NEW YORK COURT OF APPEALS ROUNDUP

PREEMPTION, POTHOLE LAW NOTICE AND DOUBLE JEOPARDY

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

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Governor David A. Paterson appointed a newcomer to the Court of Appeals, Presiding Justice of the Appellate Division, First Department, Jonathan Lippman, to succeed Chief Judge Judith S. Kaye following her retirement at the end of last year. The Senate confirmed his appointment yesterday.

This month we discuss three of the Court's recent decisions. In Helmsley-Spear Inc. v. Fishman, the Court found that federal labor law did not preempt the state court's ability to enjoin a nuisance. In D'Onofrio v. City of New York, it addressed what constitutes adequate notice of a sidewalk defect for purposes of what has become commonly known as the "Pothole Law," and at what point that determination should be taken away from the jury. And in Matter of Rivera v. Firetog, the Court reviewed the criteria for directing a mistrial on all counts due to a jury deadlock in the absence of a declaration by the jury that it has reached a partial verdict, and the standard of review of mistrial orders.

Federal Preemption

Helmsley-Spear Inc. v. Fishman raises the issue of whether federal labor law preempted a state court action against conduct by a union. The Supreme Court, New York County, in a detailed opinion by Justice Martin Shulman, issued a preliminary injunction. The Appellate Division, First Department, reversed and dismissed the complaint. In a carefully crafted opinion for the majority by Judge Eugene F. Pigott Jr., the Court of Appeals reversed. It held that Congress did not intend to preempt state jurisdiction to adjudicate the private nuisance claim asserted.

The case arose out of efforts by a union to organize the employees of Copstat Security, an independent contractor that Helmsley-Spear, as the managing agent for the Empire State Building (ESB) had retained to provide security. Over the course of more than two months, union members handed out leaflets at various entrances to the building.

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

The action was brought by Helmsley-Spear and the owners of nearby businesses. Their complaint did not challenge the distribution of leaflets, but rather the persistent drumming or banging with sticks on five-gallon containers or paint cans while leaflets were being handed out. It alleged that the drumming was a private nuisance that negatively impacted their ability to do business and the well-being of those who worked on their premises.

The union claimed that its banging to attract the attention of the intended recipients of its message was protected by the National Labor Relations Act and its constitutionally guaranteed right to free speech.

To support its position, the union introduced a Letter Ruling by the National Labor Relations Board. The ruling dismissed an unfair labor practice charge filed by Copstat, which had asserted that the union's conduct was forcing Helmsley-Spear to discontinue the use of Copstat's services and causing Copstat's employees to select the union as their collective bargaining agent.

It was critical to the majority's decision that the preliminary injunction issued by the Supreme Court restrained further drumming only, and did not prohibit the distribution of leaflets. This limitation on the scope of the injunction gave the Court the ability to look through the more narrow lens of whether the union's conduct was within the appropriate scope of state authority "to keep order within its borders," while also fully respecting federal supremacy to protect union activity.

The Court concluded that, even if the drumming were arguably "protected" conduct under the act, the statute would not prevent the application of state law with respect to the tort of private nuisance. U.S. Supreme Court jurisprudence has not eliminated state jurisdiction over conduct traditionally subject to state regulation, in the absence of an express preemption provision in the federal statute.

The majority also distinguished the argument in the dissent by Judge Susan Phillips Read, joined in by Judge Victoria A. Graffeo. Relying upon Sears, Roebuck & Co. v. San Diego District Council of Carpenters, 436 U.S. 180 (1978), the dissent argued that because the NLRB found the drumming to be "actually protected" under the act, no state court could interfere with such conduct.

According to the majority, however, the NLRB did not find the drumming itself to be "protected" conduct, but only ruled that the drumming did not transform the protected conduct of distributing leaflets into prohibited conduct. A review of the proof of the significant nature and impact of the drumming on the plaintiffs, their employees and the tenants of the ESB, as elaborately presented in the opinion of the Supreme Court, as opposed to the description of the minimal impact of the drumming recited in the NLRB's ruling, showed a factual predicate justifying the application of state law nuisance principles and the issuance of an injunction. This difference in factual records is explained by the fact that more offensive drumming occurred for a sustained period after the time period at issue in the NLRB proceeding.[1]

Helmsley-Spear can be a significant decision in New York. While it recognizes presumptive supremacy of federal law in labor matters, it has clearly left room for the application of state law principles with respect to matters traditionally subject to state law regulation.

