

COURT OF APPEALS NEW FILINGS

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

November 25 through December 1, 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.

BEST (EMIL), PEOPLE v:

App. Term, 9th and 10th Judicial Districts, order of 5/9/11; affirmance; leave to appeal granted by Pigott, J., 11/22/11; TRIAL - PHYSICALLY RESTRAINED DEFENDANT - HANDCUFFS AND LEG SHACKLES DURING NONJURY TRIAL - TRIAL COURT DID NOT CONDUCT INQUIRY REGARDING NEED FOR RESTRAINTS OR PUT ON RECORD ANY REASONS FOR VISIBLE RESTRAINTS - CLAIMED VIOLATION OF DUE PROCESS RIGHTS; CLAIMED INSUFFICIENCY OF ACCUSATORY INSTRUMENT; 1ST District Court, Nassau County convicted defendant, after a nonjury trial, of endangering the welfare of a child; App. Term affirmed.

GLATZER v BEAR, STEARNS & CO., INC. et al.:

1ST Dept. App. Div. order of 10/4/11; denial of relief related to appeal; sua sponte examination of 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;
APPEAL - CHALLENGE TO APPELLATE DIVISION'S DENIAL OF SO MUCH OF PLAINTIFF'S MOTION AS SOUGHT "RELATED RELIEF";
App. Div. granted plaintiff's motion to the extent it sought an enlargement of time to perfect his appeal and denied the motion to the extent it sought related relief.

IRB-BRAZIL RESSEGUROS v INEPAR INVESTMENTS, S.A., et al.:

1ST Dept. App. Div. order of 4/26/11; modification; leave to appeal granted by Court of Appeals, 11/22/11;
CONFLICT OF LAWS - LAW GOVERNING CONTRACT ACTIONS - WHETHER A COURT MUST UNDERTAKE A TRADITIONAL CONFLICT OF LAW ANALYSIS WHEN THERE IS AN EXPRESS CHOICE-OF-LAW PROVISION IN AN AGREEMENT - GENERAL OBLIGATIONS LAW § 5-1401;
Supreme Court, New York County awarded judgment in favor of plaintiff and against defendants in the principal amount of \$27,772,409.86, plus interest at the rate of 9.9% per annum from 10/22/09 and postjudgment interest at the rate of 9.9%; App. Div. modified to limit the rate of postjudgment interest to the statutory rate of 9% per annum.

ITHACA CITY SCHOOL DISTRICT, MATTER OF v NEW YORK STATE DIVISION OF HUMAN RIGHTS:

3RD Dept. App. Div. order of 6/30/11; modification; leave to appeal granted by Court of Appeals, 11/17/11;
CIVIL RIGHTS - STATE DIVISION OF HUMAN RIGHTS - JURISDICTION OVER PUBLIC SCHOOL DISTRICT - WHETHER PUBLIC SCHOOL DISTRICT IS AN "EDUCATION CORPORATION OR ASSOCIATION" WITHIN THE MEANING OF EXECUTIVE LAW § 296(4); THE STANDARD GOVERNING THE IMPOSITION OF LIABILITY UNDER SECTION 296(4); WHETHER A LEGAL BASIS EXISTS FOR A SEPARATE DAMAGES AWARD TO THE PARENT OF A STUDENT WHO HAS BEEN RACIALLY HARASSED BY FELLOW STUDENTS;
Supreme Court, Tompkins County, among other things, granted petitioner's application, in a proceeding pursuant to Executive Law § 298, to annul a determination by respondent State Division of Human Rights finding that petitioner permitted the racial harassment of one of its students; App. Div. vacated the order, reinstated the petition, deemed the matter transferred to it for de novo review, and upon such review, modified the determination by reducing the amount awarded for compensatory damages to respondent Amelia Kearney from \$200,000 to \$50,000.

LAZZARI, MATTER OF v TOWN OF EASTCHESTER, et al.:

2ND Dept. App. Div. order of 8/2/11; affirmance; leave to appeal granted by Court of Appeals, 11/22/11;

CIVIL SERVICE - JUDICIAL REVIEW - WHETHER CIVIL SERVICE LAW § 71 ENTITLES THE TOWN TO RECEIVE MEDICAL CERTIFICATION OF AN EMPLOYEE'S FITNESS BEFORE IT MUST REINSTATE AN EMPLOYEE

PREVIOUSLY DISCHARGED DUE TO WORK-RELATED INJURIES - WHETHER BACK PAY UNDER CIVIL SERVICE LAW § 77 IS APPROPRIATE FOR A MUNICIPAL EMPLOYEE UNLAWFULLY DENIED REINSTATEMENT, BUT WHOSE ORIGINAL TERMINATION WAS NOT UNLAWFUL;

Supreme Court, Westchester County granted the petition and directed that petitioner be reinstated to the positions of Assistant Building Inspector and Deputy Building Inspector for the Town of Eastchester; App. Div. affirmed.

MIRANDA (CARLOS), PEOPLE v:

1ST Dept. App. Div. order of 8/24/10; reversal; leave to appeal granted by Jones, J., 11/3/11;

CRIMES - UNLAWFUL SEARCH AND SEIZURE - WHETHER POLICE LACKED REASONABLE SUSPICION TO BELIEVE THAT KNIFE CLIPPED TO DEFENDANT'S POCKET WAS A GRAVITY KNIFE; SUPPRESSION HEARING;

Supreme Court, Bronx County granted defendant's motion to suppress evidence; App. Div. reversed, denied defendant's motion to suppress evidence, and remanded the matter for further proceedings on the accusatory instrument.

