

NEW YORK COURT OF APPEALS ROUNDUP

MURDER CONVICTION OVERTURNED; PRENUPTIAL AGREEMENT FOUND INVALID

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In this month's column, we address a case construing the effect of a lengthy coercive police interrogation on a subsequent confession made in the presence of counsel. We also discuss the court's determination that a seemingly minor defect in a notary's affirmation invalidated an otherwise enforceable prenuptial agreement. Finally, we discuss the court's response to questions certified by the U.S. Court of Appeals for the Second Circuit regarding the existence of a private right of action under the General Business Law provisions preventing the termination of service agreements.

Conviction Overturned

The court recently issued another opinion in a criminal appeal that raises serious constitutional issues. In [*People v. Guilford*](#), the court found that a defendant's 49 1/2-hour long custodial interrogation rendered his subsequent murder confession involuntary despite the fact that there was an eight-hour break between the interrogation and the confession and despite the fact that his counsel was present at his confession. In an opinion by Chief Judge Jonathan Lippman, the court found that the break in questioning and the presence of counsel were not sufficient to remove the taint from the prior coercive interrogation. Judges Victoria Graffeo, Susan Phillips Read, Robert Smith, Eugene Pigott Jr. and Jenny Rivera joined in the opinion. Judge Sheila Abdus-Salaam took no part in the decision.

James Guilford was arrested on March 20, 2007, for the murder of his former girlfriend who had gone missing in Syracuse in early February. Syracuse police officers interrogated him for more than 49 hours from approximately 11:30 p.m. on Tuesday, March 20 until 1 a.m. on Friday, March 23, 2007. He was advised of his Miranda rights

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at the beginning of the interrogation but apparently was not permitted to sleep during the subsequent 49 hours of questioning and was not provided with any food other than a single sandwich. Defendant made a number of incriminating statements and eventually told the detectives that he would tell them where the victim's body was located as long as they provided him with a lawyer and allowed him to speak to the assistant district attorney with whom he had spoken earlier. The assistant district attorney made arrangements for defendant to obtain counsel and then advised defense counsel that defendant's sentence would be capped at 18 years if he revealed the location of the victim's body. Defense counsel spoke with his client and then informed the detectives that his client would not speak with them any further that night. Defendant was booked and placed in a holding cell at approximately 1:30 a.m. on March 23.

Defendant was arraigned at 9:30 the same morning and was then questioned by police in the presence of his counsel. When asked, "what happened," defendant answered, "I killed her." Defendant subsequently moved to suppress the statements he made while in custody. The trial court granted the motion as to the statements made during the 49-hour interrogation but denied the motion with respect to the subsequent confession. Defendant was convicted of murder in the second degree and sentenced to a term of 25 years to life. He appealed the judgment to the Appellate Division, Fourth Department, which affirmed his conviction in a decision in which two judges dissented.

The Court of Appeals noted that the burden is on the state to prove the voluntariness of a confession beyond a reasonable doubt. In many cases, that burden can be met by simply showing that appropriate Miranda warnings were provided. Where, as here, there is evidence of actual coercion, the state must make a higher showing. The court noted that defendant's interrogation was substantially longer than custodial interrogations in other cases that had been deemed impermissibly coercive. In addition, defendant had not slept for more than 50 hours and the evidence adduced at the suppression hearing indicated that he was not provided with any food other than a single sandwich. Given these facts, the court determined that the eight hour break between his initial questioning and his subsequent confession was not sufficient to remove the taint of the initial coercive interrogation.

The court also rejected the argument that the presence of counsel at the confession established the voluntariness of that statement. The court found that while Miranda provides that the presence of an attorney can be "an effective buffer" against coercion, it does not suggest that the presence of an attorney necessarily neutralizes the effect of an extensive prior coercive interrogation. By the time that counsel was appointed in this case, defendant had already agreed to disclose the location of the victim's body and the evidence showed that defendant had been so depleted by more than two days of

constant interrogation that there were serious questions as to his ability to usefully confer with his attorney.

Accordingly, the court reversed the Fourth Department's decision, finding that the suppression motion should have been granted, and remanded the case for a new trial.

Prenuptial Agreement

While prenuptial agreements are recognized as matters one should approach with a "measure of deliberation" because of their "significance," a party must comply with the legal niceties when executing such agreements in order to make them enforceable. Gary Galetta, the soon-to-be-married groom, learned this the hard way with respect to such an agreement he entered into a week before his wedding to Michelle in July 1997.

When Gary filed for divorce in 2010, Michelle brought a separate action for divorce and sought a declaration that the couple's prenuptial agreement was invalid because Gary had not executed the agreement in accordance with the requirements of the law. In reversing the order of the Appellate Division, Fourth Department, and granting Michelle's motion for summary judgment in [*Galetta v. Galetta*](#), the court, in a unanimous opinion by Judge Graffeo (Judge Abdus-Salaam taking no part), determined the agreement signed by Gary to be invalid.

Domestic Relations Law §236B(3) provides, in part, that "[a]n agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded."

Real Property Law §291, which governs the recording of deeds, states that "[a] conveyance of real property, within the state, on being duly acknowledged by the person executing the same, or proved as required by this chapter, may be recorded in the office of the clerk in the county where such real property is situated...."

The opinion of the court as to the validity of the prenuptial agreement in this case turned on whether the certificate of acknowledgement accompanying Gary's signature complied with the requirements of the law: Was it "duly acknowledged"? The signatures of the parties to the agreement were conceded to be authentic and there was no claim by Michelle that she had been caused to sign the agreement by reason of fraud or duress.

