

NEW YORK COURT OF APPEALS ROUNDUP

CONDEMNATION, CANINE SNIFF SEARCHES, PRIVACY FOR LEGAL MALPRACTICE

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On the heels of its decision in the *Atlantic Yards* takings case, the Court of Appeals upheld the exercise of the power of eminent domain to condemn private property to be developed by Columbia University for campus expansion and other uses. In another case, the Court disagreed with the conclusion of the U.S. Supreme Court that a canine sniff of the exterior of a vehicle does not constitute a search. Finally, the Court addressed the issue of which parties are in privity with a decedent's estate planning lawyer and therefore may assert a malpractice claim against him. The Court held that an estate representative may assert a malpractice claim, but in dicta stated that beneficiaries and other third parties may not. We respectfully submit that the latter conclusion may in some circumstances lead to unfair results, as discussed below.

Taking for Campus Expansion

Last year, the Court deferred to the Empire State Development Corporation's (ESDC) determination that the site of the Atlantic Yards development project was 'blighted,' and upheld the condemnation of private property on that site, in *Matter of Goldstein v. New York State Urban Development Corp.*, 13 N.Y.3d 511 (2009). In *Matter of Kaur v. New York State Urban Development Corp.*, the Court again applied its broad interpretation of the power of eminent domain and the doctrine of deference to the conclusions of a 'quasi-legislative' agency to uphold a condemnation of property for development by Columbia University, a non-profit institution.

As often happens, the development process in this case has taken many years. Columbia first approached the New York City Economic Development Corporation (EDC) in 2001 about expanding its campus into and revitalizing West Harlem. EDC

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conducted an economic analysis of the neighborhood and issued an economic development plan, concluding that Columbia would be a 'key catalyst' in revitalizing the neighborhood and partner in job creation. In 2003, it hired Urbitran Associates to conduct a study, which documented conditions meriting a designation of the area as blighted.

In 2004, ESDC met with EDC and Columbia to discuss condemnation of land in the proposed development area. ESDC commissioned studies by Allen King Rosen & Fleming [FN1] and Earth Tech. Based upon the studies, ESDC adopted a General Project Plan upon which it solicited public comments and held a hearing. In response to matters raised by the public, ESDC modified the plan. [FN2] It issued findings and a determination, and sponsored the project as both a 'land use improvement project' with a public purpose and a 'civic project.' The challenge, in the Appellate Division, First Department, of petitioners (whose property was slated to be condemned) resulted in a plurality opinion concluding that ESDC's findings and determination were unsupported by the record.

Judge Carmen Beauchamp Ciparick authored the opinion of the Court. The Court easily disposed of petitioners' argument that the Columbia project did not constitute a 'public use,' the basis for takings authorized by the New York constitution. *Matter of Goldstein* had made clear that the elimination of urban blight is a 'public purpose.' The Court also criticized the Appellate Division for having substituted its own judgment for that of the ESDC on whether the project site was blighted. The judiciary must defer to the legislature on exercise of the takings power, ESDC is a 'legislatively designated agency,' and therefore the agency's judgment must be upheld by the courts unless it is found to be 'irrational or baseless.' Such a finding that could not be made here, the Court held.

The Court proceeded to address the alternative basis of ESDC's decision, namely that the development plan qualified as a 'civic project.' Regardless of whether an area is blighted, ESDC is statutorily authorized by the New York State Urban Development Corporation Act (UDC Act) to exercise eminent domain in furtherance of civic projects, defined to include those with an educational purpose. The Court ruled that the Appellate Division was mistaken in concluding that this provision is limited to public educational institutions. Both the plain language of the UDC Act and the policy stated therein support that projects involving private educational institutions can be 'civic.'

Judge Robert S. Smith concurred in the result. He deemed the finding of blight 'strained and pretextual, but...no more so than the comparable finding in *Goldstein*.' Thus, he agreed with the majority that the ESDC's determination of blight should be upheld and the development should be permitted to proceed as a 'public use' project. Judge Smith wrote separately to express his disagreement with the majority's ruling on the 'civic project' basis for the ESDC's approval. He argued that it was unnecessary for the Court

to have reached the issue, and that the majority erred analyzing the issue based upon an interpretation of the UDC Act without considering whether its interpretation of the statute's broad terms was unconstitutional.

Dog Sniffs Car

People v. Devone involved two cases in which a police officer made a lawful vehicle stop, and then, based upon events that occurred after the stop, decided to conduct a canine search of the exterior of the vehicle, and following an 'alert' response by the dog, conducted an interior search. In both cases, that search revealed the presence of illegal drugs in an enclosed space. The Appellate Division, Third Department, applying the 'founded suspicion' standard, held that the searches in both cases were legal.

The Court affirmed in a 4-3 decision. It observed that the U.S. Supreme Court has held that a canine sniff does not constitute a 'search' for federal constitutional purposes. See *United States v. Place*, 462 U.S. 696 (1983). The Court of Appeals, however, adhered to its precedent holding that a canine sniff constitutes a search as a matter of state constitutional law. The distinction between federal and New York jurisprudence in this area was explained in the opinion for the majority written by Judge Eugene F. Pigott, Jr.: Whereas the Supreme Court has focused on what may be revealed by a search, the Court of Appeals has focused on the area of the search and whether a reasonable expectation of privacy exists in such place.

