

COURT OF APPEALS NEW FILINGS

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

June 29, 2012 through July 5, 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.

ALICIDE (JAMES), PEOPLE v:

2ND Dept. App. Div. order of 5/1/12; affirmance; leave to appeal granted by Graffeo, J., 6/25/12;

CRIMES - JURORS - WHETHER TRIAL COURT COMMITTED MODE OF PROCEEDINGS ERROR IN PERSONALLY PARTICIPATING IN THE READBACK OF TESTIMONY OF TWO PROSECUTION WITNESSES; ALLEGED DUE PROCESS VIOLATIONS AND VIOLATION OF CPL 310.30;

Supreme Court, Kings County convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree, and imposed sentence; App. Div. affirmed.

BEATY (DONNY P.), PEOPLE v:

4TH Dept. App. Div. order of 11/10/11; affirmance; leave to appeal granted by Smith, J., 6/27/12;

CRIMES - INSTRUCTIONS - INTOXICATION - WHETHER THE TRIAL COURT ERRED IN REFUSING TO CHARGE THE JURY THAT INTOXICATION MAY NEGATE THE INTENT ELEMENT OF RAPE IN THE FIRST DEGREE; CONSOLIDATION AND SEVERANCE - WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SEVER THE FIRST FOUR COUNTS OF THE INDICTMENT, WHICH INVOLVED ONE VICTIM AND CHARGED HIM WITH, AMONG OTHER THINGS, RAPE IN THE FIRST DEGREE, FROM THE FIFTH COUNT OF THE INDICTMENT, WHICH CHARGED HIM WITH BURGLARY IN THE SECOND DEGREE WITH RESPECT TO ANOTHER VICTIM; SUFFICIENCY OF THE EVIDENCE OF BURGLARY IN THE SECOND DEGREE;

Supreme Court, Monroe County convicted defendant, upon a jury verdict, of rape in the first degree, burglary in the first degree, assault in the second degree, petit larceny and burglary in the second degree; App. Div. affirmed.

BROWN (THOMAS), PEOPLE v:

1ST Dept. App. Div. order of 12/27/11; affirmance; leave to appeal granted by Jones, J., 6/21/12;

CRIMES - SENTENCE - CONCURRENT AND CONSECUTIVE TERMS - WHETHER DEFENDANT WAS VALIDLY SENTENCED TO CONSECUTIVE TERMS OF IMPRISONMENT FOR CONVICTIONS OF MURDER IN THE SECOND DEGREE AND CRIMINAL POSSESSION OF A WEAPON IN THE THIRD DEGREE; WHETHER PROSECUTOR'S SUMMATION IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF; Supreme Court, New York County convicted defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the third degree, and sentenced him to an aggregate term of 28 years to life; App. Div. affirmed.

DARRYL C., MATTER OF:

1ST Dept. App. Div. order of 6/26/12; reversal with dissents; sua sponte examination whether the two-Justice dissent at the App. Div. is on a question of law;

INFANTS - JUVENILE DELINQUENTS - UNLAWFUL SEARCH AND SEIZURE - WHETHER POLICE OFFICER WAS JUSTIFIED IN CONDUCTING A LIMITED SAFETY FRISK;

Family Court, Bronx County adjudicated Darryl C. a juvenile delinquent upon his admission that he committed acts that, if committed by an adult, would constitute the crime of criminal possession of a weapon in the second degree, and placed him on probation; App. Div. reversed and dismissed the delinquency petition.

FLAMENBAUM (DECEASED), MATTER OF:

2ND Dept. App. Div. order of 5/30/12; reversal; leave to appeal granted by App. Div., 6/22/12; Rule 500.11 review pending; EXECUTORS AND ADMINISTRATORS - CLAIMS AGAINST ESTATE - MUSEUM'S CLAIM FOR RETURN OF AN ARTIFACT IN POSSESSION OF THE DECEASED; LACHES; ESTATES - ACCOUNTING;

Surrogate's Court, Nassau County, after a hearing, among other things, determined that the Vorderasiatisches Museum had met its prima facie burden of proving legal title or a superior right of possession to certain personal property in the possession of the estate of Riven Flamenbaum and denied the museum's claim for return of the property as barred by the doctrine of laches; App. Div. reversed, granted the museum's claim for return of certain personal property in the possession of the estate of Riven Flamenbaum, and remitted the matter to Surrogate's Court for further proceedings including the entry of a decree, among other things, directing Hannah K. Flamenbaum, as executor of the estate of Riven Flamenbaum, to turn over the subject property to the museum, and dismissed the executor's cross appeal.

