

COURT OF APPEALS NEW FILINGS

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

July 9 through July 15, 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.

ACOSTA v CITY OF NEW YORK, et al.:

2ND Dept. App. Div. order of 4/6/10; reversal; leave to appeal granted by Court of Appeals, 6/29/10; Rule 500.11 review pending; TRIAL - VERDICT - SETTING VERDICT ASIDE - SUFFICIENCY OF THE EVIDENCE SUPPORTING JURY VERDICT FINDING DEFENDANTS LIABLE FOR BATTERY AND FALSE ARREST - APPELLATE DIVISION DETERMINATION THAT "THE RECORD IS REplete WITH INSTANCES WHERE THE TESTIMONY AND OTHER EVIDENCE ADDUCED BY THE PLAINTIFF WAS MANIFESTLY UNTRUE AND TAILORED TO AVOID THE CONSEQUENCES OF PREVIOUS STATEMENTS MADE BY HIM TO DISINTERESTED NONPARTY WITNESSES"; Supreme Court, Kings County denied defendants' motion pursuant to CPLR 4404(a) to set aside a jury verdict in favor of the plaintiff and for judgment as a matter of law or to set aside the jury verdict as against the weight of the evidence and for a new trial, and granted defendants' separate motion pursuant to

CPLR 4404(a) to set aside the verdict on the issue of damages only to the extent of ordering a new trial unless the plaintiff stipulated to reduce the damages award for future pain and suffering to the principal sum of \$325,000 (the 12/18/08 order); thereafter, Supreme Court issued a judgment that, upon the 12/18/08 order and plaintiff's stipulation, is in favor of the plaintiff and against defendants in the principal sum of \$480,000; App. Div. reversed the judgment, granted that branch of the defendants' motion pursuant to CPLR 4404(a) which was to set aside the jury verdict and for judgment as a matter of law, and modified the 12/18/08 order accordingly.

AMERICAN HOME ASSURANCE CO., et al. v NAUSCH, HOGAN & MURRAY, Inc. et al.:

1ST Dept. App. Div. order of 3/23/10; affirmance; leave to appeal granted by App. Div., 6/22/10;
INSURANCE - AGENTS AND BROKERS - BROKERS ON CONTRACTS OF REINSURANCE - CAUSES OF ACTION FOR INDEMNITY, CONTRIBUTION, BREACH OF FIDUCIARY DUTY, NEGLIGENCE AND UNJUST ENRICHMENT - ACCRUAL OF CAUSES OF ACTION - STATUTE OF LIMITATIONS - ALLEGED ATTEMPT TO CIRCUMVENT STATUTE OF LIMITATIONS BY PLEADING INDEMNITY AND CONTRIBUTION CAUSES OF ACTION - WHETHER THE COMPLAINT FAILS TO STATE A CAUSE ACTION FOR CONTRIBUTION;
Supreme Court, New York County denied defendant Newman Martin and Buchan (1987) Limited's motion to dismiss the complaint; App. Div. affirmed.

CLARK, PEOPLE ex rel. v WALSH:

3RD Dept. App. Div. order of 5/27/10; affirmance; sua sponte examination whether any jurisdictional basis exists for an appeal as of right;
HABEAS CORPUS - AVAILABILITY OF RELIEF;
Supreme Court, Sullivan County denied application for writ of habeas corpus; App. Div. affirmed.

DOHERTY et al. &c. v MERCHANTS MUTUAL INSURANCE COMPANY:

4TH Dept. App. Div. order of 6/11/10; affirmance with dissents;
INSURANCE - ACTION AGAINST INSURER - ACTION ALLEGING THAT INSURER ACTED IN BAD FAITH BY FAILING TO SETTLE AN UNDERLYING PERSONAL INJURY ACTION WITHIN THE POLICY LIMITS, THEREBY EXPOSING THE DEFENDANT IN THE UNDERLYING ACTION TO PERSONAL LIABILITY FOR THE DIFFERENCE BETWEEN THE VERDICT AMOUNT AND THE POLICY LIMIT;
SUMMARY JUDGMENT;
Supreme Court, Erie County granted defendant's motion for summary judgment dismissing the complaint; App. Div. affirmed.

EDWARDS, et al. v ERIE COACH LINES CO., et al.:

4TH Dept. App. Div. orders of 4/30/10; affirmances; leave to appeal granted by App. Div., 7/2/10;
CONFLICT OF LAW - LAW GOVERNING TORT ACTIONS - ACTION SEEKING DAMAGES FOR INJURIES OR WRONGFUL DEATH RESULTING FROM COLLISION OF TRACTOR-TRAILER PARKED ON SHOULDER OF HIGHWAY IN NEW YORK AND

ONTARIO, CANADA - WHETHER COURTS BELOW ERRED IN DETERMINING THAT THE LAW OF ONTARIO, CANADA APPLIED AS TO NONECONOMIC DAMAGES; EVIDENCE - JUDICIAL NOTICE - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT SUPREME COURT DID NOT ABUSE ITS DISCRETION BY TAKING JUDICIAL NOTICE OF ONTARIO LAW REGARDING NONECONOMIC DAMAGES DESPITE DEFENDANTS' FAILURE TO RAISE THE APPLICABILITY OF SUCH LAW AS AN AFFIRMATIVE DEFENSE AND TO PROVIDE THE SUBSTANCE OF THE LAW IN THEIR PLEADINGS PURSUANT TO CPLR 3016(e) - INTERPLAY BETWEEN CPLR 3016(e) AND CPLR 4511(b); Supreme Court, Livingston County granted defendants' motions and determined that the law of Ontario, Canada concerning noneconomic damages applies to this action to recover damages for personal injury and wrongful death; App. Div. affirmed.

