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EASTERN DISTRICT ROUNDUP

Sentence Reviewed, Injunction Denied, 'Frustration of Purpose' Claim Sustained

This column reports on several significant representative decisions handed down recently in the U.S. District Court for the Eastern District of New York. Judge Frederic Block issued a memorandum explaining his intention to reduce an overly harsh sentence required as a mandatory minimum in 2011. Judge Brian M. Cogan declined to preliminarily enjoin the enforcement of City Executive Orders requiring certain indoor venues to prohibit unvaccinated people from remaining on the premises. And Judge Rachel P. Kovner dealt with a bank's claims seeking to avoid contractual obligations to an airline in light of disruptions caused by COVID-19.

Compassionate Release: 'Stacking' of Convictions

In *United States v. Sessoms*, 04 CR 706 (EDNY, Oct. 6, 2021), Judge Block intimated, in an "indicative ruling", F.R. Crim P. 37(a)(3), that extraordinary and compelling circumstances, including changes in the law after a Draconian sentence had to be imposed in 2011, would justify compassionate release.

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Defendant is serving a sentence of 35 years, most of which resulted from the prosecutorial practice of "stacking" convictions under 18 U.S.C. §924(c). Today he would face a mandatory minimum of 17 years. He now moves for compassionate release pursuant to 18 U.S.C. §3582(c)(1)(A)(i). Defendant has appealed Block's denial of his §2255 motion asserting ineffective assistance of trial counsel. Pending appeal, the Second Circuit has jurisdiction over the judgment of conviction and sentence. Accordingly, Block entered this memorandum as an "indicative ruling". Defense counsel has stated that he would consider withdrawing the appeal upon a granting of compassionate release.

In 2005 defendant was charged with racketeering, kidnapping, attempted robbery, drug distribution, and one count under §924(c) of using a firearm in connection with the kidnapping/attempted robbery. These crimes arose out of his membership in a drug gang. He declined a plea offer requiring testimony against his co-defendants. The government then superseded the indictment to add another firearms charge. He was convicted on all counts after a jury trial. Judge David G. Trager, stating that the 35-year minimum was inappropriate, adjourned sentencing to allow for possible mitigating legislation. After Judge Trager died, the case was reassigned to Judge Block, who sentenced defendant to the mandatory minimum.

At the time of sentencing, §924(c) mandated a consecutive sentence of 25 years "[i]n the case of a second or subsequent conviction under this subsection." The Supreme Court had held that the mandate applied to multiple convictions in the same proceeding. *Deal v. United States*, 508 U.S. 129 (1993). Prosecutorial charging discretion could therefore lead to "stacking" and Draconian sentences. In 2018 the First Step Act amended §924(c)(1)(c)(i) to "clarify" that the 25-year penalty applies only to violations that occur after a prior conviction is final. But the change was not retroactive. Congress also amended the compassionate release statute to allow a district court to reduce a term of imprisonment if, after considering the usual §3553(a)

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factors, it finds "extraordinary and compelling circumstances" for a reduction. Previously, only the Director of the Bureau of Prisons could ask for such a reduction. Now a defendant may seek relief.

Defendant here had to show more than the abolition of "stacking" to meet his burden. The "new regime" is a "stacking-plus dynamic." Slip op. 5. Defendant presented several "plus" factors. "Foremost" is Block's own view at sentencing that 35 years was too severe.

Second, defendant's efforts towards rehabilitation, as to both work performance and course completion, have been "extraordinary".

Finally, defendant clearly incurred a "trial penalty" for not pleading. "As was so often the case when the possibility of stacking was on the table, the government added the second §924(c) charge shortly after [defendant] refused to cooperate." Slip op. 7. When the government offered a plea without a second §924(c) charge during jury selection, it was a global offer that defendant could not accept because a co-defendant refused. Other members of the gang who pleaded guilty without cooperation generally received sentences of 10 to 12 years.

These extraordinary and compelling circumstances warrant a reduction. Block reserved final decision until after a full resentencing proceeding, while noting that the government's last plea offer was for 17 years, the current mandatory minimum—and a number that would seem to "satisfy the §3553(a) factors." The court therefore "would grant" the "motion for compassionate release were the Second Circuit to remand for that purpose." Slip op. 8-9.

Challenge to Emergency Executive Orders

In *Dixon v. De Blasio*, 21 CV 5090 (EDNY, Oct. 10, 2021), Judge Cogan denied plaintiffs' motion for a preliminary injunction barring enforcement of three New York City Emergency Executive Orders (EEO), which require "covered entities" to "prevent individuals who have not received a COVID-19 vaccine from remaining in certain indoor facilities for prolonged periods of time."

The three EEOs prohibit "covered entities" from permitting a person without proof of vaccination and identification to enter Indoor Entertainment and Recreational Settings, Indoor Food Services and Indoor Gyms and Fitness Settings. There are three exceptions: (1) individuals who enter covered premises for a quick and limited purpose such as using the bathroom or picking up an order; (2) nonresident performing artists and nonresident individuals accompanying them may enter covered premises to perform; and (3) nonresident sports teams and nonresident individuals accompanying them may enter covered premises to engage in athletic competitions. Houses of worship and private residential or office buildings limited to the use of residents, owners or tenants are not "covered premises."

Block reserved final decision until after a full resentencing proceeding, while noting that the government's last plea offer was for 17 years, the current mandatory minimum—and a number that would seem to "satisfy the §3553(a) factors."

