

# *State of New York Court of Appeals*

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Tuesday, April 23, 2013

- No. 87 James Square Associates LP v Mullen**
- No. 88 Matter of J-P Group, LLC v New York State Dept. of Economic Development**
- No. 89 Matter of Morris Builders, LP v Empire Zone Designation Board**
- No. 90 Matter of Hague Corporation v Empire Zone Designation Board**
- No. 91 Matter of WL, LLC v Department of Economic Development**

These cases stem from changes New York made to eligibility criteria for its Empire Zones Program, which provides tax incentives to qualifying businesses that establish or expand operations in economically distressed areas. To reduce costs and curb abuses, the Legislature amended General Municipal Law § 959(a) in April 2009 to permit the Department of Economic Development to decertify businesses that transfer employees or property from one related entity to another to make it appear they have created new jobs or invested in their facilities, a practice known as "shirt-changing." It also adopted a cost-benefit standard, requiring a certified business "to provide economic returns to the state in the form of total remuneration to its employees (i.e. wages and benefits) and investments in its facility greater in value" than the tax benefits it received. The legislation also amended the Tax Law to bar carryover of tax credits by decertified businesses as of January 1, 2008. In August 2010, the Legislature amended the statute again "to clarify and confirm" that it intended the 2009 amendments to apply retroactively to January 1, 2008.

Nine businesses whose Empire Zones certifications were revoked in 2009 brought these actions against the State to challenge their decertification and the retroactive application of the new eligibility criteria. The primary issue here is whether the 2009 amendments can be applied retroactively to January 2008, although WL, LLC continues to challenge its decertification.

The Appellate Division, Fourth Department -- in James Square and J-P Group -- found the Legislature intended the 2009 amendments to apply retroactively, but ruled that would deprive plaintiffs of their property without due process. There was no indication the plaintiffs "had any warning that the criteria for certification ... were going to change ... prior to April 2009," it said. "Further, and most significantly, it is undisputed that plaintiffs maintained their eligibility for empire zones' tax credits throughout the tax year beginning January 1, 2008 pursuant to the criteria then in effect.... Under the circumstances, those tax credits 'have induced action in reliance thereon [and thus] ... may not be invalidated by subsequent legislation'...."

The Appellate Division, Third Department -- in WL, Morris Builders, and Hague -- agreed the 2009 amendments are prospective. It found the Legislature did not intend them to be retroactive at the time they were enacted and, in any case, it said retroactive decertification would be an unlawful taking of property. "Contrary to [the State's] contention, it is petitioner's certification as a participant in this program -- and not the attendant tax benefits and credits -- that are at issue in this proceeding and represent a property interest that is entitled to due process protection...."

The State argues that the Legislature intended the amendments to be retroactive and that "limited retroactive denial" of the tax incentives would not violate due process. "Both the Supreme Court ... and this Court have repeatedly upheld retroactive tax legislation against due process challenges, and this case fits squarely within the pattern the Courts have approved," it said, because "(1) petitioner was forewarned of the possibility of Program changes and thus could not reasonably rely on the continued availability of the tax credits, (2) the period of retroactivity, slightly more than 15 months..., has been routinely upheld and is not excessive, and (3) the amendments serve two legitimate public purposes by curing abuses of the Program and providing essential budget savings...."

For appellant State: Assistant Solicitor General Owen Demuth (518) 474-6639  
For respondents James Square et al: Jonathan B. Fellows, Syracuse (315) 218-8000  
For respondent J-P-Group: Jennifer C. Persico, Buffalo (716) 882-4890  
For respondent Morris Builders: Philip M. Halpern, White Plains (914) 684-6800  
For respondent Hague: Michelle L. Merola, Albany (518) 465-2333  
For respondent-appellant WL: Robert K. Weiler, Syracuse (315) 422-1391

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## **No. 92 People v Grady Hampton**

Grady Hampton was accused of killing Kareem Sapp in Uniondale (Nassau County) in December 2007, allegedly shooting him in the street in a fit of jealousy over a woman. His first trial ended in a hung jury. At his second trial, after the prosecution rested, Hampton moved to dismiss for failure to make out a prima facie case. Acting Supreme Court Justice Jerald S. Carter heard arguments on the motion and reserved decision. After the close of evidence, Hampton again moved for a trial order of dismissal. Justice Carter said he had "concerns" about "whether or not the People have met their burden," but again reserved decision. The jury found Hampton guilty of second-degree murder and criminal possession of a weapon.

