

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed  
by the Court of Appeals Clerk's Office  
**July 3 through July 9, 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.**

ACEVEDO (STEVEN), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 4/7/09; affirmance; leave to appeal granted by Graffeo, J., 6/25/09;

CRIMES - SENTENCE - CONCURRENT AND CONSECUTIVE TERMS - DRUG LAW REFORM ACT OF 2004 (DLRA) (L 2004, CH 738, § 23) - WHETHER A COURT ENGAGING IN A RESENTENCING UNDER THE DLRA HAS AUTHORITY TO RECONSIDER THE ORIGINAL SENTENCING COURT'S CONSECUTIVE SENTENCING DETERMINATION AND DIRECT THAT SENTENCES ON FELONY DRUG CONVICTIONS RUN CONCURRENTLY WITH SENTENCES ON NON-DRUG FELONY CONVICTIONS; APPEALABILITY OF APPELLATE DIVISION ORDER AFFIRMING THE GRANT OF AN APPLICATION FOR RESENTENCING;

Dutchess County Court resentenced defendant, pursuant to the DLRA, to a determinate term of imprisonment of 15 years and post release supervision for five years, upon his conviction of criminal possession of a controlled substance in the first degree; App. Div. affirmed.

BARNAN ASSOCIATES v 196 OWNERS CORP.:

1<sup>ST</sup> Dept. App. Div. order of 11/18/08; modification and affirmance; leave to appeal granted by Court of Appeals, 6/25/09; LANDLORD AND TENANT - LEASE - TAX ESCALATION CLAUSE - WHETHER TAX ABATEMENTS GRANTED TO DEFENDANT COOPERATIVE AFFECT THE AMOUNT OF TAX ESCALATION PAYABLE BY PLAINTIFF COMMERCIAL TENANT - APPLICATION OF VOLUNTARY PAYMENT DOCTRINE AND SIX-YEAR STATUTE OF LIMITATION;

Supreme Court, New York County denied plaintiff's motions for summary judgment and to amend its complaint and granted defendant's cross motion for summary judgment dismissing the complaint; App. Div. modified to the extent of granting plaintiff's motion for summary judgment and denied defendant's cross motion for summary judgment dismissing the complaint, directed the Clerk to enter judgment in plaintiff's favor and affirmed as so modified.

BOARD OF EDUCATION OF THE BAY SHORE UNION FREE SCHOOL DISTRICT, MATTER OF v KAIN:

2<sup>ND</sup> Dept. App. Div. order of 3/17/09; affirmance; leave to appeal granted by Court of Appeals, 6/25/09;

SCHOOLS - EDUCATION OF CHILDREN WITH DISABILITIES - PROVISION OF AIDE AT PRIVATE SCHOOL - WHETHER SCHOOL DISTRICT IS REQUIRED TO PROVIDE A STUDENT CLASSIFIED AS "OTHER HEALTH IMPAIRED" WITH A ONE-ON-ONE AIDE AT THE STUDENT'S PRIVATE SCHOOL - EDUCATION LAW § 3602-c(9) - WHETHER A ONE-ON-ONE AIDE FALLS WITHIN THE DEFINITION OF "SERVICES" IN EDUCATION LAW § 3602-c(1)(a);

Supreme Court, Suffolk County denied a petition for review of a determination of the State Review Officer of the New York State Education Department, and in effect, dismissed the Education Law § 4404(3) proceeding; App. Div. affirmed.

CRISTIANO, MATTER OF v COMMISSIONER OF LABOR:

3<sup>RD</sup> Dept. App. Div. order of 5/28/09; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

UNEMPLOYMENT INSURANCE - EMPLOYEE OR INDEPENDENT CONTRACTOR - ASSERTION THAT LABOR LAW § 625, WHICH REQUIRES A PARTY APPEALING AN UNEMPLOYMENT INSURANCE DECISION TO POST A BOND, IS UNCONSTITUTIONAL;

App. Div. affirmed an Unemployment Insurance Appeal Board decision, which ruled that Salvatore Cristiano was liable for additional unemployment insurance contributions based on remuneration paid to tailors and other similarly situated.

CRONIN v JAMAICA HOSPITAL MEDICAL CENTER:

2<sup>ND</sup> Dept. App. Div. order of 3/17/09; affirmance; leave to appeal granted by Court of Appeals, 6/30/09;

HOSPITALS - MALPRACTICE - WHETHER A NEGLIGENCE ACTION MAY BE PREDICATED UPON A DEFENDANT'S FAILURE TO COMPLY WITH A DECEDENT'S DO NOT RESUSCITATE ORDER - PUBLIC HEALTH LAW § 2965(4);

Supreme Court, Queens County granted defendant's motion for summary judgment dismissing the complaint and denied, as academic, plaintiff's cross motion to strike the answer; App. Div. affirmed.

