

COURT OF APPEALS NEW FILINGS

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

July 5, 2013 through July 11, 2013

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.

BOROWSKI v PTAK:

4TH Dept. App. Div. order of 6/7/13; affirmance with a two-Justice dissent; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution;

MOTOR VEHICLES - COLLISION - PLAINTIFF'S VEHICLE REAR-ENDED ONE DEFENDANT'S STOPPED VEHICLE - WHETHER THE APPELLATE DIVISION ERRED IN DETERMINING THAT ISSUES OF FACT PRECLUDED SUMMARY JUDGMENT IN DEFENDANT'S FAVOR BASED UPON THE COURT'S CONCLUSION THAT PLAINTIFF SUBMITTED EVIDENCE OF AN ADEQUATE, NON-NEGLIGENT EXPLANATION FOR THE COLLISION;

Supreme Court, Erie County, denied defendant Jeremy J. Ptak's motion for summary judgment dismissing the complaint; App. Div. affirmed.

MARCUS CC., MATTER OF v ERICA BB. (and another proceeding):

3rd Dept. App. Div. order of 6/20/13; affirmance with a two-Justice dissent; sua sponte examination whether the dissent at the Appellate Division is on a question of law and whether the order appealed from finally determines the proceeding within the meaning of the Constitution;

PARENT AND CHILD - CUSTODY - GRANDMOTHER'S PETITION FOR CUSTODY - WHETHER THE GRANDMOTHER MET HER BURDEN OF ESTABLISHING EXTRAORDINARY CIRCUMSTANCES WHICH WOULD MAKE HER CLAIM OF CUSTODY SUPERIOR TO THAT OF THE CHILD'S BIOLOGICAL FATHER;

Family Court, Sullivan County, among other things, granted petitioner's application, in proceeding No. 2 pursuant to Family Court Act article 6, for custody of the subject child; App. Div. affirmed.

CDR CREANCES S.A.S, &c. v COHEN:

1st Dept. App. Div. order of 12/27/12; affirmance; leave to appeal granted by Court of Appeals, 6/25/13;

DISCLOSURE - PENALTY FOR FAILURE TO DISCLOSE - STRIKING ANSWER AS SANCTION FOR COMMITTING FRAUD ON COURT - STANDARD OF PROOF APPLICABLE TO DETERMINE WHETHER TO GRANT A MOTION TO STRIKE AN ANSWER AND ENTER A DEFAULT JUDGMENT BASED UPON DEFENDANTS' ALLEGED FRAUD UPON THE COURT - WHETHER FACTUAL DISPUTE ON THE ISSUE OF FRAUD IS TO BE RESOLVED BY THE COURT OR A JURY; DAMAGES - DEFENDANTS' ENTITLEMENT TO AN EVIDENTIARY HEARING;

Supreme Court, New York County judgment awarded plaintiff the principal sum of \$135,359,331.95, with \$50,965,529.62 in prejudgment interest from July 12, 2007; App. Div. affirmed.

DUNBAR (JERMAINE), PEOPLE v:

2nd Dept. App. Div. order of 1/30/13; reversal; leave to appeal granted by Smith, J., 5/20/13;

CRIMES - CONFESSION - STATEMENTS MADE BY DEFENDANT DURING PRE-ARRAIGNMENT PROGRAM - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT A "PREAMBLE" GIVEN BY LAW ENFORCEMENT AUTHORITIES TO DEFENDANT BEFORE ARRAIGNMENT AND PRIOR TO THE RECITATION OF THE MIRANDA WARNINGS, VIOLATED DEFENDANT'S MIRANDA RIGHTS;

Supreme Court, Queens County, convicted defendant of attempted robbery in the second degree and criminal mischief in the fourth degree, upon a jury verdict, and imposed sentence; App. Div. reversed, granted that branch of defendant's omnibus motion that was to suppress a videotaped statement made by him to law enforcement authorities, and ordered a new trial.

