

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed  
by the Court of Appeals Clerk's Office  
**October 3 through October 9, 2008**

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.

**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.**

ANONYMOUS (AN ATTORNEY), MATTER OF, v:

3<sup>RD</sup> Dept. App. Div. order of 8/15/08; partial grant of motion to vacate letter of admonition and confirmation; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right;  
ATTORNEY AND CLIENT - DISCIPLINARY PROCEEDING - LETTER OF ADMONITION - CLAIMED VIOLATION OF DUE PROCESS AND OTHER RIGHTS; App. Div. granted respondent's motion to vacate an April 17, 2008 letter of admonition issued by petitioner Committee on Professional Standards only to the extent of vacating the first indented paragraph of the letter and by vacating so much of the letter as determined that respondent's conduct violated Disciplinary Rule 1-102(A)(4) of the Code of Professional Responsibility, and otherwise confirmed the letter of admonition.

ALMETER (JEREMY), PEOPLE v:

Genesee County Court order dated 3/25/08; affirmance; leave to appeal granted by Pigott, J., 9/16/08;  
CRIMES AND CRIMINAL PROCEDURE - CONDUCT OF TRIAL JUDGE - JOINT TRIAL FOR MISDEMEANOR AND VIOLATION CHARGES - JURY DECIDED ASSAULT CHARGE AND JUDGE DECIDED TRESPASS CHARGE - WHETHER DEFENDANT WAS ENTITLED TO HAVE THE JURY CONSIDER BOTH OF THE CHARGES PURSUANT TO CRIMINAL PROCEDURE LAW § 340.40(3);  
Batavia City Court judgment convicted defendant of trespass;  
Genesee County Court affirmed.

ARTS4ALL, LTD. v HANCOCK:

1<sup>ST</sup> Dept. App. Div. order of 8/26/08; affirmance and dismissal with dissents and denial of motion to dismiss cross appeal; sua sponte examination whether any jurisdictional basis exists to support the appeal as of right and whether the portion of the App. Div. order that denies the motion to dismiss plaintiffs' cross appeal and for other relief finally determines the action within the meaning of the Constitution;  
DISCLOSURE - PENALTY FOR FAILURE TO DISCLOSE - STRIKING OF PLEADINGS FOR NONCOMPLIANCE WITH DISCLOSURE ORDERS (CPLR 3126[3]) - ALLEGED DUE PROCESS VIOLATIONS - MONETARY SANCTION FOR FAILURE TO APPEAR AT A DEPOSITION - REQUEST FOR SIGNED TRANSCRIPTS REFLECTING SUPREME COURT'S ORAL ORDERS - DENIAL OF APPELLATE DIVISION MOTION;  
Supreme Court, New York County dismissed plaintiffs' remaining cause of action and defendant's counterclaims for failure to comply with discovery and effectively denied defendant's request for signed transcripts; App. Div. affirmed and denied defendant's motion to dismiss plaintiffs' cross appeal.

BAILEY (ERIC), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 4/8/08; affirmance; leave to appeal granted by Jones, J., 9/24/08;  
CRIMES AND CRIMINAL PROCEDURE - POSSESSION OF FORGED INSTRUMENT - PENAL LAW § 170.30 - SUFFICIENCY OF THE EVIDENCE - INTENT ELEMENT - CHALLENGE TO APPELLATE DIVISION RULING THAT THE "TOTALITY OF THE EVIDENCE, INCLUDING DEFENDANT'S STATEMENT TO THE POLICE EVINCING A CONSCIOUSNESS OF GUILT, AND THE LACK OF ANY REASON FOR DEFENDANT TO BE CARRYING COUNTERFEIT BILLS IN A SHOPPING DISTRICT OTHER THAN TO PASS THEM, SUPPORTED THE INFERENCE THAT HE POSSESSED THE BILLS WITH THE REQUISITE INTENT"; CONFESSION - WHETHER DEFENDANT'S PRE-MIRANDA WARNING STATEMENT TO POLICE DURING ROUTINE ARREST PROCESSING WAS SUBJECT TO SUPPRESSION;  
Supreme Court, New York County judgment convicted defendant, after a jury trial, of criminal possession of a forged instrument in the first degree and two counts of attempted grand larceny in the fourth degree, and sentenced him to an aggregate term of 1 1/2 to 4 1/2 years; App. Div. affirmed.

