

**JUSTICE THOMAS A. DICKERSON
NEW YORK STATE SUPREME COURT
PUBLISHED DECISIONS
1994-2011**

1994:YONKERS CITY COURT, NEW YORK STATE

Celona v. Celona

New York Law Journal, March 25, 1994, p. 36, col. 2, Yks. City Ct., former wife seeks unpaid alimony; history of Small Claims Courts.

Andre v. Pace University

161 Misc. 2d 613, 618 N.Y.S. 2d 975, 1994, students seek tuition refund; breach of contract; rescission; breach of fiduciary duty; educational malpractice; consumer protection statute, General Business Law 349, rev'd 170 Misc. 2d 893, 655 N.Y.S. 2d 777, N.Y.A.T. 1996.

Bartolomeo v. Runco

162 Misc. 2d 485, 616 N.Y.S. 2d 695, 1994, tenant seeks damages for eviction from illegal apartment; breach of contract; breach of covenant of quiet enjoyment; fraudulent misrepresentation; consumer protection statute, General Business Law 349.

DiPasquasio v. City of Yonkers

New York Law Journal, September 16, 1994, p. 31, col. 1, Yks. City Ct., taxpayer seeks damages for tire blow out caused by pothole; negligence.

Nationwide Exterminating & Deodorizing Inc. V. B. Wanda

New York Law Journal, August 19, 1994, p. 24, col. 4, Yks. City Ct., exterminator seeks to recover money for services rendered; motion to vacate default denied.

Rossi v. 21st Century Concepts, Inc.

162 Misc. 2d 932, 618 N.Y.S. 2d 182, 1994, consumer returns pots and pans and seeks refund; consumer protection statutes, Door-To-Door Sales Protection Act and General Business Law 349; rescission.

Ricciardi v. Frank d/b/a InspectAmerica Engineering, P.C.

163 Misc. 2d 337, 620 N.Y.S. 2d 918, 1994, mod'd 170 Misc. 2d 777, 655 N.Y.S. 2d 242, N.Y.A.T. 1996, homeowners sue professional engineer for inspection malpractice; negligent inspection; negligent misrepresentation; consumer protection statute, General Business Law 349.

Yochim v. Mount Hope Cemetery Association

163 Misc. 2d 1054, 623 N.Y.S. 2d 80, 1994, consumers sue cemetery for failing to maintain grave sites; breach of contract; rescission; breach of fiduciary duty.

Friedland Realty, Inc. V. East Main, Inc.

New York Law Journal, November 9, 1994, p. 26, col. 4, Yks. City Ct., real estate broker seeks commission; breach of contract.

Djordjevic v. King Bear Auto Service Center

New York Law Journal, November 14, 1994, p. 32, col. 1, Yks. City Ct., consumer seeks damages from mechanic after engine burns up; negligence.

1995:YONKERS CITY COURT, NEW YORK STATE

Eagel v. Yonkers Racing Corporation

165 Misc. 2d 944, 630 N.Y.S. 2d 662, 1995, New York State Racing and Waging Board seeks to intervene in gambler's dispute.

Gellerman v. Oleet

164 Misc. 2d 715, 625 N.Y.S. 2d 831, 1995, buyers seek to recover attorneys fees from sellers of house; promissory estoppel.

Yochim v. McGrath

165 Misc. 2d 10, 626 N.Y.S. 2d 685, 1995, tenant seeks damages after eviction from illegal sublet; breach of contract; breach of covenant of quiet enjoyment; consumer protection statute, General Business Law 349; fraudulent misrepresentation.

Hansen v. American Infusion Services, Inc.

New York Law Journal, June 12, 1995, p. 37, col. 3, Yks. City Ct., quitting salesperson seeks recovery of sales commission draw; breach of employment contract.

Pellegrini v. Landmark Travel Group

165 Misc. 2d 589, 628 N.Y.S. 2d 1003, 1995, consumer seeks refund of cost of vacation package; breach of contract; negligence; negligent misrepresentation; breach of fiduciary duty; consumer protection statute, General Business Law 349.

Spatz v. Axelrod Management Co., Inc.

164 Misc. 2d 759, 630 N.Y.S. 2d 461, 1995, tenants seek damages for water damage to apartments; strict liability; breach of warranty of habitability, Real Property Law 235-b.

Nardi v. Gonzalez

165 Misc. 2d 336, 630 N.Y.S. 2d 215, 1995, dog owner seeks damages for dog bite; strict liability-vicious dog.

Farrauto, Berman, Fontana & Selznick v. Keowongwan

166 Misc. 2d 804, 634 N.Y.S. 2d 346, 1995, lawfirm seeking fees is charged with malpractice; legal malpractice.

Giarrantano v. Midas Muffler

166 Misc. 2d 390, 630 N.Y.S. 2d 656, 1995, consumer seeks damages for breach of warranty on defective brake shoes; UCC 2-316(1); UCC 2-719(2); consumer protection statutes, General Business Law 617(2)(a) and General Business Law 349; breach of warranty.

Anilesh v. Williams

New York Law Journal, November 15, 1995, p. 38, col. 2, Yks. City Ct., landlord can not recover unpaid rent for illegal apartment; breach of lease agreement.

Mongelli v. Cabral

166 Misc. 2d 240, 632 N.Y.S. 2d 927, 1995, bird owners seek recovery of pet cockatoo named Peaches; action to recover a chattel.

Brown v. Hambric

168 Misc. 2d 502, 638 N.Y.S. 2d 873, 1995, instant travel agents, educational fraud and pyramid schemes; breach of contract; consumer protection statutes, General Business Law 359-fff and General Business Law 349; rescission.

1996: YONKERS CITY COURT, NEW YORK STATE

Tri-County Audiology P.C. v. Applied Behavior Analysis Corp.

New York Law Journal, January 23, 1996, p. 31, col. 4, Yks. City Ct., tortious interference of an ' at will ' contract requires a higher level of malice than contracts of a fixed duration.

DiCesare v. Ferncliff Manor for the Retarded, Inc.

New York Law Journal, February 2, 1996, p. 34, col. 5, Yks. City Ct., employee wins dispute over accrued vacation pay because an ambiguous written vacation policy allows admission of extrinsic evidence supporting employee's position; breach of employment contract.

People v. McLean Car Wash, Inc.

New York Law Journal, February 20, 1996, p. 30, col. 6, Yks. City Ct., car wash placed illegal signs on sidewalks and telephone polls for 50 years; found in violation of sign ordinance and fined; City had "abysmal record of enforcing its statutes".

Walker v. Winks Furniture

168 Misc. 2d 265, 640 N.Y.S. 2d 428, 1996, furniture store falsely promises a delivery date of one week; disclaimers void; rescission; consumer protection statutes, Merchandize Delivery Act and General Business Law 349.

Benitez v. Restifo

167 Misc. 2d 967, 641 N.Y.S. 2d 523, 1996, landlord allows third floor tenant to intentionally cause flood to another tenant's basement apartment; breach of covenants of quiet enjoyment and warranty of habitability, Real Property Law 235-b.

Weisz v. City of Yonkers

168 Misc. 2d 901, 644 N.Y.S. 2d 950, 1996, State and City liable for damages to vehicle caused by pothole; State Highway Law 58 does not preempt local common law duties; negligence.

Rubinoff v. U.S. Capitol Insurance Co.

New York Law Journal, May 10, 1996, p. 31, col. 3, Yks. City Ct., insurance company fails to provide defense; breach of insurance contract; negligent misrepresentation; consumer protection statute, General Business Law 349.

Posillico v. Freeman

New York Law Journal, June 18, 1996, p. 33, col. 6, Yks. City Ct., chiropractor limited to no-fault insurance payments; contract in which patient agreed to pay all unpaid fees deemed void.

Williams v. Carson

New York Law Journal, July 15, 1996, p. 26, col. 6, Yks. Cty. Ct., owner of vehicle unable to rebut presumption of permissive use by brother who stole vehicle and caused accident; negligence.

Millan v. Yonkers Avenue Dodge, Inc.

New York Law Journal, September 17, 1996, p. 26, col. 5, Yks. Cty. Ct., 72 hour "cooling off" rescission rights period does not apply to sale of used cars; New York's Used Car Lemon Law preempts "cooling off" concept and requires opportunity to cure defects; consumer protection statutes, Personal Property Law Section 428; General Business Law Section 198-b.

Buell v. Cablevision

New York Law Journal, September 27, 1996, p. 32, col. 2, Yks. Cty. Ct., witness fee dispute arising from trial subpoenas served by television personality Glendora dismissed and referred to United States District Court.

Ritchie v. Empire Ford Sales, Inc.

New York Law Journal, November 7, 1996, p. 30, col. 3, Yks. Cty. Ct., used car burns up 4 ½ years after purchase because of defective ignition switch, the subject of a subsequent recall notice; dealer liable under consumer protection statutes, Vehicle and Traffic Law Section 417 and General Business Law Section 349 and strict products liability doctrine.

1997:YONKERS CITY COURT, NEW YORK STATE

People v. Ziad Alghzai

New York Law Journal, January 21, 1997, p. 32, col. 6, Yks. Cty. Ct., failure to produce case file meant that prosecutor's declaration of readiness was illusory and had not stopped the running of the speedy trial clock; indictment dismissed.

Watson v. R & L Brokerage Inc.

New York Law Journal, January 23, 1997, p. 33, col. 3, Yks. Cty. Ct., insurance broker waited three days to mail application during which insured's car was stolen; broker negligent in failing to timely mail or fax application and liable for value of car.

Cambridge v. Telemarketing Concepts, Inc.

171 Misc. 2d 796, 655 N.Y.S. 2d 795, 1997, corporation fails to honor agreement to provide scholarship to employee; breach of contract and violation of consumer protection statute, General Business Law Section 349.

Sharknet Inc. v. Techmarketing, NY Inc.

New York Law Journal, April 22, 1997, p. 32, col. 3, Yks. Cty. Ct., Internet conference and exhibition promoter misrepresented number of attendees and length of Internet exhibition to developer of commercial Web sites; breach of contract and violation of consumer protection statute, General Business Law Section 349, aff'd N.Y. App. Term, December 7, 1999.

Oxman v. Amoroso

172 Misc. 2d 773, 659 N.Y.S. 2d 963, 1997, couple fires abusive aupair and seeks refund of contract price; consumer contract containing forum selection clause, Utah, choice of law clause, Utah, and damages limitations clause held unenforceable; breach of contract, negligent misrepresentation and violation of consumer protection statute, General Business Law Section 349.

DiMarzo v. Terrace View

New York Law Journal, June 9, 1997, p. 34, col. 3, Yks.

Cty. Ct., restaurant patron loses expensive cashmere coat; restaurant liable for replacement cost on theories of bailment and negligence; General Business Law Section 201 not apply, aff'd & remanded for new trial on damages, App. Term., October 27, 1998.

Buono v. Giaimis

New York Law Journal, July 2, 1997, p. 33, col. 4, Yks. Cty. Ct., father demands return of \$10,000 given to daughter to pay his funeral expenses and burial costs; no anticipatory breach of contract; contract violates Statute of Frauds; conditional gift.

Darden v. Yonkers Motor Corp.

New York Law Journal, August 1, 1997, p. 28, col. 2, Yks. Cty. Ct., Connecticut attorneys admitted to practice in but without an office in New York State file complaint; complaint dismissed because of failure to comply with Judiciary Law § 470.

Filpo v. Credit Express Furniture Inc.

New York Law Journal, August 26, 1997, p. 26, col. 4, Yks. Cty. Ct., furniture company violates consumer protection statutes, Personal Property Law §§ 428, 429, Door-To-Door Sales Act, and General Business Law § 349, in failing to inform Spanish speaking consumers of three day cancellation period and failing to refund monies after they canceled; overreaching contract clauses found null and void.

