

New York Law Journal



—NO. 119 + \$3.00

NEW YORK, THURSDAY, JUNE 21, 2007

©2007 ALM Pro

M. NO. 1 5928
LIBRARY
REED SMITH SHAR & MCCLEAY
200 WEST LEXINGTON AVENUE 28TH FL.
NEW YORK, NY 10022
01/15/08

IN BRIEF

Teitelbaum Tapped to Lead Ethics Commission



Herbert Teitelbaum

Herbert Teitelbaum, chairman of the securities litigation practice at Bryan Cave, has been named executive director of the state Ethics Commission. Commission Chairman John Feerick said he selected Mr. Teitelbaum because of his "competence, integrity, independence and excellent leadership abilities." Mr. Teitelbaum, 64, has been at Bryan Cave since 1996. Before that he was a partner specializing in litigation involving the rights of large classes of individuals at Teitelbaum, Hiller, Rodman, Faden & Hilscher. The Ethics Commission has been without an executive director since Karl Sleight resigned in February to join Harris Beach in Albany. The commission is set to go out of existence on Sept. 22, 2007, when it will be merged with the state Temporary Commission on Lobbying to form a new Commission on Public Integrity. In a statement yesterday, Mr. Feerick indicated that he expects to put Mr. Teitelbaum's name before the yet-to-be-named 13-member board at the new commission for selection as its first executive director. Mr. Feerick also praised David Grandeau, executive director of the Lobbying Commission, for being a "strong and important advocate for reform." Mr. Grandeau, who was often critical of the Ethics Commission under Mr. Sleight, said he was not among the approximately 30 applicants for the post filled by Mr. Teitelbaum. He said yesterday in a "forestry clean" decision that he made a decision about who he wants to run the Public Integrity Commission. Mr. Grandeau said he will spend between now and September assuring that the culture of aggressive enforcement at the Lobbying Commission carries over to the new commission. "I have to start con-

Continued on page 4

Habeas Revoked After Witness Recants Claims

BY MARK HAMBLETT

A RECANTING alibi witness has given prosecutors the ammunition they needed to finally ensure that a Rockland County murderer stays behind bars.

Citing the recantation, the U.S. Court of Appeals for the Second Circuit yesterday overturned a writ of habeas corpus granted for Charles Hemstreet.

The decision came three years after the circuit had initially agreed with Southern District Judge Charles Bryant that Mr. Hemstreet should be released because his lawyer had failed to pursue the witness' claim that she was unwilling to testify because she had been warned to stay away from the trial by investigators.

"We're very gratified by the ruling," said Rockland County District Attorney Michael Bongiorno. "The Second Circuit reached what I think is the right result. I am very happy for the family of Kenneth Hiep Sr., which has had a lot of wounds reopened by the appellate process in this case."

Judges Robert Sack and Barrington Parker decided the appeal in *Hemstreet v. Griener*, 02-2747-pr, with Judge Parker writing for the majority. Judge Thomas Meskill dissented.

Mr. Hemstreet said his 1998 trial was tainted because of ineffective assistance by defense attorney Murray Richman, who had failed to seek a remedy for the alleged police intimidation of witness Jeanette Buccell.

Ms. Buccell refused to appear at Mr. Hemstreet's trial for the 1992 murder of his business partner, Kenneth Hiep.

Mr. Hemstreet also claimed his appellate attorney was ineffective for failing to pursue the ineffective assistance claim on direct appeal to the Appellate Division.

Judge Bryant agreed and granted the petition. The circuit affirmed that ruling in 2004.

Continued on page 3

Garson Loses Bid to Delay Prison Term During Appeal

Ex-Judge to Surrender Tuesday

BY DANIEL WISE

AN APPELLATE judge ruled yesterday that convicted ex-Supreme Court Justice Gerald P. Garson of Brooklyn must go to prison even as he appeals his 3-to-10 year sentence for bribery and related crimes.

Mr. Garson, 74, who handled divorce cases during his six years on the bench, will surrender to begin serving his sentence on Tuesday.

In a brief four-paragraph order, Justice Edward D. Carni of the Appellate Division, Second Department, denied without explanation Mr. Garson's request for a stay pending appeal and dissolved an earlier order that had allowed the ex-judge to remain free on \$15,000 bail while his stay application was decided.

