Vol. 35 - No. 52
1/1/16

COURT OF APPEALS NEW FILINGS

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

December 25, 2015 through December 31, 2015

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.

BHUGRA v MASSACHUSETTS CASUALTY INSURANCE COMPANY:
1ST Dept. App. Div. order of 10/1/15; denial of motion; sua sponte examination whether the order appealed from 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;
APPEAL - APPELLATE DIVISION - MOTION TO ENLARGE TIME TO PERFECT APPEAL;
App. Div. granted plaintiff an enlargement of time to perfect her appeal from a 3/25/14 Supreme Court, New York County, order to the September 2015 term; thereafter, the App. Div. denied plaintiff's motion for additional time to perfect the appeal.

CASTIGLIONE, et al. v KRUSE, et al.:
2ND Dept. App. Div. order of 7/29/15; reversal; leave to appeal granted by App. Div., 12/3/15; Rule 500.11 review pending;
MOTOR VEHICLES - INJURIES TO PEDESTRIANS - PEDESTRIAN STRUCK BY CAR IN CROSSWALK; SUMMARY JUDGMENT; COMPARATIVE FAULT;
Supreme Court, Suffolk County, among other things, denied plaintiffs' motion for summary judgment on the issue of liability; App. Div. reversed and granted plaintiffs' motion for summary judgment on the issue of liability.

DIEGELMAN, et al., MATTER OF v CITY OF BUFFALO, et al.:
4TH Dept. App. Div. order of 6/12/15; reversal; leave to appeal granted by Court of Appeals, 12/15/15;
MUNICIPAL CORPORATIONS - NOTICE OF CLAIM - LATE NOTICE - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT THE GENERAL MUNICIPAL LAW § 205-e CLAIM WAS PATENTLY WITHOUT MERIT; WHETHER A POLICE OFFICER'S ENTITLEMENT TO GENERAL MUNICIPAL LAW § 207-c BENEFITS PRECLUDES THE OFFICER FROM BRINGING A GENERAL MUNICIPAL LAW § 205-e CLAIM AGAINST THE OFFICER'S MUNICIPAL EMPLOYER;
Supreme Court, Erie County, granted claimants' application for leave to serve a late notice of claim; App. Div reversed and denied the application.

D&R GLOBAL SELECTIONS, S.L. v BODEGA OLEGARIO FALCON PINEIRO:
1ST Dept. App. Div. order of 5/14/15; reversal; leave to appeal granted by Court of Appeals, 12/16/15;
COURTS - JURISDICTION - LACK OF BASIS FOR PERSONAL AND LONG-ARM JURISDICTION - WHETHER NEW YORK COURTS POSSESSED SUBJECT MATTER JURISDICTION OVER THIS ACTION, ARISING FROM AN ORAL AGREEMENT BY THE NONDOMICILIARY PLAINTIFF BROKER TO PROCURE AN AMERICAN IMPORTER FOR THE NONDOMICILIARY DEFENDANT WINERY'S PRODUCTS, PURSUANT TO BUSINESS CORPORATION LAW § 1314(b)(4), WHICH REQUIRES A SHOWING OF PERSONAL JURISDICTION UNDER CPLR 302;
Supreme Court, New York County, granted plaintiff's motion to reargue and, upon reargument, denied defendant's motion for summary judgment; App. Div. reversed, granted defendant's motion for summary judgment, and directed the Clerk to enter judgment dismissing the complaint.

EAST RAMAPO CENTRAL SCHOOL DISTRICT, MATTER OF v KING, et al.:
3RD Dept. App. Div. order of 6/4/15; affirmance; leave to appeal granted by Court of Appeals, 12/17/15;
PROCEEDING AGAINST BODY OR OFFICER - CERTIORARI - CPLR ARTICLE 78 PROCEEDING - WHETHER THE APPELLATE DIVISION ERRED IN DETERMINING THAT THE SCHOOL DISTRICT WAS FORECLOSED FROM BRINGING AN ARTICLE 78 PETITION BECAUSE THE FEDERAL INDIVIDUALS WITH DISABILITIES EDUCATION ACT DOES NOT PROVIDE A PRIVATE RIGHT OF ACTION FOR LOCAL EDUCATIONAL AGENCIES TO CHALLENGE A DETERMINATION OF RESPONDENT STATE EDUCATION DEPARTMENT;

Supreme Court, Albany County, dismissed petitioner's application, in a CPLR article 78 proceeding, to, among other things, review a determination of respondent State Education Department which found that petitioner's dispute resolution practices relating to several students' individualized education programs violated the Individuals with Disabilities Education Act; App. Div. affirmed.

MATTER OF FRELIX, AN ATTORNEY:
1ST Dept. App. Div. order of 10/22/15; suspension of attorney; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;
ATTORNEY AND CLIENT - DISCIPLINARY PROCEEDINGS - SUSPENSION - CLAIMED DUE PROCESS AND EQUAL PROTECTION VIOLATIONS REGARDING PROFESSIONAL MISCONDUCT CHARGES;
App. Div. suspended respondent attorney from the practice of law for a period of 5 years.

MATTER OF R.M., APPLICANT FOR ADMISSION TO THE NEW YORK STATE BAR:
1ST Dept. App. Div. orders of 7/28/14 and 11/6/15; denial of application for admission to practice law; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right and whether the 7/28/14 order appealed from finally determines the proceeding within the meaning of the Constitution;
ATTORNEY AND CLIENT - ADMISSION TO PRACTICE - CLAIMED ERRORS AND CONSTITUTIONAL VIOLATIONS IN APPELLATE DIVISION'S DENIAL OF PETITIONER'S APPLICATION FOR ADMISSION TO PRACTICE;
App. Div. denied petitions seeking an order granting petitioner's application for admission to practice as an attorney and counselor-at-law in the State of New York, without prejudice to petitioner's application for same currently pending before the Committee on Character and Fitness (7/28/14 order); thereafter, App. Div. denied petitioner's application for admission to practice as an attorney and counselor-at-law in the State of New York (11/6/15 order).

