

COURT OF APPEALS NEW FILINGS

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

August 20 through August 26, 2010

Each week, the Clerk's Office prepares a list of recently-filed appeals, indicating short title, jurisdictional predicate, subject matter and key issues. Some of these appeals may not reach decision on the merits because of dismissal, on motion or sua sponte, or because the parties stipulate to withdrawal. Some appeals may be selected for review pursuant to the alternative procedure of Rule 500.11. For those appeals that proceed to briefing in the normal course, the briefing schedule generally will be: appellant's brief to be filed 60 days after the appeal was taken; respondent's brief to be filed 45 days after the filing of appellant's brief; and a reply brief, if any, to be filed 15 days after the filing of respondent's brief.

The Court welcomes motions for amicus curiae participation from those qualified and interested in the subject matter of these newly filed appeals. Please refer to Rule 500.23 and direct any questions to the Clerk's Office.

BROWN (JAZZMONE), PEOPLE v:

4TH Dept. App. Div. order of 2/11/10; affirmance; leave to appeal granted by Lippman, Ch.J., 8/12/10;

CRIMES - IDENTIFICATION OF DEFENDANT - LINEUP IDENTIFICATION OVER FOUR YEARS AFTER CRIME AND AFTER PHOTO ARRAY; EFFECTIVE ASSISTANCE OF COUNSEL - ALLEGED FAILURE OF DEFENSE COUNSEL TO OBJECT TO PROSECUTORIAL MISCONDUCT IN SUMMATION;

Erie County Court convicted defendant of murder in the second degree, two counts of attempted murder in the second degree, three counts of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree; App. Div. affirmed.

COLLADO (DIONIS), PEOPLE v:

1ST Dept. App. Div. order of 5/25/10; reversal; leave to appeal granted by Nardelli, J., 8/10/10;

CRIMES - SENTENCE - PERSISTENT VIOLENT FELONY OFFENDER - VACATUR OF SENTENCE FOR PREDICATE FELONY - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT, "WHERE A DEFENDANT RECEIVES AN ENHANCED SENTENCE BASED UPON A PREDICATE FELONY OFFENSE AND THE SENTENCE IMPOSED FOR THE PREDICATE OFFENSE IS VACATED DUE TO THE FAILURE TO PRONOUNCE A TERM OF (POST-RELEASE SUPERVISION), THE RESENTENCING DATE CONTROLS WHETHER THE EARLIER CRIME QUALIFIES AS A PREDICATE OFFENSE UNDER PENAL LAW § 70.06(1)(b)(ii)";

Supreme Court, New York County resentenced defendant, as a second violent felony offender, to an aggregate term of 8 years to be followed by 5 years post-release supervision for his 2005 conviction on two counts of robbery in the second degree; App. Div. reversed and remanded the matter for resentencing, including further proceedings with respect to defendant's predicate felony status.

FRANOV (ROBERT), PEOPLE v:

2ND Dept. App. Div. order of 3/16/10; modification; leave to appeal granted by Read, J., 8/16/10;

CRIMES - SUFFICIENCY OF EVIDENCE - WHETHER THE TERM "OTHERWISE USES A VEHICLE" IN PENAL LAW § 165.05(1) REQUIRES "DOMINION AND CONTROL" OVER THE VEHICLE;

Supreme Court, Queens County convicted defendant of unauthorized use of a vehicle in the second degree, criminal mischief in the third degree, possession of burglar's tools, and criminal possession of stolen property in the fifth degree, and imposed sentence; App. Div. modified by vacating the conviction of unauthorized use of a vehicle in the second degree, vacating the sentence imposed thereon and dismissing that count of the indictment, and affirmed as so modified.

SALAZAR v NOVALEX CONTRACTING CORP., et al.:

1ST Dept. App. Div. order of 4/1/10; reversal; leave to appeal granted by App. Div., 8/17/10; Rule 500.11 review pending;

LABOR - SAFE PLACE TO WORK - PLAINTIFF CONSTRUCTION WORKER FELL INTO OPEN TRENCH WHILE WALKING BACKWARDS AND SPREADING CONCRETE ON BASEMENT FLOOR - AVAILABILITY OF CLAIMS UNDER LABOR LAW §§ 200, 240(1) AND 241(6); SUMMARY JUDGMENT;

Supreme Court, Bronx County granted the motion of defendants Novalex Contracting Corp., 96 Rockaway, LLC and T-Construction Co., Inc. for summary judgment dismissing plaintiff's Labor Law §§ 240(1) and 241(6) claims; App. Div. reversed, denied defendants' motion, and reinstated plaintiff's Labor Law § 240(1) and § 241(6) claims.

WILINSKI et al. v 334 EAST 92ND HOUSING DEVELOPMENT FUND
CORP., et al.:

1ST Dept. App. Div. order of 3/23/10; modification; leave to appeal granted by App. Div., 7/27/10 and 8/10/10;
LABOR - SAFE PLACE TO WORK - LABOR LAW § 240(1) - PLAINTIFF ALLEGEDLY HIT IN THE HEAD BY TWO VERTICAL PIPES THAT FELL OVER WHEN HIT BY DEBRIS FROM A WALL UNDERGOING DEMOLITION - CHALLENGE TO APPELLATE DIVISION HOLDING THAT, "SINCE BOTH PIPES AND PLAINTIFF 'WERE AT THE SAME LEVEL AT THE TIME OF THE COLLAPSE [OF THE PIPES,] THE INCIDENT WAS NOT SUFFICIENTLY ATTRIBUTABLE TO ELEVATION DIFFERENTIALS TO WARRANT IMPOSITION OF LIABILITY PURSUANT TO LABOR LAW § 240(1)'" - APPLICABILITY AND CONTINUING VIABILITY OF MISSERITTI v MARK IV CONSTR. CO. (86 NY2d 487 [1995]) - RUNNER v NEW YORK STOCK EXCHANGE (13 NY3d 599 [2009]); LABOR LAW § 241(6) - APPLICABILITY OF INDUSTRIAL CODE PROVISIONS, 12 NYCRR 23-3.3(b)(3) AND (c), WHETHER SECTION 23-3.3(b)(3) REQUIRES PLAINTIFF TO SHOW THAT WIND PRESSURE OR VIBRATION CAUSED THE PIPES TO FALL - WHETHER PLAINTIFF'S INJURIES WERE CAUSED BY "WEAKENED OR DETERIORATED FLOORS OR WALLS OR FROM LOOSENED MATERIAL" WITHIN THE MEANING OF SECTION 23-3.3(c) - WHETHER CERTAIN DEFENDANTS ESTABLISHED THEIR ENTITLEMENT TO SUMMARY JUDGMENT UPON THE GROUND THAT THEY WERE NOT OWNERS OR CONTRACTORS WITHIN THE MEANING OF THE LABOR LAW;
Supreme Court, New York County granted plaintiffs' motion for summary judgment on the issue of liability under Labor Law § 240(1) and denied defendants' cross motion for summary judgment dismissing the complaint; App. Div., modified to deny plaintiffs' motion and to grant defendants' cross motion to the extent of dismissing the section 240(1) claim and otherwise affirmed.