

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed
by the Court of Appeals Clerk's Office
May 4 through May 10, 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.

ALVARADO v MILES:

1ST Dept. App. Div. order of 8/10/06; reversal with dissent; leave to appeal granted by Court of Appeals, 4/26/07; Rule 500.11 review pending;

PHYSICIANS AND SURGEONS - DENTISTS - MALPRACTICE - SUMMARY JUDGMENT - WHETHER CONFLICTING EXPERT TESTIMONY IN DENTAL MALPRACTICE CASE RAISED TRIABLE ISSUES OF FACT AS TO WHETHER DEFENDANT DEPARTED FROM THE PREVAILING STANDARD OF CARE AND IF SO, WHETHER SUCH DEPARTURE WAS A PROXIMATE CAUSE OF PLAINTIFF'S INJURIES;

Supreme Court, New York County severed and dismissed plaintiff's informed consent claim and otherwise denied defendant's motion for summary judgment; App. Div. reversed by granting defendant's motion for summary judgment and dismissing the complaint.

AMERICAN COMMITTEE FOR THE WEIZMANN INSTITUTE OF SCIENCE, MATTER OF, v DUNN:

1ST Dept. App. Div. order of 1/4/07; affirmance; leave to appeal granted by Court of Appeals, 4/26/07;

WILLS - PROBATE - UNDUE INFLUENCE - WHETHER PETITION TO VACATE PROBATE DECREE FAILED TO PLEAD CLAIM SOUNDING IN UNDUE INFLUENCE WHERE DECEDENT CHOSE TO BENEFIT NIECE AFTER DECEDENT'S BROTHER PROVIDED HOSPICE CARE IN HIS HOME DURING DECEDENT'S TERMINAL STAGE OF ILLNESS; DISCOVERY - WHETHER A CHARITY THAT FAILS TO RECEIVE NOTICE OF A PROBATE PROCEEDING UNTIL AFTER THE WILL HAS BEEN ADMITTED TO PROBATE SHOULD BE GIVEN AN OPPORTUNITY TO CONDUCT DISCOVERY TO DEMONSTRATE UNDUE INFLUENCE; STATUTE OF FRAUDS - WHETHER AN ENFORCEABLE AGREEMENT TO MAKE A TESTAMENTARY BEQUEST EXISTED;

Surrogate's Court, New York County granted respondents' motion to deny the petition to vacate the probate decree or for turnover of property under SCPA 2105; App. Div. affirmed.

AMOROSI, MATTER OF, v SOUTH COLONIE INDEPENDENT CENTRAL SCHOOL DISTRICT, et al.:

3RD Dept. App. Div. order of 11/22/06; reversal; leave to appeal granted by Court of Appeals, 5/1/07;

CIVIL RIGHTS - DISCRIMINATION IN EMPLOYMENT - HUMAN RIGHTS LAW § 296 CLAIM OF DISCRIMINATION BASED ON PREGNANCY; LIMITATION OF ACTIONS - WHETHER APPROPRIATE STATUTE OF LIMITATIONS FOR A DISCRIMINATION CLAIM FOR DAMAGES AGAINST A SCHOOL DISTRICT UNDER HUMAN RIGHTS LAW § 296 IS THREE YEARS OR ONE YEAR; NOTICE OF CLAIM - APPLICATION FOR LEAVE TO FILE LATE NOTICE OF CLAIM;

Supreme Court, Albany County granted petitioner's motion for leave to serve a late notice of claim; App. Div. reversed and denied petitioner's motion for leave to serve a late notice of claim.

GAJADHAR (WINSTON), PEOPLE v:

1ST Dept. App. Div. order of 1/23/07; affirmance; leave to appeal granted by Kaye, Ch.J., 4/23/07;

CRIMES AND CRIMINAL PROCEDURE - RIGHT TO JURY TRIAL - WAIVER OF RIGHT - WHETHER A CRIMINAL DEFENDANT CAN WAIVE HIS RIGHT TO A JURY OF TWELVE INDIVIDUALS AND AGREE TO AN ELEVEN MEMBER JURY; Supreme Court, New York County judgment convicted defendant, after a jury trial, of murder in the second degree and attempted robbery in the first degree, and imposed sentence; App. Div. affirmed.

