

COURT OF APPEALS NEW FILINGS

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

November 26 through December 2, 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.

AAA CARTING AND RUBBISH REMOVAL, INC., MATTER OF v TOWN OF SOUTHEAST, et al.:

2ND Dept. App. Div. order of 6/8/10; reversal; leave to appeal granted by Court of Appeals, 11/23/10;

MUNICIPAL CORPORATIONS - BIDS AND BIDDERS - WHETHER THE TOWN BOARD ACTED ARBITRARILY OR CAPRICIOUSLY IN AWARDING A GARBAGE COLLECTION CONTRACT TO AN ENTITY OTHER THAN THE LOWEST BIDDER - GENERAL MUNICIPAL LAW § 103;

Supreme Court, Putnam County granted a CPLR article 78 petition, annulled the determination of the Town Board of the Town of Southeast awarding a refuse hauling contract to Sani-Pro Disposal Services Corp., doing business as Suburban Carting, and directed the Town Board to award the contract to petitioner; App. Div. reversed, denied the petition, confirmed the determination and dismissed the proceeding.

CLARKE v RODRIGUEZ:

2ND Dept. App. Div. order of 5/4/10; affirmance; leave to appeal granted by Court of Appeals, 11/23/10; Rule 500.11 review pending;

EVIDENCE - BEST EVIDENCE RULE - ADMISSION INTO EVIDENCE OF COPY OF RESIDENTIAL REAL ESTATE CONTRACT CONTAINING ORIGINAL OF PLAINTIFF'S SIGNATURE, PHOTOCOPY OF DEFENDANT'S SIGNATURE AND CERTAIN DISPUTED CONTENTS - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT PLAINTIFF'S EXPLANATION OF THE ORIGINAL CONTRACT'S UNAVAILABILITY PERMITTED ADMISSION OF SECONDARY EVIDENCE OF CONTRACT'S CONTENTS; SPECIFIC PERFORMANCE - CONTRACT FOR SALE OF REAL PROPERTY - SUFFICIENCY OF PROOF THAT PLAINTIFF WAS READY, WILLING AND ABLE TO PERFORM HIS OBLIGATIONS UNDER THE CONTRACT;

Supreme Court, Kings County, among other things, granted plaintiff specific performance of a residential real estate sales contract; App. Div. affirmed.

COLLINS, MATTER OF v DUKES PLUMBING & SEWER, INC.:

3RD Dept. App. Div. order of 7/1/10; affirmance; leave to appeal granted by Court of Appeals, 11/17/10;

WORKERS' COMPENSATION - AGGREGATE TRUST FUND - WHETHER THE 2007 AMENDMENTS TO WORKERS' COMPENSATION LAW § 27(2) REQUIRE EMPLOYERS TO DEPOSIT THE PRESENT VALUE OF UNCAPPED PERMANENT PARTIAL DISABILITY (PPD) AWARDS INTO THE AGGREGATE TRUST FUND - APPLICATION TO CLAIMS WITH A DATE OF DISABILITY/INJURY PRIOR TO JULY 1, 2007 BUT WITH A PPD CLASSIFICATION AFTER THAT DATE; App. Div. affirmed a May 6, 2009 Workers' Compensation Board decision that directed the employer's workers' compensation carrier to make a deposit into the aggregate trust fund pursuant to Workers' Compensation Law § 27(2).

COMMISSIONER OF SOCIAL SERVICES &c., MATTER OF v PAUL C.:

1ST Dept. App. Div. order of 5/11/10; affirmance; leave to appeal granted by App. Div., 10/28/10; Rule 500.11 review pending;

ESTOPPEL - JUDICIAL ESTOPPEL - WHETHER DISTRICT ATTORNEY'S DECISION NOT TO PROSECUTE MOTHER FOR WELFARE FRAUD BARS PROCEEDING FOR CHILD SUPPORT; PARENT AND CHILD - SUPPORT - REMOVAL OF PROCEEDING FROM FAMILY COURT TO SUPREME COURT - DENIAL OF OBJECTION TO SUPPORT MAGISTRATE'S QUASHING OF FATHER'S SO-ORDERED SUBPOENA FOR COMMISSIONER OF SOCIAL SERVICES' PUBLIC ASSISTANCE RECORDS - FATHER'S ENTITLEMENT TO DEVIATION FROM CHILD SUPPORT STANDARDS ACT GUIDELINES - FATHER'S RIGHT TO CROSS EXAMINE MOTHER;

Family Court, New York County denied in part respondent father's objections to a December 2006 support order directing him to pay child support; thereafter, the same court denied all of respondent father's objections to (a) a November 2007 order denying his motion for summary judgment to dismiss the proceeding on the ground of judicial estoppel, and (b) a January 2008 child support order directing him to pay child support without a deviation from the Child Support Standards Act guidelines; App. Div. affirmed.

