

COURT OF APPEALS NEW FILINGS

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

September 6, 2013 through September 12, 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.

CALAFF (IVAN), PEOPLE v

1ST Dept. App. Div. order of 2/19/13; dismissal; leave to appeal granted by Graffeo, J., 9/6/13;
APPEAL - APPELLATE DIVISION - DISMISSAL OF APPEAL FOR FAILURE TO TIMELY PROSECUTE;
Supreme Court, New York County, convicted defendant, upon his guilty plea, of attempted burglary in the second degree, and sentenced him, as a second violent felony offender, to a term of 3 to 6 years; App. Div. dismissed the appeal for failure to timely prosecute.

COLIN REALTY CO., LLC, MATTER OF v TOWN OF NORTH HEMPSTEAD, et al.:

2ND Dept. App. Div. order of 6/5/13; affirmance; leave to appeal granted by Court of Appeals, 9/3/13;
 MUNICIPAL CORPORATIONS - ZONING - VARIANCE - HYBRID PROCEEDING BY ADJACENT LANDOWNER CHALLENGING VARIANCES GRANTED TO PROPOSED RESTAURANT - WHETHER APPELLATE DIVISION ERRED IN DETERMINING THAT THE TOWN OF NORTH HEMPSTEAD BOARD OF ZONING AND APPEALS PROPERLY TREATED THE RESTAURANT'S APPLICATION FOR VARIANCES FOR OFF-STREET PARKING AND LOADING-ZONE REQUIREMENTS AS APPLICATIONS FOR AREA VARIANCES RATHER THAN APPLICATIONS FOR USE VARIANCES;
 Supreme Court, Nassau County, denied the petition and dismissed the proceeding; App. Div. affirmed.

COSTELLO, MATTER OF v NEW YORK STATE BOARD OF PAROLE et al.:

3RD Dept. App. Div. order of 12/27/12; confirmation; leave to appeal granted by Court of Appeals, 8/27/13;
 PAROLE - REVOCATION - CPLR ARTICLE 78 PROCEEDING TO REVIEW BOARD OF PAROLE'S DETERMINATION TO RESCIND PETITIONER'S PAROLE - WHETHER THE APPELLATE DIVISION PROPERLY DETERMINED THAT VICTIM IMPACT STATEMENTS, SUBMITTED AFTER THE BOARD'S DECISION TO GRANT PAROLE, CONSTITUTED NEW INFORMATION SUFFICIENT TO JUSTIFY THE BOARD'S DECISION TO ORDER A RESCISSION HEARING AND THEREAFTER RESCIND ITS PAROLE DETERMINATION AND DENY PAROLE;
 App. Div. confirmed the determination and dismissed the petition.

FLOYD, MATTER OF v CITY OF NEW YORK, et al. (AND 10 OTHER PROCEEDINGS):

1ST Dept. App. Div. order of 5/28/13; affirmance; leave to appeal granted by Court of Appeals, 8/29/13;
 CIVIL SERVICE - CLASSIFICATION - MAYORAL ORDERS THAT DIRECTED RECLASSIFICATION OF CIVIL SERVICE EMPLOYEES IN UNGRADED SKILLED TRADE TITLES - WHETHER THE COURTS BELOW ERRED IN HOLDING THAT THE CITY WAS REQUIRED TO COMPLY WITH THE PROVISIONS OF CIVIL SERVICE LAW § 20(2) PRIOR TO MODIFYING THE PERSONNEL RULES AND REGULATIONS OF THE CITY OF NEW YORK; LABOR UNIONS; LABOR LAW § 220;
 Supreme Court, New York County, in three judgments, annulled Mayoral Personnel Orders No. 2012/1 and 2012/2, dated 4/11/12;
 App. Div. affirmed.

TOWN OF NORTH HEMPSTEAD, MATTER OF v COUNTY OF NASSAU:

2ND Dept. App. Div. order of 1/16/13; modification; leave to appeal granted by Court of Appeals, 9/3/13;
 COLLEGES AND UNIVERSITIES - COMMUNITY COLLEGE - COST OF EDUCATING TOWN RESIDENTS AT COMMUNITY COLLEGE OUTSIDE COUNTY - WHETHER THE EDUCATION LAW PERMITS A COUNTY TO CHARGE BACK A TOWN WITHIN THE COUNTY FOR PAYMENTS THE COUNTY EXPENDS FOR TOWN RESIDENTS TO ATTEND THE FASHION INSTITUTE OF TECHNOLOGY (FIT) AND, IF SO, WHETHER SUCH CHARGE-BACKS ARE RESTRICTED TO TWO-YEAR EDUCATION AND ASSOCIATE DEGREE PROGRAMS - WHETHER THE COUNTY MUST FORMALLY

ADOPT A RESOLUTION AUTHORIZING THE COUNTY TREASURER TO COLLECT THE CHARGE-BACKS IN CONNECTION WITH FIT PRIOR TO IMPOSING SUCH COSTS UPON THE TOWN; SETOFF AND COUNTERCLAIM - RIGHT TO SETOFF - WHETHER THE COUNTY MAY OFFSET THE CHARGE-BACKS AGAINST THE TOWN'S SHARE OF SALES TAX REVENUE THE COUNTY IS OBLIGATED TO PAY TO THE TOWN;

