

COURT OF APPEALS NEW FILINGS

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

June 11 through June 17, 2010

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 60 days after the appeal was taken; respondent's brief to be filed 45 days after the filing of appellant's brief; and a reply brief, if any, to be filed 15 days after 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.

CLYDE (RAYMOND), PEOPLE v:

4TH Dept. App. Div. orders of 4/30/10; reversal and affirmance; leave to appeal granted by Scudder, P.J., 6/3/10;

CRIMES - ATTEMPTED RAPE IN THE FIRST DEGREE - SUFFICIENCY OF THE EVIDENCE; TRIAL - PHYSICALLY RESTRAINED DEFENDANT - LEG SHACKLES - APPLICABILITY OF HARMLESS ERROR ANALYSIS; WITNESS - WHETHER THE APPELLATE DIVISION CORRECTLY HELD THAT THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO PRECLUDE THE PROSECUTOR FROM QUESTIONING MEDICAL EXPERTS ON THE ISSUE WHETHER THE VICTIM'S INJURIES MET THE LEGAL DEFINITIONS OF PHYSICAL INJURY AND SERIOUS PHYSICAL INJURY SET FORTH IN THE PENAL LAW;

Cayuga County Court order that granted in part defendant's motion for a trial order of dismissal and dismissed count one of the indictment; Cayuga County Court judgment convicting defendant of assault in the second degree (two counts), unlawful imprisonment in the first degree and promoting prison contraband in the first degree; App. Div. affirmed the order, reversed the judgment and granted a new trial on counts two through five of the indictment.

EUJOY REALTY CORP. v VAN WAGNER COMMUNICATIONS, LLC.:

1ST Dept. App. Div. order of 5/18/10; 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 at the App. Div. is on a question of law;

LANDLORD AND TENANT - RENT - WHETHER THE APPELLATE DIVISION CORRECTLY HELD THAT PLAINTIFF LANDLORD WAS ENTITLED TO SUMMARY JUDGMENT IN AN ACTION FOR RENT AND COUNSEL FEES ARISING OUT OF A TERMINATED LEASE AGREEMENT - LANDLORD'S ENTITLEMENT TO FULL YEAR'S RENT FOR 2007 WHERE LESSEE OF ADVERTISING BILLBOARD TERMINATED LEASE AS OF JANUARY 8, 2007 - DENIAL OF MOTION TO AMEND ANSWER;

Supreme Court, New York County, in an action for rent in the amount of \$94,133.57 and counsel fees arising out of a terminated lease agreement, denied plaintiff landlord's motion for summary judgment, granted the part of defendant tenant's cross motion that sought summary judgment dismissing the complaint and denied that part of defendant's cross motion that sought leave to amend the answer to add the affirmative defense of estoppel; App. Div. reversed, granted plaintiff's motion, denied defendant's motion and remanded for an assessment of counsel fees.

HENRY v PEGUERO et al.:

1ST Dept. App. Div. 4/29/10; reversal with dissents; sua sponte examination whether the appeal was timely taken, whether the order appealed from finally determines the action within the meaning of the Constitution and whether the two-justice dissent at the App. Div. is on a question of law;

Supreme Court, Bronx County granted plaintiff's motion to renew and reargue a 11/10/08 Supreme Court, Bronx County order granting summary judgment dismissing the complaint, vacated the 11/10/08 order and granted defendants' motion for summary judgment only to the extent of dismissing plaintiff's claims under the 90/180 days category; App. Div. reversed, denied plaintiff's motion to renew and reargue, reinstated the order dismissing the entire complaint and directed the Clerk to enter judgment accordingly.

STATE OF NEW YORK, MATTER OF v FARNSWORTH, &c.:

4TH Dept. App. Div. order of 4/30/10; affirmance; 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;

CRIMES - SEX OFFENDERS - CIVIL COMMITMENT OR SUPERVISION - CONSTITUTIONALITY OF MENTAL HYGIENE LAW ARTICLE 10 AS APPLIED TO PERSONS CONVICTED OF CERTAIN DESIGNATED FELONIES COMMITTED BEFORE

THE EFFECTIVE DATE OF ARTICLE 10 - APPLICATION OF CLEAR AND CONVINCING EVIDENCE STANDARD - CLAIMED VIOLATION OF APPELLANT'S DUE PROCESS AND EQUAL PROTECTION RIGHTS;
Supreme Court, Chautauqua County denied respondent's motion to dismiss a petition for civil management under article 10 of the Mental Hygiene Law; App. Div. affirmed.