Diament v. Kaiser Foundation Health Plan Inc.

New York Law Journal, September 25, 1997, p. 34, col. 1, Yks. Cty. Ct., employees received therapy sessions from health care plan which were terminated because problems deemed not responsive to short-term management; plan must reimburse employees for cost of non-plan therapy health care.

Mathew v. Klinger

New York Law Journal, October 7, 1997, p. 29, col. 3, Yks. Cty. Ct., pet dog swallows chicken bone and dies seven days later; two veterinarians committed

malpractice and are held responsible for dog's death; damages of \$1,500.00 awarded; aff'd and mod'd, 179 Misc. 2d 609, 686 N.Y.S. 2d 549, App. Term. 1998, reducing damages from \$1,500.00 to \$528.25.

Kozlowski v. Sears

New York Law Journal, November 6, 1997, p. 27, col. 3, Yks. Cty. Ct., homeowner purchases defective vinyl windows; consumer protection statute; contract rescinded for failure to comply with Personal Property Law §§ 428, 429, Door-To-Door Sales Act; contract clause disclaiming liability for premises damage void.

C.T.V., Inc. v. Curlen

New York Law Journal, December 3, 1997, p. 35, col. 1, Yks. Cty. Ct., consumer purchases " Beat The System Program " of \$25,000 worth of certificates and the opportunity to sell the program to other consumers and receives neither certificates nor a refund; violation of General Business Law §§ 359-fff, prohibition of pyramid schemes, and 349, prohibition of misleading and deceptive business practices, and negligent misrepresentation.

1998:YONKERS CITY COURT, NEW YORK STATE

McBride & McCabe Interiors v. Kantro

New York Law Journal, February 19, 1998, p. 32, col. 3, Yks. Cty. Ct., interior decorators rendered design services without a signed contract; homeowner liable for fees based upon quasi contract, quantum meruit, unjust enrichment and promissory estoppel.

Baker v. Burlington Coat Factory

175 Misc. 2d 951, 673 N.Y.S. 2d 281, 1998, consumer purchases fake fur and returns it two days later because it is shedding and defective; retail store's " no cash refund " policy null and void, U.C.C. §§ 2-314, 2-714 preempt General Business Law § 218-a which allows

" no cash refund " policies if notice proper; failure to inform consumers of availability of cash refund for defective goods violates General Business Law § 349, deceptive business practices. Cited as authority by the New York Court of Appeals in Karlin v. IVF America, Inc., 93 N.Y. 2d 282, 712 N.E. 2d 662, 690 N.Y.S. 2d 495, 498, 1998.

Andersen v. Ryder Truck Rental, New York Law Journal, March 23, 1998, p. 34, col. 1, Yks. Cty. Ct., consumer who waits thirty days for rental truck to be repaired recovers cost of motels and food for thirty days; breach of contract and promissory estoppel found.

Miller v. Corbett

1998 WL 185059, Yks. Cty. Ct. 1998, attorney seeking inquest on damages violated Judiciary Law § 470, failing to maintain office in New York State, and Part 136 of Rules of Chief Administrator requiring arbitration of fee disputes in matrimonial actions; sanctions of \$250 imposed , mod'd 177 Misc. 2d 266, 676 N.Y.S. 770, 1998, reargument granted; finding of a violation of Judiciary Law § 470 and imposition of sanctions vacated.

BNI New York Ltd. v. DeSanto

177 Misc. 2d 9, 675 N.Y.S. 2d 752, 1998, BNI, a business and professional networking organization, seeks to enforce a membership fees note; complaint dismissed and note rescinded on grounds of failure of consideration, misrepresentations and unconscionability; violation of General Business Law § 349.

Petrello v. Winks Furniture

New York Law Journal, May 21, 1998, p. 32, col. 3, Yks. Cty. Ct., furniture store misrepresents sofa as covered in Ultrasuede HP and protected by 5 year warranty when sofa actually covered in an inferior fabric; order form altered after purchase; fraudulent misrepresentation; rescission; breach of implied warranty of

merchantability; violation of General Business Law § 349.

Jerome v. Famby

New York Law Journal, June 3, 1998, p. 30, col. 3, Yks. Cty. Ct., landlord sued tenant three times over same transaction in two different Small Claims Courts; landlord falsely certified that he had not previously sued the tenant; third lawsuit found to be frivolous and brought to harass, intimidate, oppress and annoy tenant; landlord barred from filing any new lawsuits for one year unless receives permission from Judge sitting in small claims court.

Borys v. Scarsdale Ford Inc.

New York Law Journal, June 15, 1998, p. 34, col. 4, Yks. Cty. Ct., consumer demands new car after discovering it was repainted before delivery; dealer must have opportunity to repaint under new car lemon law, General Business Law § 198-a, and express warranty; dealer may be liable under General Business Law § 396-p(5), new car contract disclosure rules, but Small Claims Court has neither equitable nor monetary jurisdiction to enforce G.B.L. § 396-p(5).

Heyward v. Pirrotti

New York Law Journal, August 4, 1998, p. 26, col. 1, Yks. Cty. Ct., consumer hires attorney to pursue wrongful discharge claim; first retainer requires \$2000 minimum fee for payment of hourly time charges and expenses; second retainer provides for contingency fee and expenses; two retainers ambiguous and attorney must refund balance of minimum fee after second retainer entered into.

Bridget Griffin-Amiel v. Frank Terris Orchestras

178 Misc. 2d 71, 677 N.Y.S. 2d 908, 1998, bride to be hires orchestra and wedding singer Paul Rich to perform at wedding reception; without prior notice a different wedding singer is substituted; breach of contract;

disclaimer void; negligent misrepresentation; violation of General Business Law § 349, deceptive and misleading business practices; damages included one half of contract price and \$500.00 for embarrassment, humiliation and annoyance. Cited as authority by the New York Court of Appeals in Karlin v. IVF America, Inc., 93 N.Y. 2d 282, 712 N.E. 2d 662, 690 N.Y.S. 2d 495, 498, 1998.

Dellagala v. Brown

178 Misc. 2d 445, 679 N.Y.S. 2d 526, 1998, attorney receives \$100,000 certified check from debtor and instead of delivering it to his client-creditor he mails it by regular mail; the check is lost and replaced five months later; attorney liable in malpractice and ordered to pay client five months' worth of lost interest.

Guterman v. Romano Real Estate

New York Law Journal, October 28, 1998, p. 36, col. 3, Yks. Cty. Ct., real estate broker misrepresents that house with septic tank was connected to sewer system; one year later buyer discovers septic tank when toilet backs up causing in excess of \$3,000 in damages; fraudulent and negligent misrepresentation; violation of General Business Law § 349.

1999:YONKERS CITY COURT, NEW YORK STATE

Brown v. Marra

New York Law Journal, March 8, 1999, p. 32, col. 4, Yks. Cty. Ct., motion to (1) transfer Small Claims Court case to Civil Court based upon assertion of counterclaim in excess of \$3,000 jurisdictional limit or (2) stay prosecution pending fee dispute arbitration denied as frivolous and not well founded in the law.

Demuro v. Hofstede

New York Law Journal, March 18, 1999, p. 33, col. 4,

Yks. Cty. Ct., tenants obtained a decision from Division of Housing and Community Renewal, DHCR, reducing rent; instead of appealing DHCR decision tenant withheld rent and in response to non-payment action sought an additional abatement by claiming a breach of warranty of habitability; Court dismissed defense as tenants were collaterally estopped from raising habitability issues previously adjudicated.

Bank v. La Costa Apartment Corp.

New York Law Journal, March 31, 1999, p. 38, col. 5, Yks. Cty. Ct., winning bidder for co-op obtains refund of deposit after learning of no-pet policy; unjust enrichment; incorporation by reference doctrine; failure to give adequate notice of no-pet policy.

Goodman v. Central Park Auto Wash Inc.

New York Law Journal, April 12, 1999, p. 31, col. 4, Yks. Cty. Ct., cash wash damages bike and roof rack; bailments and negligence; disclaimer not enforced.

Mizra v. National Standard Mortgage Corp.

New York Law Journal, April 28, 1999, p. 31, col. 1, Yks. Cty. Ct., mortgage agreement canceled based upon misrepresentations; motion seeking to stay proceedings and enforce arbitration clause denied; arbitration clause not enforced.

O'Brien v. Exotic Pet Warehouse, Inc., New York Law Journal, October 5, 1999, p. 35, col. 2, Yks. Cty. Ct., pet owner recovers for loss of baby African Grey Parrot; negligent clipping of wings; negligent misrepresentation and violation of General Business Law Section 349.

2000:WESTCHESTER COUNTY FAMILY COURT, NEW YORK STATE

D.S. v. C.S.,

New York Law Journal, April 20, 2000, p. 34, col. 2, Westchester Family Court. The petitioner mother, having moved from Virginia two months ago, sought sole custody of the parties' two children. The father challenged the court's jurisdiction, claiming that the custody petition should be brought in Virginia since Virginia was the " home state ". The court held that although Virginia was the home state, the federal Parental Kidnaping Prevention Act pre-empted state law considerations by requiring that one of the contestants reside in Virginia at the time of the filing. Jurisdiction in New York was upheld since neither mother nor father resided in Virginia and the " location of substantial evidence " and " significant contacts " supported accepting jurisdiction for the best interests of the children.

B.L. v. M.L.

New York Law Journal, June 23, 2000, p. 33, col. 5, Westchester Family Court. The Petitioner filed a family offense petition claiming that respondent, her ex-husband, committed second-degree assault and first-degree harassment. Respondent moved to dismiss the petition for failure to state a cause of action. Reviewing the alleged conduct of respondent, the court agreed that neither cause of action was sustainable. However, the court sought to encourage a " user friendly " Family Court. It said that the pleadings must be liberally construed and that the standard was whether the allegations sustained any recognized family offense. Petitioner alleged that respondent repeatedly made anonymous phone calls to her home and office and had sent a copy of the divorce papers to a friend. The court found that these allegations supported causes of action for aggravated harassment in the second degree and harassment in the second degree.

F.H. v. M.L.

New York Law Journal, September 14, 2000, p. 25. col. 4, Westchester County Family Court. For six years, the

Court was involved in the contentious and abusive relationship between the petitioner father and respondent mother. After the mother moved to Connecticut, she was charged with neglecting their two children. Connecticut's Department of Children and Families removed the children for six and a half months to its care and custody. Consequently, the father filed a petition in Westchester seeking sole custody. Mother moved to dismiss on the ground of lack of jurisdiction or to transfer the petition to the Connecticut court before which a neglect petition was pending. The Court reviewed New York's Uniform Child Custody Jurisdiction Act, Connecticut's Uniform Child Custody Jurisdiction And Enforcement Act and the Parental Kidnaping Prevention Act. In deciding to retain jurisdiction, the Court stressed: the Court's nine prior visitation orders, the six-year relationship between the law guardian and children, that the children lived most of their lives in New York, and that the father had continuously resided in New York.

Matter of J.M.

New York Law Journal, October 3, 2000, p. 31, col. 2, Westchester County Family Court. In a juvenile delinquency petition, it was alleged that the 12-year-old respondent had sexual intercourse with his 11-year-old cousin. The petition charged respondent with rape (later withdrawn), sexual abuse and consensual sodomy, all of which were denied. The alleged act occurred in July 1999. The matter was referred by the Probation Department to the Westchester County Attorney's Office in October 1999. Nine months later, the county attorney filed this petition. Respondent moved to dismiss the petition on the ground of due process and violation of his right to a speedy trial. The court found that pre-indictment/pre-petition delays are subject to due process and speedy trial analysis but that the 9-month delay did not prejudice respondent in any way. Also, the delay was reasonable, given obstacles in obtaining the victim's needed statement.

