

# *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.

To be argued Tuesday, February 7, 2012

## **No. 33 Abacus Federal Savings Bank v ADT Security Services, Inc.**

Abacus Federal Savings Bank, a federally chartered savings and loan in New York City, contracted with ADT Security Services, Inc. in 1991 to install and maintain a central station alarm system to protect the bank and its vault, including entry detectors, motion detectors, smoke detectors and secure communication channels to transmit alarms. Abacus contracted with Diebold Incorporated to provide back-up security equipment and monitoring of ADT's alarm system. Both contracts contained exculpatory clauses providing that ADT and Diebold would not be liable for losses caused by their negligence or failure to perform under the contracts, and both contracts required Abacus to insure itself against theft and other risks. The Diebold contract also contained a waiver-of-subrogation clause stating that Abacus "shall look solely to its insurer for recovery of its loss and hereby waives any and all claims for such loss against Diebold."

In March 2004, after the bank closed for the weekend, burglars broke in, cut their way into the vault with blow torches, and spent as long as 18 hours looting safe deposit boxes and a safe containing the bank's overnight cash. Alleging that the security systems were not properly installed, maintained or monitored and, as a result, neither police nor the bank were notified of the burglary, Abacus brought this action for breach of contract and gross negligence against ADT and Diebold to recover \$6 million in alleged losses.

Supreme Court denied the defendants' motion to dismiss. Regarding the breach of contract claim and the exculpatory clauses, it said, "Our courts routinely enforce contractual provisions ... which do absolve a party from acts of their own ordinary negligence; but public policy prohibits contractual [disclaimers] of liability for gross negligence.... Thus, if the defendants were grossly negligent in failing to respond to alarm signals, the exculpatory provisions of the agreements would not protect [them]." Regarding the gross negligence claim, it said, "I can't decide at this stage of the proceedings ... that as a matter of law these failures were not the result of ... gross negligence. The plaintiff is entitled to conduct some discovery to determine whether or not the failures on the part of the defendants constitute gross negligence."

The Appellate Division, First Department reversed and dismissed the complaint, ruling the exculpatory clauses were enforceable. Abacus's "allegations that these defendants provided an inadequate security system, which they also failed to inspect, amount to nothing more than claims of ordinary negligence as opposed to gross negligence," it said. While a fire alarm company can be held liable for gross failure to perform a contract, that rule is "based upon reasoning that the fire alarm company's duty, separate and apart from its contractual obligations, arose from the very nature of its services -- to protect people and property from physical harm....," it said. "By contrast, no public interest is implicated here...." It also held Diebold's waiver-of-subrogation clause "constitutes a defense to all of plaintiff's claims, including gross negligence."

Abacus argues the defendants' failure to cure problems in the alarm systems, despite prior notice of numerous failures, constitutes gross negligence and renders the exculpatory clauses unenforceable. It also contends the waiver of subrogation and self-insurance requirements in the contracts are not enforceable against allegations of gross negligence.

For appellant Abacus: George Sava, Garden City (516) 352-2999

For respondent ADT: Charles Eblen, Kansas City, Missouri (816) 474-6550

For respondent Diebold: Dennis M. Rothman, Manhattan (212) 964-6611

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## **No. 34 People ex rel. McManus v Horn**

Shaun McManus, a parolee facing a felony arson charge in the Bronx, was arrested on new misdemeanor charges in March 2009 and Supreme Court set "cash only" bail at \$20,000. McManus was unable to post bail through an insurance company due to the "cash only" requirement. McManus moved for a bail alteration, arguing that CPL 520.10(2)(b) required the court to set bail in at least two forms.

CPL 520.10(2) states, "The methods of fixing bail are as follows: (a) A court may designate the amount of the bail without designating the form or forms in which it may be posted...; (b) The court may direct that the bail be posted in any one of two or more of the forms specified in subdivision one, designated in the alternative, and may designate different amounts varying with the forms."

