State of New York
Court of Appeals

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To be argued Wednesday, February 9, 2022 (arguments begin at 2 p.m.)

No. 13 Revis v Schwartz

Former National Football League cornerback Darrelle Revis is suing New York attorney Neil Schwartz and his law partner, Jonathan Feinsod, to recover damages for alleged breach of contract, fraud and related claims involving endorsement deals. Revis retained Schwartz as a contract advisor before signing his first NFL contract with the New York Jets in 2007, and the two men signed the standard representation agreement (SRA) required by regulations of the National Football League Players Association (NFLPA), in which Revis agreed that Schwartz would receive 2% of the compensation he earned under team contracts negotiated by Schwartz. The SRA contained a dispute resolution provision, which stated, "Any and all disputes between Player and Contract Advisor involving the meaning, interpretation, application, or enforcement of this Agreement shall be resolved exclusively through the arbitration procedures set forth in" the NFLPA regulations. Those regulations provide that any arbitration would be conducted pursuant to the voluntary labor arbitration rules of the American Arbitration Association (AAA). In a space contained in the SRA for the parties to list any other agreements between them, Revis and Schwartz noted that they had entered into a marketing and endorsements (M&E) agreement that entitled Schwartz to 10% of Revis' earnings from endorsement deals he negotiated.

When Revis filed this suit in 2016 for breach of the endorsements agreement, the Schwartz defendants moved to compel arbitration. Revis responded that the arbitration agreement in the SRA applies only to disputes involving player contracts, not endorsement deals.

Supreme Court granted the defendants' motion to compel arbitration, saying, "It is clear to the court that the parties entered into a valid arbitration agreement and that the issues stated in the [lawsuit] are encompassed within the SRA's broad arbitration clause...." It rejected Revis' claims that Schwartz acted as his attorney on endorsement deals and that this alleged misconduct was unrelated to Schwartz's player contract negotiations governed by the SRA.

The Appellate Division, Second Department affirmed in a 3-2 decision, ruling the defendants "established as a matter of law" that Revis agreed in the SRA "to arbitrate 'gateway' questions of arbitrability" by incorporating the AAA rules, which left courts with no authority to decide the issue. It said the SRA invokes "the broad umbrella of the NFLPA regulations..., which contains a broadly worded arbitration clause" and requires that the arbitration comply with the rules of the AAA. "The AAA rules, in turn, grant the arbitrator 'the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.' The SRA thus makes 'clear reference' to section 5 of the NFLPA regulations, which, in turn, makes 'clear reference' to the AAA rules in such a way that the intent of the parties to incorporate those specific documents 'may be ascertained beyond doubt'...."

The dissenters said, "[I]t is a misreading of the contract documents to draw a line from the SRA to the NFLPA regulations to the AAA rules, and then ... to conclude that the separate [M&E] contract must initially go to an arbitrator.... Notably..., the SRA only incorporates the arbitration procedures of the NFLPA regulations to the extent of resolving disputes over the meaning ... or enforcement '*of this Agreement*,' meaning the SRA only. By the plain language of the SRA, the NFLPA regulations are not incorporated for the resolution of disputes that arise outside of the SRA," in which "the existence of the M&E is disclosed but expressly described as a 'separate agreement.'" They said, "Here, there is no 'unambiguous' provision in the SRA that any disputes ... involving the M&E be arbitrated, particularly where there is at least a question of fact as to whether Schwartz's role in the M&E was that of an attorney rather than a contract advisor."

For appellants Revis et al: Mark S. Levinstein, Washington DC (202) 434-5000
For respondents Schwartz et al: Mario Aieta, Manhattan (212) 404-8755

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No. 14 People v Angelo Burgos

Angelo Burgos and several co-defendants were charged with assault after two men were slashed and seriously injured during a street brawl in Manhattan in March 2012. In 2013, Burgos retained Andres Aranda, an attorney who had represented him twice before in criminal cases, to defend him against the charges. Aranda had a history of disciplinary sanctions issued by the Appellate Division, First Department, including an admonition in 1989 for neglecting a criminal case and a one-year suspension imposed in 2006 for neglecting client matters. In May 2015, about two months before Burgos' assault trial was to begin, the U.S. Court of Appeals for the Second Circuit suspended Aranda from practicing law in that court for 18 months based on a "pattern of misconduct" in neglecting criminal appeals. Aranda did not inform Burgos or the state trial court of the suspension.

On Aranda's advice, Burgos waived his right to a jury and proceeded to a bench trial. Supreme Court acquitted him of two gang assault counts, but convicted him of four counts of first-degree assault and sentenced him to 20 years in prison.

In February 2016, after the verdict, the First Department imposed reciprocal discipline on Aranda and suspended him for 18 months, to run from the date of the Second Circuit's suspension. Burgos then retained a new attorney and filed a CPL 440 motion to vacate his conviction, arguing that Aranda's failure to disclose his suspension by the Second Circuit deprived Burgos of his right to counsel of his choice and that Aranda's Second Circuit suspension amounted to a constructive suspension in New York State courts, thus depriving him of his right to counsel when Aranda represented him at trial.

Supreme Court denied the motion to vacate, saying "there is no legal or ethical authority which required" Aranda to inform Burgos of his Second Circuit suspension. Aranda "was still in good standing in this jurisdiction when he tried the indictment at issue. The defendant has not explained how the attorney's silence fell below professional standards, or prejudiced him."

