

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed
by the Court of Appeals Clerk's Office
June 15 through June 21, 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.

ADULT HOME AT ERIE STATION, INC., MATTER OF, v ASSESSOR AND BOARD OF ASSESSMENT REVIEW OF CITY OF MIDDLETOWN et al.:

2ND Dept. App. Div. order of 1/16/07; reversal; leave to appeal granted by Court of Appeals, 6/5/07;

TAXATION - EXEMPTIONS - PROPERTY USED EXCLUSIVELY FOR CHARITABLE PURPOSES - WHETHER NOT-FOR-PROFIT CORPORATION THAT OPERATED AN ADULT HOME WAS ENTITLED TO EXEMPTION FROM REAL PROPERTY TAXES PURSUANT TO RPTL 420-a(1)(a);

Supreme Court, Orange County judgment, after a non-jury trial, among other things, denied the petition insofar as it sought a real estate tax exemption for the subject property under RPTL 420-a; App. Div. reversed, granted the branches of the petitions seeking to declare the subject property exempt for the tax years 2001/2002 and 2002/2003, and declared that the subject property was exempt from real property taxes pursuant to RPTL 420-a for those tax years.

BERG v ALBANY LADDER COMPANY, INC., et al. (and a third-party action):

3RD Dept. App. Div. order of 5/17/07; affirmance with dissents; Rule 500.11 review pending; NEGLIGENCE - INJURY OF WORKER UNLOADING STEEL TRUSSES FROM A FLATBED TRUCK AT A CONSTRUCTION SITE - LABOR LAW § 240(1) AND 242(6) CLAIMS; SUMMARY JUDGMENT - DISMISSAL OF COMPLAINT; Supreme Court, Schenectady County denied plaintiff's cross motion for partial summary judgment on the issue of liability, granted defendants' motion to dismiss the complaint, dismissed the complaint and third-party complaint, dismissed the cross claims and counterclaims made by third-party defendant Stone Bridge Iron & Steel, Inc. and the counterclaim made by third-party defendant Fast Trek Steel; App. Div. affirmed.

A.E.F. (ANONYMOUS) v K.T.L. (ANONYMOUS), PEOPLE ex rel.:

2ND Dept. App. Div. order of 5/15/07; affirmance; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right; PARENT AND CHILD - VISITATION - WHETHER APPELLANT MADE A SUFFICIENT SHOWING OF A MATERIAL CHANGE IN CIRCUMSTANCES TO REQUIRE A HEARING ON HER REQUESTED MODIFICATION OF A PRIOR VISITATION ORDER BASED ON HER ALLEGED WORK SCHEDULE CHANGE AND NEED TO ACCOMMODATE HER RELIGIOUS BELIEFS; APPEAL - ACADEMIC AND MOOT QUESTIONS - WHETHER APPEAL WAS ACADEMIC WHERE SUBSEQUENT ORDER REQUIRED RESPONDENT TO MAKE "REASONABLE ACCOMMODATION" IN VISITATION FOR APPELLANT'S RELIGIOUS OBSERVANCE WHEN APPELLANT WAS UNABLE TO DRIVE CHILD ON A HOLY DAY; JUDGES - RECUSAL - ALLEGED IMPROPER DENIAL OF MOTION TO RECUSE; Supreme Court, Nassau County denied petitioner mother's application to modify prior order of same court dated January 13, 2005, which, among other things, had awarded child custody to father and set a visitation schedule for petitioner; App. Div. affirmed in part and dismissed in part as academic.

KISH &c. v GRAHAM, et al.:

4TH Dept. App. Div. order of 3/16/07; reversal with dissents; leave to appeal granted by App. Div., 6/8/07; DISCLOSURE - EX PARTE INTERVIEWS WITH NON-PARTY TREATING PHYSICIANS BY DEFENSE COUNSEL IN MEDICAL MALPRACTICE ACTION - CPLR ARTICLE 31 - FEDERAL HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 (HIPAA) (42 USC § 1320d) - WHETHER PLAINTIFF MAY BE REQUIRED TO EXECUTE AUTHORIZATIONS PERMITTING DEFENSE COUNSEL TO CONDUCT POST-NOTE OF ISSUE EX PARTE INTERVIEWS WITH TREATING PHYSICIANS; Supreme Court, Allegany County granted defendants' motion compelling plaintiff to execute authorizations pursuant to HIPAA which would allow defendants to conduct post-note of issue ex parte interviews with treating physicians; App. Div. reversed by denying the motion.

MINGO (JOHN), PEOPLE v:

2ND Dept. App. Div. order of 2/27/07; affirmance; leave to appeal granted by Jones, J., 6/4/07; Rule 500.11 review pending; CRIMES AND CRIMINAL PROCEDURE - SENTENCE - CLAIMED EXCESSIVENESS OF VIOLATION OF PROBATION SENTENCE - WHETHER APPELLATE REVIEW OF EXCESSIVENESS OF VIOLATION OF PROBATION SENTENCE IS BARRED BY DEFENDANT'S WAIVER OF THE RIGHT TO APPEAL TAKEN AT THE ORIGINAL GUILTY PLEA TO THE CHARGE UNDERLYING THE PROBATIONARY SENTENCE; Supreme Court, Kings County amended sentence; App. Div. affirmed.

