

COURT OF APPEALS NEW FILINGS

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

October 12, 2012 through October 18, 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.

ASARO (PATRICK A.), PEOPLE v:

2ND Dept. App. Div. order of 4/3/12; affirmance; leave to appeal granted by Pigott, J., 10/2/12;

CRIMES - MANSLAUGHTER IN THE SECOND DEGREE AND RECKLESS ASSAULT - SUFFICIENCY OF EVIDENCE OF RECKLESSNESS WHERE DEFENDANT, WHO WAS TRAVELING AT A HIGH RATE OF SPEED WHEN HE CRASHED INTO ANOTHER CAR, WAS FOUND NOT GUILTY OF DRIVING WHILE ABILITY IMPAIRED - REPUGNANCY OF VERDICT ACQUITTING DEFENDANT OF DRIVING WHILE ABILITY IMPAIRED BUT CONVICTING HIM OF MANSLAUGHTER IN THE SECOND DEGREE; WITNESSES - EXPERT WITNESS - WHETHER SUPREME COURT ERRED IN ALLOWING PEOPLE'S EXPERT ACCIDENT RECONSTRUCTIONIST TO TESTIFY TO ULTIMATE CONCLUSIONS WHERE HE HAD LOST HIS ORIGINAL NOTES CONTAINING COMPUTATIONS HE USED TO DETERMINE THE SPEED OF THE VEHICLES INVOLVED IN THE ACCIDENT - ALLEGED VIOLATION OF DEFENDANT'S RIGHT OF CONFRONTATION; ALLEGED PROSECUTORIAL MISCONDUCT;

BIOTRONIK A.G. v CONOR MEDSYSTEMS IRELAND, LTD., et al.:

1ST Dept. App. Div. order of 5/29/12; affirmance; leave to appeal granted by App. Div., 9/25/12; Rule 500.11 review pending; CONTRACTS - BREACH OR PERFORMANCE OF CONTRACT - DAMAGES - LOST RESALE PROFITS - DISTRIBUTION AGREEMENT; Supreme Court, New York County dismissed the complaint; App. Div. affirmed.

CORNELL v 360 WEST 51ST STREET REALTY, LLC, et al.:

1ST Dept. App. Div. order of 3/6/12; modification with dissents; leave to appeal granted by App. Div., 10/2/12; WITNESSES - EXPERT WITNESS - TENANT'S CLAIM OF INJURY ARISING OUT OF EXPOSURE TO TOXIC MOLD - SCIENTIFIC RELIABILITY OF EXPERT PROOF; WHETHER PLAINTIFF'S PROOF ESTABLISHED A CAUSAL RELATIONSHIP; Supreme Court, New York County, among other things, granted the motion of defendants 360 West 51st Street Corp. and Geoffrey Shotwell for summary judgment dismissing the complaint as against them; App. Div. modified by reinstating the complaint as against defendant 360 West 51st Street Corp., and otherwise affirmed.

FERGUSON v ROCHESTER CITY SCHOOL DISTRICT:

4TH Dept. App. Div. order of 10/5/12; reversal with dissents; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution and whether the two justice dissent is on a question of law; TRIAL - VERDICT - SETTING VERDICT ASIDE - WHETHER THE APPELLATE DIVISION ERRED IN SETTING VERDICT ASIDE AS AGAINST THE WEIGHT OF THE EVIDENCE; Supreme Court, Monroe County denied plaintiff's CPLR 4404(a) motion to set aside a jury verdict and grant judgment in her favor or a new trial and, thereafter, entered judgment in defendant's favor; App. Div. reversed the judgment, granted plaintiff's post-trial motion to set aside the verdict as against the weight of the evidence, reinstated the complaint and granted a new trial.

GALETTA v GALETTA:

4TH Dept. App. Div. order of 6/15/12; affirmance with dissents; leave to appeal granted by App. Div., 9/28/12; MARRIAGE - PRENUPTIAL AGREEMENT - VALIDITY - WHETHER A DEFECTIVE CERTIFICATE OF ACKNOWLEDGMENT MAY BE CURED BY A SUBSEQUENT AFFIDAVIT; Supreme Court, Monroe County, among other things, denied plaintiff's motion for summary judgment; App. Div. affirmed.

