

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed
by the Court of Appeals Clerk's Office
September 14 through September 20, 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.

COX et al. v NAP CONSTRUCTION COMPANY et al.:

1st Dept. App. Div. order of 5/24/07; affirmance; leave to appeal granted by App. Div., 8/30/07;

LABOR - PREVAILING RATE OF WAGES - PREEMPTION BY FEDERAL PREVAILING WAGE STATUTE - WHETHER THE DAVIS-BACON ACT (40 USC §§ 3142[a], [b]) PREEMPTS OR OTHERWISE PRECLUDES CLAIMS PURSUANT TO LABOR LAW AND 12 NYCRR 142-3.2 FOR FAILURE TO PAY PREVAILING WAGES, SUPPLEMENTAL BENEFITS AND OVERTIME COMPENSATION TO LABORERS ON A FEDERALLY FUNDED PUBLIC WORKS PROJECT;

Supreme Court, New York County denied defendant NAP Construction Company, Inc.'s CPLR 3211(a)(7) motion to dismiss plaintiffs' sixth, seventh, eighth, tenth and eleventh causes of action; App. Div. affirmed.

JENKINS (JONATHAN), PEOPLE v:

1ST Dept. App. Div. order of 7/26/07; affirmance; leave to appeal granted by Tom, J., 9/6/07; Rule 500.11 review pending; CRIMES AND CRIMINAL PROCEDURE - PLEA BARGAINING - ENFORCEMENT OF AGREEMENT - COMPLIANCE WITH CONDITIONS OF PLEA AGREEMENT - SPECIFIC PERFORMANCE; CLAYTON MOTION (People v Clayton, 41 AD2d 204) - PRESERVATION OR WAIVER OF ISSUES RAISED IN WITHDRAWN MOTION;

Supreme Court, New York County convicted defendant, upon his guilty plea, of criminal sale of a controlled substance in the fifth degree, and sentenced him, as a second felony offender, to a term of 3 1/2 to 7 years imprisonment; App. Div. affirmed.

JERICHO WATER DISTRICT v ONE CALL USERS COUNCIL, INC., et al.:

2ND Dept. App. Div. order of 12/12/06; reversal; leave to appeal granted by Court of Appeals, 9/4/07; PUBLIC UTILITIES - CONTRIBUTORS TO COSTS OF OPERATING A ONE-CALL NOTIFICATION SYSTEM FOR SAFETY OF THOSE DIGGING NEAR UNDERGROUND FACILITIES - WHETHER PLAINTIFF WATER DISTRICT IS A "MUNICIPALITY" WITHIN THE MEANING OF GENERAL BUSINESS LAW § 761(3) AND THEREFORE EXEMPT FROM CONTRIBUTING TO THE ONE-CALL SYSTEM COSTS; MUNICIPAL CORPORATIONS;

Supreme Court, Nassau County denied plaintiff's motion for summary judgment and, in effect, granted defendants' cross motion for summary judgment dismissing plaintiff's amended complaint and compelling plaintiff to pay defendants' past and future bills for one-call messages; App. Div. reversed, granted plaintiff's motion for summary judgment, denied that branch of defendants' cross motion which was for summary judgment, and remitted the matter to Supreme Court for entry of a judgment declaring that plaintiff is a "municipality" within the meaning of General Business Law § 761(3) and, therefore, exempt from contributing to the costs of operating the one-call notification system.

MCALLISTER, MATTER OF, v GOORD:

3RD Dept. App. Div. order of 7/19/07; confirmation of determination; sua sponte examination whether there is any jurisdictional basis for an appeal as of right, and whether appeal was timely taken;

PRISONS AND PRISONERS - DISCIPLINE OF INMATES - WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSIONER'S DETERMINATION OF GUILT WITH RESPECT TO THE CHARGES OF VIOLENT CONDUCT AND MAKING THREATS; CLAIMED DENIAL OF FAIR HEARING AND DUE PROCESS; App. Div. confirmed determination of respondent Commissioner of Correctional Services which found petitioner guilty of violating certain prison disciplinary rules, and dismissed the petition.

RODRIGUEZ, MATTER OF, v DOAR, et al.:

4TH Dept. App. Div. order of 7/6/07; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;
PROCEEDING AGAINST BODY OR OFFICER - DISMISSAL OF CPLR ARTICLE 78 PETITION CHALLENGING FAIR HEARING DETERMINATION MADE BY ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES;
Supreme Court, Onondaga County granted respondents' motion to dismiss the CPLR article 78 petition; App. Div. affirmed.

SOLOW MANAGEMENT CORP. v TANGER et al.:

1ST Dept. App. Div. order of 1/11/07; reversal; leave to appeal granted by Court of Appeals, 9/6/07;
SHERIFFS AND CONSTABLES - POUNDAGE FEES (CPLR 8012[b]) - CITY MARSHALL'S ENTITLEMENT TO POUNDAGE WHERE JUDGMENT DEBTORS FILED APPEAL BOND AFTER MARSHALL'S LEVY AND MARSHALL DID NOT COLLECT ON THE LEVY BUT RELEASED IT WITHOUT COMPLYING WITH CPLR 5204;
Supreme Court, New York County granted nonparty City Marshall's motion for poundage and directed defendants to pay his poundage fee; App. Div. reversed and denied the City Marshall's motion.