

COURT OF APPEALS NEW FILINGS

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

**November 1, 2013 through November 7, 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.**

COLESON, &c., et al. v CITY OF NEW YORK et al.:

1<sup>ST</sup> Dept. App. Div. order of 5/9/13; affirmance; leave to appeal granted by App. Div., 10/15/13;

MUNICIPAL CORPORATIONS - TORT LIABILITY - SPECIAL RELATIONSHIP - WHETHER THERE IS ANY EVIDENCE THAT CITY POLICE OR OTHER CITY EMPLOYEES ASSUMED AN AFFIRMATIVE DUTY TO PROTECT PLAINTIFF FROM ATTACKS BY HER HUSBAND - DUTY OF CARE; SUMMARY JUDGMENT; Supreme Court, Bronx County, granted defendants' motion for summary judgment dismissing the complaint; App. Div. affirmed.

DOWNING v FIRST LENOX TERRACE ASSOCIATES:

1<sup>ST</sup> Dept. App. Div. order of 4/25/13; reversal; leave to appeal granted by App. Div., 10/22/13;  
ACTIONS - CLASS ACTIONS - MOTION TO DISMISS PUTATIVE CLASS ACTION - WHETHER PURPORTED CLASS ACTION SEEKING RECOVERY OF ALLEGED UNLAWFUL RENT OVERCHARGES UNDER THE RENT STABILIZATION LAW (RSL) SHOULD BE DISMISSED PURSUANT TO CPLR 901(b), WHICH, WITH AN EXCEPTION NOT APPLICABLE IN THIS CASE, PROHIBITS CLASS ACTIONS TO RECOVER STATUTORY PENALTIES, WHERE RSL § 26-516(a) MANDATES A PENALTY OF TREBLE DAMAGES IN CERTAIN CIRCUMSTANCES - A PUTATIVE CLASS REPRESENTATIVE HAS WAIVED THE RIGHT OF THE CLASS TO SEEK TREBLE DAMAGES AND CLASS MEMBERS MAY OPT OUT TO PURSUE TREBLE DAMAGES IN INDIVIDUAL ACTIONS;  
Supreme Court, New York County, upon renewal, granted defendants' motion to dismiss plaintiffs-tenants' action; App. Div. reversed, denied the motion and remanded the matter for further proceedings to determine whether the allegations in the amended complaint satisfy the criteria for a class action set forth in CPLR 901(a).

GUDZ v JEMROCK REALTY COMPANY, LLC:

1<sup>ST</sup> Dept. App. Div. order of 4/25/13; affirmance with dissents; leave to appeal granted by App. Div., 10/22/13;  
ACTIONS - CLASS ACTIONS - MOTION TO DISMISS PUTATIVE CLASS ACTION - WHETHER PURPORTED CLASS ACTION SEEKING RECOVERY OF ALLEGED UNLAWFUL RENT OVERCHARGES UNDER THE RENT STABILIZATION LAW (RSL), SHOULD BE DISMISSED PURSUANT TO CPLR 901(b), WHICH, WITH AN EXCEPTION NOT APPLICABLE IN THIS CASE, PROHIBITS CLASS ACTIONS TO RECOVER STATUTORY PENALTIES, WHERE RSL § 26-516(a) MANDATES A PENALTY OF TREBLE DAMAGES IN CERTAIN CIRCUMSTANCES - A PUTATIVE CLASS REPRESENTATIVE HAS WAIVED THE RIGHT OF THE CLASS TO SEEK TREBLE DAMAGES - WHETHER SUCH WAIVER DISQUALIFIES PLAINTIFF AS AN ADEQUATE CLASS REPRESENTATIVE - WHETHER THE RENT OVERCHARGE CLAIMS CAN BE DETERMINED ON A CLASS-WIDE BASIS - ALLEGED PROCEDURAL ERRORS IN MOTION FOR CLASS CERTIFICATION;  
Supreme Court, New York County, upon reargument, adhered to its prior order granting plaintiff's motion for class certification; App. Div. affirmed.

