

COURT OF APPEALS NEW FILINGS

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

**July 15 through July 21, 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 within 60 days after the appeal was taken; respondent's brief to be filed within 45 days after the due date for the filing of appellant's brief; and a reply brief, if any, to be filed within 15 days after the due date for 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.**

ATTEA (ANTHONY), PEOPLE v:

4<sup>TH</sup> Dept. App. Div. order of 5/6/10; affirmance; leave to appeal granted by Centra, J., 6/29/11; Rule 500.11 review pending;  
CRIMES - JURISDICTION OF OFFENSES - WHETHER COUNTY COURT LACKED JURISDICTION TO ACCEPT DEFENDANT'S GUILTY PLEA TO HIGHER CHARGE THAN THAT FOR WHICH HE WAS ORIGINALLY ARRESTED;  
Erie County Court convicted defendant, on his guilty plea, of criminal possession of stolen property in the third degree; App. Div. affirmed.

BERAKA v BITON et al.:

App. Term, 1<sup>st</sup> Dept. order of 5/17/10; affirmance; sua sponte examination whether there is any basis for an appeal as of right form an order of the Appellate Term and whether the order appealed from finally determines the action within the meaning of the Constitution;

DISCLOSURE - PENALTY FOR FAILURE TO DISCLOSE - DEFENDANT'S ANSWER STRICKEN;

Civil Court, New York City, (1) granted plaintiff's motion to stike the answer of defendant Crystal Biton for noncompliance with a disclosure order, and denied defendant Biton's motion to vacate the disclosure default (1/5/04 order); (2) denied defendants' motion to vacate the 1/5/04 order; and (3) denied defendants' motion for various relief; App. Term affirmed.

DAIS (QUINTON), PEOPLE v:

1<sup>st</sup> Dept. App. Div. order of 2/3/11; affirmance; leave to appeal granted by Read, J., 7/12/11;

CRIMES - SENTENCE - WHETHER COURT RESENTENCING DEFENDANT UNDER THE DRUG LAW REFORM ACT HAS AUTHORITY TO ADJUDICATE DEFENDANT A SECOND FELONY DRUG OFFENDER PREVIOUSLY CONVICTED OF A VIOLENT FELONY WHERE DEFENDANT WAS ONLY ADJUDICATED AS A SECOND FELONY OFFENDER AT HIS ORIGINAL SENTENCING PROCEEDING;

Supreme Court, New York County resentenced defendant, as a second felony drug offender whose prior conviction was for a violent felony, to a term of 6 years, with 3 years postrelease supervision; App. Div. affirmed.

GLACIAL AGGREGATES LLC v TOWN OF YORKSHIRE:

4<sup>th</sup> Dept. App. Div. order of 6/10/11; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

MUNICIPAL CORPORATIONS - ZONING - NONCONFORMING USE - CHALLENGE TO APPELLATE DIVISION ORDER HOLDING THAT SUPREME COURT PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT DISMISSING THE AMENDED COMPLAINT - CAUSE OF ACTION PURSUANT TO 42 USC § 1983;

Supreme Court, Cattaraugus County declared that the mining of sand and gravel aggregate was a lawful nonconforming use of plaintiff's property and awarded damages to plaintiff; following remittitur by the Court of Appeals, App. Div. affirmed; thereafter, Supreme Court awarded plaintiff attorneys' fees and disbursements; App. Div. affirmed.

HERRING (CARLOS), PEOPLE v:

2<sup>nd</sup> Dept. App. Div. order of 1/18/11; affirmance; leave to appeal granted by Lippman, Ch.J., 7/7/11;

CRIMES - JURORS - DISCHARGE OF JUROR - DENIAL OF DEFENDANT'S MOTION FOR MISTRIAL DUE TO JUROR WHO ALLEGEDLY SLEPT DURING TRIAL AND DELIBERATIONS; DISCLOSURE - FAILURE TO PRODUCE ROSARIO MATERIAL - WHETHER A SANCTION HAD TO BE IMPOSED FOR THE LOSS OF

NOTES OF A FLORIDA LAW ENFORCEMENT OFFICER AS TO, AMONG OTHER THINGS, THAT OFFICER'S EFFORTS TO LOCATE DEFENDANT; SENTENCE - CONCURRENT AND CONSECUTIVE TERMS - WHETHER SENTENCE ON CONVICTION OF CRIMINAL POSSESSION OF A WEAPON IN THE THIRD DEGREE WAS PROPERLY IMPOSED TO RUN CONSECUTIVELY TO SENTENCE ON CONVICTION OF MURDER IN THE SECOND DEGREE;

County Court, Rockland County convicted defendant of murder in the second degree, assault in the second degree, criminal possession of a weapon in the second degree, and criminal possession of a weapon in the third degree, upon a jury verdict, and imposed sentence; App. Div. affirmed.

