

COURT OF APPEALS NEW FILINGS

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

May 9, 2014 through May 15, 2014

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 with dissents; leave to appeal granted by App. Div., 5/1/14;
FRAUD - FRAUD IN INDUCEMENT - ALLEGATION THAT PLAINTIFF WAS FRAUDULENTLY INDUCED 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 SUCH FUND ACTUALLY WAS A SHORT SELLER - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT THE AMENDED COMPLAINT FAILED TO ESTABLISH JUSTIFIABLE RELIANCE AS A MATTER OF LAW BECAUSE PLAINTIFF DID NOT PLEAD THAT "IT EXERCISED DUE DILIGENCE BY INQUIRING ABOUT THE NONPUBLIC INFORMATION REGARDING THE HEDGE FUND WITH WHICH IT WAS IN CONTACT PRIOR TO ISSUING THE FINANCIAL GUARANTY, OR THAT IT INSERTED THE APPROPRIATE PROPHYLACTIC PROVISION TO ENSURE AGAINST THE POSSIBILITY OF MISREPRESENTATION";

Supreme Court, New York County, denied defendant's motion to dismiss causes of action for fraudulent inducement and fraudulent concealment; App. Div. reversed, granted defendant's motion to dismiss the causes of action for fraudulent inducement and fraudulent concealment and directed the clerk to enter judgment dismissing the first amended complaint.

BROWN & BROWN, INC. et al. v JOHNSON et al.:

4TH Dept. App. Div. order of 2/7/14; modification; leave to appeal granted by App. Div., 5/2/14;

EMPLOYMENT RELATIONSHIPS - RESTRICTIVE COVENANT IN EMPLOYMENT CONTRACT - CLAIMED BREACHES OF NONSOLICITATION AND NONINDUCEMENT CLAUSES OF EMPLOYMENT CONTRACT - WHETHER THE FLORIDA CHOICE-OF-LAW CLAUSE IN THE EMPLOYMENT AGREEMENT IS "TRULY OBNOXIOUS" TO NEW YORK PUBLIC POLICY AND UNENFORCEABLE - WHETHER NONSOLICITATION CLAUSE COULD BE PARTIALLY ENFORCED;

Supreme Court, Erie County, granted, in part, defendants' motion for summary judgment, dismissing part of the first clause of action, dismissing the second and third causes of action, and denied the motion as to the fourth cause of action; App. Div. modified by granting that part of defendants' motion for summary judgment dismissing the complaint with respect to the non-solicitation covenant in the first cause of action and denying the remainder of the motion.

CANDINO, MATTER OF v STARPOINT CENTRAL SCHOOL DISTRICT, et al.:

4TH Dept. App. Div. order of 3/21/14; reversal with dissents; Rule 500.11 review pending;

SCHOOLS - NOTICE OF CLAIM - LATE NOTICE - VIRUS ALLEGEDLY CONTRACTED AT SCHOOL WRESTLING TOURNAMENT - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT CLAIMANT FAILED TO ESTABLISH THAT SCHOOL RESPONDENTS HAD "ACTUAL KNOWLEDGE" OF THE ESSENTIAL FACTS CONSTITUTING HIS CLAIM;

Supreme Court, Erie County, granted claimant's application for leave to serve a late notice of claim; App. Div. reversed, denied claimant's application pursuant to General Municipal Law § 50-e(5) for leave to serve a late notice of claim.

CASSATA v STATE OF NEW YORK, et al.:

4TH Dept. App. Div. order of 3/21/14; reversal; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

JUDGES - JUDICIAL SALARIES - PAY DISPARITY BETWEEN MUNICIPALITIES IN SAME COUNTY - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT A RATIONAL BASIS EXISTS FOR THE SALARY DISPARITY BETWEEN TONAWANDA CITY COURT AND BUFFALO CITY COURT JUDGES SET FORTH IN JUDICIARY LAW § 221-i, AND THAT THE STATUTE THEREFORE DOES NOT VIOLATE THE EQUAL PROTECTION RIGHTS OF A TONAWANDA CITY COURT JUDGE;

