

COURT OF APPEALS NEW FILINGS

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

January 25, 2013 through January 31, 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.

FABRIZI v 1095 AVENUE OF THE AMERICAS, L.L.C., et al.:
1ST Dept. App. Div. order of 9/18/12; modification with dissents; leave to appeal granted by App. Div., 12/13/12;
NEGLIGENCE - ELECTRICIAN INJURED BY PIPE FALLING FROM CEILING WHERE GENERAL CONTRACTOR WAS REMODELING A COMMERCIAL SPACE - CLAIMED FAILURE OF DEFENDANTS TO PROVIDE A REQUESTED COUPLING DEVICE TO PREVENT THE PIPE FROM FALLING - WHETHER LABOR LAW § 240(1) APPLIES IN THIS SITUATION; SUMMARY JUDGMENT;
Supreme Court, New York County denied the motion of defendants 1095 Avenue of the Americas, L.L.C. and J.T. Magen Construction Company for summary judgment dismissing the Labor Law § 240(1) claim as against them, and granted plaintiff's motion for summary judgment on the issue of the liability of said defendants and defendant Dechert LLP under § 240(1); App. Div. modified to deny plaintiff's motion.

KOULAJIAN v SMITH, et al.:

1ST Dept. App. Div. order of 12/13/12; affirmance with dissents; Rule 500.11 review pending; NEGLIGENCE - DUTY - WHETHER DEFENDANTS FAILED TO USE REASONABLE CARE IN ENTRUSTING TO THEIR TWO-YEAR-OLD CHILD THE USE OF A WHEELED SUITCASE, WHICH STRUCK PLAINTIFF'S LEGS AND CAUSED HER TO FALL AND SUSTAIN INJURIES; SUMMARY JUDGMENT; Supreme Court, New York County granted defendants' motion for summary judgment dismissing the complaint; App. Div. affirmed.

MASON (CURTIS L.), PEOPLE v:

4TH Dept. App. Div. order of 12/21/12; affirmance; leave to appeal granted by Read, J., 1/4/13; Rule 500.11 review pending; CRIMES - EVIDENCE - WHETHER THE APPELLATE DIVISION FAILED TO CONDUCT WEIGHT-OF-THE-EVIDENCE REVIEW, AS REQUESTED BY DEFENDANT; WHETHER THE TRIAL COURT ERRED IN REFUSING TO PRECLUDE DNA EVIDENCE; County Court, Seneca County convicted defendant, upon a jury verdict, of official misconduct and imposed sentence; App. Div. affirmed.

NASH v THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY:

1ST Dept. App. Div. order of 1/8/13; affirmance with dissents; sua sponte examination whether the dissent at the App. Div. is on a question of law; JUDGMENTS - VACATUR OF JUDGMENT - REVERSAL IN RELATED BUT SEPARATE ACTION - CPLR 5025(a)(5) - WHETHER SUPREME COURT ERRED IN GRANTING DEFENDANT'S MOTION TO VACATE THE JUDGMENT; Supreme Court, New York County granted defendant's motion to vacate the judgment and dismissed the complaint; App. Div. affirmed.

TOWN OF OYSTER BAY v LIZZA INDUSTRIES, INC. (AND NINE OTHER ACTIONS):

2ND Dept. App. Div. order of 4/24/12; affirmance; leave to appeal granted by Court of Appeals, 12/13/12; TORTS - NUISANCE - ALLEGED CONTINUING PUBLIC NUISANCE - CLAIMED DEFECTS IN SEWER CONSTRUCTION WORK CAUSING DAMAGE TO, AMONG OTHER THINGS, ROADWAYS; STATUTE OF LIMITATIONS - WHAT STATUTE OF LIMITATIONS APPLIES TO SETTLING DAMAGE FROM SEWER WORK COMPLETED IN THE 1970s AND 1980s - MUNICIPALITIES AS THIRD-PARTY BENEFICIARIES TO CONSTRUCTION CONTRACTS BETWEEN THE COUNTIES AND DEFENDANT CONSTRUCTION COMPANIES - WHETHER ACTIONS ARE TIME-BARRED; STARE DECISIS; Supreme Court, Nassau County granted defendant's motion for summary judgment dismissing the complaint as time-barred; App. Div. affirmed.

