

COURT OF APPEALS NEW FILINGS

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

January 22, 2016 through January 28, 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.

ACQUEST WEHRLE, LLC v TOWN OF AMHERST:

Supreme Court, Erie County, judgment of 1/6/16, bringing up for review 4TH Dept. App. Div. order of 6/19/15; modification; sua sponte examination whether App. Div. order directly involves a substantial constitutional question so as to support an appeal as of right pursuant to CPLR 5601(d);

CIVIL RIGHTS - FEDERAL CIVIL RIGHTS CLAIM - DEPRIVATION OF SUBSTANTIVE DUE PROCESS - TERMINATION OF OFFICE PARK PROJECT LOCATED IN WETLAND - WHETHER PLAINTIFF ESTABLISHED A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN A SEWER TAP-IN WAIVER REQUEST THAT TOWN BOARD MADE THEN RESCINDED; DAMAGES - WHETHER THE TRIAL COURT ERRED IN NOT ALLOWING EVIDENCE IN MITIGATION OF PLAINTIFF'S DAMAGES AND IN ALLOWING PLAINTIFF TO RECOVER DAMAGES FOR EXPENSES INCURRED BY AN UNRELATED ENTITY;

Supreme Court judgment awarding plaintiff money damages and attorneys' fees; App. Div. modified by granting that part of defendant's motion seeking summary judgment dismissing the eighth cause of action and vacating the jury award on that cause of action, affirmed the judgment as modified, and remitted to Supreme Court for recalculation of the final judgment; therefore, Supreme Court awarded plaintiff \$3,941,967.64.

AGENCIES FOR CHILDREN'S THERAPY SERVICES, INC. v NEW YORK STATE DEPARTMENT OF HEALTH, et al.:

2ND Dept. App. Div. order of 12/30/15; reversal; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; CONSTITUTIONAL LAW - SEPARATION OF POWERS - WHETHER EXECUTIVE ORDER NO. 38 AND TWO SETS OF REGULATIONS PROMULGATED BY THE NEW YORK STATE DEPARTMENT OF HEALTH (DOH), AS SET FORTH IN 10 NYCRR PART 1002 AND IN CERTAIN AMENDMENTS TO 10 NYCRR SUBPART 69-4, VIOLATE THE SEPARATION OF POWERS DOCTRINE EMBODIED IN THE NEW YORK STATE CONSTITUTION; EARLY INTERVENTION PROGRAMS FOR DEVELOPMENTALLY DISABLED CHILDREN PROVIDED BY PRIVATE AGENCIES THROUGH CONTRACT WITH THE DOH;

Supreme Court, Nassau County, granted plaintiff's motion for summary judgment declaring that Executive Order (Cuomo) No. 38 (9 NYCRR 8.38), 10 NYCRR part 1002, and certain amendments to 10 NYCRR subpart 69-4 are invalid and may not be enforced, and denied defendants' cross motion for summary judgment declaring that 10 NYCRR part 1002 and the challenged amendments to 10 NYCRR subpart 69-4 are valid; App. Div. reversed, denied plaintiff's motion for summary judgment, granted defendants' cross motion for summary judgment, and remitted the matter to Supreme Court for entry of a judgment declaring that 10 NYCRR part 1002 and the challenged amendments to 10 NYCRR subpart 69-4 are valid.

ARTIBEE, et al. v HOME PLACE CORPORATION:

3RD Dept. App. Div. order of 8/13/15; modification; leave to appeal granted by App. Div., 1/6/16; NEGLIGENCE - COMPARATIVE NEGLIGENCE - APPORTIONMENT OF LIABILITY FOR INJURIES CAUSED BY FALLING TREE BRANCH BETWEEN DEFENDANT PROPERTY OWNER AND STATE OF NEW YORK, A NONPARTY WHICH WAS BEING SUED SEPARATELY BY PLAINTIFFS IN THE COURT OF CLAIMS - WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A JURY CHARGE ON APPORTIONMENT; JURY INSTRUCTIONS; Supreme Court, Warren County, among other things, denied defendant's motion in limine for a jury charge on apportionment; App. Div. modified by reversing so much of the order as denied defendant's motion for a jury charge on apportionment, granted defendant's motion, and affirmed as so modified.

BOOKMAN (DAVID), PEOPLE v:

2ND Dept. App. Div. order of 9/30/15; affirmance; leave to appeal granted by Austin, J., 1/8/16; Rule 500.11 review pending; CRIMES - SUPPRESSION HEARING - HANDGUN FOUND IN TRUNK OF CAR STOPPED FOR INOPERATIVE BRAKE LIGHT AND ITEMS HANGING FROM REARVIEW MIRROR - CAR SEARCHED AFTER ARREST OF CAR OCCUPANTS WHEN POLICE OFFICER SAW "CLOUDY" PLASTIC BAG, BELIEVED TO CONTAIN COCAINE RESIDUE, IN CAR; WHETHER THE PEOPLE MADE A PRIMA FACIE SHOWING THAT THE STOP OF THE VEHICLE HAD A LEGALLY SUFFICIENT BASIS; APPEAL - WAIVER OF RIGHT TO APPEAL - WHETHER DEFENDANT'S WAIVER WAS VOLUNTARY, KNOWING AND INTELLIGENT; Supreme Court, Queens County, convicted defendant, upon his guilty plea, of attempted criminal possession of a weapon in the second degree, and imposed sentence; App. Div. affirmed.

