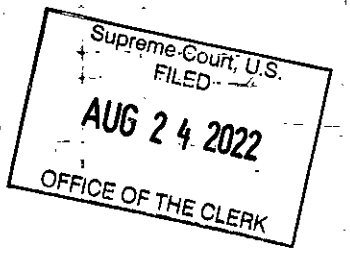
No. 22-5552

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



ROBERT BUDWILOWITZ,

Petitioner,

vs.

MARC NICHOLS ASSOCIATES *et al.*,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

ROBERT BUDWILOWITZ

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QUESTIONS PRESENTED

- Is the dismissal of the motion for leave to appeal by the New York State Court of Appeals (*see* 2022 NYSlip Op 60107) inconsistent?
- Is N.Y. Comp. Codes R. & Regs. tit. 22 § 500.24 correctly applied to the motion of reargument by the New York State Court of Appeals?
- Is the appeal fully compliant with New York State law?
- Have the principles of extraordinary circumstances and the so-called Ross factors; the principles fairness, truth, and judicial efficiency, have been violated?
- Has this case a legal precedence?
- Has the Eighth amendment, a Constitutional right, been violated?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

☑All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

MARC S. KOUFFMAN

RELATED CASES

Martin v. City of Boise, 902 F.3d 1031, 1035, United States Court of Appeals (9th Circuit), Judgment entered September 4, 2018.

Martin v. City of Boise, 920 F.3d 584, United States Court of Appeals (9th Circuit), Judgment entered April 1, 2019.

City of Boise v. Martin, 140 S. Ct. 674 (2019) (mem.), Supreme Court of the United States, Judgment entered December 16. 2019.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITY CITED

PAGE NUMBER

OTHER CASES

STATUTES AND RULES

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☑ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is

☑ reported at 2022 NY Slip Op 60107.

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the highest state court motion Reargument appears at Appendix A to the petition and is

☑ reported at 2022 NY Slip Op 65082.

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished

The opinion of the state trial court appears at Appendix C to the petition and is

☑ reported at 2021 NY Slip Op 03402.

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

☑ For cases from **state courts**:

The date on which the highest state court decided my case was 04/28/2022.
A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date:
, and a copy of the order denying rehearing appears at Appendix .

☑ An extension of time to file the petition for a writ of certiorari was granted to and including September 26, 2002, on July 21, 2022, in Application No. A. 22A42.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- The Eighth Amendment to the United States Constitution:

  "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

- 42 U.S.C. §1983 Civil action for deprivation of rights.

STATEMENT OF THE CASE

This case is about extreme hardship caused to petitioner by respondent over a prolonged period by systematically breaching contract and permanent physical eye damage. Opposing party has not filed documents in the appeals nor participated in oral arguments on May 11, 2021.

Relevant facts of the proceedings.

Supreme Court New York County.

After defendants failed to appear numerous times, a Default Judgment was filed on January 14, 2019, but was denied.

The defendants have defaulted on August 9, 2019 (Index No. 101292/16, *see* Appendix E).

The matter was dismissed with a sua sponte order issued on October 11, 2019, *see* Appendix D).

First Appellate Division of the Supreme Court.

An amended Notice of Motion for poor person relief and transcript and admission of new evidence was granted January 28, 2020. A motion to vacate the dismissal and enlarge the time was granted on August 21, 2020.

Appellant-plaintiff moved to vacate the dismissal by arguing there was a reasonable excuse and extenuating circumstances, and by invoking the Eight amendment (Appeal No. 13967). The Standards applied were the principles of extraordinary circumstances and the Ross principles: fairness, truth, and judicial efficiency. The appeal (Case No. 2020-00857) was dismissed on June 1, 2021 (*see* Appendix C).

A motion for reargument or for leave to appeal to the Court of appeals was denied on July 22, 2021 (Mo. No. 2021-02081). Appellant-plaintiff had argued:

> "that extraordinary circumstances might not exist to dismiss the complaint sua sponte (Onewest Bank, FSB v Prince, 130 AD3d 700, 701 [2015])."
>
> "appellant filed a Default Judgment dated January 14, 2019, which was denied in the order filed July 8th, 2019, because of an answer of the defendants:
>
> > "In opposition, defendants argue that many of the prior adjournments were requested by plaintiff, were on consent, or were administratively adjourned by the court."

The answer from opposition to the Default Judgment is incorrect. Only one adjournment was requested by plaintiff. Plaintiff has never received the answer from opposition, not in person nor per mail. Plaintiff, therefore, was unable to reply to the incorrect answer. With a reply in which the answer was corrected, the Default Judgment would not have been denied."

