

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed  
by the Court of Appeals Clerk's Office

**May 13, 2016 through May 19, 2016**

Each week the Clerk's Office prepares a list of recently-filed appeals, indicating short title, jurisdictional predicate, subject matter and key issues. Some of these appeals may not reach decision on the merits because of dismissal, on motion or sua sponte, or because the parties stipulate to withdrawal. Some appeals may be selected for review pursuant to the alternative procedure of Rule 500.11. For those appeals that proceed to briefing in the normal course, the briefing schedule generally will be: appellant's brief to be filed within 60 days after the appeal was taken; respondent's brief to be filed within 45 days after the due date for the filing of appellant's brief; and a reply brief, if any, to be filed within 15 days after the due date for the filing of respondent's brief.

**The Court welcomes motions for amicus curiae participation from those qualified and interested in the subject matter of these newly filed appeals. Please refer to Rule 500.23 and direct any questions to the Clerk's Office.**

BENNETT v HUCKE, et al.:

2<sup>ND</sup> Dept. App. Div. order of 9/16/15; affirmance; leave to appeal granted by Court of Appeals, 5/3/16; Rule 500.11 review pending; LABOR - SAFE PLACE TO WORK - LIABILITY OF CONSTRUCTION MANAGER - WHETHER PLAINTIFF RAISED A TRIABLE ISSUE OF FACT AS TO CONSTRUCTION MANAGER'S STATUS AS THE GENERAL CONTRACTOR ON THE PROJECT THROUGH THE SUBMISSION OF CHECKS BY THE HOMEOWNER TO THE CONSTRUCTION MANAGER WITH THE LETTERS "G.C." CONTAINED IN THE MEMO LINE;

Supreme Court, Suffolk County, granted the motion of defendants Alan Kirk and Alan H. Kirk, Inc. for summary judgment dismissing the complaint insofar as asserted against them; App. Div. affirmed.

THE BURLINGTON INSURANCE COMPANY v NEW YORK CITY TRANSIT  
AUTHORITY et al.:

Supreme Court, New York County, judgment, bringing up for review  
1<sup>ST</sup> Dept. App. Div. order of 8/11/15; reversal; leave to appeal  
granted by Court of Appeals, 5/5/16;

INSURANCE - LIABILITY INSURANCE - CONSTRUCTION OF POLICY -  
WHETHER THE APPELLATE DIVISION ERRED IN DETERMINING THAT  
DEFENDANTS WERE ADDITIONAL INSURED UNDER PLAINTIFF INSURER'S  
GENERAL LIABILITY POLICY WITH A CONTRACTOR, WHERE THE ACCIDENT  
FOR WHICH COVERAGE WAS SOUGHT WAS NOT CAUSED BY THE CONTRACTOR'S  
NEGLIGENCE OR FAULT;

Supreme Court, New York County, granted plaintiff Burlington  
Insurance Company (Burlington) summary judgment on its first  
cause of action declaring that Burlington owes defendants New  
York City Transit Authority (NYCTA) and Metropolitan Transit  
Authority (MTA) no coverage in the underlying personal injury  
action, granted Burlington leave to amend its complaint to assert  
a second cause of action against NYCTA for contractual  
indemnification as equitable subrogee of the City of New York,  
and denied defendants' cross motion for summary judgment on its  
first cause of action; thereafter, Supreme Court, as relevant  
here, granted Burlington's motion for summary judgment for  
contractual indemnification against NYCTA and directed judgment  
in favor of Burlington in the amount of \$950,000, plus  
prejudgment interest, fees and costs; App. Div. reversed, denied  
Burlington's motions for summary judgment and to amend the  
complaint, granted defendants' cross motion for summary judgment  
on the first cause of action to the extent of declaring that  
defendants were entitled to coverage in the underlying personal  
injury action as additional insureds under the subject policy,  
and directed the Clerk to enter judgment accordingly; thereafter,  
Supreme Court, among other things, declared that defendants were  
entitled to coverage as additional insureds under the Burlington  
policy and awarded attorneys' fees.

GARTHON BUSINESS, INC., et al. v STEIN, et al.:

1<sup>ST</sup> Dept. App. Div. order of 4/26/16; reversal and modification  
with two-Justice dissent; sua sponte examination whether the  
order appealed from finally determines the action within the  
meaning of the Constitution;

ARBITRATION - AGREEMENT TO ARBITRATE - SUCCESSIVE AGREEMENTS -  
WHETHER THE APPELLATE DIVISION CORRECTLY HELD THAT, AS TO CLAIMS  
THAT AROSE WHEN THE FIRST AGREEMENT AT ISSUE WAS IN FORCE, THE  
FORUM SELECTION CLAUSE IN THE FIRST AGREEMENT, WHICH STATED THAT  
DISPUTES WOULD BE RESOLVED IN THE COURTS OF THE UNITED STATES OF  
AMERICA, SURVIVED CERTAIN SUBSEQUENT AGREEMENTS THAT TERMINATED  
PRIOR AGREEMENTS, CONTAINED MERGER CLAUSES AND CLAUSES REQUIRING  
ARBITRATION OF DISPUTES - WHETHER CLAIMS THAT OTHERWISE WOULD BE  
SUBJECT TO ARBITRATION SHOULD BE LITIGATED IN COURT BECAUSE THEY  
ARE "INEXTRICABLY BOUND" TO CLAIMS ARISING UNDER THE FIRST

AGREEMENT - WHETHER COURT OR ARBITRATORS SHOULD DECIDE ISSUE OF ARBITRABILITY; WHETHER THE APPELLATE DIVISION CORRECTLY GRANTED PLAINTIFFS' MOTION FOR DISCOVERY ON THE ISSUES OF PERSONAL JURISDICTION AND ALTER EGO;

Supreme Court, New York County, denied plaintiffs' motion for limited discovery on the issues of, among other things, personal jurisdiction and alter ego; the same court granted the separate motions of defendants Stein and Aurdeley Enterprises Limited to compel arbitration and stay discovery, and dismissed the action subject to certain conditions; App. Div. reversed the Supreme Court order that denied the motions to compel arbitration, and reinstated the complaint; and modified the order that denied plaintiffs' motion for limited discovery to permit discovery on those issues, and otherwise affirmed.

JOHNSON, MATTER OF v COUNTY OF ORANGE, et al.:

2<sup>ND</sup> Dept. App. Div. order of 4/13/16; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

CIVIL SERVICE - CHALLENGE TO TERMINATION OF PETITIONER'S PROBATIONARY EMPLOYMENT AS A DEPUTY SHERIFF - WHETHER THE TERMINATION OF PETITIONER'S EMPLOYMENT WAS IN BAD FAITH, FOR A CONSTITUTIONALLY IMPERMISSIBLE OR AN ILLEGAL PURPOSE, OR IN VIOLATION OF STATUTORY OR DECISIONAL LAW - PETITIONER'S RIGHT OF INTIMATE ASSOCIATION UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION;

Supreme Court, Orange County, granted respondents' motion to dismiss the petition for failure to state a cause of action; App. Div. affirmed.