KASSE (HAROUNA), PEOPLE v:

1<sup>ST</sup> Dept. App. Term order of 6/28/13; affirmance; leave to appeal granted by Lippman, Ch. J., 10/22/13; Rule 500.11 review pending;  
CRIMES - ACCUSATORY INSTRUMENT - CLAIMED FACIAL INSUFFICIENCY OF MISDEMEANOR COMPLAINT - WHETHER ALLEGATIONS PROVIDED REASONABLE CAUSE TO BELIEVE THAT DEFENDANT SOLD OR OFFERED TO SELL GOODS IN A PUBLIC PLACE;  
Criminal Court of City of New York, New York County, convicted defendant, upon his guilty plea, of unlicensed general vending, and imposed sentence; App. Term affirmed.

KILDUFF, MATTER OF v ROCHESTER CITY SCHOOL DISTRICT, et al:

4<sup>TH</sup> Dept. App. Div. order of 6/14/13; reversal; leave to appeal granted by Court of Appeals, 10/22/13;  
SCHOOLS - TEACHERS - COLLECTIVE BARGAINING AGREEMENT - WHETHER APPELLATE DIVISION ERRED IN DETERMINING THAT, BASED ON EDUCATION LAW § 3020(1) AND THE EFFECTIVE DATE OF THE RELEVANT COLLECTIVE BARGAINING AGREEMENT, PETITIONER SHOULD HAVE BEEN GIVEN A CHOICE AS TO WHETHER SHE WANTED A SECTION 3020-a HEARING OR TO USE THE DISCIPLINARY PROCEDURES IN THE COLLECTIVE BARGAINING AGREEMENT; Supreme Court, Monroe County, denied the CPLR article 78 petition seeking, among other things, to annul the determination suspending her for 30 days with pay from her position as a tenured teacher with respondent Rochester City School District; App. Div. reversed, granted the petition, annulled the determination and directed respondents to reinstate petitioner to her position as a tenured teacher forthwith with full back pay and benefits and to remove all references to the discipline imposed from petitioner's personnel file.

MERRY-GO-ROUND PLAYHOUSE, INC., MATTER OF v ASSESSOR OF THE CITY OF AUBURN, et al.:

4<sup>TH</sup> Dept. App. Div. order of 3/22/13; reversal; leave to appeal granted by Court of Appeals, 10/22/13;  
TAXATION - ASSESSMENT - REAL PROPERTY TAX LAW (RPTL) ARTICLE 7 PROCEEDING TO REVIEW AN ASSESSMENT ON REAL PROPERTY MADE BY THE CITY RESPONDENTS - WHETHER THE SUBJECT PROPERTIES, TWO APARTMENT BUILDINGS HOUSING A THEATER'S SEASONAL ACTORS AND STAFF, WERE USED EXCLUSIVELY FOR A TAX EXEMPT PURPOSE AS DEFINED BY RPTL 420-a(1)(a);  
Supreme Court, Cayuga County, among other things, granted respondents' motion for summary judgment and denied petitioner's cross motion for summary judgment; App. Div. reversed, denied respondents' motion for summary judgment, granted petitioner's cross motion for summary judgment, granted the petition insofar as it seeks a tax exemption pursuant to RPTL 420-a(1)(a) for the subject real property, and remitted the matter to Supreme Court for further proceedings.