The New York State Court of Appeals State.

The Motion for Leave to appeal (Mo. No. 2021-760, filed August 30, 2021) was dismissed on January 6, 2022 (*see* Appendix B).

A motion for Reargument (Mo. No. 2022-133) was denied on April 28, 2022 (see Appendix A).

REASONS FOR GRANTING THE PETITION

The Eight amendment to the United States has been invoked in the appeal. The New York State Court of Appeals has chosen to decide an important question of federal law that has not been, but should be, settled by this Court. In doing so it has decided an important federal question in a way that conflicts with relevant decisions of this Court (*see* Rule 10(c)).

CONCLUSION

The appeal taken from the sua sponte order from the Supreme Court, New York County (Judge Robert Reed) entered October 11, 2019, at the First appellate division, is taken correctly (*see* Onewest Bank, FSB vs Prince, 130 AD3d 700, 701 [2015]. Petitioner had a reasonable excuse and there were extraordinary and extenuating circumstances.

The order August 9, 2019, states "the answer of the defendant is stricken" and the Default Judgment dated January 19, 2019, would prevail since the answer from opposition to the Default Judgment is incorrect. Only one adjournment was requested by plaintiff-appellant. A Judge would not schedule and conference and then adjourn it without a valid reason. And certainly not many times. All other adjournments were caused by a no-show of defendant-respondent (CPLR §2001, *see* Kachalsky, 14 N.Y.3d at 744–45, 925 N.E.2d at 81, 899 N.Y.S.2d at 749). Therefore, there would be no need for an inquest hearing. Although petitioner argues for a remand to the court of origination in the motion of reargument, effectively there is not difference between a remand or vacating of the dismissal (*see* Halley v Servedio 2016 NY Slip Op 50240(U).

The standards initially invoked at the 1st Appellate division of the Supreme Court: the principles of extraordinary circumstances and the so-called Ross factors; the principles fairness, truth, and judicial efficiency, have been violated.

According to Judge Berzon, there was no option of sleeping indoors (see Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019). Similarly, there was no option for

appellant to be homeless or not. If there was an option, appellant's choice would have been not to be homeless, have a job and hire a lawyer on his behalf.

In the Nine court ruling Judge Marsha Berzon Court of Appeals, Ninth Circuit said: "The Eight Amendment prohibits (the state) from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or condition." (*See* Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019)).

Dissenting from the denial of rehearing en banc, Judge Bennett, joined by Judges Bea, Ikuta, R. Nelson, and joined by Judge M. Smith as to Part II, stated that the panel's decision, is wholly inconsistent with the text and tradition of the Eighth Amendment.

On December 16, 2019, the United States Supreme Court denied certiorari in the *Martin v. City of Boise* case (*See* City of Boise v. Martin, 140 S. Ct. 674 (2019) (mem.)). The denial means the Ninth Circuit's 2018 ruling stands. Affirming the unconstitutionality of a decision by an authority.

Non-compliance was a the virtually inseparable consequence of petitioner's status/condition (*see* Jones, 444 F.3d at 1136 & 1137).

The order dated Oct. 11, 2019, can be considered a punishment for the act of non-complying with order Aug. 9, 2019. Appellant status and condition were such that he was not able to comply which the order dated August 9, 2019. Petitioner was inherently not able to avoid non-compliance. Being homeless implicitly means that there are periods where there is no safe place to sleep and that sleeping in chair is mandatory or that there are unpredictable periods where you lack any

financial resources. The Supreme court New York County order dated October 11, 2019, was issued on the false premise there was a choice in the matter of compliance, while there was none.

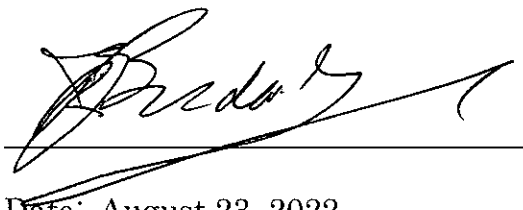
Therefore, said order, is unfair, unreasonable, and cruel. The said order violates the Eight Amendment for the case with docket number 101292/2016 because the Eight Amendment prohibits cruel and unusual punishments.

The decision of the New York State Court of Appeals, which only involves the Eight amendment of the United States, is inconsistent (*see* Appendix B).

The appeal is compliant with the rule of law of the State of New York.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: August 23, 2022