State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711 or gspencer@nycourts.gov.

To be argued Tuesday, May 2, 2017

No. 62 Wilson v Dantas

Robert E. Wilson III was working in Citibank's private equity group in Manhattan in 1997 when he devised a plan to permit the bank to invest in Brazilian companies that were being privatized. Citibank reassigned him to Brazil, and the bank, Wilson and a Brazilian citizen, Daniel Valente Dantas, formed a Cayman Islands investment fund named Opportunity Equity Partners, L.P. to make the investments in conjunction with other entities. One of the co-investors, a British Virgin Islands company named Opportunity Invest II, Inc., was controlled by Dantas. The bank, Wilson and Dantas also formed Opportunity Equity Partners, Ltd. (OEP) -- headed by Dantas -- to manage the co-investment entities. To implement the plan, Citibank's lawyers in New York drafted an operating agreement, limited partnership agreement, and shareholder agreement, all of which were executed in New York in 1997. Wilson, who owned 1 percent of OEP, alleges he was to receive 5 percent of OEP's profits under the shareholder agreement and an oral agreement with Dantas. Citibank subsequently sued Dantas and the Opportunity entities for breach of contract, which resulted in a confidential settlement in 2008.

Wilson brought this action against Dantas and the Opportunity entities, among others, alleging that his share of OEP's profits was distributed to others under the settlement, despite assurances that he would be paid. Among other claims, he alleged the defendants were in breach of contract and their fiduciary duty for failing to pay his five percent share of the profits or disclose the terms of the settlement agreement. The defendants moved to dismiss for lack of personal jurisdiction, forum non conveniens, and failure to state a claim. Supreme Court dismissed the suit for lack of personal jurisdiction.

The Appellate Division, First Department modified the order on a 3-1 vote and reinstated six causes of action, finding it had long-arm jurisdiction and rejecting the defendants' argument that New York was not a proper forum. Regarding forum non conveniens, it said the case "involves only one foreign jurisdiction's law (that of the Cayman Islands)," thus diminishing the burden on New York courts. While the parties "are nonresidents of New York, the ... investment program was designed and the related contracts negotiated and signed in New York, several of the entities involved are located here, and plaintiff argues that many of the witnesses and documents ... are here." It said there is "no undue hardship to defendants, who entered New York to transact business and continued to have contacts with New York entities during the performance of the contracts," while the lack of a right to a jury trial in Brazil or the Cayman Islands would cause a potential hardship for Wilson.

The dissenter argued New York lacks jurisdiction and, "even more compelling," provides an inconvenient forum. "Brazil, the place of residence of plaintiff and Dantas, where the underlying transactions took place," offers a better forum, he said. "[N]o party to this action is a New York resident or entity," and the shareholder agreement requires the application of Cayman Islands law, he said. Wilson "negotiated and executed" the agreement, and "[c]ontractual choice of law provisions are enforceable."

For appellants Dantas et al: Philip C. Korologos, Manhattan (212) 446-2300
For respondent Wilson: Terrance G. Reed, Alexandria, Virginia (703) 299-5000

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To be argued Tuesday, May 2, 2017

No. 63 D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro

D&R Global Selections, S.L., a Spanish wine broker, brought this breach of contract action against Bodega Olegario Falcon Pineiro, a well-known Spanish vineyard, to recover commissions allegedly owed it for arranging the import of defendant's wine into New York. Neither company is authorized to do business in New York or has offices, employees or bank accounts in the state. In 2005, they entered into an oral agreement in Spain under which plaintiff was to find an American importer for defendant's wine in exchange for a commission. In May 2005, plaintiff introduced defendant to Kobrand Corp., a New York wine importer, and defendant began shipping wine to Kobrand later that year. Defendant made all of its commission payments to plaintiff in Spain with euros. Plaintiff alleges that defendant's representatives attended events in New York in 2005 and 2006 to promote its wine. Defendant entered into an exclusive distribution agreement with Kobrand and, in January 2007, it stopped paying commissions, maintaining it was required to make payments to plaintiff only for one year. Plaintiff, contending it was entitled to commissions for as long as defendant sold its wine to Kobrand, filed this suit against defendant in New York.