The degree of privacy expected in the location is also relevant to the level of suspicion necessary to justify a search, the Court observed. It held that the 'reasonable suspicion' standard held applicable to a canine sniff in the hallway of an apartment building in *People v. Dunn*, 77 N.Y.2d 19, 25 (1990), cert. denied, 501 U.S. 1219 (1991), to be inapplicable, reasoning that the expectation of privacy in an automobile is lesser than the expectation for a residence. As a result, the Court adopted the less demanding 'founded suspicion' standard for canine sniff searches of vehicles.

Judge Ciparick, joined by Chief Judge Jonathan Lippman and Judge Theodore T. Jones, dissented, arguing that reasonable suspicion was the appropriate standard. The dissenters also criticized the standard adopted by the majority because it requires suspicion not of illegal drug activity specifically, but of any criminal activity. For example, in one of the cases the officer suspected that the vehicle had been stolen. 'Without a nexus between the suspicion held by the police and the capability of the canine, the probe sanctioned by the majority is but a fishing expedition,' Judge Ciparick wrote.

Estate Planning Malpractice

While the opinion in *Estate of Schneider v. Finmann* can hardly be cited as a serious breach of the walls of the 'citadel of privity' in New York, some may see it as a glimmer of a willingness by the Court to look at whether what have long been seen as immutable principles, such as 'privity' and 'duty,' must yield in some circumstances to fundamental fairness. Clearly, in writing for a unanimous Court, Judge Jones took great care to keep the decision's holding narrow.

The case presented a relatively straightforward issue: Can the personal representative of the estate of a deceased client sue lawyers for malpractice concerning advice given the client during his lifetime on estate planning matters? The lawyers' motion to dismiss was granted by the Supreme Court. A unanimous panel of the Appellate Division, Second Department, affirmed. It relied upon the 'wellestablished rule in New York' that, absent fraud, collusion, malicious acts or other special circumstances, an attorney is not liable for malpractice to those not in privity with him. Lacking privity, the Second Department reasoned, the estate representative had no claim.

The underlying estate planning advice involved the purchase during the client's lifetime of a \$1 million life insurance policy, the proceeds of which would not be included in his taxable estate and would be paid, free of tax, to the policy's beneficiary. It was alleged, however, that with the help of the defendant lawyers, the client during his lifetime asserted his individual ownership of the policy through making various transfers of it and, ultimately, a transfer directly to himself, thereby rendering the \$1 million proceeds part of his taxable estate upon his death.

In reaching its decision to reverse, the Court reviewed the general state of the law in the United States with respect to the requirement of privity between a plaintiff and an estate planning lawyer. It noted that New York was among only a 'handful of jurisdictions' that applied strict privity in cases of malpractice claims brought by estate beneficiaries. While not called upon to do so in this case, the Court reached out to state that malpractice claims by beneficiaries or other third parties against estate planning attorneys remain barred because of the lack of strict privity. It permitted claims by an estate representative such as the plaintiff in *Schneider*, however, finding that a representative basically stands in the shoes of the decedent. Thus, between those parties there is the required privity 'or a relationship sufficiently approaching privity.'

We respectfully suggest that, having availed itself of the opportunity to address the issue of estate beneficiaries' right to sue in dicta, the Court should have more favorably sided with the majority of states. Consider the divorced man who remarries, and directs his estate planning lawyer to change his will to ensure that his children from a prior marriage receive estate assets remaining after distribution to his new wife of the share

to which she is entitled by law. After he dies, it is discovered that by pure inadvertence his intentions have been foiled; the bequests to the children were omitted from his will. Should the children's lawsuit against the lawyer be dismissed? We think not, but under *Schneider*, it would be

In those states that have given beneficiaries the right to sue, life has gone on nicely, and it would have in New York had *Schneider* gone one step further in relaxing the strict privity rule. At the core of the issue is fairness. This is one principle that all courts strive to achieve and that, for the most part, shapes the law. Moreover, fairness is what convinces all who are subject to the law to accept it. But what are often described as 'policy considerations' invoked for the common good can sometimes cause what can be seen as unfair results. 'Privity' and 'duty' are two such considerations that fundamental fairness calls upon courts to yield to in the right circumstances, while always being 'mindful of the consequential, and precedential, effects of their decisions.' 532 Madison Ave. Gourmet Foods Inc. v. Finlandia Ctr. Inc., 96 N.Y. 2d 280 (2001).

Endnotes:

1. Allen King Rosen & Fleming had previously been retained by Columbia in connection with the project. Its simultaneous work for ESDC and Columbia was criticized in an Article 78 proceeding that arose out of Freedom of Information Law requests by business groups, including one of the petitioners in *Kaur*.
2. The Article 78 proceeding referred to n. 1, above, went to the Court of Appeals. ESDC's hearing on its plan for development of the area was held during the appeal process. The fact that the public record was closed by ESDC while it continued to withhold certain documents pending a final appellate determination became an issue in the *Kaur* litigation. One justice of the Appellate Division concluded that this constituted a procedural due process violation, but the Court of Appeals disagreed.

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