

COURT OF APPEALS NEW FILINGS

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

**May 12, 2017 through May 18, 2017**

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.**

COKE, SR., MATTER OF v BARGNESI:

4<sup>TH</sup> Dept. App. Div. order of 11/29/16; dismissal; sua sponte examination of whether the order finally determines the proceeding within the meaning of the Constitution, whether a substantial constitutional question is directly involved to support an appeal as of right and whether any jurisdictional basis exists to support an appeal as of right; Proceeding Against Body or Officer--Certiorari--Conditional dismissal of proceeding by Appellate Division; App. Div. denied petitioner's motion for permission to proceed as a poor person, and dismissed the proceeding unless the requisite filing fee is paid within 120 days.

THE FRIENDS OF P.S. 163, INC., et al., MATTER OF v JEWISH HOME LIFECARE, MANHATTAN; DAISY WRIGHT, et al., MATTER OF v JEWISH HOME LIFECARE, MANHATTAN:

1<sup>ST</sup> Dept. App. Div. order of 1/19/17; reversal; leave to appeal granted by App. Div., 5/2/17;

Environmental Conservation--Environmental Quality Review--Whether respondent Department of Health took the requisite "hard look" at the proposed project's anticipated adverse environmental impacts, including noise and hazardous material impacts, and provided a "reasoned elaboration" of its basis for approving the project, including the remedial measures to be employed to mitigate adverse impacts;

Supreme Court, New York County, granted the petitions seeking to annul a Findings Statement issued by respondent New York State Department of Health (DOH), dated 12/10/14, approving respondent Jewish Home Lifecare, Manhattan's application to construct a 20-story nursing home facility in Manhattan, and remitted the matter to DOH for preparation of an amended Final Environmental Impact Statement to reconsider the findings on the issues of noise and hazardous materials; App. Div. reversed, denied the petitions, reinstated the Findings Statement, and dismissed the CPLR article 78 proceeding.

HAKES (BRIAN), PEOPLE v:

3<sup>RD</sup> Dept. App. Div. order of 10/20/16; reversal; leave to appeal granted by DiFiore, Ch.J., 4/21/17;

Crimes--Sentence--Whether sentencing court had the authority to require defendant to pay for an electronic monitoring program (a Secure Continuous Remote Alcohol Monitoring [SCRAM] bracelet) as a condition of his probation--SCRAM bracelet removed when defendant told monitoring company that he was unable to make payments required for continued use of bracelet;

County Court, Sullivan County, revoked defendant's probation and imposed a sentence of imprisonment; App. Div. reversed and remitted the matter to County Court for proceedings not inconsistent with the court's decision.

KHALEEL, MATTER OF v VANREIL, et al.:

2<sup>ND</sup> Dept. App. Div. order to show cause, unsigned; sua sponte examination whether there is an appealable order and whether a substantial constitutional question is directly involved to support an appeal as of right;

Proceeding against Body or Officer--Order to show cause submitted to Appellate Division--Justice declined to sign; claimed due process violations;

App. Div. Justice declined to sign order to show cause.

MATTER OF KOZIOL, A SUSPENDED ATTORNEY:

3<sup>RD</sup> Dept. App. Div. order of 4/13/17; denial of motion; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right;

Attorney and Client--Disciplinary Proceedings--Denial of motion to set aside suspension orders; alleged constitutional violations;

App. Div. denied the motion by respondent attorney for an order setting aside the suspension orders dated 9/23/10 and 6/6/13 without prejudice to the filing of an application for reinstatement in compliance with the Rules of the Appellate Division, Third Department (22 NYCRR) § 806.16(a) and the Uniform Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.16.

LEMMA, MATTER OF v NASSAU COUNTY POLICE OFFICER INDEMNIFICATION BOARD, et al.:

2<sup>ND</sup> Dept. App. Div. order of 2/1/17; affirmance; leave to appeal granted by Court of Appeals, 5/9/17;

Counties--Defense and Indemnification of Employee--Whether police officer's actions were within the "proper discharge of his duties," thereby entitling him to defense and indemnification under General Municipal Law § 50-1; whether respondent Board's determination denying defense and indemnification was arbitrary and capricious;

Supreme Court, Nassau County, denied the petition and dismissed the proceeding brought pursuant to CPLR article 78 to review a 5/22/09 determination of the Nassau County Police Officer Indemnification Board that petitioner was not entitled to defense or indemnification in an action in U.S. District Court for the Eastern District of New York; App. Div. affirmed.

MOORE v GUERRA, et al.:

2<sup>ND</sup> Dept. App. Div. order of 3/27/17; denial of motion; 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--Appellate Division--Denial of motion for various types of relief related to trial and appeal;

Supreme Court, Kings County, denied plaintiff's motion seeking recusal of Hon. Dawn Jimenez-Salta; App. Div. denied appellant's motion to direct Supreme Court "to send the case to the jury," to recuse certain Appellate Division Justices from determining the appeal, to transfer the appeal to the Appellate Division, First Department, for a preference in the calendaring of the appeal and for poor person relief.

SICA, MATTER OF v DiNAPOLI &c.:

3<sup>RD</sup> Dept. App. Div. judgment of 7/7/16; annulled determination; leave to appeal granted by Court of Appeals, 5/9/17;

Civil Service--Retirement and Pension Benefits--Accidental disability retirement--whether the Appellate Division correctly held that the record did not contain substantial evidence to support the Comptroller's determination that petitioner

firefighter's injuries from being exposed to colorless and odorless gases while responding to an emergency at a supermarket were not the result of an "accident" within the meaning of Retirement and Social Security Law § 363;

App. Div. annulled respondent's determination denying petitioner's application for accidental disability retirement benefits, and remitted the matter to respondent for further proceedings not inconsistent with the court's decision.

TOMHANNOCK, LLC v ROUSTABOUT RESOURCES, LLC:

3<sup>RD</sup> Dept. App. Div. order of 4/6/17; affirmance with two-Justice dissent; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution;

Specific Performance--When Remedy Appropriate--Whether plaintiff, which entered into an option agreement whereby buyers of a parcel of real property agreed to reconvey a portion of the parcel to plaintiff upon plaintiff's request, was entitled to specific performance of the option agreement despite the fact that plaintiff was unable to record the necessary deed due to a failure to obtain subdivision approval;

Supreme Court, Rensselaer County, denied defendant's motion for summary judgment and granted plaintiff's cross motion for partial summary judgment seeking specific performance; App. Div. affirmed.