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OPENING STATEMENT

In a previous issue of *Cases & Points* (Volume V, Issue 4 – Fall, 2003), we addressed the issue of lost wage recovery by illegal aliens in light of the United States Supreme Court's decision in Hoffman Plastic. and the divergence of opinion between the First Department's recent holdings and those of the trial courts in the Second Department. That divergence of opinion has now become even more clear by the Appellate Division, Second Department's recent holding in Majlinger v. Cassinno Construction Corp. That confusion will soon be eliminated by New York's Court of Appeals when it hears the appeal from the First Department's holding in Balbuena v. IDR Realty.

The existing conflict between the various Departments in New York in their interpretation of Hoffman Plastic is the subject of our lead article.

THE UNSETTLED ISSUE OF ILLEGAL ALIENS' RIGHT TO RECOVER LOST WAGES IN BODILY INJURY LAWSUITS (REVISITED)

By: Michael E. Gorelick and Jessica Ferraro

I. Disagreement Between New York's First and Second Departments: Undocumented Immigrant Workers' Right to Recover for Lost Wages

When an employee is injured in a workplace accident, a fundamental part of his remedy is the right to recover damages for lost wages. The employee is entitled to recover for back pay and for the future wages he would have earned were he able to work. But whether an undocumented alien worker injured in a workplace accident is entitled to recover for the lost wages he might have earned had he been able to continue to work illegally in the United States, or whether such an award of lost wages is at odds with the United States' policy on immigration, is unsettled in New York.

As to this question, New York's First and Second Departments are split and the New York Court of Appeals will soon rule on the issue when it considers the Balbuena case, now awaiting a hearing. In Balbuena v. IDR Realty, 13 A.D.3d 285, (1st Dept. 2004), New York's Appellate Division, First Department, ruled that an injured worker's recovery for lost wages was limited to the wages he would have been able to earn in his home country.

In contrast with the First Department, the Second Department recently decided that undocumented immigrant workers are entitled to recover the lost wages that they would have earned in the United States as any other worker might, and that employers can not escape liability for the worker's lost wages by virtue of a worker's status as an undocumented alien. Majlinger v. Cassino Contr. Corp., 802 N.Y.S.2d 56, (2nd Dept. 2005).

Though at odds in their approaches, both Departments seek the same end—to effectuate Congress's intention in passing the Immigration Reform and Control Act of 1986 (IRCA), enacted to discourage the employment of undocumented immigrant workers by requiring employers to verify every employee's eligibility to work in the United States. 8 U.S.C. §1324a et seq.

II.. Hoffman Plastics and the Source of the Controversy

The First and Second Departments' split rests on their respective interpretations of a 2002 United States Supreme Court case, Hoffman Plastic Compounds, Inc. v. National Labor Relations Board, 535 U.S. 137, 122 S.Ct. 1275. In a 5 to 4 decision, then Chief Justice Rehnquist's majority decision held that federal immigration policy, as expressed by Congress in the IRCA, foreclosed the NLRB from awarding back pay to an undocumented alien who had never been legally authorized to work in the United States. The Court ruled that it was improper to award damages for lost wages to Jose Castro, a citizen of Mexico, who obtained employment using the birth certificate of an American-born friend, and to three other employees of Hoffman Plastics who were wrongfully laid off for their union activities. The Supreme Court held that it would directly oppose federal immigration policy "to award back pay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud." Hoffman, 535 U.S. 137 at 149.

In the Balbuena decision in December 2004, the First Department interpreted Hoffman as a federal preemption to the plaintiff for his lost wages, resulting from the construction accident in which he was injured and became unable to work.

