

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 or gspencer@nycourts.gov.

To be argued Tuesday, January 7, 2025

No. 1 **Cuomo v New York State Commission on Ethics and Lobbying in Government**

Former Governor Andrew Cuomo filed this action to challenge the constitutional validity of the State Commission on Ethics and Lobbying in Government (COELIG), which was created in 2022 by enactment of a revised Executive Law § 94 to replace the Joint Commission on Public Ethics (JCOPE) as the enforcer of New York’s ethics and lobbying laws for government officials. COELIG consists of 11 members, five of them nominated by the Governor and other executive branch officials and six of them nominated by leaders of the legislative branch. Prior to appointment, all nominations must be reviewed and approved by the independent review committee (IRC), made up of the deans of the state’s accredited law schools. A COELIG member may only be removed by a majority vote of the other members.

In 2020, JCOPE approved then-Gov. Cuomo’s plans to publish a book about his handling of the COVID pandemic, but it subsequently conducted an investigation into his preparation and publication of the book and charged him with ethics violations. JCOPE was disbanded before resolving the charges, but COELIG elected to proceed with the case against Cuomo. Cuomo then filed this suit against COELIG, contending that the Legislature’s enactment of Executive Law § 94 violated the separation-of-powers doctrine under the State Constitution, which vests executive power in the Governor and provides that the Governor “shall take care that the laws are faithfully executed.”

Supreme Court granted summary judgment to Cuomo, finding that COELIG was exercising “executive power belonging to the executive branch” and declaring Executive Law § 94(10) and (14) unconstitutional.

The Appellate Division, Third Department affirmed, finding that “the Legislature, though well intentioned in its actions, violated the bedrock principles of separation of powers.... Executive Law § 94 revokes the Governor’s enforcement power with respect to the ethics laws, thereby depriving her of all discretion in determining the methods of enforcement of these laws. Instead, it places this power into the hands of [COELIG], an entity over which she maintains extremely limited control and oversight, as she appoints a minority of members and has no ability to remove members. Moreover, appointments must be approved by the IRC, an external nongovernmental entity made up of people who are in that position solely by virtue of their employment and do not answer to the populace. As such, Executive Law § 94 creates an agency with executive power, in that it has the authority to investigate and impose penalties for the violation of the ethics laws, while being entirely outside the control of the executive branch. Thus, it usurps the Governor’s power to ensure the faithful execution of the ... ethics laws.”

COELIG argues the separation-of-powers doctrine in New York “is practical, flexible, and permits overlap between the branches of government.” COELIG is constitutional because its “structure is designed to meet a compelling and legitimate institutional need: It ensures that the Commission is sufficiently insulated, both in fact and in appearance, from the political branches it monitors and thereby able to fulfill its mission. And that structure embodies the political branches’ considered judgment as to how to best regulate their own operations and thereby protect their integrity and good name – a judgment that is entitled to respect. Equally important, the Commission’s structure does not allow for the Legislature to usurp the executive power. The Governor agreed to the Commission’s structure and has retained meaningful influence and supervision over the Commission’s composition, funding, and operation. And numerous statutory constraints prevent the Legislature from controlling the Commission.”

For appellant COELIG: Assistant Solicitor General Dustin J. Brockner (518) 776-2017

For respondent Cuomo: Gregory J. Dubinsky, Manhattan (646) 837-5151

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No. 4 Albert Behler v Kai-Shing Tao

Albert Behler brought this breach of contract action against Kai-Shing Tao, a longtime friend who controlled a publicly traded company, Remark Holdings Inc., and Digipac LLC, a vehicle he used to route investments by friends and family to Remark. In 2012, the two men entered into an oral contract (the exit opportunity agreement) in which Behler agreed to invest \$3 million in Remark through Digipac on the condition that Tao would cash out his investment after five years – in November 2017. Behler acquired a 24.14% stake in Digipac with his investment. Tao acknowledged the cash-out deadline at a meeting with Behler in June 2017, but failed to cash out his shares, then valued at \$11.6 million. Tao admitted his breach of the exit opportunity agreement when Behler confronted him in January 2018, and Behler then filed this suit.

Tao moved to dismiss, arguing that his oral exit agreement with Behler had been superceded by an amendment to Digipac’s LLC agreement that he unilaterally drafted and executed in 2014. The original LLC agreement designated Tao as the “Sole Member” of Digipac, gave him exclusive discretion to make distributions, and provided that the agreement “may be amended only in a writing signed by the Sole Member.” The amended LLC agreement made no mention of an automatic exit opportunity for Behler of any other member. Its merger clause states that it “constitutes the sole and entire agreement of the parties ... and supercedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral. The original and amended LLC agreements say they are governed by Delaware law.

