

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed
by the Court of Appeals Clerk's Office
February 6 through February 12, 2009

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.

BARKLEE 94, LLC v O'KEEFE:

1ST Dept. App. Div. order of 1/6/09; denial of motion for leave to appeal to the App. Div.; 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;

LANDLORD AND TENANT - SUMMARY HOLDOVER PROCEEDING - RENT STABILIZED APARTMENT - CLAIMED VIOLATION OF "NO ALTERATION" CLAUSE OF LEASE; LIMITATION OF ACTIONS; APPEAL - APPELLATE DIVISION - DENIAL OF MOTION FOR LEAVE TO APPEAL FROM APPELLATE TERM ORDER; CLAIMED DENIAL OF DUE PROCESS;

Civil Court, New York County judgment dismissing a holdover proceeding; thereafter, the same court granted tenant's CPLR 4404 cross motion to the extent of ordering landlord to restore or repair the bathroom radiator and awarded tenant attorneys' fees; App. Term, among other things, affirmed the judgment and modified the order by vacating the award of attorneys' fees to tenant; App. Div. denied petitioner-landlord's motion for leave to appeal to the App. Div.

BISHOP, MATTER OF:

1ST Dept. App. Div. orders of 6/24/08 and 12/30/08; disbarment (6/24/08 order) and denial of motion for leave to appeal to Court of Appeals (12/30/08 order); sua sponte examination whether the December 30, 2008 App. Div. 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 from the June 24, 2008 App. Div. order;

ATTORNEY AND CLIENT - DISCIPLINARY PROCEEDINGS - DISBARMENT - RECIPROCAL DISCIPLINE;

App. Div. disbarred attorney and denied his motion for leave to appeal to the Court of Appeals.

DAVIS (GEORGE), PEOPLE v:

1ST Dept. App. Div. order of 9/9/08; affirmance; leave to appeal granted by Jones, J., 1/22/09;

CRIMES - CONTROLLED SUBSTANCES - WHETHER TRIAL COURT PROPERLY DECLINED TO CHARGE CRIMINAL POSSESSION IN THE SEVENTH DEGREE (SIMPLE POSSESSION OF A CONTROLLED SUBSTANCE) AS A LESSER INCLUDED COUNT WHERE DEFENDANT CHARGED WITH CRIMINAL SALE OF A CONTROLLED SUBSTANCE AND POSSESSION WITH INTENT TO SELL RELIED ON AN "AGENCY" DEFENSE;

Supreme Court, New York County convicted defendant of criminal sale of a controlled substance in the third degree and sentenced him, as a second felony drug offender, to a term of 4 1/2 years; App. Div. affirmed.

GOTAY v BREITBART, et al.:

1ST Dept. App. Div. order of 11/6/08; affirmance; leave to appeal granted by App. Div., 1/20/09; Rule 500.11 review pending;

ATTORNEY AND CLIENT - MALPRACTICE - STATUTE OF LIMITATIONS - CONTINUOUS REPRESENTATION DOCTRINE; SUMMARY JUDGMENT;

Supreme Court, New York County denied plaintiff's cross motion for summary judgment and granted motions by several defendants for summary judgment and dismissed the complaint and all cross claims as against those defendants; upon reargument, Supreme Court denied the motions for summary judgment by all but one of those defendants and denied plaintiff's cross motion for summary judgment; App. Div. affirmed.

HAUSMAN, MATTER OF (DECEASED):

2ND Dept. App. Div. order of 5/20/08; reversal; leave to appeal granted by Court of Appeals, 1/22/09;

DEEDS - VALIDITY - DEED TRANSFERRING DECEDENT'S REAL PROPERTY TO EXECUTOR'S LIMITED LIABILITY COMPANY (LLC) PRIOR TO ITS FORMATION - WHETHER THE LLC WAS A DE FACTO ENTITY CAPABLE OF TAKING TITLE ON THE DATE DEED WAS EXECUTED - CORPORATE ESTOPPEL DOCTRINE;

Surrogate's Court, Kings County granted a petition to determine the validity of a deed executed by decedent to the extent of deeming the deed valid; App. Div. reversed, denied the petition

and deemed the deed invalid.

