

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed  
by the Court of Appeals Clerk's Office  
**September 4 through September 10, 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.**

BLAKE, PEOPLE ex rel. v PATAKI:

2<sup>ND</sup> Dept. App. Div. order of 12/2/08; reversal; leave to appeal granted by App. Div., 4/1/09; Rule 500.11 review pending; HABEAS CORPUS - WHEN REMEDY APPROPRIATE - CHALLENGE TO APPELLATE DIVISION ORDER (1) REVERSING A SUPREME COURT JUDGMENT THAT GRANTED A PETITION FOR A WRIT OF HABEAS CORPUS, VACATED A GOVERNOR'S WARRANT FOR PETITIONER'S EXTRADITION TO SOUTH CAROLINA AND DISMISSED A FUGITIVE COMPLAINT, (2) REINSTATED THE FUGITIVE COMPLAINT AND (3) REMITTED TO SUPREME COURT FOR FURTHER PROCEEDINGS - EFFECT ON PETITIONER'S FUGITIVE STATUS OF PRIOR SOUTH CAROLINA GOVERNOR'S DECISION NOT TO ACCEPT EXTRADITION IN 1993;

Supreme Court, Suffolk County, after a hearing, sustained the petition for a writ of habeas corpus, vacated the Governor's warrant for petitioner's extradition to South Carolina and dismissed the fugitive complaint; App. Div. reversed, dismissed the writ, reinstated the Governor's warrant for extradition, reinstated the fugitive complaint and remitted to Supreme Court for further proceedings in accordance with the court's decision and order.

BRANDY B. &c. v EDEN CENTRAL SCHOOL DISTRICT, et al.:

4<sup>TH</sup> Dept. App. Div. order of 6/5/09; affirmance; leave to appeal granted by Court of Appeals, 9/3/09;

NEGLIGENCE - FORESEEABILITY - NOTICE OF DANGEROUS CONDUCT OF STUDENT WHO SEXUALLY ASSAULTED PLAINTIFF MINOR ON A SCHOOL BUS; SUMMARY JUDGMENT - EXISTENCE OF TRIABLE ISSUE OF FACT; Supreme Court, Erie County granted defendants' motion for summary judgment dismissing the complaint as against them; App. Div. affirmed.

CINTRON, MATTER OF v CALOGERO &c.:

1<sup>ST</sup> Dept. App. Div. order of 2/26/09; affirmance; leave to appeal granted by App. Div., 8/18/09; Rule 500.11 review pending;

LANDLORD AND TENANT - RENT - CPLR ARTICLE 78 PROCEEDING TO ANNUL AN ORDER OF RESPONDENT COMMISSIONER OF THE DIVISION OF HOUSING AND COMMUNITY RENEWAL LIMITING RENT OVERCHARGES RECOVERABLE BY A TENANT;

Supreme Court, Bronx County denied the petition and dismissed the CPLR article 78 proceeding seeking, among other things, to annul a final order of respondent insofar as it limited the rent overcharges recoverable by petitioner to the 4 years prior to the filing of the overcharge complaint, and limited treble damages to the 2 years prior to the filing of the complaint; App. Div. affirmed.

GALLIANO v STALLION, INC.:

1<sup>ST</sup> Dept. App. Div. order of 5/5/09; modification; leave to appeal granted by Court of Appeals, 9/1/09;

JUDGMENTS - FOREIGN JUDGMENT - THE HAGUE CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS - WHETHER NEW YORK CAN RECOGNIZE A FOREIGN JUDGMENT ENTERED ON DEFAULT WHERE PROCESS INITIATING THE FOREIGN ACTION WAS SERVED UPON A NEW YORK DEFENDANT IN A FOREIGN LANGUAGE - NECESSITY TO TRANSLATE DOCUMENT INTO ENGLISH - CPLR 2101; PROPRIETY OF SERVICE OF PROCESS ON CORPORATE EMPLOYEES; CHALLENGE TO APPELLATE DIVISION'S INTERPRETATION OF CPLR 5305 AND TO THE CONSTITUTIONALITY OF THAT STATUTE;

Supreme Court, New York County awarded plaintiff damages plus interest at 5 percent prior to October 7, 2004 and 9 percent thereafter; the same court thereafter denied defendant's motion to renew; App. Div. modified, granted renewal, decreased the rate of interest after October 7, 2004 to 5 percent and otherwise affirmed.

GORDON, MATTER OF et al. v TOWN OF ESOPUS et al. (AND THREE OTHER PROCEEDINGS):

3<sup>RD</sup> Dept. App. Div. order of 2/26/09; reversal with dissents; leave to appeal granted by Court of Appeals, 9/3/09;

TAXATION - ASSESSMENT - REAL PROPERTY TAX LAW ARTICLE 7  
PROCEEDING TO REVIEW AN ASSESSMENT ON REAL PROPERTY - WHETHER  
MANAGED FOREST LAND UNDER RPTL 480-a SHOULD BE VALUED ON ITS  
HIGHEST AND BEST USE, INSTEAD OF ON ITS CURRENT USE; EVIDENCE -  
WHETHER PETITIONERS DEMONSTRATED BY A PREPONDERANCE OF THE  
EVIDENCE THAT THE SUBJECT PROPERTY IS OVERVALUED;

Supreme Court, Ulster County granted petitioners' application, in  
four proceedings pursuant to RPTL article 7, to challenge the tax  
assessments on certain real property owned by petitioners; App.  
Div. reversed and dismissed the petitions.

