

COURT OF APPEALS NEW FILINGS

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

**October 2 through October 8, 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.**

BARKER CENTRAL SCHOOL DISTRICT, et al., MATTER OF v NIAGARA COUNTY INDUSTRIAL DEVELOPMENT AGENCY et al. [AND RELATED PROCEEDINGS]:

4<sup>TH</sup> Dept. App. Div. order of 5/1/09; reversal; leave to appeal granted by Court of Appeals, 9/17/09;

MUNICIPAL CORPORATIONS - INDUSTRIAL DEVELOPMENT AGENCIES - PAYMENTS IN LIEU OF TAXES (PILOT) - CHALLENGE TO APPELLATE DIVISION ORDER ANNULING NIAGARA COUNTY INDUSTRIAL DEVELOPMENT AGENCY (NCIDA) RESOLUTION PURSUANT TO WHICH NCIDA DETERMINED THAT FINANCIAL ASSISTANCE WAS WARRANTED FOR AN INDEPENDENT POWER PRODUCER - WHETHER NCIDA'S DETERMINATION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE - WHETHER SUBSTANTIAL EVIDENCE STANDARD APPLIED - APPELLATE DIVISION'S ALLEGED IMPOSITION OF NON-STATUTORY REQUIREMENTS AND IMPROPER EVIDENTIARY STANDARD;

Supreme Court, Niagara County dismissed the petition/complaint in proceeding No. 1 and the petition in proceeding No. 2, and dismissed the Real Property Tax Law article 7 proceedings by AES Somerset, LLC with respect to the Somerset Generating Station; App. Div. reversed, granted the petition/complaint in proceeding No. 1 and the petition in proceeding No. 2, annulled the final resolution of the Niagara County IDA dated October 27, 2006 and the resulting agreements, and reinstated the Real Property Tax Law article 7 proceedings commenced by AES Somerset, LLC with respect to the Somerset Generating Station.

BOVIS LEND LEASE LMB, INC., et al. v GARITO CONTRACTING, INC., et al.:

1<sup>ST</sup> Dept. App. Div. order of 9/8/09; modification with dissents; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution; INSURANCE - DUTY TO DEFEND AND INDEMNIFY - CHALLENGE TO APPELLATE DIVISION ORDER DETERMINING THAT PLAINTIFF GENERAL CONTRACTOR, AN ADDITIONAL INSURED UNDER A POLICY ISSUED TO DEFENDANT SUBCONTRACTOR, IS NOT ENTITLED TO INDEMNIFICATION BASED UPON THE JURY VERDICT IN THE UNDERLYING PERSONAL INJURY ACTION, IN WHICH THE JURY CONCLUDED THAT THE SUBCONTRACTOR'S NEGLIGENCE WAS NOT A SUBSTANTIAL FACTOR IN CAUSING THE PERSONAL INJURY PLAINTIFF'S ACCIDENT - RENEWAL - WHETHER APPELLATE DIVISION ERRED IN NOT FOLLOWING ITS PRIOR DECISION IN THIS CASE - APPLICATION OF WORTH CONSTRUCTION CO. v ADMIRAL INS. CO. (10 NY3d 411);

Supreme Court, New York County granted motions of defendant insured Garito Contracting, Inc. and defendant insurer Twin City Fire Insurance Co. to renew their prior motions of dismissal of the complaint and summary judgment, respectively, and, upon renewal, adhered to the prior order declaring that plaintiff general contractor Bovis Lend Lease LMB, Inc. is an additional insured entitled to coverage; App. Div. modified, on the law, to the extent of declaring that Bovis is not entitled to indemnification, and otherwise affirmed.

JONES et al. v TOWN OF CARROLL et al.:

Supreme Court, Chautauqua County order of 6/25/09, bringing up for review App. Div. order of 12/31/08; modification; leave to appeal granted by Court of Appeals, 9/22/09;

LOCAL LAWS - VALIDITY - CHALLENGE TO LOCAL LAW NO. 1 OF 2005 OF THE TOWN OF CARROLL (LOCAL LAW NO. 1) - WHETHER TOWN'S ENACTMENT OF LOCAL LAW NO. 1 VIOLATED THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA), WAS ARBITRARY AND CAPRICIOUS, AND ILLEGALLY EXTINGUISHED AN EXISTING LAWFUL USE;

Supreme Court, Chatauqua County judgment declaring sections 2 and 3 of Local Law No. 1 invalid as they relate to plaintiffs' property; App. Div. modified the judgment by denying plaintiffs' motion for summary judgment and vacating the declaration, and affirmed as so modified; thereafter, Supreme Court dismissed plaintiffs' remaining cause of action.

KADRY (MOHAMED), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 6/9/09; modification; leave to appeal granted by Smith, J., 9/25/09;  
CRIMES - SENTENCE - CONCURRENT AND CONSECUTIVE TERMS - RESENTENCE TO CONCURRENT TERMS OF IMPRISONMENT, EACH LONGER THAN THE ORIGINALLY IMPOSED CONSECUTIVE TERMS - CPL 430.10;  
Supreme Court, Kings County resentenced defendant upon his conviction of two counts of conspiracy in the second degree and two counts of criminal solicitation in the second degree to indeterminate terms of 8 to 24 years imprisonment on each count of conspiracy in the second degree and 1 to 3 years imprisonment on each count of criminal solicitation, all terms to run concurrently; App. Div. modified by reducing the term of imprisonment imposed upon each conviction of conspiracy in the second degree from an indeterminate term of 8 to 24 years imprisonment to an indeterminate term of 5 to 15 years imprisonment.

SIMMONS (PARIS), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 8/4/09; affirmance with dissents; leave to appeal granted by Moskowitz, J., 9/24/09;  
CRIMES - INSTRUCTIONS - CHALLENGE TO TRIAL COURT'S RESPONSE TO JURY QUESTION REGARDING INTENT ELEMENT OF ATTEMPTED ASSAULT IN THE FIRST DEGREE;  
Supreme Court, New York County convicted defendant, after a jury trial, of attempted assault in the first degree, criminal possession of a weapon in the second degree and assault in the second degree, and sentenced him to an aggregate term of 9 years; App. Div. affirmed.

TISLON v STATE OF NEW YORK:

Supreme Court, Kings County denial of order to show cause; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution, whether an appeal lies from the denial of the order to show cause and whether any jurisdictional basis otherwise exists to support a direct appeal pursuant to CPLR 5601(b)(2);  
CHALLENGE TO DENIAL OF ORDER TO SHOW CAUSE;  
Supreme Court, Kings County denied an order to show cause.