GARCIA (RODRIGUECE), PEOPLE v:

1ST Dept. App. Div. order of 3/23/10; affirmance; leave to appeal granted by Lippman, Ch.J., 6/30/10;

CRIMES - RIGHT TO COUNSEL - CONFLICT OF INTEREST - WHETHER THE SENTENCING COURT CONDUCTED AN ADEQUATE INQUIRY INTO DEFENSE COUNSEL'S ALLEGED CONFLICT OF INTEREST;

Supreme Court, Bronx County convicted defendant, upon his guilty plea, of attempted robbery in the first degree and sentenced him, as a second violent felony offender, to a term of 7 1/2 years; App. Div. affirmed.

MCCARTHY v TURNER CONSTRUCTION, INC., et al.:

1ST Dept. App. Div. order of 4/20/10; affirmance; leave to appeal granted by App. Div., 6/29/10;

INDEMNITY - WHEN CLAIM FOR COMMON-LAW INDEMNIFICATION IS AVAILABLE - PROPERTY OWNERS AND GENERAL CONTRACTOR LIABLE UNDER LABOR LAW § 240(1) TO INJURED PLAINTIFF WORKING DIRECTLY FOR A SUBCONTRACTOR - WHETHER NON-NEGLIGENT PROPERTY OWNERS MAY SEEK COMMON-LAW INDEMNIFICATION FROM A NON-NEGLIGENT GENERAL CONTRACTOR WHO DID NOT ACTUALLY SUPERVISE OR CONTROL THE INJURED PLAINTIFF'S WORK BUT WHOSE CONTRACT WITH A NON-PARTY STATED THAT IT "SHALL SUPERVISE AND DIRECT" THE CONTRACT WORK AND "SHALL BE SOLELY RESPONSIBLE FOR AND HAVE CONTROL OVER CONSTRUCTION MEANS, METHODS, TECHNIQUES, SEQUENCES AND PROCEDURES FOR COORDINATING ALL PORTIONS" OF SUCH WORK;

Supreme Court, New York County denied the motion of defendants Boston Properties, Inc. and Times Square Tower Associates, LLC for summary judgment on their cross claim for contribution and common-law indemnification against defendant John Gallin & Son, Inc., and awarded Gallin summary judgment dismissing the cross claims; App. Div. affirmed.

OPHARDT, MATTER OF v VASQUEZ, &c, et al.:

4TH Dept. App. Div. orders of 6/11/10; affirmance and confirmation of determination; sua sponte examination whether a substantial constitutional question is directly involved to

support an appeal as of right;

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MUNICIPAL CORPORATIONS - VIOLATIONS OF THE NEW YORK STATE UNIFORM FIRE PREVENTION AND BUILDING CODE (BUILDING CODE) (19 NYCRR 1219.1 et seq.) - WHETHER ROCHESTER'S MUNICIPAL CODE VIOLATIONS BUREAU HAS JURISDICTION TO ADJUDICATE VIOLATIONS OF THE BUILDING CODE;

Monroe County Court order and judgment, in a combined CPLR article 78 and declaratory judgment action, transferring the CPLR article 78 proceeding to the App. Div. and, among other things, declaring that the Municipal Code Violations Bureau has jurisdiction to adjudicate violations of the Building Code; App. Div. affirmed the judgment, confirmed the determination finding that petitioner violated various Building Code provisions and dismissed the CPLR article 78 petition.

THE RGH LIQUIDATING TRUST, &c. v DELOITTE & TOUCHE LLP et al.:

1ST Dept. App. Div. order of 12/18/09; modification; leave to appeal granted by App. Div. 6/22/10 (as corrected on 7/8/10); ACCOUNTS AND ACCOUNTING - ACTION AGAINST ACCOUNTANTS - WHETHER THE SECURITIES LITIGATION UNIFORM STANDARDS ACT OF 1998 (SLUSA) REQUIRES THE DISMISSAL OF FRAUD CLAIMS AGAINST AN ACCOUNTING FIRM ASSERTED BY PLAINTIFF LIQUIDATING TRUST ON BEHALF OF HOLDERS OF BONDS ISSUED BY BANKRUPT COMPANY;

Supreme Court, New York County, among other things, denied defendants' motion to dismiss the amended complaint with respect to claims asserted on behalf of identified creditors and groups of creditors of Reliance Group Holdings, Inc.; App. Div. modified to grant the motion to the extent of dismissing the claims asserted on behalf of holders of bonds issued by Reliance, and otherwise affirmed.