P.I. v. C.D.

New York Law Journal, November 22, 2000, p. 32, col. 1
Westchester County Family Court. The Petitioner telephoned the Respondent wanting to know the whereabouts of their child in common. The Respondent threatened to kill the Petitioner if she tried to " get (their) 2 year old daughter back from him ". He also stated that " if I won custody of (their) daughter on (their) upcoming court date...that he would kill both me and our daughter ". On a motion to dismiss the Petition for a failure to state a Family Offense, the Court dismissed the Petition finding, among other things, that no cause of action was stated for Aggravated Harassment in the Second Degree, PL § 240-30(1), because the Respondent did not initiate the telephone call.

A.M. v. M.I.

New York Law Journal, December 28, 2000, p. 28, col. 4,
Westchester County Family Court. The Respondent paged the Petitioner who then telephoned the Respondent during which the Respondent threatened the Petitioner by stating that " if he had to get rid of me to see his kids, he will do what he has to do ". After a hearing the Court found that the Respondent had committed the Family Offense of Aggravated Harassment in the Second Degree by using a pager to precipitate the initiation of the telephone call by the Petitioner. In addition, the Court called upon the State Legislature and the Courts to expand the application of the PL § 240.30(1) to all telephone communications involving threats of physical violence or death within the context of domestic violence.

2001: WESTCHESTER COUNTY FAMILY COURT, NEW YORK STATE

H.G. v. COMMISSIONER OF SOCIAL SERVICES

New York Law Journal, April 6, 2001, p. 22, col. 2
Westchester County Family Court. The maternal great-aunt petitioned for overnight visitation with her great-niece, a child placed in foster care at the time of her birth nearly four years ago. Although there was statutory authority giving parents, grandparents and siblings the standing to seek visitation there was no such authority for others, such as great-grandparents, aunts, uncles and former foster parents, to seek visitation. Under the doctrine of equitable estoppel, persons who are neither biological nor adoptive parents can seek visitation if they can show an actual and substantial relationship. Here, although the child went into foster care nearly four years ago, petitioner had no contact with her other than a monthly one-hour supervised visit held at DSS offices commencing in June 2000. Petition dismissed.

MATTER OF J.V

New York Law Journal, May 3, 2001, p. 26, col. 4,
Westchester County Family Court. A petition was filed alleging that respondent while acting in concert with others set a blue U.S. postal mailbox on fire causing damage to the mailbox and the mail within. Respondent had admitted, orally and in writing, to a Youth Division Investigator of the Yonkers Police Department that he was involved in the incident. Respondent is now seeking to suppress those statements. Respondent raised two issues. One was whether or not the written statement was made voluntarily, knowingly and intelligently. The other was whether or not respondent was questioned in an appropriately designated juvenile room. The Court found that respondent was properly informed of his rights and that he freely waived them.

J.V. V. J.C.

New York Law Journal, June 25, 2001, p. 32, col. 6,
Westchester County Family Court. Petitioner's son, a resident of Westchester County, visited his aunt in Waltham, Mass., and during a disagreement, she threatened to ' shoot him '. A family offense petition

was filed in Westchester County and respondent aunt moved to dismiss. The court sua sponte addressed the issue of subject matter jurisdiction. It said that Family Court and Criminal Court had concurrent jurisdiction over Article 8 proceedings and as a consequence, the subject matter jurisdiction of Family Court was the same as that of Criminal Court. Therefore, subject matter jurisdiction was limited to events occurring within New York state. Accordingly, the court dismissed the matter, finding no subject matter jurisdiction and no "compelling" reason to find subject matter jurisdiction since the family offense occurred entirely in Waltham, Mass., and had no direct or residual impact in New York State.

2003: NEW YORK STATE SUPREME COURT, 9TH JUDICIAL DISTRICT, WHITE PLAINS, NEW YORK

MATTER OF COSCETTE V. TOWN OF WALLKILL, New York Law Journal, February 4, 2003, p. 23, col. 1, (West. Sup.); 2003 WL 1700490, 2003 N.Y. Slip. Op. 50624, rev'd 2005 NY Slip Op 04040, ___ WL ___ (2D Dept. 2005). Petitioner, Respondent town's former police chief, was dismissed from his position following a disciplinary proceeding, premised upon a federal jury's verdict against him, for alleged acts of misconduct and incompetence. He sought reinstatement arguing, among other things, that the bill of particulars was inadequate and that the hearing officer had failed to make an independent factual finding during the disciplinary hearing. The court vacated petitioner's termination and remanded the matter for a new hearing, ordering the hearing officer to make an independent factual finding. The court ruled that despite petitioner's repeated requests and a prior supreme court order, the town had not provided an adequate bill of particulars. It also ruled that, pursuant to Civil Practice Law and Rules 3018(a), by failing to respond in any manner to the issue of the

hearing officer's failure to make an independent factual finding, the town had conceded the issue.

MATTER OF CHRISLEX STAFFING LTD. V. NEW YORK STATE DEPARTMENT OF HEALTH, New York Law Journal, March 20, 2003, p. 24, col. 5 (West. Sup.); 195 Misc. 2d 465, 758 N.Y.S. 2d 481 (2003), 2003 WL 1566605, 2003 NY Slip Op. 23474 (2003); N.Y. Slip Opinions at <http://www.courts.state.ny.us/reporter/Decisions.htm>.

The County's Dept. Of Social Services (DSS) had requested that petitioner care for the disabled daughter of a former county employee. The DSS represented that Medicaid would reimburse petitioner. The Dept. Of Health (DOH) refused continued payment of petitioner's Medicaid reimbursement claims after it wrongly concluded that the county's health benefits plan provided third-party insurance coverage. After 13 months, the plan's administrator concluded that coverage was not provided. The DOH refused payment of plaintiff's claims as time-barred under 18 New York Code, Rules and Regulations § 540.6(a)(3)(1). The court ruled that the DOH was estopped from asserting a defense of untimely filing because petitioner has relied on DSS misrepresentations about Medicaid coverage and the DOH's conclusion as to third party coverage. It also ruled that the DSS should have known of the DOH's incorrect coverage determination.

MATTER OF MCCOMB V. DELFINO, New York Law Journal, April 8, 2003, p. 23, col. 5 (West. Sup.). Petitioner City official was suspended on disciplinary charges proffered by respondent mayor pursuant to Civil Service Law §75. Respondent designated a hearing officer (HO) for the disciplinary proceedings. Petitioner challenged the HO's refusal to dismiss the disciplinary hearing as jurisdictionally defective. Respondent claimed that the challenge was premature because no final determination had been made in the disciplinary action. Citing Matter of Essex County v. Zagata, the court rejected immediate appeal, holding that an administrative agency's assertion of jurisdiction did not inflict a ` concrete

injury ` for a finding of finality. The court dismissed the challenge, finding the HO had not made a final determination. Noting that under CSL §75(2) an HO may only make recommendations with respect to disciplinary charges, the court ruled that because the HO had not submitted recommendations to the city and no decision had been made on the charges, petitioner had not suffered any injury.

AYDELOTT v. TOWN OF BEDFORD ZONING BOARD OF APPEALS, New York Law Journal, June 25, 2003, p. 21, col. 4 (West. Sup.). Petitioner, whose four-acre property includes a home, swimming pool and tennis courts, challenged respondent zoning board of appeals' (ZBA) denial of a variance to expend his kitchen and construct a three-car garage. The ZBA found that at completion of the proposed construction there would be a resulting building coverage of 7.1 percent where 3 percent is allowed and an impervious surface of 11.7 percent where 8 percent is allowed. The court ordered the ZBA to grant the variance, finding that it had failed to fully balance the benefit to petitioner against the detriment to the neighborhood's health, safety and welfare pursuant to Town Law § 267-b(3)(b). Noting that the ZBA had concerned itself almost exclusively with whether the requested area variance was substantial, the court determined that the ZBA's consideration of a percentage deviation alone is an inadequate indicator of whether a variance application is substantial.

MATTER OF SIRIGNANO V. SUNDERLAND, New York Law Journal, August 12, 2003, p. 21, col. 2 (N.Y. Sup.); 2003 NY Slip Op 23697, 196 Misc. 2d 831, 196 Misc. 2d 831, 766 N.Y.S. 2d 786 (2003). On July 25, 2003, petitioner political nominee filed a petition challenging respondent county board of elections' July 23, 2003 determination that a challenger's nominating petition was valid. The court denied the petition as untimely, noting that July 10, 2003 was the last date to file a petition with the board. Under Election Law §

16-102(2), a proceeding to validate or invalidate a petition must be brought within 14 days after the last date to file a petition with the board. Citing *Matter of Eckart v. Edelstein* and *Matter of Bruno v. Peyser*, the court found that the three-day exception to the 14-day filing rule, as codified by a 1992 amendment to § 16-102(2), applies to a proceeding to validate a petition found to be invalid rather than one to invalidate a valid petition. The court determined that the appellate division should clarify whether the decision in *Rapp v. Wright* sets out a new exception to the 14-day filing rule by extending the scope of the three-day extension to petitions that have been declared valid.

MATTER OF JAMIL v. VILLAGE OF SCARSDALE BOARD OF APPEALS, *New York Law Journal*, October 9, 2003, p. 20, col. 3 (West. Sup.). Homeowners challenged approval of an assisted living facility's construction. The building inspector's finding that the facility constituted a permitted use subject to a special permit were memorialized in the village planner's staff notes circulated at a May 27, 1998 pre-application conference. On April 24, 2002, the planning board decided that the facility qualified as a special permit use under the village code's definition of hospital, sanitarium or nursing home. Under Village Law §7-712-a(5) petitioners had 60 days from the filing of the building inspector's determination to appeal. The court dismissed their petition as untimely, finding that the inspector's determination was filed at the March 27 1998 submission of the village planner's staff notes and on April 24, 2002 when the planning board accepted a final environmental impact statement detailing the inspector's determinations. The court also ruled that the appeal was barred by laches.

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. The Petitioner sought review of property tax assessments for 1996 through 2002. Pursuant to 22 NYCRR 202.21(e), the court vacated notes of issue for 1996 through 2002 and dismissed petitioner's tax assessment review proceedings for 1996 through 1999, finding that failure to file income and expense statements with the Westchester County Clerk violated the filing requirements of 22 NYCRR 202.59(d)(1). It also found that Petitioner's failure to serve triplicate certified copies of the property's income and expense statements violated 22 NYCRR 202.59(d), (d)(1). The court rejected Petitioner's claim that the filing requirements of 22 NYCRR 202.59(d)(1) need not be enforced, finding, among other things, that service of income and expense statements pursuant to 22 NYCRR 202.59(b), (d)(1) is not equivalent to nor a substitute for filing the statements pursuant to 22 NYCRR 202.59(d)(1).

MATTER OF NEXTEL OF NEW YORK, INC. V. ASSESSOR OF THE VILLAGE OF SPRING VALLEY, 4 Misc. 3d 233, 771 N.Y.S. 2d 853 (2004), New York Law Journal, February 6, 2004, p. 20, col. 3 (West. Sup. 2004). The Petitioner, Nextel of New York, challenged the assessment of its telecommunications equipment by the Assessor of the Village of Spring Valley for 2001, 2002 and 2003 on the grounds that the equipment [antennae, coaxial cables and communications shed] was personal property and not taxable as real property. The Court held that Nestle's telecommunications equipment was taxable as real property pursuant to R.P.T.L. 102(12)(I) or as common law fixtures. In addition the Court held that the Petitions must be dismissed for failing to submit an appraisal and rebut the presumption of validity by submitting an appraisal and expert testimony at trial.

