

COURT OF APPEALS NEW FILINGS

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

March 16, 2012 through March 22, 2012

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.

ASSOCIATION FOR COMMUNITY LIVING, INC. et al., MATTER OF v NEW YORK STATE OFFICE OF MENTAL HEALTH, et al.:

3RD Dept. App. Div. order of 2/9/12; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;
HEALTH - MEDICAID - CHALLENGE TO AGENCY'S MEDICAID EXEMPT INCOME RECOUPMENT POLICY - ALLEGED VIOLATION OF RULE-MAKING REQUIREMENTS CONTAINED IN ARTICLE IV, SECTION 8 OF THE STATE CONSTITUTION - NECESSITY FOR A RECOUPMENT HEARING - CONSTITUTIONAL CHALLENGE TO L 2010, CH 111, PART D;
Supreme Court, Albany County dismissed a CPLR article 78 petition seeking, among other things, review of respondents' implementation of Medicaid exempt income requirements; App. Div. affirmed.

ECHEVARRIA (ALEX), PEOPLE v:

1ST Dept. App. Div. order of 11/15/11; affirmance; leave to appeal granted by Ciparick, J., 3/8/12;

CRIMES - RIGHT TO PUBLIC TRIAL - CLOSURE OF COURTROOM - CONSIDERATION OF REASONABLE ALTERNATIVES TO CLOSURE - CLOSURE LIMITED TO DURATION OF TRIAL TESTIMONY BY UNDERCOVER POLICE OFFICERS WITH CONSIDERATION TO BE GIVEN TO ANY REQUESTS BY DEFENDANT'S FAMILY MEMBERS FOR ACCESS TO THE COURTROOM DURING THAT TIME; JURY CHARGE - CHALLENGE TO COURT'S CHARGE ON THE AGENCY DEFENSE;

Supreme Court, New York County convicted defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal sale of a controlled substance in or near school grounds, and sentenced him, as a second felony drug offender whose prior felony conviction was a violent felony, to concurrent terms of 10 years; App. Div. affirmed.

FRACCOLA v FRACCOLA:

4TH Dept. App. Div. order of 2/10/12; affirmance; sua sponte examination whether the appeal insofar as taken by Playtime Boutique, Inc. should be dismissed because Albert Fraccola is not its authorized legal representative pursuant to CPLR 321(a) and whether a substantial constitutional question is directly involved to support an appeal as of right;

PLEADING - COMPLAINT - DISMISSAL OF COMPLAINT;

Supreme Court, Oneida County, among other things, granted defendants' motion to dismiss the complaint and dismissed the complaint; App. Div. affirmed.

GRIFFIN (ANTHONY), PEOPLE v:

1ST Dept. App. Div. order of 12/15/11; reversal; leave to appeal granted by Sweeny, J., 2/28/12;

CRIMES - RIGHT TO COUNSEL - WHETHER THE APPELLATE DIVISION ERRED IN RULING THAT THE TRIAL COURT'S DISCHARGE OF DEFENDANT'S COUNSEL WITHOUT CONSULTING DEFENDANT WAS AN ABUSE OF DISCRETION AND INTERFERED WITH DEFENDANT'S RIGHT TO COUNSEL;

Supreme Court, New York County convicted defendant of robbery in the first degree and attempted robbery in the first degree, and sentenced him to concurrent terms of 20 years to life; App. Div. reversed and remanded for further proceedings.

J-P GROUP, LLC, MATTER OF v NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT:

4TH Dept. App. Div. order of 1/31/12; modification;

CONSTITUTIONAL LAW - DUE PROCESS OF LAW - RETROACTIVE APPLICATION OF EMPIRE ZONE ACT AMENDMENTS - REVOCATION OF TAX CREDITS;

Supreme Court, Erie County, among other things, granted a CPLR article 78 petition to annul the determination of respondent New York State Department of Economic Development revoking petitioner's certification as a qualified Empire zone enterprise; App. Div. modified by vacating the first and third through seventh decretal paragraphs and affirmed the judgment as modified.

