

COURT OF APPEALS NEW FILINGS

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

January 28 through February 3, 2011

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.

ABN AMRO BANK, N.V. et al. v MBIA INC., et al.:

1ST Dept. App. Div. order of 1/11/11; reversal with dissents;
CONTRACTS - BREACH OR PERFORMANCE OF CONTRACT - CLAIMS ARISING
OUT OF RESTRUCTURING OF CONGLOMERATE INCLUDING INSTITUTIONS
HOLDING INSURANCE POLICIES ISSUED BY MBIA INSURANCE CORPORATION -
MOTION TO DISMISS COMPLAINT ON BASIS THAT CLAIMS CONSTITUTE
IMPERMISSIBLE COLLATERAL ATTACK ON THE INSURANCE SUPERINTENDENT'S
APPROVAL OF THE RESTRUCTURING; DISMISSAL AND NONSUIT;
Supreme Court, New York County denied defendants' motion to
dismiss the complaint; App. Div. reversed and granted defendants'
motion to dismiss the complaint.

BAZIL, PEOPLE ex rel. v MARSHALL:

2ND Dept. App. Div. order of 10/26/10; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

HABEAS CORPUS - AVAILABILITY OF RELIEF - CHALLENGE TO JURY INSTRUCTION;

Supreme Court, Westchester County denied a petition for a writ of habeas corpus and dismissed the proceeding; App. Div. affirmed.

CORSELLO et al. v VERIZON NEW YORK, INC., &c., et al.:

2ND Dept. App. Div. orders of 9/14/10; leave to appeal granted by App. Div., 1/21/11;

EMINENT DOMAIN - INVERSE CONDEMNATION - MULTI-PROPERTY TELEPHONE SERVICE TERMINALS AFFIXED TO INDIVIDUAL BUILDINGS - WHETHER INDIVIDUAL PROPERTY OWNERS HAVE A CAUSE OF ACTION FOR DAMAGES FOR INVERSE CONDEMNATION OR FOR A VIOLATION OF GENERAL BUSINESS LAW § 349; STATUTE OF LIMITATIONS; PARTIES - CLASS CERTIFICATION; Supreme Court, Kings County denied those branches of defendants' motion pursuant to CPLR 3211(a) which were to dismiss the first, second and fifth causes of action for failure to state a cause of action and as barred by the statute of limitations (Order No. 1); thereafter, the same court denied plaintiff's motion for, among other things, class certification pursuant to CPLR article 9 (Order No. 2); App. Div. dismissed the cross appeal from so much of Order No. 1 as denied that branch of defendants' motion which was to dismiss the first cause of action; and modified the order by (1) deleting the provision thereof denying that branch of defendants' motion which was to dismiss the first cause of action alleging inverse condemnation and substituting therefor a provision granting that branch of the motion, and (2) deleting the provision thereof granting that branch of defendants' motion which was to dismiss the third cause of action alleging unjust enrichment and substituting therefor a provision denying that branch of the motion; App. Div. dismissed as academic the appeal from so much of Order No. 2 as denied the plaintiffs' motion for leave to amend the first amended complaint, and otherwise affirmed.

JACKSON & NASH LLP v E. TIMOTHY McAULIFFE PLLC, et al.:

1ST Dept. App. Div. order of 12/28/10; affirmance with dissents; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution; EXECUTORS AND ADMINISTRATORS - COMPENSATION - WHETHER DEFENDANT FORMER LAW PARTNER WAS ENTITLED TO SUMMARY JUDGMENT DISMISSING THAT PORTION OF THE COMPLAINT SEEKING AN ACCOUNTING AND RECOVERY OF COMMISSIONS HE RECEIVED AS CO-EXECUTOR OF AN ESTATE - TIME WHEN COMMISSION BECAME "PAYABLE" WITHIN THE MEANING OF THE PARTNERSHIP AGREEMENT - APPLICABILITY OF SCPA 2307(5)(b);

Supreme Court, New York County granted the motion of the individual defendant McAuliffe for summary judgment dismissing that portion of the complaint that sought an accounting and recovery of commissions he received as co-executor of an estate, and denied plaintiff's cross-motion for partial summary judgment on its claims sounding in, among other things, breach of contract, breach of fiduciary duty and unjust enrichment for damages for alleged unbilled time for the period of July 1 through August 14, 2003; App. Div. affirmed.

TERRACE COURT, MATTER OF v NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL:

1ST Dept. App. Div. order of 12/28/10; affirmance with dissents; LANDLORD AND TENANT - RENT REGULATION - MAJOR CAPITAL IMPROVEMENT (MCI) RENT INCREASE - LANDLORD'S APPLICATION FOR MCI RENT INCREASE FOR PERFORMING, AMONG OTHER THINGS, POINTING, WATERPROOFING AND MASONRY WORK ON OUTSIDE OF APARTMENT BUILDING - CHALLENGE TO DETERMINATION BY NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL (DHCR) PERMANENTLY EXEMPTING FIVE APARTMENTS FROM AN MCI RENT INCREASE GRANTED AS TO THE REMAINING APARTMENTS BECAUSE A MOISTURE PROBLEM EXISTED IN THE FIVE APARTMENTS AFTER THE WORK WAS COMPLETED - WHETHER DHCR ERRED OR ACTED ARBITRARILY AND CAPRICIOUSLY IN PERMANENTLY EXEMPTING THE FIVE APARTMENTS FROM THE MCI RENT INCREASE RATHER THAN ALLOWING THE LANDLORD TO OBTAIN THE RENT INCREASE PROSPECTIVELY IF IT CORRECTED THE MOISTURE PROBLEM;

Supreme Court, New York County denied a CPLR article 78 petition to annul respondent DHCR's determination that denied a MCI rent increase for five apartments in petitioner's building, and dismissed the article 78 proceeding; App. Div. affirmed.