

COURT OF APPEALS NEW FILINGS

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

**May 10, 2013 through May 16, 2013**

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.**

ALBUNIO, et al. v THE CITY OF NEW YORK et al.:

1<sup>ST</sup> Dept. App. Div. order of 12/27/12; affirmance; leave to appeal granted by Court of Appeals, 4/30/13;  
ATTORNEY AND CLIENT - COMPENSATION - CONTINGENCY FEE AGREEMENT - SCOPE OF AGREEMENT PROVIDING FOR A FEE OF 33 1/3 PERCENT OF "THE SUM RECOVERED, WHETHER RECOVERED BY SUIT, SETTLEMENT OR OTHERWISE" - WHETHER "SUM RECOVERED" INCLUDES STATUTORY COUNSEL FEES AWARDED FOR TRIAL WORK IN A CIVIL RIGHTS ACTION;  
Supreme Court, New York County granted nonparty respondent's motion to determine her fees to the extent of including her statutory attorneys' fee award for trial level work in the total recovery for purposes of calculating her contingency fee; App. Div. affirmed.

COVINGTON, MATTER OF v FISCHER:

Supreme Court, Seneca County judgment of 6/6/12; dismissal of CPLR article 78 proceeding; sua sponte examination whether an appeal as of right lies pursuant to CPLR 5601(b)(2);

PRISONS AND PRISONERS - DISCIPLINE OF INMATES - FOUR-MONTH STATUTE OF LIMITATIONS - CHALLENGE TO SUPREME COURT JUDGMENT DISMISSING AS UNTIMELY PETITIONER'S CPLR ARTICLE 78 PROCEEDING CHALLENGING A PRISON DISCIPLINARY DETERMINATION FOLLOWING A TIER III HEARING;

Supreme Court dismissed as untimely the CPLR article 78 proceeding challenging respondent's determination after a Tier III disciplinary hearing.

GARDNER, MATTER OF v COXSACKIE-ATHENS CENTRAL SCHOOL DISTRICT:

3<sup>RD</sup> Dept. App. Div. judgment of 2/16/12 annulling respondent school district's determination and Supreme Court judgment of 4/2/13 awarding back pay and ordering respondent to make petitioner whole for unreimbursed health benefits; sua sponte examination whether the Supreme Court order finally determines the proceeding within the meaning of the Constitution; if not, whether the parties' letters dated 3/29/13 and 4/8/13 constitute a stipulation that finally determines the proceeding within the meaning of the Constitution; whether the App. Div. order satisfies the requirements of CPLR 5601(b)(1), except that of finality so as to allow an appeal as of right pursuant to CPLR 5601(d); and whether a basis exists for an appeal as of right pursuant to CPLR 5601(b)(2);

LIMITATION OF ACTIONS - FOUR-MONTH STATUTE OF LIMITATIONS - EXTENSION UPON FILING NOTICE OF CLAIM - APPLICABILITY OF EXTENSION; CIVIL SERVICE - TERMINATION OF EMPLOYMENT - FAILURE TO PROPERLY DESIGNATE HEARING OFFICER - WAIVER OF OR FAILURE TO PRESERVE CHALLENGE TO IMPROPER DESIGNATION - RATIFICATION OF DESIGNATION BY BOARD OF EDUCATION;

App Div. annulled respondent's determination terminating petitioner's employment and granted the CPLR article 78 petition to the extent of restoring petitioner to his former position with back pay and benefits; thereafter, Supreme Court, Greene County awarded petitioner back pay and ordered respondent to make petitioner whole for unreimbursed health benefits.