MOSS (ANDREW), PEOPLE v:

1ST Dept. App. Div. order of 11/22/11; affirmance; leave to appeal granted by Ciparick, J., 3/13/12;
CRIMES - RIGHT TO PUBLIC TRIAL - CLOSURE OF COURTROOM - WHETHER UNDERCOVER OFFICER'S TESTIMONY AT HINTON HEARING ESTABLISHED AN OVERRIDING INTEREST THAT WARRANTED CLOSURE OF THE COURTROOM - CONSIDERATION OF REASONABLE ALTERNATIVES TO CLOSURE - COURT REJECTED ALTERNATIVE TO CLOSURE PROPOSED BY DEFENDANT BUT PERMITTED DEFENDANT'S FAMILY MEMBERS TO ATTEND PROCEEDINGS; Supreme Court, New York County convicted defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentenced him, as a second felony drug offender whose prior conviction was a violent felony, to a term of 10 years; App. Div. affirmed.

TERMINELLO et al. v THE VILLAGE OF PIERMONT, &c., et al.:

2ND Dept. App. Div. order of 2/7/12; reversal and affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;
TAXATION - REAL PROPERTY TAX - CLASSIFICATION OF CONDOMINIUMS AS HOMESTEADS OR NON-HOMESTEADS AND IMPOSITION OF DIFFERENT TAX RATES ON EACH - EQUAL PROTECTION CHALLENGE TO RPTL 1903, AS APPLIED BY LOCAL LAW NO. 7 (2005) OF THE VILLAGE OF PIERMONT; Supreme Court, Rockland County denied Village defendant's motion for summary judgment dismissing the complaint insofar as asserted against it and declared that Real Property Tax Law article 19, as applied by Local Law No. 7 (2005) of the Village of Piermont, is not unconstitutional; and denied plaintiffs' cross motion for summary judgment on the issue of liability; App. Div. reversed the Supreme Court order insofar as appealed from by the Village defendant, granted the Village defendant's motion, and remitted to Supreme Court for entry of a judgment declaring that Real Property Tax Law article 9, as applied by Local Law No. 7 (2005) of the Village of Piermont, is not unconstitutional; and affirmed the Supreme Court order insofar as cross-appealed from by plaintiffs.

UNITED STATES FIDELITY & GUARANTY COMPANY, et al. v AMERICAN RE-INSURANCE COMPANY, et al.:

1ST Dept. App. Div. order of 1/24/12; affirmance; leave to appeal granted by App. Div., 3/8/12;
INSURANCE - REINSURANCE - "FOLLOW THE FORTUNES" CLAUSE - REINSURED'S DECISION TO ALLOCATE ALL SETTLEMENT CLAIMS AND, THUS, ALL REINSURANCE CLAIMS TO A 1959 INSURANCE CONTRACT, WHICH HAD A \$200,000 PER PERSON LIMIT AND, IF NOT SUBJECT TO AN UPWARD AMENDMENT OF THE RETENTION AMOUNT, WAS SUBJECT ONLY TO A \$100,000 RETENTION FOR EACH COVERED LOSS - APPLICATION OF FOLLOW THE FORTUNE'S CLAUSE WHERE REINSURERS CHALLENGE REINSURED'S ALLEGED BAD FAITH OR ABSENCE OF "UTMOST GOOD FAITH" IN ALLOCATING ITS

SETTLEMENT WITH ITS INSURED AND IN TREATING ALL CLAIMS AS ARISING UNDER A SINGLE POLICY YEAR - WHETHER TRIABLE ISSUES OF FACT EXIST AS TO WHETHER THE PARTIES AGREED TO RETROACTIVELY INCREASE THE RETENTION AMOUNT FROM \$100,000 TO \$3 MILLION;

Supreme Court, New York County granted plaintiffs' motion for summary judgment, denied defendants' motions for summary judgment and awarded damages to plaintiffs as against certain defendants; App. Div. affirmed.