

COURT OF APPEALS NEW FILINGS

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

**April 5 through April 11, 2019**

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.**

BLOCH v CITY OF NEW YORK, et al.:

2<sup>ND</sup> Dept. App. Div. order of 2/6/19; denial of motion; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right and whether any jurisdictional basis exists for an appeal as of right;

**Appeal--Appellate Division--Late Notice of Appeal;**

App. Div. denied branch of plaintiff's motion which was for, in effect, leave to file a late notice of appeal, and otherwise denied plaintiff's motion as academic.

BRITO v GOMEZ et al.:

1<sup>ST</sup> Dept. App. Div. order of 11/27/18; affirmance with dissents; leave to appeal granted by App. Div., 3/19/19; Rule 500.11 review pending;

**Disclosure--Scope of Disclosure--Whether plaintiff in personal injury action who makes a claim for lost earnings and loss of enjoyment of life waives the physician-patient privilege only with respect to personal injuries affirmatively placed in controversy, and not with respect to prior injuries not raised in the lawsuit; plaintiff's bill of particulars alleged injuries only to her cervical spine, lumbar spine, and left shoulder, but defendants sought discovery relating to prior knee injuries;**

Supreme Court, Bronx County, denied defendants' motion to strike the note of issue and to compel plaintiff to provide discovery relating to prior medical treatment of her knees; App. Div. affirmed.

HSBC BANK USA v LUGO:

1<sup>ST</sup> Dept. App. Div. order of 2/21/19; modification; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution;

**Pleading--Answer--Whether Supreme Court properly denied defendant's motion to compel acceptance of an untimely answer;**

Supreme Court, Bronx County, denied defendant's motion to dismiss the complaint and granted plaintiff's cross motion for leave to reply to defendant's counterclaims; App. Div. modified to grant the motion to compel plaintiff to accept defendant's untimely answer, and otherwise affirmed.

LAU v HUMAN RESOURCES ADMINISTRATION, &c., et al.:

1<sup>ST</sup> Dept. App. Div. order of 1/22/19; 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;

**Pleading--Amendment--Whether Supreme Court properly denied plaintiff's motion to submit a third amended complaint--plaintiff sought consequential damages based on temporary suspension of Supplemental Nutrition Assistance Program benefits; alleged due process violation;**

Supreme Court, New York County, denied plaintiff's motion for leave to submit a third amended complaint; App. Div. affirmed.

NATIONAL FUEL GAS DISTRIBUTION CORPORATION, MATTER OF v PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK:

3<sup>RD</sup> Dept. App. Div. order of 2/28/19; confirmation of determination; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

**Public Utilities--Rate Making--Public Service Commission--Challenge to the Earnings Sharing Mechanism imposed by respondent in its rate making process for a utility providing gas distribution services in New York and Pennsylvania--challenge to the overall determination as unsupported by substantial evidence--challenge to the Commission's use of inconsistent methodologies to set depreciation expense as arbitrary, capricious and unsupported by substantial evidence;** Supreme Court, Albany County, transferred the proceeding to the Appellate Division; App. Div. confirmed respondents' determination establishing petitioner's rates for gas service, and dismissed the petition.

SALINAS v WORLD HOUSEWARES PRODUCING CO. LTD., et al.:

1<sup>ST</sup> Dept. App. Div. order of 11/20/18; affirmance; leave to appeal granted by Court of Appeals, 3/26/19; Rule 500.11 review pending;

**Negligence--Products Liability--Whether plaintiff raised a triable issue of fact as to whether a potholder manufactured, distributed and sold by defendants was a proximate cause of burn injuries in an accident involving a home oven; summary judgment--expert affidavits;**

Supreme Court, New York County, granted defendants' motion for summary judgment dismissing the complaint; App. Div. affirmed.

MATTER OF SAVITT, A SUSPENDED ATTORNEY:

1<sup>ST</sup> Dept. App. Div. order of 2/21/19; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

**Attorney and Client--Disciplinary Proceedings--Order suspending attorney from the practice of law for a period of three years; alleged due process violations;**

App. Div. suspended appellant from the practice of law for a period of three years, nunc pro tunc to 4/26/18.

SHAWE v ELTING:

1<sup>ST</sup> Dept. App. Div. order of 2/26/19; reversal; sua sponte examination of whether a substantial constitutional question is directly involved to support an appeal as of right;

**Estoppel--Collateral Estoppel--Whether defendant was collaterally estopped from re-litigating issues raised in action litigated in Delaware Court of Chancery--Disclosure--whether Appellate Division properly dismissed complaint pursuant to CPLR 3103(c) based on plaintiff's disclosure abuses; alleged violation of the Full Faith and Credit Clause of the United States Constitution;**

Supreme Court, New York County, denied defendant's motion to dismiss the action pursuant to CPLR 3103 and 3126; App. Div. reversed and dismissed the complaint with prejudice.

SIPP (DON P.), PEOPLE v:

4<sup>TH</sup> Dept. App. Div. order of 2/1/19; affirmance with dissents; leave to appeal granted by Carni, J., 3/20/19; Rule 500.11 review pending;

**Crimes--Evidence--Sufficiency of evidence that victim sustained "a serious physical injury"--failure of trial court to charge the jury on the lesser included offense of assault in the third degree;**

County Court, Seneca County, convicted defendant, upon a jury verdict, of assault in the second degree; App. Div. affirmed.

MATTER OF MARIAN T. (LAUREN R.):

3<sup>RD</sup> Dept. App. Div. order of 11/21/18; affirmance; leave to appeal granted by Court of Appeals, 3/28/19;

**Adoption--Adoption of Adult--Whether Surrogates' Court had discretion to dispense with adult adoptee's consent in adoption proceeding; petitioners commenced proceeding to adopt 64-year old woman with severe intellectual disabilities, who resided in petitioners' family care home; construction of Domestic Relations Law § 111(1)(a);**

Surrogate's Court, Otsego County, granted petitioner's application, in a proceeding pursuant to Domestic Relations Law article 7, for adoption of Marian T.

WHITE et al. v PLEXOUSAKIS, et al.:

Supreme Court, Orange County, order of 12/13/18; denial of reargument; sua sponte examination of whether an appeal lies to the Court of Appeals in the first instance or whether the appeal should be transferred to the App. Div.;

**Motions and Orders--Reargument or Renewal--Leave to reargue dismissal of medical malpractice action;**

Supreme Court denied plaintiff's motion for leave to reargue Supreme Court's 7/28/18 order granting defendant's motion for summary judgment dismissing the complaint.