

# *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, February 14, 2012

**No. 48 Simkin v Blank**

*(papers sealed)*

Steven Simkin and Laura Blank separated in 2001, after 28 years of marriage, and were divorced in 2006, after entering into an agreement to divide their property -- including residences, vehicles, and their banking and investment accounts -- based on a valuation date of September 1, 2004. Under the 2006 property agreement, Blank waived spousal support and marital property rights in the value of Simkin's law practice; the parties agreed that each would keep accounts held in their own name; and Simkin paid Blank \$6.25 million. Three years later, Simkin learned he was a victim of Bernard Madoff's massive Ponzi scheme, and he brought this action against Blank for reformation of the agreement based on mutual mistake and for unjust enrichment. He contended that, at the time of the property settlement, the parties believed that he had an account in his name with Bernard L. Madoff Investment Securities and that it was worth \$5.4 million as of the valuation date. He claimed that \$2.7 million of the \$6.25 million he paid to Blank represented her half of the Madoff account, which he said did not really exist.

Supreme Court granted Blank's motion to dismiss the suit, saying Simkin's "claim of mistake is opaque, stating simply that the account at issue did not exist. There is no assertion, however, that at the time of the agreement the account could not be redeemed for value.... An investor's ability to redeem an account for value was the assumption on which the parties relied in dividing their property and in doing so they made no mistake." It said Simkin was "unjustly harmed" by Madoff's fraud, but "[t]here is no evidence ... that [Blank] was unjustly enriched."

The Appellate Division, First Department reversed and reinstated the complaint in a 3-2 decision, saying Supreme Court and the dissent erred "by resolving a fact -- the assumption on which the parties relied in dividing their property -- in defendant's favor on a motion to dismiss." It said Simkin "pleads mutual mistake with the requisite particularity" and the complaint states causes of action based on mutual mistake and unjust enrichment. The majority said "defendant and the dissent ignore the allegations of mutual mistake as to the actual existence of the account itself" and "attempt to foreclose plaintiff's claims by transmogrifying the claim of mutual mistake into a claim of mistake in valuation." It said Simkin "*never* had an account in his name with Madoff; on Madoff's own admission there were no accounts within which trades were made on behalf of investors."

The dissenters argued Simkin's claim of mutual mistake fails because the alleged mistake "does not involve a fundamental assumption of the contract," because it "did not exist at the time the parties entered into their agreement," and because allowing the claim would "undermine[] decades of established precedent favoring finality in divorce cases." Simkin "negotiated successfully to retain the Madoff account, presumably because he expected the Madoff account to continue its highly profitable performance," and he continued to invest in it, they said. "Accordingly, he alone took on the risk that he might not be able to recoup his investment...."

For appellant Blank: Richard D. Emery, Manhattan (212) 763-5000  
For respondent Simkin: Mark H. Alcott, Manhattan (212) 373-3000

# *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, February 14, 2012

## **No. 49 Matter of Leshner v Hynes**

In 1984, Orthodox Rabbi Avrohom Mondrowitz was indicted in Brooklyn on multiple counts alleging he had sexually abused young boys. Mondrowitz fled to Israel. The Kings County District Attorney initially sought to extradite him, but dropped the effort in 1993, apparently because the treaty between the United States and Israel at that time did not permit extradition for such crimes. Michael Leshner, a journalist and attorney who represents several alleged victims of Mondrowitz and has pressed to revive the case, obtained some records of the investigation in 1998 under the Freedom of Information Law (FOIL). In 2007, when the District Attorney resumed extradition efforts, Leshner filed a new FOIL request for all records pertaining to the case against Mondrowitz since September 1993, including any correspondence between the District Attorney's Office and federal agencies. The DA's Office denied his request and rejected his administrative appeal under Public Officers Law § 87(2)(e)(i), which exempts from FOIL records that would "interfere with law enforcement investigations or judicial proceedings," and Civil Rights Law § 50-b(1), which prohibits disclosure of any document "which tends to identify" a sex crime victim. Leshner brought this article 78 proceeding to challenge the decision.

Supreme Court held that, under section 87(2)(e)(i), records relating to the criminal case "would seem to be subject to a blanket exemption because Mondrowitz's prosecution is active." However, it said communications between the District Attorney and federal agencies "allegedly pertain to Mondrowitz's extradition and, therefore, they are not exempt from disclosure." It directed the District Attorney to provide copies to Leshner, "subject to any necessary redactions."

The Appellate Division, Second Department ruled all of the requested documents were exempt from disclosure. Under Public Officers Law § 87(2)(e)(i), the District Attorney was "not required to detail the manner in which each document" would interfere with an investigation, it said. "Rather, under the circumstances here, the assertion that disclosure would interfere with an ongoing law enforcement investigation was a sufficiently particularized justification for the denial of access...." Regarding the documents exempted under Civil Rights Law § 50-b(1), it said the District Attorney was not required to disclose the records "even though redaction might remove all details which 'tend to identify the victim[s]'...."

