State of New York Court of Appeals

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To be argued Tuesday, January 6, 2015

No. 5 BDC Finance L.L.C. v Barclays Bank PLC *(record sealed)*

In May 2005, the hedge fund BDC Finance L.L.C. and Barclays Bank PLC entered into a derivatives transaction, a total return swap, that required BDC to post collateral with Barclays in an amount that fluctuated based on the value of the investment assets. One part of their agreement, the Credit Support Annex (CSA), specified procedures for each party to demand adjustments in the amount of collateral based on those changes in value. It provides that the transfer of collateral must be made by the next business day if the demand is made by 1 p.m., or by the second business day if the demand is made later. In the event of a dispute over a collateral call, the CSA permitted the disputing party to notify the demanding party of the dispute and transfer only the undisputed amount, and the parties were then required to engage in a prescribed dispute resolution process. However, the Delivery of Collateral clause of the parties' Master Confirmation Agreement states, "Notwithstanding anything in the [CSA] to the contrary ... [Barclays] shall Transfer any Return Amounts ... not later than the Business Day following the Business Day on which [BDC] requests the transfer...." BDC argues that this clause supercedes the dispute resolution provision of the CSA, while Barclays argues that it modifies only the timing of transfers for demands made after 1 p.m.

On October 6, 2008, BDC demanded that Barclays transfer to it $40 million in excess collateral. Barclays, contending it owed only $5,080,000, made no payment on October 7. Barclays transferred $5 million to BDC on October 8, and the same day BDC sent a "Notice of Failure to Transfer Return Amount" stating that Barclays had been required to pay either the $40 million demanded or the undisputed amount by October 7. The notice declared a Potential Event of Default and advised Barclays it had two days to cure or it would be in default. On October 13, BDC sent a notice declaring Barclay's in default for failing to transfer the balance of the $40 million during the cure period. BDC terminated the parties' agreements as of the following day and demanded the return of all of its collateral, about $297 million. When Barclays refused, BDC filed this breach of contract action. Supreme Court denied BDC's motion for summary judgment on liability, finding unresolved issues of fact.

The Appellate Division, First Department modified, on a 3-2 vote, by granting summary judgment on liability to BDC. The majority found the CSA required Barclay's to dispute the amount of the collateral call by October 7. "The evidence in the record establishes as a matter of law that Barclays did not do this. Barclays' payment of $5 million on October 8, 2008 was a day late.... Having failed to timely pay the undisputed amount by the deadline, Barclays lost any right it may have had to suspend payment of the full $40 million." In any event, it said, "The plain and unambiguous language of the Delivery of Collateral clause requires Barclays to transfer any Return Amount demanded by BDC no later than the business day following the demand.... Thus, the Delivery of Collateral clause expressly supercedes the form language in the CSA which would have otherwise permitted Barclays to dispute before paying...."

The dissenters argued the Delivery of Collateral clause "should be read as modifying only the Transfer Timing provision of the CSA," not the dispute resolution provisions. "[I]t is illogical that the agreements would require only one party to pay first and dispute later," they said, and "BDC unequivocally advised Barclays that it had the right to pay or dispute" under the CSA at the time of its collateral call. They also said Supreme Court "correctly found issues of fact whether Barclays intended its communications with BDC ... to be a notice of dispute under the CSA, whether they imparted sufficient notice to BDC, and whether BDC complied with the informal dispute mechanism;" and further questions "as to whether there was any undisputed amount owed by Barclays to BDC."

For appellant Barclays: Robinson B. Lacy, Manhattan (212) 558-3121
For respondent BDC: Craig A. Newman, Manhattan (212) 530-1800

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To be argued Tuesday, January 6, 2015

No. 6 People v Michael S. Brumfield

Michael Brumfield was arrested by Rochester police after a traffic stop in 2008. He served notice on the prosecutor of his intention to testify before the grand jury under CPL 190.50, which provides that, "upon signing and submitting to the grand jury a waiver of immunity pursuant to section 190.45, such person must be permitted to testify...." CPL 190.45 does not specify the form the waiver must take, but states that the waiver is a document, signed by the defendant, "stipulating that he waives the privilege against self-incrimination and any possible or prospective immunity to which he would otherwise become entitled, pursuant to section 190.40, as a result of giving evidence in such proceeding."