JOSEPH II, PEOPLE ex rel. v SUPERINTENDENT OF SOUTHPORT  
CORRECTIONAL FACILITY:

3<sup>RD</sup> Dept. App. Div. order of 2/26/09; reversal; leave to appeal  
granted by Court of Appeals, 9/3/09;

CRIMES - SEX OFFENDERS - CIVIL COMMITMENT OR SUPERVISION - GRANT  
OF WRIT OF HABEAS CORPUS - WHETHER PETITIONER IS A "DETAINED SEX  
OFFENDER" AS DEFINED IN MENTAL HYGIENE LAW § 10.03(g)(5) AND THUS  
THE PROPER SUBJECT OF A PETITION FOR CIVIL MANAGEMENT WHERE  
PETITIONER WAS IN THE CUSTODY OF THE DEPARTMENT OF CORRECTIONAL  
SERVICES (DOCS) FOR VIOLATING THE CONDITIONS OF HIS POSTRELEASE  
SUPERVISION THAT DOCS ADMINISTRATIVELY IMPOSED AT THE SAME TIME  
THAT PETITIONER WAS RELEASED FROM PRISON AND COMMITTED TO AN  
OFFICE OF MENTAL HEALTH FACILITY PURSUANT TO MENTAL HYGIENE LAW §  
9.27;

Supreme Court, Chemung County dismissed petitioner's application  
for a writ of habeas corpus; App. Div. reversed, granted the writ  
of habeas corpus and ordered DOCS to immediately release  
petitioner.

THE PHOENIX CORPORATION v U.W. MARX, INC., et al.:

3<sup>RD</sup> Dept. App. Div. order of 7/9/09; modification with dissents;  
sua sponte examination whether the two-justice dissent at the  
App. Div. is on a question of law and whether the App. Div. order  
finally determines the action within the meaning of the  
Constitution;

STATUTE OF FRAUDS - ORAL MODIFICATION OF WRITTEN AGREEMENT - PART  
PERFORMANCE - EQUITABLE ESTOPPEL - WHETHER PLAINTIFF DEMONSTRATED  
AN ENFORCEABLE ORAL MODIFICATION TO THE PARTIES' WRITTEN  
SUBCONTRACT WITH RESPECT TO THE RESPONSIBILITY FOR THE PAYMENT OF  
OVERTIME EXPENSES;

Supreme Court, Rensselaer County awarded plaintiff damages in the  
amount of \$423,524.85 plus pre-judgment interest from June 25,  
2005 to the date of the order, and dismissed defendant's  
counterclaims; App. Div. modified by reducing the amount awarded  
to plaintiff by \$191,870 and affirmed as so modified; thereafter,  
in an amended judgment, Supreme Court awarded plaintiff  
\$573,651.29, which includes pre-judgment interest from June 28,  
2004 to the date of the original judgment.

RAMOS (RAMON), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 4/14/09; affirmance; leave to appeal granted by Lippman, Ch. J., 8/19/09; Rule 500.11 review pending; CRIMES - RIGHT TO REPRESENTATION PRO SE - ALLEGED DENIAL OF RIGHT TO ACT PRO SE BY COURT'S APPOINTMENT OF STANDBY COUNSEL; ALLEGED DEPRIVATION OF DEFENDANT'S RIGHT TO COUNSEL OF HIS OWN CHOOSING; RIGHT TO BE PRESENT AT TRIAL - WAIVER - ALLEGED DELEGATION OF JUDICIAL FUNCTION TO COURT CLERK WHO, AT COURT'S DIRECTION, EXPLAINED TO DEFENDANT HIS RIGHT TO BE PRESENT AT TRIAL AND THAT THE TRIAL WOULD CONTINUE IN HIS ABSENCE; TIMELINESS OF PROSECUTION - INDICTMENT FILED NEARLY 10 YEARS AFTER INCIDENT - APPLICATION OF FIVE-YEAR STATUTE OF LIMITATIONS PURSUANT TO CPL 30.10(2)(b) WHERE DEFENDANT'S WHEREABOUTS WERE CONTINUOUSLY UNKNOWN AND UNASCERTAINABLE BY THE EXERCISE OF REASONABLE DILIGENCE UNTIL HIS DNA PROFILE FROM SEXUAL ASSAULT EVIDENCE KIT WAS MATCHED TO DNA EVIDENCE TAKEN FROM HIM PURSUANT TO A SUBSEQUENT INCARCERATION; Supreme Court, Queens County convicted defendant of rape in the first degree, two counts of sodomy in the first degree and one count of robbery in the second degree, upon a jury verdict, and imposed sentence; App. Div. affirmed.

