

COURT OF APPEALS NEW FILINGS

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

December 5, 2014 through December 11, 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.

FARIAS v SIMON:

1ST Dept. App. Div. order of 11/18/14; affirmance with two-Justice dissent; Rule 500.11 review pending;
LABOR - SAFE PLACE TO WORK - HOMEOWNER'S EXEMPTIONS UNDER LABOR LAW §§ 240(1) AND 241 - HOMEOWNER DEFENDANTS' ENTITLEMENT TO SUMMARY JUDGMENT;
Supreme Court, New York County, (1) granted the motion for summary judgment dismissing the claims against the homeowner defendants, (2) denied plaintiff's motion for summary judgment on the claims against the homeowner defendants, (3) denied the third-party defendant Guttilla Contracting Ltd.'s motion for summary judgment dismissing the third-party complaint, and (4) severed and dismissed the main action and directed that the third-party action shall continue under index number 113267/08; App. Div. affirmed.

MATTER OF JACKSON F. (ANONYMOUS) (SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES; GABRIEL F.) (AND ANOTHER PROCEEDING):

2ND Dept. App. Div. order of 10/29/14; affirmance; sua sponte examination of whether a substantial constitutional question is directly involved to support an appeal as of right; PARENT AND CHILD - ABUSED OR NEGLECTED CHILD - WHETHER FAMILY COURT ERRED IN DRAWING AN ADVERSE INFERENCE AGAINST RESPONDENT FATHER BASED ON HIS FAILURE TO TESTIFY AT THE FACT-FINDING HEARING, AND IN ADMITTING INTO EVIDENCE A CHILD PROTECTIVE SERVICES INTAKE REPORT WITH THE IDENTITY OF THE REPORTER REDACTED; CLAIMED DUE PROCESS VIOLATIONS; Family Court, Suffolk County, among other things, after fact-finding and dispositional hearings, found that father neglected the child Jackson F., placed father under the supervision of the Suffolk County Department of Social Services, and suspended judgment for a period of one year provided father complied with enumerated terms and conditions; and, among other things, directed father to refrain from consuming illegal drugs or alcohol, misusing prescription medication, and engaging in acts or threats of domestic violence; App. Div. affirmed the order of fact-finding and disposition, and the order of protection.

LLIBRE (MARCOS), PEOPLE v:

1ST Dept. App. Div. order of 6/3/14; denial of writ of error coram nobis; leave to appeal granted by Rivera, J., 12/3/14; CRIMES - RIGHT TO COUNSEL - EFFECTIVE REPRESENTATION - COUNSEL'S FAILURE TO INFORM DEFENDANT OF HIS RIGHT TO APPEAL AND TO FILE A NOTICE OF APPEAL - WHETHER THE APPELLATE DIVISION ERRED IN DENYING DEFENDANT'S APPLICATION FOR A WRIT OF ERROR CORAM NOBIS SEEKING LEAVE TO FILE A LATE NOTICE OF APPEAL - PEOPLE v SYVILLE (15 NY3d 392 [2010]); App. Div. denied application for a writ of error coram nobis.

MANKO v GABAY, &c., et al. (AND OTHER ACTIONS):

2ND Dept. App. Div. orders of 6/20/13, 9/30/13 and 2/26/14; sua sponte examination of whether the order appealed from 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 - DISMISSAL OF APPEAL FOR FAILURE TO PERFECT - DENIAL OF MOTION FOR LEAVE TO APPEAL TO COURT OF APPEALS; Supreme Court, Kings County, granted motion to dismiss complaint; App. Div. (1) granted appellant Manko's motion to enlarge the time to perfect the appeal to the extent that the time to perfect was enlarged until 7/26/13, and ordered that no further enlargement of time would be granted; (2) among other things, denied the branch of appellant Manko's motion which was to enlarge the time to perfect the appeal, granted the branch of respondent's motion which was to dismiss the appeal and dismissed the appeal for failure to timely perfect; and (3) denied that branch of appellant Manko's motion which was for leave to appeal to the Court of Appeals, and otherwise denied her motion.

