State of New York Court of Appeals

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To be argued Tuesday, May 6, 2014

No. 121 Norex Petroleum Limited v Blavatnik

Norex Petroleum Limited, an oil company based in Alberta, Canada, brought an action in 2002 in U.S. District Court for the Southern District of New York against two Russian nationals living in New York, Leonard Blavatnik and Victor Vekselberg, and several foreign companies allegedly owned or controlled by them. Asserting claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), Norex alleged the defendants misappropriated its majority interest in a Siberian oil field in 2001 -- using armed militiamen and corrupt Russian court proceedings, among other illegal means -- after the fall of the Soviet Union. Norex amended its complaint in 2005 to add BP PLC as a defendant. The federal trial court granted a defense motion to dismiss the suit for lack of subject matter jurisdiction, and the U.S. Court of Appeals for the Second Circuit affirmed. In 2011, when the federal dismissal took effect, Norex brought this action in State Supreme Court in Manhattan, asserting related state law claims against the same defendants.

The defendants moved to dismiss the action as time-barred under CPLR 202, New York's borrowing statute, which requires a nonresident plaintiff to satisfy the statute of limitations of New York and of the foreign jurisdiction where the claims accrued, in this case, Alberta. Alberta law provides a two year limitations period for the claims at issue, and it does not toll the limitations period while a related action is pending in another court. Norex argued its suit was timely under 28 USC § 1367(d), which gives plaintiffs 30 days to re-file related claims in state court after their federal case is dismissed "unless State law provides for a longer tolling period;" and under CPLR 205(a), which gives plaintiffs six months to re-file related claims. Supreme Court granted the motion to dismiss under CPLR 202, finding Alberta's statute of limitations would have expired for most defendants in 2004, two years after Norex filed its federal action.

The Appellate Division, First Department affirmed. It ruled 28 USC § 1367(d), giving plaintiffs 30 days to re-file related claims "unless State law provides for a longer tolling period," did not apply in this case because CPLR 205(a) gives plaintiffs in New York six months. However, it said, "CPLR 205(a) could not save [Norex's] claims in any event, because New York's borrowing statute requires the courts to apply Alberta's limitations period," which provides no toll.

Norex argues its action is timely under 28 USC § 1367(d) and CPLR 205(a), the federal and state savings statutes. It says the lower court's conclusion that 28 USC § 1367(d) does not apply because CPLR 205(a) provides a longer tolling period, even though that toll is not available here, "defies common sense, the plain language and purpose of both statutes, and controlling [state and federal] precedents." It says the limiting phrase in 28 USC § 1367(d), "unless State law provides for a longer tolling period," should apply only when the longer state tolling period is actually available in the particular case.

For appellant Norex: Barry R. Ostrager, Manhattan (212) 455-2000
For respondents Blavatnik et al: Owen C. Pell, Manhattan (212) 819-8200

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To be argued Tuesday, May 6, 2014

No. 107 People v Sidney Wisdom *(papers sealed)*

An intruder shot 66-year-old Amy Donaldson three times in the chest and choked her 4-year-old granddaughter after forcing his way into her Prospect Heights apartment in January 1996. She identified an acquaintance, Sidney Wisdom, as the shooter. Because her injuries prevented her from appearing before the grand jury, the prosecutor obtained court approval to conduct a videotaped examination of Donaldson, but failed to place her under oath before questioning her. When the video was played for the grand jury, the prosecutor realized the error and obtained a court order for a second videotaped examination, which was conducted 15 days after the first. Donaldson was sworn and attested that her previous statements were true, but she was not asked to recount any of her prior testimony. After the second video was shown to the grand jury, it indicted Wisdom on numerous charges.

At trial, Wisdom was convicted of second-degree attempted murder (two counts), first-degree burglary and endangering the welfare of a child, sentenced to an aggregate term of 25 to 50 years. Nearly 10 years later, in 2007, the Appellate Division granted Wisdom's pro se motion for poor person relief and assignment of counsel to perfect his appeal. Among other claims, he argued that the integrity of the grand jury was impaired by the presentation of Donaldson's unsworn testimony, and that the oath administered after that presentation did not cure the defect.

The Appellate Division, Second Department reversed and dismissed the indictment, with leave to resubmit the charges to another grand jury, ruling the integrity of the proceeding was impaired under CPL 210.35(5). "The oath is effective to promote truthful testimony only if the oath is administered before the witness testifies," it said. Due to the failure to swear in Donaldson before her first examination, "the grand jury proceeding 'fail[ed] to conform to the requirements of article one hundred ninety' (CPL 210.35[5]), and "the extent of the deviation from those requirements was so great that dismissal is required.... No evidence in the grand jury, other than in Donaldson's videotaped examinations, inculpated the defendant." It said the second examination did not cure the error. "The testimonial oath is intended to influence the witness while the witness is testifying, in each answer. The belated oath to Donaldson did not serve that purpose, given the failure to restate the content of her first examination.... A finding here that the prosecutor's failure to administer the oath to Donaldson was inconsequential would be tantamount to a conclusion that the testimonial oath is merely an empty exercise."

