

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed  
by the Court of Appeals Clerk's Office  
**February 13 through February 19, 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.**

FRASER v 301-52 TOWNHOUSE CORP.:

1<sup>ST</sup> Dept. App. Div. order of 12/30/08; affirmance with dissents; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution; EVIDENCE - SCIENTIFIC EVIDENCE - FRYE HEARING - PRECLUSION OF EXPERT EVIDENCE ON WHETHER ALLEGED DAMPNES AND MOLD CONDITION IN DEFENDANT'S BUILDING CAUSED PLAINTIFFS' HEALTH PROBLEMS; Supreme Court, New York County granted plaintiffs' motion for reargument and renewal of an October 5, 2006 Supreme Court order, which, after a Frye hearing, granted defendants' motion to preclude plaintiffs from offering certain expert evidence at trial and granted defendants summary judgment dismissing plaintiffs' causes of action based on personal injury, and, upon reargument and renewal, adhered to the original determination; App. Div. affirmed.

GLACIAL AGGREGATES LLC v TOWN OF YORKSHIRE:

4<sup>TH</sup> Dept. App. Div. order of 12/31/08; reversal; sua sponte examination whether the App. Div. order finally determines the action within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support the appeal taken as of right;

MUNICIPAL CORPORATIONS - ZONING - NONCONFORMING USE - WHETHER PLAINTIFF'S MINING OF SAND AND GRAVEL AGGREGATE ON THE PROPERTY IN QUESTION WAS A LAWFUL NONCONFORMING USE AND WHETHER PLAINTIFF HAD ACQUIRED A VESTED RIGHT TO MINE THE PROPERTY - PLAINTIFF'S ENTITLEMENT TO DAMAGES PURSUANT TO 42 USC § 1983 FOR DEPRIVATION OF A CONSTITUTIONALLY VESTED RIGHT TO MINE THE PROPERTY; DIRECTED VERDICT;

Supreme Court, Cattaraugus County judgment declaring, among other things, that the mining of sand and gravel aggregate was a lawful nonconforming use on certain property of plaintiff, and awarding money damages to plaintiff; App. Div. reversed, granted defendant's motion for a directed verdict, dismissed the second cause of action, and granted judgment in favor of defendant declaring that the mining of sand and gravel aggregate on the property in question is not a lawful nonconforming use and that plaintiff did not acquire a vested right to mine the property.

HARGETT v TOWN OF TICONDEROGA, et al.:

3<sup>RD</sup> Dept. App. Div. order of 11/20/08; modification; leave to appeal granted by App. Div., 1/30/09;

EMINENT DOMAIN - LITIGATION EXPENSES - ACTION PURSUANT TO EDPL 702(B) SEEKING REIMBURSEMENT FOR LEGAL COSTS AND EXPENSES INCURRED IN PRIOR CONDEMNATION PROCEEDING PURSUANT TO EDPL 207(A) - ATTORNEY'S FEES;

Supreme Court, Essex County, among other things, granted defendants' cross motion for summary judgment dismissing the complaint and denied plaintiff's motion for summary judgment on the complaint; App. Div. modified by reversing so much of the Supreme Court order as granted defendants' cross motion and as denied plaintiff's motion in its entirety; denied defendants' cross motion, granted plaintiff's motion on the issue of liability, remitted the matter to Supreme Court for further proceedings not inconsistent with the App. Div. decision and affirmed the order as so modified.

OVERSTOCK.COM v NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE:

Supreme Court, New York County order of 1/15/09; sua sponte examination whether the only question involved on the appeal is the validity of a statutory provision of the State or of the United States under the Constitution of the State or of the United States and, if so, whether the constitutional question is

CONSTITUTIONAL LAW - VALIDITY OF STATUTE - CHALLENGE TO TAX LAW  
§ 1101 (b)(8)(vi);

Supreme Court granted the State defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(7) and denied plaintiff's cross motion for summary judgment.

SWEENEY v BRUCKNER PLAZA ASSOCIATES, et al.:

1<sup>ST</sup> Dept. App. Div. order of 12/18/08; reversal with dissents; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution; NEGLIGENCE - PROXIMATE CAUSE - WHETHER PLAINTIFF MADE OUT A PRIMA FACIE CASE ON CLAIMS FOR TRESPASS TO CHATTEL AND NEGLIGENCE - ACTION TO RECOVER DAMAGES FOR PERSONAL INJURIES SUSTAINED AFTER PLAINTIFF'S VAN WAS TOWED FROM A SHOPPING CENTER PARKING LOT AND PLAINTIFF, A PERSON WITH QUADRIPLÉGIA, TRAVELED BY WHEELCHAIR TO RETRIEVE THE VAN FROM THE TOWING COMPANY LOT; DIRECTED VERDICT; Supreme Court, Bronx County granted the motion of defendants Bruckner Plaza Associates and Zerega Recovery Corp. for a directed verdict at the close of plaintiff's evidence and dismissed the complaint; App. Div. reversed, denied plaintiffs' motion, reinstated the complaint and remanded the matter for a new trial.

WILLIAMS, PEOPLE ex rel. v LACLAIR:

3<sup>RD</sup> Dept. App. Div. order of 1/18/09; denial of writ of habeas corpus; sua sponte examination whether substantial constitutional question is directly involved to support an appeal as of right; HABEAS CORPUS - AVAILABILITY OF RELIEF; App. Div. denied application for writ of habeas corpus.