But in Majlinger, decided in September 2005, the Second Department ruled that an employer could not avoid liability for lost wages of a worker injured when he fell from scaffolding by virtue of the fact that the worker was an immigrant not in possession of any documents that would demonstrate his eligibility for employment in the United States. Majlinger, 802 N.Y.S.2d 56 at 58. The Second Department interpreted Hoffman much more narrowly than the First Department, holding that Hoffman applied only to an undocumented alien worker's federal cause of action under the National Labor Relations Act, and not state law personal injury damages. The Court also cautioned that too broad a reading of Hoffman could potentially infringe upon the other rights and protections to which undocumented workers are now entitled. It noted that if the IRCA preempts state labor law, for example, "employers of undocumented aliens would be free to ignore New York law governing workplace safety, labor relations, and the furnishing of workers' compensation coverage." Id. at 64.

III.. Looking Ahead: Balbuena on Appeal

When Balbuena is soon heard by the New York Court of Appeals, it is anyone's guess whether the Court will side with the First or Second Department on the issue of undocumented workers' right to recover for lost wages. Solely for purposes of discussion, this article speculates that it is more likely that the Court of Appeals will agree with the Second Department's interpretation and rule that undocumented workers may not be denied lost wages based solely on their immigration status. This predication has two bases: first, allowing Balbuena to stand threatens existing New York Labor Laws, as the Majlinger opinion points out; and second, the best way to effectuate Congress's intention may be to focus the economic impact of the IRCA on employers, rather than undocumented workers, as federal preemption does.

First, the Balbuena decision opens the door to too-widespread preemption of state labor law. In its cursory four paragraph Balbuena opinion, the First Department does not limit the applicability of its holding in any way. Rather, it avoids any discussion of federal preemption, and instead awards the plaintiff a recovery that "would not offend any foreign policy." Balbuena, 13 A.D.3d 285 at 286. Without any explanation of its reasoning, the Court's phrasing invites later courts to find that any New York State labor- or immigration-related law could be preempted if the outcome of its application would meet the vague standard of "offending foreign policy."

Second, the most effective way to serve Congress's intent may well be to discourage employer from utilizing illegal aliens as a cheap alternative to citizens and documented aliens. In Hoffman and Balbuena, the Courts are unwilling to "reward" undocumented immigrant workers by allowing recovery for lost wages, focusing on removing any economic "benefit" to the worker. But rather then aiming to reduce the supply of workers by penalizing them for their immigrant status, the Court of Appeals may well find it more effective to disregard any "benefit" to the employee and instead decrease the employers' demand for undocumented workers by directing the economic impact of the IRCA at those employers, as the Second Department's Majlinger decision does.

The Second Department makes a persuasive argument that withholding otherwise available remedies from undocumented aliens would create a "perverse incentive" for unscrupulous employers to hire them. Majlinger, 802 N.Y.S.2d 56 at 66. Employers might be tempted to hire undocumented immigrants knowing that such employees would have no recourse to pursue proper wages and benefits or damages for workplace injuries.

ment and allows state law to apply equally to both undocumented immigrant workers and citizens of the United States, the incentive to employ undocumented immigrant workers may be reduced.

How the Court of Appeals decides this issue will have great social and economic impact upon employees and employers, alike. It will also have significant economic effect upon members of the construction industry and their insurers, as well.

We will update this article as soon as the Court rules in Balbuena.

Recent Negligent Security Cases

Along with New York's Labor Law, negligent security is one of the most fertile grounds for tort litigation in New York. The general principles are relatively straightforward. Their application to the facts of each case are not.

The general principles are settled:

It is the duty of an owner of premises to take minimal precautions or security measures to protect members of the public from reasonably foreseeable criminal acts of third-persons. An owner of premises does not have the duty to take protective measures unless there is a foreseeable risk of harm resulting from the criminal activities of third-persons on the premises. However, if the danger from a criminal act was foreseeable, the premises owner may be liable.

The question of whether criminal acts of third-persons were "reasonably foreseeable" depends on whether the owner had reason to know, from prior history of criminal activities on the premises or in near proximity, that there was a likelihood of criminal conduct which would endanger the safety of a tenant or a visitor.