"We are very concerned about Justice Garson's medical condition" and are exploring "other legal options," Mr. Garson's lawyer, Jeremy Gutman, said yesterday.

"We have raised very extensive, substantial issues, and are confident Justice Garson will be vindicated on the appeal," he added. Mr. Gutman said he had advised Mr. Garson not to make any comments to the media.

On June 5, the trial judge, Acting Supreme Court Justice Jeffrey Berry of Orange County, imposed three consecutive sentences on Mr. Garson that cumulated to 3-to-10 years. Justice Carni later that day issued a temporary stay keeping Mr. Garson's \$15,000 bail in place until he decided the request for a stay until the appeal is decided.

In April, after a month-long trial, Mr. Garson was convicted of bribery for providing a lawyer who had



Gerald P. Garson enters Brooklyn Supreme Court earlier this month for sentencing.

NY1J PHOTO/RICK KOPSTEIN

become a cooperating witness with court appointments, ex parte legal advice and courtesies such as unrestricted access to his courtroom in exchange for thousands of dollars of free meals and drinks, and, in one instance, a \$250 box of Dominican cigars.

Mr. Garson also was convicted on a related count of accepting a reward for official misconduct and of accepting \$1,000 in referral fees from the cooperating lawyer, Paul Siminovsky.

Three other defendants connected to the Garson investigation, who were either convicted or pleaded guilty, also will be sentenced Tuesday. They are former court

Continued on page 6

DECISIONS OF INTEREST

FIRST DEPARTMENT

LEGAL PROFESSION: Facts alleged do not support legal malpractice claim against law firm by individual plaintiff. *Topor v. Enbar, Supreme Court, New York* (p. 18, col. 1).

CONTRACTS: Material issues of fact regarding nature, percentage of property's ownership precludes summary judgment. *All Brands Fork Lift Corp. v. Yetish Inc., Supreme Court, Bronx* (p. 19, col. 1).

SECOND DEPARTMENT

BUSINESS LAW: Motion granted judgment for Sylvan's fraudulent misrepresentation and violation of GBL §349. *Drew v. Sylvan Learning Center Corp., Civil Court, Kings* (p. 19, col. 3).

CRIMINAL PRACTICE: Officer failed to obtain warrant for seizures of animals; evidence suppressed, case dismissed. *People v. Barry Delaney and Kevin Lewis, Criminal Court, Richmond* (p. 20, col. 1).

BUSINESS LAW: Plaintiff has apparent interest in property, proper party to seek appointment of temporary receiver. *Sadlik v. Point Lookout Fish Dock Inc., Supreme Court, Nassau* (p. 20, col. 3).

ENVIRONMENTAL LAW: Court finds jury's penalty award of \$6 million not excessive against Simoco for cleanup costs. *State of New York v. LTV Realty Co.*

Inc., Supreme Court, Nassau (p. 20, col. 3).

UNITED STATES COURTS

CIVIL RIGHTS: Police officer conducting suggestive ID not liable under §1983 for applicant's conviction, incarceration. *Wray v. City of New York, 2d Cir.* (p. 18, col. 1).

ALTERNATIVE DISPUTE RESOLUTION: Delay leads to denial of motion to lift stay of action pending arbitration of discrimination claims. *Eluwell v. Google Inc., SDNY* (p. 21, col. 3).

INTELLECTUAL PROPERTY: Trade dress infringement, unjust enrichment claims dismissed from crowns' use in ad campaign. *Thompson v. V.E.W. Ltd., SDNY* (p. 21, col. 3).

INTELLECTUAL PROPERTY: Lensman awarded \$64,865, not \$600,000 sought, for use of photos on travel agency's web site. *Burch v. Nyarko, SDNY* (p. 22, col. 1).

BUSINESS LAW: Fraud claims arising from acquisition dismissed; loss causation pleading standards not satisfied. *Multi-Plan Inc. v. Emergis Inc., SDNY* (p. 22, col. 3).

CIVIL PRACTICE: Summary judgment dismissing fiduciary duty breach claim against former officer deemed premature. *S.W.B. New England Inc. v. R.A.B. Food Group LLC, SDNY* (p. 23, col. 1).

Abandonment at Issue in Family's Feud Over Distribution on 9/11-Related Funds



Elsie Goss-Caldwell holds a photo Tuesday of her son, Leon Caldwell Jr., left, and Kenneth Caldwell, who was killed at the World Trade Center.

