

COURT OF APPEALS NEW FILINGS

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

**March 6, 2015 through March 12, 2015**

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.**

AOKI, MATTER OF v AOKI:

1<sup>ST</sup> Dept. App. Div. order of 5/13/14; reversal; leave to appeal granted by Court of Appeals, 2/24/15;

POWERS - POWER OF APPOINTMENT - VALIDITY OF IRREVOCABLE PARTIAL RELEASE - CONSTRUCTIVE FRAUD - WHETHER THE APPELLATE DIVISION ERRED IN DETERMINING THAT (1) THE BURDEN-SHIFTING FRAMEWORK FOR CONSTRUCTIVE FRAUD BY A FIDUCIARY APPLIES ONLY WHERE THE FIDUCIARY WAS A PARTY TO OR HAD AN INTEREST IN THE SUBJECT TRANSACTION AND (2) THE CONSTRUCTIVE FRAUD DOCTRINE DID NOT APPLY BECAUSE DECEDENT'S ATTORNEYS WERE NOT PARTIES TO NOR HAD AN INTEREST IN THE RELEASES AT ISSUE, WHERE THE ATTORNEYS ALLEGEDLY BENEFITTED INDIRECTLY FROM THE SIGNING OF THE RELEASES;

Surrogates's Court, New York County, denied the motion of respondents Devon and Steven Aoki for summary judgment declaring valid two partial releases of a power of appointment executed by decedent Rocky Aoki; thereafter, the same court, after a non-jury trial, invalidated the two partial releases based upon the alleged constructive fraud of Rocky Aoki's attorneys; App. Div. reversed, vacated the decree, granted the motion by respondents Devon and Steven Aoki for summary judgment declaring valid the two partial releases of the power of appointment, and declared that the releases are valid.

AMBAC ASSURANCE CORP., et al. v COUNTRYWIDE HOME LOANS, INC.:

1<sup>ST</sup> Dept. App. Div. order of 12/4/14; reversal; leave to appeal granted by App. Div., 3/3/15;

DISCLOSURE - MATERIAL EXEMPT FROM DISCLOSURE - COMMUNICATIONS SUBJECT TO ATTORNEY-CLIENT PRIVILEGE - WAIVER OF PRIVILEGE AS TO COMMUNICATIONS MADE BETWEEN ATTORNEY AND CLIENT IN KNOWN PRESENCE OF THIRD PARTY - COMMON-INTEREST EXCEPTION - WHETHER THE APPELLATE DIVISION CORRECTLY HELD THAT THE COMMON-INTEREST EXCEPTION APPLIES EVEN WHERE THE PARTIES' COMMON LEGAL INTEREST DOES NOT INVOLVE PENDING OR REASONABLY ANTICIPATED LITIGATION - APPLICATION TO COMMUNICATIONS RELATING TO PENDING MERGER; Supreme Court, New York County, denied the motion by defendant Bank of America Corp. (BAC) to vacate the order of a Special Referee, holding that documents relating to a pending merger between BAC and defendant Countrywide Financial Corp. are not protected from disclosure by the common-interest doctrine; App. Div. reversed, granted the motion and remanded the matter for further proceedings.

MATTER OF ANONYMOUS, FOR ADMISSION AS AN ATTORNEY AND COUNSELOR-AT-LAW:

1<sup>ST</sup> Dept. App. Div. order of 2/18/14; denial of renewed application for admission; sua sponte examination whether the two-Justice dissent at the App. Div. is on a question of law; ATTORNEY AND CLIENT - ADMISSION TO PRACTICE - CONVICTED FELON - WHETHER THE APPELLATE DIVISION ERRED IN DENYING PETITIONER'S THIRD APPLICATION FOR ADMISSION TO THE BAR; App. Div. denied petitioner's renewed application for admission to the bar of the State of New York.

ARAGON (ANTONIO), PEOPLE v:

1<sup>ST</sup> Dept. App. Term order of 7/29/14; affirmance; leave to appeal granted by Read, J., 2/24/15;

CRIMES - ACCUSATORY INSTRUMENT - FACIAL SUFFICIENCY - POSSESSION OF WEAPON - BRASS METAL KNUCKLES - WHETHER THE ACCUSATORY INSTRUMENT WAS FACIALLY SUFFICIENT WHERE IT ALLEGED THAT POLICE RECOVERED FROM DEFENDANT "ONE SET OF BRASS METAL KNUCKLES"; Criminal Court of the City of New York, New York County, convicted defendant, upon a plea of guilty, of disorderly conduct, and imposed sentence; App. Term affirmed.

