State of New York Court of Appeals

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To be argued Thursday, January 9, 2014 (10 a.m. session)

No. 11 Voss v The Netherlands Insurance Company

Deborah Voss, owner of several businesses in the Syracuse area, purchased a commercial building to house them in the Village of Liverpool in 2006. She obtained insurance coverage for the building through CH Insurance Brokerage Services Co., Inc., which procured a $75,000 business interruption policy from Peerless Insurance Company to cover lost business income caused by damage to the property. She later said in a deposition that CH Insurance considered the types of businesses she owned, their sales figures and the size of the building to determine the appropriate amount of coverage and, when she questioned the sufficiency of the $75,000 business interruption policy, the brokerage assured her the amount was adequate and said it would review the coverage annually as her businesses grew.

The roof of the building breached in March 2007, causing significant water damage, and after a contractor made repairs, the roof partially collapsed in April 2007, causing more water damage. Voss later testified that Peerless paid $3,197 for business interruption after the first incident and $30,000 after the second. Later in April 2007, Voss agreed on CH Insurance's recommendation to reduce her business interruption coverage to $30,000. The building suffered another partial roof collapse in February 2008, and Voss testified that she received no payment on her business interruption claim.

Voss and her companies brought this action for negligence and breach of contract against CH Insurance, among others, alleging the broker improperly advised them that $75,000 in business interruption coverage would be adequate. They claimed their losses exceeded $2 million. Supreme Court granted the broker's motion for summary judgment dismissing the suit.

The Appellate Division, Fourth Department affirmed on a 3-1 vote. It said CH Insurance failed to establish that no special relationship existed between it and the plaintiffs, finding evidence that Voss relied on the broker's "expertise and assurance regarding the appropriate level of insurance." However, it ruled the suit was properly dismissed because the plaintiffs were "charged with conclusive presumptive knowledge of the terms and limits" of the policy. It also found that, even if CH Insurance negligently failed to obtain sufficient coverage, its negligence was not a proximate cause of the plaintiffs' damages in view of Voss's testimony that her businesses would have remained operational if the $75,000 policy limit had been paid in a timely manner for each of the first two incidents.

The dissenter argued that, if Voss relied on CH Insurance's expertise and experience, "it is no answer for the broker to argue, as an insurer might, that the insured has an obligation to read the policy." He said that, if the plaintiffs could demonstrate that they had a special relationship with CH Insurance and that the broker was negligent, the disparity between the $75,000 policy and the plaintiffs' claimed loss of $449,724 in the April 2007 roof collapse "would provide the necessary proximate cause for an award of damages" for that incident.

For appellants Voss et al: Dirk J. Oudemool, Syracuse (315) 474-7447
For respondent CH Insurance: Thomas M. Witz, Albany (518) 449-8893

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To be argued Thursday, January 9, 2014 (10 a.m. session)

No. 12 People v Victor Gonzalez

Victor Gonzalez was arrested for the murder of his boss, Wilfredo Lebron, at Gonzalez's apartment in the Hunts Point area of the Bronx in May 2006. He struck Lebron several times in the head with a hammer, then dismembered the body and scattered it in garbage bags over a four-block area around his home. He admitted killing Lebron in a written statement to police and a videotaped statement to a prosecutor, saying Lebron was drunk and repeatedly assaulted him. He said Lebron had abused him physically and mentally for weeks and had threatened to kill him, claiming that he acted in self defense and also that he "lost my mind" during the struggle.

Gonzalez initially filed a CPL 250.10 notice of intent to present psychiatric evidence in support of a defense of extreme emotional disturbance (EED) and he submitted to a mental examination by a prosecution psychologist, but he withdrew the notice before trial. After the prosecution presented its evidence, including the videotaped confession in which Gonzalez made numerous statements to the effect that he had lost his mind, the defense rested without calling witnesses or cross-examining any prosecution witnesses about his mental state. Based entirely on the prosecution's evidence, Gonzalez asked the trial court to instruct the jury on the EED defense. The court agreed, but also found that his request for the charge was the equivalent of a "notice of intent to proffer psychiatric evidence" under CPL 250.10, which would permit the prosecution to reopen its case and present evidence of his statements to its psychologist in rebuttal. Gonzalez then withdrew his request for an EED charge. He was convicted of second-degree murder and sentenced to 25 years to life.

