*State of New York*
*Court of Appeals*

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# NEW YORK STATE COURT OF APPEALS

## Background Summaries and Attorney Contacts

## Week of October 18 thru October 20, 2022

# *State of New York Court of Appeals*

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To be argued Tuesday, October 18, 2022

**No. 83 Delgado v State of New York**

Roxanne Delgado and three other New York residents brought this action to challenge the constitutionality of a provision of the 2018 budget bill that created the Committee on Legislative and Executive Compensation (the "Committee") and directed it to determine whether the salaries and allowances of state legislators, statewide elected officials, and executive branch commissioners "warrant an increase." The enabling statute gave the Committee a list of factors to consider, including "the parties' performance and timely fulfillment of their statutory and Constitutional responsibilities; the overall economic climate;" and the compensation and benefits provided to such officials in other states and the federal government. The statute required the Committee to report its findings and recommendations by Dec. 10, 2018, and provided that the recommendations would "have the force of law" unless the Legislature modified or rejected them prior to Jan. 1, 2019. It also stated that the recommendations, once in effect, would supercede inconsistent salary provisions in the Executive Law and Legislative Law. The Committee met its deadline and recommended an array of pay increases, including a raise to $110,000 for legislators in 2019. It also imposed restrictions on outside income for legislators beginning in 2020. The Legislature took no action, allowing the recommendations to take effect. The plaintiffs argued that the enabling statute amounted to an unconstitutional delegation of legislative power and that the Committee exceeded any authority that had been delegated to it.

Supreme Court rejected the plaintiffs' unconstitutional delegation claim and upheld the pay increases for statewide elected officials and commissioners for 2019, 2020 and 2021. However, it ruled the Committee exceeded its authority in imposing restrictions on outside income for legislators and, because those restrictions were intertwined with the legislative pay raises for 2020 and 2021, the court voided them. It upheld the legislative pay hike for 2019.

The Appellate Division, Third Department affirmed, saying "the Legislature enacted a law making the basic policy choice that the salaries of [the officials] must be 'adequate,' and circumscribed the Committee's power by providing a list of factors to help guide its analysis.... The Legislature then implemented a safeguard whereby it reserved the right to view a report of the Committee's recommendations, after which it could either modify them or grant them the force of law. In other words, it was the Legislature – not the Committee – that had the final say in determining whether the Committee's recommended changes would go into effect...."

The plaintiffs argue, "The Legislature granted an unelected body the power to make compensation 'recommendations' that superseded existing statutes" in violation of the State Constitution. "It further failed to fix legislative salaries by law, as the Constitution requires, or make any policy decision on compensation. Further, the Committee unconstitutionally exceeded any authority lawfully delegated to it by the Legislature by implementing its own policy determinations."

For appellants Delgado et al: Cameron J. Macdonald, Albany (518) 434-3125
For respondent State: Senior Assistant Solicitor General Victor Paladino (518) 776-2012

# *State of New York Court of Appeals*

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To be argued Tuesday, October 18, 2022

**No. 84 Federal National Mortgage Association v Jeanty**

In 2007, Maxi Jeanty obtained a $384,000 mortgage to purchase a residential property in Brooklyn and, in 2008, Chase Home Finance LLC commenced an action to foreclose on it. In 2009, Jeanty executed a Home Affordable Modification Trial Period (HAMP) plan, a newly created federal program designed to help struggling homeowners by allowing those who qualified to modify their mortgages and reduce their monthly payments. Under his HAMP trial plan, Jeanty agreed to make three monthly payments at a reduced rate of $2,553. The plan provided that if Jeanty made the payments and complied with all other terms of the agreement, the lender would offer a permanent modification but, if he was not in compliance, the trial plan would terminate and any payments made would be applied to the amount owed on the mortgage. Jeanty made seven payments of $2,553 under the HAMP plan, but Chase never offered a permanent modification. In 2014, Chase moved for a voluntary discontinuance of its 2008 foreclosure action and the mortgage was transferred to the Federal National Mortgage Association (Fannie Mae). In 2015, Fannie Mae commenced this action against Maxi and Sherley Jeanty, co-owners of the property, to foreclose on the mortgage.