MATTER OF GUPTA, AN ATTORNEY:

2<sup>ND</sup> Dept. App. Div. order of 3/8/13 vacating prior order, suspending appellant from the practice of law, and authorizing Grievance Committee to institute disciplinary proceeding against appellant; leave to appeal granted by Court of Appeals, 5/7/13; ATTORNEY AND CLIENT - DISCIPLINARY PROCEEDINGS - WHETHER THE APPELLATE DIVISION ERRED IN SUSPENDING ATTORNEY FROM PRACTICE OF LAW ON ITS OWN MOTION WITHOUT PROVIDING HIM WITH NOTICE THAT IT WAS CONSIDERING SUSPENSION, THE EVIDENTIARY BASIS FOR SUCH SUSPENSION, AND AN OPPORTUNITY TO RESPOND;

App. Div., on appellant's motion to vacate a prior order of the court striking his name from the roll of attorneys to reflect his automatic disbarment based on a now-reversed federal felony conviction, and to reinstate him to the practice of law, (1) granted the motion to the extent of vacating the court's prior order, (2) otherwise denied the motion, and (3) on the court's own motion, immediately suspended appellant from the practice of law, and authorized the Grievance Committee for the Second, Eleventh and Thirteenth Judicial Districts to institute and prosecute a disciplinary proceeding against appellant based on the acts of professional misconduct underlying his alleged criminal conduct.

HOOVER, et al. v NEW HOLLAND NORTH AMERICA, INC., &c. et al.:

4<sup>TH</sup> Dept. App. Div. order of 11/16/12; affirmance; leave to appeal granted by Court of Appeals, 4/30/13;  
PRODUCTS LIABILITY - DEFECTIVELY DESIGNED PRODUCT - TRACTOR-DRIVEN POST HOLE DIGGER - ENTANGLEMENT HAZARD - WHETHER REMOVAL OF DAMAGED SAFETY SHIELD BY OWNER OF POST HOLE DIGGER WAS A SUBSTANTIAL ALTERATION OR MODIFICATION ABSOLVING SELLER AND DISTRIBUTOR OF POST HOLE DIGGER OF LIABILITY - PROXIMATE CAUSE - SUFFICIENCY OF THE EVIDENCE; EVIDENCE - WHETHER VERDICT WAS BASED ON IMPROPERLY ADMITTED EVIDENCE; ALLEGEDLY ERRONEOUS JURY INSTRUCTIONS AND VERDICT SHEET;  
Supreme Court, Niagara County awarded plaintiff Jessica Bowers money damages upon a jury verdict; App. Div. affirmed.

JONES (HAROLD), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 2/5/13; reversal; leave to appeal granted by Graffeo, J., 5/6/13;  
CRIMES - POSSESSION OF WEAPON - POSSESSION OF LOADED FIREARM IN HOME BY DEFENDANT PREVIOUSLY CONVICTED OF A CRIME (PENAL LAW § 265.03[3]) - APPLICABILITY OF "HOME OR PLACE OF BUSINESS" EXCEPTION (PENAL LAW § 265.02[1]);  
Supreme Court, New York County, among other things, reduced a count charging criminal possession of a weapon in the second degree to criminal possession of a weapon in the third degree (3/2/11 order); denied reargument (3/10/11 order); and, thereafter, effectively granted reargument and, upon reargument, adhered to the 3/2/11 order (6/15/11 order); App. Div. reversed the 3/2/11 Supreme Court order and reinstated the charge of criminal possession of a weapon in the second degree, dismissed as academic an appeal from the 6/15/11 order, and dismissed as nonappealable the appeal from the 3/10/11 order.

KASLOW, MATTER OF v CITY OF NEW YORK, et al.:

2<sup>ND</sup> Dept. App. Div. order of 1/16/13; affirmance; leave to appeal granted by Court of Appeals, 5/2/13;

CIVIL SERVICE - RETIREMENT AND PENSION BENEFITS - SERVICE CREDIT FOR CIVILIAN SERVICE - WHETHER THE COURTS BELOW ERRED IN INTERPRETING RETIREMENT AND SOCIAL SECURITY LAW § 504-a TO ADD TO PETITIONER'S TIER 3 RETIREMENT BENEFIT FOR CORRECTIONAL SERVICES A BENEFIT CALCULATION FOR NON-CORRECTIONAL SERVICES; Supreme Court, Kings County granted the petition in a proceeding pursuant to CPLR article 78 to annul a determination of the New York City Employees' Retirement System, which denied petitioner's request for service credit for his prior employment with the New York City Department of Environmental Protection for purposes of determining his retirement benefits from the New York City Department of Correction; App. Div. affirmed.