SADEK v WESLEY, et al.:

1<sup>st</sup> Dept. App. Div. order of 4/15/14; reversal; leave to appeal granted by App. Div., 2/26/15;

WITNESSES - EXPERT WITNESS - PRECLUSION OF TESTIMONY - TRIAL COURT GRANTED MOTION TO PRECLUDE NEUROLOGICAL EXPERT FROM TESTIFYING UPON THE GROUND THAT EXPERT'S FIRST REPORT, WHICH STATED THERE WAS A PROBABLE CAUSAL RELATIONSHIP BETWEEN MOTOR VEHICLE ACCIDENT AND PLAINTIFF'S EMBOLIC STROKE, WAS NEGATED BY EXPERT'S SUPPLEMENTAL REPORT BECAUSE THAT REPORT DID NOT SUFFICIENTLY ESTABLISH CAUSATION - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT EXPERT'S FIRST REPORT PROVIDED A SUFFICIENT BASIS TO ALLOW THE EXPERT TO TESTIFY AS TO THE CAUSE OF PLAINTIFF'S EMBOLIC STROKE AND THE SUPPLEMENTAL REPORT ONLY PROVIDED GROUNDS TO IMPEACH EXPERT'S ANTICIPATED TRIAL TESTIMONY; WHETHER THE APPELLATE DIVISION CORRECTLY DETERMINED THAT NEW EXPERT'S PROPOSED TESTIMONY SHOULD NOT HAVE BEEN PRECLUDED BECAUSE IT DID NOT ENTIRELY CONCERN A NEW THEORY OF CAUSATION TO THE EXTENT HE WAS PREPARED TO TESTIFY THAT THE ACCIDENT WAS A PROBABLE CAUSE OF DISLODGING THE BLOOD CLOT THAT CAUSED PLAINTIFF'S STROKE - NECESSITY FOR A FRYE HEARING - WHETHER EVIDENCE AT FRYE HEARING SUFFICIENTLY ESTABLISHED THE RELIABILITY OF EXPERT'S ASSERTIONS AS TO CAUSATION - TIMING OF IN LIMINE MOTIONS;

Supreme Court, New York County, granted defendant's motion in limine to preclude the testimony of plaintiff's neurological expert and directed entry of judgment dismissing the complaint; App. Div. reversed and restored the matter to the trial calendar.

SPEAKS (LOUIS), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 1/14/15; affirmance; leave to appeal granted by Hill, J., 2/26/15;

CRIMES - IDENTIFICATION OF DEFENDANT - LINEUP - NO REQUIREMENT THAT LINEUP PARTICIPANTS BE NEARLY IDENTICAL TO DEFENDANT - WHETHER THE LINEUP IN WHICH DEFENDANT WAS IDENTIFIED BY A WITNESS WAS UNDULY SUGGESTIVE; CRIMES - EVIDENCE - WHETHER THE ADMISSION OF TESTIMONY OF A DETECTIVE RECOUNTING DESCRIPTION OF PERPETRATOR GIVEN BY NONTESTIFYING AND TESTIFYING WITNESSES VIOLATED THE HEARSAY RULE OR DEFENDANT'S RIGHT OF CONFRONTATION; WHETHER DEFENDANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY FAILED TO OBJECT TO THE PROSECUTOR'S ALLEGEDLY IMPROPER COMMENTS DURING SUMMATION;

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

ESTATE OF WAGNER, MATTER OF (AARISMAA; WAGNER):

Surrogate's Court letter of 1/29/15; sua sponate examination whether a direct appeal lies pursuant to CPLR 5601(b)(2) and whether the 1/29/15 letter from the Surrogate's Court is an appealable paper within the meaning of CPLR 5512(a);  
APPEAL - APPEALABLE PAPER - LETTER FROM SURROGATE'S COURT;  
Surrogate's Court, Seneca County, returned as unfiled documents submitted by Jaan Aarismaa IV.