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 Wednesday, October 18, 2017

No. 120 Matter of Mestecky v City of New York

In 2011 and 2012, the New York City Department of Buildings (DOB) issued a series of notices of violation to Frank Mestecky for undertaking construction work without permits at a rental property he owns in New Hyde Park, Queens. According to the affidavits of service, a DOB inspector in each case made one attempt to personally serve the notice on Mestecky by knocking on the door and ringing the bell, then posted the notice on the door and later mailed a copy to him at the New Hyde Park address. In three cases, copies were also mailed to his residence in Bayside, Queens. DOB, as well as the Fire Department and Department of Sanitation, are authorized to use the "affix and mail" method of service for notices of violation under City Charter § 1049-a(d)(2)(b), but only if "a reasonable attempt has been made to deliver such notice to a person in such premises upon whom service may be made as provided for by article three of the civil practice law and rules...."

An administrative law judge rejected Mestecky's claims that service was improper, and the Environmental Control Board sustained seven notices of violation against him. Regarding the four cases in which notices were not mailed to his Bayside home, the Board found that the City had only the New Hyde Park address on file at the time they were mailed. Mestecky brought this article 78 proceeding against the City to challenge the determinations.

The Appellate Division, First Department found that service was proper and dismissed the suit, saying, "We find that the inspector's one attempt at personal service satisfies the 'reasonable attempt' requirement set forth in section 1049-a(d)(2)(b). The reference to CPLR article 3 in the City Charter's affix and mail provision merely prescribes the class of individuals whom [the City] must try to personally serve, and does not import the 'due diligence' requirement of CPLR article 3.... This interpretation of the City Charter is supported by the statutory language as a whole, and by the legislative history showing a legislative intent to make service under section 1049-a(d)(2) of the City Charter less onerous than service under CPLR article 3."

Mestecky argues that "the plain language of the Charter and applicable legal precedent require service of [notices of violation] to comply with the same due process requirements established for service of process under the CPLR." He says the Second Department adopted the "due diligence" standard of CPLR article 3 for service of violation notices in First Horizon Home Loans v NYC Environmental Control Board (118 AD3d 875), and requires multiple attempts at personal service before the affix and mail method is used. He says this Court should require "more than one attempt at service..., the first being an attempt at personal service and, at a minimum, another for the purpose of 'affixing and mailing.'" He also argues that his due process rights were violated when he was not permitted to cross-examine the inspectors about their attempted service, and that the notices should have been mailed to him at his Bayside residence.

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To be argued Wednesday, October 18, 2017

No. 47 Carlson v American International Group, Inc.

After his wife was killed in a 2004 collision with a commercial van owned by MVP Delivery and Logistics, Inc. in Niagara County, Michael Carlson obtained a $7.3 million wrongful death judgment against MVP and its van driver. MVP's insurer paid its policy limit of $1.1 million, the only money Carlson has so far recovered.

DHL Express (USA), Inc. had a freight delivery contract with MVP at the time of the accident and Carlson argued MVP and its driver were insured under the "hired auto" provisions of DHL's insurance policies. He sued DHL and its insurers -- American Alternative Insurance Co. (AAIC), National Union Fire Insurance Company of Pittsburgh, and American International Group (AIG) -- to recover the unpaid portion of the judgment under Insurance Law § 3420(a)(2), which permits a prevailing plaintiff to sue a responsible insurer to satisfy a judgment if the insurer's policy was "issued or delivered in this state." The "hired auto" provisions of DHL's policies defined an insured as anyone "using with your permission a covered auto you own, hire or borrow," or similar language.

Supreme Court denied AAIC's motion to dismiss the suit, rejecting its argument that Carlson could not assert a direct claim under Insurance Law § 3420 because its policy was not issued or delivered in New York. The court said, "The law is clear that the location of the insured and the risk to be insured are the determinative factors rather than where a policy is actually delivered or issued.... Here, it is undisputed that the accident took place in New York State while the named insured was doing business within the state." In a separate decision, it rejected the insurers' claims that the MVP van was not a "hired auto" under DHL's policies. "[T]he record reflects a substantial amount of supervision and control exerted by DHL over the operations of MVP; including but not limited to, the fact that MVP's office was located inside a DHL facility; all of MVP's vehicles were garaged in DHL's facility; and DHL's managers provided daily instructions to employees of MVP," it said.