GLASSMAN v ProHEALTH AMBULATORY SURGERY CENTER, INC., et al.
(APP. DIV. NO. 2011-08252):

2ND Dept. App. Div. order of 6/13/12; dismissal; sua sponte examination whether the terms of the Court's remittitur were violated;

APPEALS - ALLEGED VIOLATION OF COURT OF APPEALS REMITTITUR; App. Div. dismissed defendants' appeal from a 9/24/10 Supreme Court, Nassau County, order that, among other things, denied that branch of their motion which was to discharge or cancel an appeal bond filed by them on 5/23/07, and determined that plaintiff is entitled to enforce an interlocutory judgment entered on 1/16/09, on consent of the parties, that awarded the plaintiff an attorney's fee.

GLASSMAN v ProHEALTH AMBULATORY SURGERY CENTER, INC., et al.
(APP. DIV. NOS. 2011-08261, 2011-08249 and 2011-08255):

2ND Dept. App. Div. order of 6/13/12; dismissal; sua sponte examination whether the terms of the Court's remittitur were violated;

APPEALS - ALLEGED VIOLATION OF COURT OF APPEALS REMITTITUR; App. Div. (1) dismissed defendants' appeal from stated portions of a Supreme Court order entered 10/29/10, which, among other things, upon remittitur, in effect, denied those branches of their motion which were for leave to renew their prior motion for leave to amend their answer to include an affirmative defense alleging breach of contract and a counterclaim alleging breach of fiduciary duty and, thereupon, for summary judgment dismissing the complaint and on the proposed counterclaim alleging breach of fiduciary duty; (2) dismissed defendants' appeal from stated

portions of an amended decision of Supreme Court dated 6/2/11; and (3) affirmed a Supreme Court amended judgment entered 9/10/11, which, upon the order entered 10/29/10, and upon an interlocutory judgment entered 1/16/09, awarding plaintiff attorney's fees, was in plaintiff's favor in the principal sum of \$512,061, plus \$925,000 in attorney's fees.

ISLAND PARK, LLC v STATE OF NEW YORK:

3RD Dept. App. Div. order of 3/22/12; affirmance; leave to appeal granted by Court of Appeals, 6/27/12;
EMINENT DOMAIN - DE FACTO APPROPRIATION - CLOSURE OF A PRIVATE AT-GRADE RAILROAD CROSSING - WHETHER CLOSURE OF CROSSING WAS A DE FACTO TAKING OF CLAIMANT'S EASEMENT OVER THE CROSSING;
Court of Claims, among other things, granted defendant's cross motion for summary judgment dismissing the claim; App. Div. affirmed.

JOHNSON (MARCHE), PEOPLE v:

4TH Dept. App. Div. order of 4/27/12; affirmance; leave to appeal granted by Fahey, J., 5/31/12; Rule 500.12 review pending;
CRIMES - SENTENCE - RESENTENCE - POSTRELEASE SUPERVISION - APPROPRIATE CORRECTIVE ACTION - CHALLENGE TO APPELLATE DIVISION DETERMINATION THAT SENTENCING COURT ERRED IN PERMITTING DEFENDANT TO REPRESENT HIMSELF AT RESENTENCING, BUT THAT SUCH ERROR DID NOT REQUIRE A REMAND FOR RESENTENCING BECAUSE THERE WERE NO ISSUES TO BE LITIGATED WITH RESPECT TO THE SENTENCE - WHETHER PEOPLE STIPULATED TO RESENTENCE WITHOUT IMPOSITION OF POSTRELEASE SUPERVISION;
Cayuga County Court resentenced defendant to the same term of imprisonment as to which he was originally sentenced, to be followed by five years of postrelease supervision; App. Div. affirmed.

MORRIS BUILDERS, LP, et al., MATTER OF v NEW YORK STATE EMPIRE ZONE DESIGNATION BOARD:

3RD Dept. App. Div. order of 5/3/12; modification;
CONSTITUTIONAL LAW - TAKING OF PROPERTY - ELIGIBILITY TO PARTICIPATE IN EMPIRE ZONE PROGRAM - WHETHER THE APRIL 2009 AMENDMENTS TO GENERAL MUNICIPAL LAW § 959, PROVIDING FOR THE REVOCATION OF ELIGIBILITY TO PARTICIPATE IN THE EMPIRE ZONE PROGRAM FOR COMPANIES THAT FAILED TO MEET CERTAIN CRITERIA AS OF 1/1/08 VIOLATED DUE PROCESS; ECONOMIC DEVELOPMENT;
Supreme Court, Albany County, among other things, dismissed petitioner's application, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, to review a determination of respondent Empire Zone Designation Board revoking the certification of petitioner Morris Builders, LP as an empire zone business enterprise; App. Div. modified by

reversing so much of the judgment as dismissed that part of the petition/complaint seeking a declaration that the April 2009 amendments to General Municipal Law § 959 may not be applied retroactively to 1/1/08; granted the petition/complaint to that extent and declared that said amendments shall be applied prospectively; and affirmed the judgment as so modified.

