

COURT OF APPEALS NEW FILINGS

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

April 11, 2014 through April 17, 2014

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.

CARR (LEE), PEOPLE v:

1ST Dept. App. Div. order of 11/14/13; affirmance; leave to appeal granted by Graffeo, J., 3/31/14;
CRIMES - RIGHT TO COUNSEL - WHETHER TRIAL COURT VIOLATED DEFENDANT'S RIGHT TO COUNSEL BY CONDUCTING AN EX PARTE, UNTRANSCRIBED DISCUSSION WITH THE PEOPLE'S MAIN WITNESS WHO CLAIMED HE WAS TO ILL TOO TESTIFY ON THE DAY HE WAS SCHEDULED; TRIAL COURT'S REFUSAL TO CHARGE THE LESSER INCLUDED OFFENSE OF ASSAULT IN THE THIRD DEGREE;
Supreme Court, Bronx County, convicted defendant, upon a jury verdict, of murder in the second degree, and sentenced him to a term of 25 years to life; App. Div. affirmed.

DABROWSKI, &c. v METROPOLITAN LIFE INSURANCE COMPANY:

2ND Dept. App. Div. order of 1/29/14; reversal; sua sponte examination of whether any jurisdictional basis exists for an appeal as of right;

INSURANCE - LIFE INSURANCE - CANCELLATION OF POLICY; SUMMARY JUDGMENT;

Supreme Court, Suffolk County, among other things, denied defendant's motion for summary judgment dismissing the complaint; App. Div. reversed and granted defendant's motion for summary judgment dismissing the complaint.

FAISON, &c. v LEWIS, &c., et al.:

2ND Dept. App. Div. order of 5/29/13; modification; leave to appeal granted by Court of Appeals, 4/8/14;

LIMITATION OF ACTIONS - ACTION TO VOID A DEED AND MORTGAGE BASED ON ALLEGATIONS OF FORGERY - WAIVER OF STATUTE OF LIMITATIONS DEFENSE;

Supreme Court, Kings County, granted defendant Bank of America's motion to dismiss the complaint in its entirety as time-barred and denied, as academic, plaintiff's cross motion to dismiss the 15th affirmative defense asserted in the joint answer of defendants Bank of America and Mortgage Electronic Registration Systems, Inc. (MERS); App. Div. modified by (1) deleting the provision granting that branch of defendant Bank of America's motion which was to dismiss the complaint insofar as asserted against defendants Tonya Lewis, Dorothy Lewis and MERS, and substituting therefor a provision denying that branch of the motion, and (2) deleting the provision denying, as academic, that branch of plaintiff's cross motion which was to dismiss the 15th affirmative defense insofar as asserted by defendant MERS; and also modified, affirmed.

FLUSHING SAVINGS BANK, FSB v BITAR &c., et al.:

2ND Dept. App. Div. order of 5/1/13; affirmance; leave to appeal granted by Court of Appeals, 4/3/14;

MORTGAGES - FORECLOSURE - DEFICIENCY JUDGMENT - WHETHER AFFIDAVIT OF PLAINTIFF'S APPRAISER WAS TOO CONCLUSORY TO ESTABLISH A PRIMA FACIE SHOWING OF THE FAIR MARKET VALUE OF THE PROPERTY AS OF THE FORECLOSURE SALE DATE - DENIAL OF PLAINTIFF'S UNOPPOSED APPLICATION FOR A DEFICIENCY JUDGMENT WITHOUT EXPRESSED FINDING AS TO PROPERTY VALUE, HEARING ON VALUATION OR OPPORTUNITY FOR PLAINTIFF TO CURE ALLEGED INSUFFICIENCY IN PROOF;

Supreme Court, Kings County, among other things, denied that branch of plaintiff's motion which was pursuant to RPAPL 1371(2) for leave to enter a deficiency judgment against defendant Bitar; App. Div. affirmed.

FORECLOSURE OF TAX LIENS, MATTER OF (FIRST CHURCH OF GOD IN CHRIST, INC.; CITY OF HUDSON):

3RD Dept. App. Div. order of 2/27/14; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

TAXATION - REAL PROPERTY TAX - IN REM TAX FORECLOSURE PROCEEDING - NOTICE TO PROPERTY OWNER; ALLEGED DENIAL OF DUE PROCESS WHERE PETITIONER RELIGIOUS CORPORATION DID NOT RECEIVE ACTUAL NOTICE OF TAX FORECLOSURE PROCEEDING ON PARCEL PURPORTEDLY PREVIOUSLY CONVEYED TO ITS MINISTER;

Supreme Court, Columbia County, dismissed petitioner's application, in a proceeding pursuant to RPTL article 11, to set aside a judgment of foreclosure and transfer of title concerning real property; App. Div. affirmed.