CONCEPCION, MATTER OF v JOHNSON:

1ST Dept. App. Div. order of 4/1/10; denial of poor person relief; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right; APPEAL - MOTION FOR POOR PERSON RELIEF; DISCLOSURE - FREEDOM OF INFORMATION LAW - CPLR ARTICLE 78 PROCEEDING TO COMPEL THE BRONX COUNTY DISTRICT ATTORNEY TO PRODUCE CERTAIN DOCUMENTS; Supreme Court, Bronx County denied the relief sought in petitioner's CPLR article 78 petition to obtain certain documents, and dismissed the proceeding; App. Div. denied petitioner's motion for leave to prosecute the appeal as a poor person and for related relief.

DiGUGLIELMO (RICHARD D.), PEOPLE v:

2ND Dept. App. Div. order of 5/25/10; reversal; leave to appeal granted by Pigott, J., 11/19/10; CRIMES - VACATUR OF JUDGMENT OF CONVICTION - CPL 440.10 MOTION TO VACATE JUDGMENT BASED ON NEWLY DISCOVERED EVIDENCE - STANDARD OF REVIEW; MURDER - DEPRAVED INDIFFERENCE MURDER; DISCLOSURE - ALLEGED FAILURE OF THE PEOPLE TO DISCLOSE EVIDENCE FAVORABLE AND MATERIAL TO THE DEFENSE; ALLEGED DUE PROCESS VIOLATIONS; APPEALABILITY AND REVIEWABILITY OF DISCRETIONARY ORDER DENYING MOTION TO VACATE JUDGMENT ON THE GROUND OF NEWLY DISCOVERED EVIDENCE; Westchester County Court, among other things, granted that branch of defendant's motion which was pursuant to CPL 440.10 to vacate a 12/15/97 judgment of that court convicting defendant, upon a jury verdict, of murder in the second degree; App. Div. reversed, denied that branch of defendant's motion which was pursuant to CPL 440.10 to vacate the judgment, reinstated the judgment, and remitted the matter to County Court to direct defendant to surrender himself to the court in order that execution of the judgment might resume.

HALPERN, MATTER OF [HALPERN v HALPERN]:

1ST Dept. App. Div. order of 8/17/10; affirmance; leave to appeal granted by App. Div., 11/9/10; Rule 500.11 review pending; WILLS - EXECUTION - VALIDITY - WHETHER A MATERIAL ISSUE OF FACT EXISTED REGARDING THE DUE EXECUTION OF A WILL; SUMMARY JUDGMENT ADMITTING WILL TO PROBATE; Surrogate's Court, New York County, among other things, admitted the document dated September 12, 1958 to probate as the last will and testament of Seymour Halpern, also known as Seymour Lionel Halpern; App. Div. affirmed.

HAQUE, MATTER OF v BEZIO:

4TH Dept. App. Div. judgment of 7/2/10, confirming administrative determination; leave to appeal granted by Court of Appeals, 11/17/10;

PROCEEDING AGAINST BODY OR OFFICER - PRISONS AND PRISONERS - DISCIPLINE OF INMATES - WHETHER THE TIME LIMIT FOR COMMENCEMENT OF A PRISONER DISCIPLINARY HEARING CONTAINED IN 7 NYCRR 251-5.1(a) IS MANDATORY OR DIRECTORY - IF SUCH TIME LIMIT IS DIRECTORY, WHETHER PETITIONER ESTABLISHED PREJUDICE ENTITLING HIM TO RELIEF - WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE DETERMINATION OF GUILT - VIDEOTAPE OF INCIDENT ALLEGEDLY CONTRADICTING DETERMINATION OF GUILT;

App. Div. confirmed a determination that found petitioner guilty of violating inmate rules and dismissed the CPLR article 78 proceeding.

HUFF v RODRIGUEZ:

Supreme Court, Erie County judgment of 10/8/10, to bring up for review a 4TH Dept. App. Div. order of 7/10/09; reversal; sua sponte examination whether (1) the October 8, 2010 Supreme Court judgment finally determines the action within the meaning of the Constitution, (2) the July 10, 2009 App. Div. order necessarily affects the October 8, 2010 judgment and (3) the two-justice dissent at the App. Div. is on a question of law;

TRIAL - ARGUMENT AND CONDUCT OF COUNSEL - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT REVERSAL WAS REQUIRED BECAUSE OF COMMENTS MADE BY DEFENDANTS' ATTORNEY IN SUMMATION THAT PLAINTIFF DID NOT CALL HER EXPERT WITNESS BECAUSE HIS TESTIMONY WOULD NOT SUPPORT PLAINTIFF'S CLAIM THAT DEFENDANT DRIVER CAUSED THE AUTOMOBILE ACCIDENT;

Supreme Court, Erie County judgment dismissing the complaint upon a jury verdict in favor of defendants on liability with respect to a motor vehicle accident; App. Div. reversed, reinstated the complaint and granted a new trial on liability; following a new trial, Supreme Court issued a judgment adjudging defendants 100% negligent.

