

COURT OF APPEALS NEW FILINGS

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

**March 4 through March 10, 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 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 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.**

CARRIE B., MATTER OF v JOSEPHINE B.:

3<sup>RD</sup> Dept. App. Div. order of 11/15/10; affirmance;  
PARENT AND CHILD - VISITATION - CHALLENGE TO APPELLATE DIVISION  
ORDER AFFIRMING DISMISSAL OF PETITION BROUGHT BY BIOLOGICAL  
MOTHER OF TWO CHILDREN AS TO WHOM HER PARENTAL RIGHTS WERE  
TERMINATED AND WHO WERE ADOPTED BY PETITIONER'S MOTHER -  
PETITIONER'S STANDING TO SEEK VISITATION WITH CHILDREN AS THEIR  
BIOLOGICAL MOTHER AND ADOPTIVE SIBLING;  
Family Court, Tompkins County dismissed petitioner's application,  
in a proceeding pursuant to Family Court Act article 6, for  
visitation with two children; App. Div. affirmed.

MIRVISH v MOTT, &c., et al.:

1<sup>ST</sup> Dept. App. Div. order of 5/27/10; reversal; leave to appeal granted by Court of Appeals;

GIFTS - INTER VIVOS GIFT - DEAD MAN'S STATUTE - TESTIMONY BY PERSON FROM WHOM PETITIONER DERIVES INTEREST AS EVIDENCE OF GIFT DELIVERY - CHALLENGE TO APPELLATE DIVISION RULING THAT SUCH TESTIMONY WAS INADMISSIBLE UNDER CPLR 4519 AND COULD NOT BE USED TO SUPPORT PETITIONER'S MOTION FOR SUMMARY JUDGMENT - EFFECT OF HANDWRITING ON BACK OF PHOTOGRAPH OF SCULPTURE BY WHICH DECEDENT PURPORTEDLY GAVE THE SCULPTURE TO PETITIONER'S ASSIGNOR;

LIMITATION OF ACTIONS - WHETHER PETITIONER'S CONVERSION CLAIM IS BARRED BY THE APPLICABLE THREE-YEAR STATUTE OF LIMITATIONS;

Surrogate's Court, New York County granted petitioner's cross motion for summary judgment on a petition for damages for claims sounding in conversion, replevin and constructive trust, and for a declaration that petitioner was the rightful owner of a bronze sculpture known as "The Cry" pursuant to an inter vivos gift by decedent to petitioner's assignor, and denying respondents' motion for summary judgment dismissing the petition; App. Div. reversed, granted respondents' motion for summary judgment to the extent of declaring that petitioner's claim of ownership of "The Cry" and his claims for damages are barred by the statute of limitations, and denied petitioner's cross motion.

PESA, et al. v YOMA DEVELOPMENT GROUP, INC., et al.:

Supreme Court, Queens County judgment, bringing up for review a 2<sup>ND</sup> Dept. App. Div. order of 6/1/10; dismissal of appeal as to one defendant and affirmance as to another defendant; leave to appeal granted by Court of Appeals, 2/24/11;

CONTRACTS - BREACH OF CONTRACT - REAL ESTATE PURCHASE AGREEMENTS - WHETHER BUYERS ARE REQUIRED TO PROVE THAT THEY WERE READY, WILLING AND ABLE TO PERFORM UNDER THE CONTRACTS IN ORDER TO SUCCEED IN AN ACTION SEEKING DAMAGES FOR SELLER'S ANTICIPATORY BREACH;

Supreme Court, Queens County, among other things, dismissed the complaint as against defendant Southpoint, Inc., granted the cross motion of defendant Yoma Development Group, Inc. to the extent of dismissing claims against it for specific performance and punitive damages and granted that branch of plaintiffs' cross motion which was for summary judgment on the issue of liability on the causes of action alleging breach of contract as against defendant Yoma Development Group, Inc.; App. Div. dismissed the appeal by defendant Southpoint, Inc. for lack of aggrievement, and otherwise affirmed; thereafter, Supreme Court awarded damages to plaintiff as against defendant Yoma Development Group, Inc. and dismissed the complaint as against defendant Southpoint, Inc.

ROSENBLUM, MATTER OF v THE NEW YORK CITY CONFLICTS OF INTEREST BOARD, et al.:

1<sup>ST</sup> Dept. App. Div. order of 7/1/10; affirmance; leave to appeal granted by Court of Appeals, 2/24/11;

SCHOOLS - TEACHERS - DISCIPLINARY PROCEEDINGS - WHETHER THE COURTS BELOW ERRED IN CONCLUDING THAT EDUCATION LAW § 3020-a PROVIDES THE EXCLUSIVE MEANS TO DISCIPLINE A TENURED PEDAGOGUE AND THAT RESPONDENT NEW YORK CITY CONFLICTS OF INTEREST BOARD THEREFORE MAY NOT PROCEED WITH A TRIAL AGAINST A TENURED PEDAGOGUE BEFORE RESPONDENT NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS FOR THE ALLEGED VIOLATION OF THE CITY'S CONFLICTS OF INTEREST LAW;

Supreme Court, New York County granted a CPLR article 78 petition for a judgment prohibiting respondents from proceeding with an administrative trial of petitioner, a tenured pedagogue employed by the Board of Education of the City of New York, for the alleged violation of the Conflicts of Interest Law of the City of New York; App. Div. affirmed.

SNIFFEN, MATTER OF v WEYGANT:

3<sup>RD</sup> Dept. App. Div. order of 2/10/11; modification; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution and whether the two-justice dissent was on the question of law;

PARENT AND CHILD - CUSTODY - RELOCATION OF CUSTODIAL PARENT - WHETHER MOTHER'S RELOCATION WOULD BE IN CHILDREN'S BEST INTEREST - EXISTENCE OF PROOF CONCERNING CERTAIN FACTORS SUPPORTING RELOCATION;

Family Court, Schoharie County, among other things, dismissed petitioner's application, in three proceedings pursuant to Family Court Act article 6, to modify a prior order of custody; App. Div. modified by reversing so much of the Family Court order as dismissed petitioner's application, granted the petition and remitted to Family Court for establishment of a visitation schedule for respondent, and affirmed the order as so modified.

STEWARD (ANTHONY), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 11/16/10; affirmance; leave to appeal granted by Ciparick, J., 2/24/11;

CRIMES - SENTENCE - WHETHER DEFENDANT WITH A PRIOR VIOLENT FELONY CONVICTION, BUT NEVER ADJUDICATED A "SECOND FELONY OFFENDER," IS ELIGIBLE FOR RESENTENCING UNDER CPL 440.46 - DRUG LAW REFORM ACT OF 2009;

Supreme Court, New York County denied defendant's CPL 440.46 motion for resentencing; App. Div. affirmed.

WRIGHT (NAFIS), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 11/16/10; affirmance; leave to appeal granted by Ciparick, J., 2/24/11;

CRIMES - SENTENCE - WHETHER DEFENDANT WITH A PRIOR VIOLENT FELONY CONVICTION, BUT NEVER ADJUDICATED A "SECOND FELONY OFFENDER," IS ELIGIBLE FOR RESENTENCING UNDER CPL 440.46 - DRUG LAW REFORM ACT OF 2009;

Supreme Court, New York County denied defendant's CPL 440.46 motion for resentencing; App. Div. affirmed.