Supreme Court denied the motion, ruling that CPL 520.10(2)(b) authorized cash only bail. It said, "The plain language of the statute ('may direct,' not must direct) clearly envisions that while a judge has the discretion to set more than one manner in which bail may be posted, it does not mandate that a judge set two or more of the forms authorized by the statement in each and every case." The bail court said its conclusion was bolstered by the language of CPL 520.10(2)(a). "By choosing the phrase 'form or forms in which [bail] may be posted' the drafters made it eminently clear that the statute envisioned the propriety of a judge setting a form of bail, i.e., a singular form of bail (as was done here)," it said.

McManus brought this CPLR article 70 petition for a writ of habeas corpus before a different judge, contending he was being illegally detained because he was denied his right to two or more forms of bail. Supreme Court denied the writ and dismissed the petition, saying neither CPL 520.10(2)(a) or (b) precludes a court from "specifying only one form in which ... bail may be posted." The Appellate Division, First Department affirmed.

McManus argues, "The bail statute only provides two mechanisms for setting bail," neither of which permit cash only bail. "Under CPL 520.10(2)(a), the court may set an amount of bail and remain silent as to the form, allowing the defendant to post bail in any available form," he says, "or under CPL 520.10(2)(b), the court may control the manner in which the defendant posts bail by setting two or more forms ... and requiring the defendant to choose one of them. The plain language of the statute does not provide a mechanism for the court to set a single form of bail, such as 'cash only.'" He argues that the Legislature's intent in adopting the statute "was to make it easier for defendants to post bail, an intent that is inconsistent with setting a single form of bail, such as 'cash only.'"

For appellant McManus: V. Marika Meis, Bronx (718) 838-7846

For respondent: Bronx Assistant District Attorney Stanley R. Kaplan (718) 590-2000

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## **No. 35 People v James Extale**

In November 2004, two Rochester police officers were returning to their patrol cars parked on Galusha Street at night when they saw a pickup truck approaching with its headlights off. One officer flashed a light at the truck. They said the truck accelerated and swerved toward them. It struck one of the patrol cars, severely injuring Officer Nicole Cookingham. The driver, James Extale, was caught a short time later and found to have a blood-alcohol content of .20 percent. He was indicted on charges of first degree assault, second degree assault, and first degree vehicular assault, among other crimes.

At his first trial, Extale did not deny that he was driving while intoxicated, but contended there was insufficient proof of first degree assault because he did not intend to ram the patrol car. County Court dismissed the second degree assault charge, but submitted it to the jury as a lesser-included offense of first degree assault. The jury found Extale guilty of first degree assault and vehicular assault and five other charges. It did not reach the second degree assault charge.

The Appellate Division, Fourth Department found the assault verdicts were inconsistent because they require different mental states: first degree assault requires a finding of intentional conduct and vehicular assault a finding of criminal negligence. The court reversed the assault and vehicular assault convictions and ordered a new trial on those counts.

At the retrial, the prosecutor withdrew the vehicular assault charge (a nonviolent felony), and was allowed to present second degree assault as a lesser-included offense of first degree assault (both violent felonies). Extale was convicted of second degree assault and sentenced to seven years in prison.

The Appellate Division affirmed, rejecting Extale's claim that the prosecutor lacked authority to withdraw the vehicular assault charge. "The People have 'broad discretion in determining when and in what manner to prosecute a suspected offender'..., including the discretion to reduce a charge when they deem it appropriate..., " it said. "Although there is no provision in CPL article 210 authorizing the People to withdraw a count in an indictment, there is also no provision prohibiting the People from doing so. We thus conclude that, in the absence of a statutory provision limiting such authority, decisions concerning the manner in which to prosecute a defendant are within the prosecutor's 'broad discretion'...."