BY TOM PERROTTA

A JUDGE in Brooklyn yesterday heard testimony in a case that pits the mother of a man who died in the 2001 terrorist attacks on the World Trade Center against her former husband, who wants half of their son's \$2.9 million award from the federal September 11th Victim Compensation Fund.

Brooklyn Surrogate Margarita Lopez Torres held a day-long hearing that included testimony from the mother, Elsie Goss-Caldwell; the father, Leon Caldwell; their eldest son, Leon Jr.; and family friends.

The case might turn on Surrogate Lopez Torres' interpretation of Estates, Powers and Trusts Law §4-1.4(a), which precludes the distribution of a deceased child's estate to a partner who has refused to provide for, or abandon, a child before the child reached age 21.

Ms. Goss-Caldwell of Philadelphia testified that her former husband physically abused her before

Continued on page 2

Continued on page 3 | World Trade Center.

Per Held Not Liable for Improper Identification Proof

HAMBLETT

A PLAINTIFF who claims his rights to due process and a fair trial were violated by the admission into evidence of an impermissibly suggestive identification procedure cannot recover civil rights damages against the officer who ran the procedure, a federal appeals court ruled yesterday.

Eastern District Judge Jack Weinstein has refused to grant summary judgment to police defendants on the claim of Raymond Wray, who said his robbery trial was tainted by a police decision to bring one of his alleged victims to his cell for identification.

But Judge Weinstein was aware that his decision presented two questions worthy of an interlocutory appeal: Where the admission of trial testimony on a witness

identification violated due process and fair trial rights, can a defendant establish a §1983 claim against the officer who ran the identification procedure and can he establish a §1983 claim against the police department for failing to adequately train and supervise the officer?

The U.S. Court of Appeals for the Second Circuit answered "both questions in the negative" in *Wray v. City of New York*, 05-3341-cv. Chief Judge Dennis Jacobs, Judge Rosemary Pooler and, sitting by designation, Eighth Circuit Judge John Gibson decided the appeal. Judge Jacobs wrote for the court.

Mr. Wray's long journey through the courts began with his arrest in 1990, when police on a stakeout atop a Queens restaurant saw two men, one of whom was

wearing a long black coat and a hat, point a gun at Melvin Mitchell and steal his coat outside the restaurant.

Officers William Weller and James McCavera apprehended one assailant, Dennis Bailey, and then went into the restaurant, where they found Mr. Wray wearing a long black coat and a hat, and placed him under arrest.

Mr. Mitchell, who was with his friend, Craig Williams, during the robbery, went to the police precinct within hours. Both men were taken separately to look at Mr. Wray as he was sitting in a holding cell and both immediately identified him as the gunman.

A Queens Supreme Court justice ruled after a suppression hearing that Mr. Wil-



Judge Jacobs

The decision appears on page 18.

Now at ny1j.com

Continued on page 7

LAW JOURNAL

INSIDE

Perspective: The Diary of George Templeton Strong, by William J. Dean

Securities Regulation: Scheme Liability: Court Actions Against Aiders, Abettors, by Roberto S. Karmel

Outside Counsel: End of Litigation Explosion in New York No-Fault, by Mitchell S. Lustig and Jill Lubin Schatz

Calendar of Events
Classifieds
Court Calendars
Court Notes
Decisions
Letters to the Editor

CORPORATE UPDATES: Plaintiff's Firms Turn To Wage and Hours Suits, by Beth Bar

Corporate Tax: Warrants Not Received in Connection With Performance of Services, by David E. Kahan and Elliot Pizem

New Deals: by Sam Weisberg

CC Contract Drafting: "Worsening." Why contract language shouldn't be an afterthought, by Kenneth A. Adams

NY Getting Ahead of Fraud and Abuse, by Bridger Rohde

Privacy and Data Protection: Collecting Employee Data in Europe, by William A. Tannenbaum and Catherine Youssel Kassenoff

BONDS

Appeals
Supersedeas
Discharge Lien
Exactor
Guardian
Lost Instrument

Titlevest
1031Vest

12 KITCHENS,
23 BATHROOMS,
217 APPLIANCES,

Half Day Program, July 12, 2007
Westin Times Square, New York

New York Law Journal



-NO. 119 • \$3.00

NEW YORK, THURSDAY, JUNE 21, 2007

Abandonment at Issue in Family's Feud Over Distribution on 9/11-Related Funds



AP PHOTO/DIANE BONDAREFF

Elsie Goss-Caldwell holds a photo Tuesday of her sons, Leon Caldwell Jr., left, and Kenneth Caldwell, who was killed at the World Trade Center.