MATTER OF SKM ENTERPRISES, INC. v. THE TOWN OF MONROE, 2 Misc. 3d 1004(A), 2004 WL 503485(2004), New York Law Journal, March 24, 2004, p. 20, col. 1 (West. Sup. 2004). Petitioner challenged a 1997 assessment for a bowling alley that burned down in July 1997. A

1996 assessment review proceeding was dismissed, with prejudice, on the merits. In its challenge to the 1997 assessment, petitioner recycled its 1996 appraisal. Its appraiser said, without additional appraisal, that there was no difference in the property's fair market value between Jan. 1, 1996 and Jan. 1, 1997. The court struck the recycled 1996 appraisal and dismissed petitioner's 1997 tax assessment challenge, finding that petitioner's 1997 appraisal did not reflect the proper valuation date of Jan. 1, 1997 or the correct taxable status date of March 1, 1997, required by Real Property Tax Law § 301 and 22 NYCRR § 202.59(h). Because petitioner failed to submit an acceptable appraisal in its petition and 1997 tax assessment proceeding, it was unable to rebut the presumed validity of the 1997 assessment.

MATTER OF RECKSON OPERATING PARTNERSHIP, L.P. v. THE TOWN OF GREENBURGH, 2 Misc. 3d 1005(A), 2004 WL 556580 (2004), New York Law Journal, April 7, 2004, p. 23, col. 1_(West. Sup. 2004). Petitioner challenged assessments for 1997, 1998 and 1999 on its four-story office building comprising approximately 113,062 square feet. Both parties' experts utilized an income-capitalization approach to value the property. Respondent assessor's expert also used a sales-comparison approach by analyzing eight sales from Dec. 1, 1997 to Dec. 24, 1999. After trial, the court ordered \$428,629 in reductions. It rejected the sales-comparison approach for valuation as inapplicable due to the lack of income data concerning leases of comparable commercial buildings. Recognizing that purchasers of commercial buildings but an ' income stream ' the court found the income-capitalization approach to be the proper method to value the subject property. The court also rejected the use of a neighboring commercial building as a comparable property due to its significant physical differences from the building at issue.

MATTER OF JAMIL v. VILLAGE OF SCARSDALE PLANNING BOARD,

4 Misc. 3d 642, 778 N.Y.S. 2d 670 (2004), 2004 N.Y. Slip. Op. 24197 (N.Y. Sup. 2004), New York Law Journal, June 23, 2004, p. 21, col. 3 (West. Sup.). Petitioner challenges respondent planning board's approval of an assisted living facility as a special use in a residential district. The court denied the notice of petition, ruling that the planning board's decision was neither arbitrary, erroneous, nor violative of lawful procedure. Village zoning code provisions permit a hospital, sanitarium or nursing home as a special use in the subject district. The court noted reports expressing the need for assisted living facilities, as well as state legislation establishing an assisted living program. After examining definitions of " assisted living facilities ", " nursing home " and " sanitarium " and citing the Connecticut case Antonik v. Greenwich Planning and Zoning Commission, the court held that the board rationally concluded that an assisted living facility would serve a proposed population which " is the same as would have occupied a nursing home prior to the development of the assisted living concept ".

MATTER OF ORANGE AND ROCKLAND UTILITIES, INC. v. ASSESSOR OF THE TOWN OF HAVERSTRAW, 4 Misc. 3d 1005(A), 2004 WL 1609183 (2004), New York Law Journal, July 13, 2004, p. 19, col. 1 (West. Sup.). On September 25, 2000 petitioner utility filed a note of issue as to a proceeding to review taxes assessed in 1996 on an electric power plant sold in 1998. The respondents' motion to strike the note of issue and tax review proceeding as untimely under Real Property Tax Law § 718 was held in abeyance until an appellate ruling that an August 3, 2000 memorandum of agreement settling the parties' tax dispute was unenforceable. The court granted respondents' motion. It rejected as inapplicable petitioner's claim that settlement efforts to extend the time to file a note of issue indicated that it did not intend to abandon the tax assessment review proceeding. Citing the appellate determination in Matter of Pyramid Crossgates which cited Matter of

Sullivan LaFarge v. Town of Makakating and Matter of Waldbaum's #122 v. Board of Assessors, the court held that the four year filing requirement of RPTL § 718 was a mandatory provision that must be strictly applied.

MATTER OF OSBORN MEMORIAL HOME ASSOCIATION v. ASSESSOR OF THE CITY OF RYE, 4 Misc. 3d 1009(A), 2004 WL 1656500 (West. Sup. 2004). In a tax assessment review proceeding, petitioner, " a not-for-profit organization which, for the past 90 years, has provided housing for the elderly in a facility situated on land located in the City of Rye ", seeks restoration of a " full mandatory exemption from real property taxes...pursuant to RPTL 420-(a)(1)(a) which it enjoyed from 1908 to 1996 when its exemption was revoked and later restored to 20.8%. At issue was the scope of an audit pursuant to 22NYCRR § 202.59© and after reviewing the legislative history, statutory construction and Generally Accepted Accounting Principals the Court held that the petitioner should have unrestricted access to the balance sheets for all years in questions to aid in the performance of the audit.

MATTER OF THE BANK OF NEW YORK v. ASSESSOR OF THE VILLAGE OF BRONXVILLE, 4 Misc. 3d 1014(A) (2004), 2004 WL 1829467 (N.Y. Sup. 2004), New York Law Journal, August 24, 2004, p. 20, col. 1 (N.Y. Sup.). In a tax assessment review proceeding, petitioner bank sought review and reduction of respondents' 1991-2003 real property tax assessments of its branch located in Bronxville, New York. At trial, petitioner called as its first witness a licensed professional engineer, who provided expert testimony on the cost to reconstruct the bank. After three days of cross-examination, petitioner wanted to begin redirect examination. The trial, however, was postponed indefinitely due to the expert's serious illness. It was unlikely that he would be able to resume testimony for a " considerable period of time, if at all ". Petitioner now moved for a mistrial, claiming that an extensive redirect was

essential. The court found that due to many new matters raised in respondents' cross-examination, petitioner would be prejudiced by not having an opportunity for redirect. Accordingly, the court granted petitioner's motion in the ' interests of justice '.

MATTER OF AN APPLICATION PURSUANT TO 16-102 OF THE ELECTION LAW WILLIAM G. SAYEGH v. ANTHONY G. SCANNAPIECO, COMMISSIONERS OF THE PUTNAM COUNTY BOARD OF ELECTIONS, 4 Misc. 3d 1015(A) (2004), 2004 WL 1852884 (West. Sup. 2004), *aff'd* 10 A.D. 3d 479, 780 N.Y.S. 2d 743 (2d Dept. 2004), *leave to appeal denied* 3 N.Y. 3d 603, 782 N.Y.S. 2d 697, 816 N.E. 2d 570 (2004). Petitioners sought a declaration that July 15, 2004 political party state committee designating petitions were valid. Based on objections filed on July 19, 2004, respondent county elections commissioners deemed the petitions untimely under the 14-day filing rule of Election Law § 16-102(2). Although petitioners' order to show cause and verified petition were filed with the county clerk on August 2, 2004, their service on the county board of elections was not effected until August 6, 2004. The court dismissed the verified petition as untimely under Election Law § 16-102(2). It found July 15 the last day to file the petitions and ruled that the 14-day limitation period of § 16-102(2) expired on July 29, 2004. Applying the three business day exception, the court found that petitioners' last day to file and complete service was August 2, 2004. Although petitioners filed their papers on August 2, their failure to complete service " on all necessary parties " until August 6, 2004, violated § 16-102(2) statute of limitations. Decision *affirmed* A.D. 2d Dept. August 20, 2004.

MATTER OF AN APPLICATION PURSUANT TO 16-102 OF THE ELECTION LAW REGINA SHAW ALI v. ANTHONY G. SCANNAPIECO, COMMISSIONERS OF THE PUTNAM COUNTY BOARD OF ELECTIONS, 10 A.D. 3d 438, 780 N.Y.S. 2d 906 (2d Dept. 2004), *leave to appeal denied* 3 N.Y. 3d 603, 782 N.Y.S. 2d 697, 816 N.E. 2d 570 (2004).

MATTER OF ORANGE AND ROCKLAND UTILITIES, INC. v. ASSESSOR OF THE TOWN OF HAVERSTRAW, 5 Misc. 3d 1010(A), 2004 WL 2472472 (West. Sup. 2004). Petitioner sought, by way of subpoena, discovery of non-party appraisals prepared by respondent's expert appraiser for purpose of cross examination. Various non-parties moved to quash the subpoenas. The Court held that non-party appraisals prepared by respondent's expert witness which were not filed and not exchanged were covered by the CPLR § 3101 attorney work-product privilege and not available to petitioner for review.

MATTER OF 325 HIGHLAND LLC v. ASSESSOR OF THE CITY OF MOUNT VERNON, NEW YORK, 5 Misc. 3d 1018(A), 2004 WL 2683668 (West. Sup. 2004), New York Law Journal, December 3, 2004, p. 26, col. 3 (West. Sup. 2004). Petitioner moved to reduce amount of real property assessments by respondents to reflect purchase price, which is generally evidence of highest rank to determine true value of property unless explained away as abnormal. Respondents argued sale price was " abnormal " and did not represent fair market value of the property since less than a year after purchasing it for \$640,000, petitioner listed the property for \$1,850,000. Petitioner, however, claimed property had decreased in value because it lost its " grand-fathered " protection when its use as a home for the elderly was abandoned for over a year. Under the guidance of Plaza Hotel Associates v. Wellington Associates, which stated that courts need not insure profitability of business transactions or remedy failure to foresee changes in the economy, the Court found that petitioner's real estate listing was not so unusual as to take the case outside the scope of the general rule and revalued property accordingly.

MATTER OF GEMILAS CHASUDIM KEREN ELUZER INC. v. ASSESSOR OF THE TOWN OF RAMAPO, 5 Misc. 3d 1026(A), 2004 WL 2852658, (West. Sup.), New York Law Journal, December 20, 2004, p. 20, col. 3 (West. Sup. 2004). Petitioner Free Loan Society claimed that as a

charitable organization it was entitled to real property tax exemption. According to petitioner, a free loan society is organized by orthodox Jewish synagogues to secure capital from donors and make interest-free loans to needy applicants. The court held that to be entitled to such an exemption under Real Property Tax Law § 420-1(1)(a) petitioner had the burden to show the property was owned by an exempt charitable organization and was used exclusively for charitable purposes. It held that due to the absence of profit or charged interest rates, petitioner's free loan society was a charitable activity and met the first test for tax exemption. However, it determined that the premises were not primarily used for the charitable activities of the society, but were used almost exclusively as the owners' family residence. Thus petitioner did not meet the second test for tax exemption and its request was denied.

MATTER OF CONGREGATION SHERITH YISOEL VILEDNKI v. TOWN OF RAMAPO 5 Misc. 3d 1027(A), 2004 WL 2903585 (West. Sup. 2005). Motion seeking permission to depose the Tax Assessor of the Town of Ramapo denied.

MATTER OF THE VILLAGE OF PORT CHESTER, 5 Misc. 3d 1031(A), 2004 WL 2952860 (West. Sup. 2004). Condemnor, the Village of Port Chester ordered to pay advance payments into an escrow account pending outcome of condemnees' federal appeal in an action challenging the condemnation proceeding on due process grounds. Condemnor ordered to pay statutory interest of 6% on the advance payment. Distinction drawn between interest payments on tax refunds arising out of tax certiorari proceedings and interest imposed in condemnation proceedings.

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MATTER OF MCCOMB v. REASONER, 6 Misc. 3d 1012(A), 2005 WL 127052 (West. Sup.). Motion seeking to dismiss Article 78 Petition of former employee of City of White Plains whose employment was terminated granted.