In other words, to establish the existence of a duty on the part of the premises owner to take minimal precautions or security measures to protect tenants or visitors against criminal intrusions, it must be shown that the owner either knew or had reason to know from past experience, that there was a likelihood of conduct on the part of third-persons which is likely to endanger the safety of persons foreseeably on the premises.

The following recent decisions have involved the Courts' application of these general principles:

- In Alvarez v. Masaryk Towers Corp., 789 N.Y.S.2d 727 (2nd Dept. 2005), the Appellate Division found that a landlord could not be held liable to the guest of a tenant who was assaulted by criminals and robbed at gunpoint, absent evidence that the assailants were intruders who had entered the building through a negligently maintained entranceway.

The Court found that the defendant/owner has satisfied its initial burden of establishing its entitlement to summary judgment by presenting the aforesaid evidence. In opposing the motion, the plaintiff failed to raise a triable issue of fact as to whether the assailants were intruders who entered the building through a negligently maintained entranceway.

In Alvarez, the only evidence that was presented was that the lock and intercom system on the front door were operable and that the basement door of the building was locked during the 90 minute period before the assault occurred.

In granting summary judgment to the owner, the Court noted that to create a question of fact a plaintiff must show more than just that he was a victim of a crime. He must show the landlord's conduct was

the "proximate cause of the injury and that it is more likely or more reasonable than that the assailant was an intruder who gained access to the premises through a negligently maintained entrance".

After quoting the general principles stated above, the Court found that there had been no evidence presented that the assailants gained entrance through the negligently maintained entranceway and thus, the complaint was dismissed.

- In Anokye v. 240 East 175th Street Housing Development Fund Corp., 792 N.Y.S.2d 417 (1st Dept. 2005), a tenant's survivors brought an action against the building owners and a security guard company, alleging that the tenant's death had been the result of the defendants' failure to take minimal security precautions.

In Anokye, the evidence presented in opposition to defendants' motion to dismiss indicated that the locks on the lobby doors were not working and the contracted for security guard was not present at his lobby post, at the time of the incident; it also established that the building had been the scene of drug and other criminal activities, including burglaries, in the past.

The Court found the existence of a question of fact as to whether the building owners had breached their duty to take minimal security precautions to protect the tenants from the criminals acts of third-party intruders and as to whether that failure was the proximate cause of the tenant's harm. Thus, the Court refused to dismiss the Complaint as against the owner.

On the other hand, the trial court's dismissal of the complaint against the security guard company was affirmed by the Appellate Division, which noted that in the security guard company's contract with the building owners, the guard company had not expressly assumed any protective duty enforceable by the tenants. Thus, the complaint against the security guard company was dismissed.

- In Venetal v. City of New York 2005 WL 2385019 (2d Dept. 2005), a tenant who was raped at gunpoint on the rooftop of an apartment building brought an action against the NY City Housing Authority, alleging inadequate premises security.

The trial court granted the Housing Authority's motion for summary judgment. On appeal, however, the Appellate Division, Second Department, found that questions of fact existed which mandated the denial of the motion. In doing so, the Court noted that a landlord is not the insurer of the safety of its tenants and only has a duty to take minimal precautions to protect tenants from foreseeable harm, including foreseeable criminal conduct by a third-person.

In marshalling the evidence submitted in opposition to the Housing Authority's motion, the Court found that the crime statistics relied upon by the plaintiff in opposition to the motion had been produced by the defendant, Housing Authority, in pre-trial disclosure and were maintained by the Housing Authority Police. The Court found that the "experiential evidence of more than 70 felonies, including murder, forcible rape, arson, assault, and burglaries with forced entries, committed during the two years prior to the date the plaintiff was raped, demonstrates that the [premises where the rape occurred] suffered from an extensive history of violent criminal activity". The defendant's notice of this criminal history was established by the building's superintendent's testimony that copies of police reports were given to the building manager. The Court further noted that the evidence presented in opposition to the motion, raised a question of fact as to whether the plaintiff's assailant was an intruder who gained access to the building because of a defect in the front door lock (which she heard shut behind her after she entered the ntered the building).

