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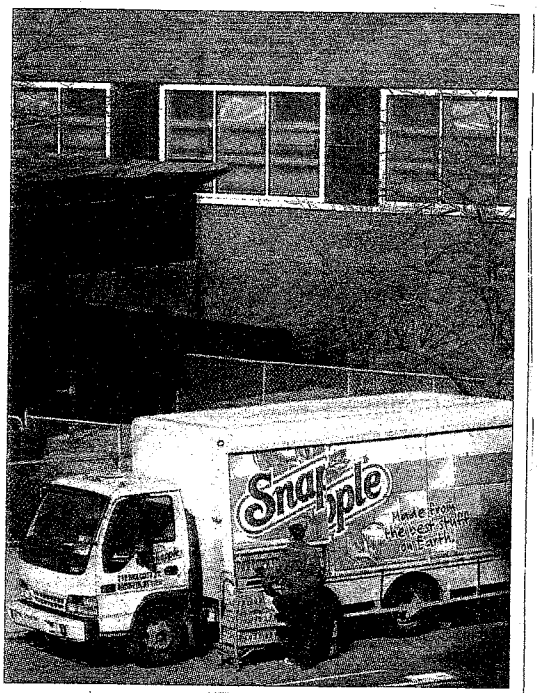

NEWSCOM PHOTO/RICHARD B. LEVINE

Snapple products are delivered to a public school in Chelsea.

Court Upholds City's Snapple Contract

But Future Deals Are Subject To Franchise Committee Review

BY JOHN CAHER

ALBANY — The Court of Appeals yesterday upheld New York City's innovative marketing contract with the Snapple beverage company, but said that in the future concession contracts for the use of the city's intellectual property must be scrutinized by the Franchise and Concession Review Committee.

COURT OF APPEALS

The decisions appear on page 22.

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The 7-0 ruling in *Matter of Comptroller of the City of New York v. Mayor of the City of New York*, 93, essentially upholds the lower courts and casts the final word in a long-simmering brouhaha between Mayor Michael Bloomberg and Comptroller William C. Thompson Jr. Both public officials came out of the case with a partial victory.

The case centered on a novel but apparently ill-fated fund-raising initiative of the Bloomberg administration. It is rooted in the July 2003 creation of the Marketing and Development Corp., an entity established by the Bloomberg administration to market the city's well-known image and to basically turn Gotham into a recognized brand.

In April 2004, the administration entered into an agreement with Snapple that gave the company exclusive rights to sell its products in some 3,500 vending machines and concessions on city properties. Snapple agreed to turn over 30 percent of the proceeds and to promote tourism in the city. The agreement permitted Snapple to use city trademarks, logos and other intellectual property.

City Comptroller Thompson challenged the agreement, claiming the Bloomberg administration had improperly bypassed the Franchise and Concession Review Committee since only the vending portion of the contract, not the marketing part, was submitted for scrutiny and subjected to a public hearing.

The trial judge, Justice Richard F. Braun, agreed with Mr. Thompson that the concession commission had jurisdiction over contracts for the private use of the city's intellectual property, not just its real property, under City Charter §362a, but refused to invalidate the Snapple deal. Rather, in an opinion affirmed by the Appellate Division, First Department, Justice Braun held that future agreements licensing the use of the city's name would have to go through the committee.

Yesterday, the Court of Appeals affirmed in a unanimous opinion by Chief Judge Judith S. Kaye.

At the outset, the Court concluded that, although it is a "close question," the term "property" in §362a is not limited to real property. Consequently, the Franchise and Concession Review Committee (FCRC) has jurisdiction to review those contracts.

"As a result of our holding, FCRC review will occur for concession contracts involving intangible, as well as real city-owned property," Chief Judge Kaye wrote.

That was a victory for the comptroller.

But the Court said the comptroller lacked power to reject the contract. And that was a victory for the mayor.

"The delegation of duties set forth in the relevant provisions of the [City Charter] establishes in plain language that the Mayor and the Corporation Counsel—not the Comptroller—bear the burden of determining that procedural requirements have been met and legal authority exists to award a concession contract," the Court said.

The Snapple deal was controversial from the outset and, according to a study issued earlier this year by Harvard Business School, was hindered by both a "skeptical media environment" and the litigation commenced by Mr. Thompson. It was expected to bring in $126 million, but yielded only about $32 million. In April, the president of the Marketing Development Corporation resigned and the entity was merged with NYC & Co., the city's tourism agency.

Assistant Corporation Counsel Dona B. Morris defended the mayor, Judd Burstein of Manhattan represented the comptroller and Richard Schwed of Shearman & Sterling in Manhattan appeared for Snapple.

Power of Attorney

Also yesterday, the Court said agents sanctioned through power of attorney to bestow gifts on themselves have a fiduciary obligation to the principal. It declined, however, to decide if the burden of proof shifts to a self-dealer to prove that the deal was free of fraud or undue influence.

Matter of the Estate of George J. Ferrara, 92, centered on a man who willed his entire estate to the Salvation Army and named it administrator. However, after George J. Ferrara was transferred from his home in Florida to a nursing home in Rockland County he signed a statutory power of attorney short form designating his nephew and brother attorneys-in-fact.

Mr. Ferrara specifically gave them the power to make gifts to them-

City's Snapple Contract Upheld

selves. And shortly before he died, his nephew, Dominick Ferrara, did just that—giving himself a gift of about $820,000, which constituted virtually the entire estate.

The Salvation Army sought to recover the assets, claiming that Dominick Ferrara had not rebutted the presumption of impropriety that attaches when an agent makes a gift to himself. But Rockland County Surrogate's Court dismissed the action, citing a 1997 amendment to the General Obligations Law. The court, in an opinion affirmed by the Appellate Division, Second Department, found that after Jan. 1, 1997, the presumption of impropriety no longer applied and the Salvation Army had the burden of proving that the gift was invalid.

