NEW YORK COURT OF APPEALS ROUNDUP

IN-STATE LAW OFFICE REQUIREMENT FOR NON-RESIDENT ATTORNEYS

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April 15, 2015

This month we discuss two cases addressing questions certified by the U.S. Court of Appeals for the Second Circuit, one responding to a question as to whether a non-resident lawyer admitted to practice in New York must maintain a physical office in the state in order to practice here and one responding to a question of contractual interpretation of an oil and gas lease in the context of then-governor David Paterson's 2008 moratorium on "fracking." We also discuss a case in which the court declined to rule on a question concerning police officers' reasonable suspicion in stopping two robbery suspects.

Admitted Nonresidents

In *Schoenefeld v. State of New York*, the Second Circuit certified to the court the question of what are the minimum requirements necessary to satisfy §470 of New York's Judiciary Law, which requires lawyers admitted in New York, but who reside outside the state, to maintain an "office for the transaction of law business" within the state in order to practice law here.

The background of the case is interesting. Plaintiff Ekaterina Schoenefeld is a graduate of Rutgers University School of Law and was admitted to the bar in New York in 2006. She is also admitted in New Jersey where she resides and maintains her only office. While it is not addressed in the various court decisions here, she is otherwise apparently "in good standing" in New York and in compliance with all other requirements to practice law here other than not having an office in New York.

Schoenefeld learned of the impact of §470 while attending a CLE program in New York and brought an action in the U.S. District Court for the Southern District of New York seeking a declaration that §470 of the Judiciary Law violates the U.S. Constitution. Specifically, Schoenefeld argued that a physical office requirement violated the Privileges and Immunities Clause of Article IV, Section 2, of the Constitution because it was imposed on non-resident attorneys but not on resident lawyers and it did not serve any substantial state interest. The case was transferred to the Northern District, which granted summary judgment to Schoenefeld. The state appealed to the Second Circuit which certified the question to the court.

The state invited the court to narrowly construe §470 to avoid it being declared unconstitutional by the Second Circuit, but the court declined to do so. The state specifically suggested a limited burden upon nonresident attorneys, such as a type of physical presence for the receipt of service at a given address or the appointment of an agent within New York. Instead, in a unanimous decision by Chief Judge Jonathan Lippman (Judge Leslie E. Stein, taking no part) the court held that when a statute is clear, "it should be construed according to its plain terms" and that the court had no discretion to rule otherwise. Accordingly, the

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court answered the certified question by finding that §470 should be applied as written and non-resident lawyers admitted to practice in New York need to maintain a physical office in the state.

The case is now on its way back to the Second Circuit. Because the Second Circuit determined that the certified question was "a controlling question of state law," it would appear that the court's decision will likely result in a holding that §470 is unconstitutional as violative of the Privileges and Immunities Clause because it places an impermissible burden upon plaintiff's right to practice law that is not imposed on resident attorneys.

Force Majeure and Fracking

In *Beardslee v. Inflection Energy*, the court answered another question certified by the Second Circuit. This question involved the interpretation of language that is common in oil and gas leases and which had been construed by courts in other oil-producing states but which represented an issue of first impression in New York.

Plaintiffs are landowners in Tioga County who entered into oil and gas leases with Victory Energy Corporation in which they granted Victory the right to drill for oil and gas and conduct geophysical and seismic testing for a nominal annual fee and, if Victory started drilling, for a royalty on gross proceeds of the oil and gas extracted from their property. Victory shared its interests under the leases with a predecessor of defendant Inflection Energy LLC. Each lease contained what is known in the oil and gas industry as a habendum clause which sets forth the period in which the energy companies can exercise their drilling rights. The habendum clauses at issue here provided:

It is agreed that this lease shall remain in force for a primary term of five (5) years from the date hereof and as long thereafter as the said land is operated by lessee in the production of oil or gas.

Each lease also contained a force majeure clause providing that if drilling or other operations are delayed or interrupted because of an event outside the control of the parties, including as a result of some government order, rule or regulation, then "the time of such delay or interruption shall not be counted against lessee, anything in this lease to the contrary notwithstanding."

On July 23, 2008, during the initial five-year "primary term" of each of the leases and before any drilling had commenced, then-governor Paterson ordered a formal public environmental review to address the impact of the controversial oil drilling technique known as "fracking" and directed that no fracking permits would be issued until the review and related studies were completed. In response to this moratorium on fracking, Inflection sent notices to the plaintiff landowners that the state government actions constituted a force majeure event under the leases which extended the leases' respective terms.

In February 2012, after the leases' primary terms had expired, the landowners commenced a declaratory judgment against Inflection, Victory and others in the U.S. District Court for the Northern District of New York seeking a declaration that the leases had expired. Defendants answered and counterclaimed for a declaration that the leases had been extended by operation of the force majeure clause as a result of New York's moratorium on fracking. Plaintiffs moved for summary judgment. Defendants opposed the motion and cross-moved for summary judgment in their favor.

