NEW YORK COURT OF APPEALS ROUNDUP

9/11 MATERIAL UNDER FOIL; TAXING TELECOMMUTERS; FEDERAL ARBITRATION ACT

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Last month the Court of Appeals *sua sponte* rejected attempts to directly appeal to that Court two Supreme Court decisions on gay marriage, *Hernandez v. Robles* and *Samuels v. New York State Dep't of Health*, instead transferring those appeals to the Appellate Division, First and Third Departments, respectively, on the basis that a direct appeal does not lie when questions in addition to the constitutional validity of a statute also are involved.

The Court also ruled upon the New York City Fire Department's refusal to produce certain material relating to September 11 that the press and several families of victims sought under New York's Freedom of Information Law, McKinney's Public Officers Law §§ 84, *et seq.* ("FOIL"); again upheld State taxation of all income earned by a non-resdient working in New York only part of the time, in this case a true "telecommuter;" and resolved the standard for determining when a contract with an arbitration clause is subject to the federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* ("FAA"), namely whether the subject of the contract must have a "substantial affect" on interstate commerce, or merely an "affect."

9/11 Material Under FOIL

The New York Times, later joined by the families of eight men who died in the September 11, 2001 attack on the World Trade Center, brought an Article 78 proceeding pursuant to FOIL to obtain records from the New York City Fire Department, *In re The New York Times v. City of New York Fire Dep't.* The records that the Department objected to producing fell into three categories: calls to its 911 service on the day of the attack; "dispatch calls" on its internal system that day; and "oral histories" – Departmental interviews of firefighters conducted in the aftermath of September 11.

The Department initially had opposed any disclosure of 911 calls. Before the Court of Appeals, however, did not seek reversal of the Appellate Division, First Department's ruling directing disclosure of the words of public employees and the relatives of the intervening families. But the other callers' words, the Department argued, fell within FOIL's exception for

"unwarranted invasion of personal privacy." A majority of the Court agreed.

The decision, by Judge Robert S. Smith, first rejected petitioners' argument that no privacy interest exists for the words of those no longer living, finding that family members have an interest that survives the callers' deaths. The Court next balanced that interest against the public interest in disclosure to determine if the invasion of privacy was "unwarranted."

The opinion makes clear that not all 911 calls involve a privacy interest so great as to justify nondisclosure. The words of the callers from September 11 were deemed deserving of protection, however, because they are "different" due to the "desperate straights" of the callers and the "public attention" the tapes may attract. The Court expressed concern that "in some cases [the tapes] will be exploited by media seeking to deliver sensational fare to their audience." The public concern that the Court deemed "legitimate" – interest in learning about the events of September 11 and the performance of the 9/11 system – would be sufficiently addressed by disclosure of the operators' end of the conversations.

It was on this balancing test that three Judges disagreed with the majority. The opinion by Judge Albert M. Rosenblatt dissenting in part, in which Chief Judge Judith S. Kaye and Judge Carmen Beauchamp Ciparick joined, argued that the balancing of interests favored release of transcripts (but not recordings) of the callers' portions of the tapes, from which personal identifying information or "some unusually personal component, such as an expression of dying wishes . . . as opposed to the ordinary reporting of crime scene facts" could be redacted. The minority maintained that there is no reasonable expectation of privacy in a 911 call, and that the nature of the World Trade Center attack elevated the public interest: "Americans deserve to have as full an account of that event as can be responsibly furnished."

As to the families intervening, the Court held that their feelings are also entitled to the respect. The Fire Department should honor requests for disclosure by survivors as to their own calls and relatives of the deceased as to their lost family members' calls. With the memory of the Terry Schiavo matter fresh, one can only hope that relatives of the deceased can agree upon whether their loved one's words should be made public.

The Court further held that dispatch calls are protected from disclosure under FOIL's intra-agency exception, unless and to the extent they contain either factual data or instructions to staff that affect the public. Expressions of opinions and recommendations, however, such as a dispatcher's view of the handling of the rescue operation, is the type of material that the intra-agency exception is intended to protect so as to encourage the free exchange of opinions, advice and criticism within an agency.

The third category of material was created by the Fire Department in order to preserve the recollections of firefighters who responded to the attack. The Department had explained that these recorded interviews had two purposes, "to be an invaluable historical

record, in addition to assisting in any investigations or assessments of the incident." The Court found that firefighters whose interviews were "recorded for the benefit of posterity" should reasonably have understood that their words were destined for pubic disclosure, rendering the privacy and intra-agency exceptions inapplicable. It qualified its ruling that the oral histories should be disclosed, however, based upon the Department's assertion that portions of the histories are "exceedingly personal in nature." The Fire Department is not to redact those portions itself, but may bring to the attention of the Supreme Court specific excerpts that it believes fall into that category for consideration Court *in camera*.

Finally, the Department asserted that six unidentified tapes and/or transcripts within the requested material had been given to the U.S. Department of Justice which intends to use them at the trial of Zacarias Moussaoui, and should not be disclosed under FOIL's law enforcement exception. The Court expressed skepticism that the exception would apply, but directed that the Department of Justice be afforded the opportunity to argue for non-disclosure before the Supreme Court, if it so wished.

Taxing Telecommuters

In re Huckaby v. New York State Division of Tax Appeals presented the Court with another opportunity to consider the right of New York to tax a non-resident on 100% of his income received from a New York employer where much of the work was done outside New York. Again, as it had done recently in *Zelinsky v. Tax Appeals Tribunal*, 1 N.Y.3d 85 (2003), *cert. denied*, 541 U.S. 1009 (2004) the Court in an opinion by Judge Susan Phillips Read, for a 4-3 majority, concluded that the "necessity of the employer" test applied and that the taxpayer was liable for the tax payable on 100% of his income. While the basic facts in both cases were in some respects the same, the *Huckaby* case presented differences that provoked the dissent by Judge Robert S. Smith.

