May 22, 2017

Eric Rasmusen notes on the oral argument

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*Appeals procedure notes.*

*NY allow interlocutory appeals, so we would have had a Citigroup appeal after the Motion to Dismiss even if Rasmusen won.*

*The appeal of right is to the Appellate Division, First Department (of four). It has its own rules. A 5-judge panel will rule.*

*If 2 judges dissent, then the appeal goes of right to the Court of Appeals, the top court. Otherwise, there are two ways it can get there (1) If 3 judges of the Appellate Division agree to send it, or (2) If 2 judges of the Court of Appeals agree to hear it. The Court of Appeals has 5 judges.*

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*Here are sections from the May 17 oral argument transcript before Judge Ramos of the New York Supreme Court, Commercial Division, in Manhattan (the trial court, not the appeals court, in New York). This is from the unverified transcript, so it still has transcriber errors in it, e.g. “FOIL” for “FOIA” (Freedom of Information Act), periods in the wrong places, and so forth. Any boldfacing is by me, for words I think especially significant.*

*Start with Judge Ramos’s opening words:*

THE COURT: Good morning everyone. This is a question to the array. I haven't seen any papers from the State of New York, **has the Attorney General of the State of New York appeared** in any context at all in this case?

*Now continue with Judge Ramos’s questioning of Rasmusen’s lawyer, Mr. Sinatra:*

MR. SINATRA: But, your Honor, we're the provider in that section. "Provided that such information shall not be deemed publicly disclosed in a report or investigation because it was disclosed, or provided p**ursuant to article six** of the Public Officers Law, **or** under **any other federal, state or local law, rule or program,** enabling the public to request, receive or view documents or information in the possession –

THE COURT: **That's a FOIL request.**

MR. SINATRA: Except that we've got article six of the Public Officer's Law. **Or under any other federal** -- federal, state or local --

THE COURT: Where does your client say he got this information? Only from the 10-K; is that the allegation in the complaint?

MR. SINATRA: Certainly with respect to the New York State, the only place it could have come from is from the 10-K.

THE COURT: It wasn't in the newspaper?

MR. SINATRA: No.

THE COURT: You're saying this is not just a FOIL

MR. SINATRA: Nope. **The section in (b) (ii) is not just for FOIL.**

THE COURT: **You can have your opinion; I can have mine.**

MR. SINATRA: Of course, your Honor.

THE COURT: Let's go on.

*It seems here that the judge didn’t get, “****or under any other federal, state or local law, rule or program enabling the public to request, receive or view documents or information in the possession of public officials or public agencies.”***  *The statute says,*

*(ii) in a federal, New York state or New York local government report, hearing, audit, or investigation that is made on the public record or disseminated broadly to the general public;****provided that such information shall not be deemed “publicly disclosed” in a report*** *or investigation* ***because it was disclosed*** *or provided pursuant to article six of the public officers law,* ***or under any other federal, state or local law, rule or program enabling the public to request, receive or view documents or information in the possession of public officials or public agencies;***

*Immediately after the last exchange, Mr. Sinatra brought up the regulation requiring the state Attorney-General to be present:*

MR. SINATRA: There's one last wrinkle, your Honor, and that is the state regulation that the Attorney General issued on this very point. If in case this Court, your Honor, is inclined to dismiss on public disclosure for federal report grounds, the State AG has issued a regulation, which is 13 NYCRR cited in our brief, 400.5, that **requires the Attorney General to oppose the dismissal**, if the dismissal is going to be based solely on alleged public disclosure.

THE COURT: **That's why I asked, where is the Attorney General's Office?**

MR. SINATRA: I think that **before this Court can dismiss on that basis, the Court has to grapple over that issue; what to do about the regulation when the AG is not here?**

THE COURT: **I don't second guess the Attorney General, I rule on cases. That's what I do.**

*Regulation 13 N.Y.C.R.R. § 400.5(b) says*

*400.5 Public disclosure bar motions.*

***The State shall*** *not seek to dismiss, and shall* ***oppose the dismissal, of a*qui tam*action*** *pursuant to paragraph (b) of subdivision nine of section 190 of the New York False Claims Act* ***in the event that:***

*(a) any cause of action in the*qui tam*plaintiff’s complaint would be dismissed other than a cause of action alleging substantially the same allegations or transactions that have been publicly disclosed in a manner set forth in such paragraph (b); or*

*(b)* ***any cause of action in the*qui tam*plaintiff’s complaint would be dismissed*** *pursuant to subparagraph (ii) of such paragraph (b)* ***solely because of an alleged public disclosure in a Federal report****, hearing, audit, or investigation.*

*The question of first impression (that is, a legal issue unaddressed so far in the courts) is: “What should a court do when a state officer is required by regulation to appear in court and do something, but he doesn’t show up?--- behave as if he did show up and do what was legally required of him, or behave as if there were no legal requirement for him to do it, or cite him for contempt and command him to show up? The question goes beyond this particular case, and thus the public (and the Attorney-General) would benefit from a written opinion clarifying what the courts will do.*

*The Court immediately moved on to a new topic, Citigroup’s false statement under the False Claims Act.*

THE COURT: **What is the false statement** that you are alleging?