Notice of Sidewalk Defect

Under §7-201[c][2] of the Administrative Code, a plaintiff may not recover from New York City for personal injury "sustained in consequence of" a sidewalk being out of repair, obstructed, or in an unsafe or dangerous condition, unless the city received prior written notice of the condition and failed to repair it within 15 days.[2]

The Code requires the Commissioner of Transportation to keep a public record of all such notices. The purpose of the law is to limit the municipality's liability.[3]

The enterprising New York State Trial Lawyers Association created the Big Apple Pothole and Sidewalk Protection Corporation, which employs surveyors to create maps indicating the location and nature of sidewalk defects. Each year, Big Apple reportedly files over 5,000 maps that cover various sections of the city and reflect over 700,000 defects. At one point, citing administrative convenience, the Department of Transportation attempted to reject Big Apple's maps for filing. However, the company was successful in obtaining a court order directing the department to accept and file its maps.[4]

In 2002, the city's comptroller made three recommendation aimed at reducing payments in sidewalk trip-and-fall cases: (1) amend the Code to require greater specificity as to location and defect; (2) grant the city additional time from notice within which to make the repair; and (3) expand the liability of abutting property owners. Only the third recommendation was adopted.

In D'Onofrio v. City of New York and its companion case, Shaperonovitch v. City of New York, defects at the sites of the plaintiffs' respective accidents were identified on filed Big Apple maps. The Court nevertheless held that the city had not been furnished with sufficient notice for liability to be imposed.

Big Apple's maps are marked with symbols denoting the nature of each defect. At the site of Mr. D'Onofrio's accident, the map was clearly marked with a straight line, the symbol for a "raised or uneven portion of sidewalk." But the plaintiff testified that he fell as a result of a grating that moved when he stepped on it and some broken cement that he observed in the area.

While it was not clear exactly how the accident occurred, the Court, in an opinion by Judge Robert S. Smith, found that the defect as described by the plaintiff and depicted in a photograph was not of a raised or uneven portion of sidewalk. Thus, although the jury found that plaintiff established notice, its verdict could not stand. The Court ruled that, as a matter of law, there was no notice of the particular defect that caused plaintiff's fall.

Shaperonovitch presented the flipside scenario: although the cause of plaintiff's accident was clear (a sidewalk elevation), the map was not. The place where Ms. Shaperonovitch fell was marked on the map with a symbol that was not listed in the map's key but did have a straight line as a constituent part. Plaintiff argued that the jury could have found the "ambiguous" symbol provided notice of an elevation. Because the symbol did not match the key's symbol for elevation, however, the Court again found that the map did not furnish notice of the type of defect that caused the accident. It held that no rational jury could have found otherwise, and overturned the verdict.

Judge Theodore T. Jones dissented, and was joined in doing so by Judge Eugene F. Pigott Jr. The dissenters argued that the City need only be provided with notice of the general category of a defect. They maintained that it was at least a "close call" as to whether the crumbling cement around the grating upon which Mr. D'Onofrio fell could constitute a sidewalk elevation, and noted that no other symbol on the map could have more closely described the problem. With respect to Ms. Shaperonovitch, the jury was competent to decide whether the map's symbol was "meaningless" and did not give notice, or gave notice of multiple defects, including the one that caused her accident.

Double Jeopardy

Supported by the New York State Association of Criminal Defense Lawyers as amicus, the petitioner in the Article 78 proceeding of Matter of Rivera v. Firetog, sought to bar his retrial on one of the counts submitted to the jury. The Court, however, held in a 6-1 ruling, that a retrial would not violate the double jeopardy clauses of the federal or state constitutions. Its decision, set forth in an opinion by Judge Graffeo, establishes a high hurdle for a defendant arguing that the trial court abused its discretion in failing to ask the jury whether it had reached a partial verdict.

Three counts were submitted to the jury in Enrique Rivera's trial arising out of a barroom stabbing death, second degree murder and its lesser included offenses of first and second degree manslaughter. The jury was instructed to reach a decision on the murder count first, deliberate on the first degree manslaughter count only if it had acquitted the defendant of murder, and proceed to the second degree manslaughter count only if it had acquitted the defendant of first degree manslaughter. On the third day of deliberations the court delivered an Allen[5] charge, and on the fifth day it declared a mistrial.

