

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed
by the Court of Appeals Clerk's Office
May 15 through May 21, 2009

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.

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.

ARTS4ALL v HANCOCK:

1ST Dept. App. Div. order of 8/26/08; affirmance and dismissal with dissents; leave to appeal granted by App. Div., 4/28/09; DISCLOSURE - PENALTY FOR FAILURE TO DISCLOSE - STRIKING OF PLEADINGS FOR NONCOMPLIANCE WITH DISCLOSURE ORDERS (CPLR 3126[3]) - REQUEST FOR SIGNED TRANSCRIPTS REFLECTING SUPREME COURT'S ORAL ORDERS;

Supreme Court, New York County, among other things, dismissed defendant's counterclaims for failure to comply with discovery and effectively denied defendant's request for signed transcripts; App. Div. affirmed and dismissed the appeal from a Supreme Court ruling imposing sanctions on defendant.

AWARDS.COM et al v KINKO'S, INC., et al.:

Supreme Court judgment of 2/10/09, bringing up for review 1st Dept. App. Div. order of 4/19/07; modification; leave to appeal granted by Court of Appeals, 5/12/09;

CONTRACTS - BREACH OR PERFORMANCE OF CONTRACT - MATERIALITY OF DEFAULT - FAILURE TO MAKE ONE PAYMENT OF MONTHLY FEE - LOST PROFITS - PARTIES' CONTEMPLATION OF LOST PROFITS AS A POTENTIAL BASIS FOR DAMAGES IN THE EVENT OF BREACH - SPECULATIVE NATURE OF SUCH DAMAGES;

Supreme Court, New York County granted defendants' motion for summary judgment to the extent of dismissing the claims for fraud and lost profits; App. Div. modified by dismissing the complaint in its entirety, and affirmed the order as so modified; thereafter, Supreme Court awarded defendants' damages on their counterclaim.

CHASM HYDRO, INC., MATTER OF v NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION:

3RD Dept. App. Div. order of 1/29/09; affirmance; leave to appeal granted by Court of Appeals, 5/12/09;

ENVIRONMENTAL CONSERVATION - WATER SUPPLY - WATER POLLUTION CONTROL - WHETHER RESPONDENT AGENCY WAS ACTING WITHOUT JURISDICTION IN COMMENCING AN ADMINISTRATIVE ENFORCEMENT PROCEEDING AGAINST OPERATORS OF AN HYDROELECTRIC DAM LOCATED ON A NAVIGABLE, CLASS C RIVER FOR ALLEGED VIOLATIONS OF STATE WATER QUALITY STANDARDS;

Supreme Court, Franklin County dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, for a writ of prohibition and a stay of administrative proceedings commenced by respondent New York State Department of Environmental Conservation; App. Div. affirmed.

ECHEVARRIA, MATTER OF v MARKS &c.:

4TH Dept. App. Div. judgment of 12/31/08; dismissal of CPLR article 78 petition; leave to appeal granted by Court of Appeals, 5/5/09;

PROCEEDINGS AGAINST BODY OR OFFICER - PROHIBITION - POST-RELEASE SUPERVISION (PRS) - WHETHER PROHIBITION LIES TO PREVENT RESPONDENT COUNTY COURT JUDGE FROM CORRECTING A PRIOR FAILURE TO IMPOSE PRS BY RESENTENCING A DEFENDANT TO PRS AFTER HIS ORIGINALLY IMPOSED SENTENCE HAS BEEN FULLY SERVED - ALLEGED DOUBLE JEOPARDY AND DUE PROCESS VIOLATIONS IF DEFENDANT IS RESENTENCED TO PRS;

App. Div. dismissed a CPLR article 78 petition seeking to prohibit respondent from proceeding with resentencing or other proceedings with respect to Monroe County indictment No. 98-817.