MORRIS (SHANE), PEOPLE v:

2ND Dept. App. Div. order of 8/27/14; reversal; leave to appeal granted by Graffeo, J., 11/25/14; Rule 500.11 review pending; CRIMES - JURORS - NOTICE TO COUNSEL OF SUBSTANTIVE JUROR INQUIRY LETTER - MODE OF PROCEEDINGS ERROR - WITHOUT DEFENSE COUNSEL'S OBJECTION TO THE COURT'S PROCEDURES OR RESPONSES, TRIAL JUDGE READ NOTES FROM JURY FOR THE FIRST TIME IN PRESENCE OF COUNSEL AND DEFENDANT, AND RESPONDED TO JURY WITHOUT INPUT FROM COUNSEL; Supreme Court, Queens County, convicted defendant of assault in the first degree and two counts of criminal possession of a weapon in the second degree, upon a jury verdict, and imposed sentence; App. Div. reversed and ordered a new trial.

PEGASUS AVIATION I, INC., et al. v VARIG LOGISTICA S.A., et al.:

1ST Dept. App. Div. order of 6/5/14; reversal; leave to appeal granted by App. Div., 11/18/14; EVIDENCE - LOSS OR DESTRUCTION OF EVIDENCE - RELEVANCE OF SPOILIATED DOCUMENTS - WHETHER MP DEFENDANTS EXERCISED SUFFICIENT CONTROL OVER DEFENDANT VARIG LOGISTICA TO RENDER THE MP DEFENDANTS LIABLE FOR SANCTIONS FOR EVIDENCE SPOILIATION BASED ON VARIG LOGISTIC'S LOSS OF ITS ELECTRONICALLY STORED INFORMATION; Supreme Court, New York County, among other things, granted plaintiffs' motion for a trial adverse inference instruction against MatlinPatterson Global Advisors, LLC, et al. (MP defendants) as a sanction for spoliation of electronic evidence; App. Div. reversed and denied plaintiffs' motion.

MATTER OF PREYER (DISCHE; COMMISSIONER OF LABOR):

3RD Dept. App. Div. order of 10/16/14 affirmance; sua sponte examination of whether the order appealed from 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; UNEMPLOYMENT INSURANCE - CONTRIBUTIONS - TIMELINESS OF REQUEST FOR HEARING - EMPLOYER'S FAILURE TO HAVE MAIL FORWARDED PROPERLY - WHETHER THE DEPARTMENT OF LABOR VIOLATED EMPLOYER'S DUE PROCESS RIGHTS BY ISSUING UNEMPLOYMENT INSURANCE BENEFITS AWARD BASED SOLELY ON CLAIMANT'S SUBMISSIONS OR BY MAILING ITS DETERMINATION TO EMPLOYER'S OUT-OF-STATE ADDRESS RATHER THAN IN-STATE ADDRESS; App. Div. affirmed two 10/19/12 decisions of Unemployment Insurance Appeal Board, which ruled that employer Dische's request for a hearing was untimely.

RUTLEDGE (MICHAEL), PEOPLE v:

1ST Dept. App. Div. order of 4/29/14; affirmance; leave to appeal granted by Lippman, Ch.J., 12/4/14; Rule 500.11 review pending;

CRIMES - CONFESSION - VALIDITY OF DEFENDANT'S WAIVER OF MIRANDA RIGHTS - WHETHER STATEMENTS MADE TO POLICE SHOULD HAVE BEEN SUPPRESSED WHERE, PRIOR TO GIVING THE MIRANDA WARNINGS TO DEFENDANT, A DETECTIVE TOLD DEFENDANT, AMONG OTHER THINGS, THAT HE NEEDED TO TALK TO THE INTERROGATORS, THAT IT WAS IN HIS BEST INTEREST TO TELL THE INTERROGATORS HIS SIDE OF THE STORY, THAT THE EVIDENCE AGAINST HIM WAS STRONG, AND THAT THE PROSECUTOR WOULD HELP HIM IF HE COOPERATED;

Supreme Court, New York County, convicted defendant of manslaughter in the first degree, and sentencing him, as a second felony offender, to a term of 17 years; App. Div. affirmed.

