

COURT OF APPEALS NEW FILINGS

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

October 26, 2012 through November 1, 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.

ABRAHAM (AKIVA DANIEL), PEOPLE v:

3RD Dept. App. Div. order of 4/26/12; affirmance; leave to appeal granted by Pigott, J., 10/12/12;

CRIMES - INSURANCE FRAUD - CONCEALING CAUSE OF FIRE - DEFENDANT IN INSURANCE FRAUD PROSECUTION ACQUITTED OF ARSON - REPUGNANT OR INCONSISTENT VERDICT - SUFFICIENCY OF THE EVIDENCE - ARGUMENT AND CONDUCT OF COUNSEL - ALLEGED PROSECUTORIAL MISCONDUCT;

Supreme Court, Albany County convicted defendant of insurance fraud in the second degree; App. Div. affirmed.

AKWESANE CONVENIENCE STORE ASSOCIATION et al. v STATE OF NEW YORK et al.:

Supreme Court, Erie County order of 9/18/12; denial of summary judgment motion; sua sponte examination whether a direct appeal as of right lies under CPLR 5601(b)(2);

TAXATION - TAX ON CIGARETTES AND TOBACCO PRODUCTS - CONSTITUTIONAL CHALLENGE TO CHAPTER 134, PART D, OF THE 2010 SESSION LAWS - WHETHER STATUTE, AS APPLIED TO INDIAN TRADERS AND RESERVATION CIGARETTE SELLERS, IMPERMISSIBLY BURDENS INDIAN COMMERCE AND IS PREEMPTED BY THE INDIAN COMMERCE AND SUPREMACY CLAUSES OF THE UNITED STATES CONSTITUTION;

Supreme Court, Erie County granted defendants' motion for summary judgment dismissing the complaint and denied plaintiffs' cross motion for summary judgment awarding them declaratory and injunctive relief.

CANGRO v REITANO:

1ST 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;

JUDGMENTS - RES JUDICATA; COMPLAINT - FAILURE TO STATE A CAUSE OF ACTION UPON WHICH RELIEF MAY BE GRANTED; LIBEL AND SLANDER - PRIVILEGED STATEMENTS;

Supreme Court, New York County granted defendant's motion to dismiss the complaint; App. Div. affirmed.

JFK HOLDING COMPANY, LLC, et al. v CITY OF NEW YORK, et al.:

1ST Dept. App. Div. order of 7/3/12; reversal with dissents; leave to appeal granted by App. Div., 10/11/12;

LANDLORD AND TENANT - LEASE - BREACH OF LEASE CONDITION - DETERIORATION OF PREMISES - WHETHER TRIABLE ISSUES OF FACT EXIST AS TO WHETHER THE SALVATION ARMY USED COMMERCIALY REASONABLE EFFORTS TO OBTAIN CERTAIN PAYMENTS TO WHICH IT WAS ENTITLED UNDER A SERVICES AGREEMENT WITH OTHER DEFENDANTS - WHETHER DEFENDANT SALVATION ARMY WAS NONETHELESS ENTITLED TO SUMMARY JUDGMENT UNDER A LIMITATION OF DAMAGES PROVISION IN ITS LEASE - RES JUDICATA; Supreme Court, New York County granted the motion of defendant Salvation Army to dismiss the complaint as against it; App. Div. reversed, vacated the judgment in Salvation Army's favor, reinstated the third cause of action for breach of contract and remanded the matter for further proceedings.

KOCH, MATTER OF v SHEEHAN:

4th Dept. App. Div. order of 3/23/12; affirmance; leave to appeal granted by Court of Appeals, 10/18/12;

SOCIAL SERVICES - DISQUALIFICATION OR TERMINATION AS A MEDICAID PROVIDER - SCOPE OF AUTHORITY OF OFFICE OF MEDICAID INSPECTOR GENERAL - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT

THE DETERMINATION OF THE OFFICE OF THE NEW YORK STATE MEDICAID INSPECTOR GENERAL (OMIG) WAS ARBITRARY AND CAPRICIOUS - WHETHER OMIG HAD THE AUTHORITY TO EXCLUDE PETITIONER FROM THE MEDICAID PROGRAM PURSUANT TO 18 NYCRR 515.7(e) BASED ON A CONSENT ORDER IN WHICH PETITIONER DID NOT CONTEST HAVING COMMITTED MISCONDUCT BY PRACTICING MEDICINE WITH NEGLIGENCE IN THE TREATMENT OF TWO EMERGENCY ROOM PATIENTS WHO WERE NOT ALLEGED TO BE MEDICAID PATIENTS;

Supreme Court, Erie County granted the petition in a CPLR article 78 proceeding and thereby vacated the determination by respondent New York State Medicaid Inspector General to exclude petitioner from participating in the New York State Medicaid Program and reinstated him retroactively to March 10, 2010 as a participating physician in the Medicaid Program; App. Div. affirmed.

SCHREIER (DAVID W.), PEOPLE v:

4TH Dept. App. Div. order of 6/8/12; affirmance; leave to appeal granted by Read, J., 10/24/12;

CRIMES - UNLAWFUL SURVEILLANCE - SUFFICIENCY OF EVIDENCE - VICTIM VIDEOTAPED AT HOME THROUGH WINDOW - WHETHER THE EVIDENCE WAS SUFFICIENT TO ESTABLISH, AMONG OTHER THINGS, THAT THE RECORDING WAS MADE "SURREPTITIOUSLY" AND AT A PLACE AND TIME WHEN THE VICTIM HAD A REASONABLE EXPECTATION OF PRIVACY (PENAL LAW § 250.45[1]);

Monroe County Court convicted defendant, upon a nonjury verdict, of unlawful surveillance in the second degree; App. Div. affirmed.