ETTARI, MATTER OF v FISCHER &c., et al.:

3RD Dept. App. Div. order of 8/7/08; reversal; leave to appeal granted by Court of Appeals, 5/5/09;

CRIMES - SENTENCE - CONCURRENT AND CONSECUTIVE TERMS - CALCULATION OF SENTENCE - APPLICATION OF PEOPLE EX REL. GILL v

Supreme Court, Albany County dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to review a determination of the Department of Correctional Services calculating petitioner's sentence; App. Div. reversed and remitted to Department of Correctional Services for further proceedings not inconsistent with that Court's decision.

GLASSMAN v PROHEALTH AMBULATORY SURGERY CENTER, INC., et al.:

Supreme Court judgment of 1/16/09, bringing up for review 2nd Dept. App. Div. order of 10/7/08 and two orders of 11/21/05; leave to appeal granted by Court of Appeals, 5/5/09;
CONTRACTS - EMPLOYMENT CONTRACTS - WHETHER AN AMBULATORY SURGERY CENTER LICENSED UNDER ARTICLE 28 OF THE PUBLIC HEALTH LAW MAY SHARE IN FEES THAT ITS FULL-TIME PHYSICIAN-EMPLOYEE EARNED FROM PROVIDING SERVICES OUTSIDE THE AMBULATORY SURGERY CENTER WHERE THE PROVISION IN THE EMPLOYMENT AGREEMENT PROVIDING FOR THE SHARE OF SUCH FEES WAS ALLEGEDLY ILLEGAL AND UNENFORCEABLE BECAUSE IT VIOLATED THE CENTER'S CERTIFICATE OF OPERATION;

Supreme Court, Nassau County denied defendants' motion for leave to renew their prior motion for leave to amend the answer to include certain counterclaims; App. Div. affirmed; Supreme Court, upon reargument, adhered to a prior order denying defendants' motion for leave to amend the answer to include certain counterclaims and a claim for punitive damages; App. Div. affirmed; Supreme awarded plaintiff the principle sum of \$754,825 against defendants; App. Div. affirmed; thereafter, Supreme Court awarded plaintiff \$925,000 in attorney's fees, costs and interest.

KOZIOL v KOZIOL (APPEAL NO. 1):

4TH Dept. App. Div. order of 3/20/09; dismissal; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution and whether any jurisdictional basis otherwise exists to support an appeal as of right;

HUSBAND AND WIFE - DIVORCE - CHALLENGE TO APPELLATE DIVISION ORDER DISMISSING AS MOOT PLAINTIFF HUSBAND'S APPEAL FROM SUPREME COURT PENDENTE LITE ORDER CONCERNING HIS CUSTODY AND SUPPORT OBLIGATIONS;

Supreme Court, Oneida County, as relevant here, denied plaintiff's motion for custody and suspension of his support obligations pending determination of the action; App. Div. dismissed appeal as rendered moot by the subsequent judgment of divorce.

KOZIOL v KOZIOL (APPEAL NO. 2):

4TH Dept. App. Div. order of 3/20/09; dismissal of appeal; sua sponte examination whether appellant is an aggrieved party within the meaning of Civil Practice Law and Rules § 5511, whether the judgment finally determines the action within the meaning of the Constitution and whether any jurisdictional basis otherwise

exists to support an appeal as of right;

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HUSBAND AND WIFE - DIVORCE - CHALLENGE TO APPELLATE DIVISION ORDER DISMISSING APPEAL FROM DIVORCE JUDGMENT UPON THE GROUND THAT PLAINTIFF WAS NOT AN AGGRIEVED PARTY WITHIN THE MEANING OF CPLR 5511;

Supreme Court, Oneida County, as relevant here, determined custody and plaintiff husband's support obligations in accordance with a stipulation of settlement and modification agreement incorporated but not merged in the judgment of divorce; App. Div. dismissed appeal upon the ground that plaintiff husband was not an aggrieved party within the meaning of CPLR 5511.

KOZIOL v KOZIOL (APPEAL NO. 3):

4TH Dept. App. Div. order of 3/20/09; affirmance; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution and whether any jurisdictional basis otherwise exists to support an appeal as of right;

HUSBAND AND WIFE - DIVORCE - CHALLENGE TO APPELLATE DIVISION ORDER AFFIRMING A SUPREME COURT ORDER DENYING PLAINTIFF'S REQUEST TO AMEND THE CAPTION AND SETTLING THE RECORD;

Supreme Court, Oneida County, as relevant here, denied plaintiff's request to amend the caption and settled the record on appeal; App. Div. affirmed.

