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.

To be argued Thursday, January 7, 2016

No. 8 Matter of Monarch Consulting, Inc. v National Union Fire Insurance Company of Pittsburgh, PA (and two other proceedings)

National Union Fire Insurance Company of Pittsburgh, PA, sold workers' compensation insurance in California to Monarch Consulting, Inc., Priority Business Services, Inc., Source One Staffing, LLC, and other California companies beginning in 2003. National Union filed the policies with the Workers' Compensation Insurance Rating Bureau (WCIRB), as required by California Insurance Code § 11658, and the WCIRB sent them on to the California Department of Insurance (CDI) for approval. National Union later sent the insureds a series of "payment agreements" that governed their payment obligations and procedures for default and dispute resolution, among other things, which were never filed with the WCIRB. The payment agreements contained broad arbitration clauses requiring that all disputes be submitted to arbitration governed by the Federal Arbitration Act (FAA). They provided that arbitrators "will have exclusive jurisdiction over the entire matter in dispute, including the question as to its arbitrability," and required that any court action concerning arbitrability be brought in Manhattan. There were no arbitration provisions in the insurance policies submitted to the WCIRB.

Claiming the insureds were in default, National Union filed petitions to compel arbitration in Manhattan Supreme Court in 2010 and 2011. Monarch, Priority and Source One opposed the petitions, arguing the arbitration provisions were unenforceable because the payment agreements that contained them were never filed with the WCIRB as required by California law.

In separate proceedings, two Supreme Court justices granted National Union's petitions to compel arbitration of its claims against Monarch and Priority. A third justice ruled in favor of Source One, finding the arbitration clause unenforceable.

In a consolidated decision, the Appellate Division, First Department held 3-2 that the payment agreements and the arbitration clauses they contained were unenforceable because National Union did not file them with California regulators as required by California law. It said application of the FAA to compel arbitration here was barred by the federal McCarran-Ferguson Act, which states, "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance." Since the arbitration and payment agreements are unenforceable under California law, the court said, "we find that applying the FAA to mandate arbitration in this case would, in fact, invalidate, impair, or supersede the California Insurance Code."

The dissenters argued that "the arbitrators, and not the court, should decide the gateway issue of whether the payment agreements containing the arbitration clauses are enforceable.... Although the insureds seek only to invalidate the arbitration provisions..., this necessarily and inextricably implicates the validity of the payment agreements as a whole. Consequently, pursuant to the parties' respective payment agreements and the [FAA], the underlying legal issue regarding the validity of the payment agreements should be decided by the arbitrators in the first instance." Arguing the McCarran-Ferguson Act does not preempt the FAA, they said "arbitration does not impair the California legal requirement" that workers' compensation policies be filed "because California law does not restrict the power of an arbitrator to address whether the payment agreements ... were required to be filed, and if so, what the consequences" for failure to file them would be.

For appellant National Union: Peter D. Keisler, Washington, DC (202) 736-8000
For respondent Priority: Jeffrey E. Glen, Manhattan (212) 278-1000
For respondent Monarch et al: Clifford G. Tsan, Syracuse (315) 218-8000
For respondent Source One: Alexander D. Hardiman, Manhattan (212) 858-1000

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To be argued Thursday, January 7, 2016

No. 9 Matter of Cisse v Graham *(papers sealed)*
Matter of Graham v Cisse

Rokhaya Cisse (mother) and Christopher Graham (father) are the unmarried parents of a girl, who was born in Queens in March 2001, and each is seeking custody of their daughter. The parties became estranged before the girl was born. Queens Family Court awarded the mother sole custody in a June 2004 order, when the girl was three years old, and granted the father visitation on alternate weekends, two evenings a week, and certain school holidays and vacations. The father, a public school teacher, married his current wife in 2004 and moved from Queens to West Babylon, Suffolk County, about two years later. The mother, who lives in Queens and is single, left a job with flexible hours, which allowed her time off to be with her daughter as needed, for a more demanding job in financial services with inflexible hours in 2007. She filed a petition to reduce the father's visitation so she would have more time with the girl on week nights and weekends. She argued that her new job and the father's move to Suffolk County constituted a change in circumstances warranting a modification to protect the best interests of the child. The father, who has three children with his wife, then petitioned to transfer custody to himself, arguing that the mother interfered with his visitation and that the girl wished to reside with him.

