

COURT OF APPEALS NEW FILINGS

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

**October 14 through October 20, 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.**

AMERICAN BUILDING SUPPLY CORP. v PETROCELLI GROUP, INC., et al.:

1<sup>ST</sup> Dept. App. Div. order of 2/22/11; reversal; leave to appeal granted by Court of Appeals, 10/13/11;

INSURANCE - COVERAGE - CLAIM BY INSURED THAT INSURANCE BROKER NEGLIGENTLY FAILED TO PROCURE ADEQUATE INSURANCE COVERAGE FOR BODILY INJURY INCURRED BY INSURED'S EMPLOYEES IN THE COURSE OF THEIR EMPLOYMENT - WHETHER INSURED'S FAILURE TO REVIEW THE POLICY BARS A NEGLIGENCE CLAIM AGAINST THE BROKER; SUMMARY JUDGMENT; Supreme Court, New York County denied defendant Petrocelli's motion for summary judgment dismissing the complaint and all cross claims as against it; App. Div. reversed, granted defendant Petrocelli's motion for summary judgment dismissing the complaint and dismissed the complaint as against Petrocelli.

ANGAMARCA v NEW YORK CITY PARTNERSHIP HOUSING DEVELOPMENT  
FUND, INC. et al.:

1<sup>ST</sup> Dept. App. Div. order of 6/21/11; modification with dissents; sua sponte examination whether the App. Div. had the power to grant leave to appeal to the Court of Appeals on a certified question from the App. Div. order granting a new trial on damages;

DAMAGES - MEASURE OF DAMAGES - IMMIGRATION STATUS OF PLAINTIFF - WHETHER DEFENDANT SHOULD HAVE BEEN ALLOWED TO PRESENT EVIDENCE ABOUT PLAINTIFF'S IMMIGRATION STATUS AND DESIRE TO RETURN TO EQUADOR AND ARGUE THAT PLAINTIFF'S FUTURE MEDICAL COSTS WOULD HAVE BEEN LOWER IF HE HAD RETURNED TO EQUADOR;

Supreme Court, New York County awarded damages to plaintiff; App. Div. modified the judgment to vacate the award for past and future pain and suffering and remanded the matter for a new trial solely as to such damages, unless defendant Jefferson Townhouses, LLC, within 30 days of service of a copy of the App. Div. order with notice of entry, stipulates to increase the award of past pain and suffering from \$100,000 to \$1,500,000 and the award for future pain and suffering from \$1,000,000 to \$3,500,000, and otherwise affirmed.

BITON v MEER:

2<sup>ND</sup> Dept. App. Div. order of 7/29/11; dismissal of appeal; sua sponte examination whether the 7/29/11 App. Div. 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 - CHALLENGE TO APPELLATE DIVISION ORDER DISMISSING APPEAL FOR FAILURE TO TIMELY PERFECT;

App. Div. dismissed appeal for failure to timely perfect.

BOWDEN (LATISHA), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 8/4/11; reversal; leave to appeal granted by Tom, J., 9/29/11; Rule 500.11 review pending;

CRIMES - SUPPRESSION HEARING - DEFENDANT'S BAG SEARCHED BY POLICE SENT UP TO BUILDING ROOFTOP AFTER OTHER OFFICERS KNOCKED AT APARTMENT DOOR AND HEARD WINDOW BEING OPENED - WHETHER CIRCUMSTANCES GAVE POLICE A REASONABLE SUSPICION THAT DEFENDANT MIGHT BE CONCEALING A WEAPON;

Supreme Court, Bronx County granted defendants' motion to suppress physical evidence and statements (3/31/10 order); effectively granted the People's motion for reargument and, on reargument, adhered to its 3/31/10 decision (4/29/10 order); and dismissed the indictment (5/24/10 order); App. Div. reversed the 3/31/10 order and denied defendant's suppression motion; dismissed the appeal from the 4/29/10 order as subsumed in the appeal from the 3/31/10 order; and reversed the 5/24/10 order, reinstated the indictment and remitted the matter for further proceedings.