Mr. Rivera initially sought to bar any retrial, but argued before the Court of Appeals only that he could not be retried on the top count. The case turned on whether the trial court had abused its discretion in failing to ask the jury whether it had reached a verdict on the murder count before declaring a mistrial. The Court declined to adopt "per se rules or mechanical formulas," and in resolving the issue adhered to its past practice of making a fact-specific inquiry.

It would be fair to say that there was some, albeit inconclusive, evidence of a jury decision that the defendant was not guilty of murder. Indeed, the trial judge twice raised the question of whether the jury should be asked if it had reached a partial verdict.

When that possibility was raised on the second day of deliberations, both sides rejected the offer. When it was raised again on the fifth day, defense counsel requested that the court inquire whether a partial verdict had been reached, but the prosecution opposed such a step. Although it acknowledged that an "inference" could be drawn that the jury had reached a verdict on the murder count, the court decided not to ask the jury whether it had, and proceeded to declare a mistrial.

How much indication of a possible partial verdict must exist before it is no longer within the discretion of the trial judge to declare a mistrial without asking the jury whether it has reached a decision on any count? Here, the jury made several requests for the instructions on all counts to be repeated, suggesting that it might be deadlocked on each of them. On the other hand, the jury had sent the judge a note stating that it could not reach a unanimous verdict and was divided as to Mr. Rivera's guilt, and sent another note asking for clarification of two terms relevant only to the manslaughter counts, "bodily harm" and "reckless action," suggesting that it was deliberating over the lesser included offenses and thus had acquitted the defendant of murder. Defense counsel also argued that the length of deliberations suggested the jurors must have considered more than the top count.

The Court of Appeals majority opinion focused less on the standard for inquiring as to a possible partial verdict, in the absence of a jury declaration that it had reached a verdict on one or more counts, before declaring a mistrial, than on the standard for declaring a mistrial due to a deadlocked jury. Its opinion listed the factors that a trial judge should consider. Once made, a trial court's decision to declare a mistrial is to be accorded "great deference."

The Court distinguished a decision upon which the Appellate Division, Second Department relied in a 4-1 ruling that the trial court abused its discretion, on the basis that the evidence of a partial verdict in *Rivera* was "far less certain." Under the circumstances of this case, the trial court had "reasonably determined that there was a manifest necessity to declare a mistrial," and thus Mr. Rivera could be retried for second degree murder, as well as manslaughter.

Judge Pigott was alone in dissenting. He argued that, "while it is true that juries should neither be encouraged nor discouraged to give a partial verdict, it is clear that they should at least be aware of that option," particularly where, as in this case, the jury was struggling and there was "some indication" that it had reached a partial verdict. The jury in *Rivera*, however, had never been informed that it was possible to declare a partial verdict.

Endnotes:

1. Post script: The Court remitted for consideration to the Appellate Division two issues not decided below: whether the complaint properly pled a cause of action for private nuisance; and whether the action alleged a labor dispute as defined in New York Labor Law §807(10)(c). The Appellate Division promptly resolved both issues on Dec. 30, 2008, holding, based on what it concluded was a determination in the Court of Appeals, that the complaint alleged a viable cause of action, and that the issues between the parties did not involve a labor dispute. The union has sought reargument in the Appellate Division, or, in the alternative, leave to return to the Court of Appeals.

2. No prior notice is required if the municipality was "affirmatively negligent in causing or creating the defective condition," however. Messina v. City of New York, 190 A.D.2d 659 (Second Dep't 1993).

3. Luis Lubell, Prior Written Notice Statutes in New York State: The Resurrection of Sovereign Immunity, 10 Touro L. Rev. 705, 706-707 (1994) ("although . . . prior written notice statutes are valid under the state constitution, they serve no purpose other than to insulate municipal corporations from liability, undermining the waiver of governmental immunity").

4. Matter of the Big Apple Pothole and Sidewalk Protection Committee Inc. v. Ameruso, 442 N.Y.S. 2d 860 (Supreme Court, New York County 1981), aff'd, 86 A.D.2d 986 (First Dep't 1982).

5. See Allen v. United States, 164 U.S. 492 (1896).

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