

COURT OF APPEALS NEW FILINGS

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

May 7 through May 13, 2010

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 60 days after the appeal was taken; respondent's brief to be filed 45 days after the filing of appellant's brief; and a reply brief, if any, to be filed 15 days after 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.

CADICHON et al. v FACELLE et al.:

1ST Dept. App. Div. order of 3/18/10; affirmance and dismissal; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution and whether the two-justice dissent at the App. Div. is on a question of law;

DISMISSAL AND NONSUIT - WANT OF PROSECUTION - CHALLENGE TO APPELLATE DIVISION ORDER THAT, AMONG OTHER THINGS, AFFIRMED A SUPREME COURT ORDER DENYING PLAINTIFFS' MOTION TO VACATE THE DISMISSAL OF THE ACTION PURSUANT TO CPLR 3216;

Supreme Court, Bronx County denied plaintiffs' motion to vacate the dismissal of the action pursuant to CPLR 3216 (8/26/08 order) and thereafter denied plaintiffs' motion to reargue and renew (1/29/09 order); App. Div. affirmed the 8/26/08 order and so much of the 1/29/09 order as denied plaintiffs' motion to renew, and dismissed the appeal from so much of the 1/29/09 order as denied plaintiffs' motion to reargue.

GRANT (JOHN), PEOPLE v:

2ND Dept. App. Div. order of 2/2/10; affirmance; leave to appeal granted by Fisher, J., 5/6/10; Rule 500.11 review pending;
CRIMES - INDICTMENT - SUFFICIENCY OF EVIDENCE BEFORE GRAND JURY - ROBBERY IN THE FIRST DEGREE - USE OR THREATENED IMMEDIATE USE OF A DANGEROUS INSTRUMENT - NOTE USED BY DEFENDANT DURING ROBBERY STATING THAT HE HAD A GUN AND WOULD SHOOT IF BANK TELLER SAID ANYTHING;

Supreme Court, Richmond County granted that branch of defendant's omnibus motion which was to dismiss the indictment to the extent of reducing the charge of robbery in the first degree to the charge of robbery in the third degree; App. Div. affirmed.

HARNETT (DAVID M.), PEOPLE v:

3RD Dept. App. Div. order of 2/25/10; affirmance with dissents; leave to appeal granted by Stein, J., 5/5/10;
CRIMES - SEX OFFENDERS - PLEA OF GUILTY - WHETHER DEFENDANT'S GUILTY PLEA TO SEXUAL ABUSE IN THE FIRST DEGREE WAS KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY ENTERED WHERE THE TRIAL COURT FAILED TO INFORM HIM PRIOR TO ENTRY OF THAT PLEA THAT HIS CONVICTION WOULD SUBJECT HIM TO THE PROVISIONS OF THE SEX OFFENDER MANAGEMENT AND TREATMENT ACT (MENTAL HYGIENE LAW ARTICLE 10), WHICH COULD RESULT IN CONFINEMENT OR INTENSIVE SUPERVISION BEYOND THE EXPIRATION OF HIS PRISON SENTENCE;

Schenectady County Court convicted defendant, upon his guilty plea, of sexual abuse in the first degree; App. Div. affirmed.

HESS, MATTER OF v WEST SENECA CENTRAL SCHOOL DISTRICT:

4TH Dept. App. Div. order of 3/26/10; affirmance with dissents; Rule 500.11 review pending;
SCHOOLS - NOTICE OF CLAIM - LATE NOTICE OF CLAIM - CHALLENGE TO APPELLATE DIVISION ORDER HOLDING THAT SUPREME COURT DID NOT ABUSE ITS DISCRETION IN GRANTING AN APPLICATION SEEKING LEAVE TO SERVE A LATE NOTICE OF CLAIM ON SCHOOL DISTRICT;

Supreme Court, Erie County granted that part of claimant's application seeking leave to serve a late notice of claim on respondent West Seneca Central School District; App. Div. affirmed.

MATTER OF LIQUIDATION OF MIDLAND INSURANCE COMPANY

[AMERICAN STANDARD, INC., et al. v SWISS REINSURANCE AMERICA CORPORATION, et al.]:

1ST Dept. App. Div. order of 2/8/10; reversal; leave to appeal granted by App. Div., 4/29/10;
INSURANCE - LIQUIDATION OF INSURER - CHOICE OF LAW - WHETHER NEW YORK SUBSTANTIVE LAW GOVERNS THE INTERPRETATION AND APPLICATION OF INSOLVENT INSURER'S INSURANCE POLICIES;

Supreme Court, New York County granted the motion of the major policyholders (MPHs) for partial summary judgment declaring that for each policyholder an individualized choice-of-law review must be undertaken following the "grouping of contacts" approach and giving predominant weight to the policyholder's principal place of business, and denied the intervening reinsurers' cross motion for partial summary judgment on the applicability of New York substantive law to all policyholder claims under the Midland policies in the liquidation; App. Div. reversed, denied the MPHs motion and granted the intervening reinsurers' cross motion, declaring that New York substantive law governs the interpretation and application of the Midland insurance policies at issue.