ODUNBAKU, MATTER OF v ODUNBAKU:
2ND Dept. App. Div. order of 8/19/15; affirmance; leave to appeal granted by Court of Appeals, 12/15/15;
PARENT, CHILD AND FAMILY - SUPPORT - SERVICE OF FINDINGS OF FACT AND ORDER ON PARTY RATHER THAN ATTORNEY - WHETHER, IN LIGHT OF THIS COURT'S DECISION IN BIANCA v FRANK (43 NY2d 168[1977]), A STATUTE OF LIMITATIONS OR OTHER TIME PERIOD FOR SUBMITTING OBJECTIONS TO A FAMILY COURT FACT-FINDING ORDER, PURSUANT TO FAMILY COURT ACT § 439(e), BEGINS TO RUN WHEN COURT PAPERS HAVE BEEN MAILED BY THE CLERK OF THE COURT ONLY TO A PARTY, NOT TO THE PARTY'S ATTORNEY;
Family Court, Richmond County, in effect, granted reargument and adhered to a November 2013 order denying as untimely defendant mother's objections to fact-finding orders reducing plaintiff father's child support obligations; App. Div. affirmed.

TARA N.P. (ANONYMOUS) v WESTERN SUFFOLK BOARD OF COOPERATIVE EDUCATIONAL SERVICES, &c., et al.:
2ND Dept. App. Div. order of 8/12/15; modification; leave to appeal granted by Court of Appeals, 12/16/15;
MUNICIPAL CORPORATIONS - TORT LIABILITY - SPECIAL RELATIONSHIP - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE COUNTY WAS NOT LIABLE EITHER (1) FOR ITS REFERRAL OF A SEX OFFENDER TO WORK AT THE SCHOOL PLAINTIFF ATTENDED OR (2) AS LANDLORD OF THE BUILDING WHERE PLAINTIFF WAS ASSAULTED; GOVERNMENTAL IMMUNITY - SPECIAL DUTY; SUMMARY JUDGMENT;
Supreme Court, Suffolk County, among other things, denied those branches of the County defendants' motion which were for summary judgment dismissing the complaint and all cross claims insofar as asserted against them; App. Div. modified by deleting the provision denying that branch of the County defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against them, and substituting therefor a provision granting that branch of the motion, and affirmed as so modified.

PICKERING, MATTER OF v CAR WIN CONSTRUCTION, INC., et al.:
3RD Dept. App. Div. order of 11/19/15; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right and whether any other jurisdictional basis exists for an appeal as of right;
WORKERS' COMPENSATION - COUNSEL FEES - WHETHER CLAIMANT'S REQUEST FOR ATTORNEYS' FEES WAS IMPROPERLY DENIED WHERE THE WORKERS' COMPENSATION LAW JUDGE APPROVED A SETTLEMENT FOR CLAIMANT THAT INCLUDED WAIVER OF A $527,252.42 LIEN FOR PAST BENEFITS RECEIVED BY CLAIMANT - WORKERS' COMPENSATION LAW § 24;
App. Div. affirmed a 5/7/14 decision of the Workers' Compensation Board which, among other things, disallowed an award of counsel fees.

MATTER OF 381 SEARCH WARRANTS DIRECTED TO FACEBOOK, INC.; FACEBOOK v NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE:
1ST Dept. App. Div. order of 7/21/15; dismissal of appeals; leave to appeal granted by Court of Appeals, 12/16/15;
CRIMES - SEARCH WARRANT - WARRANT SERVED ON ONLINE SOCIAL NETWORKING SITE - PRE-ENFORCEMENT CHALLENGE ON BEHALF OF TARGET OF WARRANT - WHETHER FACEBOOK, AN ONLINE SOCIAL NETWORKING SERVICE, SERVED WITH A WARRANT FOR CUSTOMER ACCOUNTS, CAN LITIGATE PRIOR TO ENFORCEMENT THE CONSTITUTIONALITY OF THE WARRANT ON ITS CUSTOMERS' BEHALF; COURTS - APPEALS - APPEALABLE PAPERS;

Supreme Court, New York County, denied Facebook, Inc.'s motion to quash search warrants requiring Facebook to locate and produce user information and placing Facebook under an order of nondisclosure; thereafter, Supreme Court denied Facebook's motion to compel the New York County District Attorney's Office to disclose the investigator's affidavit submitted by the District Attorney's Office in support of its application for the search warrants; App. Div. dismissed appeals by Facebook, Inc. from both Supreme Court orders as taken from nonappealable papers.

VIRUET (MIGUEL), PEOPLE v:
2ND Dept. App. Div. order of 8/26/15; affirmance; leave to appeal granted by Fahey, J., 12/15/15;
CRIMES - INSTRUCTIONS - WHETHER THE TRIAL COURT ERRED IN REFUSING TO GIVE AN ADVERSE INFERENCE CHARGE TO THE JURY AFTER THE POLICE LOST A SURVEILLANCE VIDEO THAT HAD SOME RELEVANCE TO THE SHOOTING AT ISSUE - MISSING EVIDENCE;
Supreme Court, Queens County, convicted defendant, upon a jury verdict, of murder in the second degree and two counts of criminal possession of a weapon in the second degree, and imposed sentence; App. Div. affirmed.