THE PEOPLE ex rel. DIXON v STATE OF NEW YORK (and another proceeding):

1st Dept. App. Div. orders of 6/6/13 and 5/21/13; sua sponte examination whether the June 6, 2013 order of the App. Div. finally determines the proceeding within the meaning of the Constitution and whether any jurisdictional basis exists to support an appeal as of right from the May 21, 2013 order of the App. Div.;

HABEAS CORPUS - CHALLENGE TO APPELLATE DIVISION ORDER DENYING PETITIONER'S APPLICATION FOR, AMONG OTHER THINGS, A WRIT OF HABEAS CORPUS; APPEALS - CHALLENGE TO APPELLATE DIVISION ORDER DENYING PETITIONER'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS;

App. Div. denied petitioner's motion for leave to appeal to the Court of Appeals from a decision and order of that court entered on June 28, 2012 (6/6/13 order), and denied petitioner's application for, among other things, a writ of habeas corpus (5/21/13 order).

EMPIRE CENTER FOR NEW YORK STATE POLICY, MATTER OF v NEW YORK STATE TEACHERS' RETIREMENT SYSTEM:

3RD Dept. App. Div. order of 2/21/13; affirmance; leave to appeal granted by Court of Appeals, 6/26/13;

RECORDS - FREEDOM OF INFORMATION LAW (FOIL) - NAMES OF RETIRED MEMBERS OF STATE TEACHERS' RETIREMENT SYSTEM - WHETHER THE NAMES OF RETIREES RECEIVING PENSION PAYMENTS ARE EXEMPT FROM DISCLOSURE UNDER PUBLIC OFFICERS LAW § 89(7);

Supreme Court, Albany County, dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to review respondent's determination partially denying petitioner's FOIL requests; App. Div. affirmed.

EMPIRE CENTER FOR NEW YORK STATE POLICY, MATTER OF v TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK:

1ST Dept. App. Div. order of 2/28/13; affirmance; leave to appeal granted by Court of Appeals, 6/26/13;

RECORDS - FREEDOM OF INFORMATION LAW (FOIL) - NAMES OF RETIRED MEMBERS OF CITY OF NEW YORK TEACHERS' RETIREMENT SYSTEM - WHETHER THE NAMES OF RETIREES RECEIVING PENSION PAYMENTS ARE EXEMPT FROM DISCLOSURE UNDER PUBLIC OFFICERS LAW § 87(2)(b) OR PUBLIC OFFICERS LAW § 89(7);

Supreme Court, New York County, dismissed a CPLR article 78 petition brought to annul respondent's determination denying petitioner's FOIL request for the names of retired members of respondent retirement system; App. Div. affirmed.

GOLDEN v CITIBANK, N.A.:

2ND Dept. App. Div. order of 11/7/12; reversal; leave to appeal granted by Court of Appeals, 6/26/13;

BANKS AND BANKING - CASHIER'S CHECK - WHETHER, IN THE ABSENCE OF FRAUD, A BANK MUST HONOR A CASHIER'S CHECK WHEN PRESENTED TO IT BY THE PAYEE OR CAN REFUSE TO PAY ON THE CHECK BY SHOWING THAT (1) NO CONSIDERATION WAS GIVEN FOR ITS ISSUANCE AND (2) THE PARTY DEMANDING PAYMENT IS NOT A HOLDER IN DUE COURSE;

Supreme Court, Queens County, denied, with leave to renew upon completion of disclosure, plaintiff's motion for summary judgment on the first cause of action to compel payment on a cashier's check, and to sever that cause of action; App. Div. reversed and granted plaintiff's motion for summary judgment on the first cause of action and to sever that cause of action.

