

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed  
by the Court of Appeals Clerk's Office  
**January 19 through January 25, 2007**

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.**

BOOMER v. GROSS:

3<sup>RD</sup> Dept. App. Div. order of 11/22/06; affirmance; sua sponte examination whether any basis lies for an appeal as of right; ATTORNEY AND CLIENT - MALPRACTICE - ATTORNEY RETAINED TO REPRESENT DEFENDANT TO FILE A CPL ARTICLE 440 MOTION TO CHALLENGE A CRIMINAL CONVICTION - WHETHER ACTION FOR LEGAL MALPRACTICE IS BARRED WHERE THE DETERMINATION OF GUILT IN CRIMINAL CASE IS UNDISTURBED;  
Supreme Court, Albany County granted defendant's motion for summary judgment dismissing the complaint; App. Div. affirmed.

CHARACHE (DUANE J.), PEOPLE v.:

4<sup>TH</sup> Dept. App. Div. order of 9/29/06; affirmance; leave to appeal granted by Court of Appeals, 1/11/07;  
CRIMES AND CRIMINAL PROCEDURE - SEX OFFENDERS - SEX OFFENDER REGISTRATION ACT (SORA) - PROSECUTOR'S FAILURE TO PROVIDE TIMELY NOTICE TO DEFENDANT PURSUANT TO CORRECTION LAW § 168-n(3) THAT PROSECUTOR INTENDED TO SEEK A RISK LEVEL DETERMINATION DIFFERING FROM THE RECOMMENDATION OF THE BOARD OF EXAMINERS OF SEX OFFENDERS; WHETHER DEFENDANT WAIVED RIGHT TO CHALLENGE PROSECUTOR'S NONCOMPLIANCE WITH THE NOTICE REQUIREMENT BY FAILING TO OBJECT TO THE NONCOMPLIANCE AT THE SORA HEARING;  
Genesee County Court designated defendant a level three sex offender; App. Div. affirmed.

COULL v. ROTTMAN:

1<sup>ST</sup> Dept. App. Div. order of 12/7/06; modification; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right;

HUSBAND AND WIFE - SUPPORT OF CHILDREN - WHETHER LATER-FILED PETITION FOR DOWNWARD MODIFICATION OF BASIC CHILD SUPPORT RELATES BACK TO PREVIOUSLY FILED PETITION FOR PURPOSES OF DETERMINING PLAINTIFF'S CREDIT FOR OVERPAYMENTS OF CHILD SUPPORT;

Supreme Court, New York County confirmed in part a report by a special referee concerning a petition for downward modification of child support; App. Div. modified on the law, the facts, and in the exercise of discretion by reducing plaintiff's basic child support obligations, deleting the paragraph that increased child support starting in March 2007, deleting the proviso that ordered plaintiff to pay defendant \$459.59, giving plaintiff a credit of \$15,483.71 against which plaintiff could offset future add-on expenses and otherwise affirmed.

EIGHTH JUDICIAL DISTRICT ASBESTOS LITIGATION, MATTER OF, (REYNOLDS, &c., v. AMCHEM PRODUCTS, INC., et al.):

4<sup>th</sup> Dept. App. Div. order 9/29/06; affirmance; leave to appeal granted by Court of Appeals, 1/11/07;

DISCLOSURE - PRE-TRIAL "HIGH-LOW" AGREEMENT BETWEEN PLAINTIFF AND CO-DEFENDANT - WHETHER FAILURE OF PLAINTIFF, CO-DEFENDANT AND TRIAL COURT TO DISCLOSE TO DEFENDANT AND THE JURY THE EXISTENCE OF A PRE-TRIAL HIGH-LOW AGREEMENT CONSTITUTES REVERSIBLE ERROR NECESSITATING A NEW TRIAL; EVIDENCE - ADMISSION OF VIDEOTAPE; PERSONAL INJURY ACTION ARISING OUT OF EXPOSURE TO ASBESTOS; Supreme Court, Niagara County awarded plaintiffs, on a jury verdict, the sum of \$748,851 against defendant Garlock Sealing Technologies, LLC; App. Div. affirmed.