Supreme Court, Niagara County, among other things, granted plaintiff's motion for summary judgment and declared that the pay disparity between City Court judges in the City of Buffalo and the City of Tonawanda, as set forth in Judiciary Law § 221-i, violates plaintiff's equal protection rights, and denied the cross motion for summary judgment by defendants State of New York and the Comptroller of the State of New York; App. Div. reversed, denied plaintiff's motion, granted the cross motion by the State of New York and the Comptroller of the State of New York insofar as they seek a declaration in their favor, and declared that the salary disparity between City Court judges in Buffalo and Tonawanda, set forth in Judiciary Law § 221-i, is constitutional.

NATURAL RESOURCES DEFENSE COUNCIL, et al., MATTER OF v NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION:

2ND Dept. App. Div. order 11/13/13; modification; leave to appeal granted by Court of Appeals, 5/1/14;

ENVIRONMENTAL CONSERVATION - STATE POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT - STATEWIDE GENERAL PERMIT FOR STORM WATER DISCHARGES FROM MUNICIPAL SEPARATE STORM SEWER SYSTEMS - WHETHER THE APPELLATE DIVISION CORRECTLY DETERMINED THAT THE GENERAL PERMIT AT ISSUE DOES NOT VIOLATE 33 USC § 1342(a)(1), 33 USC § 1342 (p)(3)(B)(iii), ECL 17-0805(1)(a)(ix), ECL 17-0808(3)(c), ECL 17-0811(5), ECL 17-0813, OR 6 NYCRR 750-1.14; App. Div., in a hybrid CPLR article 78 proceeding to review a determination of NYS DEC approving the issuance of state pollutant discharge elimination system general permit GP-0-10-002 for storm water discharges from municipal separate storm sewer systems, and an action for a judgment declaring that state pollutant discharge elimination system general permit GP-0-10-002 is contrary to certain state and federal laws, (1) affirmed so much of the Supreme Court, Westchester County, order and judgment entered 1/10/12, as amended 4/18/12, as was in favor of respondent/defendant NYS DEC and against petitioners/plaintiffs, in effect, declaring that the general permit did not fail to ensure that small municipalities monitored their storm water discharges and, thus, was not in violation of 33 USC § 1318(a), and did not fail to provide for public hearings on proposed storm water management plans and proposed watershed improvement strategies and, thus, was not in violation of 33 USC § 1251(e); (2) reversed so much of the order and judgment, 1/10/12, as amended 4/18/12, as was in favor of petitioners/plaintiffs and against respondent/defendant, denied that branch of the petition which was to annul the determination; and (3) remitted the matter to Supreme Court for entry of an appropriate amended judgment dismissing the proceeding and declaring, among other things, that the general permit did not create an impermissible self-regulatory system that failed to ensure that small municipalities reduced their pollutant discharges to the "maximum extent

practicable," as required by 33 USC § 1342(p)(3)(B)(iii) and ECL

17-0808(3)(c), did not fail to specify compliance schedules with respect to effluent limitations and water quality standards, as required by 6 NYCRR 750-1.14, and did not unlawfully fail to provide an opportunity for public hearings on proposed notices of intent before they were submitted to it, as required by 33 USC § 1342(a)(1) and ECL 17-0805(1)(a)(ix).

155 WEST 21ST STREET, LLC, MATTER OF v McMULLAN:

1ST Dept. App. Div. order of 12/19/13; affirmance; leave to appeal granted by Court of Appeals, 5/6/14; Rule 500.11 review pending;