IMPERATO v THE MOUNT SINAI MEDICAL CENTER, et al.:

1<sup>ST</sup> Dept. App. Div. order of 3/1/11; affirmance; leave to appeal granted by App. Div., 6/28/11; sua sponte examination whether the condition set forth in the Supreme Court order has been satisfied or if that part of the Supreme Court order has been stayed; DISCLOSURE - PRECLUSION ORDER - WHETHER A PARTY PRECLUDED FROM OFFERING EXPERT TESTIMONY AT TRIAL IS REQUIRED TO FILE AN EXPERT AFFIDAVIT OF MERIT TO SUPPORT THE GRANT OF A MOTION TO VACATE THE PRECLUSION ORDER;

Supreme Court, New York County granted plaintiffs' motion to vacate an order precluding their expert witness from testifying at trial, conditioned "upon plaintiff's payment of \$100 in costs to defendants" within 30 days of the date of the order, and denied defendants' cross motion to dismiss the action; App. Div. affirmed.

KARLSERG, MATTER OF v TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, et al.:

3<sup>RD</sup> Dept. App. Div. judgment of 6/9/11; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; TAXATION - PERSONAL INCOME TAX - CHALLENGE TO APPELLATE DIVISION JUDGMENT THAT, AMONG OTHER THINGS, DECLARED THAT LAX LAW § 615(f) WAS NOT SHOWN TO BE UNCONSTITUTIONAL AS APPLIED TO PETITIONER AND CONFIRMED THE TAX APPEALS TRIBUNAL'S DETERMINATION THAT NEW YORK'S ITEMIZED DEDUCTION FOR GAMBLING LOSSES IS REDUCED PURSUANT TO TAX LAW § 615(f) FOR TAXPAYERS WITH HIGHER INCOME LEVELS - WHETHER THE DOCTRINE OF FEDERAL CONFORMITY APPLIES TO NEW YORK'S TREATMENT OF THE ITEMIZED DEDUCTION FOR GAMBLING LOSSES - ALLEGED EQUAL PROTECTION VIOLATION;

App. Div. partially converted the CPLR article 78 proceeding to an action for declaratory judgment, declared that Tax Law § 615(f) has not been shown to be unconstitutional as applied to petitioner, confirmed respondent's determination denying petitioner's request for a refund of personal income tax imposed under Tax Law article 22, and dismissed the remainder of the petition.

NERONI (FREDERICK J.), MATTER OF, A DISBARRED ATTORNEY:

3<sup>RD</sup> Dept. App. Div. orders of 7/7/11; sua sponte examination whether the App. Div. orders denying respondent's motions to vacate prior App. Div. orders finally determine the proceeding within the meaning of the Constitution and whether a substantial constitutional question is directly involved in the orders appealed from to support an appeal as of right;

ATTORNEY AND CLIENT - DISCIPLINARY PROCEEDINGS - CHALLENGE TO APPELLATE DIVISION ORDERS THAT DENIED RESPONDENT ATTORNEY'S MOTIONS TO VACATE PRIOR APPELLATE DIVISION ORDERS AND DISBARRED HIM;

App. Div., among other things, disbarred respondent attorney, denied respondent's motion for an order seeking to vacate a 3/31/11 confidential order of that court, and denied respondent's motion for an order seeking to vacate two prior disciplinary orders of that court dated August 27, 1992 and October 6, 1992.

NORTH SYRACUSE CENTRAL SCHOOL DISTRICT, MATTER OF v NEW YORK STATE DIVISION OF HUMAN RIGHTS:

4<sup>TH</sup> Dept. App. Div. order of 4/1/11; reversal and dismissal; leave to appeal granted by Court of Appeals, 6/30/11;

CIVIL RIGHTS - DISCRIMINATION BASED ON RACE AND DISABILITY - CPLR ARTICLE 78 PROCEEDING TO PROHIBIT THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (NYS DHR) FROM HOLDING A HEARING ON A DISCRIMINATION COMPLAINT FILED ON BEHALF OF A STUDENT AGAINST THE SCHOOL DISTRICT - WHETHER THE SCHOOL DISTRICT MUST EXHAUST ALL ADMINISTRATIVE REMEDIES PRIOR TO SEEKING JUDICIAL RELIEF - EXECUTIVE LAW § 296(4);

Supreme Court, Onondaga County prohibited respondent from taking further action on the complaint in NYSDHR case number 10125491; App. Div. reversed and dismissed the petition.

