State of New York Court of Appeals

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To be argued Wednesday, January 2, 2013

No. 1 United States Fidelity & Guaranty Company v American Re-Insurance Company

This dispute over reinsurance coverage stems from general liability policies that United States Fidelity & Guaranty Company and St. Paul Fire and Marine Insurance Company (collectively USF&G) issued to Western Asbestos Company, a distributor of asbestos products, from 1948 to 1959. Western Asbestos dissolved in 1967 and Western MacArthur Company (MacArthur) took over its business. When individuals began suing MacArthur for injuries caused by exposure to Western Asbestos products, USF&G refused to defend or indemnify MacArthur, and MacArthur sued the insurer in 1993. USF&G settled the suit in 2002 by agreeing to pay more than $975 million in satisfaction of all asbestos claims. The settlement required MacArthur to file for bankruptcy.

Beginning in 1945, USF&G had entered into a series of reinsurance treaties with American Re-Insurance Company (American Re) and the Excess Casualty Reinsurance Association (ECRA), a pool of four reinsurers. The treaties are excess-of-loss contracts that require the reinsurers to reimburse a portion of each covered loss above the amount of loss retained by USF&G. The treaty for 1956 to 1962, the focus of this case, required USF&G to retain the first $100,000 of covered loss. The retention amount increased to $500,000 and then to $1 million in later treaties. In 1981, the parties agreed to retroactively increase the retention amount to $3 million, but they now disagree about whether that amendment was meant to reach back to the 1956-62 treaty.

After settling with MacArthur, USF&G submitted reinsurance claims to American Re and ECRA that were based on the $100,000 retention amount in the 1956-62 treaty. USF&G also allocated all of the reinsurance claims to 1959, as it had allocated all of its losses on the asbestos claims to its 1959 policy with Western Asbestos. American Re and ECRA refused to pay the reinsurance claims, contending that, regardless of the terms of the settlement agreement, part of the settlement amount was payment for MacArthur's bad faith claims against USF&G for refusing to defend and indemnify it, which is not covered under the reinsurance treaty. They also argued the retention amount in the 1956-62 treaty had been increased to $3 million. This litigation ensued, and Supreme Court granted summary judgment for USF&G. The court subsequently entered a judgment against the reinsurers for $420,425,536.15.

The Appellate Division, First Department affirmed in a 4-1 decision, saying, "We find that the motion court correctly determined that the follow-the-fortunes doctrine required defendants to accept the reinsurance presentation made by USF&G herein. Accordingly, all of defendants' efforts to second guess USF&G's decisions concerning allocation of the loss ... are precluded from this court's review." If it were to reach the merits, it said, "MacArthur's prior bad faith claim has no bearing on the reinsurers' obligations because the settlement agreement that resolved the coverage action does not allocate any of the settlement funds to compensating MacArthur for USF&G's alleged bad faith." It also ruled the agreement to increase the retention amount to $3 million did not apply to the 1956-62 reinsurance treaty.

The dissenter argued, "The motion court erred when it concluded that defendants had not presented evidence to raise a triable issue of fact as to whether a portion of the settlement was attributable to ... MacArthur's bad faith claim against USF&G.... There is ample evidence, including the findings made by the bankruptcy court, and the record in the underlying coverage action brought by ... MacArthur against USF&G, to support defendants' position that part of the settlement represented bad faith damages."

For appellant American Re: Herbert M. Wachtell, Manhattan (212) 403-1000
For appellants ECRA et al: Kathleen M. Sullivan, Manhattan (212) 849-7000
For respondents USF&G et al: Mary Kay Vyskocil, Manhattan (212) 455-2000

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To be argued Wednesday, January 2, 2013

No. 2 Montas v JJC Construction Corporation

Jose Montas was injured in September 1999 when he slipped and fell while crossing Monroe Avenue, near East Tremont Avenue, in the Bronx. He said he stepped over a piece of wood and slipped on "sand and construction debris" while crossing the street with his cousin. The accident occurred about four feet from a concrete barrier and chain link fence that enclosed a City-owned work site, where JJC Construction Corp. was demolishing and rebuilding the Grand Concourse overpass and bridge over East Tremont. Montas brought this personal injury action against JJC and the City, testifying at trial that the sandy residue was generated by the cutting and removal of concrete for the roadway project. He did not preserve any of the residue, but identified the "greyish-white" substance in photographs of the accident scene. The president of JJC testified that a building about five to ten feet beyond where Montas fell was undergoing brick repointing at the time, that the light-colored residue identified by Montas was not the same as the yellow mason sand his company was using, and that the residue was old mortar chipped out during the re-pointing work by an unidentified contractor.

At the close of testimony, Supreme Court granted motions by the City and JJC to dismiss for failure to establish a prima facie case. It said the evidence presented by Montas "was much more suggestion than proof regarding the source of the sand.... [T]here is insufficient evidence of causation to put this dispute before a jury."