MANN v ABEL et al.:

2ND Dept. App. Div. order of 2/27/07; reversal; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

LIBEL AND SLANDER - NEWSPAPER ARTICLE - ACTUAL MALICE - ALLEGED VIOLATION OF NEWSPAPER'S FREE SPEECH RIGHTS UNDER FEDERAL AND STATE CONSTITUTIONS; DAMAGES - COMPENSATORY AND PUNITIVE;

Supreme Court, Westchester County awarded plaintiff \$75,000 in compensatory damages and \$15,000 in punitive damages against defendant Westmore News, Inc. (Westmore), and \$15,000 in punitive damages against defendant Abel; App. Div. reversed, dismissed the claim for punitive damages, and granted a new trial on the issue of compensatory damages against defendant Westmore only, unless within 30 days after service on plaintiff of a copy of the Appellate Division decision and order, plaintiff served and filed with the Supreme Court clerk a written stipulation to reduce the verdict as to compensatory damages against Westmore from \$75,000 to \$15,000 and, in the event plaintiff so stipulated, then the judgment as so reduced and amended, was affirmed; Supreme Court, Westchester County on stipulation consenting to a reduced amount, awarded plaintiff the principle sum of \$15,000 against defendant Westmore.

PASLEY (ALEXANDER), PEOPLE v.:

1ST Dept. App. Div. order of 3/27/07; affirmance with concurrence; leave to appeal granted by Mazzarelli, J., 5/3/07; CRIMES AND CRIMINAL PROCEDURE - MURDER - DEPRAVED INDIFFERENCE MURDER - WEIGHT OF THE EVIDENCE - WHETHER THE APPELLATE DIVISION WAS REQUIRED TO CONDUCT A WEIGHT OF THE EVIDENCE REVIEW UPON DEFENDANT'S REQUEST IN THIS DEPRAVED INDIFFERENCE MURDER CASE AND, IF SO, WHETHER THE WEIGHT OF THE EVIDENCE SUPPORTED DEFENDANT'S CONVICTION; RIGHT TO COUNSEL - EFFECTIVE REPRESENTATION - ALLEGED INEFFECTIVE REPRESENTATION OF TRIAL COUNSEL IN FAILING TO MOVE TO DISMISS A DEPRAVED INDIFFERENCE MURDER CHARGE ON LEGAL SUFFICIENCY GROUNDS; Supreme Court, New York County judgment convicted defendant, after jury trial, of murder in the second degree, and sentenced him to a term of 25 years to life; App. Div. affirmed.

STEEL LOS III/GOYA FOODS, INC., MATTER OF, v BOARD OF ASSESSORS OF COUNTY OF NASSAU, et al.:

2ND Dept. App. Div. order of 12/5/06; affirmance; leave to appeal granted by Court of Appeals, 4/26/07; TAXATION - TAX REFUND - WHETHER NASSAU COUNTY ADMINISTRATIVE CODE § 6-26.0(b)(3), UNDER WHICH THE COUNTY IS RESPONSIBLE FOR THE REFUND OF TAX OVERPAYMENTS RECEIVED BY THE COUNTY, TOWNS AND SCHOOLS DISTRICTS, APPLIES TO REFUNDS OF PAYMENTS-IN-LIEU-OF - TAXES (PILOT PAYMENTS); WHETHER PILOT PAYMENTS ARE CONTRACTUAL OR ARE SUBJECT TO THE PROVISIONS OF THE TAX LAWS; Supreme Court, Nassau County, among other things, declared that defendants' obligation under Nassau County Administrative Code §6-26.0(b)(3), which requires the County to cover all deficits resulting from tax over-assessments, applies to refunds of payments in lieu of taxes; App. Div. affirmed.

STONE v STONE:

2ND Dept. App. Div. order of 4/3/07; affirmance; 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;

PARTNERSHIP - DISSOLUTION - DAMAGES - CLAIMED BREACH OF CONTRACT - WHETHER LAW OF THE CASE DOCTRINE BARRED PLAINTIFF FROM RAISING ISSUES PREVIOUSLY RAISED AND DECIDED AGAINST HIM, OR ISSUES THAT HE COULD HAVE RAISED ON HIS PRIOR APPEAL IN THE SAME MATTER; Supreme Court, Westchester County denied plaintiffs' motion to vacate an order and judgment of same court entered October 11, 1994 and to vacate a judgment of the same court entered January 9, 1995; App. Div. affirmed.