The Appellate Division, First Department affirmed, saying, "At the time of defendant's trial, his retained counsel was serving an 18-month suspension from practice before the ... Second Circuit, imposed for counsel's neglect in pursuing appeals to that court. Trial counsel's later suspension by this Court, as reciprocal discipline, was not in effect at the time of defendant's trial, notwithstanding that the suspension was nunc pro tunc to a date preceding that trial. Accordingly, we find no basis for concluding that counsel was constructively suspended from practice in this State at the time of defendant's trial.... Regardless of whether counsel should have informed defendant of the Second Circuit suspension, defendant has not shown that counsel's failure to do so requires a new trial."

Burgos argues, "[T]he essence of the right to counsel of choice is a defendant's informed decision about who will represent him. An attorney who is currently suspended in a sister jurisdiction has an obligation, similar to the obligation of an attorney laboring under an actual or potential conflict of interest, to disclose the suspension to his client and to the trial court. Only then can a trial court ensure both that the defendant is informed of, and waives, any issue pertaining to the suspension and that the trial court independently exercises its discretion in deciding whether to disqualify the lawyer." He also says the Second Circuit suspension "stripped away any assumptions about Aranda's legal ability and moral character.... [N]otwithstanding the fact that Aranda was technically still licensed to practice in New York at the time of Appellant's trial..., Appellant was constructively deprived of his right to counsel."

For appellant Burgos: Wayne E. Gosnell, Jr., Manhattan (212) 922-1080
For respondent: Manhattan Assistant District Attorney Sheila L. Bautista (212) 335-9000

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To be argued Wednesday, February 9, 2022 (arguments begin at 2 p.m.)

No. 15 The Moore Charitable Foundation v PJT Partners, Inc.

The Moore Charitable Foundation and its investment vehicle, Kendall JMAC, LLC, were defrauded of $25 million through a fake investment that was part of a Ponzi scheme operated by Andrew W.W. Caspersen. The Foundation and JMAC are suing his employers to recover their money. Caspersen was hired in 2013 as a managing director of Park Hill Group, LLC, a division of the investment bank PJT Partners, and in 2014 he arranged a deal for PJT that would generate a fee of $8.1 million from Irving Place Capital. The Foundation alleged that Caspersen sent a forged invoice to Irving Place instructing it to deposit the fee into an account he controlled, and when PJT asked him about the missing fee, he falsely told it the deal had not fully closed and the fee would be paid when it did. Caspersen used the stolen $8.1 million for high-risk investments on his own account and quickly lost it all. In 2015, he convinced the Foundation to invest $25 million in a security with a risk-free return of 15%, which did not exist. He sent the Foundation, which had no prior connection to PJT or Park Hill, a letter on Park Hill letterhead instructing it to deposit the funds into an account he created and controlled. Caspersen then wired $8.9 million of that to PJT to cover for his prior theft of the Irving Place fee and other missing fees. He wired the rest to his personal brokerage account and promptly lost it all on high-risk investments, while drinking heavily every day, according to the plaintiffs. In 2016, when he approached the Foundation about a similar $20 million investment, it looked more closely into the details and his scheme unraveled. Caspersen was arrested within weeks, pled guilty to securities fraud and mail fraud, and was sentenced to four years in prison. He was also ordered to pay $37.2 million in restitution to his victims. The plaintiffs have received none of it, but PJT returned $8.6 million to the Foundation, the amount PJT's insurer covered. The Foundation and JMAC filed this action in 2017, arguing that PJT and Park Hill were liable for their losses based on the defendants' negligent supervision of Caspersen, among other claims.

Supreme Court dismissed the claim for negligent supervision and all but one other claim, rejecting the plaintiffs' argument that Caspersen's excessive high-risk trading from his office, his diversion of the Irving Place fee, and his heavy drinking at work should have put the defendants on notice of his propensity for fraud. It said, "Plaintiffs do not ... allege defendants were aware of this conduct before Caspersen sold plaintiffs the fake investment. Engagement in high-risk behaviors such as personal trading and excessive use of alcohol is not necessarily causally connected to fraudulent conduct." It declined to consider the defendants' argument that they owed the plaintiffs no duty of care because they were not clients of the defendants.

The Appellate Division, First Department modified by dismissing the suit entirely. "The complaint fails to state a cause of action for negligent supervision, because it does not allege that defendants were aware of the facts that plaintiff contends would have put them on notice of the employee's criminal propensity...," it said. "Further, the complaint also fails to allege that plaintiffs were ever customers of defendants, which is fatal to a claim of negligent supervision."

The Foundation and JMAC argue that "there is no principled basis for drawing the line to include current and former customers within an employer's duty of non-negligent supervision, while excluding prospective customers who just happen not yet to have completed a transaction with the employer. All the relevant factors – the reasonable expectations of parties and society, and considerations of fairness and sound public policy – support treating prospective customers the same as current or former customers," and it "would be in line with caselaw both within and outside of New York." They also say they alleged "more than enough facts" to show that PJT knew or should have known of Caspersen's propensity for fraud.

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For respondents PJT and Park Hill: Aidan Synnott, Manhattan (212) 373-3000