ON SIGHT MOBILE OPTICIANS, PEOPLE v:

App. Term, Judicial Districts 9<sup>th</sup> and 10<sup>th</sup> order of 7/8/13; reversal; leave to appeal granted by Graffeo, J., 10/4/13;  
CRIMES - VIOLATION OF MUNICIPAL CODE - SIGN ORDINANCE - DEFENDANT CHARGED WITH PLACING PROHIBITED SIGN ADVERTISING ITS BUSINESS ON PUBLIC PROPERTY AT FIVE LOCATIONS - WHETHER LOCAL LAW PROHIBITING THE SIGNAGE VIOLATES CONSTITUTIONAL FREE SPEECH PROVISIONS; District Court, 6<sup>th</sup> District (Patchogue Part), Suffolk County, convicted defendant, upon its guilty plea, of multiple charges of placing a prohibited sign on public property, and assessed fines on certain of the charges; App. Term reversed five judgments, dismissed the accusatory instruments, and refunded the fines, if paid.

DARRYL P., MATTER OF v FISCHER:

3<sup>RD</sup> Dept. App. Div. order of 7/25/13; confirmed determination; sua sponte examination of whether a substantial constitutional question is directly involved or whether any other jurisdictional basis exists to support an appeal as of right; PRISONS AND PRISONERS - DISCIPLINE OF INMATES - WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE DETERMINATION OF GUILT WITH RESPECT TO CHARGES ARISING FROM PETITIONER'S ALTERCATION WITH ANOTHER INMATE; App. Div. confirmed the determination of Commissioner of Corrections and Community Services which found petitioner guilty of violating certain prison disciplinary rules, and dismissed the petition.

POLLACK v COOPERMAN, et al.:

2<sup>ND</sup> Dept. App. Div. order of 9/25/13; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; MOTIONS AND ORDERS - MOTION TO DISMISS - COMPLAINT FILED AGAINST SPECIAL REFEREE AND ASSISTANT COUNSEL TO GRIEVANCE COMMITTEE IN A GRIEVANCE PROCEEDING AGAINST PLAINTIFF, ALLEGING VIOLATIONS OF PLAINTIFF'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION, CIVIL HARASSMENT AND MAIL FRAUD - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT THE COMPLAINT FAILED TO STATE A CAUSE OF ACTION; Supreme Court, Suffolk County, granted defendants' motion pursuant to CPLR 3211 to dismiss the complaint and, in effect, denied plaintiff's cross motion to strike the defendants' motion to dismiss the complaint on the ground that the Attorney General should be disqualified from appearing in the action on behalf of defendants; App. Div. affirmed.

POLLACK, MATTER OF v KIERNAN, &c., et al.:

1<sup>ST</sup> Dept. App. Div. order of 4/11/13 (and five other App. Div. orders); reversal; sua sponte examination whether the appeal from the 4/11/13 App. Div. order is moot, whether the 4/11/13 App. Div. order directly involves a substantial constitutional question so as to support an appeal as of right, whether the appeal from the remaining five App. Div. orders was timely taken, whether the remaining five App. Div. orders finally determine the proceedings within the meaning of the Constitution, and whether an appeal lies from the 3/29/12 order of an individual App. Div. Justice; ATTORNEY AND CLIENT - DISCIPLINARY PROCEEDING - CHALLENGE TO AN APPELLATE DIVISION ORDER DENYING A CPLR ARTICLE 78 PETITION SEEKING DISCLOSURE OF CERTAIN DOCUMENTS IN PETITIONER'S DISCIPLINARY FILE, AND TO FIVE OTHER APPELLATE DIVISION ORDERS;

App. Div., among other things, reversed an 11/17/11 Supreme Court, Kings County, order granting a CPLR article 78 petition to the extent of directing the App. Div. to forward certain documents in petitioner's disciplinary file to Supreme Court for in camera review, denied the petition and dismissed the proceeding.

REED, PEOPLE ex rel. v TEDFORD:

3<sup>RD</sup> Dept. App. Div. order of 10/3/13; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

HABEAS CORPUS - AVAILABILITY OF RELIEF; CLAIMED IRREGULARITIES IN ORDER OF COMMITMENT AND CLAIMED DETAINER FOR CRIMES NOT COMMITTED;

Supreme Court, Essex County, without a hearing, denied petitioner's CPLR article 70 application for a writ of habeas corpus; App. Div. affirmed.