

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed  
by the Court of Appeals Clerk's Office  
**June 29 through July 5, 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.**

CABRERA (BRETT), PEOPLE v:

3<sup>RD</sup> Dept. App. Div. order of 5/3/07; affirmance with dissents; leave to appeal granted by Mugglin, J., 6/19/07;  
CRIMES AND CRIMINAL PROCEDURE - CRIMINALLY NEGLIGENT HOMICIDE - WHETHER EVIDENCE WAS SUFFICIENT TO ESTABLISH "DANGEROUS SPEEDING" AND TO SUSTAIN DEFENDANT'S CONVICTIONS OF CRIMINALLY NEGLIGENT HOMICIDE AND ASSAULT WHERE EVIDENCE DEMONSTRATED DEFENDANT DROVE VEHICLE 72 MILES PER HOUR ON A SECTION OF ROAD WITH A POSTED MAXIMUM SPEED LIMIT OF 55 MILES PER HOUR, LOST CONTROL OF THE VEHICLE, AND CRASHED INTO A TELEPHONE POLE AND TREE KILLING THREE OF HIS PASSENGERS AND SEVERELY INJURING A FOURTH; INSTRUCTIONS - CHARGE TO JURY - ALLEGED ERROR BY TRIAL COURT IN FAILING TO CHARGE JURY THAT EXCESSIVE SPEED ALONE WAS INSUFFICIENT TO SUSTAIN A FINDING OF CRIMINAL NEGLIGENCE AND THAT JUNIOR LICENSE VIOLATIONS WERE IRRELEVANT TO ISSUE OF CRIMINAL NEGLIGENCE; Sullivan County Court convicted defendant, after jury trial, of three counts of criminally negligent homicide, assault in the third degree, and reckless driving, and various traffic infractions; App. Div. affirmed.

COLLIER (ANDRE), PEOPLE v.:

3<sup>RD</sup> Dept. App. Div. order of 12/21/06; affirmance; leave to appeal granted by Pigott, J., 6/13/07; Rule 500.11 review pending;

CRIMES AND CRIMINAL PROCEDURE - PLEA OF GUILTY - WHETHER DEFENDANT'S ARGUMENT THAT HIS CONVICTION MUST BE REVERSED AND PLEA VACATED BECAUSE THE TRIAL COURT FAILED TO INFORM HIM THAT HE WOULD BE SUBJECT TO A MANDATORY PERIOD OF POST-RELEASE SUPERVISION MUST BE PRESERVED BY A MOTION TO EITHER WITHDRAW THE PLEA OR VACATE THE JUDGMENT OF CONVICTION ON THAT BASIS; Rensselaer County Court convicted defendant, upon his guilty plea, of attempted robbery in the first degree; App. Div. affirmed.

DIFRANCESCO, et al. v COUNTY OF ROCKLAND:

2<sup>ND</sup> Dept. App. Div. order of 6/12/07; modification; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; DECLARATORY JUDGMENTS - LOCAL LAWS - CHALLENGE TO LOCAL LAW NO. 1 OF THE COUNTY OF ROCKLAND THAT REQUIRES, AMONG OTHER THINGS, SELLERS AND LESSORS OF ANY RESIDENTIAL PROPERTY SERVED BY A PRIVATE WATER SYSTEM WITHIN THE COUNTY OF ROCKLAND TO HAVE THE WATER SYSTEM TESTED AND CERTIFIED TO ENSURE COMPLIANCE WITH COUNTYWIDE WATER-QUALITY STANDARDS; ALLEGED UNCONSTITUTIONALITY OF LOCAL LAW NO. 1 OF THE COUNTY OF ROCKLAND; Supreme Court, Rockland County denied plaintiffs' motion for summary judgment and granted defendant's motion for summary judgment; App. Div. modified by adding a provision declaring that those portions of Local Law No. 1 of 2005 of the County of Rockland which impose obligations upon, and/or regulation of, agents for sellers and/or buyers of residential dwellings in Rockland County served by private water systems, are constitutional, valid, and enforceable, and as so modified, affirmed.

FISCHBARG v DOUCET et al.:

1<sup>ST</sup> Dept. App. Div. order of 3/13/07; affirmance with dissents; leave to appeal granted by App. Div. 6/21/07;

ATTORNEY AND CLIENT - COMPENSATION - WHETHER NEW YORK ATTORNEY HAS PERSONAL JURISDICTION OVER OREGON CLIENT IN ACTION TO RECOVER FEES FOR SERVICES IN OREGON LITIGATION - LONG-ARM JURISDICTION (CPLR 302[a][1]);

Supreme Court, New York County denied defendants' motion to dismiss the complaint for lack of personal jurisdiction; App. Div. affirmed.