Supreme Court, Nassau County, as relevant to this hybrid CPLR article 78 proceeding and declaratory judgment action, denied the branch of a CPLR article 78 petition which was to review so much of a Nassau County determination as concluded that the County could offset charge-backs for the cost of educating residents of the Town of North Hempstead in 2010 at the community colleges outside the County of Nassau from the Town of North Hempstead's share of sales tax revenue collected for the fourth quarter of fiscal year 2010; in effect, denied that branch of the Town's motion which was for summary judgment declaring that the County may not charge back the Town for any costs of educating residents at the FIT; and, in effect, granted that branch of the Town's motion which was for summary judgment declaring that the County can only charge back for the costs associated with the Town residents enrolled at the FIT in two-year education programs and those seeking two-year associate degrees; App. Div. modified (1) by deleting from the second decretal paragraph the words "enrolled in two-year education program and those seeking two-year Associate degrees," (2) by deleting from the third decretal paragraph the words "That the undisputed amount of \$672,680.12, representing," and (3) by deleting the fourth, fifth, and sixth decretal paragraphs, and substituting therefor a provision declaring that the County of Nassau may not offset any charge-backs from the Town of North Hempstead's share of the sales tax revenue collected for the fourth quarter of fiscal year 2010.

POWERS v 31 E 31 LLC, et al:

1ST Dept. App. Div. order of 4/25/13; reversal; leave to appeal granted by Court of Appeals, 8/27/13;

NEGLIGENCE - DUTY - FALL FROM SETBACK ROOF - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT, GIVEN THE NATURE AND LOCATION OF THE SETBACK ROOF, IT WAS UNFORESEEABLE AS A MATTER OF LAW THAT INDIVIDUALS WOULD CHOOSE TO ACCESS IT AND, THUS, THAT DEFENDANTS HAD NO DUTY TO GUARD AGAINST SUCH AN OCCURRENCE - VIOLATIONS OF STATUTORY DUTY - APPLICABILITY OF 1968 BUILDING CODE - 1979 CERTIFICATE OF OCCUPANCY AS PROOF THAT MULTIPLE DWELLING LAW WAS NOT VIOLATED;

Supreme Court, New York County, denied defendants' motion for summary judgment dismissing the complaint; App. Div. reversed, granted defendants' motion for summary judgment dismissing the complaint and directed the Clerk to enter judgment accordingly.

Vol. 33 - No. 37
Page 4

SAFRAN, PEOPLE ex rel. v O'MEARA, &c.:

3RD Dept. App. Div. order of 8/15/13; denial of application; sua sponte examination whether a substantial constitutional question

is directly involved to support an appeal as of right;
HABEAS CORPUS - CHALLENGE TO APPELLATE DIVISION ORDER DENYING
PETITIONER'S APPLICATION FOR A WRIT OF HABEAS CORPUS;
App. Div. denied an application for a writ of habeas corpus.

SHABAZZ, PEOPLE ex rel. v RICHARDS:

3RD Dept. App. Div. order of 9/13/10; denial of application; sua
sponte examination whether the appeal from the App. Div. order
entered 9/13/10 was timely taken given the Court's 6/14/11 order
denying a motion for leave to appeal from the same App. Div.
order, whether a substantial constitutional question is directly
involved to support an appeal as of right, and whether CPLR 7011
provides an independent jurisdictional basis for an appeal as of
right;

HABEAS CORPUS - CHALLENGE TO APPELLATE DIVISION ORDER DENYING
APPLICATION FOR A WRIT OF HABEAS CORPUS;
App. Div. denied petitioner's application for a writ of habeas
corpus.

STATE OF NEW YORK, MATTER OF v KENNETH T.:

2ND Dept. App. Div. order of 5/8/13; affirmance; leave to appeal
granted by Court of Appeals, 8/29/13;

CRIMES - SEX OFFENDERS - CIVIL COMMITMENT OR SUPERVISION -
SUFFICIENCY OF THE EVIDENCE TO SUPPORT A FINDING OF MENTAL
ABNORMALITY AS DEFINED IN MENTAL HYGIENE LAW § 10.03(i) -
DIAGNOSIS OF "PARAPHILIA NOT OTHERWISE SPECIFIED, NON-CONSENT"
BASED SOLELY UPON KENNETH T.'S PAST SEX CRIMES - WHETHER
DIAGNOSIS OF "ANTISOCIAL PERSONALITY DISORDER" CAN SERVE AS THE
BASIS FOR SEX OFFENDER CIVIL MANAGEMENT;

Supreme Court, Queens County, upon a finding, made after a
nonjury trial, that Kenneth T. suffers from a mental abnormality
as defined in Mental Hygiene Law § 10.03(i), and a determination,
made after a dispositional hearing, that he currently is a
dangerous sex offender requiring confinement, in effect, granted
the petition and directed that Kenneth T. be confined to a secure
treatment facility for care and treatment; App. Div. affirmed.

ANTWAIN T., MATTER OF:

2ND Dept. App. Div. order of 4/10/13; reversal; leave to appeal
granted by Court of Appeals, 8/27/13;

INFANTS - JUVENILE DELINQUENTS - WHETHER THE APPELLATE DIVISION
PROPERLY DETERMINED THAT THE JUVENILE DELINQUENCY PETITION WAS
FACIALLY INSUFFICIENT TO SUPPORT THE CHARGE THAT RESPONDENT
POSSESSED A "DANGEROUS KNIFE" WITHIN THE MEANING OF PENAL LAW §
265.05, WHERE THE PETITION DESCRIBED THE KNIFE AS A MACHETE WITH
A 14-INCH BLADE;

Family Court, Kings County, determined that respondent Antwaine
T. was a juvenile delinquent and placed him on probation after
finding that he was under the age of 16 and possessed a dangerous

knife; App. Div. reversed, dismissed the petition and remitted the matter to Family Court for further proceedings.