

COURT OF APPEALS NEW FILINGS

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

April 6, 2018 through April 12, 2018

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.

HE (RONG), PEOPLE v:

2ND Dept. App. Div. order of 12/27/17; affirmance; leave to appeal granted by Hall, J., 3/2/18; Rule 500.11 review pending;

Crimes--Confession--Whether statement obtained from defendant following a Payton violation (see Payton v New York, 455 US 573 [1980]) was sufficiently attenuated from illegal arrest; evidence--whether the People committed a Brady violation (see Brady v Maryland, 373 US 83 [1963]) by failing to disclose the contact information of potential witnesses;

Supreme Court, Kings County, convicted defendant of two counts of assault in the second degree and criminal possession of a weapon in the fourth degree, and imposed sentence; App. Div. affirmed.

HENRY, MATTER OF v FANDRICH, et al.:

4TH Dept. App. Div. order of 3/16/18; denial of petition/complaint; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

Proceeding against Body or Officer--Mandamus--Hybrid CPLR article 78 proceeding and declaratory judgment action seeking a declaration that petitioner is eligible for judicial diversion and that respondent-defendant judge should have referred petitioner's case to a treatment court judge for a hearing; whether petitioner established a clear legal right to the relief sought; alleged unconstitutionality of CPL 216.05; alleged due process and equal protection violations;

App. Div. denied the petition/complaint in a hybrid CPLR article 78 proceeding and declaratory judgment action.

NATIONAL ENERGY MARKETERS ASSOCIATION, MATTER OF v NEW YORK STATE PUBLIC SERVICE COMMISSION:

3RD Dept. App. Div. order of 7/27/17; affirmance; leave to appeal granted by Court of Appeals, 3/27/18;

Public Utilities--Rate Making--Whether respondent New York State Public Service Commission has the authority to impose rate-making limitations on petitioner energy service companies; challenge to "Order Resetting Retail Energy Markets and Establishing Further Process," which imposed various requirements on new and renewal contracts between energy service companies and mass market customers; whether energy service companies have a property interest in continued access to utility systems, and thus are entitled to procedural due process;

Supreme Court, Albany County, among other things, partially granted petitioners' application, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, to review a determination of respondent resetting retail energy markets and establishing further process; App. Div. affirmed.

STATE OF NEW YORK, MATTER OF v HILTON C. (ANONYMOUS):

2ND Dept. App. Div. order of 2/14/18; reversal; sua sponte examination whether an appeal as of right lies under CPLR 5601(c) pursuant to the appellant's stipulation;

Crimes--Sex Offenders--Civil Commitment or Supervision—Whether the State failed to establish that the diagnosis of unspecified paraphilic disorder has achieved general acceptance in the psychiatric and psychological communities, thereby rendering expert testimony on that diagnosis inadmissible in Mental Hygiene Law article 10 proceeding; application of Frye v United States, 293 F 1012 (DC Cir 1923);

Supreme Court, Nassau County, upon a finding made after a jury trial, that the respondent 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 sex offender requiring civil confinement, granted the petition pursuant to Mental Hygiene Law article 10 and directed that the respondent be subject to a regimen of strict and intensive supervision and treatment; App. Div. held the appeal in abeyance and remitted the matter to Supreme Court, Nassau County, for the purpose of conducting a Frye hearing to resolve the question of whether the diagnosis of "unspecified paraphilic disorder" has achieved general acceptance in the psychiatric and psychological communities so as to make expert testimony on that diagnosis admissible (6/29/16 order), and thereafter, App. Div. reversed and remitted the matter to Supreme Court, Nassau County, for a new trial on the issue of mental abnormality, excluding evidence of the unspecified paraphilic disorder diagnosis and, if necessary, a new dispositional hearing (2/14/18 order).