When the prosecutor gave him a preprinted waiver form, Brumfield crossed out three paragraphs and then signed it. The portions he let stand stated that he was "(a) giving-up my right against self-incrimination, and (b) giving-up any prospective immunity to which I would otherwise be entitled pursuant to Section 190.40 of the Criminal Procedure Law;" and further said he understood "that by signing this document I give up all immunity and privileges to which I would otherwise have been entitled under the provisions of the United States Constitution, the Constitution of the State of New York, as well as any applicable statutory provisions." One paragraph he struck out related to his right to counsel and limits on his counsel's role; another said he understood "that the possible questioning before the Grand Jury will not be limited to any specific subjects, matters or areas of conduct;" and the third said, "I do hereby consent and agree to the use against me of any testimony given by me before the Grand Jury or evidence hereby produced by me upon any investigation, hearing, trial, prosecution or proceeding." When Brumfield refused to sign an unaltered waiver form, the prosecutor refused to let him testify. He was indicted on felony counts of attempted criminal possession of a weapon in the second and third degree and two misdemeanors. Brumfield moved to dismiss the indictment.

County Court denied the motion, saying "the motion to dismiss the indictment must be denied on the ground that the failure of the defendant to testify resulted not from any restrictions placed upon such right by the prosecution, but from defendant's attempt to improperly limit the waiver of immunity to his benefit." Brumfield was convicted after a jury trial and sentenced to seven years in prison on the top count.

The Appellate Division, Fourth Department reversed the conviction and dismissed the indictment with leave to the prosecution to re-present. "[T]he paragraphs in the waiver of immunity form that defendant left intact stated that defendant waived his privilege against self-incrimination and any immunity to which he would otherwise be entitled pursuant to CPL 190.40," it said. "Thus, defendant signed a waiver of immunity form that complied with the requirements of CPL 190.45(1) and was therefore required to be permitted to testify before the grand jury...."

For appellant: Monroe County Asst. District Attorney Kelly Christine Wolford (585) 753-4335
For respondent Brumfield: David R. Juergens, Rochester (585) 753-4093

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To be argued Tuesday, January 6, 2015

No. 7 Margerum v City of Buffalo

The plaintiffs in this appeal, 12 firefighters employed by the City of Buffalo, claim they were victims of reverse discrimination when the City allowed Civil Service promotional lists to expire solely because the plaintiffs, who were next in line for promotion, are Caucasian. The eligibility lists for supervisory positions were based on examinations held in 1998 and 2002, when the City was subject to a 1980 decree by the U.S. Court of Appeals for the Second Circuit finding it had discriminated against African Americans, Hispanics and women and prohibiting the City from engaging in any hiring or promotion practice "which has the purpose or effect of discriminating against any employee or future employee" on the basis of race. Men of Color Helping All Society (MOCHA), an organization of African American firefighters, filed federal class actions challenging the examinations as discriminatory. In 2005, the City's Human Resources Commissioner refused to extend the eligibility lists based on the 2002 examinations for a fourth and final year, allowing them to expire.

Plaintiffs filed this action City in 2007, alleging violations of the Human Rights Law and New York Constitution. They moved for summary judgment holding the City liable based on testimony by the Commissioner that he let the lists expire because there were no African American candidates on them. He said, "The problem is that if we kept those lists in place and the longer we kept them in place, the more white males would be promoted into these positions which would exacerbate the imbalance that we have with regard to the number of minority supervisors." The Appellate Division, Fourth Department denied the motion. It also denied the City's motion to dismiss, ruling the plaintiffs were not required to file a notice of claim.