BROWN (MICHAEL), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 4/29/08; affirmance; leave to appeal granted by Graffeo, J., 10/3/08;

CRIMES AND CRIMINAL PROCEDURE - TIMELINESS OF PROSECUTION - DNA EVIDENCE FROM 1993 CRIME PROCESSED IN 2002 AS PART OF A DNA BACKLOG PROJECT, WHICH WAS MATCHED TO A DNA SAMPLE TAKEN OF DEFENDANT IN 2002, RESULTING IN DEFENDANT'S INDICTMENT IN 2003 - APPLICATION OF FIVE-YEAR EXTENSION OF STATUTE OF LIMITATIONS WHERE DEFENDANT'S WHEREABOUTS "WERE CONTINUOUSLY UNKNOWN AND CONTINUOUSLY UNASCERTAINABLE BY THE EXERCISE OF REASONABLE DILIGENCE" (CPL 30.10[4][a][ii]); RIGHT OF CONFRONTATION - DNA EVIDENCE PREPARED BY PRIVATE LAB - TRIAL TESTIMONY FROM A CRIMINOLOGIST EMPLOYED BY THE OFFICE OF THE CHIEF MEDICAL EXAMINER, WHO WAS FAMILIAR WITH THE PRIVATE LAB'S PRACTICES, PROTOCOLS AND ACCREDITATION - WHETHER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION REQUIRES THE TESTIMONY OF A PERSON EMPLOYED BY THE PRIVATE LAB THAT PREPARED A DNA PROFILE LINKING DEFENDANT TO A CRIME;

Supreme Court, Queens County judgment convicted defendant of sodomy in the first degree (two counts), assault in the second degree (two counts), and endangering the welfare of a child, upon a jury verdict, and imposed sentence; App. Div. affirmed.

DAVIS (WAYNE), PEOPLE v:

App. Term, 2<sup>ND</sup> and 11<sup>TH</sup> Judicial Districts; affirmance; leave to appeal granted by Smith, J., 9/25/08;

CRIMES AND CRIMINAL PROCEDURE - TRIAL - JUDICIAL HEARING OFFICER - WHETHER DEFENDANT VALIDLY WAIVED HIS RIGHT TO TRIAL BEFORE A CRIMINAL COURT JUDGE WHERE THE MINUTES DO NOT MENTION HIS CONSENT BUT THE COURT FILE CONTAINS A WAIVER FORM SIGNED WITH DEFENDANT'S NAME; VIOLATION OF ORDINANCE PROVIDING THAT "NO PERSON SHALL FAIL TO COMPLY WITH OR OBEY ANY INSTRUCTION ... APPEARING ON ANY PARK SIGN, EXCEPT SUCH SIGN MAY BE DISREGARDED UPON ORDER BY A POLICE OFFICER OR DESIGNATED DEPARTMENT EMPLOYEE" (RULES OF THE CITY OF NEW YORK § 1-03[c][2]) - WHETHER THE ABSENCE OF AN ORDER TO DISREGARD A PARK SIGN IS AN ELEMENT OF THE OFFENSE THAT MUST BE PLEADED AND PROVED;

Criminal Court, Kings County judgment convicted defendant, after a nonjury trial, of failing to comply with a park sign; App. Div. affirmed.

EURYCLEIA PARTNERS, L.P., et al. v SEWARD & KISSEL, LLP, et al.:

1<sup>ST</sup> Dept. App. Div. order of 12/20/07; reversal; leave to appeal granted by Court of Appeals, 9/11/08;

FRAUD - HEDGE FUND - ACTION FOR DAMAGES FOR FRAUD AGAINST HEDGE

Supreme Court, New York County denied the motion by defendant American Express Tax & Business Services, Inc. to dismiss the complaint as against it; thereafter, the same court denied the motion by defendant Seward & Kissel, LLP to dismiss the amended complaint against it; App. Div. reversed, granted the motions and dismissed the complaint as against defendants Seward & Kissel and American Express Tax & Business Services.

