

COURT OF APPEALS NEW FILINGS

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

July 26, 2013 through August 1, 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.

ACA FINANCIAL GUARANTY CORP. v GOLDMAN, SACHS & CO.:

1ST Dept. App. Div. order of 5/14/13; reversal; sua sponte examination of whether the order appealed from finally determines the action within the meaning of the Constitution;
FRAUD - FRAUD IN INDUCEMENT - ALLEGED FRAUDULENT INDUCEMENT TO ISSUE A FINANCIAL GUARANTY FOR A PORTION OF AN INVESTMENT BY MISREPRESENTATION THAT A NONPARTY HEDGE FUND WAS TAKING A LONG POSITION IN THE INVESTMENT WHEN, IN FACT, SUCH FUND WAS ACTUALLY A SHORT SELLER - JUSTIFIABLE RELIANCE;
Supreme Court, New York County, among other things, denied the motion of defendant Goldman, Sachs to dismiss the causes of action for fraudulent inducement and fraudulent concealment against it; App. Div. reversed, granted defendant's motion to dismiss the causes of action for fraudulent inducement and fraudulent concealment, and directed entry of judgment dismissing the amended complaint.

CONCERNED HOME CARE PROVIDERS, INC., MATTER OF v STATE OF NEW YORK:

3RD Dept. App. Div. order of 7/3/13; affirmance; sua sponte examination of whether a substantial constitutional question is directly involved to support an appeal as of right; CONSTITUTIONAL LAW - VALIDITY OF STATUTE - WHETHER PUBLIC HEALTH LAW § 3614-c, COMMONLY KNOWN AS THE WAGE PARITY LAW, VIOLATES ARTICLE I, §§ 6 AND 11, ARTICLE III, § 1 AND 16, AND ARTICLE IX OF THE NEW YORK STATE CONSTITUTION; PROCEEDING AGAINST BODY OR OFFICER - WHETHER THE DEPARTMENT OF HEALTH'S INTERPRETATION OF THE TERM "TOTAL COMPENSATION" IN THE WAGE PARITY LAW IS INCONSISTENT WITH THE STATUTORY DEFINITION OF THAT TERM; Supreme Court, Albany County, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, among other things, granted respondents' motion for summary judgment dismissing the petition/complaint; App. Div. affirmed.

HAGGERTY, JR. (JOHN F.), PEOPLE v:

1ST Dept. App. Div. order of 2/7/13; affirmance; leave to appeal granted by Lippman, Ch. J., 7/16/13; CRIMES - INDICTMENT - VARIANCE BETWEEN THEORY OF INDICTMENT AND PROOF AT TRIAL - WHETHER THE EVIDENCE AT TRIAL SHOWED ONLY THAT DEFENDANT STOLE FROM THE INDEPENDENCE PARTY RATHER THAN FROM NEW YORK CITY MAYOR BLOOMBERG, AS CHARGED IN THE INDICTMENT; EVIDENCE - WHETHER TESTIMONY ABOUT THE TERMS OF THE BLOOMBERG REVOCABLE TRUST VIOLATED THE BEST EVIDENCE RULE; Supreme Court, New York County, convicted defendant, after a jury trial, of grand larceny in the second degree and money laundering in the second degree, and sentenced him to an aggregate term of 1 1/3 years, with \$750,000 in restitution; App. Div. affirmed.

KAPON, MATTER OF v KOCH:

1ST Dept. App. Div. order of 4/25/13; affirmance; leave to appeal granted by Court of Appeals, 6/25/13; DISCLOSURE - EXAMINATION BEFORE TRIAL - OUT-OF-STATE SUBPOENA - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT SUPREME COURT PROVIDENTLY EXERCISED ITS DISCRETION IN DENYING A PETITION TO QUASH OUT-OF-STATE SUBPOENAS OR FOR A PROTECTIVE ORDER BECAUSE "PETITIONERS FAILED TO SHOW THAT THE REQUESTED DEPOSITION TESTIMONY IS IRRELEVANT TO THE PROSECUTION OF THE CALIFORNIA ACTION" AND "FAILED TO ARTICULATE A SUFFICIENT, NONSPECULATIVE BASIS FOR POSTPONING THEIR DEPOSITIONS OR IMPOSING RESTRICTIONS ON THE SCOPE AND USE OF THEIR DEPOSITION TESTIMONY"; Supreme Court, New York County, denied the petition to quash out-of-state subpoenas served on petitioners or, in the alternative, for a protective order, and dismissed the proceeding; App. Div. affirmed.