The prosecution argues the failure to swear in Donaldson for her first examination did not impair the fundamental integrity of the proceeding because it "was corrected by conducting a second videotaped examination," in which "Donaldson took the testimonial oath and swore to the truth of what she had said during the first examination." Contending there was no prejudice to Wisdom, it says, "The evidence before the trial court ... showed that the belated administration of the oath did not have any effect on the substance of Donaldson's grand jury testimony. Donaldson had identified defendant as the assailant immediately after the crime, long before her grand jury testimony," and her "testimony before the grand jury was substantively the same as the testimony Donaldson gave under oath at trial."

For appellant: Brooklyn Assistant District Attorney Ann Bordley (718) 250-2464
For respondent Wisdom: De Nice Powell, Manhattan (212) 693-0085

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To be argued Tuesday, May 6, 2014

No. 108 People v Patricia Fratangelo

Patricia Fratangelo was stopped for speeding in the Town of Ovid, Seneca County, in September 2011, and was given field sobriety tests after the trooper smelled alcohol. The trooper determined that she failed four of the seven tests and arrested her. A breath test conducted about 80 minutes after the stop detected a blood-alcohol content (BAC) of .09 percent. She was charged with common law DWI (VTL § 1192[3]) and DWI per se (VTL § 1192[2]).

At trial in the Town of Ovid Justice Court, Fratangelo testified that she had shared a bottle of wine with three other people during dinner less than an hour before she was stopped. She also presented expert testimony by a pharmacologist, who concluded that, based on the rate at which alcohol is absorbed and on the breath test result, her BAC at the time of the traffic stop would have been .03 to .04 percent. Based on the expert testimony, Fratangelo requested that the judge include in his jury charge on common law DWI a portion of the Criminal Jury Instruction (CJI) that states: "Under our law, evidence that there was less than .08 of one per centum by weight of alcohol in the defendant's blood is prima facie evidence that the defendant was not in an intoxicated condition." The judge refused. Fratangelo was convicted of common law DWI and acquitted of DWI per se.

Seneca County Court affirmed, ruling that the requested CJI charge applies only to chemical test evidence, not expert opinion testimony. "The statutory basis for the presumption is Vehicle & Traffic Law § 1195, which relates to the admissibility of evidence regarding chemical tests," the court said. "Specifically, subsection (2) of § 1195 provides that the presumption arises from 'evidence of blood-alcohol content as determined by such tests'. [Emphasis added (by County Court)]. Thus, any instructions regarding prima facie evidence that can be presented as a result of V&T Section 1195, must be based upon chemical analysis, and not the opinion testimony of a defense expert."

Fratangelo argues she was entitled to the jury charge on the presumption of sobriety because it "is supported by the facts of the case," including her own testimony about when and how much she drank, the trooper's testimony about her BAC reading, and her expert witness's scientific opinion about her BAC at the time she was stopped. She says the word "evidence" in the jury instruction "is not limited to just the machine result. The law recognizes that evidence of any proposition can be either direct evidence, or circumstantial evidence.... Any evidence of a blood alcohol content at the time of operation of a motor vehicle -- based on a test performed at some later time -- is, necessarily, the product of either a presumption (that the blood alcohol content level was the same) or expert opinion (that it was not). Regardless of whether the evidence of blood alcohol content is based on a presumption or on expert opinion testimony, it is still evidence of the defendant's blood alcohol content."

For appellant Fratangelo: James A. Baker, Ithaca (607) 275-0016
For respondent: Seneca County District Attorney Barry L. Porsch (315) 539-1300

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To be argued Tuesday, May 6, 2014

No. 109 Morpheus Capital Advisors LLC v UBS AG

At the height of the financial crisis in September 2008, UBS Real Estate Securities, Inc. (UBSRE) entered into an agreement retaining Morpheus Capital Advisors LLC as its "financial advisor and investment banker" for the sale of UBSRE's student loan assets, which had a face value of $510 million, but had fallen dramatically in value and become illiquid, commonly called "toxic assets." The agreement gave Morpheus the "exclusive right to solicit counterparties for any potential Transaction involving the Student Loan Assets." Upon closing of a deal, the agreement provided that Morpheus would be paid a success fee based on a percentage of the "Transaction Amount," which it "defined as the agreed value of the Student Loan Assets which are transferred or sold to a third party, or in respect to which the risk of first loss is assumed by a third party, in one or a series of transactions."