KOZIOL v KOZIOL (APPEAL NO. 4):

4TH Dept. App. Div. order of 3/20/09; affirmance; sua sponte examination whether order appealed from finally determines the action within the meaning of the Constitution and whether any jurisdictional basis otherwise exists to support an appeal as of right;

HUSBAND AND WIFE - DIVORCE - CHALLENGE TO APPELLATE DIVISION ORDER AFFIRMING A SUPREME COURT ORDER DENYING PLAINTIFF'S CROSS MOTION FOR CUSTODY/PARENTING TIME;

Supreme Court, Oneida County, as relevant here, denied plaintiff husband's cross motion for custody/parenting time; App. Div. affirmed.

MULLINS (EUGENE A.), PEOPLE v:

3RD Dept. App. Div. order of 4/17/09; denial of writ of error coram nobis; sua sponte examination whether an appeal as of right lies from an order entered in a criminal proceeding;

CRIMES - RIGHT TO COUNSEL - EFFECTIVE REPRESENTATION -

APPLICATION FOR WRIT OF ERROR CORAM NOBIS - CLAIMED FAILURE OF SUCCESSIVE TRIAL AND APPELLATE COUNSEL TO RAISE ISSUES RELATED TO SUPPRESSION OF INCULPATORY STATEMENTS MADE BY DEFENDANT TO THE POLICE;

App. Div. denied defendant's application for writ of error coram

MYNIN (LARRY), PEOPLE v:

1ST Dept. App. Div. order of 1/29/09; affirmance; leave to appeal granted by Jones, J., 5/4/09;

CRIMES AND CRIMINAL PROCEDURE - GANG ASSAULT - WHETHER "TWO OR MORE PERSONS" SPECIFIED IN PENAL LAW § 120.06 MUST SHARE DEFENDANT'S INTENT TO CAUSE "SERIOUS PHYSICAL INJURY" IN ORDER TO HAVE "AIDED" DEFENDANT IN COMMITTING A GANG ASSAULT - EFFECT OF ACQUITTAL OF CO-DEFENDANTS - JURY CHARGE - ACCOMPLICE LIABILITY; Supreme Court, New York County convicted defendant of gang assault in the second degree and sentenced him, as a second violent felony offender, to a term of 10 years; App. Div. affirmed.

SOTO, MATTER OF v FISCHER:

2ND Dept. App. Div. order of 3/31/09; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

PRISONS AND PRISONERS - CALCULATION OF SENTENCE - CHALLENGE TO APPELLATE DIVISION ORDER AFFIRMING DISMISSAL OF CPLR ARTICLE 78 PROCEEDING CHALLENGING CALCULATION OF SENTENCE BY THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES AS RUNNING CONSECUTIVELY TO CERTAIN SENTENCES PREVIOUSLY IMPOSED; Supreme Court, Dutchess County denied a CPLR article 78 petition and dismissed the proceeding; App. Div. affirmed.

TEODORESCU v RESNICK & BINDER, P.C.:

2ND Dept. App. Div. order of 10/14/08; reversal; leave to appeal granted by Court of Appeals, 5/12/09;

ATTORNEY AND CLIENT - MALPRACTICE - DEFENDANT'S SERVICE OF UNTIMELY NOTICE OF CLAIM AND FAILURE TO SEEK PERMISSION TO FILE A LATE NOTICE OF CLAIM - WHETHER TRIABLE ISSUES OF FACT EXIST CONCERNING WHETHER PLAINTIFF WOULD HAVE PREVAILED IN HER UNDERLYING PERSONAL INJURY ACTION BUT FOR DEFENDANT'S NEGLIGENCE; Supreme Court, Kings County denied defendant's motion for summary judgment dismissing the complaint and plaintiff's cross motion for summary judgment in her favor; App. Div. reversed, granted defendant's motion for summary judgment and dismissed the complaint.