NEW YORK COURT OF APPEALS ROUNDUP

UNJUST ENRICHMENT, ADDITIONAL INSUREDS, ISSUES IN CRIMINAL PRACTICE

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JULY 18, 2012

The Court of Appeals recently held that a real estate firm's relationship with a competitor in the transaction at issue was not sufficient to support an unjust enrichment claim. Whether that result was consistent with the court's precedent or whether the decision imposed a heightened standard to sustain such a claim was disputed between the majority and dissent.

In an insurance dispute arising out of a horrible crane collapse, the court held that if misrepresentations by the primary insured rendered the liability policy void such that the primary insured was not entitled to coverage, the additional insureds similarly would not be entitled to coverage.

The court also issued two decisions of interest to criminal lawyers. First, it addressed whether a plaintiff in a malpractice action may recover damages from his criminal defense lawyer for nonpecuniary loss. Resolving a split between departments of the Appellate Division, the court held that such damages are not recoverable in those circumstances. Second, it held that an appeal lies from an oral order of a criminal court that is otherwise appealable, not only from a written order.

Unjust Enrichment Claim

A plaintiff need not have been in privity with a defendant to maintain a claim for unjust enrichment. There must be some level of relationship between the parties for that equitable, quasi-contractual cause of action to lie, however. In *Georgia Malone & Co. v. Rieder*, the Court of Appeals, in a 5-2 decision, held that the relationship between two firms with respect to the real estate due diligence materials and the transaction at issue was insufficient to support an unjust enrichment claim.

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The real estate brokerage and consulting firm of Georgia Malone & Company Inc. entered into a contract with the developer CenterRock Realty LLC and its managing member (together, CenterRock). Pursuant to the agreement, Malone provided CenterRock with due diligence and other materials concerning a residential apartment building. CenterRock agreed to keep the materials confidential and to pay Malone a commission equal to 1.25 percent of the purchase price in the event it bought the property. CenterRock entered into a purchase agreement but exercised its right to terminate the deal prior to closing. It refused to pay the $875,000 commission that Malone demanded.

CenterRock then sold the diligence materials to Rosewood Realty Group Inc. through a third party for $150,000. Rosewood found a new buyer for the property and earned a $500,000 commission. Rosewood was aware that the diligence materials it purchased had been prepared by Malone. The complaint filed by Malone did not allege that Rosewood knew the materials were sold to it in violation of a confidentiality provision, however. The majority opinion by Judge Victoria Graffeo and the dissenting opinion by Chief Judge Jonathan Lippman disagreed as to whether the complaint, when construed in plaintiff's favor, alleged that Rosewood knew that Malone had never been compensated for its work.

The Supreme Court dismissed the unjust enrichment claim against Rosewood, which ruling was affirmed by the Appellate Division, First Department. The Court of Appeals agreed that Malone had failed to state a claim against Rosewood.

The elements of the unjust enrichment cause of action are that: (1) the defendant was enriched; (2) at plaintiff's expense; and (3) "it is against equity and good conscience to permit the [defendant] to retain what is sought to be recovered." (Citation omitted.)

The court reviewed prior decisions in which it had elaborated upon the pleading requirements for an unjust enrichment claim. Those decisions established that facts must be alleged that would establish a connection between the parties that is "not too attenuated." In the instant case, the court held, the relationship between Malone and Rosewood was "too attenuated because they simply had no dealings with each other." Further, the majority found, because the complaint did not allege that Rosewood was aware of the wrongfulness of CenterRock's actions and paid for the materials, Rosewood met the criteria of a good faith purchaser for value, which does not support an unjust enrichment claim.

The decision also had a policy basis. The court reasoned that it would impose an undue burden on commercial transactions to require a party to probe the relationships between the counter-party with which it is contracting and others with whom the party

has "no direct connection." Malone's avenue to relief must be through its claims against CenterRock.

Judge Eugene Pigott Jr. joined in Lippman's dissent. The dissenters asserted that the majority opinion disregarded the equitable concerns involved and, by requiring a relationship of mutual dealing between the parties, "treads too close to requiring privity."