Family Court, while finding both parties to be fit and loving parents, granted the father's petition for custody and awarded visitation to the mother. "Significant changes have occurred since ... 2004," it said. "The father has moved a greater distance away from ... the child's residence. The mother has obtained different employment that places much greater demands on her time. The child has matured and made clearer her needs, her desires, and bases for those desires. Thus, a change of circumstances has been shown...." Noting the girl's preference to live with her father, it said, "The court does not fault the mother for her employment obligations, and applauds her for her success, but the reality is that given each parent's career choices, the father is more available during the week to parent [her]."

The Appellate Division, Second Department affirmed on a 3-1 vote, saying there was "a sound and substantial basis" for findings that a change of circumstances warranted the transfer of custody. The father's move to Suffolk County "was not the genesis of the difficulties the child has encountered in developing the relationship with her mother that she desires.... [T]he mother acknowledged that her new work schedule and the child's school schedule leave little time for them to spend quality time together during the school/work week."

The dissenter said the father failed to show there was a sufficient change of circumstances to support the transfer of custody. She said, "[T]he mother is a financially stable, upwardly mobile professional who has ... provided her daughter with a private school education," where she "is thriving academically.... The father's relocation, which focused on improving the circumstances for his wife and their three young children, was not in any way made to address the needs or best interests of the child."

The mother says she "was improperly penalized for being a working mother with a successful career." She argues the lower courts gave too much weight to the girl's preference to live with her father and too little to the disruption that would be caused by removing her from her school and her life-long home.

For appellant Cisse (mother): Barry J. Fisher, Garden City (516) 280-5065
For respondent Graham (father): Larry S. Bachner, Queens (917) 378-0176
For the child: Marc E. Strauss, Queens (718) 725-0022

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To be argued Thursday, January 7, 2016

No. 10 People v Urselina King *(papers sealed)*

Urselina King was accused of attacking the girlfriend of her ex-husband in the woman's Brooklyn apartment in March 2008. The complainant testified that King, armed with a knife, and a masked man with a gun ambushed her outside her apartment, dragged her inside and beat her, cut her with the knife, then ransacked her belongings and stole about $300. The complainant, who said King was jealous of her and had harassed her in the past, sustained fractures of her cheek and nose and cuts on her forehead and the back of her head.

King raised an alibi defense, presenting testimony of her two daughters and a niece that she was sleeping at her home in New Jersey at the time of the attack. King also sought to call a witness to testify that, days before the crime, two men told her the complainant's boyfriend had stolen their drugs, they believed the complainant had set up the theft, and they planned to "get her." Supreme Court precluded the testimony as speculative hearsay. During summations, the prosecutor said, "Only a woman would inflict th[e] kind of beating" that injured the complainant's face, a woman "who is trying as hard as she can to maim and disfigure her rival and to have an avenue for her rage and her jealousy." The prosecutor said the complainant's apartment was "a good location for a woman trying to take out her shame and her rage and her jealousy on the face of her rival." King was convicted of first-degree burglary and second-degree assault and was sentenced to nine years in prison.

The Appellate Division, Second Department affirmed in a 3-1 decision, saying King's claim of prosecutorial misconduct during summation was unpreserved. "In any event, although some of the prosecutor's remarks ... improperly included gender stereotyping, the improper comments were not so flagrant or pervasive in the context of the entire summation as to deprive the defendant of a fair trial.... Other comments ... were within the proper bounds of response to the defense summation in that they presented arguments based upon the evidence and the inferences to be drawn therefrom that the crime was a targeted attack motivated by the defendant's jealousy toward the victim ... rather than a random attack by an unapprehended perpetrator during the course of a robbery...." It said the trial court "properly precluded evidence of third-party culpability as speculative, lacking in probative value, and ... inadmissible hearsay."

