

COURT OF APPEALS NEW FILINGS

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

July 30 through August 5, 2010

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 60 days after the appeal was taken; respondent's brief to be filed 45 days after the filing of appellant's brief; and a reply brief, if any, to be filed 15 days after 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.

ALBERT F., MATTER OF:

1ST Dept. App. Div. order of 6/17/10; affirmance with dissents;
Rule 500.11 review pending;

INFANTS - JUVENILE DELINQUENTS - WHETHER EVIDENCE WAS SUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT THE JUVENILE KNOWINGLY POSSESSED TWO PAIRS OF JEANS THAT WERE IN HIS BACKPACK WHEN HE ATTEMPTED TO LEAVE A STORE - SHOPLIFTING;

Family Court, New York County adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act, which, if committed by an adult, would constitute the crime of criminal possession of stolen property in the fifth degree, and imposed a conditional discharge for a period of 12 months; App. Div. affirmed.

BERNSTEIN (JOSHUA), MATTER OF:

2ND Dept. App. Div. order of 6/1/10; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution and whether any jurisdictional predicate otherwise exists to support an appeal as of right;

ATTORNEYS AND CLIENTS - CHALLENGE TO APPELLATE DIVISION ORDER DENYING RENEWED MOTION TO VACATE ORDER DISBARRING RESPONDENT FROM THE PRACTICE OF LAW IN NEW YORK;

App. Div. denied respondent's renewed motion to vacate that court's 8/20/01 order, which disbarred him from the practice of law in New York based on one charge of professional misconduct.

CPS OPERATING COMPANY LLC v PATHMARK STORES, INC.:

1ST Dept. App. Div. order of 6/1/10; reversal; leave to appeal granted by App. Div., 7/27/10;

LANDLORD AND TENANT - LEASE - RIGHT TO SUBLEASE OR ASSIGN - LEASEHOLD ASSIGNMENT CONTRACT BETWEEN COMMERCIAL TENANT AND COMPANY FORMED BY REAL ESTATE DEVELOPER TO ACQUIRE TENANT'S RIGHTS UNDER THE LEASE - COMPANY'S RIGHT TO TERMINATE THE CONTRACT BASED UPON TENANT'S ALLEGED BREACH - WHETHER TENANT WAS REQUIRED TO OBTAIN CITY'S CONSENT TO ASSIGNMENT PURSUANT TO A LAND DISPOSITION AGREEMENT BETWEEN THE CITY AND LANDLORD WHERE SUCH AGREEMENT WAS INCLUDED AS A "PERMITTED EXCEPTION" IN THE LEASEHOLD ASSIGNMENT CONTRACT - EFFECT OF ESTOPPEL CERTIFICATE REQUIREMENT;

Supreme Court, New York County, among other things, denied defendant's motion for summary judgment dismissing the complaint in this declaratory judgment action; App. Div. reversed, granted defendant's motion and dismissed the complaint.

MARTIN, MATTER OF v TUCKER:

4TH Dept. App. Div. order of 7/2/10; affirmance with dissents; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution; PARENT AND CHILD - CUSTODY - PETITION FOR CUSTODY BY BOYFRIEND OF CHILD'S DECEASED MOTHER - WHETHER PETITIONER MET BURDEN OF ESTABLISHING THAT EXTRAORDINARY CIRCUMSTANCES EXIST TO WARRANT AN INQUIRY INTO WHETHER IT IS IN THE BEST INTERESTS OF THE CHILD TO AWARD CUSTODY TO A NONPARENT AS OPPOSED TO A SURVIVING PARENT; SUMMARY JUDGMENT;

Family Court, Oneida County awarded joint custody of the child to the parties, with primary physical custody to petitioner Martin, and directed the parties and law guardian to agree on reasonable and frequent parenting time for respondent Tucker within ten days and provide a stipulation "or the matter is to be restored to calendar on that issue"; App. Div. affirmed.