Additional Insureds' Coverage

It does not seem remarkable to us that in *Admiral Insurance v. Joy Contractors*, the court unanimously held that additional insureds will not be entitled to coverage under an insurance policy if it is rescinded because the primary insured, a construction company, made material misrepresentations in procuring the policy. Yet the court's ruling is contrary to the decisions rendered by the trial court and Appellate Division, First Department, in the matter. In addition, some in the construction industry maintain that the decision is a departure from existing law which will have significant repercussions for that industry.

The lower courts had relied upon precedent from the First and Second departments that had purported to apply two Court of Appeals decisions from the 1950s.[1]

In *Admiral Insurance*, the court both distinguished those earlier Appellate Division decisions, *Lufthansa Cargo v. New York Maritime & General Insurance*[2] and *BMW Financial Services v. Hassan*,[3] and cautioned that to the extent *Lufthansa Cargo* and *BMW Financial Services* may be read to apply to circumstances calling for rescission of an insurance policy, they may not be good law.

Plaintiff Admiral, the excess insurer, allegedly warned that misrepresentations in the underwriting submission of defendant Joy Contractors Inc. could render the $9 million excess liability policy it issued to be void or in breach of conditions precedent to coverage. Joy allegedly represented that it did not perform exterior construction work, specialized in drywall installation, and performed no work at all other than drywall work above two stories in height from grade. In fact, Joy was a structural concrete contractor performing work on an Upper East Side high-rise condominium building's exterior with a tower crane. On March 15, 2008, the tower crane collapsed. Six construction workers and one pedestrian were killed, dozens of people were injured, one building was destroyed and many others were damaged.

Admiral filed a declaratory judgment action against the insurer that had issued the primary policy, Joy and several entities claiming to be "additional insureds" entitled to coverage under the policy, namely the company that had leased the crane to Joy and owners/developers of the property. Admiral asserted various arguments as to why it

should not be required to provide coverage for liabilities arising out of the accident, including that Joy's work came within the policy's "residential construction activities" and LLC exclusions. However, we only discuss here the court's ruling on coverage for additional insureds on Admiral's causes of action based upon Joy's alleged misrepresentations—rescission or reformation of the policy and declarations that the policy was void or did not cover claims arising from the accident.

Numerous motions for summary judgment were filed by the parties. The Supreme Court held that Joy's alleged misrepresentations—even if proven—would have "no effect on the[] coverage" of those entities determined to be additional insureds. The Appellate Division affirmed that aspect of the Supreme Court's order. In an opinion by Judge Susan Phillips Read, the court disagreed with this conclusion. The matter will be returned to the trial court for further proceedings.

The Court of Appeals acknowledged that in prior decisions it had found coverage for an innocent co-insured or additional insured even when another beneficiary of the policy would not have been entitled to coverage. See n. 1, supra. In those cases, however, it was undisputed that the policies were "valid and effective." In contrast, in *Admiral Insurance*, the carrier was seeking rescission and asserting that the policy was void ab initio.

The policy here expressly addressed the implications of fraud or misrepresentation. The alleged misrepresentations prevented Admiral from evaluating the risks to which it was exposed. And if Admiral believed it was extending excess coverage to Joy for liabilities that might arise out of drywall work only, it certainly could not have anticipated being required to provide coverage to additional insureds for very different, riskier work. We submit that the court's decision makes absolute sense: If misrepresentations invalidate a policy as to the primary insured, others likewise should not be able to obtain the benefits of that policy.

Legal Malpractice

In *Dombrowski v. Bulson*, the court unanimously reversed the decision of the Appellate Division, Fourth Department, which had held that a plaintiff who has been wrongfully convicted as a result of his criminal defense attorney's malpractice could recover compensatory damages for loss of liberty, emotional damages and other losses directly attributable to his imprisonment. The court instead agreed with the First Department's conclusion in *Wilson v. City of New York*,[4] that the prohibition against awarding nonpecuniary damages in malpractice actions arising out of civil representation also applies to criminal representation.

The plaintiff in *Dombrowski* spent over five years in prison following his conviction for attempted rape, sexual abuse and endangering the welfare of a child. His petition to the County Court to vacate the conviction due to ineffective assistance of counsel was denied without a hearing. He then sought a writ of habeas corpus in federal court. A Magistrate Judge in District Court for the Western District of New York held an evidentiary hearing, concluded that Thomas Dombrowski's criminal defense lawyer's errors made it difficult for the jury to reliably assess the victim's credibility, and conditionally granted the petition unless the People commenced further proceedings within 60 days, which they did not do.