Supreme Court dismissed Behler’s suit and the Appellate Division, First Department affirmed in a 3-2 decision. The majority said the primary question is whether, under Delaware law, “a parties’ oral side agreement to repurchase shares survived the subsequent amendment of the LLC agreement concerning the same subject matter, and whether the contesting party’s ‘acknowledgment’ of the existence of the side agreement subsequent to the execution of the amended LLC agreement had any legal import. We hold that the oral side agreement did not survive the amendment of the LLC agreement, which contains a merger clause and has provisions at odds with the side agreement; and that any so-called acknowledgment of the oral side agreement did not work as an estoppel or otherwise alter the calculus.”

The dissenters said, “The fundamental issue in this case is whether a manager of an LLC may persuade a friend to invest in his LLC by orally promising the friend a guaranteed exit opportunity at a specific time and price, and then, with total impunity, amend the LLC’s operating agreement unilaterally, by, among other things, including a merger provision which he now contends nullifies their oral agreement, relieves him of all obligations under it, and deprives his friend of all legal remedies, even though nothing in the amended operating agreement is inconsistent with Tao’s obligations to perform under the oral agreement. As stated, it is clear that the answer must be no. Yet that is just ... what the majority would have this court do, in violation of basic principles of contract law and fundamental fairness.”

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For respondent Tao: Kerrin Klein, Manhattan (212) 451-2300

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No. 5 People v Charles Howard

Charles Howard was charged with first-degree robbery and lesser crimes for stealing a wallet from a sleeping subway passenger, Guztavo Herrera, at the Stillwell Avenue subway station in Brooklyn in November 2017. Herrera told the arresting officer that, when he woke up in his seat, he found his coat pocket had been cut open, his wallet removed, and he saw Howard drop the wallet and run. At trial 18 months later, Herrera testified that when he awoke, he found Howard had been trying to open his pocket with a box cutter and was standing in front of him demanding his property. Herrera handed his wallet and cell phone to Howard, who took cash and a MetroCard from the wallet and handed them back, and then fled. The arresting officer, on cross-examination, repeated Herrera's initial, conflicting account of the crime. The prosecutor did not present any testimony addressing the discrepancies between Herrera's initial statement and his trial testimony. Howard moved for a trial order of dismissal, arguing that Herrera's initial statement to the police would only support a charge of larceny, not forcible theft. The court denied the motion and Howard was convicted of first-degree robbery. He was sentenced to ten years in prison.

The Appellate Division, Second Department affirmed, saying "the evidence established that the complainant ... awoke to find that the defendant was cutting or had cut his pocket with a box cutter in order to steal his wallet. After the complainant awoke, the defendant did not flee. The defendant did not hold the box cutter at his side or put it in his pocket. Rather, the defendant continued to brandish the box cutter, holding it out while demanding that the complainant give the defendant what he had. The defendant testified that he, in fact, feared that the defendant would cut him.... [T]his evidence, and the reasonable inferences to be drawn therefrom, established, beyond a reasonable doubt, that the defendant did not merely possess the box cutter while committing a larceny, but, rather, that he forcibly stole property while threatening to use the box cutter." The court did not address the discrepancies between Herrera's two accounts of the crime.

Howard argues that his conviction should be reversed under People v Jackson (65 NY2d 265), which held, "When all of the evidence of guilt comes from a single prosecution witness who gives irreconcilable testimony pointing both to guilt and innocence, the jury is left without basis, other than impermissible speculation, for the determination of either" and "the reasonable doubt standard has not been met." Howard says the evidence against him "was insufficient under the Jackson 'sole witness rule' because the only evidence defendant committed robbery, rather than larceny, was the trial testimony of ...Herrera, and that testimony was contradicted by the statement Herrera gave to the police on the day of the crime, which described conduct that was only larceny and not robbery. There is an exception to the Jackson rule for cases in which the evidences provide jurors with "an objective, rational basis" for resolving a witness's contradictory versions of events beyond a reasonable doubt, but Howard says, "There is no explanation in this record for the conflict in Herrera's 'versions of events.'"

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For respondent: Brooklyn Assistant District Attorney Jordan Cerruti (718) 250-2792