The Court concluded that although it is a "close question," the term "property" in §362a is not limited to real property. Consequently, the committee has jurisdiction to review those contracts.

Yesterday, the Court of Appeals unanimously reversed in an opinion by Judge Susan Phillips Read.

It said Mr. Ferrara was authorized to make gifts to himself only to the extent that such gifts would further the decedent's best interests in regard to financial, tax or estate matters.

"The term 'best interest' does not include such unqualified generosity to the holder of a power of attorney, especially where the gift virtually impoverishes a donor whose estate plan, shown by a recent will, contradicts any desire to benefit the recipient of the gift," Judge Read said.

However, after deciding that Mr. Ferrara did not meet his fiduciary duty, the Court declined to decide an issue raised both by the Salvation Army and the attorney general as intervenor—whether the burden of proof shifted to Mr. Ferrara to establish that his self-dealing was free of fraud or deception.

Assistant Solicitor General Mariya S. Treisman appeared for the intervening attorney general. Edwin David Robertson of Caldwalader, Wickerhsam & Taft in Manhattan represented the Salvation Army. Annette G. Hasapidis of South Salem appeared for Mr. Ferrara.

Referees' Legal Expenses

The Court also unanimously reversed the First Department and held that court-appointed referees are not entitled to legal representation at state expense when they are sued in their official capacity.

Matter of O'Brien v. Spitzer, 94, centers on attorney Stephen L. O'Brien, who was appointed by Supreme Court to function as the referee in a Suffolk County foreclosure.

After Mr. O'Brien sold the summer home at public auction in 2002, mortgagor Donald MacPherson lodged a federal lawsuit against the referee. Mr. O'Brien sought representation by the attorney general, claiming that he was an employee rather than an independent contractor.

Then-Suffolk County Supreme Court Justice James M. Catterson, now of the First Department, held in a first-impression ruling that court-appointed referees are entitled to state representation when they are sued in their official capacity. The Second Department affirmed, only to be reversed by the Court of Appeals.

The central, case-specific issue here was whether Mr. O'Brien was an employee of the state, thus entitled to state defense, or an independent contractor.

In an opinion by Judge Robert S. Smith, the Court agreed with the attorney general that Mr. O'Brien was an independent contractor. It noted that the state does not withhold income tax or provide Workers' Compensation benefits for Mr. O'Brien, and that he furnishes whatever materials he needs for his work and pays his own expenses.

Most significantly, though, the Court made clear that the attorney general's determinations regarding defense and indemnification under §17 of the Public Officers Law should generally be respected by the courts.

"When a person claiming to be a public employee requests indemnification, the Attorney General must first decide whether that person is indeed an employee, or is an independent contractor," Judge Smith wrote. "Where his decision is a reasonable one, courts should not second-guess it."

Deputy Attorney General Richard Rifkin, a longtime Department of Law lawyer making his first appearance before the Court of Appeals in at least a decade, represented the state. Mr. O'Brien appeared pro se.

Other Appeals

In other cases decided yesterday:

• The Court resolved a split between the First Department and Third Department on the labor dispute exception in the assault statute.

People v. Santana, 81, involves defendant Edwin Santana, who was convicted of third-degree assault for punching his roommate in a dispute over rent payments, and of second-degree criminal contempt for violating an order of protection. He argued that the contempt charge was jurisdictionally defective because it did not specify that his conduct did not arise out of a labor dispute.

At issue on appeal was whether the labor dispute exception for contempt is a true exception, or just a proviso that must be raised by the defense. The First Department in *People v. D'Angelo*, 284 AD2d 146, held that the labor dispute element is a proviso. But the Third Department came to the opposite conclusion in *People v. Kirkham*, 273 AD2d 509.

Yesterday, the Court of Appeals said the First Department got it right. And writing for the Court was a former Third Department justice, Victoria A. Graffeo.

"We are unpersuaded...that the inclusion of the reference to 'labor disputes' in the second-degree criminal contempt statute creates an exception that must be affirmatively pleaded as an element in the accusatory instrument, rather than a proviso that need not be pleaded but may be raised by the accused as a bar to prosecution or a defense at trial," Judge Graffeo wrote. "We therefore conclude that the 'labor disputes' clause operates as a proviso that the accused may raise in defense of the charge rather than exception that must be pleaded by the People in an accusatory instrument."

Lawrence T. Hausman of the Legal Aid Society Criminal Appeals Bureau in Manhattan argued for Mr. Santana. Manhattan Assistant District Attorney Megan E. Joy represented the prosecution. Judge Albert M. Rosenblatt had granted leave.

• Reversed a conviction of a defendant who pleaded guilty without being warned that she would be subjected to mandatory post-release supervision.

People v. Tammi L. Van Deusen, 100, centers on a robbery defendant who plea bargained for a term of 5 to 15 years. But when Tammi L. Van Deusen pleaded guilty, she was not advised that her period of incarceration would be followed by five years of post-release supervision.

Although the Third Department had in similar cases permitted defendants to withdraw their guilty pleas, it found no need to do so here because the prison term (8 years) and the period of post-release supervision (5 years) did not exceed the 15-year maximum agreed to. The Court of Appeals granted leave through Judge Robert S. Smith and unanimously reversed in a memorandum.

The Court of Appeals found Van Deusen indistinguishable from *People v. Catu*, 4 NY3d 242, where it said last year that "failure of a court to advise of post-release supervision requires reversal."

Paul J. Connolly of Delmar argued for Ms. Van Deusen. John E. Maney of the New York Prosecutors Training Institute in Albany appeared for the Chenango County District Attorney.

— John Caher can be reached at jcaher@alm.com.