

NEW YORK COURT OF APPEALS

O'Brien v. Spitzer

7 N.Y.3d 239 (2006) · Decided June 29, 2006

OPINION

O'Brien v. Spitzer 7 N.Y.3d 239

SMITH, J.

OPINION OF THE COURT

R.S. Smith, J. We hold that the Attorney General properly found a private lawyer who was appointed as referee in a mortgage foreclosure proceeding to be an independent contractor, not a state employee. The referee therefore was not entitled to defense and indemnification from the State in a lawsuit brought against him.

Facts and Procedural History This case arises out of a proceeding to foreclose a mortgage on a home owned by Donald MacPherson. Supreme Court entered a judgment of foreclosure and sale, and appointed petitioner, a lawyer in private practice, as referee to supervise the sale of the property. The property was sold and MacPherson, contending that the foreclosure and sale violated his constitutional rights, brought a lawsuit in federal court seeking damages and injunctive relief against several defendants, including petitioner. Petitioner informed the Attorney General of the lawsuit, and requested defense and indemnification pursuant to Public Officers Law § 17. The Attorney General rejected the request, relying on the exclusion of “independent contractor[s]” from the rights given by the statute. Petitioner then brought this proceeding under CPLR article 78 against the Attorney General, seeking an order annulling the Attorney General’s determination and directing the Attorney General to defend petitioner in MacPherson’s suit. MacPherson later withdrew his claims against petitioner, but petitioner continues to seek indemnification for the expense the suit caused him.

*242Supreme Court granted the petition, and the Appellate Division affirmed. The Appellate Division permitted the Attorney-General to appeal to this Court on a certified question, and we now reverse.

Discussion Public Officers Law § 17 (2) (a) requires the State to “provide for the defense” of an “employee” in an action arising out of his or her public duties. “Employee” is defined in Public Officers Law § 17 (1) (a), which provides in relevant part: “As used in this section, unless the context otherwise requires the term ‘employee’ shall mean any person holding a position by election, appointment or employment in the service of the state, . . . but shall not include an independent contractor.” The issue is whether petitioner was an “employee” or an “independent contractor” within the meaning of this section. We first consider whether the Attorney General’s resolution of this issue is entitled to deference, and we conclude that it is. While as a general rule courts will not defer to administrative agencies in matters of “pure statutory interpretation” (*Matter of KSLM-Columbus Apts., Inc. v New York State Div. of Hous.*

& Community Renewal, 5 NY3d 303, 312 [2005]), deference is appropriate “where the question is one of specific application of a broad statutory term” (Matter of American Tel. & Tel. Co. v State Tax Commn., 61 NY2d 393, 400 [1984], quoting NLRB v Hearst Publications, Inc., 322 US 111, 131 [1944] [interpreting the term “employees”]). This case is in that category. The terms “employee” and “independent contractor” are familiar ones, and their definitions are well known. Broadly speaking, an employee is someone who works for another subject to substantial control, not only over the results produced but also over the means used to produce the results. A person who works for another subject to less extensive control is an independent contractor (e.g., Matter of Hertz Corp. [Commissioner of Labor], 2 NY3d 733, 735 [2004]; Matter of Charles A. Field Delivery Serv. [Roberts], 66 NY2d 516, 521 [1985]). But it is often not easy to apply those definitions to specific facts. 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. Where his decision is a reasonable one, courts should not second-guess it. Here, there was ample basis for the Attorney General’s determination that petitioner was an independent contractor, not an *243employee. Petitioner worked without day-to-day supervision and chose his own hours of work; it was he who selected the date for the foreclosure sale. He performed his duties on a part-time basis, while also working for clients of his private law practice. His compensation did not come from state funds, but from the sale proceeds. The State did not withhold income tax or provide workers’ compensation. Petitioner furnished whatever materials he needed for his work, and paid his own expenses, subject to reimbursement from the sale proceeds. He deposited the proceeds in a special bank account bearing his own name, as required by CPLR 2609. He was, in short, substantially more independent from state control over his activities than a typical state employee. Beyond this, public policy supports the Attorney General’s decision: The purpose of Public Officers Law § 17 is, in essence, to provide insurance against litigation. Private lawyers like petitioner ordinarily have malpractice coverage, and the Legislature is unlikely to have intended to substitute the State for lawyers’ malpractice carriers. Accordingly, the order of the Appellate Division should be reversed, without costs, the petition dismissed and the certified question answered in the negative. Chief Judge Kaye and Judges G.B. Smith, Ciparick, Rosenblatt, Graffeo and Read concur. Order reversed, etc.