ATTORNEY AND CLIENT - FRIVOLOUS CONDUCT - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT PETITIONERS AND THEIR ATTORNEY ENGAGED IN FRIVOLOUS CONDUCT WARRANTING THE IMPOSITION OF SANCTIONS BY INITIATING A SPECIAL PROCEEDING AT SUPREME COURT PURSUANT TO RPAPL 881 FOR AN ORDER GRANTING THEM A LICENSE TO PASS THROUGH CERTAIN PROPERTY ON THE SAME DAY THAT THE APPELLATE DIVISION DENIED THEIR MOTION TO VACATE A PRELIMINARY INJUNCTION PENDING RESOLUTION OF THEIR APPEAL OF THE SUPREME COURT ORDER PRELIMINARILY ENJOINING THEM FROM ENTERING THAT PROPERTY; Supreme Court, New York County, denied respondent McMullan's cross motion for sanctions; App. Div. reversed, granted respondent McMullan's motion for sanctions, with sanctions to be imposed upon petitioners and their counsel in the amount of \$10,000 each, and awarded reasonable attorneys' fees to respondent McMullan, payable by petitioners and their counsel, in the amount to be determined on remand; Supreme Court awarded attorneys' fees against petitioner; App. Div. affirmed.

PEOPLE &c., ex rel. DeLIA, ON BEHALF OF SS. (ANONYMOUS) v MUNSEY:

2ND Dept. App. Div. order of 3/19/14; reversal; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right and whether the issues presented have become moot;

HABEAS CORPUS - INVOLUNTARY COMMITMENT - PATIENT'S RIGHT TO IMMEDIATE RELEASE WHERE HOSPITAL FILES AN INVOLUNTARY RETENTION APPLICATION AFTER EXPIRATION OF THE INITIAL RETENTION PERIOD - WHETHER MENTAL HYGIENE LAW § 33.15(b) REQUIRES SUPREME COURT TO CONDUCT AN EXAMINATION INTO PATIENT'S ALLEGED MENTAL DISABILITY AND RETENTION BEFORE GRANTING WRIT OF HABEAS CORPUS IN A PROCEEDING BROUGHT PURSUANT TO CPLR ARTICLE 70;

Supreme Court, Queens County, in a habeas corpus proceeding brought under CPLR article 70 by the Mental Hygiene Legal Service on behalf of a person admitted to Holliswood Hospital as an involuntary patient, in effect, granted the writ, without a hearing, and directed that the patient be released; App. Div. reversed.

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SOWELL, MATTER OF v FISCHER:

3RD Dept. App. Div. order of 4/24/14; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

PRISONS AND PRISONERS - DISCIPLINE OF INMATES - WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE DECISION OF THE HEARING OFFICER TO REMOVE PETITIONER FROM HIS TIER III PRISON DISCIPLINARY HEARING; DUE PROCESS; CLAIMED BIAS OF HEARING OFFICER; Supreme Court, Albany County, dismissed petitioner's CPLR article 78 application to review respondent's determination finding petitioner guilty of violating certain prison disciplinary rules; App. Div. affirmed.

STATE OF NEW YORK, MATTER OF v ROBERT F.:

2ND Dept. App. Div. order of 1/15/14; affirmance; leave to appeal granted by Court of Appeals, 5/6/14;

CRIMES - SEX OFFENDERS - CIVIL COMMITMENT OR SUPERVISION - WHETHER SUPREME COURT ERRED BY PERMITTING THE STATE'S EXPERT TO PROVIDE REBUTTAL TESTIMONY AT A DISPOSITIONAL HEARING VIA TWO-WAY VIDEO CONFERENCE - WHETHER THE HEARING COURT IS REQUIRED TO MAKE A FINDING OF "GOOD CAUSE" OR "EXCEPTIONAL CIRCUMSTANCES" BEFORE PERMITTING A REBUTTAL WITNESS TO TESTIFY VIA TWO-WAY VIDEO CONFERENCE INSTEAD OF IN PERSON;

Supreme Court, Kings County, in a proceeding pursuant to Mental Hygiene Law article 10 for the civil management of Robert F., upon a finding, made after a jury trial, that Robert F. suffers from a mental abnormality as defined in Mental Hygiene Law § 10.03(i), and upon a determination, made after a dispositional hearing, that he is a dangerous sex offender requiring civil confinement, in effect, granted the petition and directed that Robert F. be committed to a secure treatment facility for care, treatment, and control until such time as he no longer requires confinement; App. Div. affirmed.