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. v FIERO:

1ST Dept. App. Div. order of 10/26/06; affirmance; leave to appeal granted by Court of Appeals, 6/5/07; LIMITATION OF ACTIONS - ONE-YEAR STATUTE OF LIMITATIONS - WHETHER PLAINTIFF'S ACTION TO COLLECT A DISCIPLINARY FINE IT HAD IMPOSED IS A PROCEEDING TO CONFIRM AN ARBITRATION AWARD AND THUS SUBJECT TO A ONE-YEAR LIMITATION PERIOD; ASSOCIATIONS - WHETHER NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. IS AUTHORIZED TO BRING A STATE COURT ACTION TO COLLECT DISCIPLINARY FINES IT HAS IMPOSED; Supreme Court, New York County granted plaintiff's motion for summary judgment and awarded it over one million dollars as against defendants; App. Div. affirmed.

936 SECOND AVENUE, L.P. v SECOND CORPORATE DEVELOPMENT COMPANY, INC., et al.:

1ST Dept. App. Div. order of 2/6/07; affirmance; leave to appeal granted by Court of Appeals, 6/7/07; Rule 500.11 review pending; LANDLORD AND TENANT - RENT - INTERPRETATION OF RENT VALUATION PROVISION OF NET LEASE - WHETHER THE LEASE PROVISION PRECLUDES AN APPRAISER FROM CONSIDERING THE LEASE ITSELF AS AN ENCUMBRANCE WHEN VALUING THE PROPERTY FOR THE PURPOSE OF ESTABLISHING RENT FOR A RENEWAL TERM; DECLARATORY JUDGMENT; Supreme Court, New York County declared that under the terms of the parties' lease, the encumbrance of the lease does not have to be considered by the appraisers who determine the value of the premises in connection with establishing the net rent for the first ten years of the renewal term; App. Div. affirmed.

RICHARDS v WEST, PEOPLE ex rel. (and two other proceedings):

3RD Dept. App. Div. orders of 5/22/07; sua sponte examination whether the App. Div. orders appealed from finally determine the proceedings within the meaning of the Constitution and whether any jurisdictional basis exists for appeals as of right; PROCEEDING AGAINST BODY OR OFFICER - APPELLATE DIVISION DENIAL OF MOTIONS FOR JUDGMENT IN DEMAND IN LIEU OF COMPLAINT; PRISONS AND PRISONERS; App. Div. denied motions for judgment in demand in lieu of complaint.

SPOTA, MATTER OF, v JACKSON:

2ND Dept. App. Div. order of 2/27/07; affirmance; leave to appeal granted by Court of Appeals, 6/7/07;

INDIANS - INTERNAL TRIBAL AFFAIRS - PROCEEDING UNDER INDIAN LAW § 8 TO REMOVE AN ALLEGED INTRUDER ON THE RESERVATION - WHETHER STATE COURTS HAVE AUTHORITY UNDER INDIAN LAW § 8 TO DETERMINE WHETHER ESTRANGED WIFE OF A BLOOD-RIGHT MEMBER OF THE TRIBE IS AN "INTRUDER";

Suffolk County Court determined that respondent Jackson was not an "intruder" within the meaning of Indian Law § 8 and denied the District Attorney's petition on behalf of the Unkechaug Indian Reservation to remove respondent Jackson from the reservation; App. Div. affirmed.

SUAREZ, MATTER OF, v JOHNSON et al.:

1ST Dept. App. Div. order of 5/31/07; denial of article 78 petition; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

PROCEEDING AGAINST BODY OR OFFICER - PROHIBITION - WHETHER DOUBLE JEOPARDY CLAUSES OF STATE AND FEDERAL CONSTITUTIONS BAR APPELLANT'S FURTHER PROSECUTION FOR FIRST DEGREE MANSLAUGHTER AFTER ACQUITTAL ON INTENTIONAL MURDER COUNT - "SAME OFFENSE"; COLLATERAL ESTOPPEL;

App. Div. denied article 78 application and dismissed the petition.

WINDHAM (JOSEPH), PEOPLE v:

2ND Dept. App. Div. order of 2/13/07; affirmance; leave to appeal granted by Court of Appeals, 6/12/07;

CRIMES AND CRIMINAL PROCEDURE - SEX OFFENDERS - SEX OFFENDER REGISTRATION ACT (SORA) - WHETHER A DEFENDANT SENTENCED IN 1991 TO CONCURRENT TERMS OF ONE TO THREE YEARS FOR FIRST DEGREE SEXUAL ABUSE AND FOUR TO TWELVE YEARS FOR FIRST DEGREE ROBBERY, WHO WAS INCARCERATED ON SORA'S EFFECTIVE DATE OF JANUARY 21, 1996, IS SUBJECT TO ADJUDICATION UNDER SORA;

Supreme Court, Kings County adjudicated defendant a level three risk offender under the Sex Offender Registration Act and denied defendant's request to be tested under a different risk assessment formula; App. Div. affirmed.