People v Lupo
2017 NY Slip Op 32538(U)
November 29, 2017
Criminal Court of the City of New York, New York County
Docket Number: 2017NY001963
Judge: Lyle E. Frank

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART E

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

MAUREEN LUPO,
Defendant.

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DECISION AND ORDER

Docket Number 2017NY001963

For the People: Matthew Thiman, Assistant District Attorney
New York County District Attorney's Office

For the Defendant: Andrea Risoli, Attorney for the Defendant
New York, NY

LYLE E. FRANK, J.:

The Defendant, Maureen Lupo, is charged with two counts of Assault in the Third Degree (Penal Law §§ 120.00 [1], [2]), one count of attempted Assault in the Third Degree (Penal Law §§ 110, 120.00 [1]), and Harassment in the Second Degree (Penal Law § 240.2 6[1]). The Defendant has moved pursuant to Criminal Procedure Law ("CPL") § 30.30 to dismiss the charges for the violation of her statutory right to a speedy trial. Specifically, the Defendant argues that the People have denied her right to a speedy trial by failing to be ready for trial within 90 days of the commencement of this case. **For the following reasons, the court concludes that 91 chargeable days elapsed before the People converted the hearsay charges in the Complaint and answered "ready" for trial. Defendant's motion to dismiss is therefore GRANTED.** [1]

When the top count charged is a Class A misdemeanor punishable by a maximum imprisonment term of one-year, the People are required to be ready for trial within ninety days of

[1] In deciding this motion, the court has reviewed the Defendant's motion to dismiss, the People's opposition, and the court's file for this case.

the commencement of the action, minus any excludable delays (CPL 30.30 [1] [b]; *see also* Penal Law § 70.15 [1] [a], 120.00). "Ready for trial" requires two necessary elements. First, the People must communicate their readiness for trial, either in open court or by filing a written notice of readiness with the court and serving it upon the defendant's attorney (*People v Kendzia*, 64 NY2d 331, 337 [1985]). Second, the People must, in fact, be ready to proceed at the time of the declaration of readiness (*id.* [noting that the "[t]he statute contemplates an indication of present readiness"). If the People are not ready for trial within the relevant statutory time period, the prosecution will be dismissed unless the People can demonstrate that specific adjournments should be excluded (*People v Brown*, 28 NY3d 392, 403 [2016]).

The Defendant was arraigned in Criminal Court on the instant charges on February 6, 2017. At arraignment, the court released the Defendant on her own recognizance. The court also adjourned the case to March 28, 2017 for the People to serve and file the Supporting Deposition of the Complaining Witness, which was necessary to convert the hearsay factual allegations in the Complaint.

When the parties returned to court on March 28, 2017, Defense Counsel submitted an affirmation that stated that she was engaged in another matter and would not be able to appear on March 28. The Defendant, however, was present. The court adjourned the case to May 9, 2017, as requested by Defense Counsel, for Defense Counsel to appear. The People also filed a motion to consolidate Defendant Lupo's case with the case of a separately charged co-Defendant. The People did not file or serve the Supporting Deposition from the Complaining Witness on March 28, 2017.

On May 8, 2017, the People filed and served the Supporting Deposition of the Complaining Witness, and off-calendar Certificate of Readiness, and a Motion to Consolidate

with the court and on Defense Counsel. When the parties returned to court on May 9, 2017, the court adjourned the case for the remainder of the briefing on the People's Motion to Consolidate, as well as for the Defendant to file an Omnibus motion.

The Defendant's motion to dismiss this case pursuant to CPL 30.30 is granted. As discussed above, the Defendant was arraigned on February 6, 2017. The Supporting Deposition and Certificate of Readiness were not served until May 8, 2017 – 91 days after arraignment.[2] This exceeds the 90-days within which the People were required to be ready for trial.

It does not appear to be disputed that the People were required to convert the hearsay allegations in the Complaint. Absent an express waiver, the Defendant has the right to be brought to trial on an Information (*see* CPL 100.10 [1], [4]; 170.65 [1]; *see also People v Alejandro*, 70 NY2d 133, 136 [1987] ["an information which fails to contain nonhearsay allegations establishing "if true, every element of the offense charged and the defendant's commission thereof" (CPL 100.40[1][c]) is fatally defective."]; *see also People v Woods*, 21 Misc 3d 1105(A), *1 n. 1 [Crim Ct NY County 2008] ["Since a misdemeanor complaint, which may serve as a basis for the commencement of a criminal action, may not—absent a waiver (see CPL 170.65[3])—serve as a basis for prosecution of a misdemeanor charge (see CPL 100.10[4]), the People may not properly answer ready until the complaint has been converted to an information (see CPL 100.10[1]; 170.65[1])"]).

The People therefore could not answer "ready" for trial until they had successfully converted the hearsay factual allegations in the Complaint – here, the facts from the Complaining

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[2] Although Defense Counsel states that the off-calendar Certificate of Readiness was filed on May 6, the court notes that the Affirmation of Service as well as the court's own date stamp on the Certificate of Readiness were both May 8, 2017.

Witness – by filing and serving a Supporting Deposition. (*See People v Colon*, 59 NY2d 921 [1983].)

Neither Defense Counsel's absence from court on March 28, 2017, nor the People's filing of a Motion to Consolidate, obviated the People's need to convert the hearsay allegations by filing a Supporting Deposition. The People argue that the adjournment from March 28 to May 9, for Defense Counsel to appear, rendered this period excludable from 30.30 calculations, even in the pre-conversion context. The court disagrees. While delays for motion practice are usually excludable (*see* CPL 30.30 [4] [a]), there are exceptions to this rule (*see People v Schneck*, 20 Misc 3d 1146(A) [Crim Ct NY County 2008]). The court finds the delay from the appearance on March 28, 2017 to the filing of the Supporting Deposition and Certificate of Readiness to be properly charged against the People. It would simply be illogical to allow the People to avoid properly converting a Complaint to an Information within the time required by the statute by filing a motion – which is what the court would be ruling if it held the time between March 28 and May 8 to be excludable.

The fact that Defense Counsel was not present on March 28, 2017 also does not excuse the People from properly converting the Complaint to an Information. Nothing preventing the People from filing and serving (via mail) the Supporting Deposition and Certificate of Readiness on Defense Counsel at any time between the appearance on March 28, 2017 and May 7, 2017 – 90 days from the Defendant's arraignment. The People, however, chose to file and serve these documents on May 8, 2017, which was 91 days after the Defendant's arraignment.

As the court finds 91 days to be chargeable, the court does not reach the Defendant's remaining contentions regarding chargeability.

Defendant's motion to dismiss pursuant to CPL 30.30 is according GRANTED.

The foregoing constitutes the opinion, decision, and order of the court.

Dated: November 29, 2017
New York, New York

ENTER:

Lyle E. Frank, J.C.C.