

COURT OF APPEALS NEW FILINGS

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

May 13 through May 19, 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 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.

ABACUS FEDERAL SAVINGS BANK v ADT SECURITY SERVICES, INC., et al.:

1ST Dept. App. Div. order of 10/12/10; reversal; leave to appeal granted by Court of Appeals, 5/5/11;

NEGLIGENCE - BREACH OF CONTRACT - ACTION BY BANK TO RECOVER DAMAGES AGAINST SECURITY AND ALARM COMPANIES FOR LOSSES RESULTING FROM A BURGLARY - WHETHER PLAINTIFF STATED CAUSES OF ACTION FOR COMMON LAW GROSS NEGLIGENCE AND BREACH OF CONTRACT THAT ARE NOT BARRED BY EXCULPATORY CLAUSES IN THE ALARM CONTRACTS; DISMISSAL AND NONSUIT; WHETHER BANK HAS STANDING TO SUE FOR LOSSES INCURRED BY SAFE DEPOSIT CUSTOMERS AS A RESULT OF BURGLARY;

Supreme Court, New York County denied so much of defendants' motions as sought to dismiss the causes of action for breach of

contract and gross negligence; App. Div. reversed, granted in their entirety the motions of defendants ADT and Diebold to dismiss the amended complaint as against them, and dismissed the amended complaint as against those defendants.

BAKER, MATTER OF v POUGHKEEPSIE CITY SCHOOL DISTRICT, et al.:

2ND Dept. App. Div. judgment of 5/11/10; annulment of agency determination; leave to appeal granted by Court of Appeals, 3/24/11;

ADMINISTRATIVE LAW - HEARING - CPLR ARTICLE 78 PROCEEDING TO REVIEW A DETERMINATION OF THE BOARD OF EDUCATION OF THE POUGHKEEPSIE CITY SCHOOL DISTRICT - WHETHER TWO BOARD MEMBERS WHO TESTIFIED AT THE DISCIPLINARY HEARING OF THE SCHOOL DISTRICT'S BUSINESS MANAGER SHOULD HAVE DISQUALIFIED THEMSELVES FROM REVIEWING THE HEARING OFFICER'S DETERMINATION FINDING PETITIONER GUILTY OF MISCONDUCT AND/OR INCOMPETENCE; CIVIL SERVICE LAW § 75; BACK PAY AND BENEFITS;

App. Div. granted a CPLR article 78 petition to review a determination of the Board of Education of the Poughkeepsie City School District which adopted the findings and recommendations of a hearing officer, finding petitioner guilty of eight charges of misconduct and/or incompetence, and terminated his employment; annulled the determination, and remitted the matter to respondent Board of Education, excluding the Board members who testified at the disciplinary hearing, for a review of the findings and recommendations of the hearing officer and a determination of the amount of back pay and benefits owed to petitioner, if any, and for a new determination thereafter.

BOARD OF MANAGERS OF COPLEY COURT CONDOMINIUM, MATTER OF v TOWN OF OSSINING:

2ND Dept. App. Div. order of 12/21/10; reversal; leave to appeal granted by Court of Appeals, 5/3/11;

TAXATION - ASSESSMENT - JUDICIAL REVIEW - FAILURE TO SERVE SCHOOL SUPERINTENDENT - WHETHER PETITIONER'S "GEOGRAPHICAL MISTAKE" IN SERVING PETITIONS ON THE SUPERINTENDENT OF SCHOOLS OF A NEIGHBORING SCHOOL DISTRICT, RATHER THAN ON THE SUPERINTENDENT OF SCHOOLS OF THE SCHOOL DISTRICT IN WHICH IT OWNS CERTAIN REAL PROPERTY, CONSTITUTED "GOOD CAUSE" TO EXCUSE ITS FAILURE TO SERVE THE CORRECT SCHOOL DISTRICT AND TO ALLOW IT TO EFFECT SUCH SERVICE NUNC PRO TUNC - RPTL 708(3);

Supreme Court, Westchester County denied Briarcliff Manor Union Free School District's motion to dismiss the proceedings on the ground that the petitions were not served upon its Superintendent of Schools and granted the petitioner's cross motion for leave to serve the petitions upon the Superintendent of Schools of the

Briarcliff Manor Union Free School District nunc pro tunc; App. Div. reversed, granted Briarcliff Manor Union Free School District's motion to dismiss the proceedings on the ground that the petitions were not served upon its Superintendent of Schools, and denied petitioner's cross motion for leave to serve the petitions upon the Superintendent of Schools of the Briarcliff Manor Union Free School District nunc pro tunc.

DIMERY v ULSTER SAVINGS BANK:

2ND Dept. App. Div. order of 3/22/11; affirmance; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right;

JUDGMENTS - VACTUR OF JUDGMENT; OCCUPANCY OF REAL ESTATE - EVICTION;

Supreme Court, Putnam County denied plaintiff's motion to vacate a 10/26/00 Supreme Court judgment providing, among other things, for the eviction of plaintiff from her home and enjoining her from bringing any further motions without the permission of Supreme Court; App. Div. affirmed.

