

COURT OF APPEALS NEW FILINGS

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

June 28, 2013 through July 4, 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.

BENNETT, MATTER OF v MCKOY, et al.:

3rd Dept. App. Div. order of 4/12/13/ denial of motion; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution and whether any jurisdictional basis exists for an appeal as of right;

APPEAL - APPELLATE DIVISION - DENIAL OF MOTION FOR EXPUNGEMENT AND DAMAGES;

App. Div. denied motion for expungement and damages.

DLJ MORTGAGE CAPITAL, INC. v KONTOGIANNIS, et al.:

1ST Dept. App. Div. order of 1/15/13; reversal; leave to appeal granted by App. Div., 5/30/13; Rule 500.11 review pending; PRINCIPAL AND AGENT - APPARENT AUTHORITY; FRAUD - CLAIMS AGAINST TITLE INSURERS FOR ACTS OF THEIR AGENTS ALLEGED TO BE CO-CONSPIRATORS IN A MORTGAGE FRAUD SCHEME; Supreme Court, New York County, among other things, denied the motions of defendants Chicago Title Insurance Company, Inc. and United General Title Insurance Company, Inc. to dismiss the complaint as against them; App. Div. reversed and granted the defendants' motions to dismiss the complaint as against them.

FELICIANO (WILSON), PEOPLE v:

1ST Dept. App. Div. order of 12/27/12; affirmance; leave to appeal granted by Mazzairelli, J., 6/4/13; Rule 500.11 review pending; CRIMES - PLEA OF GUILTY - WHETHER TRIAL COURT PROPERLY CONCLUDED THAT DEFENDANT FAILED TO MEET THE CONDITIONS OF HIS PLEA AGREEMENT - SECOND PLEA AGREEMENT; Supreme Court, New York County convicted defendant, upon his guilty plea, of criminal sale of a controlled substance in the fifth degree, and sentenced him, as a second felony offender, to a term of 2 to 4 years; App. Div. affirmed.

GORMAN, MATTER OF v RICE, et al:

2ND Dept. App. Div. order of 5/22/13; reversal; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; PROCEEDING AGAINST BODY OR OFFICER - PROHIBITION - DOUBLE JEOPARDY - DURING COURSE OF TRIAL ON CHARGES OF DRIVING WHILE INTOXICATED, UNSAFE LANE CHANGE AND ENDANGERING THE WELFARE OF A CHILD, TRIAL JUDGE SUA SPONTE DECLARED A MISTRIAL BUT, PRIOR TO THE JURY'S DISCHARGE, RESCINDED THE DECLARATION AND DECLARED A MISTRIAL ON THE CONSENT OF PETITIONER - WHETHER RETRIAL IS BARRED ON THE GROUND OF DOUBLE JEOPARDY; Supreme Court, Nassau County, in effect, granted the CPLR article 78 petition in the nature of prohibition to bar the retrial of petitioner in an action entitled People v Gorman pending in District Court, Nassau County under Docket No. 2006NA016493 to the extent of dismissing the pending action and barring prosecution of petitioner on the charges enumerated in the indictment in that action; App. Div. reversed, denied the petition, and dismissed the proceeding on the merits.

JOHNSON (RAUL), PEOPLE v:

2ND Dept. App. Div. order of 11/14/12; affirmance; leave to appeal granted by Read, J., 6/18/13; CRIMES - RIGHT TO COUNSEL - DEFENDANT, REPRESENTED BY COUNSEL ON A SERIES OF BURGLARY CHARGES, AGREED TO ASSIST PROSECUTORS IN THE

INVESTIGATION OF A STABBING WHICH HE SAID HAD BEEN CONFESSED TO BY SOMEONE ELSE - DURING SUBSEQUENT POLICE QUESTIONING ABOUT THE STABBING, DEFENDANT CONFESSED TO COMMITTING THE ASSAULT HIMSELF - WHETHER DEFENDANT'S SUBSEQUENT WAIVER OF MIRANDA RIGHTS WAS VALID UNDER THE CIRCUMSTANCES; SUPPRESSION HEARING; Rockland County Court convicted defendant, upon a jury verdict, of attempted murder in the second degree and assault in the first degree, and imposed sentence; App. Div. affirmed.

MONETTE et al. v TRUMMER, et al.:

4TH Dept. App. Div. order of 4/26/13; reversal with dissents; Rule 500.11 review pending with a jurisdictional inquiry whether the order appealed from finally determines the action within the meaning of the Constitution;

MOTOR VEHICLES - OWNER OF VEHICLE - VICARIOUS LIABILITY UNDER VEHICLE AND TRAFFIC LAW § 388 - WHETHER THERE ARE ISSUES OF FACT REGARDING WHETHER DEFENDANT CAR DEALERSHIP HAD SUFFICIENT "USE AND POSSESSION" OF THE VEHICLE TO BE CONSIDERED A CO-OWNER WITH DEFENDANT JESSE BALL; SUMMARY JUDGMENT;

Supreme Court, Cattaraugus County denied the motion of defendant Jim Ball Pontiac-Buick-GMC, Inc. for summary judgment dismissing the complaint and all cross claims against it; App. Div. reversed, granted the motion of defendant Jim Ball Pontiac-Buick-GMC, Inc. for summary judgment, and dismissed the complaint and all cross claims against Jim Ball Pontiac-Buick-GMC, Inc.