Dombrowski's malpractice complaint was dismissed by the Supreme Court on the grounds that nonpecuniary damages are not recoverable in a malpractice action and that the plaintiff had not suffered any pecuniary damages because he had continued to receive Social Security disability benefits while imprisoned. (The issue of what categories of pecuniary damages are available in a malpractice action against a former criminal defense lawyer was not before the Court of Appeals.)

In reversing, the Fourth Department observed that the risk of imprisonment due to attorney malpractice is the "primary risk" in most criminal cases, and analogized the cause of action for criminal malpractice to those for false arrest and malicious prosecution, for which damages for loss of liberty are recoverable in New York. The Appellate Division also noted that the trend in other states was to allow for nonpecuniary damages for criminal malpractice, even in states that, like New York, do not allow such damages for civil malpractice.

Chief Judge Jonathan Lippman wrote for the court. His opinion observed that criminal attorney malpractice requires a showing that the plaintiff has "at least a colorable claim of actual innocence—that the conviction would not have resulted absent the attorney's negligent representation," but is not an intentional tort, unlike false arrest and malicious prosecution (which require a showing of actual malice). The crux of the decision, however, concerned policy issues. Specifically, the court expressed concern that a contrary ruling could have "devastating consequences for the criminal justice system" and discourage the "already strapped defense bar" from representing indigents in criminal cases. As a result, nonpecuniary damages are not available in New York to a former client who was the victim of his criminal defense lawyer's malpractice.

Criminal Oral Orders

Not every decision made by a criminal court is appealable, only those decisions as to which a statute specifically provides for an appeal are. But when a criminal court determination is otherwise appealable, must the determination be reduced to writing to

be appealed? The court answered that question in the negative in *People v. Elmer*, in which it resolved two cases.

In *Elmer*, the County Court dismissed 22 counts of a 37-count indictment in an oral ruling because it found that the People's dilatory conduct had deprived the defendant of her right to a speedy trial. The Appellate Division, Third Department, dismissed the appeal because the ruling was never reduced to a writing and entered.

In the companion case of *People v. Cooper*, the defendant pleaded guilty to criminal possession of a controlled substance after the County Court denied from the bench his motion to suppress the evidence. Ordinarily, the denial of a suppression motion is appealable notwithstanding the entry of a guilty plea. The Appellate Division, Fourth Department, held that the defendant had forfeited his right to appeal by pleading guilty before the oral ruling was transcribed. It went on to evaluate the merits of the suppression ruling and determined that the police had probable cause for the search.

The Court of Appeals, in an opinion by Judge Theodore Jones, resolved the issue presented by simple statutory construction. Certain provisions of the Criminal Procedure Law and Penal Law apply to a "written" order. Other provisions do not, including CPL 450.20(1), pursuant to which the prosecution appealed in *Elmer*, and CPL 710.70(2), pursuant to which the defendant appealed in *Cooper*. Presumably the Legislature knew the difference between a "written order" and an "order" when it enacted CPL 450.20(1) and 710.70(2). (For civil proceedings, CPLR 2219(a) provides that an order "shall be in writing" or, upon the request of any party, "shall be reduced to writing or otherwise recorded" except in town or village court or where otherwise provided by law, further supporting that the Legislature is able to articulate a requirement that an order be written when that is its intention.) As a result, in both cases the Appellate Division erred in finding the appeal improper because the order being appealed from was not written.[5]

Endnotes:

1. See *Greaves v. Public Serv. Mut. Ins.*, 5 N.Y.2d 120 (1959) and *Morgan v. Greater N.Y. Taxpayers Mut. Ins. Ass'n*, 305 N.Y. 243 (1953).

2. 40 A.D.3d 444 (1st Dept. 2007).

3. 273 A.D.2d 428 (2d Dept.), lv. denied, 95 N.Y.2d 767 (2000).

4. 294 A.D.2d 290 (1st Dept. 2002).

5. The conviction in *Cooper* was upheld, however, because the Court of Appeals found there was sufficient record evidence to support the Fourth Department's finding that the police had probable cause for the search.