GAMMON (BRIAN), PEOPLE v:

App. Term, 9th and 10th Judicial Districts, order of 12/15/10; affirmance; leave to appeal granted by Lippman, Ch.J., 5/9/11; CRIMES - SENTENCE - RESENTENCE OF ADDITIONAL TIME IN JAIL TO REMEDY ERROR BY JAIL PERSONNEL RESULTING IN DEFENDANT'S RELEASE; SEARCH OF THE RECORD BY APPELLATE TERM TO DETERMINE WHAT SENTENCE ORIGINALLY INTENDED BY DISTRICT COURT - CPL 430.10; INCREASE IN SENTENCE BY TRIAL COURT AFTER SENTENCE PRONOUNCED AND AFTER DEFENDANT REMANDED TO CORRECTIONAL FACILITY; DOUBLE JEOPARDY; 1ST District Court, Suffolk County imposed an additional 60 days in jail, upon defendant's admission to a violation of probation; App. Term affirmed.

MANKO v LENOX HILL HOSPITAL:

2ND Dept. App. Div. orders of 2/8/11, 2/14/11 and 3/4/11; sua sponte examination whether the orders appealed from finally determine the action within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right from the App. Div. order;

APPEAL - CHALLENGES TO VARIOUS APPELLATE DIVISION ORDERS, ONE OF WHICH, AMONG OTHER THINGS, DISMISSED PLAINTIFF'S APPEALS FROM FOUR SUPREME COURT ORDERS;

App. Div. denied that branch of plaintiff's motion which was to enlarge the time to perfect appeals from one Supreme Court order dated May 15, 2009 and three Supreme Court orders dated August 14, 2009, dismissed the appeals on the court's own motion for failure to comply with the rules and a prior order of the court, and otherwise denied the motion as academic; among other things,

granted that branch of plaintiff's motion which was, in effect, for leave to reargue her prior motion to waive certain rule requirements regarding the certification of an appendix, and, upon reargument, deleted one decretal paragraph of the prior order granting the motion and replaced it with a decretal paragraph setting a new date for the service and filing of a replacement appendix that did not contain certain designated material; thereafter, on the court's own motion, the court amended the February 14, 2011 order by deleting the date set therein for the service and filing of a replacement appendix and substituting a new date therefor.

McCABE et al. v ST. PAUL FIRE AND MARINE INSURANCE COMPANY:

4TH Dept. App. Div. order of 12/30/10; affirmance; leave to appeal granted by Court of Appeals, 5/3/11;
INSURANCE - DUTY TO DEFEND AND INDEMNIFY - INSURANCE COMPANY'S OBLIGATION UNDER A CLAIMS-MADE PROFESSIONAL LIABILITY POLICY TO INDEMNIFY ATTORNEY IN UNDERLYING MALPRACTICE ACTION - WHETHER INSURANCE LAW § 3240(a)(4) APPLIES TO THE REPORTING REQUIREMENT CONTAINED IN A CLAIMS-MADE POLICY SO THAT COVERAGE EXISTS EVEN THOUGH THE CLAIM WAS REPORTED TO THE INSURANCE COMPANY ONLY AFTER THE POLICY PERIOD EXPIRED;
Supreme Court, Erie County granted defendant St. Paul Fire Insurance Company's motion for leave to reargue and, upon reargument, adhered to its ruling that such defendant was obligated to indemnify defendant David E. Fretz, Esq. for an award of compensatory damages obtained by plaintiffs and not an award of treble damages; App. Div. affirmed.

McCAIN v STATE OF NEW YORK:

2ND Dept. App. Div. order of 1/26/11; denial of reargument; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right;
APPEAL - APPELLATE DIVISION - DENIAL OF MOTION TO WAIVE PAYMENT OF FILING FEE AND FOR FREE TRANSCRIPTS;
App. Div., among other things, granted the branch of appellant's motion which was for leave to prosecute the appeal on the original papers, directed that the appeal will be heard on the original papers and on the briefs of the parties, and denied those branches of appellant's motion seeking to waive payment of the filing fee and for free transcripts; thereafter, the same court denied appellant's motion for leave to reargue those branches of his prior motion which were to waive payment of the filing fee and for free transcripts, and, on the Court's own motion, enlarged appellant's time to perfect the appeal until March 28, 2011.

REDFORD et al. v CUOMO and BITTON, et al.:

Court of Claims orders of 5/11/10, 10/13/10 and 2/23/11;
dismissal; sua sponte examination whether any jurisdictional
basis exists for a direct appeal from the orders of the New York
Court of Claims dated October 13, 2010, May 11, 2010 and February
23, 2011;

STATE - CLAIM AGAINST STATE - CHALLENGE TO ORDERS OF COURT OF
CLAIMS DISMISSING VARIOUS CLAIMS;

Court of Claims, in three orders, dismissed Claim Nos. 118003,
118004, 118086 and 118087.