RAMOS (ROLAND), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 3/31/09; affirmance; leave to appeal granted by Carni, J., 8/4/09; Rule 500.11 review pending; CRIMES - EVIDENCE - BUSINESS RECORDS - JUDICIAL NOTICE - WHETHER JUDICIAL NOTICE PROVIDED A BASIS FOR ADMITTING A COMPLAINING WITNESS'S ALLEGED BANK RECORDS INTO EVIDENCE AS BUSINESS RECORDS; Supreme Court, Queens County convicted defendant of grand larceny in the fourth degree and scheme to defraud in the first degree, upon a jury verdict, and imposed sentence; App. Div. affirmed.

ROSA v STATE OF NEW YORK:

3<sup>RD</sup> Dept. App. Div. order of 6/18/09; affirmance; sua sponte examination whether there is any jurisdictional basis for an appeal as of right; NEGLIGENCE - MAINTENANCE OF PREMISES - TABLE SAW INJURY TO INMATE WORKING AS A CARPENTER - WHETHER CLAIMANT FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT DEFENDANT DID NOT PROVIDE HIM WITH REASONABLY SAFE EQUIPMENT; Court of Claims dismissed the claim at the close of evidence at trial; App. Div. affirmed.

SHAPARD, MATTER OF v ZON, et al.:

4<sup>TH</sup> Dept. App. Div. order of 6/5/09; dismissal of appeal; sua sponte examination whether there is any jurisdictional basis for an appeal as of right; PROCEEDING AGAINST BODY OR OFFICER - CPLR ARTICLE 78 PROCEEDING TO REVIEW DETERMINATION IN PRISON DISCIPLINARY PROCEEDING; APPEAL DISMISSED BY APPELLATE DIVISION - MOOTNESS; Supreme Court, Erie County dismissed the CPLR article 78 proceeding; App. Div. dismissed appeal as moot.

STATE FARM MUTUAL AUTOMOBILE COMPANY v LANGAN &c.:

2<sup>ND</sup> Dept. App. Div. order of 9/16/08; modification with dissents; leave to appeal granted by App. Div., 8/25/09;  
INSURANCE - AUTOMOBILE INSURANCE - INSURED INTENTIONALLY STRUCK BY CAR - COVERAGE UNDER POLICY'S MANDATORY PERSONAL INJURY PROTECTION ENDORSEMENT AND DEATH, DISMEMBERMENT AND LOSS OF SIGHT PROVISIONS - INTERPRETATION OF TERM "ACCIDENT"; LAW OF THE CASE; Supreme Court, Nassau County, upon renewal, granted that branch of the plaintiff's motion which was for summary judgment declaring that plaintiff was not obligated to provide insurance coverage for the injuries sustained by Neil Conrad Spicehandler as a result of a hit-and-run incident on February 12, 2002, and denied that branch of defendant's cross motion which was for summary judgment declaring that the plaintiff was obligated to provide insurance coverage for the injuries sustained by Neil Conrad Spicehandler as a result of the hit-and-run incident on February 12, 2002; App. Div. modified by (1) deleting the provision of the order granting that branch of the motion which was for summary judgment declaring that plaintiff is not obligated to provide coverage pursuant to the mandatory personal injury protection endorsement and death, dismemberment, and loss of sight provisions of its insurance contract for the injuries sustained by Neil Conrad Spicehandler as a result of a hit-and-run incident on February 12, 2002, and substituting therefor a provision denying that branch of the motion, and (2) deleting the provision of the order denying that branch of the cross motion which was for summary judgment declaring that plaintiff is obligated to provide coverage pursuant to the mandatory personal injury protection endorsement and death, dismemberment, and loss of sight provisions of its insurance contract for the injuries sustained by Neil Conrad Spicehandler as a result of a hit-and-run incident on February 12, 2002, and substituting therefor a provision granting that branch of the cross motion.

TAYLOR (GREGORY), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 5/28/09; affirmance; leave to appeal granted by McGuire, J., 8/25/09;  
CRIMES - DEPRAVED INDIFFERENCE MURDER - SUFFICIENCY OF THE EVIDENCE;  
Supreme Court, Bronx County convicted defendant, after a jury trial, of depraved indifference murder in the second degree, and sentenced him to a term of 25 years to life; App. Div. affirmed.

WILLIAMS (RAHJEEM), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 4/14/09; affirmance; leave to appeal granted by Pigott, J., 8/13/09;  
CRIMES - JURORS - WHETHER DEFENDANT MADE A KNOWING, INTELLIGENT AND VOLUNTARY WAIVER OF THE RIGHT TO BE PRESENT AT DISCUSSIONS WITH PROSPECTIVE JURORS REGARDING POSSIBLE BIAS;  
Supreme Court, Bronx County convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree, and sentenced him, as a second felony offender, to

a term of 4 1/2 to 9 years; App. Div. affirmed.