

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed
by the Court of Appeals Clerk's Office
April 6 through April 12, 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.

DISNEY ENTERPRISES, INC., et al., MATTER OF, v TAX APPEALS
TRIBUNAL OF STATE OF NEW YORK:

3RD Dept. App. Div. order of 3/1/07; confirmation of determination; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

TAXATION - FRANCHISE TAX ON BUSINESS CORPORATIONS - WHETHER THE BUSINESS ALLOCATION PERCENTAGE USED BY THE DEPARTMENT OF TAXATION AND FINANCE, WHICH INCLUDED THE NEW YORK SALES OF PETITIONER'S WHOLLY-OWNED CALIFORNIA SUBSIDIARY IN THE NUMERATOR OF PETITIONER'S COMBINED GROUP'S RECEIPTS FACTOR, VIOLATED PUBLIC LAW 86-272 (15 USC §§ 381-384); ALLEGED VIOLATION OF DUE PROCESS AND COMMERCE CLAUSE;

App. Div. confirmed respondent's determination which, among other things, denied petitioner's request for a refund of corporate franchise tax imposed pursuant to Tax Law article 9-a, and dismissed the petition.

FESTA, et al. v NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS, et al.:

1ST Dept. App. Div. order of 2/22/07; modification; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;
MUNICIPAL CORPORATIONS - ZONING - NEW YORK CITY CABARET LAW (ADMINISTRATIVE CODE OF THE CITY OF NEW YORK § 20-360) - NEW YORK CITY ZONING RESOLUTION - REGULATION OF CIRCUMSTANCES UNDER WHICH PARTICIPATORY SOCIAL DANCING MAY BE PERMITTED IN EATING AND DRINKING ESTABLISHMENTS - WHETHER PARTICIPATORY SOCIAL DANCING CONSTITUTES PROTECTED FREE SPEECH UNDER THE NEW YORK STATE CONSTITUTION;
Supreme Court, New York County denied plaintiffs' motion for a preliminary injunction, granted defendants' cross motion for summary judgment and dismissed the complaint; App. Div. modified to declare in defendants' favor that the Cabaret Law and attendant zoning regulations are constitutional to the extent challenged.

MALCOLM G. (ANONYMOUS), MATTER OF:

2ND Dept. App. Div. order of 3/13/07; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;
INFANTS - JUVENILE DELINQUENTS - SUFFICIENCY OF EVIDENCE - PRESERVATION OF ISSUES FOR APPELLATE REVIEW;
Family Court, Kings County adjudged respondent a juvenile delinquent and placed him on probation for a period of 12 months; App. Div. dismissed as academic so much of the order of disposition as placed respondent on probation and otherwise affirmed.

HABERMAN, et al., MATTER OF, v ZONING BOARD OF APPEALS OF CITY OF LONG BEACH et al.:

2ND Dept. App. Div. order of 12/5/06; reversal; leave to appeal granted by Court of Appeals, 3/29/07;
MUNICIPAL CORPORATIONS - ZONING - VARIANCE - VACATUR OF BUILDING PERMIT ISSUED PURSUANT TO COURT-APPROVED STIPULATION BETWEEN PARTIES - NECESSITY FOR SUBSEQUENT RATIFICATION OF STIPULATION BY ZONING BOARD OF APPEALS;
Supreme Court, Nassau County annulled revocation of the building permit issued on August 12, 2003, remanded the matter to the respondent Zoning Board Appeals to further consider and address the issues, and denied the motions by the Zoning Board of Appeals and respondent Xander to dismiss the petition; App. Div., upon granting reargument, reversed, denied the petition, dismissed the proceeding on the merits, dismissed the complaint except the fourth cause of action insofar as asserted against the City of Long Beach, confirmed the determination of the Zoning Board of Appeals of the City of Long Beach, and remitted the matter to Supreme Court for entry of a judgment declaring that petitioners are not entitled to the building permit issued on August 12, 2003.

INGRAHAM, et al., MATTER OF, v PLANNING BOARD OF TOWN OF SOUTHEAST et al.:

2ND Dept. App. Div. order of 1/30/07; reversal; leave to appeal granted by Court of Appeals, 3/27/07;

ENVIRONMENTAL CONSERVATION - ENVIRONMENTAL IMPACT STATEMENT - REQUIREMENT OF SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT (SEIS); CPLR ARTICLE 78 PROCEEDING TO CHALLENGE A DETERMINATION OF RESPONDENT PLANNING BOARD CONDITIONALLY GRANTING APPROVAL OF A FINAL SUBDIVISION PLAT;

Supreme Court, Westchester County denied the petition and dismissed the proceeding; App. Div. reversed, granted the petition and annulled the Planning Board determination.