Leshner argues the Appellate Division's ruling on Public Officers Law § 87(2)(e)(i) "creates an altogether new FOIL exemption that would allow law enforcement agencies to assert 'blanket' withholding privileges for virtually all documents in their possession, even if those documents are unrelated to a criminal prosecution," as long as "there *may be* a criminal prosecution in a given case." He notes that his FOIL request sought only documents created since September 1993, nine years after Mondrowitz fled. He also argues, "[T]he Appellate Division's holding seriously misapplies Civil Rights Law § 50-b, allowing Respondents to assert a blanket exemption -- rather than the document-by-document justification actually required under this statute -- in order to withhold all documents in their possession, even though they have never specified a single document that identifies a victim of sex abuse...."

For appellant Leshner: Michael Leshner (pro se), Passaic, NJ (973) 470-0212

For respondent Hynes: Brooklyn Assistant District Attorney Morgan J. Dennehy (718) 250-2515

# *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, February 14, 2012

## **No. 50 Matter of Town of Waterford v NYS Department of Environmental Conservation**

In 2002, when the federal Environmental Protection Agency (EPA) approved a plan requiring the General Electric Company to dredge sediments contaminated with polychlorinated biphenyls (PCBs) from the Hudson River, the Town of Waterford was among the downstream communities that raised concerns about the effect the dredging might have on their drinking water, which they take from the river. In response, the EPA ordered GE to evaluate contingency measures to provide municipalities with water if their supplies became contaminated. After GE's final "Water Supply Options Analysis" was published in 2007, Waterford filed a Freedom of Information Law (FOIL) request with the State Department of Environmental Conservation (DEC) for its records regarding standards that would be used to determine acceptable levels of PCBs in drinking water and how alternate water supplies would be made available. DEC disclosed some documents, but withheld a larger number on the ground they were covered by the FOIL exemption for inter-agency and intra-agency materials in Public Officers Law § 87(2)(g). Many of the withheld documents were emails exchanged among the EPA, DEC and State Department of Health (DOH), which have overlapping jurisdiction and shared statutory responsibility for the remediation project. Waterford filed this article 78 to compel disclosure.

Supreme Court ruled that communications with EPA, a federal agency, were not covered by the inter- and intra-agency exemption based on Public Officers Law § 86(3), which defines "agency" for purposes of FOIL as "any state or municipal department, board, bureau, division ... or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof...." It also said its "determination is governed by recognition that 'FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government.'"

The Appellate Division, Third Department reversed on that issue on a 3-2 vote, ruling the exemption can apply to communications between state and federal agencies. "[T]he legislative purpose in providing this exemption to the disclosure requirements of FOIL can only be served by focusing on the nature of the relationship that exists between the entities, and asking whether the communication in question is exchanged as part of the deliberative process in government decision-making...", it said. "Here, the relationship that has existed for more than 25 years among these state and federal agencies on this project is statutorily based and memorialized by contractual agreements which, in effect, require that they work together to address the threat posed by PCB contamination in the Hudson River."

The dissenters argued the majority's opinion improperly "expands the scope of the ... exemption ... to include materials exchanged between state and federal agencies" involved in the dredging project and "thwarts the basic premises that FOIL is to be construed liberally, that government records are presumptively available for public inspection, and that exemptions are to be construed narrowly...." They said, "[B]y the very definition of the term 'agency'..., the inter-agency/intra-agency exemption is specifically limited to materials exchanged within and between state and municipal governmental agencies...."

For appellant Waterford: Craig M. Crist, Albany (518) 478-2762

For respondent DEC: Assistant Solicitor General Paul Groenwegen (518) 474-1394

# *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, February 14, 2012

## **No. 51 Corsello v Verizon New York, Inc.**

William and Evelyn Corsello have owned a four-unit apartment building on Vanderbilt Avenue in Brooklyn since the 1950s. They have never lived in the building, but rent it out to others. They allege that, "in the 1970s or 1980s or earlier," a predecessor of Verizon Communications and Verizon New York affixed a telephone distribution panel and associated cables to the back wall of their building to provide telephone service to their building and other nearby buildings. In an August 2006 letter to Verizon, the Corsellos demanded compensation and the removal of all wiring and hardware that provided service to other buildings. They say Verizon responded that it had the right to attach the distribution terminal without paying compensation and it would not be removed. In October 2007, the Corsellos brought this putative class action against Verizon on behalf of themselves and similarly situated property owners, seeking damages for inverse condemnation, trespass, unjust enrichment and deceptive business practices under General Business Law § 349, among other things.