BY TOM PERROTTA

A JUDGE in Brooklyn yesterday heard testimony in a case that pits the mother of a man who died in the 2001 terrorist attacks on the World Trade Center against her former husband, who wants half of their son's \$2.9 million award from the federal September 11th Victim Compensation Fund.

Brooklyn Surrogate Margarita López Torres held a day-long hearing that included testimony from the mother, Elsie Goss-Caldwell; the father, Leon Caldwell; their eldest son, Leon Jr.; and family friends.

The case might turn on Surrogate López Torres' interpretation of Estates, Powers and Trusts Law §4-1.4(a), which precludes the distribution of a deceased child's estate to a partner who has refused to provide for, or abandoned, a child before the child reached age 21.

Ms. Goss-Caldwell of Philadelphia testified that her former husband physically abused her before

Hearing on Distribution of 9/11 Funds

Continued from page 1

and after they were married and abandoned their children sometime between 1974 and 1975, when he moved to New Jersey.

Leon Jr. has a Ph.D. in counseling psychology and is a visiting professor at the University of Memphis. Kenneth, who had lived in Brooklyn, was a 30-year-old executive at Alliance Consulting, which had offices in the World Trade Center.



Surrogate
López Torres

During a break in the testimony, Ms. Goss-Caldwell said her former husband's attempt to claim a portion of the award was "despicable."

"He did nothing for [Kenneth] in life," she said. "I think he's immoral."

Mr. Caldwell, a 59-year-old Vietnam veteran who lives in New Jersey and works as a cook, would not comment beyond his testimony. He has already received \$25,000 from the Workers' Compensation Board as a result of his son's death, though the board garnished about half that for failure to pay child support.

During his testimony, Mr. Caldwell said he never abused his wife and at most pushed her away when she hit and pushed him. He said he paid child support for a year until he lost his job, and continued to pay later. Asked why he did not maintain a relationship with his sons, he said Ms. Goss-Caldwell would not let him.

Ms. Goss-Caldwell's attorney, Paul J. Bschorr of Reed Smith, who is handling the case pro bono, called numerous witnesses in order

to portray this case as one of abandonment.

Leon Jr. testified that his relationship with his father was "non-existent." He said he only tried to get in touch with his father, once, as part of his studies in family psychology (Mr. Caldwell said his son had called him on other occasions).

When Leon Jr. learned that Mr. Caldwell had traveled to New York to assert his right to receive part of Kenneth's estate, Leon Jr. said, "It was extremely alarming that he would do that."

Mr. Bschorr and his colleague, Wallace B. Neel, also called a friend of Ms. Goss-Caldwell's, a sister in their parish, and the former basketball coach at the boys' parochial school in Philadelphia. The witnesses either said that they did not know Mr. Caldwell or that he had played no role in his son's lives that they were aware of.

Mr. Caldwell's attorney, Richard M. Chisholm of New Jersey, cast his client as a man shut out by his former wife. Mr. Caldwell testified that his wife would hang up on him when he called and prevent him from seeing his children.

Mr. Chisholm also offered brief testimony from Mr. Caldwell's current wife.

Surrogate López Torres gave little indication of her interpretation of the case. However, she showed considerable interest in Mr. Caldwell's testimony about the efforts he made to visit his children.

"Did you ever go to court?" the judge asked.

"I just didn't do that," Mr. Caldwell replied. He said he could not afford an attorney. When the judge asked if he had gone to court without an attorney, he said he did not know what to do since he was living in New Jersey and his children were in Philadelphia.

After the terrorist attacks, Mr. Caldwell said he read in the newspaper that his son's father was unknown.

"I got mad so I went to New York to let them know I was still around," Mr. Caldwell said.

"Did you go with a lawyer?" the judge asked.

"No," Mr. Caldwell said.

Surrogate López Torres gave the parties 60 days to submit final papers and reserved decision.

— Tom Perrotta can be reached at tperrotta@alm.com.