NOGHREY v TOWN OF BROOKHAVEN et al.:

Supreme Court, Suffolk County second amended judgment of 4/27/12, bringing up for review 2ND Dept. App. Div. order of 2/21/12; dismissal and modification; sua sponte examination whether the order appealed and cross-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; CONSTITUTIONAL LAW - TAKING OF PROPERTY - DUE PROCESS - ADMINISTRATIVE DELAY - PARTIAL REGULATORY TAKING THROUGH MUNICIPAL REZONING - SUMMARY JUDGMENT - ECONOMIC IMPACT - APPLICATION BY COURT OR JURY OF BALANCING OF FACTORS TEST STATED IN PENN CENTRAL TRANSP. CO. v NEW YORK CITY (438 US 104 [1978]); App. Div. (1) dismissed defendants' appeals from (a) so much of a 2/11/10 Supreme Court, Suffolk County order as, upon a jury verdict finding, among other things, that the plaintiff sustained damages in the principal sum of \$1,202,000 (\$842,000 for the property known as Diamond Plaza and \$360,000 for the property known as Liberty Plaza), denied their motion pursuant to CPLR 4404(a) to set aside the verdict and for judgment as a matter of law, or, in the alternative, to set aside the verdict as contrary to the weight of the evidence and for a new trial, and (b) a judgment of the same court dated 5/7/10; and (2) modified an amended judgment of the same court dated 9/20/10, which, upon the jury verdict and the order, among other things, was in favor of the plaintiff and against defendants in the principal sum of \$1,202,000, (a) by reducing the award from the principal sum of \$1,202,000 to the principal sum of \$842,000, and (b) by deleting the provision thereof awarding the plaintiff interest on the principal sum of \$1,202,000; (3) affirmed the amended judgment as so modified; (4) granted that branch of defendants' motion pursuant to CPLR 4404(a) which was to set aside the jury verdict with respect to the property known as Liberty Plaza as contrary to the weight of the evidence and for a new trial with respect to that property and modified the 2/11/10 order accordingly; (5) severed so much of the ninth and twelfth causes of action of the amended complaint as alleged a partial regulatory taking of the Liberty Plaza property without just compensation pursuant to 42 USC § 1983; and (6) remitted the matter to Supreme Court, Suffolk County, for a new trial on those portions of the ninth and twelfth causes of action, and for a

recalculation of interest on the damages award pertaining to the property known as Diamond Plaza in accordance with the court's decision, and thereafter for an entry of appropriate amended judgments; thereafter, Supreme Court, Suffolk County, among other things, awarded plaintiff \$842,000, plus \$4,501,223 interest with respect to the "Diamond Plaza" property.

PADILLA (KENNETH), PEOPLE v:

1ST Dept. App. Div. order of 11/10/11; affirmance; leave to appeal granted by Jones, J., 6/21/12;
CRIMES - UNLAWFUL SEARCH AND SEIZURE - INVENTORY SEARCH - WHETHER THE POLICE CONDUCTED A PROPER INVENTORY SEARCH AND PREPARED A MEANINGFUL INVENTORY LIST; SUFFICIENCY OF THE EVIDENCE SUPPORTING CONVICTION OF CRIMINAL POSSESSION OF A WEAPON IN THE SECOND DEGREE; ALLEGED PROSECUTORIAL MISCONDUCT;
Supreme Court, New York County convicted defendant of criminal possession of a weapon in the second degree and sentenced him, as a second violent felony offender, to a term of 7 years; App. Div. affirmed.

PRINCIPE, MATTER OF v NEW YORK CITY DEPARTMENT OF EDUCATION:

1ST Dept. App. Div. order of 4/5/12; affirmance with dissents; leave to appeal granted by App. Div., 6/19/12; motion to dismiss appeal pending;
SCHOOLS - TEACHERS - TERMINATION OF EMPLOYMENT - CPLR ARTICLE 75 PROCEEDING - WHETHER PENALTY OF TERMINATION WAS EXCESSIVE FOR MIDDLE SCHOOL DEAN OF DISCIPLINE INVOLVED IN PHYSICAL INCIDENTS WITH TWO STUDENTS;
Supreme Court, New York County, among other things, denied respondent's cross motion to deny the petition and dismiss the CPLR article 75 proceeding, granted the petition to the extent of vacating as excessive the penalty of termination of petitioner's employment as a New York City school teacher, and remanded the matter to the Hearing Officer for a lesser penalty; App. Div. affirmed.