local governments cannot regulate the terms of benefit plans, except to the extent that they govern benefits outside of the federal statute’s scope. The Council had argued that, rather than compelling employers to offer domestic partner benefits, the EBL instead simply provided that the City, when acting as a “market participant,” would not do business with firms that fail to do so. This argument was rejected. In executing the EBL, the government would be acting less like a proprietor and more like a regulator, using its leverage to obtain a policy end.

Lesser Included Offenses

The Court resolved a split in the Departments of the Appellate Division in *People v. Richard Miller*, holding unanimously that intentional murder and felony murder, both forms of second degree murder, are lesser included offenses of first degree intentional felony murder, at least when predicated upon burglary or robbery.

Although such a result might seem obvious, the prosecution in *Miller* and its companion case, *People v. Christopher Rodriguez*, raise two arguments against it. The first was that because all the crimes at issue are class A-1 felonies, intentional murder and felony murder are not “lesser” and intentional felony murder is not “greater”. The Court, in an opinion by Judge Albert M. Rosenblatt, explained that the lesser included offense determination does not rest upon such classification. Because first degree murder is of a different degree and carries a considerably harsher possible penalty, it certainly is greater than second degree murder.

The People next invoked CPL 1.20(37), which provides that when it is impossible to commit a crime “without concomitantly committing, by the same conduct, another offense,” the latter is a lesser included offense of the former. In *People v. Glover*, 57 N.Y.2d 61 (1982), the Court had changed the “impossibility” doctrine test to refer not to the facts of a particular case, but to whether in the abstract it is possible to commit the greater crime without, by the same conduct, also committing the lesser one.

The People posited a factual scenario in which, due to a quirk in the Penal Law, it theoretically would be possible to commit felony murder in the first degree based upon the aggravating factor of flight without also committing second degree felony murder. However, the abstract test of Glover must be applied “only to the subdivision [of the Penal Law] which the particular act or omission referred to in the indictment brings into play.” (Quotation omitted.) Where the felonies underlying intentional felony murder are first or second degree burglary or robbery as in these cases, or attempted second degree murder, the Court held, because such crimes cannot be committed without also committing second degree felony murder, the latter crime is a lesser included offense.

Thus, the First Department in *Miller* should have dismissed the second degree felony murder counts of which the defendant was convicted, and the Second Department in *Rodriguez* properly dismissed such counts.

The import of the decisions is that in cases where the indictment charges only intentional felony murder, the prosecution and defense will be able to request that the lesser included offenses of intentional murder and felony also be submitted to the jury, if supported by legally sufficient evidence. Had the Court ruled otherwise, juries in such circumstances would not be given lesser charges to consider.