

COURT OF APPEALS NEW FILINGS

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

**August 2, 2013 through August 8, 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.**

GONNARD, MATTER OF v GUIDO:

2<sup>ND</sup> Dept. App. Div. order of 7/24/13; affirmance; sua sponte examination whether the appeal from the Family Court order entered 12/21/12 is timely, whether that order finally determines the proceeding within the meaning of the Constitution, and whether a direct appeal from that order lies pursuant to CPLR 5601(b)(2);

PARENT AND CHILD - CUSTODY - WHETHER FAMILY COURT ERRED IN GRANTING MOTHER'S PETITION FOR A CHANGE OF LEGAL AND RESIDENTIAL CUSTODY OF THE PARTIES' CHILD - ATTORNEYS' FEES;

Family Court, Westchester County, among other things, granted mother's petition to modify a prior custody order so as to award the mother sole legal and residential custody of the subject child, and awarded attorneys' fees to mother in an amount to be determined; App. Div. affirmed.

GRUBSTEIN (HOWARD), PEOPLE v:

App. Term 9<sup>TH</sup> and 10<sup>TH</sup> Judicial Districts order of 12/10/12; reversal; leave to appeal granted by Read, J., 7/26/13; CRIMES - PLEA OF GUILTY - MOTION TO WITHDRAW GUILTY PLEA TO DRIVING WHILE INTOXICATED (DWI) ON THE GROUND, AMONG OTHERS, THAT THE COURT DID NOT ADVISE THE SELF-REPRESENTED DEFENDANT THAT A SUBSEQUENT DWI OFFENSE COULD BE CHARGED AS A FELONY - MOTION TREATED AS A MOTION TO VACATE THE JUDGMENT OF CONVICTION UNDER CPL 440.10 - WHETHER THE APPELLATE TERM ERRED IN CONCLUDING THAT CPL 440.10(C) APPLIED TO BAR DEFENDANT'S CLAIM BECAUSE OF HIS FAILURE TO CHALLENGE THE PLEA ON DIRECT APPEAL; Justice Court, Town of Tuxedo, Orange County, granted defendant's motion to vacate a judgment convicting defendant, upon his guilty plea, of driving while intoxicated; App. Term reversed, and denied defendant's motion to vacate the judgment of conviction.

HAHN, MATTER OF v WILLIAMS:

3<sup>RD</sup> Dept. App. Div. judgment of 6/27/13; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; LICENSES - FIREARMS - CHALLENGE TO DETERMINATION REVOKING PETITIONER'S PISTOL PERMIT UPON THE GROUND THAT PETITIONER'S DEemeanOR IN THE COURTROOM DEMONSTRATED THAT HE DID NOT POSSESS THE TEMPERAMENT, DEemeanOR AND JUDGMENT NECESSARY TO HAVE SUCH A PERMIT - ALLEGED VIOLATION OF PETITIONER'S RIGHTS UNDER THE SECOND AMENDMENT OF THE FEDERAL CONSTITUTION; App. Div. confirmed respondent's determination revoking petitioner's pistol license.

JEFFERSON v STUBBE:

4<sup>TH</sup> Dept. App. Div. order of 6/7/13; 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; COSTS - POOR PERSONS - CHALLENGE TO APPELLATE DIVISION ORDER THAT AFFIRMED A SUPREME COURT ORDER DENYING PLAINTIFF'S MOTION FOR PERMISSION TO PROCEED AS A POOR PERSON, UPON THE GROUND THAT THE ACTION DOES NOT HAVE "ARGUABLE MERIT"; Supreme Court, Monroe County, denied plaintiff's motion for permission to proceed as a poor person; App. Div. affirmed.

LONG ISLAND LIGHTING COMPANY v ALLIANZ:

1<sup>ST</sup> Dept. App. Div. order of 3/26/13; modification; leave to appeal granted by App. Div., 7/23/13; INSURANCE - DISCLAIMER OF COVERAGE - WHETHER THE DUTY TO DISCLAIM AS SOON AS REASONABLY POSSIBLE SET FORTH IN INSURANCE LAW § 3420(d) APPLIES TO ENVIRONMENTAL PROPERTY DAMAGE CLAIMS - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT TRIABLE ISSUES OF FACT EXISTED AS TO WHETHER INSURERS WAIVED THEIR RIGHT TO DISCLAIM COVERAGE BASED UPON THE INSURED'S LATE NOTICE OF AN OCCURRENCE;

Supreme Court, New York County, upon renewal, granted so much of the motions for summary judgment by defendants American Reinsurance Company, Century Indemnity Insurance Company and the Northern Assurance Company of America as sought a declaration that they have no duty to defend or indemnify plaintiffs regarding environmental damage claims on the Bay Shore manufactured gas plant site, due to plaintiffs' failure to provide timely notice under the respective policies, but denied the motions as to the Hempstead manufactured gas plant site; App. Div. modified to deny the motions as to the Bay Shore manufactured gas plant site and vacate the declaration.