Huckaby was a long-time Tennessee resident and computer programmer. His prior employment had been with an employer in Tennessee that had reorganized its business. In the reorganization, Huckaby was terminated. He was then hired by his current, New York-based employer, which had been a client of the reorganized Tennessee company.

Huckaby and his employer agreed that he would work primarily from his home and would make the 900-mile, two-hour trip to New York as needed by his job. He spent 75% of the time he worked in Tennessee and 25% in New York. Thus, unlike the taxpayer in *Zelinsky*, who commuted from his home in Connecticut to his work as a professor at Cardozo School of Law in New York City, Huckaby could hardly be described as a commuter.

Huckaby acknowledged, however, that he did his work in Tennessee solely for personal reasons, that his employer did not require him to work there and would have permitted him to work out of New York.

After a thorough review of the statutory background of the "necessity of the employer" test, the Court concluded that the Legislature, because of the complexity of dealing with taxing non-residents who work both within and outside the State, had left the issue to rulemaking by the State Commissioner of Taxation and Finance. The rule as promulgated, while acknowledging the potential for the allocation of non-residents income for tax purposes between the state of residence and the state in which the employer was conducting business, clearly announced the requirement of "necessity" of the employer to have the employee perform duties outside of New York, rather than permitting work out of State for the convenience of the employee.

The Court concluded that the Commissioner had duly carried out his responsibility by adopting the "necessity of the employer" test, and affirmed the judgment of the Appellate Division.

In doing so, the majority also rejected Huckaby's argument that his facts differed from those in *Zelinsky* and in another Court of Appeals decision because he was not engaged in an arrangement used to avoid or evade taxes. As the Court explained, those precedents were not based upon the taxpayer's intent to avoid New York income tax; Huckaby chose to work for a New York employer with the benefit accruing from such work, and the distance of his residence from the employer's office was not determinative.

The Court also rejected Huckaby's position that taxing him for 100% of his income violated due process because his tax obligation was grossly out of proportion to the benefits he received from New York. The Court reasoned that Huckaby's due process rights were not violated because the tax imposed was reasonably related "to values connected" with the State. To Huckaby's suggestion that the "necessity of the employer" test would permit New York to impose a 100% tax on the income of a non-resident employee who only worked in New York one day per year, the Court sidestepped that issue as "not before us," and concluded that the contacts with New York by Huckaby were sufficient to overcome due process concerns.

Finding a reasonable basis for New York's policy for dealing with non-residents, the Court also found no violation of Huckaby's equal protection rights.

The comprehensive dissent by Judge Smith concluded that the tax imposed upon Huckaby, who was beyond commuting distance from New York, was contrary to New York's Tax Law, and that the interpretation of that law by the majority violated the due process clause of the United States constitution.

It is obvious that the issues raised here will likely be back before the Court by a taxpayer with a more equitable position for allocating taxes between the state of his residence and his New York-source income.

It is also not unlikely that a petition for *certiorari* to the Supreme Court of the United States will be forthcoming in *Huckaby*.

Federal Arbitration Act

Matter of Diamond Waterproofing Systems, Inc. v. 55 Liberty Owners Corp. is another action arising out of the events of September 11. In 1995, the parties entered into a contract for Diamond Waterproofing to repair and reconstruct the facade of the landmark building, 55 Liberty Street. The contract provided for arbitration of any claim "arising out of or related to the Contract," and that it would be governed by "the law of the place where the Project is located." Work was completed in 1996. A post-September 11 inspection of the building revealed cracks on the facade. 55 Liberty Owners Corp. demanded arbitration, and Diamond Waterproofing brought an action to stay arbitration on the ground that the demand for arbitration was untimely.

Under New York law, threshold statute of limitations questions relating to arbitration are resolved by the courts, but under the federal Arbitration Act they are decided by the arbitrator. The issues, therefore, were whether the FAA governed the agreement and, if so, whether the agreement came within the FAA exception that permits parties to contract to have courts determine statute of limitations disputes.

The FAA applies to arbitration provisions in contracts "evidencing a transaction involving commerce." The Supreme Court, New York County, determined that the FAA did not govern the parties' arbitration agreement because the project did not have a "substantial affect" on interstate commerce. The Appellate Division, First Department reversed, applying the less stringent "affects" interstate commerce test. The Court of Appeals, in an opinion by Judge Carmen Beauchamp Ciparick for a unanimous Court, affirmed. It adopted the "affects" test for determining FAA applicability, and agreed that the test had been met because some of the materials, equipment and services for the project came from outside of New York, and some meetings relating to the project were held outside the State.

As noted above, even under the FAA the parties could have contracted to submit statute of limitations questions to the courts. Their agreement contained no such explicit provision, however. In addition, the choice of law clause provided only that New York law would govern the agreement. In order for parties to incorporate New York law that timeliness issues in an arbitrated dispute are determined by the courts, a contract must state that New York law governs "the agreement *and its enforcement.*" (Emphasis in original, citation omitted.) Without that "critical language concerning enforcement," however, all controversies, including over the statute of limitations, are governed by the FAA.

In their monthly New York Law Journal column about New York Court of Appeals developments, Roy Reardon and Mary Elizabeth McGarry discuss the production of certain material relating to the September 11, 2001 attacK on the World Trade Center, the taxing of telecommuters, and the Federal Arbitration Act.

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