Thus, the Court held that summary judgment should not have been granted and the matter must proceed to trial.

- In Anonymous v. Anonymous, (N.Y. Sup. Ct., N.Y.L.J., January 28, 2005), plaintiff, a student at New York University, brought suit against the University, as a result of an assault and attempted rape in a unisex bathroom on the main floor of NYU's Hayden Resident Hall.

NYU moved for summary judgment dismissing the complaint while the plaintiff, the victim of the assault, cross-moved for partial summary judgment against NYU on the issue of liability.

The facts of the case are as follows: Plaintiff was on her way out of the Hayden Hall dormitory and stopped at the unisex bathroom where she briefly encountered the cleaning lady. There was a deadbolt on the door of the bathroom that could only be locked from the inside. As the plaintiff entered one of the stalls, the cleaning lady left so that the door was unlocked. The perpetrator entered and attacked the plaintiff.

The Court found the two crucial issues to be addressed were: (1) was the incident foreseeable and (2) were sufficient precautions taken when the perpetrator was permitted to use the facilities?

NYU argued that the incident was not foreseeable because there had been no prior rapes reported at the Hayden Residence. It also contended that it fulfilled its requirement to provide the same level of minimum security that a commercial landlord was responsible to provide to its tenants and their guests. Plaintiff, however, contended that the relevant statistics for crimes on the NYU campus and in the NYU residence halls made this incident easily foreseeable. Plaintiff also argued that the defendant was both negligent and in breach of contract because the security guard it employed was only supposed to allow students and their visitors and employees onto the premises in accordance with the terms of written documents furnished to the plaintiff.

The Court found that it was unable to grant summary judgment to the plaintiff because the statistics concerning violent crimes that NYU relied upon were hearsay and were not sufficient to support a grant of summary judgment. However, the Court found that plaintiff may be able to lay a foundation for their entry into evidence at trial and should be given an opportunity to do so. Thus, NYU's motion was denied. The Court found that if plaintiff was successful in having those statistics entered into evidence at trial, it would be up to the jury to determine whether they are sufficient to establish foreseeability. Thus, the Court denied both parties' motions on the question of negligence.

The Court also held that NYU's reference to cases involving the standard of care required of a landlord in residential and commercial buildings were not applicable. The Court found that the oral and written representations made by NYU to the plaintiff to induce her to enroll at the school evinces an intention to create much more than a minimum level of security. Thus, the failure of the employed security guard could be found by the jury to constitute a breach of contract by NYU to prevent the assailant from entering the building.

- Vetrone v. HaDi Corp., 2005 NY Slip Op. 08108 (2nd Dept.— October 31, 2005), is a negligent security case with a twist. In Vetrone, the plaintiff was a security guard who had been hired by the owners of the restaurant and party promoters to maintain order at the restaurant's door during a New Year's Eve party.

The promoters had sold many pre-paid, advance tickets to the event. However, on the night of the party, they and the owners also admitted entry to numerous non-ticket holders at the door.

At 11:30 p.m., the security guard was told not to admit any more patrons, as the restaurant was overcrowded. At that time, nearly 100 people, including many pre-paid ticketholders, were waiting at the door to enter. A scuffle ensued and the security guard was injured. He sued the restaurant owners and party promoters. Each defendant separately moved for summary judgment.

In affirming the Supreme Court's denial of the party promoters' motion for summary judgment and in reversing the Supreme Court's grant of summary judgment to the restaurant owners, the Court noted that there was evidence in the record that the party promoters knowingly sold tickets to a significantly greater number of people than the venue could accommodate and were physically present at the restaurant helping to control the event when the incident occurred. Moreover, the Court found that the owners of the restaurant not only permitted the promoters to sell pre-paid tickets to far more individuals than the restaurant could accommodate, but also knowingly admitted non-ticketholders at the door.