47 AVENUE B EAST, INC., MATTER OF v NEW YORK STATE LIQUOR AUTHORITY:

1<sup>ST</sup> Dept. App. Div. order of 5/21/09; grant of CPLR article 78 petition; Rule 500.11 review pending;  
LICENSES - REVOCATION OF LIQUOR LICENSE - ALLEGED VIOLATION OF STATE LIQUOR AUTHORITY RULES 54.2 AND 54.3 (9 NYCRR) §§ 48.2 AND 48.3; PROCEEDING AGAINST BODY OR OFFICER - WHETHER RESPONDENT EXCEEDED ITS AUTHORITY AND ACTED ULTRA VIRES IN PROMULGATING RULES;

App. Div. granted petition challenging respondent's determination revoking petitioner's on-premises liquor license, and annulled the determination.

HOWARD S. v LILLIAN S.:

1<sup>ST</sup> Dept. App. Div. order of 3/17/09; affirmance; leave to appeal granted by App. Div., 6/11/09;  
HUSBAND AND WIFE - DIVORCE - EQUITABLE DISTRIBUTION - CONSIDERATION OF MARITAL FAULT - EGREGIOUS FAULT - ENTITLEMENT TO DISCOVERY; LIMITATION OF DAMAGES ON CLAIM OF FRAUD AGAINST DEFENDANT WIFE;

Supreme Court, New York County denied plaintiff husband's cross motion for "liberal discovery" and limited his compensatory damages for his fraud claim against defendant wife to his share of the collaborative law process fees; App. Div. affirmed.

KAE, PEOPLE ex rel. v CONWAY:

2<sup>ND</sup> Dept. App. Div. order of 4/22/09; denial of application for a writ of habeas corpus; sua sponte examination whether the appeal was timely taken and whether any jurisdictional basis exists to support an appeal as of right;

HABEAS CORPUS - CHALLENGE TO APPELLATE DIVISION ORDER DENYING APPLICATION FOR A WRIT OF HABEAS CORPUS;

App. Div., among other things, denied so much of petitioner's application as sought a writ of habeas corpus, and dismissed the petition.

KISINA (TATYANA), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 3/3/09; affirmance; leave to appeal granted by Graffeo, J., 6/23/09;

CRIMES - FALSIFYING BUSINESS RECORDS - WHETHER DOCUMENTS DEFENDANT SUBMITTED TO A HEALTH INSURANCE COMPANY WERE BUSINESS RECORDS WITHIN THE MEANING OF PENAL LAW § 175.00 (2); EVIDENCE - EXCLUSION OF EVIDENCE THAT DEFENDANT PROVIDED PROPER MEDICAL TREATMENT TO AN UNDERCOVER INVESTIGATOR; PRESERVATION;

Supreme Court, Queens County convicted defendant of two counts of insurance fraud in the third degree and two counts of falsifying business records in the first degree, upon a jury verdict, and imposed sentence; App. Div. affirmed.

NYCTL 1999-1 TRUST v 573 JACKSON AVENUE REALTY CORP.:

1<sup>ST</sup> Dept. App. Div. order of 10/28/08; affirmance; leave to appeal granted by Court of Appeals, 6/25/09;

TAXATION - TAX LIENS, TAX SALES AND TAX TITLES - FORECLOSURE OF TAX LIEN - RPAPL 1341 - CPLR 5519 - SATISFACTION OF STATUTORY REQUIREMENTS FOR STAY OF FORECLOSURE SALE - CHALLENGE TO ENTRY OF JUDGMENT OF FORECLOSURE THAT INCLUDES AMOUNTS DEFENDANT SAYS IT ALREADY PAID OR ARISE FROM AN UNREASONABLE CLAIM FOR LEGAL FEES AND COSTS;

Supreme Court, Bronx County granted foreclosure of a tax lien and directed sale of real property; thereafter, the same court denied defendant's motion to vacate the foreclosure sale; App. Div. affirmed.

SANTAGATA, MATTER OF v WOODS:

Supreme Court, Orange County decision of 5/26/09; dismissal of CPLR article 78 petition; sua sponte examination whether the Supreme Court decision is an appealable paper within the meaning of CPLR 5512 and whether any jurisdictional basis otherwise exists for a direct appeal pursuant to CPLR 5601(b)(2);

PROCEEDING AGAINST BODY OR OFFICER - CHALLENGE TO DENIAL OF PISTOL LICENSE APPLICATION;

Supreme Court dismissed a CPLR article 78 petition challenging a determination denying petitioner's application for a pistol license.