CITIZENS FOR ST. PATRICK'S et al., MATTER OF v WATERVLIET ZONING BOARD OF APPEALS, et al.:

3RD Dept. App. Div. order of 7/23/15; affirmance; sua sponte examination whether a substantial constitutional question is directly involved and whether any basis exists for an appeal as of right;

INJUNCTIONS - DAMAGES - BOND POSTED WHEN APPELLATE DIVISION JUSTICE GRANTED PETITIONERS' REQUEST FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION PENDING APPEAL - WHETHER SUPREME COURT ERRED IN GRANTING RESPONDENT'S APPLICATION FOR DAMAGES, IN THE FORM OF COUNSEL FEES, INCURRED AS A RESULT OF THE ISSUANCE OF THE TEMPORARY RESTRAINING ORDER (THEREAFTER AWARDING RESPONDENT DAMAGES IN THE FULL AMOUNT OF THE BOND SUM) - CPLR 6315; Supreme Court, Albany County, among other things, in a proceeding pursuant to CPLR article 78, granted a motion by respondent PCP Watervliet, LLC for damages sustained as a result of a temporary restraining order; App. Div. affirmed.

CUNNINGHAM v SECURITY MUTUAL INSURANCE COMPANY:

County Court, Tompkins County, order of 12/14/15; affirmance; sua sponte examination whether an appeal as of right pursuant to CPLR 5601(b)(1) lies from a County Court order entered in an action originating in City Court;

APPEAL - CHALLENGE TO COUNTY COURT ORDER AFFIRMING A CITY COURT JUDGMENT THAT DID NOT AWARD PLAINTIFFS ALL DAMAGES SOUGHT; Ithaca City Court awarded plaintiff \$1,798.50 in damages after rejecting certain claims for uncovered costs of repairs to a vacation cottage; County Court affirmed.

MATTER OF KARNAZES, A DISBARRED ATTORNEY:

3RD Dept. App. Div. order of 11/12/15; denial of motion for reconsideration; 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;

ATTORNEY AND CLIENT - DISCIPLINARY PROCEEDINGS - DISBARMENT - MISAPPROPRIATION OF CLIENT FUNDS - RECIPROCAL DISCIPLINE - CLAIMED CONSTITUTIONAL VIOLATIONS;

App. Div. granted the motion of the Committee on Professional Standards, disbarred attorney Karnazes, commanded her to desist from the practice of law in any form, and ordered that she comply with the court's rules regulating the conduct of disbarred attorneys; App. Div. thereafter denied her motion for reconsideration.

NOMURA HOME EQUITY LOAN, INC., &c. v NOMURA CREDIT & CAPITAL, INC. (AND THREE OTHER ACTIONS):

1ST Dept. App. Div. order of 10/13/15; modification; leave to appeal granted by App. Div., 1/5/16;

CONTRACTS - BREACH OR PERFORMANCE OF CONTRACT - RESIDENTIAL MORTGAGE-BACKED SECURITIES - WHETHER "SOLE REMEDY" PROVISION REQUIRING DEFENDANT TO CURE OR REPURCHASE MORTGAGE LOANS NOT CONFORMING TO REPRESENTATIONS AND WARRANTIES PROHIBITS PLAINTIFFS FROM SEEKING MONEY DAMAGES FOR BREACH OF A CONTRACTUAL PROVISION PROVIDING THAT THE CONTRACT CONTAINS NO UNTRUE STATEMENTS;

Supreme Court, New York County, (Index No. 653783/12) granted defendant Nomura Credit & Capital, Inc.'s motion to dismiss the complaint as to the third and fourth causes of action and denied the motion as to the first and second causes of action; (Index No. 651124/13) granted defendant's motion to dismiss the complaint as to the third and fourth causes of action and denied the motion as to the first and second causes of action; (Index No. 652614/12) as relevant here, limited the relief available under the first cause of action to specific performance of the repurchase protocol or, if loans cannot be repurchased, to damages consistent with its terms, limited the first cause of action to the alleged breaches of the Mortgage Representations, granted defendant's motion to dismiss the second cause of action, and denied the motion as to the third cause of action; and (Index No. 650337/13) as relevant here, limited the relief available under the first cause of action to specific performance of the repurchase protocol or, if loans cannot be repurchased, to damages consistent with its terms, limited the first cause of action to the alleged breaches of the Mortgage Representations, granted defendant's motion to dismiss the second cause of action, and denied the motion as to the third cause of action; App. Div. modified the orders entered under Index Numbers 653783/12 and 651124/13 to deny the motions as to the third cause of action and modified the orders entered under Index Numbers 652614/12 and 650337/13 to permit plaintiffs to seek damages on the first cause of action for breach of the No Untrue Statement Provision (section 7 of the Mortgage Loan Purchase Agreement [MLPA]) and for failure to give prompt written notice after discovering material breaches of the representations and warranties in section 8 of the MLPA, and otherwise affirmed.