MATTER OF MERIAM OSBORN MEMORIAL HOME ASSOCIATION V. CITY OF RYE, 6 Misc. 3d 1011(A), 2005 WL 120792 (West. Sup. 2005). Motion to preclude evidence of resident medical condition during stay at petitioner's facility denied.

MATTER OF AMERICAN PROPERTIES INVESTORS v. THE VILLAGE OF MOUNT KISCO. Motion to preclude appraisal premature. <http://www.nycourts.gov/courts/9jd/taxcert.shtml> Motion to preclude appraisal premature; application to obtain opponent's appraisal denied.

MATTER OF FORECLOSURE OF TAX LIENS BY TOWN OF MOUNT PLEASANT. Motion to stay Town of Mount Pleasant's tax lien enforcement proceeding denied. Taxpayers are required to pay a disputed tax prior to challenging the propriety of the tax in a court proceeding. <http://www.nycourts.gov/courts/9jd/taxcert.shtml>.

MATTER OF SALVATION & PRAISE DELIVERANCE v. THE CITY OF POUGHKEEPSIE, 6 Misc. 3d 1021(A), 2005 WL 332409 (Dutchess Sup. 2005), New York Law Journal, February 24, 2005, p. 19, col. 3 (Dutchess Sup.). Bar claim action granted; Article 7 petition moot.

MATTER OF MIRIAM OSBORN MEMORIAL HOME ASSOC. v. THE CITY OF RYE, 6 Misc. 3d 1035(A), 2005 WL 562748 (West. Sup.), New York Law Journal, March 21, 2005, p. 20, col. 3 (West. Sup.). Petitioner nursing home sought to reinstate a previously revoked tax exemption under Real Property Tax Law (RPTL) § 420-a. The issue before the court was which party bore the burden of proof. It explained that, generally, a taxpayer has the burden to prove that its property is exempt. However, it opined that where a municipality has withdrawn a previously granted exemption, it bears the burden to prove the

property is subject to taxation. Respondent argued that it had only previously considered petitioner's "charitable" use exemption, and therefore that petitioner bore the burden of showing applicability of a "hospital" use exemption. The court determined that the assessor had considered whether respondent was entitled to an exemption under RPTL § 420-a as a "hospital" and had taken away a "hospital" exemption. Accordingly, it determined respondent had the burden to prove petitioner was no longer entitled to exemption.

MATTER OF MARKIN v. TOWN OF ORANGETOWN, 6 Misc. 3d 1035(A), 2005 WL 562748 (Rockland Sup.), New York Law Journal, April 6, 2005, p. 24, col. 1 (Rockland Sup. 2005). Homeowners brought an Article 78 proceeding challenging the town's reassessment of their properties in 1999 at values higher than a 1997/1998 assessment. Petitioners alleged the town's method of reassessment was selective, as it did not carry out a general revaluation of all properties and, hence, violated their equal protection rights. The assessor argued that because the allegations did not give rise to constitutional illegality, petitioners' could only seek redress under Real Property Tax Law Article 7(RPTL). The court explained that although generally assessment challenges must be brought under RPTL, there existed a narrow exception to this exclusive jurisdiction for taxpayers challenging the method employed in assessment of several properties, rather than the overvaluation or undervaluation of a specific property. The court found petitioners set forth sufficient evidence to bring their challenge within the exception.

MATTER OF MERIAM OSBORN MEMORIAL HOME ASSOCIATION v. CITY OF RYE, 7 Misc. 3d 1004(A), 2005 WL 756588 (West. Sup.), New York Law Journal, April 11, 2005, p. 20, col. 3 (West. Sup.). Motion seeking to preclude testimony of law professor on the meaning of "charitable" under Real Property Tax Law § 420-a granted.

MATTER OF MERIAM OSBORN MEMORIAL HOME ASSOCIATION v. THE CITY OF RYE. Motion seeking to preclude introduction at trial of ancient documents including letters from 1908 to 1913 denied.

<http://www.nycourts.gov/courts/9jd/taxcert.shtml>.

MATTER OF NYACK PLAZA HOUSING ASSOC. v. TOWN OF ORANGETOWN, 2005 NY SLIP OP, 2005 WL 887269 (Rockland Sup.), New York Law Journal, April 21, 2005, p. 20, col. 1 (Rockland Sup.). In Real Property Tax Law Article (RPTL) 7 proceeding, respondent town assessor sought to introduce at trial evidence of an assessment class ratio. The assessor opined that using a single assessment ratio for all property created artificially high value for commercial properties and resulted in an excessive number of tax certiorari proceedings. It asked the court to permit the assessment of properties using class ratios that would separate commercial properties from residential properties for assessment purposes. The court found that RPTL Article 18 limited this kind of classification system to " special assessing units " with a population of one million or more. As respondent was not a special assessing unit, the court held it was required to assess all properties within its boundaries at a single, uniform overall percentage of value. It suggested that respondent resolve the issue through legislation rather than litigation.

MATTER OF ORANGE AND ROCKLAND UTILITIES, INC. v. THE ASSESSOR OF THE TOWN OF HAVERSTRAW, 7 Misc. 3d 1017, 801 N.Y.S. 2d 238 (2005), (Rockland Sup. 2005), New York Law Journal, May 13, 2005, p. 21, col. 1 (Rockland Sup.). Petitioner moved to amend its filed tax certiorari petitions setting forth its demand for full value for tax years 1995-2003 to conform to the market values found at trial by its appraiser. The difference between the sums at issue was nearly \$1 billion. The court followed Real Property Tax Law § 720(1)(b), which prohibits reducing assessments to an amount less than they requested in a petition. It found that these ` reduction limitations ` applied throughout the state,

except in New York City, explaining that municipalities rely upon demands to allocate their resources and prepare defenses. Without such a rule, it opined, municipalities ` may ve placed in a precarious financial position when a case in which they believed that had only a limited exposure to potential refund suddenly resulted in a court order directing a much larger refund ` . It rejected petitioner's contention that the limitations violated constitutional requirement that assessments cannot exceed full value.

MATTER OF PATRICIA C. VILLAMENA V. THE CITY OF MOUNT VERNON, 7 Misc. 3d 1020(A), 2005 WL 1083712, New York Law Journal, June 13, 2005, p. 20, col. 3 (West. Sup. 2005). Petitioner in a Real Property Tax Law (RPTL) Article 7 proceeding, sought to reduce the 2003 assessment on her property to reflect the final valuation calculation determined by the assessment board. The court addressed the need for municipalities to have in place comprehensive assessment plans which explain how assessors assess or re-assess properties on a consistent basis. It opined that suc plans should be required since they give guidance to assessors and lend credibility to their assessments from the standpoint of property owners. Here it found the City did not have such a plan in place in 1993, 2002 and 2003. It determined that the state equalization rate, not the residential assessment ratio, applied in a RPTL 7 proceeding. Finally, it concluded that petitioner provided insufficient evidence of ` selective re-assessment ` . Nevertheless, it ordered a new inspection and assessment of her property and a refund if appropriate. "

MATTER OF BRODIE v. OFFICE OF THE ASSESSOR, TOWN OF RAMAPO, 8 Misc. 3d 1001(A), N.Y.L.J., June 22, 2005, p. 21, col. 3 (Rockland Sup. 2005). Claim for STAR tax exemption barred by statute of limitations).

MATTER OF FALBE v. TAX ASSESSOR FOR THE TOWN OF CORNWALL, 8 Misc. 3d 1004(A), N.Y.L.J., June 29, 2005,

p. 20, col. 1 (Orange Sup. 2005). Order directing Village to pay tax refund vacated because of misrepresentations.

MATTER OF MERIAM OSBORN HOME ASSOCIATION v. ASSESSOR OF THE CITY OF RYE, 8 Misc. 3d 1008(A) (West. Sup. 2005) Motion to quash subpoena for accountant's work papers granted.

ADULT HOME AT ERIE STATION v. ASSESSOR OF THE CITY OF MIDDLETOWN, 8 Misc. 3d 1010(A) (Orange Sup. 2005), *rev'd* 36 A.D. 3d 699, 828 N.Y.S. 2d 459 (2d Dept. 2007), *motion for leave to appeal to court of appeals granted* 8 N.Y. 3d 814, 838 N.Y.S. 2d 840 (2007). (tax exemption and valuation of non for profit adult home)

MATTER OF MGD HOLDINGS HAV, LLC v. ASSESSOR OF THE TOWN OF HAVERSTRAW, 2005 WL 1645051 (Rockland Sup. 2005). Selective reassessment; summary judgment denied.

MATTER OF D'ONOFRIO v. VILLAGE OF PORT CHESTER, 2005 WL 1668403, N.Y.L.J., July 25, 2005, p. 21, col. 1 (West Sup. 2005). The instant condemnation suit was scheduled for trial with the condemnee (" claimant ") having filed his appraisal with a value conclusion of \$830,000 and the condemnor (" the village ") having filed its appraisal with a value conclusion of \$600,000 for the subject property. The village stated that the " value [did] not reflect deduction for unpaid real estate taxes, if any, and deduction for the costs of contamination remediation, if any ". Claimant sought to exclude any evidence at trial as to any diminution in the value of the property by reason of cleanup or remediation costs resulting from alleged environmental contamination. The court granted the motion, with the proviso that any condemnation award would be used to pay outstanding tax liens. It also held that the balance would be escrowed, pending the outcome of a separate suit to determine claimant's responsibility, if any, for the contamination remediation costs of the property.

MATTER OF 2 PERLMAN DRIVE v. THE BOARD OF ASSESSORS OF THE VILLAGE OF SPRING VALLEY, 9 Misc. 3d 382, 800 N.Y.S. 2d 816 (Orange Sup. 2005). R.P.T.L. § 727(1) Moratorium; two exceptions reviewed.

MATTER OF CONGREGATION KNESSET ISRAEL v. ASSESSOR OF TOWN OF RAMAPO, 8 Misc. 3d 1021(A), 2005 WL 1811832, N.Y.L.J., August 30, 2005, p. 20, col. 3 (Rockland Sup.). Respondent Town Assessor sought summary judgment dismissing petitioner synagogue's petition for a tax exemption under (RPTL) § 462 stating a religious corporation owning a residence actually used by units officiating clergy may be tax exempt. Petitioners cross-moved for summary judgment. Respondents asserted petitioner was not entitled to the exemption because its rabbi was not a full time officiant, but rather a part-time clergyman. Petitioners argues that rabbi satisfied the full-time requirement, putting in over 40 hours a week performing services for the congregation. The court found the existence of factual issues sufficient to warrant a trial, such as who actually owned the property, the rabbi or the congregation, as well as whether the rabbi should be considered a full-time officiant or a part-time clergyman because of his employment outside the synagogue. Thus, the court denied both summary judgment motions.

MATTER OF WARD V. WESTCHESTER COUNTY BOARD OF ELECTIONS, 8 Misc. 3d 1027(A), 2004 WL 1992243, N.Y.L.J., August 26, 2005, p. 20, col. 3 (West. Sup.). Petitioner sought an order directing respondent board of elections to conduct an opportunity to ballot. The Appellate Division, Second Department, stated if the designating petition was facially invalid because of the failure to obtain the statutorily required minimum number of signatures, or where the designating petition was rejected for substantive rather than technical defects, the candidate was not entitled to ballot. Upon review of the objections ruled upon by respondent, this court found that all of them were substantive and not technical in nature, and that these substantive defects

called into serious question the existence of adequate support among eligible voters, thus petitioner was not entitled to an opportunity to ballot. Also, petitioner was not entitled to the opportunity since the petition was facially invalid for failure to obtain the statutorily required number of signatures, this petitioner's request was denied in its entirety.