The Jeantys argued the action was barred by the six-year statute of limitations, which was triggered when the 2008 foreclosure action accelerated the mortgage. Fannie Mae contended the HAMP agreement was an acknowledgment of the mortgage debt which restarted the limitations period under General Obligations Law (GOL) § 17-101, and that the payments Jeanty made under the plan were partial payments on the mortgage that renewed the statute of limitations.

Supreme Court dismissed the action as untimely, saying the HAMP agreement "is insufficient to serve as an acknowledgment of the debt" and reset the limitations period. "While the agreement presumes the continued existence of a debt, there was no unconditional promise to pay it.... [T]he borrowers were making payments in the hope of being offered a chance to pay on terms other than those previously agreed to. Their 'promise' to pay, if any, was conditional and the condition was not fulfilled."

The Appellate Division, Second Department affirmed, finding the foreclosure action was time-barred. Jeanty's "execution of the HAMP plan, and the trial payments made pursuant thereto, did not constitute an 'unconditional and unqualified acknowledgment of [the] debt sufficient to reset the statute of limitations'...," it said, because "'[a]ny intention to repay the debt was conditioned on the parties reaching a permanent modification agreement...."

Fannie Mae cites the conflicting decision by the Appellate Division, Third Department in Wells Fargo Bank v Grover (165 AD3d 1541), which said "a borrower who entered into a HAMP agreement necessarily admitted the existence of the underlying debt, acknowledged that more payments were due, and made an implied promise to pay them in consideration of the modification of the mortgage." It also argues that, under GOL § 17-107, "the statute of limitations began running anew on March 8, 2010, when Borrowers made their final trial plan payment under the HAMP Agreement."

For appellant Fannie Mae: Adam M. Swanson, Manhattan (212) 609-6800
For respondent Jeantys: Brian McCaffrey, Jamaica, NY (718) 480-8280

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To be argued Wednesday, October 19, 2022

**No. 86 Worthy Lending LLC v New Style Contractors, Inc.**

Worthy Lending LLC began making a series of loans to Checkmate Communications LLC in 2019 pursuant to a financing agreement that gave Worthy a security interest in Checkmate's assets, including its accounts receivable. The agreement also authorized Worthy to notify Checkmate's account debtors of its security interest in the accounts and instruct them to make payments directly to Worthy. The lender sent such a notice to New Style Contractors, Inc., an account debtor that owed Checkmate more than $1.4 million, and directed New Style to make its payments only to Worthy. It warned New Style that, pursuant to Uniform Commercial Code (UCC) § 9-406, payments made to Checkmate "will not discharge any of [New Style's] obligations with respect to such Accounts" and New Style "shall remain liable to [Worthy] for the full amount of such Accounts." Worthy sent additional notices to New Style when it continued to make its payments to Checkmate, but New Style never made a payment to Worthy. After Checkmate defaulted on more than $3.2 million in loans from Worthy in 2020, Worthy accelerated the debt and demanded immediate payment. Worthy then brought this action against New Style asserting a single claim under UCC 9-607 and seeking recovery of all amounts New Style paid to Checkmate after it received Worthy's first notice of assignment.

Supreme Court dismissed the suit, saying, "As an initial matter, the court finds that the agreement between [Worthy] and Checkmate provided [Worthy] with a security interest and was not an assignment" of Checkmate's accounts. It said Worthy's "complaint admits that there is an underlying dispute between it and Checkmate, and that Checkmate owes plaintiff over $3 million.... The existence of that dispute bars plaintiff from bringing a cause of action under UCC § 9-607. In other words, that ongoing dispute bars plaintiff from bringing a case against one of Checkmate's debtors based on the notion that [New Style] should have started paying [Worthy] before Checkmate even defaulted...." It further held that "the notice of assignment was not sufficient under UCC § 9-406 to require [New Style] to start making payments to plaintiff. Of course, a secured party with a security interest is not the same as an assignee...."