IG SECOND GENERATION PARTNERS, LP, et al., MATTER OF, v NEW YORK STATE DEPARTMENT OF HOUSING & COMMUNITY RENEWAL, &c.:

1<sup>ST</sup> Dept. App. Div. order of 11/30/06; affirmance with dissent; leave to appeal granted by App. Div., 6/21/07; Rule 500.11 review pending;

LANDLORD AND TENANT - RENT REGULATION - WHETHER DEPARTMENT OF HOUSING AND COMMUNITY RENEWAL (DHCR) HAD AUTHORITY TO CANCEL RENT ARREARS FOLLOWING DISMISSAL OF FAIR MARKET RENT APPEAL WHERE DHCR FOUND THAT RENT CALLED FOR IN LEASE WAS LESS THAN FAIR MARKET VALUE;

Supreme Court, New York County annulled determination of respondent DHCR that forgave rent arrears owned by respondent-intervenor Dru Arstark as a result of dismissal of her fair market rent appeal, and remanded to DHCR to determine amount of arrearage and period of repayment; App. Div. affirmed.

MCCURDY v THE STATE OF NEW YORK:

2<sup>ND</sup> Dept. App. Div. order of 2/27/07; affirmance; leave to appeal granted by Court of Appeals, 6/28/07;

EMINENT DOMAIN - AWARD - APPROPRIATE MEASURE OF CONSEQUENTIAL DAMAGES FOR TAKING OF TEMPORARY EASEMENT OF ROAD FRONTAGE WHERE SUBJECT PARCEL IS UNDEVELOPED VACANT PROPERTY - WHETHER DAMAGES ARE BASED ON RENTAL VALUE OF ENTIRE REMAINDER, RATHER THAN THE PORTION OF THE PROPERTY ACTUALLY ENCUMBERED BY THE TEMPORARY EASEMENT;

Court of Claims awarded claimant principal sum of \$850 for taking in fee and consequential damages for a temporary easement in the principal sum of \$20,900; App. Div. affirmed.

MCKINNEY et al. v COMMISSIONER OF NEW YORK STATE DEPARTMENT OF HEALTH, et al.:

1<sup>ST</sup> Dept. App. Div. order of 6/19/07; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

CONSTITUTIONAL LAW - VALIDITY OF STATUTE - ENABLING LEGISLATION - WHETHER LEGISLATURE VIOLATED ARTICLE III, SECTION 1 OF THE CONSTITUTION OF THE STATE OF NEW YORK WHEN IT ENACTED LEGISLATION ESTABLISHING THE COMMISSION ON HEALTH CARE FACILITIES OF THE 21<sup>ST</sup> CENTURY (BERGER COMMISSION) AND VESTED IT WITH THE POWER TO UNDERTAKE A REORGANIZATION OF THE HEALTH CARE SYSTEM WITHIN THE STATE;

Supreme Court, Bronx County granted defendants' motion pursuant to CPLR 3211(a) to dismiss plaintiffs' complaint that challenged the constitutionality of the legislation establishing the Commission on Health Care Facilities in the 21<sup>st</sup> Century (L 2005, ch 63, part E, § 31); App. Div. affirmed.

MILL CREEK PHASE 1 STATEN ISLAND BLUEBELT SYSTEM, MATTER OF, v VIGLIAROLO, et al.:

2<sup>ND</sup> Dept. App. Div. order of 3/13/07; affirmance; leave to appeal granted by App. Div., 6/19/07; Rule 500.11 review pending;

INTEREST - RATE OF INTEREST - WHETHER INTEREST RATE ON TAX LIEN AGAINST THE SUBJECT PROPERTY CONTINUED TO ACCRUE AT A RATE OF EIGHTEEN PERCENT AFTER THE CITY ACQUIRED THE SUBJECT PROPERTY THROUGH A CONDEMNATION PROCEEDING OR WAS LIMITED TO SIX PERCENT PURSUANT TO GENERAL MUNICIPAL LAW § 3-a(2);

Supreme Court, Richmond County granted motion by NYCTL 1998-1 Trust and the Bank of New York seeking to compel the City of New York City (City) to release and turn over amounts due and owing under a tax lien recorded against the subject property from any final award issued only to the extent of directing that the City pay movants the money due and owing to them pursuant to the tax lien certificate, with interest payable at the rate of 18% from May 22, 1997 through July 30, 1998, and at the rate of 6% from July 31, 1998 through the date that the tax lien is paid from any final award; App. Div. affirmed.