GUAMAN (LUIS), PEOPLE v:

App. Term, 1st Dept. order of 6/27/12; affirmance; leave to appeal granted by Ciparick, J., 10/4/12; Rule 500.11 review pending;

CRIMES - INFORMATION - FORCIBLE TOUCHING - PENAL LAW § 130.52 - WHETHER ACCUSATORY INSTRUMENT WAS FACIALLY INSUFFICIENT FOR FAILING TO ALLEGE THE ELEMENT OF "FORCE" WHERE DEFENDANT "RUBBED AGAINST" THE COMPLAINANT SUBWAY RIDER;

Criminal Court of the City of New York convicted defendant, upon his guilty plea, of forcible touching, and imposed sentence; App. Div. affirmed.

HARRIS (JOSEPH), PEOPLE v:

1st Dept. App. Div. order of 6/12/12; affirmance; leave to appeal granted by Graffeo, J., 9/28/12;

CRIMES - SENTENCE - CONCURRENT AND CONSECUTIVE TERMS - WHETHER THE TRIAL COURT ERRED IN IMPOSING CONSECUTIVE SENTENCES FOR THE CONVICTIONS OF ATTEMPTED MURDER IN THE SECOND DEGREE AND CRIMINAL POSSESSION OF A WEAPON IN THE SECOND DEGREE;

Supreme Court, New York County convicted defendant, after a jury trial, of attempted murder in the second degree, assault in the first degree and two counts of criminal possession of a weapon in the second degree, and sentenced him, as a persistent violent felony offender, to an aggregate term of 45 years to life; App. Div. affirmed.

HERNANDEZ (FELIX), PEOPLE v:

1st Dept. App. Div. order of 8/21/12; affirmance with dissents; leave to appeal granted by Freedman, J., 10/2/12;

CRIMES - PLEA OF GUILTY - WITHDRAWAL OF PLEA - ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL WHO PURPORTEDLY FAILED TO DISCUSS THE IMMIGRATION CONSEQUENCES (DEPORTATION) OF GUILTY PLEA;

Supreme Court, New York County convicted defendant, upon his guilty plea, of sexual abuse in the first degree, and sentenced him, as a second violent felony offender, to a term of five years; thereafter, the same court denied defendant's CPL 440.10 motion to vacate the judgment of conviction; App. Div. affirmed.

REED (LANCE J.), PEOPLE v:

4th Dept. App. Div. order of 7/6/12; affirmance with dissents; leave to appeal granted by Martoche, J., 10/2/12;

CRIMES - EVIDENCE - SUFFICIENCY OF EVIDENCE - FELONY MURDER AND ROBBERY - IDENTIFICATION OF SUPERMARKET BAG RECOVERED FROM CAR FLEEING SCENE OF CRIME; CIRCUMSTANTIAL EVIDENCE;

Monroe County Court convicted defendant, upon a jury verdict, of murder in the second degree and two counts of robbery in the first degree; App. Div. affirmed.

RHODES (BRENDAN J.), PEOPLE v:

4th Dept. App. Div. order of 1/31/12; modification; leave to appeal granted by Pigott, J., 9/27/11; Rule 500.11 review pending;

CRIMES - FACTUAL SUFFICIENCY OF THE PLEA ALLOCUTION - WHETHER GUILTY PLEA WAS KNOWING, VOLUNTARY AND INTELLIGENT;

Allegany County Court judgment convicted defendant, upon his guilty plea, of robbery in the first degree; App. Div. modified by vacating the sentence, affirmed the judgment as modified and remitted to Allegany County Court.

SANDIFORD v CITY OF NEW YORK DEPARTMENT OF EDUCATION, et al.:

1ST Dept. App. Div. order of 4/24/12; modification with dissents; leave to appeal granted by App. Div., 10/4/12;

CIVIL RIGHTS - DISCRIMINATION BASED ON SEXUAL ORIENTATION - RETALIATION - TERMINATION OF SCHOOL AIDE; "PRETEXT" FOR TERMINATION - BURDEN OF PROOF; SUMMARY JUDGMENT; COLLATERAL ESTOPPEL BASED ON UNION GRIEVANCE RESULT;

Supreme Court, New York County, insofar as appealed from, granted defendants' motion for summary judgment insofar as it sought dismissal of plaintiff's retaliation claim under the New York City and New York State Human Rights Laws and denied the motion insofar as it sought dismissal of her discrimination claims; App. Div. modified by denying the motion as to plaintiff's retaliation claim, and otherwise affirmed.

