

COURT OF APPEALS NEW FILINGS

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

July 5, 2012 through July 12, 2012

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.

CANTAVE (JEAN), PEOPLE v:

2ND Dept. App. Div. order of 3/6/12; affirmance; leave to appeal granted by Pigott, J., 6/27/12;

CRIMES - RIGHT TO REMAIN SILENT - WHETHER DEFENDANT WHO CHOOSES TO TESTIFY MAY BE CROSS EXAMINED ABOUT THE UNDERLYING FACTS OF A RECENT CONVICTION THAT IS STILL ON APPEAL - SANDOVAL HEARING; WHETHER TRIAL COURT ERRED IN REFUSING TO ADMIT DEFENDANT'S 911 CALL AS AN EXCITED UTTERANCE OR PRESENT SENSE IMPRESSION; Supreme Court, Queens County convicted defendant, upon a jury verdict, of assault in the third degree, and imposed sentence; App. Div. affirmed.

JENNINGS (ROOSEVELT), PEOPLE v:

App. Term, 2ND, 11th and 13th Districts; affirmance; leave to appeal granted by Smith, J., 6/27/12;

CRIMES - ACCUSATORY INSTRUMENT - SUFFICIENCY - IDENTIFICATION OF CONTROLLED SUBSTANCE - ALLEGATION IN ACCUSATORY INSTRUMENT AND SUPPORTING DEPOSITION THAT ARRESTING OFFICER IDENTIFIED SUBSTANCE AS CRACK COCAINE RESIDUE BASED UPON HER PROFESSIONAL TRAINING AND PRIOR EXPERIENCE;

Criminal Court of the City of New York, Kings County convicted defendant, after a nonjury trial, of attempted criminal possession of a controlled substance in the seventh degree; App. Term affirmed.

J.P. MORGAN SECURITIES, INC., et al. v VIGILANT INSURANCE COMPANY, et al.:

1ST Dept. App. Div. order of 12/13/11; reversal; leave to appeal granted by Court of Appeals, 6/26/12;

INSURANCE - BUSINESS INSURANCE - WHETHER PUBLIC POLICY PROHIBITS INSURANCE COVERAGE FOR \$160 MILLION DISGORGEMENT PAYMENT TO SECURITIES AND EXCHANGE COMMISSION (SEC) MADE BY PLAINTIFFS' PREDECESSORS IN SETTLEMENT OF CHARGES THAT THEY FACILITATED CERTAIN UNLAWFUL TRADING PRACTICES, ABSENT PROOF THAT THE DISGORGED FUNDS WERE DERIVED FROM THE UNLAWFUL TRADING PRACTICES - WHETHER THE APPELLATE DIVISION ERRED IN RELYING ON NON-ADJUDICATED FINDINGS BY THE SEC RECITED IN A SETTLEMENT ORDER THAT EXPRESSLY PROVIDES THAT SUCH FINDINGS WERE NOT ADMITTED OR DENIED BY PLAINTIFFS' PREDECESSORS;

Supreme Court, New York County denied defendants' motions to dismiss the complaint; App. Div. reversed, granted defendants' motions to dismiss the complaint, and directed the Clerk to enter judgment dismissing the complaint.

KLEINSER v ASTARITA, et al.:

1ST Dept. App. Div. order of 2/14/12; affirmance; motion to dismiss appeal pending;

ATTORNEY AND CLIENT - MALPRACTICE; SUMMARY JUDGMENT - WHETHER PLAINTIFF RAISED AN ISSUE OF FACT AS TO CLAIMS OF LEGAL MALPRACTICE AND BREACH OF CONTRACT;

Supreme Court, New York County granted defendants' motion for summary judgment dismissing the complaint; App. Div. affirmed.

KOEGLER, MATTER OF v WOODARD:

1ST Dept. App. Div. order of 6/7/12; affirmance with dissents; sua sponte examination whether the two-Justice dissent at the App. Div. is on a question of law;

PARENT AND CHILD - CUSTODY - RELOCATION OF MOTHER TO ANOTHER STATE - FAMILY COURT DENIED MOTHER'S PETITION FOR CUSTODY AND REQUEST TO RELOCATE TO TEXAS WITH THE CHILD;

Family Court, New York County denied respondent mother's petition for custody of the parties' child and permission to relocate to Texas with the child, and awarded the parties joint custody; App. Div. affirmed.

LEE (THOMAS), PEOPLE v:

1ST Dept. App. Div. order of 11/29/11; affirmance; leave to appeal granted by Lippman, Ch. J., 7/2/12;
CRIMES - TRIAL - INTERPRETERS - WHETHER DEFENDANT WAS DEPRIVED OF A FAIR TRIAL WHERE ONE OF THE VICTIMS TESTIFIED THROUGH A CANTONESE COURT INTERPRETER WHO WAS ACQUAINTED WITH THE VICTIMS AND THE TRIAL JUDGE DID NOT INQUIRE INTO THE AVAILABILITY OF ANOTHER INTERPRETER; PROOF OF PRIOR CONVICTIONS - CHALLENGE TO TRIAL COURT'S SANDOVAL RULING;
Supreme Court, New York County convicted defendant, after a jury trial, of burglary in the second degree and grand larceny in the third degree, and sentenced him to an aggregate term of 10 years; App. Div. affirmed.