After the verdict, and with the motions still unresolved, Justice Carter learned that a friend of his was Sapp's uncle and decided to recuse himself due to the conflict. Hampton submitted a written motion to dismiss or set aside the verdict for lack of legally sufficient evidence. He also moved for a mistrial, arguing that Judiciary Law § 21 would prohibit a substitute judge from deciding the dismissal motions. The statute reads, "A judge other than a judge of the court of appeals, or of the appellate division of the supreme court, shall not decide or take part in the decision of a question, which was argued orally in the court, when he was not present and sitting therein as a judge."

The case was reassigned to Justice Daniel R. Palmieri, who denied the motion to dismiss and the motion for a mistrial under Judiciary Law § 21. He said, "Because a decision on a motion to set aside a verdict is based entirely on legal principles, and this court has read and become familiar with the entire record of the trial..., it finds that there are no grounds for a mistrial based upon a violation of Judiciary Law § 21."

The Appellate Division, Second Department affirmed, saying, "Since purely legal questions were involved, all discussion was recorded in the minutes, and the successor Judge was not called upon to weigh conflicting testimony or assess credibility'..., Judiciary Law § 21 did not bar Justice Palmieri from determining the defendant's motion."

Hampton argues the substitute judge violated section 21 by deciding his dismissal motion. "If the initial judge has entertained argument or litigated a particular motion, regardless of whether or not it is a purely legal one or a motion which must analyze facts to legal elements, the statute is violated if a successor judge addresses the issue..., he says. "Further, the adjudication of a trial order of dismissal is, in fact, a circumstance where a trial court is reviewing the factual evidence to ascertain whether the People have established the legal elements of the crime in the particular case."

For appellant Hampton: Joseph A. Gentile, Mineola (516) 742-6590

For respondent: Nassau County Assistant District Attorney Barbara Kornblau (516) 571-3800

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**No. 94 Galetta v Galetta**

*(papers sealed)*

Gary and Michelle Galetta signed a prenuptial agreement prior to their marriage in 1997. After the husband filed for divorce in 2010, the wife moved for summary judgment determining that the prenuptial agreement was invalid and unenforceable because the husband's signature was not properly acknowledged under Domestic Relations Law § 236(B)(3) and Real Property Law § 303, which require that the certificate of acknowledgment show the person witnessing the signing "knows or has satisfactory evidence, that the person making it is the person described in and who executed such instrument." The wife argued that the certificate of the notary public who witnessed the husband's signature did not state that he knew him or had evidence that he was Gary Galetta. In opposition, the husband submitted an affidavit from his notary, who said, "It was then, and has always been, my custom and practice ... to ask and confirm that the person signing the document was the same person named in the document.... I am confident I followed the same procedure" while witnessing the husband's signature. Supreme Court denied the wife's motion, finding there was "substantial compliance" with the statutes.

The Appellate Division, Fourth Department affirmed, on different grounds, in a 3-2 decision. It said the certificate of acknowledgment was not in substantial compliance, but ruled that defects in an acknowledgment may be cured and that the "subsequently-filed affidavit from the notary who took [the husband's] acknowledgment raises a triable issue of fact whether the prenuptial agreement was properly acknowledged." The majority said, "The statements of the notary ... 'constitute competent and admissible evidence concerning routine professional practice sufficient to raise a triable issue of fact'...."

The dissenters argued the prenuptial agreement was invalid because it was not properly acknowledged. They said the husband did not raise a claim that the notary's affidavit cured any defect in the acknowledgment and, in any case, they argued that such a defect is not subject to cure. Even if it could be cured, they said, the affidavit did not raise an issue of fact because "there was no 'identity of the person making the acknowledgment with the person described in the instrument and the person who executed the same'...."

For appellant Michelle Galetta: Francis C. Affronti, Rochester (585) 248-0142

For respondent Gary Galetta: Kathleen P. Reardon, Rochester (585) 230-4881