

COURT OF APPEALS NEW FILINGS

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

April 1 through April 7, 2011

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.

DIBBLE v NEW YORK CITY TRANSIT AUTHORITY:

1ST Dept. App. Div. order of 6/22/10; reversal; leave to appeal granted by Court of Appeals, 3/24/11;

WITNESSES - EXPERT WITNESS - PERSONAL INJURY ACTION - PLAINTIFF STRUCK BY SUBWAY TRAIN - WHETHER JURY'S VERDICT WAS SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE - WHETHER PLAINTIFF'S EXPERT'S TESTIMONY AS TO STOPPING DISTANCES ESTABLISHED DEFENDANT'S NEGLIGENCE;

Supreme Court, New York County, after a jury trial in which defendant was found to be 65% liable, awarded judgment to plaintiff in the total sum of \$2,412,250.20; App. Div. reversed and dismissed the complaint.

DICKINSON (ROBERT GUY), PEOPLE v:

3RD Dept. App. Div. order of 11/4/10, affirmance; leave to appeal granted by Lippman, Ch.J., 3/30/11;

CRIMES - RIGHT TO SPEEDY TRIAL - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT A CERTAIN TIME PERIOD WAS "NOT CHARGEABLE TO THE PROSECUTION [FOR SPEEDY TRIAL PURPOSES] BECAUSE THE PARTIES WERE INVOLVED IN ONGOING PLEA DISCUSSIONS AND DEFENDANT [DID] NOT DENY THAT HE AND HIS COUNSEL ACTIVELY PURSUED AND PARTICIPATED IN THESE NEGOTIATIONS";

Washington County Court convicted defendant of driving while ability impaired, aggravated unauthorized operation of a motor vehicle in the first degree, resisting arrest and failure to comply with a lawful order of a police officer; App. Div. affirmed.

EASTSIDE EXHIBITION CORP. v 210 EAST 86TH STREET CORP.:

1ST Dept. App. Div. order of 12/2/10; affirmance; leave to appeal granted by Court of Appeals, 3/31/11;

LANDLORD AND TENANT - EVICTION - UNAUTHORIZED TAKING OF DEMISED PREMISES - RENT ABATEMENT - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT A COMMERCIAL TENANT WHO IS SUBJECTED TO A PARTIAL, ACTUAL EVICTION IS NOT ENTITLED TO A TOTAL RENT ABATEMENT BUT RATHER TO A PARTIAL RENT ABATEMENT IN THE AMOUNT OF ITS ACTUAL DAMAGES;

Supreme Court, New York County dismissed defendant's claims for ejectment and for attorneys' fees and awarded plaintiff declaratory and injunctive relief preventing defendant from terminating plaintiff's lease and holding plaintiff was not in default thereof, and dismissed plaintiff's claims for a permanent injunction and abatement of rent; App. Div. modified to the extent of holding that plaintiff is entitled to be compensated for an actual partial eviction, otherwise affirmed the judgment, and remanded for a hearing to determine the amount of damages; following a hearing on remand, Supreme Court determined that plaintiff was not entitled to any abatement of rent; App. Div. affirmed.

FEDERAL INSURANCE COMPANY v INTERNATIONAL BUSINESS MACHINES CORP., et al.:

2ND Dept. App. Div. order of 11/9/10; dismissal and reversal; leave to appeal granted by Court of Appeals, 3/24/11;

INSURANCE - DUTY TO DEFEND AND INDEMNIFY - EXCESS COVERAGE - WHETHER A BREACH OF FIDUCIARY DUTY IS REQUIRED FOR THE COMMISSION OF A "WRONGFUL ACT" COVERED BY AN EXCESS INSURANCE POLICY WHERE "WRONGFUL ACT" IS DEFINED IN PERTINENT PART AS "ANY BREACH OF THE RESPONSIBILITIES, OBLIGATIONS OR DUTIES BY AN INSURED WHICH ARE IMPOSED UPON A FIDUCIARY OF A BENEFIT PROGRAM BY THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 [ERISA], OR BY THE COMMON OR STATUTORY LAW OF THE UNITED STATES" - ENTITLEMENT TO COVERAGE BY INSURED WHO IS FIDUCIARY OF A BENEFIT PROGRAM BUT WHO WAS NOT ACTING AS FIDUCIARY WITH RESPECT TO ITS ALLEGED BREACH OF ERISA - AMBIGUOUS CONTRACTS;

Supreme Court, Westchester County denied plaintiff's motion for summary judgment declaring that it has no obligation to indemnify the defendants for any amounts, including defense costs or settlement payments, that defendants may have incurred in connection with an action entitled Cooper v IBM Personal Pension Plan, and granted that branch of defendants' cross motion for summary judgment on their counterclaim alleging breach of contract (June 30, 2009 Supreme Court order); thereafter, Supreme Court entered judgment in favor of defendants and against plaintiff in the principal sum of \$25,000,000, and, upon an August 24, 2009 Supreme Court order that, in effect, denied defendants' application for an award of an attorney's fees, failed to award defendants an attorney's fee; App. Div. dismissed plaintiff's appeal from the June 30, 2009 Supreme Court order; reversed the judgment, granted plaintiff's motion for summary judgment, denied that branch of defendants' cross motion which was for summary judgment on their counterclaim alleging breach of contract, and declared that plaintiff has no obligation to indemnify defendants for any amounts, including defense costs or settlement payments that defendants may have incurred in connection with the action entitled Cooper v IBM Personal Pension Plan, and modified the June 30, 2009 order accordingly; and dismissed defendants' cross appeal from the judgment as academic.

PHILLIPS (JAMES F.), PEOPLE v:

2ND Dept. App. Div. order of 3/15/11; reversal; leave to appeal granted by Graffeo, J., 3/31/11; Rule 500.11 review pending; CRIMES - SENTENCE - WHETHER A DEFENDANT REINCARCERATED FOR A PAROLE VIOLATION IS ELIGIBLE TO APPLY FOR RESENTENCING UNDER CPL 440.46 - DRUG LAW REFORM ACT OF 2009; MOOTNESS; County Court, Orange County denied defendant's motion to be resentenced pursuant to CPL 440.46 on his conviction of criminal sale of a controlled substance in the third degree, which was originally imposed, upon his guilty plea, on December 14, 2001; App. Div. reversed and remitted to County Court for further proceedings and a new determination of defendant's motion.

REGIONAL ECONOMIC COMMUNITY ACTION PROGRAM, INC. v ENLARGED CITY SCHOOL DISTRICT OF MIDDLETOWN:

2ND Dept. App. Div. order of 12/7/10; affirmance; leave to appeal granted by Court of Appeals, 3/31/11; TAXATION - ASSESSMENT - ACTION TO RECOVER TAXES PAID TO SCHOOL DISTRICT PURSUANT TO ILLEGAL ASSESSMENT - TAXES PAID UNDER LETTER THAT PROTESTED ONLY CITY TAX PAYMENTS, NOT SCHOOL DISTRICT TAX PAYMENTS - EDUCATION LAW § 3813; Supreme Court, Orange County, judgment in favor of defendant and against plaintiff, dismissing the complaint; App. Div. affirmed.