KOEHL, MATTER OF v FISCHER:

3RD Dept. App. Div. order of 5/31/13; denial of motion; sua sponte examination of 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;
APPEAL - CHALLENGE TO APPELLATE DIVISION ORDER DENYING PETITIONER'S MOTION TO RENEW/REARGUE;
App. Div. denied petitioner's motion to renew/reargue.

O'DANIEL (WILLIAM), PEOPLE v:

3RD Dept. App. Div. order of 4/11/13; affirmance; leave to appeal granted by Lippman, Ch. J., 7/26/13;
CRIMES - RIGHT TO COUNSEL - REPLACEMENT COUNSEL - COUNSEL, INITIALLY CHOSEN BY DEFENDANT'S RETAINED COUNSEL AS A SECOND CHAIR, ULTIMATELY REPRESENTED DEFENDANT AT TRIAL DUE TO RETAINED COUNSEL'S HEALTH PROBLEMS - WHETHER DEFENDANT WAS DENIED THE RIGHT TO COUNSEL, INCLUDING THE RIGHT TO COUNSEL OF HIS CHOICE - WHETHER REPLACEMENT COUNSEL PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL; WITNESSES - EXPERT WITNESS - WHETHER THE TRIAL COURT ERRED IN ALLOWING A NURSE PRACTITIONER TO TESTIFY THAT HER EXAMINATION OF A CHILD SHOWED EVIDENCE OF SEXUAL ABUSE;
County Court, Clinton County, upon a jury verdict, convicted defendant of two counts of rape in the first degree, attempted rape in the first degree, two counts of sexual abuse in the first degree and two counts of endangering the welfare of a child; App. Div. affirmed.

RIVERA (ANNER), PEOPLE v:

2ND Dept. App. Div. order of 1/23/13; reversal; leave to appeal granted by Lippman, Ch. J., 6/26/13;
CRIMES - RIGHT TO BE PRESENT AT TRIAL - TRIAL JUDGE'S ANSWERING OF JUROR'S SUBSTANTIVE LEGAL QUESTIONS INSIDE ROBIN ROOM WITHOUT THE PRESENCE OF DEFENDANT, DEFENSE COUNSEL, THE PROSECUTOR AND OTHER JURORS - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT THE TRIAL JUDGE'S ACTS CONSTITUTED A MODE OF PROCEEDINGS ERROR NOT SUBJECT TO HARMLESS ERROR ANALYSIS EVEN THOUGH DEFENSE COUNSEL CONSENTED TO THE PROCEDURE AND THE TRIAL JUDGE TOLD COUNSEL AND DEFENDANT EVERYTHING THAT HAPPENED IN THE ROBIN ROOM AND THAT THEY COULD REQUEST A READ-BACK OF HIS CONVERSATION WITH THE JUROR AT ANY TIME;
Supreme Court, Kings County, upon a jury verdict, convicted defendant of criminal possession of a weapon in the second degree, and imposed sentence; App. Div. reversed and ordered a new trial on the count of the indictment charging defendant with criminal possession of a weapon in the second degree.

SILVA (JULIAN), PEOPLE v:

1ST Dept. App. Div. order of 10/11/12; affirmance; leave to appeal granted by Smith, J., 7/10/13;
CRIMES - JURORS - NOTE FROM JURY - TRIAL COURT'S FAILURE TO NOTIFY COUNSEL OF JURY NOTE AND TO READ NOTE INTO THE RECORD;
CLAIMED IMPROPER REMARKS IN PROSECUTOR'S SUMMATION;

Supreme Court, New York County, convicted defendant, after a jury trial, of criminal sale of a controlled substance in the first degree, criminal possession of a controlled substance in the third degree, attempted criminal possession of a weapon in the third degree and criminally using drug paraphernalia in the second degree, and sentenced him, as a second felony drug offender, to an aggregate term of 24 years; App. Div. affirmed.