

COURT OF APPEALS NEW FILINGS

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

April 8 through April 14, 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 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.

BABA-ALI v STATE OF NEW YORK:

2ND Dept. App. Div. order of 9/14/10; reversal; leave to appeal granted by Court of Appeals, 3/29/11;

STATE - CLAIM AGAINST STATE - ACTION TO RECOVER DAMAGES FOR UNLAWFUL IMPRISONMENT - NONPECUNIARY DAMAGES - PAST AND FUTURE LOST EARNINGS; WHETHER PROSECUTOR'S FAILURE TO TURN OVER A POTENTIALLY EXCULPATORY DOCUMENT TO DEFENSE COUNSEL UNTIL DAY BEFORE TRIAL CAN CONSTITUTE "FRAUD OR MISREPRESENTATION" FOR PURPOSES OF COURT OF CLAIMS ACT SECTION 8-b;

Court of Claims denied defendant's motion to dismiss the claim for failure to state a cause of action and denied claimant's cross motion for summary judgment on the issue of liability; App. Div. affirmed in part, reversed in part and granted claimant's

cross motion for summary judgment on the issue of liability; thereafter, Court of Claims, after a nonjury trial on the issue of damages, awarded claimant nonpecuniary damages in the sum of \$1,750,000, and damages for past lost earnings in the principal sum of \$343,428, and did not award claimant future lost earnings; App. Div. reversed, reduced the award of nonpecuniary damages from the principal sum of \$1,750,000 to the principal sum of \$1,000,000, and remitted the matter to the Court of Claims for entry of an appropriate amended judgment.

FISHER (AARON RICHARD), PEOPLE v:

4TH Dept. App. Div. order of 11/12/10; affirmance; leave to appeal granted by Pigott, J., 4/4/11;
CRIMES - FAIR TRIAL - COURSE OF SEXUAL CONDUCT AGAINST A CHILD - ALLEGED PROSECUTORIAL MISCONDUCT - PRESERVATION; RIGHT TO COUNSEL - EFFECTIVE REPRESENTATION - ALLEGED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL;
Supreme Court, Monroe County convicted defendant of course of sexual conduct against a child in the first and second degrees, and endangering the welfare of a child; App. Div. affirmed.

KAHN v NEW YORK CITY DEPARTMENT OF EDUCATION, et al.:

1ST Dept. App. Div. order of 12/14/10; reversal; leave to appeal granted by Court of Appeals, 4/5/11;
SCHOOLS - TEACHERS - TERMINATION OF PROBATIONARY EMPLOYMENT - TIMELINESS OF CHALLENGE - WHETHER A CPLR ARTICLE 78 PETITION CHALLENGING THE TERMINATION OF PROBATIONARY EMPLOYMENT ON SUBSTANTIVE GROUNDS IS TIME-BARRED WHERE IT IS NOT COMMENCED WITHIN FOUR MONTHS AFTER THE EFFECTIVE DATE OF TERMINATION BUT IS COMMENCED WITHIN FOUR MONTHS AFTER THE PETITIONER EXHAUSTS AVAILABLE ADMINISTRATIVE REMEDIES;
Supreme Court, New York County denied respondents' motion to dismiss a CPLR article 78 petition challenging the termination of petitioner's probationary employment as a social worker; App. Div. reversed and granted respondents' motion to dismiss the petition.

MOUNT VERNON CITY SCHOOL DISTRICT v NOVA CASUALTY COMPANY:

2ND Dept. App. Div. order of 11/23/10; affirmance; leave to appeal granted by Court of Appeals, 3/29/11;
CONTRACTS - PUBLIC WORKS CONTRACTS - BONDS - PERFORMANCE BOND - ACTION ALLEGING THAT DEFENDANT CASUALTY COMPANY BREACHED PERFORMANCE BOND PROCURED FROM IT BY CONTRACTOR THAT PERFORMED CERTAIN WORK FOR PLAINTIFF SCHOOL DISTRICT BUT FAILED TO COMPLETE ALL CONTRACT WORK - WHETHER CASUALTY COMPANY WAS ENTITLED TO SUMMARY JUDGMENT ON ITS DEFENSE THAT PLAINTIFF'S PAYMENT TO THE DEPARTMENT OF LABOR (DOL) OF \$214,000 EARNED BY CONTRACTOR, MADE TO DOL TO SATISFY UNPAID WAGE CLAIMS ON AN UNRELATED PROJECT INVOLVING ANOTHER SCHOOL DISTRICT, CONSTITUTED A FORBIDDEN DIVERSION OF TRUST FUND ASSETS UNDER LIEN LAW ARTICLE 3-a THAT DISCHARGED CASUALTY COMPANY OF ITS OBLIGATIONS UNDER THE PERFORMANCE BOND; WHETHER PLAINTIFF'S \$214,000 PAYMENT TO DOL

