

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed
by the Court of Appeals Clerk's Office
September 28 through October 4, 2007

REVISED

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.

FAIR PRICE MEDICAL SUPPLY CORP. &c. v THE TRAVELERS INDEMNITY COMPANY:

2nd Dept. App. Div. order of 6/12/07; affirmance; leave to appeal granted by App. Div., 9/19/07;

INSURANCE - NO-FAULT AUTOMOBILE INSURANCE - EFFECT OF INSURER'S FAILURE TO PAY OR DENY CLAIM WITHIN 30 DAYS - WHETHER INSURER IS PRECLUDED FROM INTERPOSING DEFENSE ALLEGING THAT CLAIM FRAUDULENTLY SEEKS REIMBURSEMENT FOR MEDICAL SUPPLIES THAT WERE NOT DELIVERED TO THE INSURED - INSURANCE LAW § 5106(a); New York City Civil Court denied plaintiff's motion and defendant's cross motion for summary judgment; App. Term reversed, granted plaintiff's motion for summary judgment in the principal sum of \$1,628.98 and remanded the matter for a calculation of statutory interest and assessment of attorney's fees; App. Div. affirmed.

FRAZIER (HECTOR), PEOPLE v:

2ND Dept. App. Div. order of 12/19/06; affirmance; leave to appeal granted by Smith, J., 9/21/07; Rule 500.11 review pending; CRIMES AND CRIMINAL PROCEDURE - SENTENCE - POST-RELEASE SUPERVISION - WHETHER SENTENCING COURT'S FAILURE TO MENTION IN OPEN COURT A PERIOD OF POST-RELEASE SUPERVISION AS PART OF THE SENTENCE RENDERS THE POST-RELEASE SUPERVISION COMPONENT OF THE SENTENCE INVALID;
Supreme Court, Queens County convicted defendant of robbery in the first degree, upon a jury verdict, and imposed sentence; App. Div. affirmed.

FREYCINET (GARY), PEOPLE v:

2ND Dept. App. Div. order of 6/19/07; affirmance; leave to appeal granted by Ciparick, J., 9/24/07; CRIMES AND CRIMINAL PROCEDURE - RIGHT OF CONFRONTATION - AUTOPSY REPORT INTRODUCED THROUGH TESTIMONY OF A MEDICAL EXAMINER WHO HAD NEITHER PERFORMED THE AUTOPSY NOR PREPARED THE REPORT - WHETHER AUTOPSY REPORT WAS INADMISSIBLE TESTIMONIAL STATEMENT (CRAWFORD v WASHINGTON, 541 US 36); JUSTIFICATION DEFENSE;
Supreme Court, Queens County convicted defendant, after a nonjury trial, of manslaughter in the second degree, tampering with physical evidence, and criminal possession of a weapon in the fourth degree, and imposed sentence; App. Div. affirmed.

HAMPTON (KOFI), PEOPLE v:

4TH Dept. App. Div. order of 9/4/07; dismissal; sua sponte examination whether there is any jurisdictional basis for this appeal taken as of right in a criminal matter;
APPEAL - APPELLATE DIVISION - APPELLATE DIVISION DISMISSAL OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS IN A CRIMINAL CASE;
App. Div. dismissed defendant's motion for leave to appeal to the Court of Appeals from a 6/22/07 order of an App. Div. justice that denied defendant's motion for a certificate granting leave to appeal from a 1/31/07 order of Supreme Court, Onondaga County.

JOHNSON (FATIN), PEOPLE v:

1ST Dept. App. Div. order of 8/9/07; affirmance with dissents; leave to appeal granted by Andrias, J., 9/25/07; CRIMES AND CRIMINAL PROCEDURE - APPEAL - PRESERVATION - JURY INSTRUCTIONS ON DEPRAVED INDIFFERENCE MURDER; IDENTIFICATION OF DEFENDANT - LINEUP - DENIAL OF APPLICATION FOR COURT-ORDERED LINEUPS TO BE CONDUCTED IN A SEQUENTIAL AND DOUBLE-BLIND FASHION;
Supreme Court, New York County convicted defendant of murder in the second degree and criminal possession of a weapon in the third degree, and sentencing him to concurrent terms of 25 years

to life and seven years, respectively; App. Div. affirmed.