MIRO et al. v PLAZA CONSTRUCTION CORPORATION, et al.:

1<sup>ST</sup> Dept. App. Div. order of 3/29/07; reversal with dissents; leave to appeal granted by App. Div., 6/21/07; Rule 500.11 review pending;

LABOR - SAFE PLACE TO WORK - LABOR LAW § 240(1) - WHETHER EVIDENCE ESTABLISHED THAT PLAINTIFF'S OWN ACTIONS WERE SOLE PROXIMATE CAUSE OF HIS FALL FROM A LADDER WHERE HE ALLEGEDLY RECOGNIZED THE UNDESIRABILITY OF FIREPROOFING MATERIAL ON HIS LADDER AND KNEW HE COULD REQUEST A DIFFERENT LADDER FROM HIS EMPLOYER BUT FAILED TO DO SO;

Supreme Court, New York County granted plaintiffs' motion for partial summary judgment as to liability on the cause of action under Labor Law § 240(1); App. Div. reversed, denied plaintiffs' motion for partial summary judgment as to liability on the cause of action under Labor Law § 240(1), and, on a search of the record, granted defendants' motion for summary judgment dismissing that cause of action.

SALAAM (RASOOL), PEOPLE v:

3<sup>RD</sup> Dept. App. Div. order of 1/4/07; affirmance; leave to appeal granted by Smith, J., 6/28/07; Rule 500.11 review pending;

CRIMES AND CRIMINAL PROCEDURE - PLEA OF GUILTY - WITHDRAWAL OF PLEA - WHETHER DEFENDANT'S CONTENTION THAT HIS PLEA WAS NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY ENTERED BECAUSE HE WAS NOT INFORMED BY THE TRIAL COURT THAT HE WOULD BE SUBJECT TO A MANDATORY PERIOD OF POST-RELEASE SUPERVISION MUST BE PRESERVED BY A MOTION TO EITHER WITHDRAW THE PLEA OR VACATE THE JUDGMENT OF CONVICTION ON THAT BASIS;

Supreme Court, Schenectady County convicted defendant, upon his guilty plea, of two counts of assault in the second degree; App. Div. affirmed.

VIGILANT INSURANCE COMPANY, et al. v THE BEAR STEARNS COMPANIES:

1<sup>ST</sup> Dept. App. Div. order of 11/14/06; modification; leave to appeal granted by App. Div. 6/19/07;

CONTRACTS - FORMATION OF CONTRACT - WHETHER TRIABLE ISSUES OF FACT EXIST CONCERNING ALLEGATION THAT DEFENDANT BREACHED THE INSURANCE POLICIES' PROVISION PROHIBITING DEFENDANT FROM SETTling ANY CLAIMS OR ASSUMING ANY CONTRACTUAL OBLIGATIONS WITHOUT PLAINTIFFS' CONSENT; INSURANCE - EXCLUSIONS - WHETHER DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT ON ISSUE OF WHETHER INVESTMENT BANKING EXCLUSION IN POLICIES APPLIED CONCERNING ALLEGATION THAT DEFENDANT'S RESEARCH ANALYSTS WERE UNDULY INFLUENCED BY INVESTMENT BANKING CONCERNS; INSURANCE - DISCLAIMER OF COVERAGE - WHETHER AN INSURED'S COMMITMENT TO PROVIDE INDEPENDENT RESEARCH AND INVESTOR EDUCATION PROGRAMS IN THE FUTURE AS PART OF A SETTLEMENT IS COVERED LOSS UNDER AN INSURANCE POLICY; ALLEGED VIOLATION OF SUPREMACY CLAUSE AND NULLIFICATION OF JUDGMENT OF UNITED STATES DISTRICT COURT CONCERNING DISGORGEMENT; Supreme Court, New York County granted plaintiffs' motion for summary judgment to the extent of declaring that defendant cannot recover \$25 million disgorgement payment through its insurance policies with plaintiffs and otherwise denied the motion; App. Div. modified, granted summary judgment to defendant on the investment banking exclusion and the independent research/investor education issue, denied summary judgment to plaintiffs regarding disgorgement, and otherwise affirmed.