Supreme Court, after defendant declined to appear, issued a default judgment against it for $133,570. The court denied defendant's motion to vacate the judgment and dismiss the suit for lack of personal and subject matter jurisdiction. The Appellate Division, First Department vacated the default judgment, but denied the motion to dismiss, saying the defendant "may" be able to establish personal jurisdiction under CPLR 302(a)(1). The long-arm statute confers personal jurisdiction over a non-domiciliary who "transacts any business within the state" for claims "arising from" those transactions.

After discovery and reargument, Supreme Court denied defendant's motion for summary judgment dismissing the suit, finding plaintiff might be able to establish subject matter jurisdiction under Business Corporation Law § 1314(b)(4). The statute permits a foreign corporation to maintain an action against another foreign corporation that would be subject to the personal jurisdiction of New York courts under CPLR 302. "Defendant has admitted to be doing business in the state...," satisfying the first prong of CPLR 302, but it said there were "issues of fact ... as to whether this court has subject matter jurisdiction over this claim."

The Appellate Division reversed and dismissed the suit, saying subject matter jurisdiction did not exist under Business Corporation Law § 1314(b)(4) because the nexus requirement for obtaining personal jurisdiction under CPLR 302 was not met. "We find that defendant's visits to New York to promote its wine constitute the transaction of business here...," it said. "However, there is no substantial nexus between plaintiff's claim for unpaid commissions in connection with the sales of that wine, pursuant to an agreement made and performed wholly in Spain, and those promotional activities...."

For appellant D&R: Robert M. Zara, Manhattan (212) 619-4500
For respondent Bodega: John P. Gleason, Manhattan (212) 986-1544

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To be argued Tuesday, May 2, 2017

No. 64 Town of Amherst v Granite State Insurance Company, Inc.

The Town of Amherst was insured under an excess liability policy issued by Granite State Insurance Company when, in 2002, a workman employed by a roofing contractor fell while working on a Town-owned building. The worker won a $23.4 million personal injury judgment against the Town. Granite State contributed its policy limit of $10 million and the Town paid the rest, then they pursued an indemnification claim against the roofing contractor. The contractor's insurer ultimately settled the claim for $31 million including interest. The Town and Granite State agreed on the division of the settlement proceeds except for the postjudgment interest, with both claiming entitlement to $3.13 million in interest under the terms of the insurance policy. The policy contained an arbitration clause which said, "In the event of a disagreement as to the interpretation of this Policy, the disagreement shall be submitted to binding arbitration ... in accordance with the Commercial Arbitration Rules of the American Arbitration Association." In 2013, the Town and Granite State executed a handwritten agreement in which they "agree[d] to litigate the issue of the ownership of the interest." The Town then brought this action for a declaration that it was entitled to the $3.13 million. Granite State moved to compel arbitration, arguing the 2013 agreement did not waive or modify the policy's arbitration clause. It also argued that the effect of the 2013 agreement on the arbitration clause was a threshold matter that must be decided in arbitration, not the courts.

Supreme Court denied Granite State's motion to compel arbitration. While "the general rule is that termination of the substantive terms of an agreement is a question for the arbitrator," it said, the 2013 agreement between the parties here "is brief and pertains solely to the manner in which the Dispute shall be resolved, thus implicating the Policy's arbitration clause. Accordingly, whether the ... Agreement effects a waiver or termination of the Policy's arbitration provision shall be determined by this Court, and not the arbitrator." On the merits, it found Granite State waived its right to arbitrate the dispute. The 2013 agreement "plainly states that the parties agree 'to litigate the [Dispute],' and the Court rejects Granite's contention that the term 'litigate' encompasses the concept of 'arbitration.'"

The Appellate Division, Fourth Department modified by granting Granite State's motion to compel arbitration, ruling an arbitrator must determine the effect of the 2013 agreement. "'Once the parties to a broad arbitration clause have made a valid choice of forum, as here, all questions with respect to the validity and effect of subsequent documents purporting to work a modification or termination of the substantive provisions of their original agreement are to be resolved by the arbitrator'...," it said. "This is not a situation in which the parties engaged in litigation to such an extent that they '"manifested a preference 'clearly inconsistent with [a] later claim that the parties were obligated to settle their differences by arbitration'"'.... Nor is this a situation in which the entire contract containing the arbitration provision has been cancelled or terminated, such that [the arbitration provision] is no longer binding upon the parties."

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For respondent Granite State: Marc S. Voses, Manhattan (212) 485-9600