NEW YORK COURT OF APPEALS ROUNDUP:

THE COURT OF APPEALS RULES ON BANKING, ZONING AND WORKERS' COMPENSATION ISSUES WITH BROAD IMPACT

ROY L. REARDON AND MARY ELIZABETH MCGARRY*
SIMPSON THACHER & BARTLETT LLP

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Three of the Court of Appeals decisions that we discuss this month involve issues of sufficiently broad application to have attracted *amicus* briefs in each case. They address: whether a commercial bank may alter certain UCC provisions governing unauthorized transfers, an issue on which the Court disagreed with the position of *amici* The Clearing House Association and American Bankers Association; how zoning boards must approach a religious or educational institution's application to expand its facilities, a question upon which *amicus* Association of Towns of the State of New York weighed in; and whether a form agreement typical in the construction industry satisfies the Workers' Compensation Law requirement of an express indemnification agreement, a matter as to which the Court rejected the argument supported by *amicus* New York State Builders Association.

We also discuss an opinion in which the Court beseeches the Board of Elections to revise the form for subscribing witness statements that must accompany designating and nominating petitions, by removing from the form language attesting to a qualification that the Court has held cannot be required under the First Amendment.

Finally, we note with sadness the passing of Hon. Bernard S. Meyer. Judge Meyer was a great contributor to legal profession in many ways, including his service as an Associate Judge of the Court of Appeals (1979-86) and prior thereto a Justice of the Supreme Court, his work as a private practitioner, his role in the creation of New York's Pattern Jury Instructions, and his active membership in numerous bench and bar associations, to name a few.

Unauthorized Bank Transfers

New York UCC Article 4A governs unauthorized and ineffective transfers (*i.e.*, those for which security procedures have not been properly executed) from a bank account. In

* **Roy L. Reardon** *and* **Mary Elizabeth McGarry** *are partners at Simpson Thacher & Bartlett LLP.*

Regatos v. North Fork Bank, the Court of Appeals resolved issues of interpretation that apparently had not been resolved by the highest court of any state that has adopted the relevant UCC provisions. They reached the Court by way of questions certified by the Court of Appeals for the Second Circuit.

UCC 4-A-505 provides that a customer is precluded from seeking to recover the principal of a payment order issued in the customer's name unless it advises the bank of its objection "within one year after the notification was received by the customer." UCC 4-A-204 provides that the customer is not entitled to interest on that amount unless it notifies the bank within a "reasonable time," not to exceed 90 days from receiving notice.

The predecessor to the defendant bank in *Regatos* had attempted to modify the one-year period in its customer agreements and require that, in order to recover principal or interest on an unauthorized transfer, a customer must give notice within 15 days of the time the customer's bank statement was "first mailed or available to the depositor." In addition, the bank had adopted the practice of holding plaintiff's bank statements, and mailing them to the plaintiff only when so requested.

The bank had received funds transfer orders in the amounts of $450,000 and $150,000, respectively. In both instances it compared the signature on the faxed order to plaintiff's signature on file, but failed to follow the agreed security procedure of confirming the order with plaintiff by telephone. The orders were reflected on statements generated but held by the bank. It was not until several months later, when he checked his accumulated bank statements, that plaintiff learned of the unauthorized transfers. Plaintiff notified the bank that same day, but it refused to replace the funds.

Judge Albert M. Rosenblatt's opinion for a unanimous Court concluded that the one-year statute of repose for giving a bank notice of its error may not be reduced by contract. Article 4-A strikes a "fine-tuned balance between the customer and the bank as to who should bear the burden of unauthorized transfers," relieving banks from liabilities for an indefinite period but also creating incentive for them to develop and follow security procedures. Permitting banks to reduce the period of repose would undermine that incentive.

The Court then turned to the certified questions regarding the adequacy of plaintiff's notice. Defendant argued that plaintiff had constructive notice of the unauthorized transfers once his statements were generated, even though they were not mailed to plaintiff at that time. The Court found that such a result would conflict with reasonable business practices. "Notice" for purposes of the statute is actual notice, and the UCC requirement that a customer seeking to recover interest have a "reasonable time" to raise an objection may not be varied by an agreement that purports to start the time running on the date of constructive notice. If defendant had called plaintiff in accordance with its security procedures, plaintiff would have had actual notice at that point. Failing that, however, the plaintiff did not have notice until he

received his bank statements.

Zoning Religious Uses

In *Matter of Pine Knolls Alliance Church v. Zoning Board of Appeals of the Town of Moreau,* the Court ruled that the Appellate Division, Third Department, had given an overly broad reading to its prior decision on the limits of zoning restrictions for educational and religious institutions, *Cornell University v. Bagnardi,* 68 N.Y.2d 585 (1986). The Court unanimously reiterated, in an opinion by Judge Victoria A. Graffeo, that imposing conditions on a special use permit for such an institution's expansion plans is permissible, as long as the conditions are not so "costly or extreme" as to undermine the expansion or effectively exclude educational or religious use of the property.

Educational and religious institutions historically have been given special treatment in zoning matters. Residential communities may not adopt blanket bans on educational and religious uses, but must consider permits for such uses on a case-by-case basis. In *Cornell,* two colleges' expansion proposals had been denied on the ground that the colleges had not established a "need" to expand. The Court ruled that was an impermissible criterion, and that zoning officials may reject expansion proposals by educational and religious organizations only on the basis of the proposals' effect on public health, safety, welfare, and morals.

