

COURT OF APPEALS NEW FILINGS

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

**April 6, 2012 through April 12, 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.**

DIGGINS (ISAAC), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 5/26/11; affirmance; leave to appeal granted by Lippman, Ch.J., 3/30/12;

CRIMES - RIGHT TO COUNSEL - EFFECTIVE REPRESENTATION - DEFENSE COUNSEL DID NOT PARTICIPATE IN PROCEEDINGS AGAINST AN ABSCONDING DEFENDANT WHO WAS TRIED IN ABSENTIA;

Supreme Court, New York County denied defendant's CPL 440.10 motion to vacate a 6/15/04 judgment of the same court; App. Div. affirmed.

FAIR v SMITH, et al.:

3<sup>RD</sup> Dept. App. Div. order of 3/8/12; affirmance; sua sponte examination whether a substantial constitutional question is directly involved;

PRISONS AND PRISONERS - FREEDOM OF WORSHIP - PRISONER TOLD THAT HE HAD TO WEAR A COLLARED SHIRT TO COVER THE BEADED NECKLACES WORN AS A PART OF HIS OBSERVANCE OF THE YORUBA/SANTERIA FAITH - CLAIMED VIOLATION OF CONSTITUTIONAL RIGHTS; Supreme Court, Ulster County granted defendants' motion to dismiss the complaint; App. Div. affirmed.

HOWARD (MALIK), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 1/12/12; affirmance with dissents; Rule 500.11 review pending;

CRIMES - ROBBERY - WHETHER THERE WAS SUFFICIENT EVIDENCE FOR A FIRST DEGREE ROBBERY CHARGE (PENAL LAW § 160.15[4]) WHERE THE "WEAPON" DISPLAYED DURING THE ROBBERY WAS NOT A LOADED, OPERABLE FIREARM - BB OR AIR GUN; AFFIRMATIVE DEFENSE; CLAIMED SUGGESTIVE SHOW-UP IDENTIFICATION; EFFECTIVENESS OF DEFENSE COUNSEL; Supreme Court, Bronx County convicted defendant, after a jury trial, of robbery in the first degree, and sentenced him, as a second violent felony offender, to a term of 14 years and 5 years post-release supervision; App. Div. affirmed.

FELDMAN, &c. v LEVINE:

1<sup>ST</sup> Dept. App. Div. order of 12/13/11; reversal; leave to appeal granted by Court of Appeals, 3/29/12;

EVIDENCE - SCIENTIFIC EVIDENCE - WHETHER ESTIMATION OF RATE OF PROGRESSION OF CANCER INVOLVED THE TYPE OF NOVEL SCIENTIFIC METHODOLOGY CONTEMPLATED FOR A FRYE HEARING; Supreme Court, New York County dismissed the complaint; App. Div. reversed, vacated the judgment, denied defendant's motion, reinstated the jury verdict awarding plaintiff the principal sum of \$1,200,000 and directed the clerk to enter judgment accordingly.

LANCASTER, MATTER OF v INCORPORATED VILLAGE OF FREEPORT (& ANOTHER PROCEEDING):

2<sup>ND</sup> Dept. App. Div. order of 2/21/12; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

PUBLIC OFFICERS - DUTY TO DEFEND OR INDEMNIFY PUBLIC EMPLOYEE - TERMINATION OF OBLIGATION - FAILURE TO COOPERATE - WHETHER NONDISPARAGEMENT CLAUSES IN STIPULATIONS OF SETTLEMENT AND DISCONTINUANCE CONSTITUTE PRIOR RESTRAINTS ON FREE SPEECH - RESPONDENTS' ALLEGED SUBVERSION OF CERTAIN PETITIONERS' OBLIGATIONS TO VILLAGE RESIDENTS - WHETHER THE CHALLENGED DETERMINATION WAS ARBITRARY AND CAPRICIOUS - ALLEGED VIOLATION OF

Supreme Court, Nassau County, in two related hybrid CPLR article 78 proceedings and actions for declaratory relief, denied the petition in proceeding number one and dismissed that proceeding, and denied the petition in proceeding number 2 and dismissed that proceeding; both petitions challenged a determination of the Board of Trustees of the Village of Freeport that revoked a prior resolution providing a defense and indemnification to petitioners in certain civil actions; App. Div. affirmed.