TOWN OF ISLIP, MATTER OF v NEW YORK STATE PUBLIC EMPLOYMENT
RELATIONS BOARD, et al.:

2ND Dept. App. Div. judgment of 3/13/13; confirmation of determination; leave to appeal granted by Court of Appeals, 6/27/13;

LABOR UNIONS - COLLECTIVE BARGAINING - PAST PRACTICE - ASSIGNMENT OF TOWN VEHICLES TO EMPLOYEES FOR PERMANENT USE - WHETHER THE APPELLATE DIVISION PROPERLY CONFIRMED A DETERMINATION BY THE NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD, WHICH CONCLUDED THAT THE TOWN IMPERMISSIBLY ALTERED A PAST PRACTICE WHEN IT UNILATERALLY DISCONTINUED CERTAIN EMPLOYEES' RIGHTS TO USE TOWN VEHICLES ON A 24-HOUR-A-DAY BASIS;

App. Div. confirmed a determination by the NYS Public Employment Relations Board (PERB) that the Town of Islip impermissibly altered a past practice when it unilaterally discontinued certain employees' rights to use Town vehicles on a 24-hour-a-day basis; denied the CPLR article 78 petition challenging the determination; dismissed the proceeding; granted PERB's cross petition to enforce the determination; and remitted to Supreme Court for the issuance of an order compelling compliance with the App. Div.'s judgment.

LLOYD-DOUGLAS (COLLIN F.), PEOPLE v:

2ND Dept. App. Div. order of 1/30/13; reversal; leave to appeal granted by Smith, J., 5/20/13;

CRIMES - CONFESSION - STATEMENTS MADE BY DEFENDANT DURING PRE-ARRAIGNMENT PROGRAM - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT A "PREAMBLE" GIVEN BY LAW ENFORCEMENT AUTHORITIES TO DEFENDANT BEFORE ARRAIGNMENT AND PRIOR TO THE RECITATION OF THE MIRANDA WARNINGS, VIOLATED DEFENDANT'S MIRANDA RIGHTS - HARMLESS ERROR;

Supreme Court, Queens County, convicted defendant of attempted murder in the second degree, assault in the first degree, unlawful imprisonment in the second degree, and criminal possession of a weapon in the third degree, upon a jury verdict, and imposed sentence; App. Div. reversed, granted that branch of defendant's omnibus motion that was to suppress a videotaped statement made by him to law enforcement authorities, and ordered a new trial.

POLHILL (EUGENE), PEOPLE v:

2ND Dept. App. Div. order of 1/30/13; reversal; leave to appeal granted by Smith, J., 5/20/13;

CRIMES - CONFESSION - STATEMENTS MADE BY DEFENDANT DURING PRE-ARRAIGNMENT PROGRAM - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT A "PREAMBLE" GIVEN BY LAW ENFORCEMENT AUTHORITIES TO DEFENDANT BEFORE ARRAIGNMENT AND PRIOR TO THE RECITATION OF THE MIRANDA WARNINGS, VIOLATED DEFENDANT'S MIRANDA RIGHTS;

Supreme Court, Queens County, convicted defendant of attempted robbery in the second degree, upon a jury verdict, and imposed sentence; App. Div. reversed, granted that branch of defendant's omnibus motion that was to suppress a videotaped statement made by him to law enforcement authorities, and ordered a new trial.

WITTORF v CITY OF NEW YORK:

1ST Dept. App. Div. order of 3/26/13; affirmance; leave to appeal granted by App. Div., 6/27/13;

MUNICIPAL CORPORATIONS - TORT LIABILITY - WHILE IN THE PROCESS OF CLOSING ROADWAY SO REPAIRS COULD BE MADE, NEW YORK CITY DEPARTMENT OF TRANSPORTATION (DOT) SUPERVISOR TOLD PLAINTIFF SHE COULD PROCEED THROUGH ROAD ON HER BICYCLE AND PLAINTIFF WAS INJURED WHEN SHE ROAD INTO A LARGE POTHOLE - WHETHER THE COURTS BELOW ERRED IN DETERMINING THAT PLAINTIFF'S INJURIES WERE CAUSED BY THE DOT EMPLOYEE'S ACTS OF TRAFFIC CONTROL, A DISCRETIONARY GOVERNMENTAL FUNCTION, RATHER THAN BY DEFENDANT'S PROPRIETARY FUNCTION OF MAINTAINING THE ROADWAY;

Supreme Court, New York County, among other things, granted defendant's motion to set aside the jury verdict on the ground that plaintiff failed to establish a prima facie case; App. Div. affirmed.