

COURT OF APPEALS NEW FILINGS

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

September 13, 2013 through September 19, 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.

COOPERSTOWN HOLSTEIN CORPORATION v TOWN OF MIDDLEFIELD:

3RD Dept. App. Div. order of 5/2/13; affirmance; leave to appeal granted by Court of Appeals, 8/29/13;

GAS AND OIL - LOCAL REGULATION - HYDROFRACKING - ZONING LAW CATEGORIZING ALL OIL, GAS AND SOLUTION MINING AND DRILLING AS PROHIBITED LAND USES WITHIN THE TOWN - WHETHER THE TOWN'S ZONING LAW IS PREEMPTED BY THE OIL, GAS AND SOLUTION MINING LAW; Supreme Court, Otsego County, among other things, granted defendant's cross motion for summary judgement dismissing the complaint and declared that defendant's zoning law was not preempted by the Oil, Gas and Solution Mining Law; App. Div.

ELLINGTON v EMI MUSIC, INC., et al.:

1ST Dept. App. Div. order of 5/2/13; affirmance; leave to appeal granted by Court of Appeals, 9/10/13;
CONTRACTS - AMBIGUOUS CONTRACTS - SONGWRITER ROYALTY AGREEMENT UNDER WHICH "SECOND PARTY" WAS REQUIRED TO PAY TO "FIRST PARTIES" AN AMOUNT "EQUAL TO FIFTY (50%) PERCENT OF THE NET REVENUE ACTUALLY RECEIVED BY THE SECOND PARTY FROM ... FOREIGN PUBLICATION" OF DUKE ELLINGTON'S COMPOSITIONS - DEFINITION OF "SECOND PARTY" TO INCLUDE A DOMESTIC PUBLISHER "AND ANY OTHER AFFILIATES" OF THAT DOMESTIC PUBLISHER - WHETHER "SECOND PARTY," IN CALCULATING THE NET REVENUE FROM WHICH IT MUST PAY ROYALTIES, MAY DEDUCT FEES THE DOMESTIC PUBLISHER PAYS TO FOREIGN SUBPUBLISHERS, WHERE THE FOREIGN SUBPUBLISHERS WERE INDEPENDENT ENTITIES WHEN THE CONTRACT WAS EXECUTED BUT ARE NOW OWNED BY THE DOMESTIC PUBLISHER - WHETHER THE APPELLATE DIVISION CORRECTLY CONCLUDED THAT CONTRACT WAS UNAMBIGUOUS AND REFERRED ONLY TO THE AFFILIATES OF THE DOMESTIC PUBLISHER THAT WERE IN EXISTENCE AT THE TIME THE CONTRACT WAS EXECUTED;
Supreme Court, New York County, granted defendant EMI Mills Music, Inc.'s motion to dismiss the amended complaint pursuant to CPLR 3211 (a) (1) and (7), and dismissed the amended complaint;
App. Div. affirmed.

FAYOLLE v EAST WEST MANHATTAN PORTFOLIO, L.P., et al.:

1ST Dept. App. Div. order of 7/23/13; affirmance; sua sponte examination whether an appeal as of right lies pursuant to CPLR 5601(a) and whether a substantial constitutional question is directly involved to support an appeal as of right;
NEGLIGENCE - SIDEWALKS - DUTY - WHETHER OWNER OF FIRST FLOOR COMMERCIAL UNIT WAS NOT AN "OWNER" WITHIN THE MEANING OF ADMINISTRATIVE CODE OF THE CITY OF NEW YORK § 7-210 AND OWED NO OTHER DUTY TO MAINTAIN SIDEWALK - TRIVIAL DEFECT - WHETHER THE COURTS BELOW CORRECTLY DETERMINED THAT AN ALLEGED DEFECT IN SIDEWALK WAS "TRIVIAL" AND THEREFORE NONACTIONABLE AS A MATTER OF LAW;
Supreme Court, New York County, denied plaintiff's motion for summary judgment and granted defendants' motion for summary judgment dismissing the complaint; App. Div. affirmed.

