

COURT OF APPEALS NEW FILINGS

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

**June 20, 2014 through June 26, 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.**

APT, et al. v MORGAN STANLEY DW, INC., et al.:

1<sup>ST</sup> Dept. App. Div. order of 3/11/14; affirmance; leave to appeal granted by Court of Appeals, 6/10/14;  
LIMITATION OF ACTIONS - FRAUD - TOLLING - WHETHER FILING OF ARBITRATION CLAIM TOLLED THE RELEVANT STATUTE OF LIMITATIONS PURSUANT TO CPLR 205(a) - FRAUDULENT CONCEALMENT - SUFFICIENCY OF PLEADING AS TO THE EXISTENCE OF FIDUCIARY RELATIONSHIP BETWEEN BROKER AND CLIENT - WHETHER TRADE CONFIRMATION SLIPS AND MONTHLY STATEMENTS PUT CLIENT ON NOTICE IN 2004 OR 2005 OF ALLEGED FRAUD; Supreme Court, New York County, granted the motion of defendants Morgan Stanley DW, Inc. and Morgan Stanley & Co, Inc. to dismiss the complaint pursuant to CPLR 3211(a)(5); App. Div. affirmed.

BOTTOM, MATTER OF v ANNUCCI, &c.:

4<sup>TH</sup> Dept. App. Div. judgment of 3/21/14; dismissal of petition; leave to appeal granted by Court of Appeals, 6/12/14;  
 PRISONS AND PRISONERS - DISCIPLINE OF INMATES - WHETHER A PRISON DISCIPLINARY DETERMINATION CAN BE BASED UPON A LOCAL FACILITY RULE THAT WAS NOT FILED WITH THE SECRETARY OF STATE;  
 App. Div. confirmed respondent's determination that found after a tier III hearing that petitioner had violated an inmate rule, and dismissed the CPLR article 78 petition.

ESTATE OF LEWIS, DECEASED, MATTER OF:

4<sup>TH</sup> Dept. App. Div. order of 1/3/14; affirmance; leave to appeal granted by Court of Appeals, 6/12/14;  
 WILLS - OBJECTIONS - REVOCATION - PRESUMPTION OF REVOCATION BY DESTRUCTION BASED UPON PETITIONER'S FAILURE TO PRODUCE ALL COPIES OF FIRST WILL - ALLEGED FAILURE OF COURTS BELOW TO EXERCISE EQUITY POWER - EFFECT OF TESTIMONY REGARDING LOST SECOND WILL AND DECEDENT'S INTENT TO REVOKE THE FIRST WILL;  
 Surrogate's Court, Jefferson County, dismissed the objections to the petition for probate and admitted to probate that last will and testament of Robyn R. Lewis, deceased, executed July 15, 1996; App. Div. affirmed.

LIN (JIN CHENG), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 4/3/13; modification; leave to appeal granted by Hall, J., 6/13/13;  
 CRIMES - EVIDENCE - WHETHER THE TRIAL COURT ERRED IN PRECLUDING ADMISSION INTO EVIDENCE OF DEFENDANT'S COMPLAINT OF MISTREATMENT BY POLICE AND A VIDEOTAPE OF DEFENDANT'S INTERVIEW BY AN ASSISTANT DISTRICT ATTORNEY; CONFESSION - VOLUNTARINESS OF CONFESSION - PRE-ARRAIGNMENT DELAY AND CIRCUMSTANCES SURROUNDING INTERROGATION DURING THAT TIME; DIRECTION TO JURY TO CONTINUE DELIBERATIONS AFTER TRIAL COURT REFUSED TO ACCEPT VERDICT ON GROUNDS OF REPUGNANCY - WHETHER TRIAL COURT ERRED IN REFUSING TO DIRECT THE JURY TO RECONSIDER VERDICT IN ITS ENTIRETY;  
 Supreme Court, Queens County, convicted defendant, upon a jury verdict, of six counts of murder in the first degree, six counts of murder in the second degree, burglary in the first degree, and attempted robbery in the first degree, and imposed sentence; App. Div. modified, by vacating the convictions of murder in the second degree, vacating the sentences imposed thereon, and dismissing those counts of the indictment, and affirmed the judgment as so modified.

McGINLEY et al. v MYSTIC WEST REALTY CORP., &c.:

1<sup>ST</sup> Dept. App. Div. order of 5/13/14; reversal with dissents;  
 Rule 500.11 review pending;  
 NEGLIGENCE - SIDEWALKS - TRIP AND FALL - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT CERTAIN DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT DISMISSING THE COMPLAINT AND CROSS CLAIMS AS AGAINST THEM;

Supreme Court, New York County, denied the motion of defendants Mystic West Realty Corp., d/b/a Rosie O'Grady's, and Trel Restaurant Inc., d/b/a Rosie O'Grady's, for summary judgment dismissing the complaint and cross claims as against them; App. Div. reversed, granted defendants' motion, and directed the Clerk to enter judgment dismissing the complaint and cross claims as against those defendants.