SOTO v J. CREW, INC., et al.:

1ST Dept. App. Div. order of 5/29/12; affirmance; leave to appeal granted by App. Div., 10/2/12;

LABOR - SAFE PLACE TO WORK - ROUTINE MAINTENANCE - CLEANING - EMPLOYEE OF COMMERCIAL CLEANING COMPANY INJURED WHEN HE FELL OFF AN A-FRAME LADDER WHILE DUSTING THE TOP OF A SHELF - WHETHER THE ACTIVITY THE INJURED PLAINTIFF WAS ENGAGED IN WAS THE TYPE OF ACTIVITY PROTECTED BY LABOR LAW § 240(1);

Supreme Court, New York County granted defendants' motions for summary judgment dismissing the complaint, and denied plaintiff's cross motion for summary judgment on the issue of liability on his Labor Law § 240(1) cause of action; App. Div. affirmed.

WELLS (CARL D.), PEOPLE v:

1ST Dept. App. Div. order of 5/24/12; affirmance; leave to appeal granted by Graffeo, J., 10/5/12;

CRIMES - UNLAWFUL SEARCH AND SEIZURE - INVENTORY SEARCH - DEFENDANT PLEADED GUILTY AFTER SUPREME COURT DENIED HIS MOTION TO SUPPRESS PHYSICAL EVIDENCE RECOVERED FROM THE CAR HE WAS DRIVING UPON THE GROUND THAT THE POLICE HAD CONDUCTED A PROPER INVENTORY SEARCH - WHETHER THE APPELLATE DIVISION ERRED WHERE, AFTER CONCLUDING THAT SUPREME COURT IMPROPERLY RELIED UPON THE

INVENTORY SEARCH DOCTRINE IN DENYING DEFENDANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE, IT UPHELD THE CONVICTION ON HARMLESS ERROR GROUNDS WHILE ACKNOWLEDGING THAT THE HARMLESS ERROR RULE REGARDING SUPPRESSION ISSUES DOES NOT NORMALLY APPLY TO CASES WHERE A DEFENDANT PLEADS GUILTY;

Supreme Court, Bronx County convicted defendant, upon his guilty plea, of operating a motor vehicle while ability impaired by drugs and of driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs, and sentenced him to a term of imprisonment of six months; App. Div. affirmed.

WISDOM (SIDNEY), PEOPLE v:

2ND Dept. App. Div. order of 7/11/12; reversal; leave to appeal granted by Graffeo, J., 10/5/12;

GRAND JURY - DEFECTIVE PROCEEDING - FAILURE TO ADMINISTER TESTIMONIAL OATH TO WITNESS BEFORE TESTIFYING TO GRAND JURY - WHETHER A TESTIMONIAL OATH IS EFFECTIVE IF ADMINISTERED AFTER A WITNESS TESTIFIES AND, IF NOT, WHETHER SUCH A DEFECT WARRANTS DISMISSAL OF AN INDICTMENT; MOTIONS AND ORDERS - WHETHER THE TRIAL COURT ABUSED ITS DISCRETION AS A MATTER OF LAW BY PERMITTING DEFENDANT TO FILE A MOTION TO DISMISS THE INDICTMENT AFTER THE TRIAL BEGAN BASED UPON THE TIMING OF THE ADMINISTRATION OF THE OATH TO THE GRAND JURY WITNESS; WHETHER DEFENDANT'S CONVICTION ON LEGALLY SUFFICIENT TRIAL EVIDENCE PRECLUDES REVIEW ON APPEAL OF HIS CHALLENGE TO THE ALLEGEDLY DEFECTIVE GRAND JURY PROCEEDING - CPL 210.30(6);

Supreme Court, Kings County convicted defendant of two counts of attempted murder in the second degree, burglary in the first degree, and endangering the welfare of a child, upon a jury verdict, and imposed sentence; App. Div. reversed, granted defendant's motion to dismiss the indictment pursuant to CPL 210.20(1)(c) and 210.35(5), dismissed the indictment, with leave to resubmit the charges to another grand jury, and remitted the matter to Supreme Court, Kings County, to immediately cause the defendant to be brought before it forthwith, at which time that court shall issue a securing order in accordance with the provisions of CPL 210.45(9).