MATTER OF MRE REALTY CORP. V. ASSESSOR OF THE TOWN OF GREENBURGH, 8 Misc. 3d 1027(A), 2005 WL 1993479 (West. Sup.), *aff'd in part* 33 A.D. 3d 802, 822 N.Y.S. 2d 629 (2d Dept. 2006). R.P.T.L. § 727(1) Moratorium; failure to timely file.

MIRIAM OSBORN MEMORIAL HOME ASSOCIATION v. ASSESSOR OF THE CITY OF RYE, __ Misc. 3d __, 2005 WL 2072322, N.Y.L.J., September 2, 2005, p. 20, col. 3 (West. Sup.). Petitioner sought to admit into evidence, during a real property tax law trial, an exhibit of an electronic print-out of date maintained by the New York State Office of Real Property Services (ORPS) that was downloaded from the ORPS SalesWeb website. Petitioner asserted the exhibit was admissible because it was an electronic record, and state Technology Law § 306 permitted admission into evidence of an electronic record. At trial, petitioner's witness testified to the manner in which she downloaded, printed and copies the electronic record off the ORPS site, how it was taken from its electronic form, and then turned into a tangible exhibit. She also testified how she retrieved this electronic record, maintained by ORPS, and the court concluded that the exhibit was a true and accurate representation of such electronic record. Since the evidence in the exhibit was an electronic record, it fell with § 306 and was therefore admissible.

MATTER OF ROCKLAND COUNTY SEWER DISTRICT No. 1, 2005 WL 2205764, 9 Misc. 3d 1106(A), N.Y.L.J., September 20, 2005, p. 20, col. 3 (Rockland Sup.). Condemnor sought an order to vacate the note of issue and certificate of

readiness filed by claimant. Condemnor acquired claimant's real property by condemnation as part of Rockland County Sewer District's expansion project, and was served with claimant's note of issue and certificate of readiness for trial, which represented that all pleadings were served and appraisal reports exchanged. Condemnor contended that pursuant to 22 NYCRR § 202.61(a)(1) the exchange of appraisals was a prerequisite to filing and serving a note of issue and certificate of readiness and claimed the note of issue which stated that appraisal reports were exchanged was patently false. The court declared the rules were clear that in eminent domain proceedings, the exchange of trial appraisals was a prerequisite to the filing and serving of a note of issue and certificate of readiness. Thus they were improper and vacated.

MATTER OF DALE JOAN YOUNG v. TOWN OF BEDFORD, 2005 WL 2230399, 9 Misc. 3d 1107(A) (West. Sup.), *aff'd* 37 A.D. 3d 729, 831 N.Y.S. 2d 431 (2d Dept. 2007). Selective Reassessment; initial assessment of newly created property; use of current market value.

MATTER OF MARKIM v. THE ASSESSOR OF THE TOWN OF ORANGETOWN, 9 Misc. 3d 1115(A), 2005 WL 2428359, N.Y.L.J., October 12, 2005, p. 21, col. 1 (Rockland Sup. 2005), *adhered to on reargument* 11 Misc. 3d 1063, 816 N.Y.S. 2d 697 (Rockland Sup. 2006). Petitioner Landowners filed this Article 78 petition challenging assessment increases by respondent assessor as violative of their equal protection rights. Petitioners alleged that assessor utilized a policy of selective reassessing and acted arbitrarily and capriciously. Respondent moved to dismiss the petition asserting petitioners' filing of an Article 78 petition was improper. The court denied the motion noting the asserting methodology was challenged, thus a collateral proceeding was the proper review. The court stated the assessor failed to provide a coherent explanation of his 1997, 199 and 1999 assessments of the properties. The court determined respondent's methodology in reassessing the properties

was unfair, unreasonable and discriminatory, and a form of selective reassessment. Thus, the court granted petitioners' Article 78 and the property assessments for 2004 were vacated.

OTRADA, INC., AMERICAN RUSSIAN AID ASSOCIATION v. ASSESSOR OF THE TOWN OF RAMAPO, 9 Misc. 3d 1116(A), 2005 WL 2428362, N.Y.L.J., October 11, 2005, p. 22, col. 3 (Rockland Sup. 2005), *aff'd* 41 A.D. 3d 678, 839 N.Y.S. 2d 123 (2d Dept. 2007). Plaintiff nonprofit sought a restoration of its 100 percent tax exempt status pursuant to Real Property Tax Law § 420-1(1)(a). Defendants reduced plaintiff's tax exempt status from 100 to 67 percent contending the nonprofit was not entitled to 100 percent exemption since partial use of the premises as residences for plaintiff's members was not necessary or incidental to its purpose, and the residences were not used to further the corporate purpose. Plaintiffs contended defendant's real property appraiser did not testify as to the reason why the exemption was reduced, nor testify that the reduction was based on any of its findings. The court found defendants did not provide sufficient evidence to meet their burden of proving why the exemption was reduced from 100 to 657 percent, and defendants woefully failed to prove their case, thus granted judgment in plaintiff's favor, restoring it to its 100 percent tax exemption for the 2003 tax year.

AAA ELECTRICIANS INC. v. VILLAGE OF HAVERSTRAW, 9 Misc. 3d 1120(A), N.Y.L.J. November 17, 2005, p. 20, col. 1 (Rockland Sup. 2005) (Claimant sought an order directing condemnor to tender the remaining balance of the advance payment based upon its highest and best appraisal of the property at issue. Condemnor alleged calculation errors were made as the appraisers failed to consider the cost to clear the site, and withdrew its original offer. Claimant alleged the reduction was made in bad faith, but the court noted Eminent Domain Procedure Law § 304(F) stated that at any time

subsequent to making a written offer, the amount may be adjusted to correct error or miscalculations. The court noted claimant accepted the advanced payment offer without objections to the reduction of the offer, and stated no provision in the EDPL permitted claimant to accept and receive an advanced payment and then challenge the amount of the payment. Thus, the court denied claimant's motion regarding the reduction of the offer).

MATTER OF THE VILLAGE OF PORT CHESTER, 10 Misc. 3d 1057(A), 2005 WL 3360898 (West. Sup. 2005). Claimant moved for an order directing the Village of Port Chester to exchange appraisals, which was twice denied by prior decisions. The court stated the issue to be decided was whether claimant abandoned his claim, and if so, whether the claim should be dismissed on the merits, and whether claimant's counsel was permitted to impose a charging lien upon an alleged settlement between claimant and the village. The court found claimant's motion was based on the same arguments and facts as the previous two motions, and there was no demonstration of extraordinary circumstances warranting a departure from the earlier determinations on this issue, it denied the motion, and granted the village's cross-motion dismissing the claim with prejudice deeming it abandoned. It also denied the attorney's claim of a charging lien based as there was no verdict, decision or judgment against which a charging lien may be imposed.

MAJAARS REALTY ASSOC. V. TOWN OF POUGHKEEPSIE, 10 Misc. 3d 1061(A), 2005 WL 3464679 (Dutchess Sup. 2005). Respondent town sought dismissal of petitioner's tax certiorari application claiming that it failed to serve or failed to make timely service, as required by Real Property Tax Law § 708(3), on the superintendent of schools and commissioner of finance. Respondent argued the petition should be dismissed for failure to comply with the mailing service requirements. Petitioner alleged that timely personal service on the commissioner of finance and the school district was authorized by §

708(4), implying that § 708(3) was merely one option of service, not the sole option. The court found it did not have to reach the issue of whether personal service was authorized by § 708(4) as it granted respondent's motion and dismissed the petition because service upon the district clerk of the school district, rather than the superintendent of schools, was fatal to the petition since § 708(3) clearly stated the superintendent of schools must be served.

2006: NEW YORK STATE SUPREME COURT, 9TH JUDICIAL DISTRICT, WHITE PLAINS, NEW YORK

MATTER OF 275 N. MIDDLETOWN RD. v. KENNY, 2006 WL 26143, N.Y.L.J., January 10, 2006, p. 21, col. 3 (Rockland Sup. 2006), *superceded* by 10 Misc. 3d 1067, 814 N.Y.S. 2d 565 (Rockland Sup. 2006). Intervenor school district moved to dismiss petitioner's tax certiorari petition alleging petitioner failed to timely file proof of service on the Intervenor and also failed to serve the Superintendent as required by Real Property Law § 708(3). Petitioner argued it mailed a notice of petition by certified mailing to the correct address for the Superintendent of Schools, and records revealed the secretary to the superintendent signed for the mailing. Further, petitioner alleged that while the affidavit of service was filed 16 days later than required, corrective action was immediately taken, proof of service was filed with the court, and the Intervenor suffered no prejudice. The court found that as the instant case involved the ministerial act of filing proof of service, petitioner's failure to timely file could be excused for good cause due to the lack of prejudice on the Intervenor. The Intervenor's motion was denied in its entirety.

MATTER OF COMMERCE DRIVE ASSOCIATES LLC v. BOARD OF ASSESSMENT REVIEW, 2006 WL 83517, N.Y.L.J., January 24, 2006, p. 21, col. 1 (Orange Sup. 2005), *aff'd* 35 A.D.

3d 856, 825 N.Y.S. 2d 370 (2d Dept. 2006). Respondent Town of Woodbury moved to dismiss petitioners' notice of petition and petition for review of assessment for failure to serve the town within the time limits set forth in Real Property Tax Law § 702(2). The court found petitioner served the Town of Waywayanda and not Woodbury. Petitioner asserted Woodbury received constructive notice within the statutory time period, but the court rejected the argument, stating failure to serve the town was not a mere irregularity, it was jurisdictionally fatal. Petitioner cross-moved to extend the filing time in the interest of justice and the court ruled Woodbury had actual notice of the claim through the service and filing of the grievance day petition. Also, the town would be " hard pressed " to claim it suffered prejudice by the failure to serve, while petitioner would be severely prejudiced by the dismissal of the petition. Thus, respondent's motion was denied, and petitioner's cross-motion was granted.

SCHLESINGER v. TOWN OF RAMAPO, 2006 WL 167844, N.Y.L.J., February 1, 2006, p. 20, col. 1 (Rockland Sup. 2005) (Respondent Town moved pursuant to 22 NYCRR § 202.59(e) to require petitioner taxpayer to permit an appraiser to do an interior inspection of the subject premises in order to complete a preliminary and trial ready appraisal. Petitioner alleged § 202.59e) was a means to obtain a pretrial conference and did not require an interior inspection. Petitioner also argued the town's appraiser failed to address how an interior inspection in 2005 would accurately reflect the condition of the interior in 1989, the year in which petitioner brought this action for a reduction in the tax assessment. The court agreed. The court noted a review of the building permits on file would provide respondent with a reasonable, alternative means of evaluating the interior of petitioner's residence as it exists in 1999. Therefore as was clear from a review of § 202.59(e) that it did not require an interior inspection by the appraiser of the subject property, it denied respondent's motion.

ORANGE AND ROCKLAND UTILITIES, INC. v. ASSESSOR OF THE TOWN OF ORANGETOWN, 2006 WL 297727 (Rockland Sup. 2006), N.Y.L.J., February 21, 2006, p. 20, col. 1 (Intervenor school district moved to dismiss petitioner's tax certiorari proceeding alleging petitioner failed to serve the Superintendents of Schools of the Parl River and South Orangetown school districts. The court noted that R.P.T.L. § 708(3) clearly stated that a copy of the petition and notice shall be mailed within 10 days from the date of service to the superintendent of schools. It also stated that excusal for good cause due to a lack of prejudice related to the failure to comply with the method of service, not the failure to serve the proper person, as the former was ministerial, while the latter was jurisdictional. Thus, the court found that while the filing of proof of service five days later than required did not prejudice intervenor, and was sufficient good cause to excuse petitioner's failure to comply with the 10 day filing mandate, the jurisdictional defect of failing to serve the proper person was fatal to the petition, and Intervenor's motion was granted.

