

COURT OF APPEALS NEW FILINGS

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

January 21 through January 27, 2011

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.

ADLER et al. v BAYER et al.:

2ND Dept. App. Div. order of 10/12/10; reversal; leave to appeal granted by Court of Appeals, 1/18/11;

INSURANCE - NO-FAULT AUTOMOBILE INSURANCE - SERIOUS INJURY - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT SUFFICIENT EVIDENCE DID NOT EXIST TO ALLOW A REASONABLE TRIER OF FACT TO FIND THAT PLAINTIFF SUSTAINED A SERIOUS INJURY UNDER THE "PERMANENT CONSEQUENTIAL LIMITATION CATEGORY" OF INSURANCE LAW § 5102(d) BECAUSE PLAINTIFF FAILED TO "SHOW THE DURATION OF THE ALLEGED INJURY AND THE EXTENT OR DEGREE OF THE LIMITATIONS ASSOCIATED THEREWITH";

Supreme Court, Rockland County judgement in a personal injury action that, upon a jury verdict and upon, in effect, the denial of defendants' motion pursuant to CPLR 4401 for judgment as a matter of law, made at the close of plaintiffs' case, is in favor of plaintiffs and against defendants in the principal sum of \$30,000 for past pain and suffering and \$300,000 for future pain and suffering; App. Div. reversed, granted defendants' motion pursuant to CPLR 4401 for judgment as a matter of law and dismissed the complaint.

BOARD OF COMMISSIONERS OF GREAT NECK PARK DISTRICT OF TOWN OF NORTH HEMPSTEAD, MATTER OF v KINGS POINT HEIGHTS, LLC:

2ND Dept. App. Div. order of 6/1/10; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; EMINENT DOMAIN - CONSEQUENTIAL DAMAGES - SEVERANCE DAMAGES TO REMAINDER PARCEL AFTER PARTIAL TAKING - OFFSET OF ONE CATEGORY OF INDIRECT DAMAGES AGAINST ANOTHER CATEGORY OF INDIRECT DAMAGES; UNDERWATER PROPERTY - VALUE OF RIPARIAN RIGHTS; Supreme Court, Nassau County, among other things, awarded claimant \$2,950,000 in compensation for the partial taking of underwater lands, but did not award claimant severance or consequential damages; App. Div. affirmed.

DAHAR v HOLLAND LADDER & MANUFACTURING CO., et al.:

4TH Dept. App. Div. orders of 12/30/10 (Appeal Nos. 1 and 2); affirmance; sua sponte examination whether any claims by or against the Martin defendants and/or the Bechtel defendants/third-party plaintiff's remain pending in this action; LABOR - SAFE PLACE TO WORK - PERSONAL INJURY ACTION SEEKING DAMAGES FOR INJURIES ALLEGEDLY SUSTAINED WHEN A PLAINTIFF FELL FROM A LADDER AT HIS EMPLOYER'S SHOP WHILE HE WAS READYING A FABRICATED COMPONENT PART FOR SHIPMENT - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT PLAINTIFF WAS NOT PERFORMING AN ACTIVITY PROTECTED BY LABOR LAW § 240(1) BECAUSE HE WAS ENGAGED IN THE NORMAL MANUFACTURING PROCESS AT A FACTORY AND WAS NOT PERFORMING WORK ON THE BUILDING ITSELF - WHETHER PLAINTIFF'S WORK ON A FABRICATED COMPONENT PART CONSTITUTED THE PROTECTED ACTIVITY OF "CLEANING" A "STRUCTURE" - PLAINTIFF'S ENTITLEMENT TO PARTIAL SUMMARY JUDGMENT ON LIABILITY UNDER LABOR LAW § 240(1) AGAINST OWNER OF PROPERTY AND OWNER OF FABRICATED COMPONENT PART; Supreme Court, Erie County, among other things, (1) granted defendants Warner and Shirley Martin's motion for summary judgment dismissing the complaint as against them, (2) granted the motion by defendants/third-party plaintiffs Bechtel Corporation and Bechtel National, Inc. only to the extent of dismissing plaintiff's causes of action against them under Labor Law §§ 240(1) and 241(6), and (3) denied plaintiff's cross motion for partial summary judgment on the issue of liability under Labor Law § 240(1) as against the Martin defendants and the Bechtel defendants/third-party plaintiffs and for permission to

amend his bill of particulars with regard to his Labor Law § 241(6) claim (Appeal No. 1); thereafter, the same court granted the Bechtel defendants' motion for reargument and, upon reargument, vacated so much of the order in Appeal No. 1 as denied the Bechtel defendants' motion for summary judgment, dismissed plaintiff's causes of action as against those defendants under Labor Law § 200 and/or common law negligence, and dismissed all cross claims and counterclaims against those defendants (Appeal No. 2); in separate orders, the App. Div. affirmed both Supreme Court orders.

DONALD v STATE OF NEW YORK:

4TH Dept. App. Div. order of 5/7/10; reversal; leave to appeal granted by Court of Appeals, 1/11/11;

STATE - CLAIM AGAINST STATE - UNLAWFUL INCARCERATION - CLAIM ALLEGING THAT THE STATE UNLAWFULLY IMPRISONED CLAIMANT FOR 676 DAYS FOR VIOLATING THE TERMS OF HIS THREE-YEAR PERIOD OF POSTRELEASE SUPERVISION (PRS) BECAUSE THE DEPARTMENT OF CORRECTIONAL SERVICES (DOCS) IMPERMISSIBLY ADDED PRS TO HIS SENTENCE - WHETHER THE APPELLATE DIVISION ERRED IN DISMISSING THE CLAIM UPON THE GROUND THAT DOCS' IMPOSITION OF PRS WAS PRIVILEGED BECAUSE IT "IMPOSED THE [THREE-YEAR] DEFAULT PERIOD OF [PRS] CONSISTENT WITH THE LAW AT THE TIME OF SENTENCING AND THUS ACTED 'BEYOND [ITS] LIMITED JURISDICTION' RATHER THAN IN THE ABSENCE OF JURISDICTION";

Court of Claims granted claimant's motion for partial summary judgment on liability and denied defendant's cross motion to dismiss the claim; App. Div. reversed, denied claimant's motion for partial summary judgment on liability, granted defendant's cross motion to dismiss the claim, and dismissed the claim.

HAZEN, MATTER OF v BOARD OF EDUCATION OF CITY SCHOOL DISTRICT OF CITY OF NEW YORK:

1ST Dept. App. Div. order of 7/20/10; affirmance; leave to appeal granted by Court of Appeals, 1/18/11; Rule 500.11 review pending; SCHOOLS - TEACHERS - LETTER IN PERSONNEL FILE - HEARING PURSUANT TO EDUCATION LAW § 3020-a - CHALLENGE TO APPELLATE DIVISION ORDER HOLDING THAT, UNDER ARTICLE TWENTY ONE OF CURRENT COLLECTIVE BARGAINING AGREEMENT, TEACHER HAD NO RIGHT TO HEARING WHERE LETTERS IN PERSONNEL FILE "WERE NOT DISCIPLINARY OR PENALTY MEASURES RELATED TO THE FILING OR DISPOSITION OF FORMAL CHARGES"; Supreme Court, New York County denied a CPLR article 78 petition seeking an order directing respondents to expunge certain letters from petitioner's personnel file; App. Div. affirmed.