HAYES (EARL), PEOPLE v:

3RD Dept. App. Div. order of 8/7/13; denial of writ of error coram nobis; sua sponte examination whether an appeal as of right lies in a criminal matter and whether a substantial constitutional question is directly involved to support an appeal as of right;
CRIMES - RIGHT TO COUNSEL - EFFECTIVE REPRESENTATION; APPEAL - APPEAL BY PERMISSION IN CRIMINAL MATTER;
App. Div. denied appellant's motion for a writ of error coram

KICKERTZ, MATTER OF v NEW YORK UNIVERSITY:

1ST Dept. App. Div. order of 10/11/12; reversal with dissents;

Rule 500.11 review pending;

PROCEEDING AGAINST BODY OR OFFICER - CERTIORARI - CPLR ARTICLE 78
PROCEEDING SEEKING TO ANNUL RESPONDENT UNIVERSITY'S DETERMINATION
EXPELLING PETITIONER FROM ITS DENTAL COLLEGE; WHETHER RESPONDENT
COMPLIED WITH ITS OWN POLICIES AND WHETHER ITS DETERMINATION WAS
ARBITRARY AND CAPRICIOUS; CHALLENGE TO RESULT FOLLOWING PRE-
ANSWER DISMISSAL OF PROCEEDING;

Supreme Court, New York County, denied the petition to annul the
determination of respondent University expelling petitioner from
its dental college, and dismissed the CPLR article 78 proceeding;
App. Div. reversed, vacated the judgment and granted the
petition; Supreme Court then granted the CPLR article 78 petition
and annulled respondent's decision to expel petitioner from the
New York University College of Dentistry.

LAWRENCE, DECEASED, MATTER OF (LAWRENCE, et al. v GRAUBARD
MILLER, et al.):

1ST Dept. App. Div. order of 5/23/13; modification; leave to
appeal granted by App. Div., 9/10/13;

ATTORNEY AND CLIENT - COMPENSATION - AMENDED RETAINER AGREEMENT
FOR REPRESENTATION OF FAMILY IN LITIGATION CONCERNING THE
ADMINISTRATION OF AN ESTATE - WHETHER CONTINGENCY FEE AGREEMENT
WAS UNCONSCIONABLE - GIFTS TO ATTORNEYS;

Surrogates' Court, New York County, among other things, (in an
order) confirmed that portion of the Referee's report dated
10/30/08 recommending as a discovery sanction the waiver of
objections under the Dead Man's Statute (CPLR 4519) in lieu of
the more severe sanction of striking the widow's pleadings in
both the contract enforcement proceeding and the rescission
action; Surrogates' Court thereafter (in an amended decree)
granted the intervenor childrens' applications to intervene in
the proceeding, awarded defendant law firm a fee of
\$15,837,374.02, and directed the individual defendants to return
to plaintiff executors cash gifts in the amount of \$5.05 million;
App. Div. affirmed the order and modified the amended decree to
reduce the law firm's fee award to the hourly fees due under the
original retainer agreement, remand for further proceedings to
determine that amount, and award interest on the law firm's fees
from 7/29/05, the date of the breach of the revised retainer
agreement.

WEBB (JAMES F.), PEOPLE v:

4TH Dept. App. Div. order of 7/5/13; modification; leave to
appeal granted by Scudder, J., 8/28/13; Rule 500.11 review

pending;

Vol. 33 - No. 38

Page 4

CONTEMPT - CRIMINAL CONTEMPT - VIOLATION OF ORDER OF PROTECTION DIRECTING DEFENDANT TO REFRAIN FROM COMMUNICATING BY TELEPHONE WITH HIS FORMER GIRLFRIEND, THE MOTHER OF DEFENDANT'S CHILD - LEGAL SUFFICIENCY OF THE EVIDENCE TO SUPPORT CONVICTION OF CRIMINAL CONTEMPT IN THE FIRST DEGREE (PENAL LAW § 215.51[b][iv]) - DEFENDANT'S TELEPHONE CALLS CONCERNING CHILD SUPPORT AND VISITATION - WHETHER THE APPELLATE DIVISION CORRECTLY CONCLUDED THAT THE EVIDENCE WAS LEGALLY INSUFFICIENT TO ESTABLISH THAT DEFENDANT MADE TELEPHONE CALLS WITH INTENT TO HARASS, ANNOY, THREATEN OR ALARM HIS FORMER GIRLFRIEND, WITH NO PURPOSE OF LEGITIMATE COMMUNICATION;

County Court, Genesee County, convicted defendant, upon a jury verdict, of criminal contempt in the first degree and four counts of criminal contempt in the second degree; App. Div. modified by reversing that part convicting defendant of criminal contempt in the first degree and dismissing the first count of the indictment, and remitted the matter to County Court for proceedings pursuant to CPLR 460.50(5).