

COURT OF APPEALS NEW FILINGS

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

**April 7, 2017 through April 13, 2017**

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.**

CHAMBERLAIN et al. v NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, et al.:

Supreme Court, Albany County, order of 3/13/17; grant of summary judgment; sua sponte examination whether an appeal as of right lies pursuant to CPLR 5601(b)(2);

Taxation--Personal Income Tax--Connecticut residents who also had "living quarters" in New York City were determined to be "statutory residents" of New York State and New York City during the relevant tax periods who should have filed New York Resident Income Tax Returns--taxpayers claim that New York's residency scheme pursuant to Tax Law §§ 605(b)(1)(B), 612 and 620 violates the United States Commerce Clause; whether a credit for investment and intangible income earned should have been applied;

Supreme Court, Albany County, granted defendants' converted summary judgment motion, denied plaintiffs' cross motion for summary judgment, declared that New York's statutory residency provisions do not violate the dormant Commerce Clause of the United States Constitution, and declared that the statutory residency provisions administered by defendants do not violate the dormant Commerce Clause of the United States Constitution and defendants are not prohibited from retaining the taxes paid by plaintiffs on notices or assessments that fail to provide a credit for taxes plaintiffs paid to other states on investment and intangible income.

CUMMINGS (TWANEK), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 12/8/16; affirmance; leave to appeal granted by Fahey, J., 3/31/17;  
Crimes--Evidence--Excited Utterances--admissibility of statement of an unidentified man in the background of the victim's 911 call pursuant to the excited utterance exception to the hearsay rule; whether, upon retrial after deadlocked jury in first trial, a different trial court judge had authority to change the ruling on the admissibility of the statement at issue--law of the case; Supreme Court, New York County, convicted defendant, after a jury trial, of assault in the first degree, two counts of attempted assault in the first degree, two counts of criminal possession of a weapon in the second degree, and two counts of assault in the second degree, and sentenced him, as a second felony offender, to an aggregate term of 18 years; App. Div. affirmed.

EVERY (DOUGLAS), PEOPLE v:

3<sup>RD</sup> Dept. App. Div. order of 1/19/17; affirmance; leave to appeal granted by Aarons, J., 3/30/17; Rule 500.11 review pending;  
Crimes--Justification-- whether the trial court improperly excluded evidence of victim's prior threats of violence, threatening conduct and reputation for violence; Instructions-- whether the trial court improperly instructed the jury on the definition of a dwelling; Argument and Conduct of Counsel -- whether alleged prosecutorial misconduct deprived defendant of a fair trial; Right to Counsel--Effective Representation--whether trial counsel was ineffective for failing to object to (1) jury instruction regarding the duty to retreat, (2) alleged prosecutorial misconduct, and (3) testimony by the medical examiner and coroner characterizing the victim's death as a homicide;  
County Court, Tioga County, convicted defendant of manslaughter in the first degree and imposed sentence; App. Div. affirmed.

MAHONEY v BROCKBANK:

2<sup>ND</sup> Dept. App. Div. order of 7/27/16; affirmance; leave to appeal granted by Court of Appeals, 4/4/17;

Interest--Prejudgment interest--in a personal injury action, whether prejudgment interest was properly computed from the date of the jury verdict on the issue of damages, rather than the date of the parties' stipulation, in which defendant conceded liability; application of CPLR 5002; Supreme Court, Suffolk County, computed prejudgment interest from the date of the jury verdict on the issue of damages; App. Div. affirmed.

PEOPLE &c., MATTER OF v JUAREZ (CONRADO); ROBLES (FRANCES):

1<sup>ST</sup> Dept. App. Div. order of 10/20/16; reversal; leave to appeal granted by Court of Appeals, 4/4/17;

Appeal--Matters Appealable--Whether an order resolving a nonparty's motion to quash a subpoena in a pending criminal action is appealable; Crimes--Disclosure--Shield Law--whether the People made a clear and specific showing that disclosure sought from reporter is critical and necessary to the People's proof of a material issue so as to overcome the qualified protection for the reporter's nonconfidential material; application of Civil Rights Law section 79-h(c);

Supreme Court, New York County, denied nonparty reporter's motions to quash subpoenas requiring her testimony and the production of notes relating to a jailhouse interview of the defendant in a criminal proceeding; App. Div. reversed and granted the motions.

PEOPLE OF THE STATE OF NEW YORK &c. v CREDIT SUISSE SECURITIES (USA), LLC, &c., et al.:

1<sup>ST</sup> Dept. App. Div. order of 12/13/16; affirmance; leave to appeal granted by App. Div., 3/21/17;

Limitation of Actions--Fraud--Whether an action brought by the Attorney General under the Martin Act and Executive Law § 63(12) for alleged investor fraud is subject to the three-year statute of limitations under CPLR 214 or the six-year statute of limitations under CPLR 213;

Supreme Court, New York County, denied the motion of defendants Credit Suisse Securities (USA), LLC, et al. to dismiss the complaint pursuant to CPLR 3211(a)(5); App. Div. affirmed.

S&P GLOBAL, INC. &c. v NEW YORK CITY TAX APPEALS TRIBUNAL, et al.:

1<sup>ST</sup> Dept. App. Div. order of 2/23/17; confirmation of decision; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; Taxation--General Corporation Tax--whether income earned from petitioner's credit rating business was properly sourced on place-of-performance or origin basis pursuant to Administrative Code of the City of New York § 11-604.3(a); Constitutional Law--Freedom of Speech--whether allocation of income from petitioner's credit rating business violated petitioner's First Amendment right to free speech;

New York City Tax Tribunal reinstated Notices of Disallowance for petitioner's New York City General Corporation Tax returns for the calendar years 2003 through 2007 and a Notice of Determination applicable to the 2008 tax year; App. Div. confirmed the Tax Tribunal decision, denied the petition, and dismissed the proceeding brought pursuant to CPLR 506(b)(4) and article 78.

STEGA &c. et al. v NEW YORK DOWNTOWN HOSPITAL, et al.:

1<sup>ST</sup> Dept. App. Div. order of 1/10/17; reversal; leave to appeal granted by App. Div., 4/6/17;

Libel and Slander--Privilege-- whether statements made by defendants to a Food and Drug Administration investigator during the course of an investigation into the hospital's institutional review board are protected by an absolute privilege in an action for defamation;

Supreme Court, New York County, denied the motion of defendants New York Downtown Hospital and Stephen G. Friedman, M.D. to dismiss plaintiff's defamation cause of action as asserted against them; App. Div. reversed and granted the motion to dismiss the complaint as against New York Downtown Hospital and Stephen G. Friedman, M.D.

WALLACE (AKEEM), PEOPLE v:

4<sup>TH</sup> Dept. App. Div. order of 2/10/17; affirmance; leave to appeal granted by Lindley, J., 3/24/17;

Crimes--Possession of Weapon--Whether "place of business" exception of Penal Law § 265.03 (3) should apply to defendant restaurant manager who brought an unlicensed handgun to work and shot himself in the leg--employees prohibited from bringing firearms to work;

Supreme Court, Erie County, convicted defendant, after a nonjury trial, of criminal possession of a weapon in the second degree; App. Div. affirmed.