JOSEY, MATTER OF, v GOORD:

3RD Dept. App. Div. order of 12/14/06; affirmance; leave to appeal granted by Court of Appeals, 4/3/07;

PRISONS AND PRISONERS - DISCIPLINE OF INMATES - RES JUDICATA - WHETHER A PRISON DISCIPLINARY PROCEEDING BASED ON PETITIONER'S CRIMINAL CONVICTION IS BARRED BY DOCTRINE OF RES JUDICATA WHERE PROCEEDING AROSE OUT OF THE SAME SET OF FACTS UNDERLYING A PRIOR DISCIPLINARY PROCEEDING IN WHICH PETITIONER WAS FOUND GUILTY OF VIOLATING SEVERAL DISCIPLINARY RULES AND A PENALTY WAS IMPOSED AGAINST HIM - CRIMINAL CONVICTION AS NEWLY DISCOVERED EVIDENCE;

Supreme Court, Albany County dismissed petitioner's CPLR article 78 proceeding to vacate respondent's determination finding petitioner guilty of violating Disciplinary Rule 1.00 for commission of a penal law offense (7 NYCRR § 270.2[A]); App. Div. affirmed.

RIVERKEEPER, INC., MATTER OF, v PLANNING BOARD OF TOWN OF SOUTHEAST et al. (AND TWO OTHER PROCEEDINGS):

2ND Dept. App. Div. order 8/8/06; reversal; leave to appeal granted by Court of Appeals, 3/27/07;

ENVIRONMENTAL CONSERVATION - ENVIRONMENTAL IMPACT STATEMENT - EFFECT OF NEW ENVIRONMENTAL INFORMATION RECEIVED AFTER PRELIMINARY SUBDIVISION PLAT APPROVAL - REQUIREMENT OF SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT (SEIS); CPLR ARTICLE 78 PROCEEDINGS TO CHALLENGE DETERMINATIONS OF RESPONDENT PLANNING BOARD;

Supreme Court, Westchester County dismissed the petition in each of three proceedings; App. Div. reversed, granted the petitions in the proceedings, annulled the determinations and remitted the matters to the Planning Board of the Town of Southeast for the preparation and circulation of a supplemental environmental impact statement.

SMALLS v AJI INDUSTRIES, INC., et al.:

1ST Dept. App. Div. order of 2/22/07; reversal with dissents; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution;

JUDGMENTS - SUMMARY JUDGMENT - LIABILITY OF CORPORATE DEFENDANTS IN MOTOR VEHICLE ACCIDENT OCCURRING WHEN DRIVER TURNED LEFT AT THIRTY-FIVE TO FORTY MILES AN HOUR, SKIDDED ON WET PAVEMENT, AND HIT A REFUSE CONTAINER, OWNED BY CORPORATE DEFENDANTS, PARKED ON SIDE OF THE ROAD;

Supreme Court, Bronx County denied the summary judgment motion by AJI Industries, Inc., Eastern Ecology Services, Inc., and Industrial Ecology Services, Inc. (AJI) defendants seeking to dismiss the complaint as to them; App. Div. reversed by granting the summary judgment motion of defendants AJI, and dismissing the complaint as against them.

STIVER v GOOD & FAIR CARTING & MOVING, INC.:

4TH Dept. App. Div. order of 9/22/06; reversal; leave to appeal granted by Court of Appeals, 3/29/07;

NEGLIGENCE - DUTY - AUTOMOBILE ACCIDENT - ALLEGED NEGLIGENT PERFORMANCE OF ANNUAL INSPECTION OF VEHICLE; SUMMARY JUDGMENT; Supreme Court, Erie County denied defendant's motion for summary judgment dismissing the complaint; App. Div. reversed, granted defendant's motion and dismissed the complaint.

VAN HORN, MATTER OF, v COUNTY OF CAYUGA et al.:

3RD Dept. App. Div. order of 11/2/06; affirmance; leave to appeal granted by Court of Appeals, 3/29/07; Rule 500.11 review pending; WORKERS' COMPENSATION - EXTENT OF DISABILITY - LOSS OF USE AWARD - LUMP SUM PAYMENT - WHETHER WORKERS' COMPENSATION BOARD ERRED IN PROVIDING FOR LUMP-SUM PAYMENT BASED ON CLAIMANT'S LOSS OF USE OF HIS ARM AND LEG (MATTER OF LACROIX v SYRACUSE EXECUTIVE AIR SERVICE, INC., __ NY3d __; WORKERS' COMPENSATION LAW § 15[3][u]); App. Div. affirmed decision of the Workers' Compensation Board that directed claimant's loss of use award be paid in a lump sum.