The Appellate Division, Fourth Department reversed and dismissed the suit, saying Carlson "may not recover against AAIC pursuant to section 3420(a)(2) because the policy was not 'issued or delivered in this state.' The parties and the court have improperly conflated the phrase 'issued or delivered' with 'issued for delivery,' which was used in the former version of Insurance Law § 3420(d), and therefore the definition of 'issued for delivery' is not relevant here.... The policy here was issued in New Jersey and delivered in Seattle, Washington, and then in Florida." In a separate decision, it ruled the insurers could not be sued under the "hired auto" provision because the delivery contract "does not show that DHL had sufficient control over the MVP vehicle in order for it to be deemed a 'hired' automobile. Rather, it showed that DHL hired MVP as an independent contractor to provide delivery services.... Moreover, inasmuch as DHL did not have control over the MVP vehicle, 'it cannot be said in any realistic sense that ... [DHL] could grant [MVP] permission to use it,'" the court said, quoting Dairylea Coop. v Rossal (64 NY2d 1).

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To be argued Wednesday, October 18, 2017

No. 56 Matter of Friedman v Rice *(papers sealed)*

In 1988, 18-year-old Jesse Friedman pled guilty to multiple charges that he sexually abused children taking after-school computer classes that he taught with his father, Arnold, at their home in Great Neck. His father also pled guilty and died in prison in 1995. Jesse Friedman was sentenced to 6 to 18 years in prison. He was released in 2001 and designated a level 3 sex offender. After the release in 2003 of "Capturing the Friedmans," a documentary film that raised questions about the techniques used to question child witnesses in the case, Friedman petitioned federal court for a writ of habeas corpus. The Second Circuit Court of Appeals denied the writ as untimely in 2010, but two judges criticized the investigative techniques used by the Nassau County District Attorney's Office and said the evidence "suggests a reasonable likelihood that Jesse Friedman was wrongfully convicted." They said "a further inquiry by a responsible prosecutor's office is justified despite a guilty plea entered under circumstances which clearly suggest that it was not voluntary." Later in 2010, the District Attorney assigned a review team of senior prosecutors to reinvestigate the case, assisted by an advisory panel of independent experts. In its 2013 report, the review team concluded that Friedman "was not wrongfully convicted."

In 2012, while the review was underway, Friedman made a Freedom of Information Law (FOIL) request to the District Attorney for all documents provided to the advisory panel. The District Attorney denied his request based, in part, on Public Officers Law § 87(2)(e)(iii), which exempts from FOIL disclosure records that would "identify a confidential source or disclose confidential information relating to a criminal investigation." Friedman filed this suit to challenge the determination. He also sought the entire case file and, pursuant to CPL 190.25(4), release of the grand jury minutes.

Supreme Court ordered the District Attorney to turn over "all documents, records of all kinds including the Grand Jury minutes, redacting only the names of the complaining witnesses" who asked for confidentiality. It clarified that it meant to disclose "every piece of paper that has been generated in the matter of People against Jesse Friedman."

The Appellate Division, Second Department reversed on a 3-1 vote, saying the District Attorney demonstrated that "documents containing information provided ... during the criminal investigation by witnesses who did not testify at trial were exempt from disclosure" under section 87(2)(e)(iii) of FOIL. That Friedman "pleaded guilty and forfeited his right to a trial does not warrant a different conclusion. Under this Court's jurisprudence, the statements of nontestifying witnesses are confidential, and that 'cloak of confidentiality' is removed 'once the statements have been used in open court'.... The entry of [Friedman's] plea of guilty did not remove the 'cloak of confidentiality'...." The court said Friedman "did not establish a compelling and particularized need for disclosure of the grand jury materials" under CPL 190.25 because he did not show how those records "will support his claim of actual innocence."

The dissenter argued that other Appellate Division departments, and federal courts construing FOIL's federal counterpart, "have held that an agency invoking the confidentiality exemption under FOIL must show facts and circumstances indicative of either an express or implied promise of confidentiality to the witnesses.... The unduly broad construction of [section 87(2)(e)(iii)] given by this Department is inconsistent with the Court of Appeals' holdings that reject 'blanket exemptions for particular types of documents'...." She said "circumstances suggest" that no promises of confidentiality were made to complainants in this case "since their trial testimony would have been required to prove the numerous charges" and the prosecutor gave Friedman's attorney their names as potential witnesses at trial. She said Friedman's effort to determine whether "flawed interviewing techniques were used to produce a flood of allegations" demonstrated a compelling need for release of the grand jury minutes."

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