The Appellate Division, First Department affirmed, saying, "When defendant requested the EED charge based on his statements to the police, defendant 'offered' that evidence 'in connection with' the EED defense, notwithstanding the fact that defendant did not present a case.... To allow defendant to recharacterize his statements [in the videotaped confession] as evidence of EED, yet not permit the People the opportunity to present evidence in rebuttal, would be manifestly unfair, effectively allowing the defense to 'sandbag' the prosecution, and defeat the very purpose of the statute." Since the prosecution's psychiatric evidence "was obtained, with defendant's consent, when defendant gave notice of his intention to present an EED defense," it said, Gonzalez "necessarily waived any Fifth Amendment rights regarding that evidence, to the extent it would be offered in relation to the EED defense."

Gonzalez argues, "Neither the plain language of CPL 250.10, its legislative history, nor the case law ... entitles the People to reopen their case and rebut their own evidence" based solely on a request for an EED charge. "It governs, and is exclusively triggered by, psychiatric evidence 'offered ... by the defendant,'" and he says he offered no such evidence on direct or cross-examination. He also contends that he never waived his Fifth Amendment privilege and that, by "effectively conditioning the EED charge on the admission into evidence of Appellant's statements to the People's psychiatrist, the trial court impermissibly forced Appellant to choose between a warranted jury charge and not having his statements used against him, violating his Fifth Amendment right."

For appellant Gonzalez: Mathew S. Miller, Manhattan (212) 450-4531
For respondent Bronx District Attorney: Peter D. Coddington(718) 838-7090

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To be argued Thursday, January 9, 2014 (10 a.m. session)

No. 30 Morris v Pavarini Construction

Glenford Morris, a carpenter, was injured during the construction of a building at Seventh Avenue and 34th Street in Manhattan in June 2002, when the back wall of a metal form that other workers were building as a mold for a concrete wall fell and crushed his hand.

Morris brought this personal injury action against the construction manager, Pavarini Construction, and the owner, Vornado Realty Trust. Among other things, he alleged that they violated Labor Law § 241(6), which imposes a nondelegable duty upon building owners and contractors to "provide reasonable and adequate protection and safety to construction workers" and to comply with safety rules and regulations promulgated by the Department of Labor. He predicated his claim on an alleged violation of 12 NYCRR 23-2.2(a), a safety regulation governing concrete work, which provides, "Forms, shores and reshores shall be structurally safe and shall be properly braced or tied together so as to maintain position and shape."

The Appellate Division, First Department dismissed the claim, ruling the regulation did not apply because the form was still under construction when the accident occurred. The Court of Appeals reversed and remitted the matter (9 NY3d 47), saying "a more complete record is necessary, both as to the nature of the object that caused the injury and the opinions of those expert in the construction of concrete walls as to whether the words of the regulation can sensibly be applied to anything but completed forms."

Supreme Court dismissed Morris's claim after a hearing on remittal, concluding that the safety regulation applies only to completed forms and that the back wall of a form, by itself, does not constitute a "form" within the meaning of 12 NYCRR 23-2.2(a). The court said, "Is a quarter panel a car? A fender? A hood? All of them put together is a car but not before."

The Appellate Division reversed on a 4-1 vote and granted summary judgment to Morris, finding the regulation applies to the assembly of forms. "The operative language of § 23-2.2(a) is that forms shall be 'braced or tied ... so as to maintain [their] position and shape,'" it said. "The erection of the back form wall is essentially the first step in this process. It defies common sense to think that the form could be structurally safe and maintain its final position and shape, if the back wall that anchors the structure is prone to falling over and collapsing because there is no requirement that it 'be properly braced'.... Moreover, it defies logic to limit the Code's directive where the danger posed to workers from these forms is so great, given that they are often hoisted to upright positions without adequate safety bracing and may remain standing for days prior to completion."

The dissenter argued that the regulation applies only to completed forms and concrete pours. "That the focus of [12 NYCRR 23-2.2(a)] is the structural integrity of the form during the placement of concrete is evident from its language, particularly the provision that the position and shape of the form be maintained by ensuring that it is 'braced or tied together.' While a requirement to brace a form could be extended to include the support of the single vertical wall panel that fell and injured plaintiff, the alternative to utilize ties to accomplish the same purpose can only be applied to a pair of such panels."

For appellants Pavarini and Vornado: Daniel Zemann, Jr., Manhattan (212) 972-1000
For respondent Morris: Cheryl Eisberg Moin, Manhattan (212) 668-6000

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To be argued Thursday, January 9, 2014 (10 a.m. session)

No. 29 People v Luis Guaman

Luis Guaman was arrested in a midtown Manhattan subway station in April 2009 after a police officer saw him approach a male passenger from behind and rub his "groin area" against the complainant's buttocks. Guaman was charged by Criminal Court information with forcible touching (Penal Law § 130.52), a Class A misdemeanor, and two lesser charges. The statute states, "A person is guilty of forcible touching when such person intentionally, and for no legitimate purpose, forcibly touches the sexual or other intimate parts of another person for the purpose of degrading or abusing such person; or for the purpose of gratifying the actor's sexual desire. For the purposes of this section, forcible touching includes squeezing, grabbing or pinching." Guaman pled guilty to forcible touching in satisfaction of all charges and was sentenced to a conditional discharge and three days of community service.