MIGUEL M., MATTER OF (ANONYMOUS):

2ND Dept. App. Div. order of 7/28/09; affirmance; leave to appeal granted by Court of Appeals, 6/3/10;

MENTAL HEALTH - ASSISTED OUTPATIENT TREATMENT - PROCEEDING PURSUANT TO MENTAL HYGIENE LAW § 9.60 (KENDRA'S LAW) - WHETHER EXCEPTIONS TO PRIVACY PROVISIONS OF HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 (HIPAA) PERMIT A PHYSICIAN, IN A KENDRA'S LAW PROCEEDING, TO OBTAIN, AND INTRODUCE INTO EVIDENCE, AN INDIVIDUAL'S MEDICAL RECORDS WITHOUT AUTHORIZATION OR A COURT ORDER; WHETHER FEDERAL HIPAA PRIVACY RULE PREEMPTS MENTAL HYGIENE LAW § 33.13;

Supreme Court, Queens County granted the petition to authorize assisted outpatient treatment; App. Div. affirmed.

REYES (CARLOS), PEOPLE v:

1ST Dept. App. Div. order of 1/28/10; reversal with dissents; leave to appeal granted by Buckley, J., 6/3/10; Rule 500.11 review pending;

CRIMES - UNLAWFUL SEARCH AND SEIZURE - EXISTENCE OF REASONABLE SUSPICION JUSTIFYING POLICE TO FORCIBLY DETAIN DEFENDANT;
Supreme Court, New York County convicted defendant, upon his guilty plea, of attempted robbery in the third degree and sentenced him, as a second felony offender, to a term of 1 1/2 to 3 years; App. Div. reversed the judgment of conviction, on the law and the facts, granted the motion to suppress physical evidence and statements, vacated defendant's guilty plea and remanded the matter for further proceedings.

RIDGE ROAD FIRE DEPARTMENT, MATTER OF v SCHIANO, et al.:

4TH Dept. App. Div. order of 11/13/09; reversal and dismissal; leave to appeal granted by Court of Appeals, 6/3/10;

PROCEEDING AGAINST BODY OR OFFICER - ACCIDENTAL DISABILITY RETIREMENT BENEFITS - WHETHER SUBSTANTIAL RECORD EVIDENCE SUPPORTS THE HEARING OFFICER'S DETERMINATION GRANTING FIREFIGHTER ACCIDENTAL DISABILITY BENEFITS PURSUANT TO GENERAL MUNICIPAL LAW § 207-a - INJURY TO DRIVER OF FIRE TRUCK; STANDARD OF REVIEW;
Supreme Court, Monroe County granted the CPLR article 78 petition and annulled respondent Schiano's determination; App. Div. reversed, dismissed the petition and reinstated the determination of respondent Schiano granting respondent Nowak benefits pursuant to General Municipal Law § 207-a.

SEIFERHELD, MATTER OF v KELLY:

1ST Dept. App. Div. order of 2/11/10; reversal; leave to appeal granted by App. Div., 5/27/10;
CIVIL SERVICE - RETIREMENT AND PENSION BENEFITS - ACCIDENTAL DISABILITY RETIREMENT - WHETHER THE APPELLATE DIVISION CORRECTLY HELD THAT POLICE PENSION FUND LACKED STATUTORY AUTHORITY TO REVOKE OR SUSPEND PETITIONER'S DISABILITY BENEFITS BECAUSE THE BOARD OF TRUSTEES DID NOT DIRECT SUCH ACTION;
Supreme Court, New York County denied a CPLR 78 petition to annual respondent Police Commissioner's determination that revoked petitioner's accident disability retirement benefits and, among other things, to restore those benefits, and dismissed the proceeding; App. Div. reversed, reinstated the proceeding, granted the petition to the extent of annulling the determination, and remanding to respondent Board of Trustees for further proceedings consistent with the court's opinion.

TOWNS, MATTER OF v GRIEVANCE COMMITTEE:

2ND Dept. App. Div. order of 4/27/10; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;
ATTORNEY AND CLIENT - DISCIPLINARY PROCEEDINGS - CHALLENGE TO APPELLATE DIVISION ORDER SUSPENDING ATTORNEY FROM PRACTICE OF LAW;
App. Div., among other things, (1) granted petitioner's motion to confirm the Special Referee's report and denied respondent's cross motion to disaffirm the report; and (2) suspended respondent from the practice of law for a period of six months, commencing 5/27/10 and continuing until further order of the court, with leave to respondent to apply for reinstatement upon the expiration of that period, upon furnishing certain proof.

ESTATE OF WRIGHT, MATTER OF v CITY OF ROCHESTER, et al.:

4TH Dept. App. Div. order of 4/20/10; denial of motion to vacate dismissal of appeal; sua sponte examination whether the order finally determines the proceeding within the meaning of the Constitution and whether any jurisdictional basis exists to support an appeal as of right;
APPEAL - CHALLENGE TO APPELLATE DIVISION ORDER DENYING MOTION TO VACATE DISMISSAL OF APPEAL;
App. Div. denied appellant's motion to vacate the dismissal of an appeal taken from a Supreme Court, Monroe County order entered on 3/17/09.