MITCHELL v CANTOR FITZGERALD, L.P., et al.:

1<sup>ST</sup> Dept. App. Div. order of 5/27/14; dismissal of appeal; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; APPEAL - APPELLATE DIVISION - CHALLENGE TO APPELLATE DIVISION ORDER DISMISSING APPEAL FOR FAILURE TO TIMELY PERFECT - DISMISSAL OF APPEAL FROM SUPREME COURT ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT AND DIRECTING THE PARTIES TO PROCEED TO ARBITRATION, PURSUANT TO ARBITRATION AGREEMENT IN A SECURITIES REGISTRATION FORM AND EMPLOYER-EMPLOYEE ARBITRATION AGREEMENT; Supreme Court, New York County, granted defendants' motion to dismiss the complaint and directed the parties to proceed to arbitration, implicitly denying plaintiff's cross motion for a default judgment; App. Div. granted defendants' motion to dismiss the appeal for failure to timely perfect and dismissed the appeal, implicitly denying plaintiff's motion to stay defendants' motion to dismiss the appeal and for other relief.

MITCHELL v NEW YORK UNIVERSITY, et al.:

1<sup>ST</sup> Dept. App. Div. order of 5/29/14; denial of motion; sua sponte examination whether the App. Div. 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; APPEAL - APPELLATE DIVISION - CHALLENGE TO APPELLATE DIVISION ORDER DENYING PLAINTIFF'S MOTION FOR "SUMMARY JUDGMENT" AND FOR OTHER RELIEF WITH RESPECT TO HIS APPEAL FROM A SUPREME COURT ORDER THAT, AMONG OTHER THINGS, GRANTED DEFENDANTS' MOTION TO DISMISS THE COMPLAINT; Supreme Court, New York County, granted defendants' motion to dismiss the complaint and denied plaintiff's cross motion for a default judgment; App. Div. denied plaintiff's motion for "summary judgment" and for other relief.

PEOPLE, et al. v SPRINT NEXTEL CORP., et al.:

1<sup>ST</sup> Dept. App. Div. order of 2/27/14; affirmance; leave to appeal granted by App. Div., 6/12/14;

TAXATION - SALES AND USE TAXES - COMPLAINT ALLEGING VIOLATION OF NEW YORK FALSE CLAIMS ACT (STATE FINANCE LAW § 189[1][g]), EXECUTIVE LAW § 63(12) AND TAX LAW, ARTICLE 12, BY KNOWINGLY MAKING FALSE STATEMENTS MATERIAL TO AN OBLIGATION TO PAY SALES TAX PURSUANT TO TAX LAW § 1105(b)(2) - SALES TAX ON INTERSTATE VOICE SERVICE SOLD BY A MOBILE PROVIDER; PREEMPTION BY FEDERAL MOBILE TELECOMMUNICATIONS SOURCING ACT (4 USC 116, et seq.) - WHETHER EX POST FACTO CLAUSE OF THE U.S. CONSTITUTION (ART. 1, § 10) BARS RETROACTIVE EFFECT OF CIVIL PENALTIES SOUGHT UNDER NEW YORK FALSE CLAIMS ACT;

Supreme Court, New York County, denied defendants' motion to dismiss the complaint in its entirety; App. Div. affirmed.

SOARES, &c., MATTER OF v CARTER, et al.:

3<sup>RD</sup> Dept. App. Div. order of 1/23/14; affirmance; leave to appeal granted by Court of Appeals, 6/10/14;

PROCEEDING AGAINST BODY OR OFFICER - PROHIBITION - WHETHER WRIT OF PROHIBITION LIES WHERE A DISTRICT ATTORNEY SEEKS AN ORDER PROHIBITING A JUDGE FROM EXERCISING HIS CONTEMPT POWER OVER THE DISTRICT ATTORNEY WHO HAS ELECTED NOT TO CONTINUE A CRIMINAL PROSECUTION;

Supreme Court, Albany County, among other things, granted petitioner Albany County District Attorney a writ prohibiting Albany City Court Judge Carter from enforcing his prior orders to the extent they required petitioner to call witnesses and present proof at suppression hearings in the underlying criminal actions against respondents Donnaruma, et al.; App. Div. affirmed.

WILLIAMS, &c., et al. v CARRION:

4<sup>TH</sup> Dept. App. Div. order of 5/2/14; modification; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

SOCIAL SERVICES - PUBLIC ASSISTANCE - AID TO DEPENDANT CHILDREN - CLASS ACTION SEEKING DECLARATORY AND INJUNCTIVE RELIEF ON BEHALF OF LOW-INCOME FAMILIES WHO ARE REQUIRED TO PAY MORE THAN 10% OF THEIR RESPECTIVE GROSS INCOMES FOR SUCH CARE - WHETHER 18 NYCRR 415.3(e)(3), WHICH AUTHORIZES SOCIAL SERVICES DISTRICTS ACROSS THE STATE TO SELECT A MULTIPLIER BETWEEN 10% AND 35% TO USE IN THE FORMULA FOR CALCULATING THE SHARE OF CHILD CARE COSTS ALLOCATED TO ELIGIBLE FAMILIES, VIOLATES SOCIAL SERVICES LAW § 410-x(1) AND (6), AND PLAINTIFFS' CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION AND TO TRAVEL;

Supreme Court, Monroe County, among other things, granted defendant's cross motion for summary judgment; App. Div. modified by vacating the first decretal paragraph and granting judgment in favor of defendant, declaring that 18 NYCRR 415.3(e)(3) is not violative of Social Services Law § 410-x(1) or (6), and does not violate plaintiffs' constitutional right to travel or their right to equal protection of the law.