The Court found that plaintiff, Vetrone, who was present because he was hired as a security guard for the party, reasonably had the right to expect that the party's promoters and the restaurant's owners would no so overbook the event as to require him, acting virtually alone, to face a large crowd of angry ticketholders who paid to attend the party but were denied entry and told to go home. Nor did the Court agree with the promoters' contention that, in effect, they owed no duty to the plaintiff because, as a security guard, he necessarily assumed the risk that the event would be so overbooked as to put him in the position of having to face and turn away this large crowd seeking entry.

While the Court noted that the acts of a third-person may constitute a superseding cause which breaks the causal connection between a defendant's negligence and a plaintiff's injuries, where, in as in this case, the acts are a "reasonably foreseeable" consequence of circumstances created by the defendants, intervening criminal acts of third-parties may still give rise to liability.

Thus, the Court held that it could not conclude that, as a matter of law, the assault upon the plaintiff as he tried to close the door of the restaurant on a crowd of people holding pre-paid tickets was an unforeseeable consequence and independent of the negligence of the defendants.

AGFJ DEVELOPMENTS

- Barry Jacobs was successful in a trial conducted before a Magistrate Judge in the United States District Court, Eastern District of New York in a case which involved the issue of whether AGF&J's insurance company client had properly cancelled its automobile insurance policy prior to the occurrence of an accident.

Plaintiff alleged that she had sustained serious injuries in an automobile accident which occurred in Queens, New York on December 6, 2001. In her lawsuit against the tortfeasors, one of the defendants failed to appear and a default judgment was entered against him.

The plaintiff filed for Uninsured Motorist arbitration against her own insurer, Allstate. Allstate commenced a special proceeding in New York State Supreme Court seeking a permanent stay of the Uninsured Motorist arbitration, alleging that the adverse driver was insured under a policy issued by AGF&J's client, Proformance Insurance Company.

Proformance opposed the petition to stay arbitration on the ground that its policy had been validly cancelled under the law of New Jersey, prior to the accident.

After a trial held in the Eastern District, Magistrate Judge Pollak issued a lengthy report and recommendation, finding that New Jersey law applied and that the Proformance policy had been validly cancelled under the law of New Jersey, prior to the accident. Thus, the adverse vehicle was uninsured and the Uninsured Motorist provision of Allstate's policy provided the coverage to the plaintiff.

- AGF&J was successful in another Uninsured Motorist proceeding. In Raphael Jean Pierre v. Wausau Ins. Co., the claimant demanded arbitration of its Uninsured Motorist claim under its policy issued by AGF&J's client, Wausau Insurance Company.

The matter was briefed and tried before the American Arbitration Association by Jay Gunsher. It was Wausau's position that the claimant had not sustained a "serious injury" within the meaning of New York's No Fault Statute.

After the hearing, the arbitrator found that although the uninsured driver was negligent, his negligence was a substantial factor in causing the accident and the claimant was not comparatively negligent, no recovery could be awarded. The arbitrator found that, based upon the evidence submitted, the claimant had not fulfilled his burden of establishing that he had suffered a serious injury sufficient to meet the threshold requirements of New York's Insurance Law. Thus, the arbitrator held that Wausau was entitled to an award dismissing the claim with prejudice.

- AGF&J continues to grow. We are pleased to announce that Thomas R. Maeglin and Liz Grisales have joined us as associates. Thomas is a 2003 graduate of Fordham Law School and earned his A.B. in 1990 from the University of Chicago. Liz is a 2001 graduate of Brooklyn Law School and earned her B.A. in 1998 from SUNY Binghamton.

AGF&J is also pleased to announce that Gabrielle Puchalsky and Alexandra Rigney have also joined the firm. Gaby graduated from Brooklyn Law School and earned her B.A. in 2002 from the University of Wisconsin-Madison. She has been employed as a lawclerk at AGF&J while in law school. Alexandra is also a graduate of Brooklyn Law School and earned her B.A. in 2000 from Georgetown University. She was a judicial intern with Judge Casey of the Southern District and has been a paralegal at Cravath, Swaine & Moore.

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