MALDONADO (JOSE), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 11/7/12; affirmance; leave to appeal granted by Lippman, Ch.J., 8/6/13;

CRIMES - MURDER - DEPRAVED INDIFFERENCE MURDER - WHETHER LEGALLY SUFFICIENT EVIDENCE SUPPORTED DEFENDANT'S CONVICTION FOR DEPRAVED INDIFFERENCE MURDER WHERE THERE WAS TESTIMONY THAT DEFENDANT TRIED TO AVOID HURTING ANYONE WHEN ATTEMPTING TO ESCAPE FROM POLICE AND WAS REMORSEFUL AFTERWARD;

Supreme Court, Kings County, convicted defendant, upon a jury verdict, of murder in the second degree, unlawful fleeing a police officer in a motor vehicle in the first degree, and grand larceny in the fourth degree, and imposed sentence; App. Div. affirmed.

MANGANO, et al. v STATE OF NEW YORK, et al.:

2<sup>ND</sup> Dept. App. Div. order of 6/26/13; reversal; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

MUNICIPAL CORPORATIONS - HOME RULE POWERS - METROPOLITAN COMMUTER TRANSPORTATION MOBILITY TAX LAW (MTA EMPLOYER TAX LAW) (CHAPTER 25, PART C, § 1 OF THE LAWS OF 2009) (TAX LAW ARTICLE 23) - WHETHER THE APPELLATE DIVISION CORRECTLY HELD THAT THE MTA EMPLOYER TAX LAW IS A SPECIAL LAW SERVING A SUBSTANTIAL STATE CONCERN, SO THAT A HOME RULE MESSAGE WAS NOT REQUIRED BEFORE ITS ENACTMENT;

Supreme Court, Nassau County, in an 8/23/12 order, among other things, granted the motions of certain plaintiffs for summary judgment on the complaint to the extent of declaring Tax Law article 23 unconstitutional and denied the cross motions of certain defendants for summary judgment declaring Tax Law article 23 constitutional and, in a 10/1/12 judgment, declared that Tax Law article 23 is unconstitutional; App. Div. reversed the judgment, denied the motion of certain plaintiffs for summary judgment on the complaint, granted those branches of the cross motions that were for summary judgment declaring that Tax Law article 23 is constitutional, modified the Supreme Court order accordingly, and declared that Tax Law article 23 is constitutional.

MYERS (ARIEL), PEOPLE v.:

3<sup>rd</sup> Dept. App. Div. order of 4/25/13; affirmance; leave to appeal granted by Garry, J., 6/21/13; Rule 500.11 review pending; CRIMES - EVIDENCE - PRIOR BAD ACTS - WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE TESTIMONY REGARDING PRIOR UNCHARGED CRIME, UNDER THE "IDENTITY" EXCEPTION SET FORTH IN MOLINEUX;

County Court, Rensselaer County, convicted defendant, upon a jury verdict, of assault in the first degree and criminal possession of a weapon in the second degree; App. Div. affirmed.

SCHENK v STATEN ISLAND UNIVERSITY HOSPITAL, et al.:

2<sup>ND</sup> Dept. App. Div. order of 7/17/13; 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 - DEFAULT JUDGMENT - VACATUR - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT SUPREME COURT PROVIDENTLY EXERCISED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION, IN EFFECT, TO VACATE AN ORDER ENTERED ON HER DEFAULT BECAUSE SHE FAILED TO DEMONSTRATE A POTENTIALLY MERITORIOUS OPPOSITION TO THE MOTION BY CERTAIN DEFENDANTS TO DISMISS THE COMPLAINT PURSUANT TO CPLR 3126;

Supreme Court, Richmond County, denied plaintiff's motion denominated, among other things, as one for leave reargue; App. Div. affirmed.