RICHES, et al., MATTER OF v NEW YORK CITY COUNCIL, et al.:

1ST Dept. App. Div. order of 4/15/10; affirmance with dissents; sua sponte examination whether the two-justice dissent at the App. Div. is on a question of law;

MUNICIPAL CORPORATIONS - SUMMARY JUDICIAL INQUIRY PURSUANT TO NEW YORK CITY CHARTER § 1109 - WHETHER THE APPELLATE DIVISION CORRECTLY HELD THAT SUPREME COURT PROPERLY EXERCISED ITS DISCRETION IN DISMISSING A PROCEEDING REQUESTING A SUMMARY JUDICIAL INQUIRY CONCERNING THE NEW YORK CITY COUNCIL'S PRACTICE OF ALLOCATING FUNDS TO NON-EXISTENT ENTITIES DURING ITS INITIAL BUDGETING PROCESS;

Supreme Court, New York County dismissed a proceeding for a summary judicial inquiry pursuant to New York City Charter § 1109; App. Div. affirmed.

RONI, LLC, et al. v ARFA, et al.:

1ST Dept. App. Div. order of 4/1/10; affirmance with dissents; Rule 500.11 review pending;

ATTORNEY AND CLIENT - WHETHER THE COMPLAINT STATES A CAUSE OF ACTION AGAINST ATTORNEYS FOR AIDING AND ABETTING PROMOTERS' ALLEGED BREACH OF FIDUCIARY DUTY IN INFLATING PURCHASE PRICE OF PROPERTIES BY RECEIVING SECRET COMMISSIONS;

Supreme Court, New York County, upon renewal and reargument, adhered to an 4/15/09 Supreme Court order granting the motion of defendants Mintz Levin Cohn Ferris Glovsky & Popeo, P.C. (Mintz Levin) and Jeffrey A. Moerdler and the cross motion of Edward Lukashok, Aubrey Realty Co., Aubrey Realty, LLC, 42nd Street Realty, LLC, Tammaz Realty, LLC, and Elul Acquisition, LLC to dismiss the claims of aiding and abetting breach of fiduciary duty as against Mintz Levin, Moerdler and Lukashok; App. Div. affirmed.

SIRICO (THOMAS), PEOPLE v:

2ND Dept. App. Div. order of 10/27/09; affirmance; leave to appeal granted by Smith, J., 3/19/10;

CRIMES - JURORS - JURY INSTRUCTIONS - WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S REQUEST FOR A JURY CHARGE ON INTOXICATION PURSUANT TO PENAL LAW § 15.25; EVIDENCE - ADMISSIBILITY OF TAPE RECORDING AND TESTIMONY REGARDING 911 TELEPHONE CALL; SUFFICIENCY OF THE EVIDENCE TO PROVE MURDER IN THE SECOND DEGREE;

Suffolk County Court convicted defendant of murder in the second degree, and imposed sentence; App. Div. affirmed.

STUART (CLAUDE), MATTER OF:

2ND Dept. App. Div. order of 3/23/10; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right and whether any jurisdictional basis exists to support an appeal as of right; ATTORNEY AND CLIENT - DISCIPLINARY PROCEEDINGS - CHALLENGE TO APPELLATE DIVISION ORDER DENYING SUSPENDED ATTORNEY'S MOTION FOR REINSTATEMENT AS AN ATTORNEY AND COUNSELOR-AT-LAW; App. Div. denied suspended attorney's motion for reinstatement.

WALKER, MATTER OF v FISCHER:

3RD Dept. App. Div. order of 3/18/10; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; PRISONS AND PRISONERS - DISCIPLINE OF INMATES - WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE DETERMINATION OF GUILT WITH RESPECT TO CHARGES OF SMUGGLING, EXTORTION AND POSSESSING UNAUTHORIZED PROPERTY; DUE PROCESS - PRISONER'S ABILITY TO PRESENT A WITNESS AND CERTAIN EVIDENCE; Supreme Court, Clinton County dismissed petitioner's CPLR article 78 application to review a determination of respondent finding petitioner guilty of violating certain prison disciplinary rules; App. Div. affirmed.