Supreme Court denied Verizon's motion to dismiss the claim for inverse condemnation, saying the company's "installation of the rear-wall terminals and connecting wires constitutes a permanent taking of plaintiffs' property that must be compensated.... [E]ven if plaintiffs or their predecessor did orally grant permission for the placement of defendants' equipment on their property at sometime in the past, plaintiffs' complaints effectively revoked such license." It also refused to dismiss the claim under General Business Law § 349, finding Verizon's alleged "misrepresentations" and "the initial intrusion by stealth and the failure to respond to plaintiffs' demands and inquiries, are sufficiently material in causing injury to plaintiffs to support a GBL § 349 claim." It said the Corsellos had standing to bring the action, even though they did not themselves receive telephone service at the building, because the allegedly deceptive practices were consumer-oriented. It dismissed the unjust enrichment claim as "duplicative of plaintiffs' trespass claim since both seek to recover damages incident to the alleged trespass." It denied the Corsellos' motion for class certification in a separate decision.

The Appellate Division, Second Department modified by dismissing the claim for inverse condemnation and reinstating the claim for unjust enrichment. Although the Corsellos stated a claim for inverse condemnation, it said, the three-year statute of limitations began to run at the time of the taking and was not tolled by Real Property Law § 261, which "only refers to situations where a telecommunications company ... affirmatively asserts rights to an owner's property by, for example, adverse possession or prescriptive easement." It said, "[T]he initial attachment of the terminal and wiring was a discrete, well-defined taking of property, and the mere addition of cable [in 2004 or 2005] did not afford the plaintiffs a new limitations period." The court said the unjust enrichment claim was not duplicative because "the trespass cause of action is based on an unjustified entry onto the property, whereas the unjust enrichment cause of action can be based on either a justified or unjustified entry," and the nature of the entry must be determined by the trier of fact. It said the Corsellos could proceed with their section 349 claim because "the plaintiffs themselves need not be consumers.... The question is whether the conduct is consumer-oriented." It said class certification was properly denied because "the proposed class definition was overbroad" and because the Corsellos "failed to establish that questions of law or fact common to the class predominate over any questions affecting only individual members ... and that their claims or defenses were typical of those of the class...."

For appellant-respondent Verizon: Patrick F. Philbin, Washington, D.C. (202) 879-5000  
For respondent-appellant Corsellos et al: David M. Wise, Babylon (908) 653-1700

# *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, February 14, 2012

## **No. 52 Mount Vernon City School District v Nova Casualty Company**

In December 2003, the Mount Vernon City School District contracted with DJH Mechanical Associates for installation of a new heating, ventilation and air conditioning system at the A.B. Davis Middle School for \$919,000. DJH obtained a performance bond from Nova Casualty Company. In June 2004, the State Department of Labor (DOL) issued a notice of cross-withholding to the district requiring it to hold back any payments DJH had earned at A.B. Davis pending investigation of unpaid wage claims against DJH for work on an unrelated project for the Mahopac Central School District. In January 2005, DOL directed the Mount Vernon district to pay over to it \$214,000 of the funds the district owed to DJH. Mount Vernon remitted the \$214,000 to DOL with the consent of DJH. In January 2006, Mount Vernon terminated its contract with DJH for failure to perform. Nova disclaimed liability and declined to complete the project under the performance bond.

Mount Vernon completed the project and filed this breach of contract action against Nova and DJH alleging that Nova failed to satisfy its obligations under the performance bond. Nova moved for summary judgment dismissing the complaint against it, contending Mount Vernon's payment of \$214,000 to DOL relieved Nova of its obligations under the bond. Nova argued that because the funds were used to pay claims on an unrelated project, the payment to DOL was a diversion of trust fund assets prohibited by New York Lien Law article 3-A. Supreme Court denied the motion, saying Nova did not complete DJH's work and, "therefore, has no rights as a subrogee to unpaid contract ... and trust fund monies." After a jury found DJH had breached its contract, Mount Vernon and Nova stipulated to have the court decide the issue of damages.

Supreme Court ruled Mount Vernon's payment to DOL did not excuse Nova's performance under the bond, reiterating that Nova had no subrogation rights to any diverted trust fund monies because it had not performed as surety. It also ruled the payment did not violate the performance bond because DJH had earned the \$214,000 and the district could pay the funds to DOL at DJH's request rather than pay DJH directly. It ruled Mount Vernon could recover attorneys' fees incurred in completing the project, but not fees incurred in its litigation against Nova.

The Appellate Division, Second Department affirmed. It said Mount Vernon's payment to DOL did not excuse Nova from liability under the bond because it "was not a fully paying and performing surety" and, thus, "it did not succeed to the rights of the owner or the Lien Law article 3-A trust beneficiaries." It also said, "[S]ince the \$214,000 represented a sum earned by DJH..., Nova failed to establish ... that by paying the money over to DOL, Mount Vernon breached the payment terms of the performance bond or the contract."

Nova argues Mount Vernon's diversion of trust funds in violation of Lien Law article 3-A excused it from performance on the bond because "the use of trust funds by the School District to pay costs on an unrelated project was a material breach of [its] contract with Nova" and the breach "substantially increased" Nova's potential cost of performance. Mount Vernon argues it is entitled to recover attorney's fees incurred in this litigation against Nova.

For appellant-respondent Nova: Neil B. Connelly, White Plains (914) 328-4100

For respondent-appellant Mount Vernon district: Andrea Tersigni, Manhattan (212) 425-6210