The Appellate Division, First Department affirmed, saying Worthy "did not have an independent cause of action against [New Style] pursuant to UCC 9-607. Plaintiff and [New Style] have no contractual or other relationship or duty to one another. Plaintiff seeks to impose upon [New Style] a separate obligation to repay plaintiff the same amount it has already paid [Checkmate] under their contract. Because there was a dispute between plaintiff, the secured creditor, and [Checkmate] as to who had the right to collect from [New Style], section 9-607(e) applied" to preclude Worthy's claim.

Worthy argues the lower court decisions conflict with a 2020 commentary from the UCC Permanent Editorial Board that UCC 9-406 does not distinguish between a security interest and an assignment, which makes its notice directing New Style to make payments directly to Worthy enforceable under UCC 9-607. It also says Checkmate's default is not a "dispute" that would void Checkmate's assignment of its accounts to Worthy.

For appellant Worthy Lending: Richard G. Haddad, Manhattan (212) 661-9100
For respondent New Style: Glenn P. Berger, Manhattan (212) 687- 3000

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To be argued Wednesday, October 19, 2022

**No. 85 Everhome Mortgage Company v Aber**

Nuchem Aber borrowed $368,000 from Fairmont Funding, LTD in 2003, and the loan was secured by a mortgage on residential property in Brooklyn. Aber allegedly stopped making monthly payments on the mortgage in 2008. Fairmont assigned the mortgage to Everhome Mortgage Company on April 13, 2009, and 17 days later – on April 30, 2009 – Everhome commenced a foreclosure action against Aber. The mortgaged property was transferred to Equity Recovery Corporation in December 2009. In 2013, Supreme Court dismissed the first foreclosure action based on Everhome's failure to appear for a conference. On June 24, 2015, Everhome commenced this second foreclosure action against Equity and Aber. In their answer, Equity and Aber contended the action was time-barred.

Supreme Court granted Equity's motion to dismiss the action as time-barred. It found the first foreclosure action "filed on 4/30/09" accelerated the mortgage, triggering the six-year statute of limitations on the entire debt, and this second action "was filed on 6/24/15, slightly more than six years later." Thus, it said Equity "met its initial burden of demonstrating, prima facie, that this action was untimely," and Everhome failed to raise a question of fact in opposition.

Everhome argued on appeal that its first foreclosure action did not accelerate the mortgage because there is a question of fact as to whether it complied with paragraph 22(b) of the mortgage agreement, which required it to give Aber a 30-day notice and opportunity to cure his default before it could validly accelerate the debt. Because it was assigned the mortgage just 17 days before it filed the first foreclosure, Everhome said it could not have provided the full 30-day notice and cure period. It also cited Aber's verified answer in the 2009 foreclosure, which asserted an affirmative defense that Everhome did not give him the required 30-day notice.

The Appellate Division, Second Department affirmed in a 3-2 decision, finding Everhome did not raise a question of fact regarding its compliance with the notice requirement. The majority said "30 days before the acceleration date, the note was held and owned by the plaintiff's predecessor in interest, Fairmont. [Everhome] proffered no evidence as to whether Fairmont sent or delivered the notice, and ... did not provide any excuse for failing to submit such evidence." Regarding Aber's assertion that Everhome did not give him any notice in 2009, the court said "a bald denial of receipt is insufficient to establish, prima facie, that such notice was not mailed or delivered, or to raise a question of fact as to mailing or delivery...."

The dissenters said "the first action could not have validly been commenced as it was calendrically impossible for [Everhome], which held the note for only 17 days prior to commencement, to have satisfied the note's 30-day notice and cure period required by paragraph 22(b)(3)." They said Aber's affirmative defense in the first action that he was not given the required notice, "facts known directly by Aber from his alleged nonreceipt of any such document," was also sufficient to raise "a question of fact about the validity of the debt acceleration made in the first action" in 2009.