ORTIZ v VARSITY HOLDINGS, LLC, et al.:

2ND Dept. App. Div. order of 7/13/10; affirmance; leave to appeal granted by App. Div., 7/13/10; Rule 500.11 review pending;

LABOR - SAFE PLACE TO WORK - RENOVATION LABORER INJURED IN FALL FROM DUMPSTER LEDGE - WHETHER WORKER WAS ENGAGED IN A PROTECTED ACTIVITY UNDER LABOR LAW § 240(1); SUMMARY JUDGMENT; Supreme Court, Kings County granted that branch of defendants' motion which was for summary judgment dismissing the third cause of action to recover damages for violation of Labor Law § 240(1) and denied plaintiff's cross motion, in effect, for summary judgment on the issue of liability on that cause of action; App. Div. affirmed.

QOSHJA (ERMAL), PEOPLE v:

1ST Dept. App. Div. order of 4/20/10; affirmance; leave to appeal granted by Lippman, Ch. J., 7/23/10; Rule 500.11 review pending; CRIMES - APPEAL - APPEAL WAIVER DOCUMENTS EXECUTED IN CONNECTION WITH GUILTY PLEA - APPELLATE DIVISION DID NOT SPECIFY WHETHER ITS AFFIRMANCE OF DEFENDANT'S JUDGMENT OF CONVICTION AND SENTENCE WAS BASED ON THE VALIDITY OF THE APPEAL WAIVER OR ITS REVIEW AND REJECTION OF DEFENDANT'S SUBSTANTIVE CLAIM REGARDING HIS SENTENCE;

Supreme Court, New York County convicted defendant, upon his guilty plea, of four counts of robbery in the first degree, three counts of burglary in the first degree, one count of robbery in the second degree and three counts of kidnapping in the second degree, and sentenced him to an aggregate term of 22 years; App. Div. affirmed.

RODRIGUEZ (ISIDRO), PEOPLE v:

1ST Dept. App. Div. order of 3/9/10; affirmance; leave to appeal granted by Lippman, Ch. J., 7/23/10;

CRIMES - POSSESSION OF FORGED INSTRUMENT IN THE SECOND DEGREE - FORGED IDENTITY DOCUMENTS, SOME BEARING DEFENDANT'S PHOTOGRAPH - SUFFICIENCY OF THE EVIDENCE OF INTENT "TO DEFRAUD, DECEIVE OR INJURE ANOTHER" (PENAL LAW § 170.25);

Supreme Court, New York County convicted defendant, after a jury trial, of four counts of criminal possession of a forged instrument in the second degree and sentenced him, as a second felony offender, to concurrent terms of 3 1/2 to 7 years; App. Div. affirmed.

SCHENECTADY COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, INC., et al., MATTER OF v MILLS:

3RD Dept. App. Div. order of 6/3/10; reversal with dissents; RECORDS - FREEDOM OF INFORMATION LAW (FOIL)- CPLR ARTICLE 78 PROCEEDING TO REVIEW RESPONDENT'S DETERMINATION DENYING PETITIONERS' FOIL REQUEST FOR NAMES AND STREET ADDRESSES OF ALL LICENSED VETERINARIANS AND VETERINARY TECHNICIANS LOCATED IN SCHENECTADY COUNTY - WHETHER FOIL'S PERSONAL PRIVACY EXCEPTION APPLIES TO THE REQUEST FOR INFORMATION - NEW YORK PUBLIC OFFICERS LAW § 89(2)(b) - AGENCY'S INABILITY TO DETERMINE WHETHER ADDRESS SUBMITTED BY LICENSEE IS BUSINESS OR RESIDENTIAL; Supreme Court, Albany County dismissed petitioners' application, in a proceeding pursuant to CPLR article 78, to review respondent's determination partially denying petitioners' FOIL

request; App. Div. reversed and granted the petition.

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TUCKER, MATTER OF v MARTIN:

4TH Dept. App. Div. order of 7/2/10; affirmance with dissents;
PARENT AND CHILD - CUSTODY - PETITION FOR CUSTODY BY FATHER
AGAINST BOYFRIEND OF CHILD'S DECEASED MOTHER - WHETHER RESPONDENT
MET BURDEN OF ESTABLISHING THAT EXTRAORDINARY CIRCUMSTANCES EXIST
TO WARRANT AN INQUIRY INTO WHETHER IT IS IN THE BEST INTERESTS OF
THE CHILD TO AWARD CUSTODY TO A NONPARENT AS OPPOSED TO A
SURVIVING PARENT; SUMMARY JUDGMENT;
Family Court, Oneida County dismissed the petition in a
proceeding pursuant to Family Court Act article 6; App. Div.
affirmed.