LANDAUER LIMITED v JOE MONANI FISH CO., INC.:

1<sup>ST</sup> Dept. App. Div. order of 12/27/12; affirmance; leave to appeal granted by Court of Appeals, 5/2/13; PROCESS - SERVICE OF PROCESS - SERVICE ON CORPORATION - DISMISSAL OF ACTION TO ENFORCE AN ENGLISH MONEY JUDGMENT ENTERED ON DEFAULT BECAUSE OF PLAINTIFF'S FAILURE TO ESTABLISH THAT IT OBTAINED PERSONAL JURISDICTION OVER DEFENDANT IN THE FOREIGN ACTION PURSUANT TO CPLR 311(a)(1) - PROCESS SERVER'S FAILURE TO ASCERTAIN WHETHER INDIVIDUALS SERVED WERE AUTHORIZED TO ACCEPT SERVICE ON CORPORATION'S BEHALF - EFFECT OF DEFENDANT'S ACTUAL NOTICE OF THE FOREIGN ACTION - JOHN GALLIANO, S.A. v STALLION, INC. (15 NY3d 75[2010]); Supreme Court, Bronx County, in an action to enforce a foreign money judgment entered against defendant on default, after a traverse hearing, denied plaintiff's motion for summary judgment in lieu of complaint and dismissed the action, without prejudice, for lack of personal jurisdiction; App. Div. affirmed.

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT, MATTER OF v RUBENSTEIN:

1<sup>ST</sup> Dept. App. Div. order of 2/5/13; grant of motion to dismiss appeal; leave to appeal granted by Court of Appeals, 5/7/13; DISCLOSURE - APPLICATION FOR RELEASE OF RECORDS IN CRIMINAL ACTION FOR USE IN DISCIPLINARY PROCEEDING AGAINST A JUDGE - EX PARTE ORDER OF SUPREME COURT - DISMISSAL OF APPEAL AS MOOT; Supreme Court, New York County denied respondent Rubenstein's motion to, among other things, vacate a prior ex parte order releasing certain records and papers to petitioner Commission; App. Div. granted petitioner Commission's motion to dismiss the appeal as moot.

PEOPLE ex rel. RYAN, o/b/o SHAVER v CHEVERKO:

2<sup>ND</sup> Dept. App. Div. order of 1/30/13; reversal; leave to appeal granted by Court of Appeals, 5/7/13; PRISONS AND PRISONERS - CALCULATION OF SENTENCE - GOOD TIME CREDIT - WHERE PENAL LAW § 70.30(2)(b) IMPOSES A TWO-YEAR LIMIT ON THE AGGREGATE TERM OF CONSECUTIVE DEFINITE SENTENCES, WHETHER A PRISONER'S RELEASE DATE SHOULD BE CALCULATED BASED UPON THE PRISONER'S ORIGINAL RELEASE DATE OR THE STATUTORY TWO-YEAR

Supreme Court, Westchester County dismissed a proceeding, in effect, pursuant to CPLR article 70 for a writ of habeas corpus; App. Div. reversed, sustained the writ and directed the Warden of the facility at which petitioner was incarcerated, or his or her agent, to immediately release petitioner upon receipt of a certified copy of the Appellate Division's decision and order.

STARKER v TRUMP VILLAGE SECTION 4, INC., et al.:

2<sup>ND</sup> Dept. App. Div. order of 3/27/13; affirmance; sua sponte examination whether the order 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;

COURTS - JURISDICTION - COMPLAINT AGAINST STATE AND NON-STATE DEFENDANTS FILED IN SUPREME COURT - DISMISSAL OF COMPLAINT AS AGAINST STATE AGENCIES WITHOUT PREJUDICE TO THE PLAINTIFF COMMENCING A CLAIM IN THE COURT OF CLAIMS;

Supreme Court, Kings County granted the motion of the defendants New York State Division of Housing and Community Renewal and Commissioner of New York State Division of Housing and Community Renewal to dismiss the complaint insofar as asserted against them, without prejudice to the plaintiff commencing a claim in the Court of Claims; App. Div. affirmed.