INOA (JOSE), PEOPLE v:

1ST Dept. App. Div. order of 9/26/13; affirmance; leave to appeal granted by Smith, J., 4/2/14;

CRIMES - WITNESSES - EXPERT WITNESS - WHETHER TRIAL COURT ERRED IN PERMITTING A POLICE DETECTIVE TO TESTIFY AS AN EXPERT WITH REGARD TO CODED OR UNEXPLAINED LANGUAGE IN RECORDED TELEPHONE CONVERSATIONS BETWEEN DEFENDANT AND HIS CODEFENDANT;

Supreme Court, New York County, convicted defendant, after a jury trial, of murder in the first and second degrees, attempted murder in the second degree, conspiracy in the second degree, assault in the first degree, and criminal possession of a weapon in the second and third degrees, and sentenced him to an aggregate term of 73 1/2 years to life; App. Div. affirmed.

LASHWAY (STEVEN), PEOPLE v:

3RD Dept. App. Div. order of 12/26/13; affirmance; leave to appeal granted by Court of Appeals, 4/3/14;

CRIMES - SEX OFFENDERS - SEX OFFENDER REGISTRATION ACT (SORA) - DEFENDANT'S RIGHT TO DISCOVERY UNDER SORA - ACCESS TO DOCUMENTS UPON WHICH THE BOARD OF EXAMINERS OF SEX OFFENDERS BASED ITS REPORT RECOMMENDING THAT DEFENDANT REMAIN A RISK LEVEL THREE SEX OFFENDER; COUNTY COURT'S DENIAL OF ADJOURNMENT OF PROCEEDING SO THAT REQUESTED DOCUMENTS COULD BE OBTAINED; ALLEGED DUE PROCESS VIOLATION;

County Court, Clinton County, denied defendant's application pursuant to Correction Law § 168-o(2) for, among other things, reclassification of his risk level sex offender status; App. Div. affirmed.

LINARES, MATTER OF v EVANS:

3RD Dept. App. Div. order of 12/5/13; reversal; leave to appeal granted by Court of Appeals, 4/3/14;

PROCEEDING AGAINST BODY OR OFFICER - CERTIORARI - CPLR ARTICLE 78 PROCEEDING CHALLENGING AN 11/8/11 DETERMINATION OF THE BOARD OF PAROLE DENYING PETITIONER'S REQUEST FOR PAROLE RELEASE - WHETHER THE PAROLE BOARD'S FAILURE TO PROMULGATE REGULATIONS PURSUANT TO EXECUTIVE LAW § 259-c(4) PRIOR TO PETITIONER'S PAROLE HEARING MAKES THE BOARD'S DETERMINATION IMPROPER; AGGRIEVEMENT; WHETHER THE BOARD'S DETERMINATION IS SUPPORTED BY THE RECORD; PROPRIETY OF THE BOARD'S SUBMISSION OF DOCUMENTS TO SUPREME COURT FOR IN

Supreme Court, Albany County, dismissed petitioner's CPLR article 78 petition to review a determination of the Board of Parole denying petitioner's request for parole release; App. Div. reversed, annulled the determination and remitted the matter to the Board of Parole for further proceedings not inconsistent with the Court's decision.

MAETREUM OF CYBELE, MAGNA MATER, INC., MATTER OF v
McCOY &c., et al.:

3RD Dept. App. Div. order of 11/21/13; reversal; leave to appeal granted by Court of Appeals, 4/1/14;
TAXATION - REAL PROPERTY TAX - EXEMPTIONS - USE OF PROPERTY FOR RELIGIOUS PURPOSES - WHETHER PROPERTY AT ISSUE WAS USED EXCLUSIVELY FOR RELIGIOUS OR CHARITABLE PURPOSES WITHIN THE MEANING OF REAL PROPERTY TAX LAW (RPTL) 420-a DURING THE YEARS AT ISSUE; BURDEN OF PROOF;
Supreme Court, Greene County, dismissed petitioner's applications, in three combined proceedings pursuant to RPTL article 7 and CPLR article 78, to review three determinations of the Board of Assessment Review for the Town of Catskill denying petitioner's applications for real property tax exemptions; App. Div. reversed, granted the petitions, and annulled the determinations of the Board of Assessment Review denying petitioner's applications for real property tax exemptions for 2009, 2010 and 2011.