BOCK v. TOWN/VILLAGE OF SCARSDALE, 2006 WL 328503 (West. Sup. 2006) (more on selective reassessment; assessor's methodology for reassessing based upon cost of improvements fair, reasonable and non-discriminatory).

MGD HOLDINGS HAV, LLC v. ASSESSOR OF THE TOWN OF HAVERSTRAW, 2006 WL 398305 (Rockland Sup. 2006) (motion to reargue earlier decision at 8 Misc. 3d 1013(A) granted and upon reargument earlier decision adhered to).

OTRADA, INC. v. ASSESSOR TOWN OF RAMAPO, 11 Misc. 3d 1058(A), New York Law Journal, March 28, 2006, p. 20, col. 3 (Rockland Sup. 2006), *aff'd* 41 A.D. 3d 678, 839 N.Y.S. 2d 123 (2d Dept. 2007) (motion to reargue earlier decision at 9 Misc. 3d 1116(A) granted and upon reargument relief sought granted).

MIRIAM OSBORN MEMORIAL HOME ASSOCIATION v. ASSESSOR OF THE CITY OF RYE, 11 Misc. 3d 1059(A) (West. Sup. 2006) (Admissibility of documents downloaded from the New York State Dept. Of Health and the U.S. Government Medicare Websites).

MATTER OF MARKIM v. ASSESSOR OF THE TOWN OF ORANGETOWN, 2006 WL 657128 (Rockland Sup. 2006), New York Law Journal, April 11, 2006, p. 19, col. 3 (Rockland Sup. 2006), (more on selective reassessment; remedies; partial assessments; motion to reargue earlier decision at 9 Misc. 3d 1115(A), and upon reargument earlier decision as modified adhered to).

MIRIAM OSBORN MEMORIAL HOME ASSOCIATION v. ASSESSOR OF THE CITY OF RYE, 2006 WL 694616 (West. Sup. 2006) (admissibility of hotel appraisals as examples of prior inconsistent statements of appraiser witness).

MATTER OF MIDWAY SHOPPING CENTER v. TOWN OF GREENBURGH, 2006 WL 820261 (West. Sup. 2006), New York Law Journal, April 18, 2006, p. 20, col. 1 (West. Sup. 2006). Petitioner shopping center owned and operated a multi-tenanted shopping center. Petitioner warehouse was a former tenant. Petitioners challenged tax assessments imposed by respondent town, its Board of Assessment Review and its Assessor, for the years 1998-2002. This challenge was commenced by five petitions filed by petitioner warehouse. At issue was whether petitioner warehouse had the authority to represent petitioner shopping center in challenging the tax assessments. After review the court concluded that petitioner warehouse never had any authority to act on behalf of petitioner shopping center. The court stated that petitioner shopping center, acting in its own best interest, chose not to file the petitions itself. The court noted that even if petitioner warehouse had such authority, both petitioners have failed to comply with the service and filing provisions of 22 NYCRR § 202.59.

MATTER OF APPLICATION OF JOHNSON v. KELLY, 11 Misc. 3d 1081(A) (Orange Sup. 2006), 2006 WL 1023917, New York Law Journal, May 15, 2006, p. 20, col. 3 (Orange Sup.). Petitioner Landowners challenged the assessments placed on the subject 60-acre property by respondent assessor. The court noted petitioners' appraiser performed a limited appraisal and pursuant to RPTL § 502(3) only a total assessment would be subject to judicial review provided by Article 7. Thus, petitioner failed to value the total assessment as required by § 502(3). The court stated no evidence was presented by petitioners which would permit the court to disregard § 502(3) that it review only the total; assessment, and ruled that as petitioners failed to file an appraisal that reviewed the entire tax map parcel and the total assessment in question, they failed to satisfy their burden of proof in rebutting the presumption the total assessment was valid. Hence, as petitioners' appraiser failed to comply with 22 NYCRR § 202.59(g)(2) and failed to value the total assessment of the subject property, the appraisal was stricken and petitioners' RPTL Article 7 petitions were dismissed.

MATTER OF APPLICATION OF MCCREADY v. TOWN OF OSSINING, 11 Misc. 3d 1086(A) (West. Sup. 2006), 2006 WL 1094570, New York Law Journal, May 26, 2006, p. 23, col. 3 (West. Sup.), *aff'd* 41 A.D. 3d 851, 837 N.Y.S. 2d 591 (2d Dept. 2007). The court was called upon to decide if respondent assessor's explanation of how and why she changed the assessed value on petitioner homeowner's property in 2002 was true, and whether her assessment methodology was fair and reasonable or a form of a selective reassessment. The court found the assessor's methodology for correcting and updating inventory data was fair and reasonable, and met the recommended threshold. It noted while the assessor did not selectively reassess the subject property, the 2002-2004 assessments challenged were vacated because in preparing the 2002 assessment, the assessor, among, other things failed to examine the 1965 building plans and 1967 property card of the property, and relied on an

unverified and inaccurate property listing. Hence, as the assessment of the subject property was poorly executed, the assessor was ordered to render a new assessment for 2002-2004 following the guidelines set forth in the decision.

MATTER OF THE APPLICATION OF NEWBURGH PLAZA v. TOWN OF NEWBURGH, 11 Misc. 3d 1088(A) (Orange Sup. 2006), 2006 WL 1152598, New York Law Journal, May 31, 2006, p. 25, col. 1. Respondents moved to dismiss the petition arguing petitioners failed to provide a return date on the notice of petition, alleging this omission rendered the underlying proceeding jurisdictionally defective. Respondents argued the defect was not jurisdictional, claiming the court was empowered to overlook such defects. The court stated it has been held that a failure to include the time and place on a notice of petition in a tax certiorari proceeding was a jurisdictional defect warranting dismissal and rejected petitioner's contention that CPLR § 403(a) did not apply. It stated the requirement that a notice of petition include a return date was not inconsistent with the commencement requirements of RPTL § 704, making § 403(a) applicable to the proceeding. The court ruled as petitioner's original notice of petition was not in compliance with § 403(a) and § 704, respondents' motion was granted.

REDHEAD PROPERTIES, LLC v. TOWN OF WAPPINGER, 2006 WL 1274077 (Dutchess Sup. 2006). Consent Judgment enforced pursuant to RPTL § 727(1); Exceptions pursuant to RPTL § 727(2)(a) (revaluation) and § 727(2)(I) (change in use) do not apply; Additional allowance of \$100 for each of 76 tax lots awarded pursuant to RPTL 722(2).

MATTER OF APPLICATION OF ALLSTATE EQUITIES, LLC v. TOWN OF NEWBURGH, 2006 WL 1290699 (Orange Sup. 2006) (Failure to provide complete return date on Notice of Petition pursuant to RPTL Article 7 is jurisdictional defect warranting dismissal of tax certiorari petition

), rev'd __A.D. 3d__, 2007 WL 2729587 (2d Dept. 2007).

MATTER OF AKW HOLDINGS LLC v. ASSESSOR OF THE TOWN OF CLARKSTOWN, 2006 WL 1440853 (Rockland Sup. 2006). Assessor's methodology of reassessing properties [but not within the context of a Town wide revaluation program] to being them " in line with the assessed value of other similar properties in the Town of Clarkstown is unfair, unreasonable and discriminatory and is a form of selective reassessment).

BLUEBERRY HILL CONDOMINIUM v. TOWN OF RAMAPO, 12 Misc. 3d 1160 (Rockland Sup. 2006), New York Law Journal, June 27, 2006, p. 24, col. 3 (Rockland Sup.). Rockland County's failure to comply with RPTL § 726(2) and make tax refunds pursuant to settlement agreement within 60 days of service of notice of entry of an order and judgment justifies an award of interest to Petitioner.

JEWISH INSPIRATION, INC v. ASSESSOR OF THE TOWN OF RAMAPO, 2006 WL 1594476 (Rockland Sup. 2006), New York Law Journal, June 12, 2006, p. 28, col. 3 (Rockland Sup.). Motion and Cross Motion for summary judgment regarding tax exemption pursuant to RPTL § 420-a denied.

KAMINSKY V. ASSESSOR OF THE TOWN OF OSSINING, 2006 WL 1628978 (West. Sup. 2006). Selective reassessment not found; assessment vacated; new assessment ordered.

RENDANO v. THE TOWN OF NEWBURGH, Index No. 4758/05, Orange County, Decision June 16, 2006. Petition dismissed; failure to provide a complete return date is jurisdictional defect.

WEBB v. TOWN OF NEWBURGH, Index No. 5134/05, Orange County, Decision June 16, 2006. Petition dismissed; failure to provide a complete return date is jurisdictional defect.

ORANGE AND ROCKLAND UTILITIES, INC. v. ASSESSOR OF THE TOWN OF HAVERSTRAW, 12 Misc. 3d 1194 (Rockland Sup.

2006). Post trial decision valuing, for tax certiorari purposes, an oil and gas fired electricity generating plant; income [DCF] and sales comparison methodologies rejected; cost [RCNLD] methodology utilized; pre and post deregulation analysis.

MIRANT NEW YORK, INC. v. TOWN OF STONY POINT ASSESSOR, 13 Misc. 3d 1204 (Rockland Sup. 2006). Post trial decision valuing, for tax certiorari purposes, an oil, gas and, primarily, coal fired electricity generating plant; income [DCF] and sales comparison methodologies rejected; cost [RCNLD] methodology utilized; pre and post deregulation analysis.

CONGREGATION OR YOSEF v. TOWN OF RAMAPO, New York Law Journal, October 17, 2006, p. 28, col. 3 (Rockland Sup. 2006)(Congregation lacks standing to request tax exemption; petition dismissed).

Khal Bais Shmiel v. Assessor of Town of Ramapo, New York Law Journal, October 10, 2006, p. 24, col. 3 (Rockland Sup. 2006)(Congregation denied tax exemption for failing to rebut assessor's allegation it made a profit).

LANDESMAN v. WHITTON, 2006 NY Slip Op 51847 (Dutchess Sup. 2006)(tax certiorari proceeding; improper service).

VGR ASSOCIATES LLC v. ASSESSOR OF THE TOWN OF NEW WINDSOR, New York Law Journal, October 25, 2006, p. 32, col. 1 (Orange Sup. 2006), 13 Misc. 3d 1218 (Orange Sup. 2006)(valuation of shopping center; appraiser undermines economic rent by fictionalizing shopping center's tax obligation).

VILLAGE OF IRVINGTON v. SOKOLIK, New York Law Journal, October 31, 2006, p. 24, col. 1 (West. Sup. 2006), 13 Misc. 3d 1220 (West Sup. 2006)(eminent domain; valuation of vacant land at \$123,564).

Matter of Village of Spring Valley, 2006 NYSlip Op 51940 (Rockland Sup. 2006)(Eminent Domain; Motion to strike prejudicial material denied).

JOHNSON v. KELLY, 2006 NYSlip Op 51951 (Orange Sup. 2006), 13 Misc. 3d 1223 (Orange Sup. 2006)(Costs and disbursements not allowed; Clerk's judgments vacated).

MATTER OF ROCKLAND COUNTY SEWER DISTRICT, 2006 NYSlip Op 52006 (Rockalnd Sup. 2006)(Eminent Domain; Discovery pursuant to CPLR § 508).

McCOMB v. REASONER, New York Law Journal, November 21, 2006, p. 28, col. 1 (West Sup. 2006)(Mayor had no authority to remover petitioner employee, designate arbitrator; termination vacated).