On appeal, he argued the accusatory instrument was facially insufficient and jurisdictionally defective because it failed to allege that the touching was "forcible."

The Appellate Term, First Department affirmed the conviction, saying, "The information -- comprising the misdemeanor complaint and the victim's supporting deposition -- alleged that at a specified time and inside a designated subway station defendant rubbed his 'groin area' and exposed penis against the victim's buttocks without the victim's consent. These factual allegations, 'given a fair and not overly restrictive or technical reading' ..., are sufficient for pleading purposes to establish reasonable cause to believe and a prima facie case that defendant committed the crime of forcible touching...."

Guaman argues the Appellate Term's "interpretation of the forcible touching statute implicitly reads the word 'forcibly' out of the statutory text." "The meaning of the words "forcible touching ... must be determined in accordance with the company they keep, the three specific examples" of "squeezing, grabbing or pinching," he says. "[I]n common parlance the act of 'squeezing, grabbing or pinching' is likely to entail the infliction of pain or at least non-trivial physical discomfort.... Obviously, the mere act of 'rubbing' does not without more entail either such compression, pain or physical discomfort. Surely no one would think that a mother who rubbed or patted her child's head had 'forcibly' touched her child's head."

For appellant Guaman: James M. McGuire, Manhattan (212) 698-3658
For respondent: Manhattan Assistant District Attorney Yuval Simchi-Levi (212) 335-9000

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To be argued Thursday, January 9, 2014 (10 a.m. session)

No. 15 Fabrizi v 1095 Avenue of the Americas, LLC

Richard Fabrizi, an electrician, was injured in March 2008 while renovating commercial space in a Manhattan building. He had been directed to reposition a "pool box," a component of a conduit system for telecommunications wires, and he had disconnected the box from the conduit pipes above and below it. This left the section of conduit above him, a steel pipe four inches in diameter and eight to ten feet long, secured only by a compression coupling to the next section of conduit at the ceiling. Fabrizi said he had asked for set screw couplings, which he considered more secure, but he was not provided with any. As he knelt beneath the suspended conduit to drill a hole through the floor, the pipe fell and crushed his thumb. He brought this personal injury action, including a Labor Law § 240(1) claim, against the building's owner, 1095 Avenue of the Americas, LLC; the general contractor, J.T. Magen Construction Company; and the tenant of the renovated space, Dechert LLP.

Supreme Court denied motions by 1095 and Megan for summary judgment dismissing the section 240(1) claim and granted Fabrizi's motion for summary judgment on liability. "[L]iability under this section is not limited to cases in which the falling object was in the process of being hoisted or secured. The question is instead whether the conduit 'required securing' while plaintiff was drilling a hole in the floor beneath it...," the court said. Liberally construing the statute to accomplish the purpose of protecting workers from gravity-related dangers, the answer is yes. No safety device was placed and operated to guard plaintiff from the unchecked speedy descent of the conduit pipe."

The Appellate Division, First Department modified to deny Fabrizi's motion and otherwise affirmed on a 4-1 vote, holding that the facts of the case are within the scope of Labor Law § 240(1). The majority said Fabrizi's "testimony is that when directed to move the pool box, he requested a set screw coupling to secure the pipe to prevent the pipe from falling during the disassembly, and that the failure of defendants to provide this device was a proximate cause of his accident.... [W]e find an issue of fact as to whether defendants failed to provide a protective device...." It said "falling object" liability under the statute is not limited to cases where the object fell while being hoisted or secured.

The dissenter said, "To permit this action to go forward would require a departure from the well settled rule that the protection of Labor Law § 240(1) is unavailable where no breach of the statutory duty to provide a worker with a protective device of the kind listed in the statute has been demonstrated.... [T]he coupling is not a statutory safety device. Rather, it is a component part of an already built conduit system, whose purpose is to connect two sections of conduit pipes in alignment...." He also said Fabrizi's injuries "were the direct consequence of his action in disengaging and removing the devices that secured the conduit pipe in place" before he began to drill.

For appellants 1095, Magen and Dechert: Daniel Zemann, Jr., Manhattan (212) 972-1000
For respondent Fabrizi: Brian J. Isaac, Manhattan (212) 233-8100