NUMRICH GUN PARTS CORPORATION, MATTER OF v RIVERA &c., et al.:

3RD Dept. App. Div. order of 3/6/14; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;
UNEMPLOYMENT INSURANCE - EMPLOYEE OR INDEPENDENT CONTRACTOR - PROCEEDING TO, AMONG OTHER THINGS, PROHIBIT RESPONDENTS FROM CHARACTERIZING PETITIONER'S CALL CENTER REPRESENTATIVES AS EMPLOYEES FOR PURPOSES OF UNEMPLOYMENT INSURANCE AND FROM CONDUCTING FURTHER ADMINISTRATIVE PROCEEDINGS ON THE ISSUE; SUBJECT MATTER JURISDICTION - LABOR LAW § 626;
Supreme Court, Albany County, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, granted respondents' motion to dismiss the petition/complaint; App. Div. affirmed.

RODRIGUEZ (SERGIO), PEOPLE v:

1ST Dept. App. Div. order of 12/12/13; affirmance; leave to appeal granted by Smith, J., 4/9/14;
CRIMES - SENTENCE - CONCURRENT AND CONSECUTIVE TERMS - CHANGE, ON RESENTENCING, FROM CONCURRENT TO CONSECUTIVE SENTENCES - WHETHER THE IMPOSITION OF CONSECUTIVE SENTENCES FOR ASSAULT AND FIRST DEGREE ROBBERY VIOLATED PENAL LAW § 70.25(2) WHERE THE ASSAULT, A SHOOTING, OCCURRED IN THE COURSE OF THE ROBBERY; REMARKS MADE BY RESENTENCING COURT; CLAIMED VIOLATION OF DUE PROCESS;

Supreme Court, New York County, resentenced defendant to consecutive terms of 25 years on his conviction of robbery in the first degree and 15 years on his conviction of assault in the first degree; App. Div. affirmed.

VIVIANE ETIENNE MEDICAL CARE, P.C. &c. v COUNTRY-WIDE INSURANCE CO.:

2nd Dept. App. Div. order of 12/18/13; modification; leave to appeal granted by App. Div., 4/9/14;
INSURANCE - NO-FAULT AUTOMOBILE INSURANCE - PLAINTIFF'S BURDEN OF PROOF ON A MOTION FOR SUMMARY JUDGMENT - EVIDENCE SUFFICIENT FOR PRIMA FACIE CASE - EFFECT OF INSURANCE CARRIER'S FAILURE TO TIMELY DENY THE CLAIM; SUMMARY JUDGMENT;
Civil Court of the City of New York, Kings County, denied that branch of plaintiff's motion which was for summary judgment on the complaint; App. Term affirmed; App. Div. modified in part, by denying that branch of plaintiff's motion which was for summary judgment, substituting a provision granting that branch of the motion, except as to the claim dated 11/17/04 in the amount of \$139, and remitting the matter to Civil Court to calculate the amount owed to plaintiff for no-fault benefits and to determine whether plaintiff is entitled to statutory interest and attorneys' fees.

WARD, MATTER OF v CITY OF NEW YORK, et al.:

App. Div. judgment of 11/14/13; leave to appeal granted by Court of Appeals, 4/1/14;
PROCEEDING AGAINST BODY OR OFFICER - CERTIORARI - LICENSES - PLUMBERS - REVOCATION OF MASTER PLUMBING LICENSE FOR VIOLATION OF BUILDING CODE - WHETHER THE APPELLATE DIVISION ERRED IN ANNULING PENALTY AS EXCESSIVE AND REMANDING TO AGENCY FOR IMPOSITION OF A LESSER PENALTY;
App. Div., in a CPLR article 78 proceeding seeking to annul a 9/13/11 determination of respondent New York City Department of Buildings which, after a hearing, revoked petitioner's master plumbing license upon a finding that she engaged in conduct that violated the New York City Building Code, granted the petition to the extent of annulling the penalty of license revocation, remanded the matter to the agency for imposition of a lesser penalty, and otherwise confirmed the determination