VIOLATION OF THE TERMS OF THE PERFORMANCE BOND; "PYRAMIDING" BY CONTRACTOR; DAMAGES - COUNSEL FEES - WHETHER CONSTRUCTION CONTRACT AND/OR PERFORMANCE BOND ENTITLED PLAINTIFF SCHOOL DISTRICT TO AWARD OF ATTORNEYS' FEES INCURRED IN THIS LITIGATION; Supreme Court, Westchester County judgment that awarded to plaintiff Mount Vernon City School District damages and attorneys' fees incurred in completing the contract work but failed to award plaintiff attorneys' fees incurred in litigation to enforce the contract and performance bond; App. Div. affirmed.

NEW YORK CITY HEALTH & HOSPITALS CORPORATION, MATTER OF v NEW YORK STATE COMMISSION ON CORRECTION:

1ST Dept. App. Div. order of 8/17/10; affirmance and dismissal; leave to appeal granted by Court of Appeals, 3/31/11; PRISONS AND PRISONERS - COMMISSION OF CORRECTION - SUBPOENA SEEKING MEDICAL RECORDS OF DECEASED INMATE - WHETHER THE PHYSICIAN-PATIENT PRIVILEGE IN CPLR 4504 PROTECTS THE MEDICAL RECORDS OF A DECEASED INMATE FROM DISCLOSURE TO A STATE AGENCY THAT SUBPOENAED SUCH RECORDS PURSUANT TO ITS STATUTORILY-MANDATED INVESTIGATIVE FUNCTIONS INTO THE CAUSE OF AND CIRCUMSTANCES SURROUNDING AN INMATE'S DEATH - CORRECTION LAW § 47; Supreme Court, New York County judgment quashing the subpoena duces tecum issued by New York State Commission on Correction and served upon Elmhurst Hospital seeking the medical records of a deceased inmate; App. Div. affirmed and dismissed the appeals from certain Supreme Court orders as subsumed in the appeal from the judgment.

OBOT v MEDAILLE COLLEGE:

4TH Dept. App. Div. order of 3/25/11; dismissal; sua sponte examination 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 - DISMISSAL OF APPEAL - WHETHER APPEAL TO APPELLATE DIVISION LIES FROM SUA SPONTE SUPREME COURT ORDER STRIKING AND VACATING A NOTE OF ISSUE AND CERTIFICATE OF READINESS; Supreme Court, Erie County struck and vacated the note of issue and certificate of readiness; App. Div. dismissed the appeal.

RAMIREZ v SHOATS:

1ST Dept. App. Div. order of 11/18/10; affirmance with dissents; leave to appeal granted by App. Div., 3/22/11; Rule 500.11 review pending; NEGLIGENCE - PLAINTIFF INJURED WHEN PIECE OF CORRUGATED METAL COVERING THE UNFINISHED LANDING OF A NEWLY CONSTRUCTED STAIRWAY SLIPPED UNDER HIS FEET, CAUSING HIM TO FALL TO THE BASEMENT LEVEL OF A BUILDING UNDER CONSTRUCTION - WHETHER STAIRWAY WAS PLAINTIFF'S SOLE MEANS OF ACCESS TO AND FROM HIS WORK AREA AND THUS WAS A SAFETY DEVICE WITHIN THE MEANING OF LABOR LAW § 240(1); RECALCITRANT WORKER; SUMMARY JUDGMENT;

Supreme Court, Bronx County denied defendant building owner's motion for summary judgment dismissing the Labor Law § 240(1) and § 241-a causes of action as against her; App Div. affirmed.

SOSA (GILBERTO), PEOPLE v:

1ST Dept. App. Div. order of 2/8/11; affirmance; leave to appeal granted by Smith, J., 4/1/11;

CRIMES - SENTENCE - RESENTENCING UNDER DRUG LAW REFORM ACT OF 2009 - MEANING OF "EXCLUSION OFFENSE" UNDER CPL 440.46(5)(a) - WHETHER A VIOLENT FELONY OFFENSE "FOR WHICH THE PERSON WAS PREVIOUSLY CONVICTED WITHIN THE PRECEDING TEN YEARS" MEANS CONVICTIONS WITHIN TEN YEARS PRECEDING THE DRUG OFFENSE FOR WHICH RESENTENCING IS SOUGHT OR, AS THE APPELLATE DIVISION CONCLUDED, CONVICTIONS WITHIN TEN YEARS PRECEDING THE RESENTENCING APPLICATION;

Supreme Court, New York County resentenced defendant pursuant to CPL 440.46 to an aggregate term of 7 years; App. Div. affirmed.