MORALES (EDGAR), PEOPLE v:

1ST Dept. App. Div. order of 5/31/11; modification; leave to appeal granted by Smith, J., 10/27/11;

CRIMES - TERRORISM - INTIMIDATION OF "CIVILIAN POPULATION" - PENAL LAW § 490.25 - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT A FINDING THAT DEFENDANT COMMITTED HIS CRIMES WITH THE INTENT TO INTIMIDATE OR COERCE A "CIVILIAN POPULATION" GENERALLY RATHER THAN THE MORE LIMITED CATEGORY OF MEMBERS OF RIVAL GANGS; SUFFICIENCY OF THE EVIDENCE SUPPORTING THE CONVICTIONS AS MODIFIED; ALLEGED "SPILLOVER PREJUDICE" FROM TERRORISM CHARGES, INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, CONFRONTATION CLAUSE VIOLATION, PREJUDICIAL REMARKS BY TRIAL COURT TO PROSPECTIVE JURORS REGARDING THE SEPTEMBER 11 TERRORIST ATTACKS, AND PAYTON AND MIRANDA VIOLATIONS;

Supreme Court, Bronx County convicted defendant, after a jury trial, of manslaughter in the first degree as a crime of terrorism, attempted murder in the second degree as a crime of terrorism, criminal possession of a weapon in the second degree as a crime of terrorism and conspiracy in the second degree, and sentenced him to consecutive terms of 20 years to life on the manslaughter count and the attempted murder count, and to concurrent terms of 15 years on the weapon possession count and 5

to 15 years on the conspiracy count; App. Div. modified by reducing the conviction for manslaughter in the first degree as a crime of terrorism to manslaughter in the first degree, the conviction for attempted murder in the second degree as a crime of terrorism to attempted murder in the second degree, the conviction for criminal possession of a weapon in the second degree as a crime of terrorism to criminal possession of a weapon in the second degree, and the conviction for conspiracy in the second degree to conspiracy in the fourth degree, and remitted the case to Supreme Court with directions to resentence defendant on the reduced counts of the judgment.

TOWN OF OYSTER BAY v KIRKLAND:

2ND Dept. App. Div. order of 2/15/11; modification; leave to appeal granted by Court of Appeals, 11/17/11;
CIVIL RIGHTS - STATE DIVISION OF HUMAN RIGHTS - ADMINISTRATIVE COMPLAINT ALLEGING THAT TOWN'S ZONING RESOLUTIONS THAT CREATED CERTAIN HOUSING PROGRAMS UNLAWFULLY DISCRIMINATED AGAINST POTENTIAL RESIDENTS ON THE BASIS OF RACE, COLOR AND NATIONAL ORIGIN - WHETHER COMPLAINT CONSTITUTED REVERSE DISCRIMINATION AND VIOLATED THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS; ADMINISTRATIVE LAW - EXHAUSTION OF ADMINISTRATIVE REMEDIES;
Supreme Court, Nassau County dismissed the amended complaint; App. Div. modified by adding to the judgment provisions declaring that the New York State Division of Human Rights acted within its authority in initiating the administrative complaint on its own and that Executive Law § 295(6)(a) and (b) are not collectively unconstitutional.

ESTATE OF KEVIN W. STANLEY, MATTER OF, and ESTATE OF KATHLEEN A. STANLEY, MATTER OF:

Surrogate's Court, Erie County order of 10/19/11, bringing up for review a 4TH Dept. App. Div. order of 12/30/10; affirmance; sua sponte examination of whether these appeals satisfy the requirements of CPLR 5601(d);
CONSTITUTIONAL LAW - FULL FAITH AND CREDIT - WHETHER THE FULL FAITH AND CREDIT CLAUSE OF THE U.S. CONSTITUTION BARRED THE SURROGATE'S COURT FROM REVIEWING A SETTLEMENT AGREEMENT ENTERED INTO IN CONNECTION WITH A WRONGFUL DEATH ACTION IN FLORIDA AND APPROVED BY A FLORIDA STATE COURT, WHERE THE SETTLEMENT AGREEMENT WAS EXPRESSLY CONDITIONED UPON APPROVAL OF BOTH THE FLORIDA COURT AND THE SURROGATE'S COURT;

Surrogate's Court, Erie County awarded guardian ad litem fees; App. Div. affirmed a 7/1/09 Surrogate's Court order that, among other things, denied petitioner's request that the court limit its role and that of the guardians ad litem with respect to settlement agreements approved by a Florida state court and expressly made subject to and conditioned upon the approval of the Surrogate's Court, and affirmed a 7/7/09 Surrogate's Court order that, among other things, directed that the applications filed by petitioners should go forward.

WHITEBOX CONCENTRATED CONVERTIBLE ARBITRAGE PARTNERS, L.P.,
et al. v SUPERIOR WELL SERVICES, INC.:

1ST Dept. App. Div. order of 7/7/11; reversal; leave to appeal granted by Court of Appeals, 11/17/11;
CORPORATIONS - TRANSFER OF STOCK - "FUNDAMENTAL CHANGE" UNDER CERTIFICATE OF DESIGNATIONS - WHETHER THE APPELLATE DIVISION ERRED IN DISMISSING THE COMPLAINT BASED ON DOCUMENTARY EVIDENCE; Supreme Court, New York County denied defendant's motion to dismiss the complaint; App. Div. reversed, granted defendant's motion to dismiss the complaint and directed the clerk to enter judgment dismissing the complaint.