HARRIS (HOWARD), PEOPLE v.:

12/19/06 order of Sweeny, Jr., J., 1st Dept., App. Div.; denial of motion; sua sponte examination whether a civil appeal lies from an order of a single Justice of the Appellate Division denying defendant leave to appeal to that court pursuant to CPL 450.15 and 460.15;

MOTIONS AND ORDERS - CHALLENGE TO SINGLE APPELLATE DIVISION JUSTICE'S DENIAL OF MOTION FOR CERTIFICATE GRANTING LEAVE TO APPEAL TO THE APPELLATE DIVISION PURSUANT TO CPL 450.15 AND 460.15 FROM A SUPREME COURT ORDER DENYING DEFENDANT'S CPL 440.10 APPLICATION;

Supreme Court, Bronx County denied defendant's CPL 440.10 motion; App. Div. Justice denied defendant's application pursuant to CPL 450.15 and 460.15 for a certificate granting leave to appeal to the First Dept. from the Supreme Court, Bronx Co. order.

LAPETINA (FRANK), PEOPLE v.:

2<sup>ND</sup> Dept. App. Div. order of 10/3/06; modification; leave to appeal granted by Pigott, J., 1/11/07;

CRIMES AND CRIMINAL PROCEDURE - JUSTIFICATION - WHETHER COURT

ERRED IN DECLINING TO GIVE A JUSTIFICATION CHARGE WITH RESPECT TO A CHARGE OF BURGLARY; EVIDENCE - ALLEGED ERROR IN REFUSING TO ADMIT PHOTOGRAPHS INTO EVIDENCE AT TRIAL;

Supreme Court, Queens County convicted defendant of burglary in the first degree, two counts of assault in the third degree, and endangering the welfare of a child; App. Div. modified by reducing the conviction of burglary in the first degree to burglary in the second degree, vacating the sentence imposed thereon, vacating the convictions of assault in the third degree and the sentences imposed thereon, and as so modified, affirmed and remitted to the Supreme Court for resentencing on the conviction of burglary in the second degree and for a new trial on the counts of assault in the third degree.

LONG (CYNTHIA), PEOPLE v.:

1<sup>ST</sup> Dept. App. Div. order of 11/14/06; affirmance with dissents; leave to appeal granted by Catterson, J., 1/16/07; Rule 500.11 review pending;

CRIMES AND CRIMINAL PROCEDURE - SUPPRESSION HEARING - WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A SUPPRESSION HEARING - ASSESSMENT OF SUFFICIENCY OF DEFENDANT'S FACTUAL ALLEGATIONS REGARDING VEHICLE STOP AND SEIZURE OF STOLEN CREDIT CARDS;

Supreme Court, New York County convicted defendant, after a jury trial, of six counts of criminal possession of stolen property in the fourth degree and sentenced her, as a second felony offender, to concurrent terms of 2 to 4 years; App. Div. affirmed.

LOVE'M SHELTERING, INC., MATTER OF, v. COUNTY OF SUFFOLK, et al.:

2<sup>ND</sup> Dept. App. Div. order of 10/24/06; modification; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

COUNTIES - COMPTROLLER - VALIDITY OF AUDIT - WHETHER AUDIT PROCESS PERFORMED BY COUNTY COMPTROLLER WAS UNCONSTITUTIONAL AND FINAL AUDIT REPORT WAS NULL AND VOID; CONTRACTS - WHETHER CONTRACT BETWEEN PETITIONER AND COUNTY FOR PETITIONER TO PROVIDE EMERGENCY HOUSING SERVICES TO INDIVIDUALS AND FAMILIES WITHOUT PERMANENT HOUSING WAS ADHESION CONTRACT;

Supreme Court, Suffolk County order and judgment the court, among other things, dismissed the petition, denied as moot respondents' cross motion for an order directing that petitioner post an additional \$50,000 security or permitting the adjustment of the per diem rate paid to petitioner to be reduced to \$56.00 per person, and denied, without prejudice to the commencement of a plenary action, petitioner's cross motion for an order fixing the per diem rate paid by the county department of social services at \$82.75 per person; App. Div. modified by adding a provision declaring that the audit was valid and the audit process was constitutional.