The petitioner in *Pine Knolls* operated a Church in a residential district of Moreau. It purchased a parcel adjoining the Church's property and sought modification of its special use permit to implement an expansion plan, including adding a building and expanding its existing buildings and parking lot. The plan also featured a second driveway to provide access to the parking lot. After conducting hearings, the Moreau Zoning Board approved all aspects of the plan other than construction of a second driveway. Relying upon an engineering report, the Board concluded that the proposed additional roadway would have an undue negative impact on the public welfare due to noise, traffic, and loss of "green space," and that the Church's traffic needs could be met by upgrading its existing entrance. The Church, however, could renew its application should the recommended changes to the first driveway prove ineffective.

The Church commenced an Article 78 proceeding. Its argument, with which the Third Department agreed, was that the Zoning Board's refusal to permit the construction of a second driveway because the need for such driveway had not been established, ran contrary to *Cornell*. The Court of Appeals reversed, and reinstated the Board's determination.

A distinction must be drawn between "second-guess[ing] the expansion needs of religious and educational institutions," which is impermissible, and considering alternative means of accommodating such needs once identified by an institution to reduce negative

impacts, which is permissible. Here, the Zoning Board did not improperly involve itself with the Church's internal affairs to determine whether expansion was warranted. Instead, the Board appropriately balanced the interests involved by allowing the Church to expand, but in a manner less intrusive on neighboring properties.

Employer Indemnification

Section 11 of the Workers' Compensation Law prohibits third-party indemnification or contribution claims against an employer for injuries to an employee, except in two circumstances: (1) if the employee sustained "grave injury," or (2) if the employer, by "written contract entered into prior to the accident . . . expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered." *Rodrigues v. N & S Building Contractors, Inc.* addressed the level of specificity an indemnification provision must contain to come within the latter exception to § 11.

Plaintiff was an employee of Caldas Concrete Company, a subcontractor to defendant and third-party plaintiff N & S Building Contractors. The two companies had worked together many times. They entered into an agreement that was not specific to any particular construction project. The agreement stated that Caldas was responsible for the safety of its employees, required Caldas to carry general liability insurance with N & S as an additional insured, and provided that Caldas would indemnify N & S against any claims or damages arising out of its subcontracted work to the extent caused by Caldas or its employees. The indemnification provisions were substantially similar to those found in form construction industry contracts not specific to New York.

Four months after the agreement was signed, N & S as general contractor subcontracted to Caldas the concrete work for a private home it was building. When plaintiff was injured at that site he sued N & S, which asserted an indemnification claim against Caldas. The Supreme Court and Appellate Division, Third Department, both held that the parties' contract did not come within the indemnification agreement exception to the Workers' Compensation Law bar to claims against employers. The Court of Appeals reversed in a 6-1 decision.

Chief Judge Judith S. Kaye, writing for the majority, first determined that the agreement applied to work at the site in question, despite the fact that Caldas was hired for that site after the agreement was executed. The agreement referred to the performance of subcontracted work, uncontradicted evidence of the parties' intent supported that the contract applied to all work for which N & S would hire Caldas, and if the agreement were construed to cover only sites identified therein it would be rendered meaningless as no site was identified.

The Court next considered whether § 11's criteria were met so as to invoke the exception, and found that they were. It declined to graft onto the statute's requirement of an express written agreement further requirements that the agreement specify the sites, persons,

and losses covered. "So long as the written indemnification provision encompasses an agreement to indemnify the person asserting the indemnification claim for the type of loss suffered, it meets the requirements of the statute."

Judge Susan Phillips Read dissented, reasoning that in enacting § 11 to provide employers relief from third-party actions unless they "expressly" agree otherwise, the Legislature cannot have contemplated that generic indemnification clauses drafted for nationwide use would constitute express agreements to forego the statute's protections.

Election Petitions

An Election Law provision required a subscribing witness to a designating petition to be a resident not just of New York State, but also of the same political subdivision as the office to which the petition related. In 2001, the Court held such provision unconstitutional under the First Amendment because there was no compelling justification for the residency requirement. *Matter of LaBrake v. Dukes*, 96 N.Y.2d 913 (2001). In *Matter of McGuire v. Gamache*, decided last month, the Court was unanimous in similarly holding unconstitutional the parallel Election Law provision applicable to independent nominating petitions. That ruling did not resolve completely the validity of the petitions in dispute, however.

Susan McGuire, an incumbent Republican and Conservative candidate for membership in the Dutchess County legislature, commenced a proceeding to invalidate independent petitions nominating Alison E. MacAvery as Senior Citizens Party candidate for that office. Several pages of signatures were obtained by a subscribing witness, John Ballo, who had stricken from his witness statement without explanation the phrase, "I am also duly qualified to sign the petition."

MacAvery's counsel represented to the trial court that the sole reason for Mr. Ballo striking the phrase was that he was not a resident of the District and thus could not attest to meeting the qualifications as stated in the form, but counsel declined the trial court's invitation to submit affidavit or other testimonial evidence to support the proposition. This was a fatal error. The Court held in a 5-2 decision that because alterations of a witness statement must be explained and initialed and because there was no admissible evidence that residency was the sole reason for Mr. Ballo altering the statement, the petitions supported by his witness statement were invalid.

This somewhat unsatisfactory result was necessitated by the lack of factual record. The majority opinion by Judge Victoria A. Graffeo did, however, acknowledge the "dilemma" facing otherwise qualified subscribing witnesses. The Court stated that the statutorily-mandated subscribing witness statements for designating and nominating petitions need to be revised for nonresident witnesses. It concluded, "[w]e urge the State Board of Elections to take whatever action is necessary to determine how best to amend the preprinted

witness statement and issue new petition forms."

Judge George Bundy Smith authored a dissent in which Judge Robert S. Smith joined, arguing, "[t]he fact that the Board of Elections or the State Legislature has not changed the form during several years after a declaration that a portion of it is unconstitutional is not an adequate reason to deny the subscribing witness his constitutional rights."