CHINESE STAFF AND WORKERS' ASSOCIATION, et al., MATTER OF v BURDEN &c, et al.:

1<sup>ST</sup> Dept. App. Div. order of 9/8/11; affirmance with dissents; ENVIRONMENTAL CONSERVATION - ENVIRONMENTAL QUALITY REVIEW - WHETHER THE DEPARTMENT OF CITY PLANNING CONDUCTED AN ADEQUATE ENVIRONMENTAL REVIEW OF A PROPOSED REZONING - ISSUANCE OF A NEGATIVE DECLARATION - STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) - "HARD LOOK" REQUIREMENT;

Supreme Court, New York County, among other things, denied the petition to annul respondent Department of City Planning's determination that the proposed rezoning of Sunset Park would not have a significant environmental impact, and dismissed the CPLR article 78 proceeding; App. Div. affirmed.

COOPER (KEVIN O.), PEOPLE v:

4<sup>TH</sup> Dept. App. Div. order of 6/10/11; affirmance; leave to appeal granted by Graffeo, J., 10/5/11;

CRIMES - APPEAL - WHETHER AN ORAL RULING ON A PRE-TRIAL MOTION, WHICH WAS NOT REDUCED TO WRITING, IS APPEALABLE; WAIVER OF RIGHT TO APPEAL; SUPPRESSION HEARING;

County Court, Monroe County convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (oral order denying defendant's motion to suppress certain evidence was issued just before defendant pleaded guilty); App. Div. affirmed.

ELMER (CAROL), PEOPLE v:

3<sup>RD</sup> Dept. App. Div. order of 5/19/11; dismissal of appeal; leave to appeal granted by Graffeo, J., 10/5/11;

CRIMES - APPEAL - WHETHER AN ORAL RULING ON A PRE-TRIAL MOTION, WHICH WAS NOT REDUCED TO WRITING, IS APPEALABLE;

County Court, Saint Lawrence County (in an oral order) granted defendant's motion to dismiss the indictment to the extent of dismissing the first 22 counts of the indictment; App. Div. dismissed the appeal and remitted the matter to County Court for further proceedings not inconsistent with the court's decision.

LASSALLE (JARVIS), PEOPLE v:

4<sup>TH</sup> Dept. App. Div. order of 6/10/11; denial of writ of error coram nobis; leave to appeal granted by Graffeo, J., 9/30/11; Rule 500.11 pending review;

CRIMES - SENTENCE - POST-RELEASE SUPERVISION (PRS) - WHETHER COUNTY COURT ERRED IN IMPOSING A PERIOD OF PRS AFTER JUDGE'S STATEMENT DURING PLEA COLLOQUY THAT THE SENTENCE WOULD BE "NO GREATER THAN 15 YEARS" - PEOPLE v CATU (4 NY3d 242); ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL - FAILURE OF DEFENDANT'S APPELLATE COUNSEL TO BRIEF THE CATU ISSUE;

Erie County Court convicted defendant, upon his guilty plea, of robbery in the first degree; App. Div. affirmed, and subsequently denied defendant's application for a writ of error coram nobis.

MANHATTAN TELECOMMUNICATIONS CORPORATION vH & A LOCKSMITH, INC., &c, et al.:

1<sup>ST</sup> Dept. App. Div. order of 3/31/11; reversal; leave to appeal granted by App. Div., 9/29/11; Rule 500.11 review pending; JUDGMENTS - DEFAULT JUDGMENT - VACATUR; CONTRACT TO PERFORM TELEPHONE SERVICES - ACTION ALLEGING FAILURE TO PAY; Supreme Court, New York County denied defendant Vanunu's motion to vacate the default judgment entered against him; App. Div. reversed and granted defendant Vanunu's motion.