On Nov. 15, 2012, the District Court granted summary judgment to plaintiffs declaring that the leases had expired, denied defendants' cross-motion and dismissed their counterclaims. The District Court did not determine whether a force majeure event had occurred and, instead, ruled that the force majeure clause did not affect the habendum clause and that the fracking moratorium did not frustrate the purpose of the leases since the leases did not require defendants to drill but merely provided them the option to do so, and, moreover, defendants could still drill using conventional means.

Defendants appealed, and the Second Circuit determined that the case turned on novel issues of New York law and that these issues were of potentially great commercial and environmental significance. Accordingly, the Second Circuit certified two questions which the court accepted:

(1) Under New York law, and in the context of an oil and gas lease, did the state's moratorium amount to a force majeure event?

(2) If so, does the force majeure event clause modify the habendum clause and extend the primary terms of the leases?

In a unanimous decision written by Judge Eugene F. Pigott Jr., the court answered the second question in the negative and thereby rendered the first question moot. The court noted that clear and unambiguous contracts should be interpreted according to the plain meaning of their terms but that, because oil and gas leases relate to a highly technical industry with a distinct terminology, the court needs to construe those leases with reference to the parties' intent and the known practices in the industry. In this instance, the habendum clause did not incorporate by reference or otherwise subject itself to the force majeure clause. Nor did the force majeure clause refer specifically to the habendum clause.

While defendants pointed to the fact that the force majeure clause included the phrase "anything in this lease to the contrary notwithstanding," the court found that this would only be applicable to conflicting contract terms. Here, the force majeure clause expressly refers to a delay or interruption in drilling or production of oil. Accordingly, it only conflicts with the secondary term of the habendum clause in which the energy company is obligated to continue to produce oil in order to prevent a lease termination. It does not relate to—or conflict with—the provisions regarding the primary period of the lease in which there is no such obligation. Therefore, the fracking moratorium had no effect on the expiration of the leases at the end of the five-year primary period.

This decision puts New York law in line with that of other oil-producing states including Texas and California.

Refusal to Review

In a memorandum decision in *People v. Brown* and *People v. Thomas*, the court declined to review a decision of the Appellate Division, First Department, overturning two criminal convictions on the grounds that the arresting officers did not have reasonable suspicion to stop the two defendants. Judge Pigott issued a strong dissent in which he questioned the effect that this ruling will have on the actions of police officers going forward.

In the early morning of Dec. 9, 2010, three New York City police officers serving in the department's "cabaret unit" were on uniformed patrol in the Times Square area. Around 1:30 a.m., one of the officers saw defendant William Brown outside a club, recognized him as someone the officer had previously arrested twice for fraudulent accosting and directed Brown to leave the area. Three hours later, the officers were in an unmarked police van and saw Brown and defendant Patrick Thomas looking over their shoulders as they ran down the middle of Broadway in Times Square.

One of the officers recognized Thomas as someone who associated with people—other than Brown—who preyed on victims in the Times Square area. The three officers exited the van and directed the defendants to stop. One of the officers then located a robbery victim outside the club where Brown had been seen a few hours earlier. The victim identified Brown and Thomas as the men who had robbed him, they were both placed under arrest, and the victim's Rolex watch and $185 in cash were recovered from Thomas.

Both defendants moved to suppress the witness showup identification. The Supreme Court denied the motions, and the defendants appealed to the First Department. The First Department reversed in a pair of 3-2

decisions finding that observation of the two defendants running down Broadway while looking over their shoulders did not give the police officers reasonable suspicion to detain the defendants. In each of the cases, one of the dissenting justices granted the People leave to appeal.

In its memorandum decision, the court determined that whether the facts of a particular case rise to the level of reasonable suspicion represents a mixed question of law and fact rather than a pure question of law. Accordingly, the court dismissed the appeals pursuant to CPL Section 450.90(2)(a) as not authorized to be taken. The majority distinguished *People v. McRay*, 51 NY2d 594 (1980)—cited by the dissent—on the grounds that the Appellate Division in that case found that the People's proof of reasonable suspicion was insufficient as a matter of law, while in this case the Appellate Division reversed the suppression court because it drew a different inference from the facts. The former presents a question of law, and the latter presents a mixed question of law and fact.

In his dissent, Pigott noted that the police officers did not simply witness the defendants running down the street late at night while looking over their shoulders. The officers also recognized the defendants as individuals who had engaged in—and associated with others who engaged in—crimes in the area. Pigott added that the officers would have been derelict in their duty if they had not detained the defendants under these circumstances and expressed the concern that decisions like this could impede effective law enforcement.