For appellant Everhome: Margaret J. Cascino, Manhattan (646) 362-4000
For respondents Aber and Equity: Anthony R. Filosa, Garden City (516) 228-6666

# *State of New York Court of Appeals*

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To be argued Wednesday, October 19, 2022

**No. 88 People v Luis Jimenez**

On a street in Jackson Heights in 2018, Luis Jimenez got into an altercation with an acquaintance named Jonathan, who was demanding that Jimenez repay a $20 loan. Jonathan was holding two metal rods, and his mother and uncle were present along with a small dog. Jimenez armed himself with a broken broomstick. Jonathan's mother ordered him to leave and, as he walked away, surveillance video showed that his uncle was trying to restrain Jimenez while the dog approached his leg. Jimenez struck the dog with the broomstick, causing a facial fracture and blinding the dog's right eye. He testified before the grand jury that he felt threatened because the dog was biting at his pants while he wrestled with Jonathan's uncle, who was trying to take the stick away. Jimenez was indicted on criminal mischief and animal cruelty charges.

Supreme Court dismissed the indictment with leave to re-present, ruling the prosecutor's failure to instruct the grand jury on the defense of justification impaired the integrity of the proceeding. It said Jimenez's testimony "supports a basis to believe that he had to choose between two evils in a situation not of his own doing. He testified that he was defending himself against an attack by multiple individuals over a dispute about money, which included the dog that was injured in this case. In his testimony, he stated that the dog had bitten him, and the video shows that he was being held by another male with the dog also at the defendant's side."

The Appellate Division, Second Department reversed on a 3-1 vote, saying, "There is no reasonable view of the evidence that forcefully striking and injuring the approximate eight-pound terrier poodle in the manner undertaken by the defendant, who was approximately 6 feet tall and weighed 200 pounds, was necessary as an emergency measure to avoid, at most, a bite by this small animal through denim pants." Further, the majority said the text of the self-defense statutes "'plainly limits the defense to situations where one person uses force against another person, making [them] inapplicable where, as here, a person used force ... against an animal'...."

The dissenter said "there was a reasonable view of the evidence that supported a justification instruction based upon the defendant's testimony that the dog was biting at his pants leg at the time he hit the dog.... With the benefit of hindsight, we may feel that the small size of the dog indicated that it was unlikely that the dog could have inflicted serious physical injury upon the defendant. However, the defendant's infliction of serious physical injury upon the dog would be justified to avoid less than serious injury to the defendant, since the interest of the defendant to protect his person cannot be equated with the interest of protecting an animal from injury. The question of whether the injury inflicted upon the dog could be justified to protect the person of the defendant or even his property is generally a question of fact to be determined by the trier of facts based upon the moral standards of the community..., and not as a matter of law based upon falsely equating the interest of the animal with the interest of a person."

For appellant Jimenez: Steven R. Berko, Manhattan (212) 577-3300
For respondent: Queens Assistant District Attorney Charles T. Pollak (718) 286-5984

# *State of New York Court of Appeals*

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To be argued Thursday, October 20, 2022

**No. 90 Maldovan v County of Erie**

Laura Cummings, a 23-year-old mentally disabled woman, was killed by her mother in the Erie County Village of North Collins in January 2010. William D. Maldovan, as administrator of her estate, brought this action against Erie County and the County Sheriff to recover damages for her pain and suffering and her wrongful death, alleging they had been negligent in responding to complaints of possible abuse in the months leading up to her death. Her brother Richard Cummings raised concerns about physical abuse with a town justice, who relayed his report to Child Protective Services (CPS) in June 2009. A CPS caseworker went to the Cummings home and asked Laura about a cut on her arm. Laura told her she sustained the cut in a fall on the porch steps. The town justice contacted Adult Protective Services (APS) in September 2009 after Richard Cummings asked him to report bruising on Laura's face. Two APS caseworkers went to the home, where Laura told them she sustained the bruises in a fall on the porch steps. Both agencies marked the reports "unfounded" and closed the cases. In November 2009, two Erie County sheriff's deputies encountered Laura, who had run away from home. She did not answer their questions and they returned her to the custody of her mother. She died two months later. Laura's mother, Eva Cummings, was subsequently convicted of murder and Laura's half-brother, Luke Wright, was convicted of rape and sexual assault committed in the months before her death.

