

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed
by the Court of Appeals Clerk's Office
June 1 through June 7, 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.

BERNSTEIN &c. et al. v PENNY WHISTLE TOYS, INC. et al.:
1ST Dept. App. Div. order of 5/1/07; affirmance with dissents;
ANIMALS - LIABILITY FOR ANIMAL BITE - BUSINESS OWNER WHO KEEPS
DOG IN STORE - NATURE OF DUTY TOWARD CHILD CUSTOMER - ABSENCE OF
EVIDENCE THAT DOG EXHIBITED VICIOUS PROPENSITY PRIOR TO INCIDENT;
NEGLIGENCE - DUTY; SUMMARY JUDGEMENT;
Supreme Court, New York County, among other things, granted
defendants' motion for summary judgment dismissing the complaint;
App. Div. affirmed.

INNOPHOS, INC. v RHODIA, S.A., et al.:

1ST Dept. App. Div. order of 3/22/07; affirmance; leave to appeal granted by App. Div., 5/29/07;

CONTRACTS - CONSTRUCTION - WHETHER THE DEFINITION OF "TAXES" IN THE PARTIES' PURCHASE AND SALE AGREEMENT INCLUDED ASSESSMENTS BY AN AGENCY OF THE MEXICAN GOVERNMENT FOR OUTSTANDING WATER EXTRACTION FEES; SUMMARY JUDGMENT - DISCOVERY - WHETHER DISCOVERY WAS REQUIRED TO RESOLVE AN ALLEGED AMBIGUITY IN THE CONTRACT; Supreme Court, New York County granted plaintiff's motion for partial summary judgment declaring that certain claims asserted against plaintiff constitute taxes as defined in the parties' purchase agreement and that any guarantee required to contest these claims is defendants' responsibility; App. Div. affirmed.

ORNSTEIN v. NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, et al.:

Supreme Court, New York County judgment of 5/8/07, bringing up for review 1ST Dept. App. Div. order of 1/3/06; reversal with dissents;

NEGLIGENCE - NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS - WHETHER PLAINTIFF HAS A VIABLE CLAIM FOR EMOTIONAL AND PSYCHOLOGICAL INJURY RESULTING FROM EXPOSURE TO THE VIRUS THAT CAUSES ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS) TO THE EXTENT SUCH CLAIM IS BASED UPON DAMAGES SUSTAINED MORE THAN SIX MONTHS AFTER PLAINTIFF'S EXPOSURE TO THE AIDS VIRUS BECAUSE INFECTION IS BELIEVED UNLIKELY WHEN THE VICTIM TESTS NEGATIVE FOR THE PRESENCE OF THE VIRUS MORE THAN SIX MONTHS AFTER EXPOSURE;

Supreme Court, New York County denied defendant's motion to dismiss any claim for damages allegedly sustained by plaintiff more than six months after the incident sued upon; App. Div. reversed, granted defendants' motion to dismiss any claim for damages allegedly sustained by plaintiff more than six months after the incident sued upon, and remanded to Supreme Court for further proceedings; Supreme Court awarded plaintiff damages of \$348,000 plus interest and costs.

SAMIENITO, et al. v WORLD YACHT, INC. et al.:

1ST Dept. App. Div. order of 3/15/07; modification; leave to appeal granted by App. Div., 5/29/07;

LABOR - HOURS AND WAGES - WHETHER APPELLATE DIVISION PROPERLY DISMISSED CAUSE OF ACTION BY PLAINTIFFS ALLEGING THAT EMPLOYER IMPROPERLY CHARACTERIZED GRATUITIES AS SERVICE CHARGES AND UNLAWFULLY RETAINED THESE GRATUITIES PAID BY PATRONS PURCHASING CRUISE DINING TICKETS; WHETHER APPELLATE DIVISION PROPERLY DISMISSED CAUSE OF ACTION FOR UNJUST ENRICHMENT BASED ON PARTIES' ORAL AGREEMENT CONCERNING PLAINTIFFS' COMPENSATION; ALLEGED VIOLATION OF LABOR LAW § 196-d AND BUSINESS LAW § 349;

Supreme Court, New York County granted defendants' motion to dismiss the first three causes of action only to the extent of dismissing the second and part of the first causes of action; App. Div. modified, dismissed the third and remainder of the first causes of action and, as so modified, affirmed.

SMALLEY, et al. v THE DREYFUS CORPORATION, et al.:

1ST Dept. App. Div. order of 3/8/07; modification; leave to appeal granted by App. Div. 5/29/07;

MASTER AND SERVANT - AT-WILL EMPLOYMENT - TERMINATION OF EMPLOYMENT - WHETHER AT-WILL EMPLOYEES MAY SUE THEIR FORMER EMPLOYER FOR FRAUDULENT INDUCEMENT BASED ON THEIR RELIANCE ON EMPLOYER'S ASSERTION THAT IT HAD NO PLAN TO MERGE THEIR GROUP WITH ANOTHER GROUP;

Supreme Court, New York County granted defendants' motion to dismiss the complaint and dismissed the second amended complaint in its entirety; App. Div. modified to the extent of reinstating plaintiffs' cause of action for fraudulent inducement.

TZOLIS, et al. v WOLFF, et al.:

1ST Dept. App. Div. order of 2/8/07; reversal; leave to appeal granted by App. Div., 5/31/07;

LIMITED LIABILITY COMPANIES - WHETHER, IN THE ABSENCE OF EXPRESS LANGUAGE IN THE LIMITED LIABILITY COMPANY LAW, A MEMBER OF A LIMITED LIABILITY COMPANY HAS STANDING TO SUE DERIVATIVELY ON THE COMPANY'S BEHALF;

Supreme Court, New York granted defendants Parkway LLC and Pennington Leasing Corporation's motion to dismiss the second cause of action alleged in plaintiffs' first amended complaint and to cancel the notice of pendency; App. Div. (1) reversed the July 6, 2006 order, denied defendants Parkway LLC's and Pennington Leasing Corporation's motion to dismiss the second cause of action, and reinstated that cause of action, and (2) modified the March 23, 2006 order by reinstating the first cause of action against Herbert Wolff, 316 Pennington LLC, Jay Podolsky, Stuart Podolsky, Solomon Freedman, and Toby Birnbaum, reinstating the second cause of action against Herbert Wolff, 316 Pennington LLC, Jay Podolsky, Stuart Podolsky, Solomon Freedman, Toby Birnbaum, Parkway LLC, and Pennington Leasing Corporation, and reinstating the notice of pendency.