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JAVIER R. (ANONYMOUS), MATTER OF:

1ST Dept. App. Div. order of 6/21/07; dismissal; leave to appeal granted by App. Div., 9/20/07; Rule 500.11 review pending; APPEAL - ACADEMIC AND MOOT QUESTION - APPELLATE DIVISION DISMISSAL OF APPEAL AS MOOT - APPLICATION PURSUANT TO FAMILY COURT ACT § 1028 FOR RETURN OF CHILD TO PARENTS AFTER TEMPORARY REMOVAL FROM HOME - DURING PENDENCY OF APPEAL TO APPELLATE DIVISION, FAMILY COURT MODIFIED ITS PRIOR ORDER AND RETURNED CHILD TO CUSTODY OF PARENTS;

Family Court, New York County denied the parents' application for return of the child to the place of residence, directed placement of the child in the custody of the Commissioner of Social Services of New York County, and directed agency supervised visits for the parents; App. Div. dismissed the appeal.

SOMAYAH v MINNELLI et al.:

1ST Dept. App. Div. order of 6/28/07; reversal with dissents; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution; CONTRACTS - QUANTUM MERUIT - FAILURE TO STATE CAUSE OF ACTION; PLEADING - STRIKING MATTER CONTAINED IN PLEADING - CPLR 3024; Supreme Court, New York County, among other things, denied defendants' motion to dismiss the third cause of action for quantum meruit and to strike certain allegations as irrelevant and inadmissible; App. Div. reversed, dismissed the third cause of action and struck the seventeenth and eighteenth paragraphs of the amended complaint.

WARE (ANTHONY), PEOPLE v:

2ND Dept. App. Div. of 1/23/07; affirmance; leave to appeal granted by Jones, J., 9/25/07; Rule 500.11 review pending; CRIMES AND CRIMINAL PROCEDURE - SENTENCE - POST-RELEASE SUPERVISION - WHETHER SENTENCING COURT'S FAILURE TO MENTION IN OPEN COURT A PERIOD OF POST-RELEASE SUPERVISION AS PART OF THE SENTENCE RENDERS THE POST-RELEASE SUPERVISION COMPONENT OF THE SENTENCE INVALID;

Supreme Court, Kings County convicted defendant of attempted assault in the first degree, attempted robbery in the first degree, and criminal possession of a weapon in the second degree, upon a jury verdict, and imposed sentence; App. Div. affirmed.

WHITE HOUSE MANOR, LTD. v BENJAMIN, et al.:

2ND Dept. App. Div. order of 7/10/07; 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;

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CONTRACTS - BREACH OF CONTRACT - UNJUST ENRICHMENT - STIPULATION OF SETTLEMENT - PROCEEDING TO ENFORCE STIPULATION OF SETTLEMENT IN WHICH RESPONDENT AGREED TO PAY PRO RATA SHARE OF REAL PROPERTY TAXES; SUMMARY JUDGMENT DECLARING BREACH OF CONTRACT FOR SALE OF REAL PROPERTY; PERSONAL JURISDICTION - WAIVER OF DEFECT IN PERSONAL JURISDICTION BY STIPULATION TO SETTLE ACTION; Supreme Court, Westchester County, among other things, declared respondent Korean Presbyterian Church of Westchester in default pursuant to the terms of a contract for the sale of real property, and awarded respondents Benjamin and the Levys recovery from the Korean Presbyterian Church of Westchester in the total sum of \$38,597.58; App. Div. affirmed.

WILSON v GALICIA CONTRACTING & RESTORATION CORP. et al.:

2ND Dept. App. Div. order of 1/16/07; modification and affirmance; leave to appeal granted by Court of Appeals, 9/18/07; MOTIONS AND ORDERS - VACATUR OF ORDER - COMPLIANCE WITH CPLR 3215(f) AND WHETHER NONCOMPLIANCE RENDERS A DEFAULT JUDGMENT A NULLITY; WHETHER PLAINTIFF'S COUNSEL WAS OBLIGATED TO WITHDRAW HIS REPRESENTATION PURSUANT TO 22 NYCRR 1200.15; Supreme Court, Kings County, after an inquest on damages, awarded the infant plaintiff \$300,000 for past pain and suffering and \$750,000 for future pain and suffering; App. Div. modified by reducing the damages award for past pain and suffering from \$300,000 to \$200,000 and by reducing the damages award for future pain and suffering from \$750,000 to \$500,000; affirmed the judgment as so modified; and remitted to Supreme Court for entry of an appropriate amended judgment.