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HENDERSON (BRIAN), PEOPLE v:

1st Dept. App. Div. order of 4/15/08; affirmance; leave to appeal granted Catterson, J., 1/22/09;

CRIMES - WITNESSES - CLAIM THAT WITNESS TESTIMONY PROCURED BY INTIMIDATION; DISCLOSURE - FAILURE TO PRODUCE ROSARIO MATERIAL - PROSECUTION'S BELATED DISCLOSURE OF CORRECTION OFFICER'S REPORT; SUFFICIENCY OF EVIDENCE; CLAIMED DENIAL OF RIGHT TO FAIR TRIAL; Supreme Court, Bronx County convicted defendant of attempted assault in the first degree, and sentenced him, as a persistent violent felony offender, to a term of 16 years to life; the same court denied defendant's CPL 440.10 motion to vacate the judgment; App. Div. affirmed.

MCLEAN v CITY OF KINGSTON et al.:

3RD Dept. App. Div. order of 12/24/08; affirmance; sua sponte examination whether so much of the December 24, 2008 App. Div. order as affirmed the May 15, 2008 Supreme Court order finally determines the action within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right from so much of the App. Div. order as affirmed the January 17, 2008 Supreme Court order and judgment;

CONSTITUTIONAL LAW - VALIDITY OF ORDINANCE - CHALLENGE TO APPELLATE DIVISION ORDER AFFIRMING JUDGMENT DECLARING KINGSTON CITY CODE CHAPTER 332 CONSTITUTIONAL AND DISMISSING THE COMPLAINT;

Supreme Court, Ulster County judgment, among other things, granted defendants' cross motion for summary judgment declaring a portion of the Kingston City Code to be constitutional and dismissed the complaint; the same court denied plaintiff's motion to renew; App. Div. affirmed.

MCNAIR (RASHAD), PEOPLE v:

1ST Dept. App. Div. order of 10/7/08; affirmance; leave to appeal granted by Smith, J., 1/29/09;

CRIMES AND CRIMINAL PROCEDURE - PRESERVATION OF ISSUE FOR APPELLATE REVIEW - SUFFICIENCY OF PLEA ALLOCUTION - EXCEPTION TO PRESERVATION REQUIREMENT - PEOPLE v LOPEZ (71 NY2d 662 [1988]); Supreme Court, New York County convicted defendant, upon his guilty plea, of forgery in the second degree and sentenced him to a term of 90 days; App. Div. affirmed.

MUNSIFF, MATTER OF:

2ND Dept. App. Div. order of 12/30/08; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

ATTORNEYS AND CLIENTS - DISCIPLINARY PROCEEDINGS - APPELLATE DIVISION ORDER DISBARRING ATTORNEY - ALLEGED DUE PROCESS

VIOLATIONS;
App. Div. disbarred attorney.

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O'HALLORAN v O'HALLORAN:

2nd Dept. App. Div. order of 1/20/09; affirmance of 4/18/07 Supreme Court order and modification of divorce judgment; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right;

HUSBAND AND WIFE - DIVORCE - CHALLENGE TO APPELLATE DIVISION ORDER AFFIRMING SUPREME COURT ORDER IMPOSING SANCTIONS UPON HUSBAND FOR FAILURE TO COMPLY WITH PRIOR ORDER - INCLUSION OF HUSBAND'S FUTURE ENHANCED EARNINGS FROM LAW DEGREE AS MARITAL PROPERTY - HUSBAND AS EXCLUSIVE MORTGAGOR;

App. Div. (1) affirmed a Supreme Court, Suffolk County order dated April 18, 2007, which granted that branch of the plaintiff's motion which was to hold defendant in contempt for failure to comply with so much of a pendente lite order of the same court dated August 14, 2006, as directed him to pay the real estate taxes on the marital residence; (2) dismissed the appeal from a Supreme Court order entered April 20, 2007, which denied defendant's motion for a mistrial; (3) modified a Supreme Court judgment of divorce entered May 22, 2007 by (a) adding a provision thereto directing the plaintiff to assume the existing mortgages encumbering the marital residence that were given in the name of the defendant, in accordance with the amended decision, (b) deleting the provision thereof directing defendant to pay pendente lite arrears in the sum of \$6,444 and (c) adding provisions thereto that defendant is entitled to declare one of the parties' children as a dependent on his income tax returns, and directing that plaintiff execute the appropriate IRS form or forms in connection therewith; and (4) affirmed the judgment as so modified and remitted the matter to Supreme Court for a hearing and new determination on the issue of arrears in defendant's pendente lite child support obligation and for entry of an amended judgment thereafter.