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, February 6, 2018

No. 19 Matter of Abdur-Rashid v New York City Police Department
Matter of Hashmi v New York City Police Department

In 2012, after a series of Associated Press articles revealed that the New York Police Department had been conducting covert surveillance of Muslim communities in New York and New Jersey in the wake of the Sept. 11, 2001 terror attacks, Talib Abdur-Rashid and Samir Hashmi filed separate Freedom of Information Law (FOIL) requests with the NYPD seeking any records relating to surveillance or investigation of them personally or of organizations with which they were affiliated. Abdur-Rashid was Imam at the Mosque of Islamic Brotherhood in Manhattan; Hashmi was a student at Rutgers University and an officer of its Muslim Student Association. The NYPD rejected both requests -- without saying whether any such records existed -- on the ground that the information would be shielded from disclosure under FOIL's law enforcement and public safety exemptions.

Abdur-Rashid and Hashmi sued to challenge the denials of their FOIL requests, arguing the NYPD failed "to provide specific and particularized justification" for withholding the records. The NYPD moved to dismiss both suits, arguing the courts should adopt and apply the federal Glomar doctrine, which permits agencies to deny requests under the federal Freedom of Information Act (FOIA) without confirming or denying that the records exist. The doctrine was established in Phillippi v CIA (546 F2d 1009 [D.C. Circuit 1976]), which upheld on national security grounds the denial of a journalist's request for information from the Central Intelligence Agency about the Hughes Glomar Explorer, a vessel built secretly for the CIA to try to recover a sunken Soviet nuclear-armed submarine in 1974. Federal agencies may issue a Glomar response where the fact that records do or do not exist falls within a FOIA exemption.

In Abdur-Rashid's case, Supreme Court dismissed his suit and ruled the Glomar doctrine could be invoked in response to FOIL requests under New York law. The NYPD had shown that disclosing whether the requested records existed could undermine other investigations by revealing information about its "operations, methodologies, and sources of information" and might pose a threat to the safety of undercover officers and informants, the court said. While "FOIA is not intended for state agencies," it said, the Glomar doctrine had "a rational basis in the law and its application "was in keeping with the spirit of similar appellate" rulings on FOIL.

In Hashmi's case, Supreme Court denied the motion to dismiss, saying adoption of the Glomar doctrine "would effect a profound change to a statutory scheme that has been finely calibrated by the legislature" and "would build an impregnable wall against disclosure of any information concerning the NYPD's anti-terrorism activities." It said the NYPD has in the past been able to prevent the disclosure of sensitive information "within the existing procedures that FOIL currently provides" and any decision to adopt Glomar should be left to the legislature.

The Appellate Division, First Department, adopting the Glomar doctrine, affirmed the dismissal of Abdur-Rashid's suit and dismissed Hashmi's suit. It said the "doctrine is 'consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL' ..., since it allows an agency to safeguard information that falls under a FOIL exemption." The NYPD "showed that answering petitioners' inquiries would cause harm cognizable under the law enforcement and public safety exemptions" in FOIL.... The affidavits submitted by NYPD's Chief of Intelligence establish that confirming or denying the existence of the records would reveal whether petitioners or certain locations or organizations were the targets of surveillance, and would jeopardize NYPD investigations and counterterrorism efforts."

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No. 21 People v Michael Johnson

In May 2009, a chauffeur returning to his home in Queens was approached by a masked gunman, who grabbed the key fob to his employer's BMW sedan. When the victim began to resist, the gunman shot him twice in the torso and drove away in the BMW. Three days later, NYPD detectives who were tailing Michael Johnson as a suspect in the shooting stopped him for traffic infractions and arrested him for driving without a valid license. They recovered two BMW key fobs, about $2,000 in cash, and a forged airport ID card from JFK, among other things. At the precinct, they learned that the SUV he was driving had been stolen; that one of the key fobs belonged to the BMW stolen in Queens and the other to a vehicle stolen in Suffolk County; and that much of the currency appeared to be counterfeit because the bills had the same serial number. While Johnson was being held at the precinct, Secret Service agents interviewed him about the counterfeit currency, Suffolk County police officers interviewed him about the BMW stolen in their jurisdiction, and Port Authority police officers interviewed him about the fake JFK ID card. As that was underway, an NYPD detective went to the hospital to show a photo array to the victim, who identified Johnson as the shooter. The detective returned to the precinct and Johnson, about 25 to 28 hours after his arrest, waived his Miranda rights and admitted he was involved in the robbery as a driver, but said another man was the shooter. He was arraigned about 29 to 33 hours after his arrest. Supreme Court denied his motion to suppress his statement as involuntary. Johnson was convicted of numerous crimes, including second-degree attempted murder, first-degree robbery, and possession of a forged instrument, and was sentenced to 32 1/2 years in prison.