ESTATE OF MURIEL M. NEALON, MATTER OF (DECEASED):

3RD Dept. App. Div. order of 3/28/13; reversal; Rule 500.11 review pending with a jurisdictional inquiry whether an appeal lies as of right pursuant to CPLR 5601(c);

FRAUD - CONSTRUCTIVE FRAUD - EXISTENCE OF CONFIDENTIAL RELATIONSHIP - WHETHER VULNERABLE PARTY MAINTAINED ABILITY TO EXERCISE FREE WILL - WHETHER THE APPELLATE DIVISION CORRECTLY DETERMINED THAT WHETHER A CONFIDENTIAL RELATIONSHIP EXISTED IN THIS CASE PRESENTED A QUESTION OF FACT THAT SHOULD HAVE BEEN SUBMITTED TO THE JURY;

Surrogate's Court, Schenectady County, judgment upon a verdict rendered in favor of petitioner; App. Div. reversed and remitted the matter to Surrogate's Court for a new trial.

NEW SURFSIDE NURSING HOME, LLC, et al. MATTER OF v DAINES, et al:

2ND Dept. App. Div. order of 2/6/13; affirmance; leave to appeal granted by App. Div., 6/7/13; Rule 500.11 review pending; HEALTH - NURSING HOMES - CPLR ARTICLE 78 PROCEEDING TO REVIEW TWO DETERMINATIONS OF THE COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF HEALTH ENFORCING AUDIT RESULTS OF PATIENT REVIEW INSTRUMENT SUBMISSIONS FOR CERTAIN YEARS - MEDICAID RATE SHEETS; DECLARATORY JUDGMENT;

Supreme Court, Queens County denied the petition and dismissed the proceeding; App. Div. affirmed.

PINNACLE CHARTER SCHOOL v BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK:

4TH Dept. App. Div. order of 7/5/13; modification; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; Supreme Court, Erie County, among other things, granted plaintiffs' motion for a preliminary injunction and granted in part defendants' cross motion by dismissing the fourth cause of action; App. Div. modified by denying plaintiffs' motion for a preliminary injunction, vacating the preliminary injunction, and granting defendants' cross motion in its entirety and dismissing the complaint, and affirmed the order as modified.

SALCEDO (TIRSO), PEOPLE v:

Supreme Court, New York County order of 5/21/13; denial of motion; sua sponte examination whether a civil appeal pursuant to CPLR 5601(b)(2) lies from a Supreme Court order denying a motion for renewal of an application for resentencing in a criminal proceeding;

CRIMES - SENTENCE - DENIAL OF MOTION FOR RENEWAL OF APPLICATION FOR RESENTENCING UNDER THE DRUG LAW REFORM ACT OF 2004;

Supreme Court denied defendant's motion for renewal of his application for resentencing under the Drug Law Reform Act of 2004.

TENENBAUM v STATE COMMISSIONER OF HOUSING AND COMMUNITY RENEWAL:

1ST Dept. App. Div. order of 5/21/09; dismissal; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution, whether the appeal is timely taken, and whether there is any jurisdictional basis for an appeal as of right;

APPEAL - DISMISSAL - APPEALABLE PAPER - WHETHER APPEAL LIES TO THE APPELLATE DIVISION FROM AN ORDER OF THE COMMISSIONER OF HOUSING AND COMMUNITY RENEWAL;

App. Div. dismissed appeal purportedly taken from "the order of the Supreme Court, New York County, entered on or about May 20, 2009" on the ground that no direct appeal lies to the App. Div. from an order of the Commissioner of Housing and Community Renewal.

WASHINGTON (JONAI), PEOPLE v:

2ND Dept. App. Div. order of 4/17/13; affirmance; leave to appeal granted by Angiolillo, J., 6/19/13;

CRIMES - SUPPRESSION HEARING - WHETHER RESULTS OF CHEMICAL BREATH TEST WERE PROPERLY SUPPRESSED - DEFENDANT HAD CONSENTED TO THE TEST AT POLICE HEADQUARTERS BUT, PRIOR TO COMMENCEMENT OF TEST, POLICE DID NOT INFORM DEFENDANT THAT HER ATTORNEY HAD CALLED A DISPATCHER AT POLICE HEADQUARTERS AND STATED "YOU HAVE TO STOP ALL QUESTIONING AND WE'RE NOT CONSENTING TO ANY FORM OF TESTING WHATSOEVER"; RIGHT TO COUNSEL;

Supreme Court, Nassau County, after a hearing, granted that branch of the defendant's omnibus motion which was to suppress the results of a chemical breath test; App. Div. affirmed.