GRA V, LLC et al. v SRINIVASAN et al.:

1<sup>ST</sup> Dept. App. Div. order of 7/29/08; affirmance with dissents; MUNICIPAL CORPORATIONS - ZONING - COMMON-LAW VESTED RIGHTS DOCTRINE TO CONTINUE DEVELOPMENT UNDER ZONING REGULATIONS APPLICABLE PRIOR TO ENACTMENT OF MORE RESTRICTIVE ZONING - VALIDITY OF FOUNDATION PERMIT;

Supreme Court, Bronx County denied a CPLR article 78 petition brought to annul the determination of respondent Board of Standards and Appeals of the City of New York, which denied an application for a declaration that petitioner GRA V, LLC had acquired a common-law vested right to continue development under zoning regulations applicable prior to the enactment of more restrictive zoning; App. Div. affirmed.

PARKHOUSE, MATTER OF, v STRINGER, et al.:

1<sup>ST</sup> Dept. App. Div. order of 8/19/08; modification and affirmance; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right; DISCLOSURE - PROCEEDING TO QUASH NONJUDICIAL SUBPOENA REGARDING TESTIMONY GIVEN AT A PUBLIC HEARING - CLAIMED VIOLATION OF RIGHT TO FREE SPEECH - WHETHER NEW YORK CITY CHARTER § 803(b) IS UNCONSTITUTIONAL AS APPLIED TO PETITIONER;

Supreme Court, New York County denied petitioner's application to quash a subpoena served by respondent Department of Investigation of the City of New York; granted respondents' motion to compel compliance with the subpoena; and denied petitioner's cross motion to strike certain matters from respondents' investigatory filings as scandalous and prejudicial, to have New York City Charter § 8803(d) declared unconstitutional as applied to her, and to enjoin respondents from interfering with her exercise of free speech; App. Div. modified to the extent of granting petitioner criminal immunity for her testimony and otherwise affirmed.

TRINITY ASSOCIATES, INC. v TELESECTOR RESOURCES GROUP, INC.:

1<sup>ST</sup> Dept. App. Div. order of 8/26/08; affirmance; Rule 500.11 review pending;

CONTRACTS - BREACH OR PERFORMANCE - DENIAL OF CPLR 4404(a) MOTION - SUFFICIENCY OF THE EVIDENCE SUPPORTING JURY VERDICT - LAW OF THE CASE;

Supreme Court, New York County denied defendant's CPLR 4404(a) motion to set aside the jury verdict and grant judgment to it as a matter of law; thereafter, judgment was entered awarding damages to plaintiff; App. Div. affirmed the judgment.

TOA CONSTRUCTION COMPANY v TSITSIRES et al.:

1<sup>ST</sup> Dept. App. Div. order of 7/8/08; reversal with dissents; leave to appeal granted by App. Div., 9/25/08 (as corrected 10/8/08); Rule 500.11 review pending;

LANDLORD AND TENANT - RENT REGULATION - PRIMARY RESIDENCE - 9 NYCRR 2524.4(c) - WHETHER LANDLORD CAN ESTABLISH THAT RENT-STABILIZED PREMISES IS NOT TENANT'S PRIMARY RESIDENCE WHERE TENANT HAS NO OTHER RESIDENCE - WHETHER TENANT'S ABSENCES FROM RENT-STABILIZED PREMISES DUE TO MENTAL ILLNESS ARE EXCUSABLE FOR PURPOSES OF THE PRIMARY RESIDENCE REQUIREMENT - CHALLENGE TO TRIAL COURT'S RELIANCE UPON VIDEOTAPE EVIDENCE AND CERTAIN DEPOSITION TESTIMONY;

Civil Court, New York County judgment awarded possession after a nonjury trial to petitioner landlord in a nonprimary residence proceeding; App Term reversed and awarded final judgment to respondent tenant dismissing the petition; App. Div. reversed and reinstated the judgment of possession awarded in favor of petitioner landlord.

THE YALE CLUB OF NEW YORK CITY, INC. v RELIANCE INSURANCE COMPANY IN LIQUIDATION:

1<sup>ST</sup> Dept. App. Div. order of 9/2/08; affirmance with dissents; Rule 500.11 review pending;

INSURANCE - DISCLAIMER OF COVERAGE - WHETHER A LETTER RECEIVED BY THE INSURED CONSTITUTES A "CLAIM" WITHIN THE MEANING OF A CLAIMS-MADE INSURANCE POLICY;

Supreme Court, New York County order and judgment confirmed a Referee's report finding coverage under the subject policy, and awarded damages in favor of plaintiff insured and against defendant; App. Div. affirmed.