

NEW YORK COURT OF APPEALS ROUNDUP

DECISIONS ON WIRETAP AND LEASE RENEWAL EXPLORE IMPACT OF LATE NOTICE

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Does late notice matter? The Court of Appeals recently addressed this question in the context of a prosecutor's failure to notify a defendant of an eavesdropping warrant no more than 90 days after the warrant's termination, as required by the Criminal Procedure Law. It ruled that unless the defendant can show prejudice due to late notice, the wiretap evidence need not be suppressed.

The court also recently addressed this question in considering equitable relief to an out-of-possession commercial tenant that fails to strictly comply with the renewal terms of a lease through inadvertence or negligence. It held that because a refusal to grant equitable relief to the plaintiff tenant/sublessor would not cause it to experience a forfeiture the failure to give notice properly would not be excused, even though the subtenant in possession had made capital improvements to the premises and would experience a forfeiture as a result of the sublessor's error. Finally, the court disposed of a tort case on the ground that proximate cause was lacking, as a matter of law.

Notice of Wiretap

Criminal Procedure Law §700.50(3) mandates that "in no case later than" 90 days after the termination of an eavesdropping or video surveillance warrant written notice must be served upon a person named therein advising him or her of the issuance of the warrant, the period of authorized eavesdropping or surveillance, and whether communications were intercepted or observations made.

Prior to its recent decision in [People v. Rodriguez](#), the court had addressed the impact of late notice by the prosecution where the defendant learned of the existence of the warrant from another source within the prescribed period, and had held that

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suppression of the wiretap evidence was not required. In *Rodriguez*, the court was called upon to decide whether wiretap evidence should have been suppressed where the defendant neither received timely notice nor had independent knowledge of the warrant pursuant to which cell phone calls in which he participated were intercepted. The court, in an opinion by Judge Eugene Pigott Jr., concluded that CPL §700.50(3) does not require suppression of wiretap evidence where, as here, the defendant fails to make a showing of prejudice. It therefore upheld defendant's conviction for criminal sale of a controlled substance and conspiracy.

The court explained the two purposes of the statutory notice requirement: "to publicize wiretaps to the community at large and to those subjected to them and to assure defendants are able to challenge the legality of eavesdropping warrants in a timely manner." With respect to the latter, the record established that defendant learned of the warrant during his arraignment approximately four months after the warrant's expiration, and there was no showing that the delay affected defendant's ability to challenge the warrant.

The majority opinion pointed to Criminal Procedure Law §700.70, which requires the prosecution to provide to a defendant within 15 days of arraignment a copy of the warrant and accompanying application and, unlike §700.50(3), explicitly provides that failure to do so requires suppression of the intercepted communications and any evidence derived therefrom. In balancing the rights of defendants against the needs of law enforcement, the court concluded that suppression is not called for where the prosecution complies with §700.70, so that the defendant has notice of the warrant within 15 days of his arraignment and the defendant cannot show prejudice as a result of the prosecution's failure to comply with §700.50(3).

Judge Carmen Beauchamp Ciparick, joined by Chief Judge Jonathan Lippman, dissented. Ciparick noted that §700.50 is part of a larger statutory scheme designed to protect Fourth Amendment rights, and characterized mandatory suppression as "perhaps the only truly effective means of fostering compliance" with §700.50(3). The dissenting opinion further observed that making prejudice a condition of suppression does not address the additional purpose of the 90-day notice requirement, namely, as noted above, to publicize wiretaps to the community at large.

Commercial Subtenant

In [*Baygold Associates v. Congregation Yetev Lev of Monsey*](#), the court applied to a commercial subtenant its 35-year old precedent in [*J.N.A. Realty v. Cross Bay Chelsea*](#), 42 N.Y.2d 392 (1977), a case that involved equitable relief to a commercial tenant that mistakenly failed to comply with a lease agreement's provisions for renewal.

In *J.N.A. Realty*, the court adopted the rule that "equity will intervene to relieve a commercial tenant's failure to timely exercise an option to renew a lease where (1) such failure was the result of 'inadvertence,' 'negligence' or 'honest mistake'; (2) the non-renewal would result in a 'forfeiture' by the tenant; and (3) the landlord would not be prejudiced by the tenant's failure to send, or its delay in sending, the renewal notice." In a 4-2 decision (Judge Theodore Jones took no part), the court in *Baygold* held that the rule did not protect an out-of-possession tenant that had not made improvements to the property of a "substantial character" which would be forfeited in the event the landlord declined to renew the lease and that instead stood only to lose a stream of income from its sublease of the property.