Plaintiffs—individuals, businesses and a business association—challenged the EEOs on various constitutional grounds. By alleging that several of their constitutional rights were violated, plaintiffs showed irreparable injury. Thus, the court's analysis focused on the likelihood of success on the merits.

Plaintiffs based their equal protection claim on the argument that "because of the lower vaccination rates among African American New York residents, the EEOs will disproportionally prevent this class of New Yorkers … from entering 'covered entities,'" requiring review of the EEOs under the strict scrutiny standard, rather than looking at whether the EEOs are related to a legitimate government interest. See slip op. 7-8. Cogan saw no need to apply the stricter standard. The EEOs are facially neutral. Indeed, the Mayor has made an effort to ensure that the African American and Hispanic communities have access to the vaccine. The EEOs are rationally related to the City's reasonable public health objectives—"suppressing the number of active and severe COVID cases by limiting unvaccinated individuals' ability to spread or contract the disease." Slip op. 12.

Plaintiffs' freedom of religion claim failed because the EEOs were not directed against a specific religious practice and there was no evidence of animus. The EEOs do not mandate vaccination. They simply place reasonable restrictions on those who are not vaccinated. Any individual of any religion can have the restrictions lifted by obtaining a vaccine.

Similarly, there is no violation of the freedom of bodily health and integrity, because the EEOs do not force anyone to get vaccinated. Nor is there a violation of plaintiffs' freedom of association. The EEOs do not limit a person's ability to associate with vaccinated or unvaccinated individuals.

To the extent plaintiffs raised issues concerning their right to pursue a

chosen occupation, that right is subject to reasonable government regulation. Here, there is no complete prohibition. The EEOs simply make vaccination a condition for certain occupations and businesses where the risk of contracting and transmitting COVID-19 is higher. There is also no constitutional violation in prohibiting unvaccinated individuals from taking their unvaccinated children into "covered entities." Slip op. 18-20.

Plaintiffs' other claims fared no better. Slip op. 20-26.

Finally, the balance of equities and the public interest both favored denying the preliminary injunction. The vaccines provide protection against COVID-19 infections, and the EEOs address the risks presented by the unvaccinated population without creating a vaccine mandate.

'Frustration of Purpose' Claim

In *Banco Santander (Brasil) S.A. v. American Airlines*, 21 CV 3098 (EDNY, Oct. 12, 2021), Judge Kovner granted in part and denied in part an airline's motion to dismiss claims by a commercial partner seeking to avoid contractual obligations in the wake of the COVID-19 pandemic.

In 2016 plaintiff Banco Santander, a Brazilian bank, entered into a 10-year agreement with American Airlines. Plaintiff would offer its customers a "co-branded" credit card that included participation in the airline's AAdvantage Program. The contract obliged plaintiff to purchase a minimum number of reward miles every year at set prices, no matter how many miles its cardholders might earn.

Plaintiff asserted two claims seeking declaratory relief from its contractual obligations. Both were premised on allegations that, when the COVID-19 pandemic hit, flights between Brazil and the United States were suspended and airline travel between those countries and elsewhere was greatly reduced. That, together with other COVID-19-related disruptions, combined to render the miles plaintiff was obliged to purchase practically worthless. The first claim, relying on plaintiff's right to terminate under the contract's "force majeure" clause, was dismissed. But Kovner sustained the second, which relied on the common law doctrine of "frustration of purpose."

The complaint's allegation that defendant had suspended flights between the United States and Brazil for more than the 90-day period allowing cancelation under the force majeure clause failed to state a claim.

The first claim, relying on plaintiff's right to terminate under the contract's "force majeure" clause, was dismissed. But Kovner sustained the second, which relied on the common law doctrine of "frustration of purpose."

The right to terminate under that clause applies only if American Airlines "delays performance or fails to perform" for more than 90 days. Plaintiff could not show such delay or failure, because the contract did not require defendant to continue flights between Brazil and the United States. Plaintiff's argument that such an obligation is implicit failed because "[t]he contract flatly states that the airline 'shall not be deemed to have made any representation, warranty or covenant or to have assumed any obligation … to the Bank under this Agreement with respect to flight activity, including any suspension, reduction or termination of flights by an AA Carrier.'" Slip op. 8.

The complaint stated a claim for frustration of purpose, which allows a party to avoid a contractual obligation when a "'wholly unforeseeable event renders the contract valueless' to that party." Slip op. 9, quoting *Axginc v. Plaza Automall*, 759 F. App'x 26, 29 (2d Cir. 2018) (summary order), quoting *United States v. Gen. Douglas MacArthur Senior Vill.*, 508 F.2d 377, 381 (2d Cir. 1974). Defendant argued that the parties' contractual disclaimer of flight obligations precludes plaintiff from establishing that the disruptions of COVID-19 were unforeseeable. But this issue could not be resolved at the pleading stage. Plaintiff alleged that "a confluence of factors stemming from the COVID-19 pandemic"—not just the suspension of flights—"rendered the contract valueless". Slip op. 10. Therefore, as Kovner noted, "the terms of the agreement do 'not resolve the parties' factual dispute regarding the foreseeability of the Covid pandemic at this early stage of the litigation to warrant dismissal [of] [p]laintiff's frustration of purpose cause of action as a matter of law.'" Slip op. 11, quoting *1877 Webster Ave. v. Tremont Ctr.*, 148 N.Y.S.3d 332, 338 (Sup. Ct., Bronx Co. 2021).