Supreme Court denied, without opinion, motions by the County and Sheriff for summary judgment dismissing the estate's complaints.

The Appellate Division, Fourth Department reversed and dismissed the suit, saying the County was entitled to summary judgment "on the ground that no special duty exists as a matter of law" because "the fourth element, justifiable reliance, cannot be met in this case." It said Richard Cummings could not have justifiably relied on the County to protect his sister because, "inasmuch as he was aware that the agencies had closed their investigations, he could not have relied upon any 'affirmative undertaking' by them." Alternatively, the court found the County was entitled to governmental function immunity because "the actions of the CPS and APS caseworkers 'resulted from discretionary decision-making'.... While the caseworkers may have been negligent, they were exercising their discretion throughout the investigations." As a third ground for dismissal, it said "a cause of action for negligent investigation is not recognized in New York." It said the Sheriff was entitled to governmental function immunity because claims he was negligent in hiring and training the deputies "all involved conduct requiring the exercise of the Sheriff's discretion and judgment." It also said such claims are "akin to a claim for negligent investigation."

Maldovan argues, in part, that the County and Sheriff are not entitled to government function immunity because – through the actions of CPS, APS and the deputies – they violated their own policies in investigating reports of Laura's abuse. He says a special relationship between the County and Laura existed based on Social Services Law Article 9-B, which created APS and imposed a duty on counties to protect adults who are unable to protect themselves, satisfying the justifiable reliance element. And he says "New York recognizes a cause of action for negligence, regardless of whether the negligent acts involved investigative activity."

For appellant Maldovan (Cummings estate): John T. Loss, Buffalo (716) 852-5533
For respondents Erie County and Sheriff: Robert P. Goodwin, Buffalo (716) 856-1636

# *State of New York Court of Appeals*

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To be argued Thursday, October 20, 2022

**No. 91 Howell v City of New York**

Dora Howell brought this personal injury action against New York City and two of its police officers to recover damages for injuries she sustained when Andre Gaskin threw her out of the third-story window of his Brooklyn apartment in November 2008. She had an order of protection against Gaskin, who was her former boyfriend and the father of her child. They no longer had a romantic relationship, but continued to live in the same building with Howell's apartment on the second floor, directly beneath Gaskin's. In the days leading up to the incident, Howell called the police three times in a week to report that Gaskin was violating the stay-away order, and the same two officers responded each time. After her first call, the officers assured her that Gaskin would be "removed from the premises" and "won't be returning," and that he would stay with his uncle. Howell saw the officers wait outside with Gaskin until his uncle picked him up. She called a second time when she returned home and heard Gaskin inside her apartment. The officers again told her they would "remove him from the premises" and "he would not be coming back." She saw them escort him outside the building and watched him walk away. She made her third call when Gaskin began banging on her apartment door with a pipe. This time, the officers asked Howell why she did not move or stay somewhere else and they said they would arrest her if she called them again. They ordered Gaskin to return to his own apartment and they assured Howell that she would "be okay." On the day of the incident, Howell answered one of Gaskin's repeated phone calls and told him she was at a friend's house nearby. Gaskin showed up, grabbed her arm, and walked her back to their building. Once inside, he dragged her up to his apartment and pushed her out of his living room window. In her lawsuit, Howell alleged that the officers negligently failed to protect her and that the City was liable for negligent hiring, training and supervision of the officers. The defendants argued they were not liable because they owed no special duty to Howell.

Supreme Court denied, as premature, the defendants' motion for summary judgment dismissing the lawsuit.

The Appellate Division, Second Department reversed and dismissed the suit, saying the defendants established that no special relationship existed between them and Howell. It said, "Specifically, the defendants established, prima facie, that the officers made no promise to arrest Gaskin, and [Howell] could not justifiably rely on vague assurances by the officers that she would 'be okay' and that Gaskin would not be returning to the building where both he and [she] lived.... [Howell's] alternate contention that the defendants violated a statutory duty owed to her is without merit...."