MACRI, MATTER OF v KELLY:

1<sup>ST</sup> Dept. App. Div. order of 12/27/11; affirmance; leave to appeal granted by Court of Appeals, 4/3/12;

CIVIL SERVICE - RETIREMENT AND PENSION BENEFITS - WORLD TRADE CENTER PRESUMPTION - PREEXISTING CONDITION - WHETHER THERE WAS CREDIBLE EVIDENCE TO REBUT THE WORLD TRADE CENTER PRESUMPTION ACCORDED TO PETITIONER'S CLAIM FOR ACCIDENTAL LINE-OF-DUTY DEATH BENEFITS;

Supreme Court, New York County granted a CPLR article 78 petition seeking, among other things, to annul respondents' decision to disapprove the designation of the death of petitioner's husband as a line-of-duty World Trade Center death, and to compel such designation; App. Div. affirmed.

MIGLINO, &c. v BALLY TOTAL FITNESS OF GREATER NEW YORK:

2<sup>ND</sup> Dept. App. Div. order of 12/27/11; modification; leave to appeal granted by App. Div., 3/19/12;

NEGLIGENCE - DUTY - WHETHER HEALTH CLUBS HAVE DUTY TO USE AUTOMATED EXTERNAL DEFIBRILLATOR (AED) DURING EMERGENCY - GENERAL BUSINESS LAW § 627-a - STATUTORY OR COMMON LAW CAUSE OF ACTION FOR FAILURE TO USE AED - "GOOD SAMARITAN" DEFENSE;

Supreme Court, Suffolk County denied defendants' motion pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action; App. Div. modified by deleting the provision denying that branch of the defendants' motion pursuant to CPLR 3211(a)(7) which was to dismiss the complaint insofar as asserted against Bally Total Fitness Corporation, and substituting therefore a provision granting that branch of the motion.

ORSI v HARALABATOS:

2<sup>ND</sup> Dept. App. Div. order of 11/22/11; reversal; leave to appeal granted by Court of Appeals, 3/27/12;

PHYSICIANS AND SURGEONS - MALPRACTICE - POST-OPERATIVE CARE - SUMMARY JUDGMENT - EXISTENCE OF TRIABLE ISSUE OF FACT AS TO PROXIMATE CAUSE - PRESERVATION OF ARGUMENT FOR APPELLATE REVIEW;

Supreme Court, Suffolk County, as relevant here, denied the motion of defendants Haralabatos and Stony Brook Orthopaedic Associates for summary judgment dismissing the complaint insofar as asserted against them; App. Div. reversed and granted the motion of defendants Haralabatos and Stony Brook Orthopaedic Associates for summary judgment dismissing the complaint insofar as asserted against them.

PEREZ, MATTER OF v RHEA, &c.:

1<sup>ST</sup> Dept. App. Div. order of 8/25/11; reversal; leave to appeal granted by Court of Appeals, 3/29/12;

PUBLIC HOUSING - TERMINATION OF TENANCY - WHETHER PENALTY WAS SO DISPROPORTIONATE TO OFFENSE OF UNDER-REPORTING INCOME AS TO BE SHOCKING TO ONE'S SENSE OF FAIRNESS;

Supreme Court, New York County dismissed a CPLR article 78 proceeding seeking to annul and vacate or, in the alternative, remand for imposition of a lesser penalty, the determination of the New York City Housing Authority (NYCHA), which terminated petitioner's tenancy based upon findings that she failed to report employment income; App. Div. reversed, granted the petition to the extent of vacating the penalty of termination and remanding the matter to NYCHA for the imposition of a lesser penalty.