The Appellate Division, Second Department affirmed on a 3-1 vote, finding no evidence that Johnson's statements were involuntary. It said that "the delay in arraigning the defendant was attributable to a thorough and necessary police investigation," which involved coordinating "with three other law enforcement agencies" and conducting a photo array at the hospital "when the victim became available." Although the prosecution did not offer affirmative proof that he was given food, drink, and access to a restroom while he was held at the precinct, the majority said Johnson "did not testify that he was denied any of these necessities, and his counsel did not offer any other proof of such deprivation." It said the trial court "providently exercised its discretion in denying his request for a missing witness charge as to the victim's son," who had estimated the shooter was about 5 inches taller than the descriptions given by other witnesses. "In light of the extensive and well-corroborated identification evidence in this case, the testimony of the victim's son as to the narrow issue of the defendant's height would have been immaterial." It said Johnson was not entitled to a mistrial after a cooperating witness testified that he had committed multiple uncharged crimes with Johnson, since "any prejudice to the defendant was ameliorated when the Supreme Court sustained his objection to the improper testimony, struck that portion of his testimony, and provided a curative instruction...."

The dissenter said Johnson's statements should have been suppressed as involuntary. "Where, as here, there is a delay of up to 33 hours between the time a defendant is arrested and arraigned, and where that defendant is interrogated by multiple law enforcement agencies, it is my view that the People must present evidence to demonstrate that the defendant was provided access to food, water, a bathroom, and sleep, in order to establish that any statements ... were made voluntarily." She said the trial court's "curative instruction was insufficient to ameliorate the prejudice" caused by the improper testimony about uncharged crimes; and Johnson was entitled to a missing witness charge regarding the victim's son, whose description of the shooter "went directly to a material issue.... [T]hese cumulative errors cannot be considered harmless, as the evidence of guilt was not overwhelming" in a case where "the assailant wore a mask concealing his entire face except for his nose and eyes."

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No. 20 Keyspan Gas East Corporation v Munich Reinsurance America, Inc.

Keyspan Gas East Corporation, facing millions of dollars in costs to clean up environmental contamination at the sites of now-closed manufactured gas plants owned by Keyspan's predecessor, the Long Island Lighting Company (LILCO), brought this action to recover its costs from insurance companies that issued general liability policies to LILCO. The contamination occurred gradually and continuously as hazardous wastes from the manufacturing process leached into soil and groundwater over more than a century, beginning around 1900.

Century Indemnity Company issued first-layer excess policies covering LILCO's gas plants in Rockaway Park, Queens, and Hempstead, Long Island, for a 16-year period from 1953 to 1969. The Century policies state that they provide coverage for accidents, occurrences, or property damage that occurs "during the policy period." Northern Assurance Company of America issued upper-layer excess policies, effective from 1960 to1962 and 1964 to 1966, covering a third LILCO gas plant in Bay Shore, Queens. Northern's policies follow form to the underlying excess policies issued by Century.

Supreme Court agreed with Century that liability for the long-term contamination should be allocated on a pro rata basis, which requires each insurer to bear a share of the cost in proportion to the amount of time its policy was in force and requires Keyspan to bear its share of the cost for periods when it chose not to buy insurance. However, it adopted an "availability" exception to pro rata allocation based on the Second Circuit decision in Stonewall Ins. Co. v Asbestos Claims Management Corp. (73 F3d 1178). The trial court held that, except for the period from 1971 to 1982 when the Insurance Law prohibited the sale of pollution liability insurance, liability for periods when insurance for contamination was unavailable should be allocated to Century.

The Appellate Division, First Department ruled the unavailability exception to pro rata allocation does not apply to Century's policies, which limit coverage to damage that occurs "during the policy period." Consolidated Edison Co. v Allstate Ins. Co. (98 NY2d 208) and M/O Viking Pump Inc. (27 NY3d 244) "make it abundantly clear" that, in resolving insurance disputes, "courts are required to look first at the language of the policies involved." It said the unavailability exception is "inconsistent with policy language restricting coverage to the policy period.... There are no express contract provisions requiring the insurer to cover damages outside of the policy period when insurance is otherwise unavailable in the marketplace."It said the exception would subject insurers to "risks beyond those contemplated by the parties when the policies were purchased."

Keyspan argues, "In allocating liability to the policyholder for periods when insurance was unavailable, the Appellate Division departed from two decades of New York case law applying the availability approach to pro-rata allocation, i.e., allocating only to periods when insurance was available." It urges the Court to adopt "Stonewall's availability approach," in which liability for long-term damage is allocated only "across years in which ... insurance was available. Insurers are responsible for the share of liability allocated to the periods in which they issued policies, while policyholders are responsible for periods in which they voluntarily self-insured." Keyspan also argues that, based on "anti-stacking language" in it policies, liability must be apportioned on an all sums basis, which would permit it to recover all of its clean-up costs under policies triggered in any one year and leave those insurers to seek contribution from other insurers whose policies covered the same risks.

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