In October 2008, the Swiss National Bank (SNB) announced plans to strengthen the Swiss financial system with a form of bailout by creating a Stabilization Fund and financing the transfer of illiquid assets from financial institutions to the fund. At the same time, UBSRE's corporate parent, Swiss bank UBS AG, announced it had reached agreement with the SNB to transfer billions of dollars of toxic assets to the Stabilization Fund, including the student loan assets held by UBSRE. Morpheus brought this breach of contract action against UBSRE and its parent, claiming it was entitled to a success fee of nearly $3 million. Supreme Court granted the defendants' motion to dismiss the complaint.

The Appellate Division, First Department modified by reinstating the complaint against UBSRE in a 3-1 decision. Although the agreement granted Morpheus "only an exclusive agency" and no broker was involved in the sale of UBSRE's assets to the Stabilization Fund, the court said, "[S]ince the agreement required UBSRE to give plaintiff the opportunity to solicit a counterparty prior to transferring its assets to the Fund, and since plaintiff pleads a breach of that very term, the complaint states a cause of action for breach of contract." It said, "To the extent that the agreement unambiguously and without limitation contemplates compensation to plaintiff when 'the risk of first loss is assumed by a third party, in one or a series of transactions,' and does not limit compensation to plaintiff only if it introduced such third party to UBSRE, we also find merit to plaintiff's contention that the agreement mandated compensation for any transaction involving UBSRE's toxic assets during the term of the agreement."

The dissenter said, "Under an exclusive agency contract, no liability to pay a commission is incurred where the property is transferred to a purchaser located by the client, without the participation of either the contracting broker or any other.... [T]he brokerage agreement provides for an exclusive agency..., not an exclusive right to sell. A party that enters into an exclusive agency provision with a broker is free to transfer the subject property to a buyer that the seller locates or, as here, independently locates the seller...."

For appellant UBSRE: Kenneth A. Caruso, Manhattan (212) 819-8200
For respondent Morpheus: William B. Pollard, III, Manhattan (212) 418-8600

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To be argued Tuesday, May 6, 2014

No. 110 KeySpan Gas East Corporation v Munich Reinsurance America, Inc.

The Long Island Lighting Company (LILCO), facing possible regulatory action requiring it to clean up soil and water contamination left by its operation of manufactured gas plants on Long Island, including plants in Hempstead and Bay Shore, notified its insurers in the fall of 1994 of the potential environmental damage claims. In response to LILCO's notices, the insurers -- including Munich Reinsurance America, Inc., Century Indemnity Company, and Northern Assurance Company of America -- issued reservation of rights letters that identified LILCO's late notice as a potential defense. In 1995, the State Department of Environmental Conservation directed LILCO to pay for investigation and any necessary remediation of the plant sites, which ultimately resulted in a negotiated consent order. The insurers disclaimed coverage in 1997, after LILCO brought this action for a declaration that the insurers must defend and indemnify it for those costs under excess comprehensive general liability policies they issued from 1953 to 1969. LILCO subsequently assigned its insurance claims to KeySpan Gas East Corporation, a National Grid subsidiary.

Supreme Court granted the insurers' motions for summary judgment declaring they had no duty to indemnify KeySpan and LILCO for environmental damage costs at the Bay Shore site, due to LILCO's failure to provide timely notice as required by the policies. It denied the insurers' motions regarding the Hempstead site, finding there were issues of fact concerning the reasonableness of LILCO's delay. The court rejected LILCO's argument that the insurers waived the defense of untimely notice by not disclaiming coverage before LILCO sued them.

The Appellate Division, First Department modified by denying the insurers' motions as to the Bay Shore site and vacating the declaration. It found, as a matter of law, that LILCO failed to give timely notice of its claims; but it said summary judgment for the insurers "is premature because issues of fact remain as to whether defendants waived their right to disclaim coverage based on late notice." The Insurers' reservation of rights "did not preclude the finding of waiver due to failure to timely issue a disclaimer...," it said. "[I]ssues of fact exist as to whether sufficient information was provided to insurers in 1995 such that their subsequent failure to issue a notice of disclaimer on the grounds of late notice, until raising it as a defense in their answers filed in 1997, resulted in a waiver...."

The insurers argue, "The decision below applies a rule requiring all insurers to make a coverage determination 'as soon as reasonably possible,' or forfeit their rights to deny coverage. No such duty exists at common law." The rule "is derived from a statutory standard prescribed for *one particular category* of insurance claims, i.e., accidental death and bodily injury claims, for policy reasons specific to those claims." They say, "Under the common-law rules that properly govern this case, LILCO's late notice ... warrants a judgment of non-coverage.... The insurers did not intentionally waive their rights to deny coverage based on late notice, and LILCO ... cannot argue that it was prejudiced by any delay in the coverage denial."

For appellants Munich Reinsurance et al: Jonathan D. Hacker, Washington, DC (202) 383-5300
For respondent KeySpan: Jay T. Smith, Manhattan (212) 841-1000

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