MORRIS (CHADON), PEOPLE v:

2ND Dept. App. Div. order of 11/29/11; affirmance; leave to appeal granted by Smith, J., 6/28/12;
CRIMES - EVIDENCE - TAPE RECORDINGS - WHETHER 911 CALL REPORTING THAT A PERSON MATCHING DEFENDANT'S DESCRIPTION COMMITTED AN UNCHARGED GUNPOINT ROBBERY WAS PROPERLY ADMITTED INTO EVIDENCE TO PROVIDE BACKGROUND INFORMATION AS TO WHY THE POLICE STOPPED DEFENDANT;
Supreme Court, Queens County convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree, and imposed sentence; App. Div. affirmed.

M&T REAL ESTATE TRUST v DOYLE:

3RD Dept. App. Div. order of 3/23/12; reversal; leave to appeal granted by Court of Appeals, 6/28/12;
MORTGAGES - FORECLOSURE - DEFICIENCY JUDGMENT - WHETHER PLAINTIFF'S MOTION FOR A DEFICIENCY JUDGMENT WAS TIMELY MADE;
Supreme Court, Erie County, among other things, granted plaintiff a deficiency judgment against defendants; App. Div. reversed the order and judgment insofar as appealed from and denied that part of plaintiff's motion which was for leave to enter a deficiency judgment against defendants.

ROTH, MATTER OF, et al. v CITY OF SYRACUSE, et al.:

Supreme Court, Onondaga County order of 3/20/12, bringing up for review 4TH Dept. App. Div. order of 11/12/10; affirmance; leave to appeal granted by Court of Appeals, 6/26/12;
TAXATION - ASSESSMENT - REAL PROPERTY TAX LAW ARTICLE 7
PROCEEDING TO REVIEW AN ASSESSMENT ON REAL PROPERTY MADE BY THE CITY RESPONDENTS - WHETHER PRESENCE OF LEAD PAINT IN THE FIVE SUBJECT PROPERTIES CONSTITUTES ENVIRONMENTAL CONTAMINATION FOR TAX ASSESSMENT PURPOSES;

Supreme Court, Onondaga County denied the petition in a proceeding pursuant to RPTL article 7; App. Div. affirmed; thereafter, Supreme Court ordered that petitioner's claims for the remaining properties are voluntarily discontinued with prejudice.

RUDOLPH (REECE), PEOPLE v:

3RD Dept. App. Div. order of 6/30/11; affirmance; leave to appeal granted by Lippman, Ch. J., 7/3/12;
CRIMES - SENTENCE - YOUTHFUL OFFENDER - CPL 720.20(1) - WHETHER A DEFENDANT CAN WAIVE CONSIDERATION FOR YOUTHFUL OFFENDER STATUS - WHETHER DEFENSE COUNSEL'S FAILURE TO PURSUE YOUTHFUL OFFENDER TREATMENT AT SENTENCING RENDERED HIS ASSISTANCE INEFFECTIVE;
County Court, Warren County convicted defendant, upon his guilty plea, of criminal possession of a controlled substance in the third degree; defendant was ultimately sentenced to five years in prison and two years of postrelease supervision, with a recommendation for the comprehensive alcohol and substance abuse treatment program; App. Div. affirmed.

SMITH (MIKAL), PEOPLE v:

1ST Dept. App. Div. order of 9/22/11; modification; leave to appeal granted by Ciparick, J., 6/25/12;
CRIMES - ROBBERY - WHETHER EVIDENCE WAS LEGALLY SUFFICIENT TO SUPPORT A CONVICTION FOR ROBBERY IN THE SECOND DEGREE (PENAL LAW § 160.10[1]) - DEFENDANT IMPERSONATED A POLICE OFFICER AND REMOVED CASH FROM THE VICTIM'S POCKET DURING A FRISK - WHETHER ELEMENT OF FORCE WAS ESTABLISHED OR MERELY "LARCENY BY TRICK"; BASIS FOR CHARGE OF CRIMINAL IMPERSONATION IF NO UNDERLYING FELONY COMMITTED;
Supreme Court, New York County convicted defendant of burglary in the third degree, robbery in the second degree, criminal impersonation in the first degree and petit larceny, and sentenced him, as a second violent felony offender, to an aggregate term of 9 years; App. Div. modified to the extent of vacating the burglary conviction and dismissing that count of the indictment.

THOMPSON (EDDIE, JR.), PEOPLE v:

3RD Dept. App. Div. order of 2/23/12; affirmance; leave to appeal granted by Lippman, Ch. J., 7/2/12;
CRIMES - RIGHT TO COUNSEL - EFFECTIVE REPRESENTATION - ISSUES WITH VARIOUS JURORS, INCLUDING JURORS WHO WERE FRIENDS OR ACQUAINTANCES OF THE DISTRICT ATTORNEY - DEFENSE COUNSEL'S FAILURE TO USE PEREMPTORY CHALLENGE WHEN CHALLENGE FOR CAUSE DENIED; WHETHER GRAND JURY TESTIMONY OF PEOPLE'S BALLISTICS EXPERT CONSTITUTED WRITTEN REPORT PURSUANT TO CPL 240.20(1)(c); DUE PROCESS;
Supreme Court, Ulster County convicted defendant of manslaughter in the second degree; App. Div. affirmed.