

COURT OF APPEALS NEW FILINGS

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

November 23, 2012 through November 29, 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.

DEVITO v FELICIANO et al.:

1ST Dept. App. Div. order of 5/26/11; affirmance; leave to appeal granted by Court of Appeals, 10/18/12;

NEGLIGENCE - PROXIMATE CAUSE - JURY FINDING THAT AUTOMOBILE ACCIDENT WAS NOT A SUBSTANTIAL FACTOR IN BRINGING ABOUT PLAINTIFF'S INJURIES - WHETHER TRIAL COURT ERRED IN REFUSING TO GIVE A MISSING WITNESS CHARGE WHERE DEFENDANT DID NOT CALL AS WITNESSES TWO PHYSICIANS WHO, AT DEFENDANT'S REQUEST, CONDUCTED INDEPENDENT MEDICAL EXAMINATIONS OF PLAINTIFF;

Supreme Court, Bronx County dismissed the complaint after a jury trial; App. Div. affirmed.

EUJOY REALTY CORPORATION v VAN WAGNER COMMUNICATIONS, LLC:

1ST Dept. App. Div. order of 5/18/10; reversal with dissents; LANDLORD AND TENANT - LEASE - TERMINATION OF LEASE AGREEMENT - LEASED ADVERTISING BILLBOARD - REVIEW OF SIGN OBSTRUCTED BY CONSTRUCTION ON NEARBY SITE - ACTION FOR RENT DUE AND COUNSEL FEES;

Supreme Court, New York County denied plaintiff landlord's motion for summary judgment, granted that part of defendant tenant's cross motion that sought summary judgment dismissing the complaint and denied the part that sought, in the alternative, leave to amend the answer to add the affirmative defense of estoppel; App. Div. reversed, granted plaintiff's motion, denied defendant's motion, and remanded the matter for an assessment of counsel fees; Supreme Court awarded judgment in favor of plaintiff in the total sum of \$197,487.39.

PEOPLE ex rel. GSSIME v MARTUSCELLO:

3RD Dept. App. Div. order of 11/1/12; denied application; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; HABEAS CORPUS - AVAILABILITY OF RELIEF; App. Div. granted motion for poor person relief to the extent that the filing fee is waived, and denied petitioner's application for a writ of habeas corpus.

NINETEEN EIGHTY-NINE, LLC v ICAHN ENTERPRISES L.P., et al./ICAHN v RAYNOR:

1ST Dept. App. Div. order of 10/16/12; affirmance; sua sponte examination whether part of the Appellate Division order 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; TORTS - INTERFERENCE WITH CONTRACTUAL RELATIONS - CLAIMS FOR TORTIOUS INTERFERENCE WITH CONTRACT, INJURIOUS FALSEHOOD AND ABUSE OF PROCESS - WHETHER THE NOERR-PENNINGTON DOCTRINE WARRANTED DISMISSAL OF PLAINTIFFS' CLAIMS BASED UPON DEFENDANT'S FILING OF A LAWSUIT IN 2010 AND A SECURITIES AND EXCHANGE COMMISSION "SCHEDULE 13D"; Supreme Court, New York County denied plaintiffs' motion for leave to amend the complaint and granted defendants' motion to dismiss the complaint; App. Div. affirmed.

JOHNSON (MARTIN), PEOPLE v:

1ST Dept. App. Div. order of 10/13/11; affirmance; leave to appeal granted by Jones, J., 10/19/12; CRIMES - RIGHT TO PUBLIC TRIAL - CLOSURE OF COURTROOM - WHETHER UNDERCOVER OFFICER'S TESTIMONY ESTABLISHED AN OVERRIDING INTEREST THAT WARRANTED CLOSURE OF THE COURTROOM TO ALL BUT DEFENDANT'S FAMILY; JURY INSTRUCTIONS - COURT'S FAILURE TO DELIVER THE "NO PRIOR SALE CONVICTIONS" ELEMENT OF THE JURY CHARGE;

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, to concurrent terms of 3 years; App. Div. affirmed.

