

COURT OF APPEALS NEW FILINGS

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

March 14, 2014 through March 20, 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.

BURTON v NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE:
Supreme Court, Albany County judgment of 1/31/14; grant of motion; sua sponte examination whether the only question involved on the appeal is the constitutional validity of a statutory provision;
TAXATION - NONRESIDENT SHAREHOLDERS - PLAINTIFFS' ELECTION UNDER INTERNAL REVENUE CODE § 338(h)(10) TO TREAT STOCK SALE AS AN ASSET SALE - WHETHER TAX LAW § 632(a)(2), AS AMENDED IN 2010, VIOLATES ARTICLE 16, § 3 OF THE NEW YORK STATE CONSTITUTION BY TREATING THE GAIN FROM THE SALE OF STOCK SUBJECT TO SUCH AN ELECTION AS NEW YORK SOURCE INCOME TAXABLE IN NEW YORK, RATHER THAN AS NON-TAXABLE INCOME FROM THE SALE OF INTANGIBLE PERSONAL PROPERTY;

Supreme Court granted defendant's motion to dismiss the complaint and declared that Tax Law § 632(a)(2), as amended in 2010, is constitutional.

C., A DISBARRED ATTORNEY, MATTER OF:

3RD Dept. App. Div. order of 1/23/14; denial of motion to dismiss; 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 PROCEEDING - CHALLENGE TO APPELLATE DIVISION ORDER DENYING RESPONDENT'S MOTION TO DISMISS PROCEEDING FOR FAILURE TO PROSECUTE, WHERE APPELLATE DIVISION HAD ISSUED AN ORDER DISBARRING RESPONDENT IN 1999; App. Div. denied respondent's motion to dismiss proceeding for failure to prosecute.

CROWDER (ADAM), PEOPLE v:

3RD Dept. App. Div. order of 10/31/13; affirmance; leave to appeal granted by Graffeo, J., 3/10/14; CRIMES - SENTENCE - POSTRELEASE SUPERVISION (PRS) - DEFENDANT INFORMED ABOUT PRS WHEN HE WAS CONSIDERING PLEA AGREEMENT, BUT COURT DID NOT DISCUSS THE PRS TERM AT THE PLEA PROCEEDING - WHETHER DEFENDANT'S CLAIM THAT HIS CONVICTION SHOULD BE VACATED ON THE BASIS THAT COUNTY COURT FAILED TO APPRISE HIM OF HIS PRS TERM AT THE TIME OF HIS PLEA IS REVIEWABLE; PRESERVATION; REVIEWABILITY OF CATU ERROR (PEOPLE v LOUREE, 8 NY3d 541 [2007]); CLAIMED DUE PROCESS VIOLATION IN SENTENCE ENHANCEMENT; County Court, Schenectady County, convicted defendant, upon his guilty plea, of attempted burglary in the second degree; App. Div. affirmed.

E., AN ATTORNEY, MATTER OF:

3RD Dept. App. Div. order of 1/30/14; suspension of attorney; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; ATTORNEY AND CLIENT - DISCIPLINARY PROCEEDINGS - SUSPENSION - WHETHER THE APPELLATE DIVISION ERRED IN DETERMINING THAT ATTORNEY "ENGAGED IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE, WITHDREW FROM REPRESENTATION OF A CLIENT WITHOUT PERMISSION OF THE COURT AND TO THE DETRIMENT OF THE CLIENT, AND FAILED TO COMPLY WITH THE RULE REGARDING THE DISBURSEMENT OF FUNDS FOR MISSING CLIENTS"; App. Div., among other things, found attorney guilty of professional misconduct and suspended him from the practice of law for a period of one year.