Extale argues no provision of the Criminal Procedure Law permits a prosecutor or court to dismiss an indicted offense where the dismissal is not in the interest of justice or part of a plea bargain. "An indictment may only be amended to cure technical deficiencies, and the court ... may do so only if those amendments do not change the theory of the prosecution presented to the grand jury," he says, contending the procedure used here usurps the authority of the grand jury and makes "the grand jury process a rubber stamp for the decisions of the ... district attorney." Where "the uncontested facts at trial justified a conviction" for vehicular assault and the first trial court denied a defense motion to dismiss it, he says, "The tactics used to circumvent an indicted charge of [vehicular assault], a crime that results in a significantly lower sentence than [the violent felony assault counts], is unjust." He also claims submission of second degree assault to the jury violated his double jeopardy rights.

For appellant Extale: Jon P. Getz, Rochester (585) 262-5130

For respondent: Monroe County Assistant District Attorney Geoffrey Kaeuper (585) 753-4674

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## **No. 37 Ryan v Kellogg Partners Institutional Services**

Daniel Ryan, a floor broker at the New York Stock Exchange, brought this breach of contract action against Kellogg Partners Institutional Services in 2005, after the brokerage terminated his employment. He testified that Kellogg's managing partner, Kevin Butler, approached him in the spring of 2003 about leaving his job at another brokerage and joining Kellogg. Ryan said Butler orally agreed that he would be paid \$350,000 for 2003, including \$175,000 paid out during the year and a non-discretionary bonus of \$175,000 to be paid at the end of the year. When Kellogg was unable to pay the bonus at the end of 2003, Ryan said he agreed to work through 2004 with the understanding that the \$175,000 bonus would be paid at the end of that year. Ryan testified that the bonus was not paid at the end of 2004 and that he was terminated in February 2005, after he refused to accept a reduced bonus of \$20,000. Butler contradicted Ryan in his testimony, denying that he ever agreed to, or even discussed, a \$175,000 non-discretionary bonus for Ryan. Butler testified that he terminated Ryan in 2005 after hearing that Ryan disparaged him and Kellogg to other brokers on the floor of the stock exchange.

The jury found Kellogg breached an oral agreement to pay Ryan a \$175,000 bonus and failed to pay wages in violation of the Labor Law. Supreme Court denied Kellogg's motions for a directed verdict and for judgment notwithstanding the verdict, finding the jury "had a rational basis for concluding that Kellogg, by Butler, promised Ryan a \$175,000 non-discretionary bonus" and then breached the promise. The court granted Ryan's motion for attorney's fees under Labor Law § 198(1-a) and, with interest on the \$175,000 judgment, awarded him \$379,956.65.

The Appellate Division, First Department affirmed in a 3-2 decision, saying, "The court correctly determined that plaintiff's breach of contract claim was not barred by the provisions of defendant's employee handbook or his employment application," which provided that Ryan's employment, compensation and benefits were at-will and could be terminated, without cause or notice, at any time. It said, "Those documents did not clearly indicate that bonuses are discretionary..., and whether the \$175,000 payment was intended to be a discretionary bonus or earned income was a factual question for determination by the jury...." It ruled that Kellogg waived its reliance on the statute of frauds by failing to plead it as an affirmative defense in its answer and that Ryan was entitled to attorney's fees under Labor Law § 198(1-a).

The dissenters argued Ryan's suit was barred by his employment application and the employee handbook. "Even assuming that the application or handbook must 'clearly indicate' that bonuses are discretionary, that requirement was easily satisfied," they said. "Although the majority is not clear on the point, it may be of the view that the word 'bonus' must appear in either the application or the handbook. If so, suffice it to say that none of the cases the majority cites so holds and that, at least in this context, it makes no sense to insist that an employer use a specific rather than a more encompassing word...."

For appellant Kellogg Partners: Kevin J. O'Connor, Manhattan (212) 382-0909  
For respondent Ryan: Thomas S. Rosenthal, Manhattan (212) 582-6651