



*State of New York
Court of Appeals*

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COURT OF APPEALS NEW FILINGS

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

December 2, 2022 through December 8, 2022

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.

CONSOLIDATED RESTAURANT OPERATIONS v WESTPORT INSURANCE CORPORATION:

1st Dept. App. Div. order of 4/7/22; affirmance; leave to appeal granted by the Court of Appeals, 11/17/22;

Insurance—Property Insurance—Whether the actual, suspected, or threatened presence of COVID-19 in plaintiff's restaurants caused "direct physical loss or damage" to the properties within the meaning of the insurance policy issued to plaintiff by defendant;

Supreme Court, New York County, granted defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) and declared that the losses plaintiff alleges in the complaint are not covered by the subject insurance policy; App. Div. affirmed.

IKB INTERNATIONAL v WELLS FARGO:

1st Dept. App. Div. order of 8/30/22; modification; leave to appeal granted by the Appellate Division on a certified question, 11/10/22;

Contracts—Construction—Whether provision in agreement governing residential mortgage backed securities trusts, which stated that trustee agreed to exercise rights for benefit of present and future certificate holders, imposed an express duty on the trustees to enforce repurchase protocol for the benefit of investors; Contracts—Breach of Performance of Contract—Whether plaintiffs sufficiently alleged that trustees had actual knowledge or written notice of event of default; whether economic loss doctrine barred claims for breach of conflict of interest and post-event of default breach of fiduciary duty; Limitation of Actions—When Cause of Action Accrues—Whether plaintiffs' pre-event of default document defect repurchase claims are time barred;

Supreme Court, New York County, inter alia, denied defendants' motions to dismiss the pre-Event of Default representation and warranty repurchase enforcement breach of contract claims, the post-Event of Default breach of contract claims, and the breach of conflict of interest and post-Event of Default breach of fiduciary duty claims, and granted the motions as to the pre-Event of Default document defect repurchase enforcement claims; App. Div., with two Justices dissenting in part, modified, by granting the motions as to the post-Event of Default breach of contract claims insofar as related to the subset of trusts governed by pooling and servicing agreements requiring written notice from an authorized party to constitute an event of default and the post-Event of Default breach of fiduciary duty claims insofar as based on alleged failures to act as contractually required, and denying the motions as to the pre-Event of Default document defect repurchase enforcement claims, and, as so modified, affirmed.

MADIGAN v BERKELEY CAPITAL LLC:

2nd Dept. App. Div. order of 5/18/22; modification; sua sponte examination of whether any jurisdictional basis exists for an appeal as of right;

Contempt—Civil and Criminal Contempt;

Supreme Court, Kings County, inter alia, (1) denied that branch of the plaintiff's motion which was to vacate a stay issued in an order of the same court dated November 6, 2017, and granted those branches of the motion of the defendants Oceana Holding Corp. and Rosa Bronstein which were to quash certain subpoenas and for an award of costs in the sum of \$2,500, and (2) denied those branches of the separate motion of the defendants Oceana Holding Corp. and Rosa Bronstein which were to hold the plaintiff's counsel in civil and criminal contempt, for an award of attorney's fees pursuant to 22 NYCRR 130-1.1, for referral to the Grievance Committee, and to disqualify the plaintiff's attorney; App. Div. modified (1) by deleting the provision of the October 22, 2018 Supreme Court order denying that branch of the motion of the defendants Oceana Holding Corp. and Rosa Bronstein which was to hold the plaintiff's counsel in criminal contempt, and substituting therefor a provision granting that branch of the motion and imposing a criminal sanction in the amount of \$10,000, and (2) by deleting the provision

thereof denying that branch of the motion of the defendants Oceana Holding Corp. and Rosa Bronstein which was for an award of attorney's fees pursuant to 22 NYCRR 130-1.1, and substituting therefor a provision granting that branch of the motion; and, as so modified, affirmed the order insofar as appealed and cross-appealed from, with costs to the defendant Oceana Holding Corp., and remitted the matter to Supreme Court for a determination of the amount of an award of reasonable attorney's fees.

WILMOT v KIRIK:

4th Dept. App. Div. order 11/10/22; affirmance; sua sponte examination of whether a substantial constitutional question is directly involved to support an appeal as of right; **Liens—Foreclosure—Whether County's in rem tax foreclosure sale triggers plaintiffs' right of first refusal to purchase subject property; whether right of first refusal ran with the land; whether County erred in failing to notify plaintiffs of foreclosure sale of property that was subject to right of first refusal; alleged due process violations;**

Supreme Court, Monroe County, among other things, set aside the judgment of foreclosure and sale of the property at issue and vacated the referee's deed issued to defendant Tony Kirik; App. Div. affirmed.

YANG v UNIVERSITY OF ROCHESTER:

4th Dept. App. Div. order of 10/18/22; dismissal; sua sponte examination of whether the order appealed from finally determines the action within the meaning of the Constitution and whether any jurisdictional basis exists for an appeal as of right;

Appeals—Order—Denial of motion seeking order settling record on appeal;
App. Div. dismissed motion insofar as it sought an order settling the record on appeal from an order of Supreme Court, Monroe County (11/12/21), and otherwise denied the motion insofar as it sought other relief.