The Appellate Division, First Department affirmed in a 3-2 decision. It said the trial court "correctly determined that plaintiff's self-serving testimony that JJC's concrete-chopping activities were the source of the greyish-white sand in the street on which he slipped was too speculative to raise an issue of fact.... [T]he facts show that it is just as likely that the accident was caused by debris from the pointing project as by debris from the roadway project, and any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation...."

The dissenters argued that a jury "could rationally have found that the sandy debris upon which he claims to have slipped and fallen was generated by JJC's activities.... The jurors could reasonably have credited the testimony of plaintiff and his cousin, based on their direct observations, that JJC's concrete-cutting activities were the source of the sandy debris. The testimony of defendants' witnesses that a nearby brick-repointing project was the source of the sandy debris merely raised a credibility issue for the jurors, who were free to reject that testimony...."

For appellant Montas: Brian J. Isaac, Manhattan (212) 233-8100
For respondent JJC: Lauren J. Wachtler, Manhattan (212) 509-3900
For respondent City of New York: Assistant Corporation Counsel Omar Nasar (718) 590-3973

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To be argued Wednesday, January 2, 2013

No. 3 Matter of Ward v City of Long Beach

Brian Ward was a lieutenant in the City of Long Beach Fire Department in October 2003, when he allegedly injured his left knee while on duty in the firehouse. Based on the line-of-duty injury, the State Comptroller approved his application for disability retirement in November 2005. In May 2008, Ward applied to the City for supplemental disability pension benefits under General Municipal Law § 207-a(2), which would pay him the difference between his regular wages and the disability benefits paid by the state. The City Fire Commissioner denied his application in July 2008 without stating a reason. Ward appealed to the City Manager, who referred the matter to Corporation Counsel Corey E. Klein. Ward, saying his inquiries to the Corporation Counsel's office went unanswered, filed this article 78 proceeding in December 2008 to challenge the denial of his application.

The City moved to dismiss and submitted an affidavit from Edwin Eaton, the former City Manager, who said Ward's estranged wife, Beverly, came to his office in December 2007 and told Eaton and Klein that Ward was not injured at the firehouse, as he claimed, but was actually injured at his daughter's high school soccer game two days earlier and was tended by several bystanders. She said he made up the firehouse injury in order to receive enhanced benefits. Klein submitted an affidavit corroborating Eaton's account of the meeting with Beverly. Klein said he considered Beverly's statements, as well as the Comptroller's determination of disability and the underlying record, in denying Ward's appeal. He also considered his own observations of Ward playing in a beach volleyball league "every summer in recent memory." He said he informed Ward by letter that he denied his appeal "due to the causation and the permanence of your disability."

After denying the City's motion, Supreme Court granted Ward's petition and ordered the City to pay him supplemental disability pension benefits, ruling it had no rational basis to deny them. The court said, "The statements by Mrs. Ward were not made under oath.... She was not asked to submit an affidavit. There is no indication that any investigation was made by any City official to verify the contents of her statements, notwithstanding the fact that the knee injury took place in public, in the presence of a number of witnesses. There is no proof that any person in law enforcement took any action against petitioner based upon Mrs. Ward's statements." It said her statements were "wholly unverified" and were made when she was in the midst of divorce proceedings. It said Klein's observations of Ward playing volleyball were "made not by a medical professional but by a lay person, who is unable to relate what he saw to the petitioner's ability to function as a firefighter." The Appellate Division, Second Department, affirmed.

The City argues, "Beverly Ward's statements regarding the origin of her husband's injury provided a rational basis upon which to deny Brian Ward's application for benefits under General Municipal Law § 207-a(2), and, through its adoption of Brian Ward's story, the lower court erred by substituting its judgment for the City's." It says his application "was properly denied based on substantial evidence discovered by and through the City Corporation Counsel during an investigation."

For appellant Long Beach: Assistant Corporation Counsel Robert M. Agostisi (516) 431-1000
For respondent Ward: Louis D. Stober, Jr., Garden City (516) 742-6546

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To be argued Wednesday, January 2, 2013

No. 4 Matter of M.G.M. Insulation, Inc. v Gardner

The Bath Volunteer Fire Department (BVFD) is a not-for-profit fire corporation in the Village of Bath, Steuben County. It receives most of its operating revenue from a fire protection contract with the Village and, prior to 2007, it was based in a firehouse owned by the Village. In 2004, BVFD obtained a $2.5 million loan for construction of a new firehouse, which was to be repaid in annual installments of $158,658 over the next 30 years. The Village named itself the lead agency for the firehouse project under the State Environmental Quality Review Act (SEQRA), and it also agreed to increase its annual contract payments to BVFD by $150,000 to cover most of the loan cost. BVFD hired R-J Taylor General Contractors, Inc. for the firehouse project in 2006, without making provision for payment of prevailing wage rates in the area.

