

COURT OF APPEALS NEW FILINGS

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

**February 11 through February 17, 2011**

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 60 days after the appeal was taken; respondent's brief to be filed 45 days after the filing of appellant's brief; and a reply brief, if any, to be filed 15 days after 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.**

AOKI v NOOTENBOOM:

1<sup>ST</sup> Dept. App. Div. order of 11/23/10; affirmance with dissents; leave to appeal granted by App. Div., 1/27/11; Rule 500.11 review pending;

DISCLOSURE - LIMITATION ON TIME FOR, AND SCOPE OF, DISCOVERY BY OBJECTANTS IN PROBATE PROCEEDING; WILLS - PROBATE;

Surrogate's Court, New York County, among other things, denied objectants' motion to extend the end date for disclosure to 10/15/10 and to delete limitations on the number and identity of the persons to be deposed; App. Div. affirmed.

AQUAVELLA, &c., et al. v VIOLA:

4<sup>TH</sup> Dept. App. Div. order of 12/30/10; affirmance with dissents;  
Rule 500.11 review pending;

STATUTE OF FRAUDS - GENERAL OBLIGATIONS LAW § 5-701(a)(1) -  
SUFFICIENCY OF MEMORANDUM - DISMISSAL OF AMENDED COMPLAINT  
ALLEGING BREACH OF THE PARTIES' 1998 ORAL AGREEMENT, WHICH  
PURPORTEDLY INCORPORATED IN ITS ENTIRETY A NONCOMPETE CLAUSE  
CONTAINED IN A 1996 WRITTEN AGREEMENT BETWEEN DEFENDANT AND A  
THIRD PARTY - CHALLENGE TO APPELLATE DIVISION ORDER AFFIRMING A  
SUPREME COURT ORDER GRANTING A CPLR 4404(a) MOTION ON THE GROUNDS  
THAT DEFENDANT HAD NOT ADMITTED THAT THE TERMS AND CONDITIONS OF  
THE 1996 WRITTEN AGREEMENT WERE INCORPORATED INTO THE 1998 ORAL  
AGREEMENT AND THAT THE WRITINGS PROFFERED BY PLAINTIFF AT TRIAL,  
EITHER ALONE OR IN COMBINATION, WERE INSUFFICIENT TO SATISFY THE  
STATUTE OF FRAUDS;

Supreme Court, Monroe County granted defendant's motion to set  
aside the jury verdict and dismissed the amended complaint; App.  
Div. affirmed.

BRAD H., et al. v THE CITY OF NEW YORK, et al.:

1<sup>ST</sup> Dept. App. Div. order of 8/10/10; reversal with dissents;  
leave to appeal granted by App. Div., 2/3/11;

STIPULATIONS - STIPULATION OF SETTLEMENT - MEANING OF PROVISION  
IN STIPULATION OF SETTLEMENT STATING THAT THE "PROVISIONS OF THIS  
AGREEMENT SHALL TERMINATE AT THE END OF FIVE YEARS AFTER  
MONITORING BY THE COMPLIANCE MONITORS BEGINS"; WHETHER THE  
APPELLATE DIVISION ERRED IN CONCLUDING THAT THE PROVISIONS OF THE  
SETTLEMENT AGREEMENT HAD "TERMINATED" AT THE TIME PLAINTIFFS  
SOUGHT INJUNCTIVE RELIEF TO COMPEL DEFENDANTS' COMPLIANCE WITH  
THE AGREEMENT; ESTOPPEL - AVAILABILITY AGAINST GOVERNMENTAL  
AGENCY;

Supreme Court, New York County, among other things, granted  
plaintiffs' motion for a preliminary injunction requiring  
defendants to continue to abide by the terms of parties'  
stipulation of settlement, which was approved in an 4/2/03  
amended final order and judgment, and denied defendants' cross  
motion for an order declaring the action terminated pursuant to  
the terms of the stipulation; App. Div. reversed, granted  
defendants' cross motion and declared the action terminated in  
the absence of jurisdiction over the dispute.

RODRIGUEZ (SERGIO), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 12/28/10, modification; leave to  
appeal granted by McGuire, J., 2/8/11;

CRIMES - SENTENCE - CONCURRENT AND CONSECUTIVE TERMS - ILLEGAL  
CONSECUTIVE SENTENCE VACATED AND MATTER REMANDED TO TRIAL COURT  
FOR RESENTENCING - WHETHER THE APPELLATE DIVISION ERRED IN  
HOLDING THAT THE TRIAL COURT ON REMAND MAY ARRIVE LAWFULLY AT THE  
AGGREGATE SENTENCE IT INTENDED TO IMPOSE BY RESTRUCTURING  
CONCURRENT SENTENCES TO RUN CONSECUTIVELY - WHETHER RESTRUCTURING  
OF SENTENCES WOULD VIOLATE CPL 430.10, PENAL LAW §§ 70.25(2) AND

70.30(1)(a), DUE PROCESS AND THE PROHIBITION AGAINST DOUBLE JEOPARDY; PROSECUTOR'S ALLEGED VIOLATION OF UNSWORN WITNESS RULE DURING SUMMATION; ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT TO PROSECUTOR'S REMARKS IN SUMMATION; Supreme Court, New York County convicted defendant, after a jury trial, of attempted murder in the second degree, assault in the first degree, two counts of robbery in the first degree, and robbery in the second degree, and sentenced him, as a second violent felony offender, to an aggregate term of 40 years; App. Div. modified to the extent of directing that the sentences for the attempted murder and assault convictions be served concurrently, remanded the matter to the trial court for resentencing, and otherwise affirmed.

TRAVIS v BATCHI:

1<sup>ST</sup> Dept. App. Div. order of 7/1/10; affirmance; leave to appeal granted by Court of Appeals, 2/10/11; INSURANCE - NO-FAULT AUTOMOBILE INSURANCE - SERIOUS INJURY - WHETHER THE INJURED PLAINTIFF RAISED A TRIABLE ISSUE OF FACT AS TO WHETHER SHE SUSTAINED A "SERIOUS INJURY" WITHIN THE MEANING OF INSURANCE LAW § 5102(d) - SUMMARY JUDGMENT; Supreme Court, New York County granted defendants' motion for summary judgment dismissing the complaint as to plaintiff Sheila Travis for lack of a serious injury; App. Div. affirmed.

UMEZE v FIDELIS CARE NEW YORK, et al.:

1<sup>ST</sup> Dept. App. Div. order of 9/21/10; affirmance with dissents; leave to appeal granted by App. Div., 1/4/11; Rule 500.11 review pending; DISMISSAL AND NONSUIT - WANT OF PROSECUTION - CONDITIONAL DISMISSAL OF COMPLAINT PURSUANT TO CPLR 3216 FOR FAILURE TO PROSECUTE - PRO SE PLAINTIFF CONTACTED ATTORNEY IN RESPONSE TO 90-DAY DEMAND TO FILE NOTE OF ISSUE - "JUSTIFIABLE EXCUSE" FOR DELAY IN PROSECUTING; Supreme Court, Bronx County granted defendants' motion pursuant to CPLR 3216 to dismiss the complaint for failure to prosecute to the extent of directing plaintiff to resume prosecution of the action within 10 days of service of the order with notice of entry; App. Div. affirmed.