MR. SINATRA: Certainly, Judge, the New York State tax filing. **The tax return submitted to the State of New York was the false statement.**

THE COURT: **What was false about it?**

MR. SINATRA: Because **it takes the net operating loss deductions when it shouldn't have.** And the reason there on the merits, your Honor

THE COURT: **Why does that constitute a false statement? They're not misrepresenting anything, they're just saying this is the net operating loss which we have taken under the federal statute; we're taking it here.There's no false statement. They're not hiding the fact that they had some additional income and they are not inflating a loss. They're being very open and candidly saying, we're going to take the NOL's.**

MR. SINATRA: **What they're candidly saying is** that we're taking the NOL's and they're properly -- **by implication, that they're properly taking them.**

THE COURT: **Is there any case law that says that we can say that they are making a false statement by implication? We're talking about fraud here.**

MR. SINATRA: **I believe the state takes the position that false tax filings are false statements.**

THE COURT: **Anybody files an erroneous tax return, that gives a relator the right to come into court and seek a portion of the recovery?**

MR. SINATRA: If that's done with the requisite scienter; if it's done knowingly and deliberately, with disregard or reckless; that is the scienter piece of it.

THE COURT: But you don't deny that the defendant complied with the federal guidelines?

MR. SINATRA: Citigroup did comply.

THE COURT: It's one thing to say that they did something wrong and we all know, hopefully, what something wrong is -- but **it's kind of hard to say that somebody did something wrong when they've complied with the instructions given to them by the government.**

MR. SINATRA: Right. The I.R.S. told Citigroup

THE COURT: **You just don't agree with what the government has done?**

MR. SINATRA: We're talking about two different things. What the I.R.S. did vis-a-vis the federal tax return, it's different from what's owing under the New York State Tax Law. And that's where we've got our tab in there.

THE COURT: **So if I file a tax return and I make a mistake on my tax return and I take a loss and I'm not entitled to take this, this gives you your client the right to bring a lawsuit against me?**

MR. SINATRA: If the dollar amount thresholds are satisfied.

THE COURT: Yes. Assuming I'm not a judge because I can never get to the threshold.

MR. SINATRA: And if you did it with the requisite scienter, your Honor, yes.

THE COURT: And the requisite scienter comes from where?

MR. SINATRA: Also in the New York law. The New York False Claims Act, it requires such a statement to be made in order to be actionable, to be made with the requisite scienter, as I've just stated.

THE COURT: What other, than the fact that they knowingly did it?

MR. SINATRA: **They knowingly did it and they should have known that the New York applied it differently.** Your Honor, that's where we have Section 1453, which takes the entire net income right from the federal return, which is great, and that's where Citigroup wants you to focus on, but 1453(k)(1) speaks more specifically as to net operating losses, and specifically incorporates the Internal Revenue Code. And the most important thing to take away here, your Honor, is that **the Internal Revenue Code is still on the books what would have barred the net operating loss deductions, if it weren't for the I.R.S. notice.** The I.R.S. notice is an free pass to Citigroup; don't take -- you may take the net operating loss deductions that are otherwise barred. And if I might, your Honor --

THE COURT: But doesn't the state follow form then?

MR. SINATRA: I'm sorry, I didn't hear that.

THE COURT: Doesn't the state follow form? That is, we follow -- doesn't the State of New York follow the federal form?

MR. SINATRA: It exactly says that as to entire net income, but it says something different with net operating losses. **It doesn't want to know what you put on the bottom of your federal tax return. It wants to know what's calculable under the federal tax law.** And the Bosch case from the New York Court of Appeals says, when a federal regulation -- even as high as a regulation, never mind the sub-regulatory guidance -- but when the federal regulation is the opposite of a federal statute, the state agencies must apply the federal statute.

THE COURT: **So you are faulting the state and Citigroup, okay.**

MR. SINATRA: Thank you, your Honor.

*New York State Finance Law section 189, the False Claims Act, applies to anyone who:*

*(g)****knowingly makes****, uses, or causes to be made or used,* ***a false record or statement material to an obligation to pay or transmit money or property to the state*** *or a local government;*

*The law was specifically intended to apply to false tax returns, and a later part mentions tax law specifically:*

*4. (a) This section shall apply to claims, records, or* ***statements made under the tax law*** *only if (i) the net income or sales of the person against whom the action is brought equals or exceeds one million dollars for any taxable year subject to any action brought pursuant to this article;  (ii) the damages pleaded in such action exceed three hundred and fifty thousand dollars;  and (iii) the person is alleged to have violated paragraph (a), (b), (c), (d), (e), (f) or (g) of subdivision one of this section;  provided, however, that* ***nothing in this subparagraph shall be deemed to modify or restrict the application of such paragraphs to any act alleged that relates to a violation of the tax law****.*

*One can tell how False Claims Act from its title--- lying about how much you owe in taxes, or about anything else involving state government funds. If you write down a deduction on your tax return knowing that you’re not entitled to it, that’s a false statement. Citigroup would not disagree with that; the two arguments in the motion to dismiss are that (a) they were entitled to the deduction and (b) if they weren’t, it was an honest mistake.*