PAYTON (WENDELL), PEOPLE v:

2ND Dept. App. Div. order of 11/14/12; affirmance; leave to appeal granted by Miller, J., 1/10/13;

CRIMES - RIGHT TO COUNSEL - EFFECTIVE REPRESENTATION - WHETHER DEFENDANT WAS DEPRIVED OF RIGHT TO CONFLICT-FREE REPRESENTATION WHEN, PRIOR TO THE COMMENCEMENT AND DURING THE COURSE OF HIS TRIAL, HIS ATTORNEY WAS SUBJECT TO A CRIMINAL INVESTIGATION BY THE SAME PROSECUTOR'S OFFICE PROSECUTING DEFENDANT, A SEARCH WARRANT WAS EXECUTED AT THE OFFICE OF DEFENDANT'S TRIAL COUNSEL DAYS BEFORE THE COMMENCEMENT OF TRIAL, AND THE TRIAL COURT DID NOT LEARN OF THE CRIMINAL INVESTIGATION UNTIL JUST BEFORE SENTENCING, AT WHICH POINT NEW COUNSEL WAS ASSIGNED; County Court, Suffolk County convicted defendant, upon a jury verdict, of robbery in the second degree, and imposed sentence; County Court then denied, without a hearing, defendant's CPL 440.10 motion to vacate the judgment of conviction; App. Div. affirmed.

PRINE v SANTEE, et al.:

4th Dept. App. Div. order of 12/21/12; reversal with dissents; Rule 500.11 review pending;

NEGLIGENCE - PROXIMATE CAUSE - REAR-END AUTOMOBILE COLLISION - CHAIN REACTION ACCIDENT; SUMMARY JUDGMENT;

Supreme Court, Erie County, among other things, denied the cross motion of defendant Anna Torres for summary judgment dismissing the amended complaint and all cross claims asserted against her; App. Div. reversed, granted the cross motion of defendant Torres for summary judgment, and dismissed the amended complaint and all cross claims against her.

ROBINSON, MATTER OF v SPINNER &c., et al.:

2ND Dept. App. Div. order and judgment of 12/26/12; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

PROCEEDING AGAINST A BODY OR OFFICER - WHEN REMEDY AVAILABLE - WHETHER MANDAMUS LIES TO COMPEL A JUSTICE OF THE SUPREME COURT TO DISMISS A CIVIL ACTION BY A CORRECTION OFFICER AGAINST AN INMATE FOR PERSONAL INJURIES; PROHIBITION - WHETHER PETITIONER HAD A CLEAR LEGAL RIGHT TO WRIT OF PROHIBITION BARRING RESPONDENTS FROM CONDUCTING PROCEEDINGS IN A CIVIL ACTION AGAINST HIM;

App. Div. granted in part the application for poor person relief, denied the petition and dismissed the proceeding.

STATE OF NEW YORK, MATTER OF v ENRIQUE D.:

1ST Dept. App. Div. order of 9/4/12; affirmance; leave to appeal granted by Court of Appeals, 1/15/13;

CRIMES - SEX OFFENDERS - CIVIL COMMITMENT OR SUPERVISION - MENTAL ABNORMALITY - EVIDENCE - WHETHER SUPREME COURT PROPERLY EXERCISED ITS DISCRETION IN REJECTING TESTIMONY FROM SEX OFFENDER'S FORMER GIRLFRIEND REGARDING THEIR SEXUAL RELATIONSHIP ON THE GROUND THAT SUCH TESTIMONY WAS NOT RELEVANT TO WHETHER SEX OFFENDER HAD A MENTAL ABNORMALITY;

Supreme Court, Bronx County adjudged respondent a dangerous sex offender and committed him to a secure treatment facility; App. Div. affirmed.

BETH V., MATTER OF v NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES et al.:

3RD Dept. App. Div. order of 9/27/12; affirmance; leave to appeal granted by Court of Appeals, 1/15/13;

WORKERS' COMPENSATION - CARRIER'S LIEN - PROCEEDS OF SETTLEMENT OF FEDERAL CIVIL RIGHTS ACTION - WHETHER THE WORKERS' COMPENSATION CARRIER IS ENTITLED TO A CREDIT PURSUANT TO WORKERS' COMPENSATION LAW § 29 FROM THE CLAIMANT'S RECOVERY AGAINST HER EMPLOYER IN A FEDERAL CIVIL ACTION;

App. Div. affirmed a decision of the Workers' Compensation Board determining that the workers' compensation carrier can take a full credit pursuant to Workers' Compensation Law § 29 from claimant's recovery against her employer in a federal civil action.