

COURT OF APPEALS NEW FILINGS

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

March 18, 2016 through March 24, 2016

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.

ESTEE LAUDER, INC. v OneBEACON INSURANCE GROUP, LLC, et al.:
1ST Dept. App. Div. order of 7/9/15; reversal; leave to appeal granted by App. Div., 2/16/16; Rule 500.11 review pending;
INSURANCE - DISCLAIMER OF COVERAGE - WAIVER OF RIGHT TO ASSERT AFFIRMATIVE DEFENSE OF LATE NOTICE WHERE INSURER FAILS TO RAISE LATE NOTICE IN LETTER OF DISCLAIMER - APPLICATION OF KEYSPAN GAS EAST CORP. v MUNICH REINSURANCE AM., INC. (23 NY3d 583 [2014]) TO WAIVER ISSUE; LAW OF THE CASE;

Supreme Court, New York County, among other things, granted defendants' motion for leave to amend their answer to reassert an affirmative defense of late notice; App. Div. reversed and denied defendants' motion for leave to amend their answer.

FABBRICANTE, MATTER OF v FABBRICANTE:

2ND Dept. App. Div. order of 1/11/16; denial of application; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right;

PARENT, CHILD AND FAMILY - CUSTODY - WHETHER THE APPELLATE DIVISION PROPERLY DENIED PETITIONER'S APPLICATION FOR A WRIT OF HABEAS CORPUS; CLAIMED CONSTITUTIONAL VIOLATIONS;

App. Div. granted that branch of petitioner's application that sought poor person relief to the extent that it waived the filing fee, otherwise denied his request for poor person relief as academic, and denied the branch of his application that was for a writ of habeas corpus.

JAMES, MATTER OF v NEW YORK STATE BOARD OF PAROLE:

3RD Dept. App. Div. order of 2/4/16; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

PROCEEDING AGAINST BODY OR OFFICER - CERTIORARI - CPLR ARTICLE 78 PROCEEDING CHALLENGING A DETERMINATION OF THE BOARD OF PAROLE DENYING HIS REQUEST FOR PAROLE RELEASE - WHETHER THE PAROLE BOARD COMPLIED WITH THE STATUTORY REQUIREMENTS SET FORTH IN EXECUTIVE LAW § 259-i; CLAIMED DUE PROCESS VIOLATIONS;

Supreme Court, Sullivan County, dismissed petitioner's CPLR article 78 petition to review respondent's determination denying petitioner's request for parole release; App. Div. affirmed.

PS 157 LOFTS, LLC, et al. v AUSTIN, et al.:

Civil Court of the City of New York order of 2/18/16; grant of motion; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution and whether the only question involved on the appeal is the constitutional validity of a statutory provision (CPLR 5601[b][2]);

MOTIONS AND ORDERS - CHALLENGE TO CIVIL COURT ORDER DETERMINING THAT WARRANT OF EVICTION MAY BE RE-EXECUTED AND GRANTING PETITIONER'S MOTION TO RENEW A PRIOR MOTION FOR USE AND OCCUPANCY TO THE EXTENT OF SCHEDULING A HEARING TO DETERMINE THE FAIR MARKET USE AND OCCUPANCY OF THE SUBJECT PREMISES - CLAIM THAT THE GRANT OF SUMMARY JUDGMENT TO PETITIONERS PURSUANT TO CPLR 3212 DEPRIVED RESPONDENTS OF THEIR CONSTITUTIONAL RIGHT TO A TRIAL BY JURY;

Civil Court of the City of New York granted petitioner's motion and determined that the warrant of eviction may be re-executed, but stayed execution until March 31, 2016 to allow respondents to vacate, and directed that, upon failure to vacate the warrant may execute after re-service of a marshal's notice, and granted petitioner's motion to renew a prior motion for use and occupancy to the extent of setting the matter down for a hearing to determine the fair market use and occupancy of the subject premises.

MENDEZ, MATTER OF v NEW YORK CITY DEPARTMENT OF EDUCATION, et al.:

1ST Dept. App. Div. order of 10/20/15; modification; leave to appeal granted by App. Div., 2/23/16;

SCHOOLS - TEACHERS - PERFORMANCE REVIEW - WHETHER THE APPELLATE DIVISION ERRED IN ANNULING THE TERMINATION OF A PROBATIONARY TEACHER'S EMPLOYMENT BASED UPON THE COURT'S CONCLUSION THAT TEACHER'S UNSATISFACTORY RATING ON PERFORMANCE REVIEW LACKED A RATIONAL BASIS;

Supreme Court, New York County, granted respondents' cross motion to dismiss the petition to annul two unsatisfactory ratings for the summer of 2011 and the 2011-2012 school year, to annul respondents' determination to terminate petitioner's probationary employment, and to reinstate her to the position of probationary teacher, and dismissed the CPLR article 78 proceeding; App. Div. modified to annul petitioner's termination, to annul the summer 2011 unsatisfactory rating, to remand the matter to the New York City Department of Education for completion of its final review and recommendation consistent with the Appellate Division's memorandum, and otherwise affirmed.

PERKINS v BARRY:

2ND Dept. App. Div. order of 12/3/15; dismissal of appeal; 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;

APPEAL - APPELLATE DIVISION - DISMISSAL OF APPEAL - CLAIMED DENIAL OF DUE PROCESS;

Supreme Court, Kings County, confirmed a referee's report; set forth the date, time and terms of the foreclosure sale; determined that if the proceeds of the sale were insufficient to cover the debt that plaintiffs could apply for a deficiency judgment; and directed that the referee transfer title to the winning bidder within 45 days without further court order; App. Div. denied defendant's motion for leave to appeal to the Court of Appeals from an 8/3/15 Appellate Division order and, on its own motion, dismissed the appeal from the Supreme Court amended judgment for failure to timely perfect it in accordance with its rules and prior order of the court.

WASHINGTON, PEOPLE ex rel. v GERBING, &c.:

1ST Dept. App. Div. order of 12/29/15; denial of writ of habeas corpus; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right;
HABEAS CORPUS - AVAILABILITY OF RELIEF; CLAIMED VIOLATION OF CONSTITUTIONAL RIGHTS - ACTUAL INNOCENCE DEFENSE - SUFFICIENCY OF THE EVIDENCE TO SUPPORT CONVICTION OF A CRIME;
App. Div. denied petitioner's motion for a writ of habeas corpus, poor person relief and assignment of counsel.

WHITEHEAD v STATE OF NEW YORK:

2ND Dept. App. Div. order of 1/12/16; denial of motion; 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;
APPEAL - CHALLENGE TO APPELLATE DIVISION ORDER THAT, AMONG OTHER THINGS, DENIED APPELLANT'S RENEWED MOTION, IN EFFECT, TO WAIVE PAYMENT OF THE FILING FEE AND FOR FREE TRANSCRIPTS ON AN APPEAL FROM A COURT OF CLAIMS ORDER GRANTING THE STATE'S MOTION TO DISMISS APPELLANT'S CLAIM AS UNTIMELY;
App. Div. (1) denied the pro se appellant's renewed motion, in effect to waive payment of the filing fee and for free transcripts on an appeal from an order of the Court of Claims dated April 29, 2014, which granted the State's motion to dismiss appellant's claim as untimely, (2) enlarged appellant's time to perfect the appeal until March 14, 2016, and (3) stated that no further enlargement of time shall be granted.