LYNCH, MATTER OF v CONDON &c.:

2<sup>ND</sup> Dept. App. Div. judgment of 8/16/11; dismissal of proceeding; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; PROCEEDING AGAINST BODY OR OFFICER - PROHIBITION - PROCEEDING AGAINST SUPREME COURT JUSTICE SEEKING TO PROHIBIT HIM FROM PROCEEDING TO TRIAL IN A CRIMINAL ACTION ENTITLED PEOPLE v LYNCH; CLAIMED DOUBLE JEOPARDY VIOLATIONS; App. Div. denied the petition and dismissed the proceeding.

SWEZEY v MERRILL LYNCH, et al.:

1<sup>ST</sup> Dept. App. Div. order of 6/16/11; reversal; leave to appeal granted by App. Div., 9/29/11; PARTIES - NECESSARY PARTIES - FOREIGN GOVERNMENT - SOVEREIGN IMMUNITY - WHETHER THE APPELLATE DIVISION ERRED IN DISMISSING A PROCEEDING TO EXECUTE A JUDGMENT AGAINST A FUND LOCATED IN NEW YORK UPON THE GROUND THAT A NONPARTY FOREIGN GOVERNMENT CLAIMED TO BE THE TRUE OWNER OF THE FUND'S ASSETS BUT COULD NOT BE JOINED AS A PARTY BECAUSE IT DECLINED TO WAIVE ITS SOVEREIGN IMMUNITY; Supreme Court, New York County, among other things, denied intervenors' motion to dismiss the petition pursuant to CPLR 3211(a)(7) and (10); App. Div. reversed, granted the intervenors' motion to dismiss based upon the impossibility of joining as parties the Republic of Philippines and the Philippine Presidential Commission on Good Government because they were necessary parties and did not waive sovereign immunity, and dismissed the proceeding.

VBH LUXURY, INCORPORATED v 940 MADISON ASSOCIATES, LLC:

1<sup>ST</sup> Dept. App. Div. order of 4/14/11; reversal; leave to appeal granted by App. Div., 9/29/11; Rule 500.11 review pending; INSURANCE - EXCLUSIONS - WHETHER A POLICY ISSUED TO INSURED TENANT EXCLUDES FROM COVERAGE TENANT'S CLAIMS AGAINST ADDITIONAL INSURED LANDLORD WHERE THE POLICY DOES NOT CONTAIN AN EXPRESS "INSURED VERSUS INSURED" EXCLUSION;

Supreme Court, New York County declared that third-party plaintiff 940 Madison Associates, LLC's claims are excluded from coverage under the policy issued by third-party defendant Excelsior Insurance Company; App. Div. reversed, vacated the declaration and declared that third-party plaintiff's claims are not excluded from coverage under the policy.

VELA v TOWER INSURANCE COMPANY OF NEW YORK:

2<sup>ND</sup> Dept. App. Div. order of 4/26/11; reversal; leave to appeal granted by App. Div., 9/29/11; Rule 500.11 review pending; INSURANCE - HOMEOWNER'S INSURANCE - RESIDENCY REQUIREMENT - WHETHER PLAINTIFF RAISED A TRIABLE ISSUE OF FACT REGARDING OWNER OCCUPANCY OF THE INSURED PREMISES UNDER RENOVATION; SUMMARY JUDGMENT;

Supreme Court, Suffolk County denied the parties' motion and cross motion for summary judgment; App. Div. reversed and granted defendant's motion for summary judgment dismissing the complaint.

WEINER v CITY OF NEW YORK, et al:

2<sup>ND</sup> Dept. App. Div. order of 4/26/11; reversal; leave to appeal granted by App. Div., 9/13/11; MUNICIPAL CORPORATIONS - TORT LIABILITY - WHETHER NEW YORK CITY EMERGENCY MEDICAL TECHNICIAN INJURED IN THE LINE OF DUTY ON MUNICIPAL PROPERTY MAY MAINTAIN AN ACTION AGAINST HIS MUNICIPAL EMPLOYER UNDER GENERAL MUNICIPAL LAW § 205-a DESPITE HIS ELIGIBILITY FOR WORKERS' COMPENSATION BENEFITS - WORKERS' COMPENSATION LAW § 11;

Supreme Court, Kings County denied defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(5) and (7) ; App. Div. reversed and granted defendants' motion.