STATE OF NEW YORK, MATTER OF v RICHARD S. (ANONYMOUS):

2ND Dept. App. Div. order of 2/14/18; reversal; sua sponte examination whether an appeal as of right lies under CPLR 5601(c) pursuant to the appellant's stipulation;

Crimes--Sex Offenders--Civil Commitment or Supervision—Whether the State failed to establish that the diagnosis of paraphilic not otherwise specified (nonconsent) is generally accepted in the psychiatric and psychological communities, thereby rendering expert testimony on that diagnosis inadmissible in Mental Hygiene Law article 10 proceeding; application of Frye v United States, 293 F 1012 (DC Cir 1923);

Supreme Court, Nassau County, upon a finding made after a jury trial, that the appellant 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, granted the petition pursuant to Mental Hygiene Law article 10 and directed that the appellant be committed to a secure treatment facility for care and treatment; App. Div. held the appeal in abeyance and remitted the matter to Supreme Court, Nassau County, for the purpose of conducting a Frye hearing to resolve the question of whether the diagnosis of paraphilia not otherwise specified (nonconsent) has achieved general acceptance in the psychiatric and psychological communities so as to make expert testimony on that diagnosis admissible (11/12/15 order), and thereafter; App. Div. reversed and remitted the matter to Supreme Court, Nassau County, for a new trial on the issue of mental abnormality and, if necessary, a new dispositional hearing (2/14/18 order).

RETAIL ENERGY SUPPLY ASSOCIATION, et al., MATTER OF v PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK:

3RD Dept. App. Div. order of 7/27/17; affirmance; leave to appeal granted by Court of Appeals, 3/27/18;

Public Utilities--Rate Making--Whether respondent New York State Public Service Commission has the authority to impose rate-making limitations on petitioner energy service companies; challenge to “Order Resetting Retail Energy Markets and Establishing Further Process,” which imposed various requirements on new and renewal contracts between energy service companies and mass market customers; whether energy service companies have a property interest in continued access to utility systems, and thus are entitled to procedural due process;

Supreme Court, Albany County, among other things, partially granted petitioners' application, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, to review a determination of respondent resetting retail energy markets and establishing further process; App. Div. affirmed.

SANCHEZ (ALEXIS), PEOPLE v:

2ND Dept. App. Div. order of 12/21/17; affirmance; leave to appeal granted by Gesmer, J., 3/29/18; Rule 500.11 review pending;

Crimes--Verdict--Whether the verdict convicting defendant of murder in the second degree and criminal possession of a weapon in the second degree was against the weight of the evidence; whether the People disproved defendant’s justification defense beyond a reasonable doubt; suppression—whether the People met their burden of establishing that the confidential informant had a basis of knowledge for the information provided to the police and that the information was reliable;

Supreme Court, Bronx County, convicted defendant of murder in the second degree and criminal possession of a weapon in the second degree, and imposed sentence; App. Div. affirmed.

SUCHOW v SUCHOW:

3RD Dept. App. Div. order of 1/4/18; reversal; sua sponte examination 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;

Husband and Wife--Divorce--Incorporation of separation agreement into final divorce decree—validity of separation agreement—challenge on fraud and duress grounds; summary judgment;

Supreme Court, Saratoga County, denied plaintiff's motion for summary judgment; App. Div. reversed, granted plaintiff's motion for summary judgment, and remitted the matter to Supreme Court for entry of a final judgment of divorce.

U. S. BANK NATIONAL ASSOCIATION, &c. v ROSE GORDON, et al.:

2ND Dept. App. Div. order of 2/28/18; reversal with dissents; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution;

Mortgages--Foreclosure--Statute of Limitations--Whether plaintiff's claims were barred by the six-year statute of limitations in CPLR 213(4)—plaintiff as successor-in-interest to original holder of mortgage note—acceleration of debt; application of CPLR 205(a) to extend successor entity's time to commence action after dismissal of first action;

Supreme Court, Kings County, granted that branch of defendant Rose Gordon's motion which was pursuant to CPLR 3211(a)(5) to dismiss the complaint insofar as asserted against her as time-barred; App. Div. reversed, and denied that branch of defendant's Rose Gordon's motion which was pursuant to CPLR 3211(a)(5) to dismiss the complaint insofar as asserted against her as time-barred.

ZAPPIN, MATTER OF, AN ATTORNEY:

1ST Dept. App. Div. order of 3/8/18; disbarment; sua sponte examination 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;

Attorney and Client--Disciplinary Proceedings--Disbarment; claimed due process issues; claimed improper use of collateral estoppel in disciplinary proceedings;

App. Div. granted the Attorney Grievance Committee's motion, affirmed the referee's findings of fact and conclusions of law, disbarred respondent attorney, and denied all of respondent's motions for affirmative relief.