SOTO (VICTOR), PEOPLE v:

1ST Dept. App. Div. order of 12/10/13; reversal; leave to appeal granted by Clark, J., 2/11/14;

CRIMES - EVIDENCE - DECLARATION AGAINST INTEREST - WHETHER A STATEMENT IN WHICH AN INDIVIDUAL ADMITS TO CONDUCT CONSTITUTING AN OFFENSE IS A STATEMENT AGAINST PENAL INTEREST, WHERE THE DECLARANT BELIEVES THAT THE CONDUCT MAY BE ILLEGAL BUT DOES NOT KNOW WHETHER IT IS ILLEGAL;

Supreme Court, Bronx County, convicted defendant, upon a jury verdict, of aggravated driving while intoxicated and driving while intoxicated, and sentenced him to concurrent terms of three years' probation and a \$1,000 fine; App. Div. reversed and remanded matter for a new trial.

SYDORIAK (TYSON), PEOPLE v:

2ND Dept. App. Div. order of 8/27/14; reversal; leave to appeal granted by Graffeo, J., 11/25/14; Rule 500.11 review pending;

CRIMES - JURORS - NOTICE TO COUNSEL OF SUBSTANTIVE JUROR INQUIRY LETTER - MODE OF PROCEEDINGS ERROR - WITHOUT DEFENSE COUNSEL'S OBJECTION TO THE COURT'S PROCEDURES OR RESPONSES, TRIAL JUDGE READ NOTES TO JURY FOR THE FIRST TIME IN PRESENCE OF COUNSEL AND DEFENDANT, AND RESPONDED TO JURY WITHOUT FIRST GETTING INPUT FROM COUNSEL;

Supreme Court, Queens County, convicted defendant of attempted murder in the second degree, upon his guilty plea, and two counts of attempted robbery in the first degree, attempted robbery in the second degree, criminal possession of a weapon in the second degree, attempted criminal possession of a controlled substance in the second degree, and attempted criminal possession of a controlled substance in the third degree, upon a jury verdict, and imposing sentence; App. Div. reversed and ordered a new trial.

WALLACE (BOBBY), PEOPLE v:

1ST Dept. App. Div. order of 1/7/14; affirmance; leave to appeal granted by Lippman, Ch.J., 11/25/14;

CRIMES - SUPPRESSION HEARING - STATEMENTS MADE BY DEFENDANT TO POLICE PRIOR TO HIS ARREST - WHETHER DEFENDANT WAS "IN CUSTODY" FOR PURPOSES OF THE RULE SET FORTH IN MIRANDA v ARIZONA - WHETHER THE "PUBLIC SAFETY" EXCEPTION TO THE MIRANDA RULE APPLIES IN THIS CASE WHERE THE OFFICERS WERE NOT CONCERNED FOR THEIR SAFETY AND THE "WEAPON" AT ISSUE WAS NOT AN INHERENTLY DANGEROUS ITEM LIKE A GUN OR KNIFE;

Supreme Court, New York County, convicted defendant, upon a jury verdict, of assault in the second degree as a hate crime, and sentenced him to a term of 3 1/2 years; App. Div. affirmed.

MATTER OF YOGA VIDA NYC, INC. v COMMISSIONER OF LABOR:

3RD Dept. App. Div. order of 7/31/14; affirmance; leave to appeal granted by Court of Appeals, 11/20/14;

UNEMPLOYMENT INSURANCE - EMPLOYEE OR INDEPENDENT CONTRACTOR - SUFFICIENT CONTROL OVER INSTRUCTORS TO CREATE EMPLOYMENT RELATIONSHIP - WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S DETERMINATION THAT NON-STAFF INSTRUCTORS, WHO TAUGHT YOGA CLASSES AT BOTH YOGA VIDA AND OTHER VARIOUS LOCATIONS, WERE IN FACT YOGA VIDA'S EMPLOYEES RATHER THAN INDEPENDENT CONTRACTORS, THUS REQUIRING YOGA VIDA TO MAKE ADDITIONAL UNEMPLOYMENT INSURANCE CONTRIBUTIONS;

App. Div. affirmed 6/19/13 decision of Unemployment Insurance Appeal Board, which assessed Yoga Vida for additional unemployment insurance contributions.