Howell contends the evidence raised questions of fact about the officers' assurances and her justifiable reliance on those assurances. "In particular, Defendants instructed Plaintiff not to call the police again or she would be arrested. Plaintiff relied on, and acted in light of, those instructions when she met and engaged with Gaskin on the day that he assaulted her for the final time. This was the first time that she did not telephone the police for protection and the first time that she engaged with Gaskin directly. Why? Because she reasonably believed that the police would not only fail to protect her, but would arrest her rather than Gaskin." She also argues the defendants violated a statutory duty under the Family Protection and Domestic Violence Intervention Act of 1994, when they failed to arrest Gaskin after her first three calls to the police. The statute mandates that the police arrest a person who violates an order of protection (CPL 140.10[4][b]), and Howell argues the statute "implies a private right of action" where no arrest is made.

For appellant Howell: Gary N. Rawlins, White Plains (212) 926-0050
For respondent City: Assistant Corporation Counsel Devin Slack (212) 356-0851

# *State of New York Court of Appeals*

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To be argued Thursday, October 20, 2022

**No. 74 People v Ronald K. Johnson**

Emergency medical personnel were called to assistant a heavily intoxicated 14-year-old girl who was found nearly unconscious and sitting in a pool of vomit at a Rochester bus stop in October 2006. At a hospital, she said she had virtually no memory of events after she began drinking with an acquaintance. A sexual assault examination recovered semen from her underwear and swabs of her body, but due to backlogs at the Monroe County Crime Lab, the DNA evidence was not analyzed until January 2010. The following month, the DNA profile was entered into the CODIS database and matched to Ronald K. Johnson, who had not been a suspect in the case. Due in part to difficulties investigators encountered in locating the victim through her mother and through school and motor vehicle records, Johnson was not indicted until June 2014. He was charged with first-degree rape, for allegedly having sexual intercourse with a person who was "incapable of consent by reason of of being physically helpless," and with second-degree rape, for intercourse with a person under the age of 15.

Johnson moved to dismiss the charges, saying the nearly eight-year delay between the crime and the indictment violated his due process right to prompt prosecution. County Court denied the motion based on the five-factor test in People v Taranovich (37 NY2d 442) for assessing preindictment delay: (1) extent of the delay; (2) reason for the delay; (3) nature of the underlying charge; (4) whether there was an extended period of pretrial incarceration; (5) whether there is any indication the defense was impaired by the delay. After his motion was denied, Johnson pled guilty to second-degree rape and was sentenced to 2½ to 5 years in prison.

The Appellate Division, Fourth Department affirmed. After assuming, without deciding, that the prosecution failed to establish good cause for the delay, it found the first three Taranovich factors favored Johnson. However, the court ruled his rights were not violated "because his defense to the charge of which he was convicted was not prejudiced in any conceivable respect by the preindictment delay.... Specifically, although defendant correctly notes that the extensive preindictment delay undoubtedly compromised his ability to contemporaneously investigate the facts and circumstances of the underlying incident, he concedes that no amount of contemporaneous investigation could have revealed a defense to the strict-liability crime of which he was ultimately convicted, namely, rape in the second degree" based on the victim's age. It said, "Whether and to what extent the preindictment delay impaired defendant's ability to defend himself on the separate count of rape in the first degree is irrelevant to our analysis because defendant was not convicted of that count."

Johnson argues the Appellate Division erred by limiting its prejudice analysis to the second-degree rape count because he was also facing the more serious first-degree rape charge when he made his motion to dismiss, the "Appellate Division acknowledged that he was prejudiced, by the delay at least as to the highest offense charged," and he accepted the plea bargain only after the trial court denied his motion. He says that had County Court dismissed the first-degree charge, he "would not have had remotely the same incentive – avoiding the risk of conviction after trial of a more serious offense – to accept the People's offer to plead guilty to rape in the second degree. Thus, the impairment of [his] defense on one count was inextricably intertwined with the other...."

For appellant Johnson: Timothy S. Davis, Rochester (585) 753-4431
For respondent: Monroe County Assistant District Attorney Kaylan C. Porter (585) 753-4674