The dissenter said "the prosecutor's comments in summation were so inflammatory and prejudicial that they deprived the defendant of a fair trial.... The prosecutor's comments that this crime could only be committed by a woman, although made without objection, appealed to gender bias and injected an issue of gender stereotyping into the trial..., warranting the reversal of the defendant's conviction in the interest of justice.... The inflammatory comments referring to the fact that the defendant was a woman were not isolated comments...."

King argues that the prosecutor's summation deprived her of a fair trial and her attorney's failure to object to the comments deprived her of the effective assistance of counsel. She says the preclusion of evidence that others had a motive and intent to harm the complainant deprived her of due process and her right to present a defense.

For appellant King: Kendra L. Hutchinson, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Solomon Neubort (718) 250-2000

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To be argued Thursday, January 7, 2016

No. 11 People v Anthony DiPippo *(papers sealed)*

Anthony DiPippo and a co-defendant were charged with the rape and murder of a 12-year-old girl, J.W., who disappeared from her home in Carmel in 1994. A hunter discovered her remains in a wooded area of Putnam County 13 months later. DiPippo was convicted of second-degree murder and first-degree rape at his first trial in 1997, but the Appellate Division granted his CPL 440.10 motion to vacate the judgment in 2011 (82 AD3d 786) based on his trial attorney's conflict of interest. His attorney had previously represented Howard Gombert, who was identified as a possible suspect during the initial police investigation of J.W.'s murder, and failed to investigate Gombert in preparing DiPippo's defense.

Prior to his retrial in 2012, new defense counsel moved to admit a sworn statement by Joseph Santoro, a fellow inmate of Gombert's at a Connecticut prison where Gombert was serving a sentence for sexually abusing a young girl. Santoro said Gombert told him in 2011 "that Putnam County was trying to get him for the killing of two girls.... He said, 'They are trying to get me for killing this girl [J.W.] but that they already convicted some other suckers.... [T]hey got no evidence against me. It's been a long time since then'.... He said he 'ended up fucking her in his red car'.... I asked him if that happened around the time she died. He said yeah -- 'the time she disappeared.'" Gombert brought up J.W. again the next time they spoke, Santoro said. "He said 'she didn't want to do it at first but I had to persuade her.' By force -- he had a smirk on his face.... It was clear to me that the guy was bragging about killing the two girls."

After a hearing, Supreme Court denied the motion to admit evidence of Gombert's possible culpability, saying "the defendant has not established a train of facts or circumstances as to tend clearly to point out Gombert as the guilty party, People v Schultz, 4 NY3d 521 (2005).... [T]here are no facts that show Howard Gombert was ever seen in the vicinity of J.W. on or about the date she was last seen alive." It refused to admit Santoro's hearsay statements about Gombert's alleged confidences as declarations against penal interest. "They wholly lack ... supporting circumstances, independent of the statements themselves, to attest to their trustworthiness and reliability," it said, citing People v Settles (46 NY2d 154 [1978]). The court excluded evidence of Gombert's prior sexual assaults on girls and young women as irrelevant. DiPippo was again convicted of second-degree murder and first-degree rape and sentenced to 25 years to life in prison. The Appellate Division, Second Department affirmed.

DiPippo argues, "The trial court abused its discretion by failing to apply a relaxed standard of admissibility to defendant's reverse Molineux proffer [of Gombert's prior sex crimes] and his remaining evidentiary offering, all of which established the trustworthiness of Howard Gombert's declarations against penal interest," thus violating his right to due process and to present a defense. He says the lower courts should have applied the more lenient standard of Settles, which said, "Supportive evidence is sufficient if it establishes a reasonable possibility that the statement might be true. Whether a court believes the statement to be true is irrelevant."

For appellant DiPippo: Mark M. Baker, Manhattan (212) 750-7800
For respondent: Putnam County Assistant District Attorney David M. Bishop (845) 808-1050