NEW YORK STATE PSYCHIATRIC ASSOCIATION, et al. v NEW YORK STATE DEPARTMENT OF HEALTH:

10/25/10 Supreme Court, Nassau County order, to bring up for review a 2ND Dept. App. Div. order of 3/16/10; modification; sua sponte examination whether the order appealed from finally determines the action/proceeding within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right;

HEALTH - MEDICARE REIMBURSEMENT - CONSTITUTIONALITY OF PROVISIONS IN THE 2008 BUDGET BILL (L 2008, Ch 58, part C) PROVIDING THAT LICENSED PSYCHIATRISTS ARE NOT ENTITLED TO BE PAID THE FULL MEDICARE PART B COINSURANCE AMOUNT FOR SERVICES RENDERED BETWEEN APRIL 1, 2007 AND APRIL 11, 2008 TO CERTAIN INDIVIDUALS WHO ARE

ELIGIBLE FOR BOTH MEDICAID AND MEDICARE BENEFITS AND/OR FOR CLAIMS PROCESSED BETWEEN APRIL 1, 2007 AND APRIL 11, 2008; Supreme Court, Nassau County amended order that denied plaintiffs/petitioners' motion for summary judgment on causes of action for declaratory relief and granted the cross motion of defendant/respondent for summary judgment on those causes of action, and in effect, denied the amended petition in a hybrid action for a judgment declaring that those portions of sections 53 and 54 of part C of the New York State 2008 budget which provide that licensed psychiatrists are not entitled to be paid the full Medicare Part B coinsurance amount for services rendered between April 1, 2007 and April 11, 2008 to certain individuals who are eligible for both Medicaid and Medicare benefits and/or for claims processed between April 1, 2007 and April 11, 2008 are unconstitutional, and, in effect, proceeding pursuant to CPLR article 78 in the nature of mandamus to compel the New York State Department of Health to pay licensed psychiatrists the full Medicare Part B coinsurance amount for those individuals pursuant to the 2006 amendment to Social Services Law § 367-a(1)(d)(iii) for services rendered and/or claims processed between April 1, 2007 and April 11, 2008; App. Div. modified, (1) by deleting the provision thereof denying the motion for summary judgment on the causes of action for declaratory relief and substituting therefor a provision granting the motion to the extent of declaring that those portions of sections 53 and 54 of part C of the New York State 2008 budget bill which provide that licensed psychiatrists are not entitled to be paid the full Medicare Part B coinsurance amount for services rendered to certain individuals who are eligible for both Medicaid and Medicare benefits and/or for claims processed between August 12, 2007 and April 11, 2008 are unconstitutional and declaring that the NYS Department of Health must pay to licensed psychiatrists the full Medicare Part B coinsurance amount for those individuals for services rendered or claims processed between August 12, 2007 and April 11, 2008, and otherwise denying the motion; and (2) by deleting the provision thereof granting the cross motion for summary judgment and substituting therefor a provision granting the cross motion only to the extent that the services or claims at issue were rendered or processed prior to August 12, 2007, and otherwise denying the cross motion; and (3) by deleting the provision thereof, in effect, denying the amended petition and substituting therefor a provision granting the amended petition to the extent of directing the defendant/respondent to pay to licensed psychiatrists the full Medicare Part B coinsurance amount for those individuals pursuant to 2006 amendment to the Social Services Law § 367-a(1)(d)(iii) for services rendered or claims processed between August 12, 2007 and April 11, 2008, and otherwise denying the amended petition"; affirmed the amended order as so modified; and remitted the matter to Supreme Court, Nassau County for the entry of an appropriate declaratory judgment; Supreme Court, Nassau County, among other things, "adjudged" that "those portions of sections 53 and 54(e) of the

New York State 2008 budget bill which provided that licensed psychiatrists are not entitled to be paid the full Medicare Part B coinsurance amount for services rendered to certain individuals who are eligible for both Medicaid and Medicare benefits and/or for claims processed between August 12, 2007 and April 11, 2008 are unconstitutional," and remanded the matter to defendant-respondent NYS Department of Health "for calculation of the amounts due and owing" to such licensed psychiatrists; thereafter, Supreme Court awarded plaintiffs \$97,400 as attorneys' fees.

61 WEST 62 OWNERS CORPORATION v CGM EMP LLC, et al.:

1ST Dept. App. Div. order of 8/24/10; reversal; leave to appeal granted by App. Div., 11/9/10; Rule 500.11 review pending; INJUNCTIONS - PRELIMINARY INJUNCTION - ACTION FOR PRIVATE NUISANCE BY OWNER OF RESIDENTIAL COOPERATIVE APARTMENT BUILDING AGAINST OPERATORS OF ROOFTOP BAR AT ADJOINING BUILDING BASED UPON "INCREDIBLY LOUD AND UNBEARABLE NOISE" EMANATING FROM THE BAR - PLAINTIFF'S ENTITLEMENT TO A PRELIMINARY INJUNCTION; Supreme Court, New York County denied plaintiff's motion for a preliminary injunction; App. Div. reversed and remanded the matter for issuance of an appropriate provisional remedy; thereafter, Supreme Court granted plaintiff a preliminary injunction.