GRAHAM COURT OWNER'S CORP. v TAYLOR:

1ST Dept. App. Div. order of 1/21/14; modification with a two-Justice dissent; leave to appeal granted by App. Div., 3/11/14;

LANDLORD AND TENANT - LEASE - ATTORNEYS' FEE PROVISION - WHETHER THE APPELLATE DIVISION CORRECTLY HELD THAT A PROVISION IN A LEASE GIVING LANDLORD THE RIGHT TO CANCEL THE LEASE IF TENANT DID NOT TIMELY CURE A DEFAULT, REGAIN POSSESSION OF THE PREMISES THROUGH A SUMMARY HOLDOVER PROCEEDING, RE-RENT THE APARTMENT AND USE ANY RENT THEREFROM TO PAY LANDLORD'S EXPENSES, INCLUDING ITS LEGAL FEES, TRIGGERS THE TENANT'S RECIPROCAL RIGHT TO LEGAL FEES UNDER THE IMPLIED COVENANT PROVIDED BY REAL PROPERTY LAW § 234; Civil Court, New York County, dismissed respondent-tenant's claim for attorneys' fees pursuant to Real Property § 234, granted respondent-tenant's claim for attorneys' fees under Real Property § 223-b, and restored the proceeding to the calendar for a hearing on the amount of attorneys' fees to be awarded; App. Term modified the Civil Court order to dismiss the claim for attorneys' fees under Real Property Law § 223-b; App. Div. modified the App. Term order to grant respondent-tenant's claim for attorneys' fees pursuant to Real Property Law § 234, remanded the matter to Civil Court for a hearing to determine the amount of the fees, and otherwise affirmed.

INGUTTI v ROCHESTER GENERAL HOSPITAL:

4TH Dept. App. Div. order of 2/14/14; reversal with a two-Justice dissent; sua sponte examination whether the order finally determines the action within the meaning of the Constitution; NEGLIGENCE - DUTY - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT HOSPITAL DID NOT HAVE A DUTY TO PREVENT ADMITTED PATIENT FROM LEAVING THE HOSPITAL AGAINST MEDICAL ADVICE OR TO ENSURE PATIENT'S SAFE RETURN HOME; Supreme Court, Monroe County, denied defendant's motion for partial summary judgment dismissing the first cause of action, which was for common law negligence; App. Div. reversed, granted defendant's motion for partial summary judgment dismissing the first cause of action, and dismissed the first cause of action.

JONES (CLEMON), PEOPLE v:

4TH Dept. App. Div. order of 9/27/13; affirmance; leave to appeal granted by Read, J., 3/5/14; CRIMES - SENTENCE - PERSISTENT VIOLENT FELONY OFFENDER - WHETHER THE PERSISTENT FELONY OFFENDER STATUTE (PENAL LAW § 70.10) SHOULD BE INTERPRETED TO HAVE A REQUIREMENT THAT NON-NEW YORK PREDICATE FELONIES HAVE A NEW YORK EQUIVALENT, AS DOES THE SECOND FELONY OFFENDER STATUTE (PENAL LAW § 70.06); County Court, Monroe County, denied defendant's motion to set aside his sentence pursuant to CPL 440.20; App. Div. affirmed.

WILLIAMS (PAUL), PEOPLE v:

4TH Dept. App. Div. order of 6/7/13; modification; leave to appeal granted by Abdus-Salaam, J., 3/5/14;

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CRIMES - INSTRUCTIONS - SEX CRIMES - WHETHER THE APPELLATE DIVISION ERRED IN DETERMINING THAT THE JURY COULD NOT HAVE CONVICTED DEFENDANT OF SEXUAL ABUSE IN THE FIRST DEGREE BASED ON

A THEORY NOT CHARGED IN THE SUPERSEDING INDICTMENT BECAUSE NO EVIDENCE SUPPORTING THE UNCHARGED THEORY WAS PRESENTED AT TRIAL; ARGUMENT AND CONDUCT OF COUNSEL - PROSECUTOR'S IMPROPER COMMENTS REGARDING DEFENDANT'S SILENCE - HARMLESS ERROR; SENTENCE - CONCURRENT AND CONSECUTIVE TERMS - WHETHER SENTENCES IMPOSED ON CONVICTIONS OF SEXUAL ABUSE IN THE FIRST DEGREE AND RAPE IN THE THIRD DEGREE MUST RUN CONCURRENTLY BECAUSE THEY AROSE FROM ONE CONTINUOUS ACT;

County Court, Onondaga County, convicted defendant, upon a jury verdict, of sexual abuse in the first degree, rape in the third degree and criminal impersonation in the first degree; App. Div. modified the judgment by vacating that part convicting defendant of criminal impersonation in the first degree and dismissing count five of the superseding indictment, and by vacating the sentence imposed for rape in the third degree; remitted the matter of Onondaga County Court for resentencing on that count; and affirmed the judgment as so modified.