The State Department of Labor (DOL) determined that contractors for the firehouse project were required to pay prevailing wages under Labor Law § 220, which applies to public works contracts "to which the state or a public benefit corporation or a municipal corporation or a commission appointed pursuant to law is a party." The statute provides that the "wages to be paid ... to laborers, workmen or mechanics upon such public works, shall be not less than the prevailing rate of wages." A DOL Hearing Officer upheld the determination, finding that BVFD and other volunteer fire corporations are the "functional equivalent" of municipal corporations and are therefore covered by the prevailing wage law. Colleen Gardner, who was then Commissioner of DOL, adopted the hearing officer's report. Taylor and its subcontractors (collectively Contractors) initiated this article 78 proceeding to annul the determination.

The Appellate Division, Third Department confirmed the determination, saying there was substantial evidence "under the particular facts of this case" to support DOL's conclusion "that BVFD -- despite its incorporation as a private entity -- essentially functioned as a Village department and, therefore, could be deemed a municipal corporation within the meaning of Labor Law § 220." It cited the general legal and financial control the Village exercised over BVFD and it said, "With respect to the project at issue, the record reveals that the Village, in addition to designating itself as lead agency for purposes of SEQRA review, initially was quite involved in discussions regarding the financing and development of the project...." It also held that construction of the firehouse qualified as a public work project.

The Contractors argue, "Prevailing wage requirements apply only to those entities specified in Labor Law § 220." They say, "[F]ire corporations are no more 'public' in purpose, no more regulated and no more reliant upon public financing than are charter schools, or many other not-for-profit corporations that provide a public service.... [S]ince these entities 'do not fall within any of the four categories to which the prevailing wage law applies,' they are not subject to its terms." They argue that 'substantial evidence' is not the test of whether the Commissioner exceeded her statutory enforcement authority by extending it to 'functional equivalents' of specified entities." They also say the firehouse is not a "public work" because it was built for the use of BVFD's members, not the general public.

For appellant Contractors: Anthony J. Adams, Jr., Rochester (585) 232-6900
For respondent Gardner: Assistant Solicitor General Zainab A. Chaudhry (518) 474-3429

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To be argued Wednesday, January 2, 2013

No. 5 People v Rafael L. Belliard

Rafael L. Belliard was arrested in Rochester in December 2006, after police found cocaine and a firearm in a hidden compartment of a car in which he was a passenger. He was indicted on charges of first and third-degree criminal possession of a controlled substance and second-degree criminal possession of a weapon. Belliard went to trial, but after Supreme Court ruled the prosecutor could cross-examine him about a prior drug conviction if he took the stand, he agreed to plead guilty to the entire indictment in exchange for a sentence of 12 years in prison.

At his plea proceeding in July 2007, Belliard admitted his constructive possession of the cocaine and the gun. The court did not inform him that, as a second felony drug offender, his new sentence must run consecutively to the undischarged portion of his sentence for a prior drug conviction pursuant to Penal Law § 70.25(2-a). He had been resentenced to a 5-year term of post release supervision (PRS) about six months before his arrest in this case. On appeal, he argued that his guilty plea was not knowing, voluntary and intelligent because Supreme Court failed to advise him that consecutive sentencing was mandatory under Penal Law § 70.25(2-a). The Appellate Division, Fourth Department summarily affirmed his conviction without opinion.

Belliard argues that mandatory consecutive sentencing under Penal Law § 70.25(2-a) is a "direct consequence of his guilty plea" and the trial court's failure to inform him of it violated his constitutional right to due process. He says, "While the 'possibility' of a consecutive state prison sentence may be deemed a 'collateral' consequence of a guilty plea, the absolute 'certainty' of such a sentence surely cannot. This mandatory penalty ... is a direct, adverse consequence to a second felony offender." He says, "This punishment is direct, immediate and completely automatic. The trial court has no discretion." He argues the court failed to provide him "with critical information that was necessary for him to make a voluntary and intelligent choice among alternative courses of action and for him to be fully aware of all direct consequences of his guilty plea."

The prosecution argues that the consecutive sentencing required by section 70.25(2-a) is not a direct consequence of Belliard's plea because it did not affect his sentence in this case. "The terms of defendant's 2007 sentence remained the same, i.e., defendant received the benefit of his bargain," it says. "The fact that defendant still had to face the consequences of his PRS violation cannot be used to invalidate the 2007 plea.... Such a result would be an unjust windfall to defendant Belliard who has been repeatedly unable to abide by the law." It argues that his "overall jail time might have been enlarged by consecutive sentences, but his 2007 sentence, standing alone, was left untouched. This is the hallmark of a collateral consequence, and the Second Circuit has rejected overall prison time as a demarcation for a direct consequence."

For appellant Belliard: David R. Juergens, Rochester (585) 753-4093
For respondent: Monroe County Assistant District Attorney Leslie E. Swift (585) 753-4564