A few weeks later, in Ricci v DeStefano (557 US 557), the U.S. Supreme Court ruled in favor of white firefighters who brought a similar reverse discrimination case against New Haven, CT. The Court held that, "before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action." It said, "An employer may defend against [such] liability by demonstrating that the practice is 'job related for the position in question and consistent with business necessity.'"

Supreme Court granted summary judgment on liability to the plaintiffs based on Ricci. The Appellate Division affirmed, saying the City defendants "did not have a strong basis in evidence to believe that they would be subject to disparate-impact liability if they failed to take the race-conscious action, i.e., allowing the eligibility lists to expire, inasmuch as the examinations in question were job-related and consistent with business necessity (see Ricci ...). After trial, Supreme Court awarded a total of $2.5 million in economic damages and $255,000 for emotional distress to 12 plaintiffs. The Appellate Division reduced the economic damages award to $1.6 million and otherwise affirmed.

The City argues the lower courts misapplied Ricci, which it says provides a "safe harbor" for employers to discontinue an employment practice they believe is having a disparate impact on a protected group of employees. It also argues the plaintiffs' failure to file a notice of claim requires dismissal. The plaintiffs argue the Appellate Division erred in reducing their award.

For appellants-respondents Margerum et al: Andrew P. Fleming, Hamburg (716) 648-3030
For respondent-appellant Buffalo: Jason E. Markel, Buffalo (716) 856-4000

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To be argued Tuesday, January 6, 2015

No. 8 People v Sandra Diaz

Sandra Diaz was arrested with Matias Rivera, a heroin addict and the father of her three children, when police raided her Manhattan apartment in 2009. In a bedroom, the officers found about 30 glassine envelopes containing heroin along with other glassines with heroin residue, unused glassines, an electronic scale, lactose, a strainer and other paraphernalia. Ten of the full glassines were in a cup on a bedside table. The other items were found in drawers. Diaz and Rivera were charged with possession of heroin with intent to sell, criminally using drug paraphernalia, and four misdemeanor counts of unlawfully dealing with a child in the first degree (Penal Law 260.20[1]) based on the presence of Diaz's children and a young niece.

Penal Law 260.20(1) applies to a defendant who "knowingly permits a child less than eighteen years old to enter or remain in or upon a place ... where ... activity involving controlled substances as defined by article two hundred twenty of this chapter ... is maintained or conducted, and he knows or has reason to know that such activity is being maintained or conducted...."

At a joint trial, Diaz and Rivera were acquitted of possession with intent to sell, but convicted of the lesser-included offense of seventh-degree possession, a misdemeanor, and the four counts of unlawfully dealing with a child. Rivera was also convicted of using drug paraphernalia. Diaz was sentenced to three years of probation.

The Appellate Division, First Department affirmed Diaz's convictions, rejecting her claim that there was insufficient evidence. "Although [Diaz's] position was that the drugs and paraphernalia found in her apartment were solely attributable to [Rivera], the evidence supports the conclusion that [Diaz] exercised dominion and control, at least jointly with [Rivera], over the contraband.... The evidence also established the elements of first-degree unlawfully dealing with a child..., including the element of 'activity involving controlled substances.' [Diaz] knew or should have known that a large amount of heroin and drug paraphernalia were in her apartment, where four children under the age of 18 lived."

Diaz argues that simple possession in the home is not "activity involving controlled substances" that "is maintained or conducted" under Penal Law 260.20(1). "The plain meaning of the terms 'activity,' 'maintained,' and 'conducted' points to conduct of an ongoing or commercial nature such that an individual does not simply violate the statute by possessing or knowing that another person possesses small amounts of controlled substances in an adult bedroom while children are present in another part of the home...," she says. "Simple possession for personal use of any substance (controlled or marijuana) was not meant to include additional liability just because a child is present on the same premises." She also argues the prosecution failed to prove she possessed drugs because the "evidence tying her to the room where largely-concealed contraband was found was completely speculative."

For appellant Diaz: Katharine Skolnick, Manhattan (212) 577-2523
For respondent: Manhattan Assistant District Attorney Karen Schlossberg (212) 335-9000