As the court pointed out, however, the purpose of the certificate of acknowledgment is to establish that the person who signed the document orally acknowledged to the notary public or other officer that he or she signed the document and that the notary or

other officer knew the person who signed the document or had "satisfactory evidence" that the signer was the person described in the document. Here, in the certificate of acknowledgment of Gary's signature, unlike the one signed by Michelle, the language "to me known and known to me to be the person described in the document" was omitted.

No evidence was presented concerning the omission, other than the affidavit of the notary public who witnessed Gary's signature in 1997. That affidavit was submitted in opposition to Michelle's motion for summary judgment and stated essentially that the notary's custom and practice prior to acknowledging a certificate was to confirm the identity of the signer and that the signer was the person named in the document, and that the notary presumed he followed that practice here. Finding that the certificate of acknowledgment was defective, the court concluded that the notary's affidavit did not cure the deficiency since the notary did not state in his affidavit that he recalled the acknowledgment or that he knew Gary prior to acknowledging his signature. The court also held that reliance on evidence of custom and practice did not cure the deficiency since the statements by the notary were too conclusory to provide a proper basis upon which to rely.

While we defer to the court, which unanimously declared the prenuptial agreement invalid, it is hard not to feel some serious sympathy for Gary. There were certificates of acknowledgment, albeit in Gary's case not in accordance with the law (unlike in *Matisoff v. Dobi*, 90 N.Y.2d 127 (1997), where there was no acknowledgment at all). In addition, both parties signed the agreement, there was no claim of fraud or duress, the absence of the magic language was likely a typist error with both certificates on one page and only Gary's without the required words, and the notary confirmed by affidavit that his practice would have confirmed Gary's identity 10 years ago when he signed the certificate. If there is a possible cure, and the court left no doubt that it did not decide that there can never be one, the facts here must come close to what should permit it.

General Business Law

In [*Schlessinger v. Valspar Corporation*](#), the Second Circuit certified two questions to the Court of Appeals arising out of New York General Business Law §395-a. The case was based upon individual purchases of furniture by the plaintiffs from the Fortunoff Department Store. Each plaintiff purchased a Guardsman Elite five-year Furniture Protection Plan when they purchased their furniture. Guardsman was a part of Valspar Corporation.

The plan provided that if the furniture became stained or damaged during the period of the contract, then Valspar, through Guardsman, would perform one or more different

services under the plan, ranging from rendering advice on how to remove stains to the complete replacement of the furniture, or would arrange for a store credit or offer a monetary settlement.

The plan also provided, inter alia, under a store closure provision, that:

[i]f the particular store location where you originally purchased your furniture... has closed, no longer carries Guardsman as a supplier, changed ownership, or has stopped selling new furniture since your purchase, Guardsman will give you a refund of the original purchase price of this Protection Plan.

Later, Fortunoff went into bankruptcy and the store where plaintiffs bought their furniture closed. Plaintiff Pianko made a claim under the plan for damages to her furniture to which Valspar, under the above-quoted provision, tendered Pianko a full refund of what she paid to buy the plan. Schlessinger's furniture suffered no damage or staining and Schlessinger made no personal claim under the plan.

Plaintiffs brought a lawsuit in the federal district court bottomed on diversity against Valspar alleging two causes of action; one for breach of contract under General Business Law §395-a and the second for damages under General Business Law §349. Plaintiffs also brought a class claim on behalf of others with New York addresses who had or would thereafter purchase a service contract under the plan or those who had already made a claim under the plan that was resolved by the payment of a full refund of the price they paid for the plan from June 1, 2004, to the date of judgment in the case.

To the extent applicable here, §395-a provides that "[n]o maintenance agreement covering parts and/or service shall be terminated at the election of the party providing such parts and/or service during the term of the agreement." The Second Circuit and the Court of Appeals assumed, as claimed by plaintiffs, that the store closure provision of the plan violated §395-a. Plaintiffs' position was that §395-a rendered the store closure provision of the plan "ineffective and not part of the agreement" and that by denying claims for relief beyond that provided by the store closure provision, Valspar breached the agreement (i.e., the furniture protection plan).

Plaintiffs sought a declaration that the store closure provision was not part of the contract, an injunction enjoining its enforcement, the reprocessing of all claims that denied relief beyond that provided by the store closure provision, damages, attorney's fees, legal expenses, and costs.

The district court dismissed the complaint relying principally upon the Court's decision in [*Kerusa Co. v. W10Z/515 Real Estate Limited Partnership*](#), 12 N.Y.3d 236 (2009), and holding that a breach of contract claim does not lie solely because of conduct prohibited

by §395-a and that a claim under General Business Law §349 for deceptive business practices cannot be based solely on a violation of §395-a.

In answering the certified questions, the Court of Appeals also relied upon *Kerusa* and concluded that §395-a provides no private right of enforcement, which the Legislature had assigned exclusively to government officials, and that to permit a private cause of action would be impermissible.

The court also concluded that Valspar's violation of §395-a did not give rise to a private remedy under §349 because §349 provides a remedy only for conduct that deceives consumers, and the termination provision in a maintenance agreement has no such tendency.

Accordingly, the court answered both questions certified to it in the negative in an opinion by Judge Read for a five-judge majority. Judge Smith dissented in part and Judge Abdus-Salaam took no part.

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