In 1976, Baygold entered into a long-term lease for premises on which it operated a nursing home. The initial term of the lease was 10 years, renewable for up to four additional 10-year terms upon written notice to the owner, Monsey Park Hotel (MPH), by certified mail no later than 270 days prior to expiration of a term. Baygold subleased the premises to an affiliate from 1976 through 1985, during which period the affiliate made approximately \$1 million in capital improvements.

The premises were then further subleased to Israel Orzel, who paid the rent and taxes on the property, in addition to \$200,000 per year initially (later raised to \$240,000) to Baygold. Orzel operated a nursing home on the premises for more than two decades, during which time he spent hundreds of thousands of dollars on capital improvements. Baygold asserted that, due to Orzel's improvements and in anticipation of exercising its option to renew the lease, it had not raised Orzel's rent.

In 2005, Baygold directed its lawyer to renew the lease for two additional 10-year terms. The Supreme Court held that Baygold had failed to establish during the bench trial that it had provided notice via certified mail in compliance with the lease's renewal provision. In 2007, the premises were sold and Baygold was given notice of termination.

The court, in an opinion by Judge Eugene Pigott, assumed that Baygold's failure to comply with the lease's renewal provisions was excusable, meeting the first prong of the *J.N.A. Realty* test. Its holding turned upon the second prong of the test: whether strict enforcement of the renewal notice provision would result in forfeiture, thus making equitable relief appropriate (as long as the owner was not prejudiced by the failure to comply).

The majority considered only whether Baygold, as opposed to Orzel, would suffer a forfeiture. It ruled that equitable relief was not appropriate under the circumstances. Baygold had not made any improvements to the premises since its affiliate subleased them to Orzel in 1985. Improvements made by a tenant in anticipation of renewal are relevant for the *J.N.A. Realty* analysis, but the Baygold improvements were

simply too attenuated from the events of 2005 to constitute a forfeiture. In essence, the court observed, Baygold was seeking to protect its economic interest in the Orzel sub-lease, not its investment in the premises or the good will of a business.

The dissenting opinion by Judge Robert Smith, in which Judge Victoria Graffeo joined, saw no reason to make a distinction between a tenant-in-possession that made improvements and a sub-tenant in possession such as Orzel that made improvements of which the owner would get the benefit and that would therefore suffer a forfeiture through the inadvertence of its sublessor.

No Proximate Cause

The Court of Appeals recently demonstrated again its willingness to review the proximate cause element of a tort claim and dismiss the claim if it finds the alleged conduct is too attenuated from the injury. In [*Williams v. New York*](#), the court held that defendant's negligent acts and plaintiff's injuries were so attenuated temporally that any causation was not proximate, as a matter of law.

Plaintiff was waiting to cross a street when a man, Tony Joseph, threw a bottle at her. Plaintiff's injuries from this unprovoked attack required two surgeries. Joseph was convicted of first-degree assault. How, then, did New York State become the defendant in the suit that followed?

Nearly two years before the attack, Joseph had been a voluntary patient at Manhattan Psychiatric Center (MPC), a non-secure civil facility on Ward's Island. Joseph managed to slip away from an aide who was escorting him to a therapy session. If the facility had classified Joseph as "escaped," it would have been required to call the police for assistance in locating him. The facility instead classified him as "left without consent," however, a classification for persons who meet certain criteria, including that they are not considered dangerous. As a result of the classification, only MPC staff members conducted the search for Joseph. They were unsuccessful.

In asserting a claim for negligent supervision, plaintiff contended that the assault would not have occurred had MPC not allowed Joseph to slip away and then classified him as "left without consent," despite his long history of violence. The Court of Claims conducted a non-jury trial, after which it dismissed the suit, finding a lack of requisite nexus between MPC's actions and the assault. That decision was overturned by a divided panel of the Appellate Division, First Department, however.

The memorandum opinion of the Court of Appeals unanimously reversing the Appellate Division found that the connection between MPC staff's conduct and the assault was "too attenuated and speculative to support liability." The decision pointed out that Joseph had been a voluntary patient. As a result, even if the MPC staff had

located him or called the police to do so, there was no reason to suppose that Joseph would have remained a patient for the following two years. Moreover, for an injury to be attributed to negligent conduct, the lapse of time between the two must be "reasonable." The court noted that the longer the gap in time, the greater the chance that other factors may have contributed to the injuries. In this case, any number of circumstances could have triggered deterioration in Joseph's mental condition. Even if MPC's supervision had been negligent, it was not a proximate cause of plaintiff's injuries, as a matter of law.

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