DYLAN P. &c., et al. v WEBSTER PLACE ASSOCIATES, L.P.:

1st Dept. App. Div. order of 10/20/15; reversal with a two-Justice dissent; leave to appeal granted by App. Div., 1/5/16; Rule 500.11 review pending;

NEGLIGENCE - MAINTENANCE OF PREMISES - WHETHER DEFENDANT BUILDING OWNER MET ITS INITIAL BURDEN OF DEMONSTRATING THAT IT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE ALLEGED DANGEROUS CONDITION, A MISSING DRAIN COVER IN THE BUILDING'S LAUNDRY ROOM; SUMMARY JUDGMENT;

Supreme Court, Bronx County, granted defendant's motion for summary judgment dismissing the complaint; App. Div. reversed and denied defendant's motion for summary judgment dismissing the complaint.

PALENCIA (CARLOS), PEOPLE v:

2ND Dept. App. Div. order of 7/29/15; reversal with a two-Justice dissent; Rule 500.11 review pending;

MOTOR VEHICLES - OPERATING VEHICLE WHILE UNDER INFLUENCE OF ALCOHOL OR DRUGS - WHETHER THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE THE RESULTS OF A PORTABLE BREATH TEST (PBT) - WHETHER PROBATIVE VALUE OF PBT EVIDENCE WAS OUTWEIGHED BY ITS PREJUDICIAL EFFECT;

Supreme Court, Nassau County, convicted defendant, upon a jury verdict, of operating a motor vehicle while under the influence of alcohol in violation of Vehicle and Traffic Law § 1192(3), and imposed sentence; App. Div. reversed and ordered a new trial.

RETAMOZZO v FRIEDLAND, et al.:

1ST Dept. App. Div. order of 10/22/15; denial of motion; sua sponte examination whether the order 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;

MOTIONS AND ORDERS - APPELLATE DIVISION ORDER DENYING PLAINTIFF'S MOTION FOR REARGUMENT OR LEAVE TO APPEAL TO THE COURT OF APPEALS FROM AN APPELLATE DIVISION ORDER THAT DENIED PLAINTIFF'S MOTION TO VACATE AN ORDER AND ENSUING JUDGMENT DISMISSING THE VERIFIED AMENDED COMPLAINT AS A SANCTION FOR WILFULLY REFUSING TO COMPLY WITH DISCOVERY ORDERS;

Supreme Court, New York County, denied plaintiff's motion to vacate an order and ensuing judgment dismissing plaintiff's verified amended complaint as a sanction for wilfully refusing to comply with discovery orders; App. Div. affirmed, and thereafter denied plaintiff's motion for reargument or leave to appeal to the Court of Appeals.

RICKETTS (RICARDO), PEOPLE v:

2ND Dept. App. Div. order of 2/18/15; affirmance; leave to appeal granted by Lippman, Ch.J., 12/29/15; Rule 500.11 review pending;

CRIMES - RIGHT OF CONFRONTATION - ALLEGED VIOLATION OF RIGHT OF CONFRONTATION WHEN TRIAL COURT ALLOWED TWO UNDERCOVER POLICE OFFICERS TO TESTIFY ANONYMOUSLY WITHOUT THRESHOLD SHOWING OF NECESSITY FOR ANONYMOUS TESTIMONY; ALLEGED IMPROPER REMARKS MADE BY PROSECUTOR; SENTENCE - CLAIMED EXCESSIVE SENTENCE; Supreme Court, New York County, convicted defendant, after a jury trial, of criminal sale of a controlled substance in the fourth degree, criminal possession of a controlled substance in the seventh degree, resisting arrest, and obstructing governmental administration in the second degree, and imposed sentence; thereafter, Supreme Court entered an amended sentence; App. Div. affirmed the judgment of conviction and amended sentence.

ROLLINS v FENCERS CLUB, INC., et al.:

1ST Dept. App. Div. order of 5/5/15; affirmance; leave to appeal granted by App. Div., 1/5/16; Rule 500.11 review pending;

CIVIL RIGHTS - DISCRIMINATION BASED ON AGE - DISCRIMINATION IN EMPLOYMENT - WHETHER THE APPELLATE DIVISION CORRECTLY HELD THAT DEFENDANTS WERE NOT ENTITLED TO SUMMARY JUDGMENT DISMISSING PLAINTIFF'S CLAIM OF AGE-BASED DISCRIMINATION IN VIOLATION OF THE NEW YORK CITY HUMAN RIGHTS LAW;

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