OMOWALE (AKINLOWO), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 4/28/11; reversal; leave to appeal granted by Ciparick, J., 7/8/11; Rule 500.11 review pending; CRIMES - UNLAWFUL SEARCH AND SEIZURE - WHETHER THE POLICE HAD PROBABLE CAUSE TO ARREST DEFENDANT FOR FALSE IMPERSONATION; Supreme Court, New York County convicted defendant of criminal possession of a controlled substance in the first degree and criminal possession of a weapon in the second degree and sentenced him, as a second felony drug offender whose prior felony drug conviction was a violent felony, to concurrent terms of 15 years and 7 years, respectively, with 5 years postrelease supervision; App. Div. reversed, granted defendant's motion to suppress physical evidence recovered in 2007 and dismissed the indictment.

OMOWALE (AKINLOWO), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 4/28/11; affirmance; leave to appeal granted by Freedman, J., 6/16/11; CRIMES - UNLAWFUL SEARCH AND SEIZURE - SEARCH OF VEHICLE'S CENTER

Supreme Court, New York County convicted defendant, upon his guilty plea, of criminal possession of a weapon in the second degree and sentenced him, as a second violent felony offender, to a term of 7 years with 5 years postrelease supervision; App. Div. affirmed.

ROBERTS &c, et al. v PATERSON &c, et al.:

1<sup>ST</sup> Dept. App. Div. order of 5/26/11; affirmance; leave to appeal granted by App. Div., 7/14/11; Rule 500.11 review pending;  
INJUNCTIONS - PRELIMINARY INJUNCTION - LIKELIHOOD OF SUCCESS ON THE MERITS - WHETHER SUPREME COURT PROPERLY DENIED PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION REQUIRING DEFENDANTS TO FUND HEALTH INSURANCE BENEFITS FOR RETIREES OF THE NEW YORK CITY OFF-TRACK BETTING CORPORATION (NYC OTB); EMPLOYMENT RELATIONSHIPS - RETIREMENT AND PENSION BENEFITS;  
Supreme Court, New York County denied plaintiffs' motion for a preliminary injunction requiring defendants to fund health insurance benefits for retirees of the NYC OTB pending determination of plaintiffs' plenary action for the same relief; App. Div. affirmed.

WELCH, PEOPLE ex rel. v HESSEL:

4<sup>TH</sup> Dept. App. Div. order of 6/10/11; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;  
HABEAS CORPUS - AVAILABILITY OF RELIEF;  
Supreme Court, Erie County denied petitioner's application for a writ of habeas corpus; App. Div. affirmed.

YAN v WANG:

1<sup>ST</sup> Dept. App. Div. order of 6/7/11; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right and whether the order appealed from finally determines the action within the meaning of the Constitution;  
HUSBAND AND WIFE - DIVORCE - GROUND OF CRUEL AND INHUMAN TREATMENT (DOMESTIC RELATIONS LAW § 170[1]); CLAIMED VIOLATIONS OF DUE PROCESS BY TRIAL JUDGE AND APPELLATE DIVISION;  
Supreme Court, New York County granted plaintiff's application for a divorce on the ground of cruel and inhuman treatment; App. Div. affirmed.

YUSUF (MALIK), a/k/a ASHFORD (YUSUF M.), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 3/3/11; affirmance; leave to appeal granted by Read, J., 7/14/11;  
CRIMES - SENTENCE - SECOND FELONY OFFENDER - WHETHER PENAL LAW § 70.70(1)(c)(4), WHICH PROVIDES FOR ENHANCED PUNISHMENT FOR "SECOND FELONY DRUG OFFENDERS PREVIOUSLY CONVICTED OF A VIOLENT FELONY" PERMITS SUCH ENHANCEMENT WHEN DEFENDANT'S PRIOR VIOLENT FELONY CONVICTION OCCURRED IN ANOTHER STATE - CPL 400.21;

Supreme Court, New York County convicted defendant, after a jury trial, of criminal possession of a controlled substance in the third and fourth degrees and criminally using drug paraphernalia in the second degree, and sentenced him, as a second felony drug offender whose prior felony conviction was a violent felony, to an aggregate term of 6 years; App. Div. affirmed.