KICKERTZ, MATTER OF v NEW YORK UNIVERSITY:

1st Dept. App. Div. order of 10/11/12; reversal with dissents; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution; COLLEGES AND UNIVERSITIES - DISCIPLINARY PROCEEDINGS - DISMISSAL OF STUDENT WITHOUT POSSIBILITY OF REINSTATEMENT - JUDICIAL REVIEW OF ACADEMIC DISCRETION - WHETHER THE APPELLATE DIVISION ERRED IN DETERMINING MERITS OF CPLR ARTICLE 78 PROCEEDING WITHOUT PERMITTING RESPONDENT TO ANSWER PROCEEDING GIVEN DENIAL OF PRE-ANSWER DISMISSAL MOTION ARISING OUT OF SAME FACTS - WHETHER RESPONDENT SUBSTANTIALLY ADHERED TO ITS OWN PUBLISHED RULES AND GUIDELINES IN REACHING ITS DETERMINATION AND WHETHER THE DETERMINATION WAS BASED ON A RATIONAL INTERPRETATION OF THE RELEVANT EVIDENCE;

Supreme Court, New York County denied the petition to annul the determination of respondent New York University that expelled petitioner from its dental college and dismissed the CPLR article 78 proceeding; App. Div. reversed, vacated the judgment and granted the petition.

MARVIN P., MATTER OF v RICE:

2ND Dept. App. Div. order of 10/3/12; grant of motions; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right;

MOTIONS AND ORDERS - CHALLENGE TO APPELLATE DIVISION ORDER 1) GRANTING A MOTION FOR LEAVE TO APPEAL TO THAT COURT FROM A SUPREME COURT ORDER DETERMINING THAT PETITIONER DOES NOT HAVE A DANGEROUS MENTAL DISORDER AND IS NOT DANGEROUSLY MENTALLY ILL, AND ORDERING HIS RELEASE FROM A SECURE PSYCHIATRIC FACILITY, AND 2) GRANTING A STAY OF THE SUPREME COURT ORDER PENDING DETERMINATION OF THE APPEAL;

Supreme Court, Orange County found that Marvin P. does not have a dangerous mental disorder and is not dangerously mentally ill, and ordered the preparation of an order of conditions and that Marvin P. be released from a secure psychiatric facility; App. Div. granted motions by Kathleen M. Rice and the State Commissioner of Health for leave to appeal to the App. Div. from the 8/17/12 order and to stay enforcement of that order pending determination of the appeals.

LUCHEY, MATTER OF v BOARD OF EDUCATION OF CITY SCHOOL DISTRICT OF THE CITY OF NIAGARA FALLS et al.:

4TH Dept. App. Div. order of 2/17/12; affirmance; leave to appeal granted by Court of Appeals, 11/19/12;

CIVIL SERVICE - TERMINATION OF EMPLOYMENT - RESIDENCY REQUIREMENT - CPLR ARTICLE 78 PROCEEDING TO ANNUL DETERMINATION TERMINATING PETITIONER'S TENURED EMPLOYMENT WITH SCHOOL DISTRICT BASED ON PETITIONER'S VIOLATION OF SCHOOL DISTRICT'S RESIDENCY POLICY; STANDARD OF REVIEW;

Supreme Court, Niagara County, among other things, granted a CPLR article 78 petition challenging respondents' termination of her employment from a tenured position because she was in violation of respondents' residency requirements, and directed respondents to reinstate petitioner to her tenured position; App. Div. affirmed.

O'TOOLE (DONALD), PEOPLE v:

1ST Dept. App. Div. order of 6/7/12; reversal; leave to appeal granted by Pigott, J., 11/20/12;

CRIMES - COLLATERAL ESTOPPEL - WHETHER THE PEOPLE WERE BARRED FROM PRESENTING ON DEFENDANT'S RETRIAL EVIDENCE THAT HIS ACCOMPLICE POINTED WHAT APPEARED TO BE A PISTOL AT THE COMPLAINING WITNESS DURING THE ALLEGED ROBBERY, WHERE DEFENDANT WAS ACQUITTED OF ROBBERY IN THE FIRST DEGREE AT THE FIRST TRIAL BUT CONVICTED OF ROBBERY IN THE SECOND DEGREE AND THE APPELLATE DIVISION HAD REVERSED THAT CONVICTION;

Supreme Court, New York County convicted defendant, after a jury trial, of robbery in the second degree, and sentenced him, as a second violent felony offender, to a term of 15 years; App. Div. reversed and remanded for a new trial.

DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT, MATTER OF; SUSAN (ANONYMOUS):

1ST Dept. App. Div. order of 9/20/12; denial of motion to quash; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right;

ATTORNEY AND CLIENT - DISCIPLINARY PROCEEDINGS - MOTION TO QUASH SUBPOENA DUCES TECUM;

App. Div. denied respondent's motion for an order pursuant to CPLR 2304 quashing a subpoena duces tecum commanding her appearance with all documents requested with respect to certain complaints against her.