MORRIS v. PAVARINI CONSTRUCTION et al.:

1<sup>ST</sup> Dept. App. Div. order of 6/8/06; reversal; leave to appeal granted by Court of Appeals, 1/9/07;  
LABOR - SAFE PLACE TO WORK - WHETHER PLAINTIFF ESTABLISHED A PRIMA FACIE VIOLATION OF LABOR LAW § 241(6) PREDICATED ON A BREACH OF THE INDUSTRIAL CODE (12 NYCRR 23-2.2[a]);  
Supreme Court, Bronx County granted defendants' summary judgment motion to dismiss and sever plaintiff's common-law negligence and Labor Law § 200 claims, and denied defendants' summary judgment motion to dismiss plaintiff's cause of action under Labor Law § 241(6); App. Div. reversed by granting defendants' motion and dismissing the cause of action under Labor Law § 241(6).

CITY OF NEW YORK v. WELSBACH ELECTRIC CORP. et al.:

1<sup>ST</sup> Dept. App. Div. order of 6/1/06; reversal; leave to appeal granted by Court of Appeals, 1/11/07;  
JUDGMENTS - RES JUDICATA - WHETHER APPELLATE DIVISION PROPERLY INVOKED DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL TO BAR THE CITY'S ACTION FOR INDEMNIFICATION AND/OR CONTRIBUTION;  
DISMISSAL OF ACTION - SUMMARY JUDGMENT; INDEMNITY;  
Supreme Court, New York County denied defendant Welsbach Electric Corp.'s motion for summary judgment dismissing the complaint;  
App. Div. reversed, granted defendant's motion and dismissed the complaint as against defendant Welsbach Electric.

NORTH, MATTER OF, v. BOARD OF EXAMINERS OF SEX OFFENDERS OF STATE OF NEW YORK:

4<sup>TH</sup> Dept. App. Div. order of 9/29/06; affirmance; leave to appeal granted by Court of Appeals, 1/11/07;  
CRIMES AND CRIMINAL PROCEDURE - SEX OFFENDERS - SEX OFFENDER REGISTRATION ACT (SORA) - WHETHER PETITIONER'S 2004 CONVICTION OF FEDERAL CHILD PORNOGRAPHY CHARGES FOR OFFENSES COMMITTED PRIOR TO MARCH 2002 REQUIRED HIM TO REGISTER AS A SEX OFFENDER IN NEW YORK STATE UNDER THE MARCH 11, 2002 AMENDMENTS TO CORRECTION LAW ARTICLE 6-C; WHETHER PETITIONER WAS PROPERLY REQUIRED TO REGISTER AS A SEX OFFENDER AS A CONDITION TO HIS FEDERAL CRIMINAL SENTENCE;  
Supreme Court, Chautauqua County judgment denied the petition and dismissed the article 78 proceeding which sought to annul respondent's determination requiring petitioner to register under SORA; App. Div. affirmed.

WATRAL & SONS, INC. v. OC RIVERHEAD 58, LLC, et al.:

2<sup>ND</sup> Dept. App. Div. order of 11/14/06; modification with dissents; sua sponte examination whether the dual dissent at the App. Div. is on a question of law;  
INDEMNITY - CONTRACTUAL INDEMNIFICATION - WHETHER DEFENDANT OWNER WAS ENTITLED TO INDEMNIFICATION FOR DAMAGE CAUSED BY PLAINTIFF EXCAVATOR'S WORK PURSUANT TO CONTRACT BETWEEN THE PARTIES;  
INTERPRETATION OF GENERAL BUSINESS LAW § 765 - PRIVATE RIGHT OF ACTION FOR PROPERTY OWNERS; COMPENSATING THIRD-PARTIES FOR ECONOMIC LOSSES RESULTING FROM THE INTERRUPTION OF ELECTRICAL POWER;

Supreme Court, Suffolk County judgment awarded plaintiff damages in an action to foreclose a mechanic's lien; App. Div. modified by deleting the provision awarding plaintiff damages in the principal sum of \$82,401, and substituting a provision awarding plaintiff damages in the principal sum of \$12,762.