MATTER OF JB REALTY LLC v. ASSESSOR OF THE VILLAGE OF BRONXVILLE, 2006 NYSlip Op 52106 (West. Sup. 2006), New York Law Journal, November 29, 2006, p. 20, col. 3 (West. Sup. 2006), 13 Misc. 3d 1233 (West. Sup. 2006)(recent sale as best evidence of value).

EARLA ASSOCIATES v. THE BOARD OF ASSESSORS, New York Law Journal, December 20, 2006, p. 27, col. 3 (Orange Sup. 2006), 13 Misc. 3d 1246 (Orange Sup. 2006)(valuation of apartment complex; fair market value assessed at \$11.3 million instead of \$15 million).

MIRIAM OSBORN MEMORIAL HOME ASSOCIATION v. ASSESSOR OF THE CITY OF RYE, 14 Misc. 3d 1209 (West. Sup. 2006) (application pursuant to RPTL 420(a)(1)(a) for a charitable use exemption denied and partial hospital use exemption granted).

MIRIAM OSBORN MEMORIAL HOME ASSOCIATION v. ASSESSOR OF THE CITY OF RYE, 15 Misc. 3d 1144 (West. Sup. 2007) (valuation).

MATTER OF EASTGATE CORPORATE PARK v. ASSESSOR OF THE TOWN OF GOSHEN, 54 A.D. 3d 1036, 865 N.Y.S. 2d 249 (2d

Dept. 2008)(Notes of Issue Vacated and Petitions
Dismissed For Failure to Comply With Filing Requirements
of 22 NYCRR 202.59(b) and (d)(1)),
aff'g _____.

**2007-2008: Appellate Division Second Department, New
York State Supreme Court**

PEOPLE v. ROBINSON, 53 A.D. 3d 63, 860 N.Y.S. 2d 159
(2d Dept. 2008)(Breathalyzer machine computer source
code is discoverable but not in this case).

JESMER v. RETAIL MAGIC, INC., 55 A.D. 3d 171, 863 N.Y.S.
2d 737 (2d Dept. 2008)(malfunctioning point of sale
computer system; breach of express warranty).

LONNER V. SIMON PROPERTY GROUP, INC., 55 A.D. 3d 100,
866 N.Y.S. 2d 239 (2d Dept. 2008)(gift card dormancy
fees challenged; a class of consumers challenged the
imposition of gift card dormancy fees of \$2.50 per month
setting forth three causes of action seeking damages for
breach of contract, violation of General Business Law
349 ("GBL 349") and unjust enrichment. Within the
context of defendant's motion to dismiss the amended
complaint, the Court found that the Lonner plaintiffs
had pleaded sufficient facts to support causes of action
for breach of contract based upon a breach of the
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AHA SALES, INC. v. CREATIVE BATH PRODUCTS, INC., 58 A.D. 3d 6, 867 N.Y.S. 2d 169 (2d Dept. 2008)(sales representative has implied private right of enforcement of Labor Law 191-b; claims under Labor Law 191-b, breach of fiduciary duty, quantum meruit and unjust enrichment sustained).

GOLDMAN v. SIMON PROPERTIES, INC., 58 A.D. 3d 208, 869 N.Y.S. 2d 125 (2d Dept. 2008)(gift card dormancy fees challenged; a class of consumers also challenged dormancy fees and the Court found that there was no private right of action under GBL 396-I and that CPLR 4544 applies to business gifts which involve a consumer transaction. The Court also restored claims for injunctive relief and declaratory judgment and allowed plaintiffs to plead unjust enrichment and money had and received as alternative claims to the breach of contract cause of action. In an earlier decision the Court found that these claims were not preempted by federal law).

GLOBE SURGICAL SUPPLY v. GEICO Insurance Company, 59 A.D. 3d 129, 871 N.Y.S. 2d 263 (2d Dept. 2008)(a class of durable medical equipment [DME] providers alleged that GEICO " violated the regulations promulgated by the New York State Insurance Department...pursuant to the no-fault provisions of the Insurance Law, by systematically reducing its reimbursement for medical equipment and supplies...based on what it deemed to be ` the prevailing rate in the geographic location of the provider ` or ` the reasonable and customary rate for the item billed `. In denying certification the Court found that Globe had met

all of the class certification prerequisites except adequacy of representation since, *inter alia*, GEICO had asserted a counterclaim and as a result Globe may be "preoccupied with defenses unique to it".

2009: Appellate Division Second Department, New York State Supreme Court

GATEWAY I GROUP, INC. v. PARK AVENUE PHYSICIANS, P.C., 62 A.D. 3d 141, 877 N.Y.S. 2d 95 (2d Dept. 2009) (medical groups and officer liable for tenant's obligations under lease under theory of piercing corporate veil).

CUSUMANO v. CITY OF NEW YORK, 63 A.D. 3d 5, 877 N.Y.S. 2d 153 (2d Dept. 2009) (fire fighter injured in fall in stairwell; stairwell was not an interior stair within meaning of statute setting forth requirements for handrails located in interior stairs; evidence legally sufficient to support conclusion that city violated statutes requiring an owner of a building to maintain it in a safe condition; damages for pain and suffering excessive).

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TUTRANI v. COUNTY OF SUFFOLK, 64 A.D. 3d 53, 878 N.Y.S. 2d 412 (2d Dept. 2009) (four vehicle collision caused by police officer in police vehicle abruptly changing lanes and slowing from 40 mph to 2 mph in 1 ½ seconds; finding of reckless disregard proper).

EPIFANI v. JOHNSON, 65 A.D. 3d 224, 882 N.Y.S. 2d 234 (2d Dept. 2009) (action by three former employees alleging eight causes of actions including (1) fraudulent inducement, (2) negligent misrepresentation, (3) intentional infliction of emotional distress, (4) prima facie tort, (5) retaliatory discharge in violation of Labor Law Section 215, (6) wrongful wage deductions and late payment of wages in violation of Labor Law Sections 191(3) and (7) 193 and (8) defamation).

DALY v. KOCHANOWICZ, 884 N.Y.S. 2d 144, 2009 N.Y. Slip P. 06232 (2d Dept. 2009) (purchaser brought action her real estate agent, broker and vendors alleging that vendors knew or should have known the property's history

of severe flooding. Complaint dismissed based upon the plaintiff's failure to conduct due diligence to discover flooding problems).

SCHUYLER v. PERRY, 886 N.Y.S. 2d 228, N.Y. Slip Op. 06825 (2d Dept. 2009) (passenger brought action to recover damages for personal injuries sustained in a motor vehicle accident during which she was riding in a vehicle she owned while it was being driven by her boyfriend; defendant's motion to amend answer by adding counterclaim seeking to hold passenger vicariously liable for her boyfriends's alleged negligence denied).

MAIO v. KRALIK, 2009 WL 3766445 (2d Dept. 2009) (firearms owner brought § 1983 action against county sheriff's department and sheriff seeking to recover damages for destruction, purportedly in accordance with applicable statutory scheme, of handguns, rifles, shotgun and various accessories that owner had surrendered pursuant to temporary order of protection; owner stated § 1983 claim against department and sheriff entitled to qualified immunity).

MATTER OF WEST BUSHWICK URBAN RENEWAL AREA, 2009 WL 3381544 (2d Dept. 2009) (condemnees seek compensation for trade fixtures from condemnor, City of New York; it was held that trade fixtures which are inconsistent with the highest and best use of the property are not entitled to compensation in addition to compensation for the taking of the property).

Matter of Montano v County Legislature of County of Suffolk (70 AD3d 203 [Nov. 17, 2009; Dickerson, Opinion; Mastro, Belen, Chambers, Concur]).

In 2008, a committee of the respondent County Legislature of the County of Suffolk voted to deny a legislative point of order challenging the discharge of a resolution to a vote by the full County Legislature. The respondent William Lindsay, in his capacity as Presiding Officer of the County Legislature, participated in the committee's vote to discharge. Subsequently, the petitioner Ricardo Montano, a member of the County Legislature, but not a member of the committee, commenced the instant hybrid proceeding against the County Legislature and Lindsay, inter alia, to review the committee's discharge, to enjoin the County Legislature from voting on the resolution, and for a judgment declaring that the discharge was unlawful and invalid. The County Legislature and Lindsay moved to dismiss pursuant to CPLR §§ 2311(a) and 7804(f). The Supreme Court denied the motion and granted the petition to the extent of annulling the determination denying the legislative point of order and discharging the resolution to the full County Legislature and directing the County Legislature to reconsider its interpretation of its own internal rules and procedures. This Court reversed on two grounds. First, the dispute constituted an internal matter for the County Legislature, not for the courts, and thus presented a nonjusticiable controversy. Second, the petitioner Montano lacked standing to prosecute this proceeding.

Whether the matter presented an internal administrative matter within the County Legislature was a threshold question. As this Court previously held in *Matter of Fornario v Clerk to Rockland County Legislature* (307 AD2d 927) "an issue involving an internal matter of a county legislature, as opposed to the New York State Legislature, presents a nonjusticiable controversy that is to be handled by the county legislature." Furthermore, this Court concluded that the mere fact that the legislative body at issue here was a county legislature rather than the New York State Legislature did not somehow render inapplicable the doctrines of separation of powers and justiciability. Additionally, this Court concluded

that, contrary to the respondents' contentions, the challenged action violated neither County Law § 153(8) nor General Construction Law § 41, and thus it did not contravene an applicable statute, law or ordinance.

Standing and capacity to sue also present threshold matters. Although the petitioner may have had capacity to sue as a member of the County Legislature, this Court concluded that he lacked standing to prosecute this proceeding, notwithstanding his assertion that he was prevented from exercising his right to vote. In fact, the petitioner did not serve on or have a vote in the committee when the resolution was, according to him, improperly voted out of the Committee. Accordingly, the petitioner's vote was not nullified or deprived of all validity as a result of the manner in which the resolution was voted out of committee. Indeed, the petitioner had no such vote. Thus, the petitioner's claimed injury was no more than "a mere abstract dilution of institutional legislative power, insufficient to confer standing" (*Urban Justice Ctr. v Pataki*, 38 AD3d 20, 25 [internal quotations omitted]).

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Matter of Level 3 Communications LLC v. DeBellis, 72

A.D. 3d 164, 895 N.Y.S. 2d 110 (2d Dept. 2010).

Presbytery of Hudson River of Presbyterian Church v. Trustees of First Presbyterian Church and Congregation of Ridgeberry, 72 A.D. 3d 78, 895 N.Y.S. 2d 417 (2010).

Wilner v. Allstate Insurance Company, 71 A.D. 3d 155, 893 N.Y.S. 2d 208 (2d Dept. 2010).

Grimaldi v. Guinn, 72 A.D. 3d 37, 895 N.Y.S. 2d 156 (2d Dept. 2010).

Bernstein v. Wysocki, 77 A.D. 3d 241, 907 N.Y.S. 2d 49 (2d Dept. 2010).

Lipschutz v. Kiderman, 76 A.D. 3d 178, 905 N.Y.S. 2d 247 (2d Dept. 2010).

HVT, Inc. v. Safeco Insurance Company of America, 77 A.D. 3d 255, 908 N.Y.S. 2d 222 (2d Dept. 2010).

Hunter v. OOIDA Risk Retention Group, Inc., 79 A.D. 3d 1, 909 N.Y.S. 2d 88 (2d Dept. 2010)

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Ippolito v. TJC Development, LLC, 83 A.D. 3d 57, 920 N.Y.S. 2d 108 (2d Dept. 2011)

Nash v. Port Washington Union Free School District, 83 A.D. 3d 139, 922 N.Y.S. 2d 408 (2d Dept. 2011)

Hirschfeld v. Horton, __A.D. 3d__, 929 N.Y.S. 2d 599 (2d Dept. 2011)

