

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed
by the Court of Appeals Clerk's Office
October 19 through October 25, 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.

DUNCAN, MATTER OF v KELLY, et al.:

1ST Dept. App. Div. order of 8/9/07; affirmance; leave to appeal granted by App. Div., 10/16/07; Rule 500.11 review pending; PROCEEDING AGAINST BODY OR OFFICER - CIVIL SERVICE - TERMINATION OF EMPLOYMENT - DISCHARGE OF PROBATIONARY POLICE OFFICER; Supreme Court, New York County dismissed a CPLR article 78 proceeding seeking to annul respondent Police Commissioner's determination terminating petitioner's employment; App. Div. affirmed.

GARNER, MATTER OF, v NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES:

3RD Dept. App. Div. order of 4/12/07; affirmance; leave to appeal granted by Court of Appeals, 10/11/07;

CRIMES AND CRIMINAL PROCEDURE - SENTENCE - WHETHER DEPARTMENT OF CORRECTIONAL SERVICES MAY IMPOSE UPON PETITIONER POST-RELEASE SUPERVISION UNDER PENAL LAW §§ 70.00(6) AND 70.45 WHEN THE SENTENCING JUDGE HAD NOT IMPOSED THAT CONDITION AT PETITIONER'S SENTENCING; CPLR ARTICLE 78 PROCEEDING IN THE NATURE OF PROHIBITION;

Supreme Court, Albany County dismissed petitioner's CPLR article 78 application to prohibit respondents from imposing a period of post-release supervision on him; App. Div. affirmed.

GEORGE (RAYMOND C.), PEOPLE v:

3RD Dept. App. Div. order of 8/9/07; modification; leave to appeal granted by Carpinello, J., 10/10/07;

CRIMES AND CRIMINAL PROCEDURE - MURDER - DEPRAVED INDIFFERENCE MURDER - WHETHER THERE WAS LEGALLY SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF DEPRAVED INDIFFERENCE MURDER; CASE LAW TO BE APPLIED;

County Court, Schoharie County convicted defendant, after a jury trial, of murder in the second degree; App. Div. modified by reducing defendant's conviction of murder in the second degree to manslaughter in the second degree and vacating the sentence imposed thereon, and remitted the matter to County Court for resentencing.

HUNTER (JEFFREY BURTON), PEOPLE v:

3RD Dept. App. Div. order of 6/7/07; reversal; leave to appeal granted by Smith, J., 6/27/07;

CRIMES AND CRIMINAL PROCEDURE - VACATUR OF JUDGMENT OF CONVICTION - DISCLOSURE - ALLEGED FAILURE TO DISCLOSE EXCULPATORY MATERIAL - RAPE COMPLAINT AGAINST A DIFFERENT MAN WHO PLEADED GUILTY TO ATTEMPTED RAPE AFTER DEFENDANT'S TRIAL;

County Court, Rensselaer County granted defendant's CPL 440.10 motion to vacate a judgment convicting him of sodomy in the first degree; App. Div. reversed, denied the motion to vacate and reinstated the judgment of conviction.

MONTILLA (FRANKLYN), PEOPLE v:

1ST Dept. App. Div. order of 2/15/07; affirmance; leave to appeal granted by Jones, J., 10/10/07;

CRIMES AND CRIMINAL PROCEDURE - POSSESSION OF A WEAPON - WHETHER ESSENTIAL ELEMENT OF WEAPON POSSESSION IN THE THIRD DEGREE (PENAL LAW § 265.02[1]), THAT DEFENDANT BE "PREVIOUSLY CONVICTED OF ANY CRIME," IS SATISFIED BY DEFENDANT'S GUILTY PLEA TO A PRIOR CRIME (SEE CPL 1.20[13]), OR ALSO REQUIRES IMPOSITION OF A SENTENCE BEFORE THE WEAPON POSSESSION CRIME IS COMMITTED;

Supreme Court, New York County convicted defendant, after a nonjury trial, of criminal possession of a weapon in the third degree and menacing in the second degree, and sentenced him to concurrent terms of 1 to 3 years and 1 year, respectively; App. Div. affirmed.

PRESERVER INSURANCE COMPANY v RYBA, et al.:

2ND Dept. App. Div. order of 2/13/07; affirmance; leave to appeal granted by Court of Appeals, 10/18/07;

INSURANCE - DISCLAIMER OF COVERAGE - APPLICABILITY OF INSURANCE LAW § 3420(d) - WHETHER NEW YORK'S RULE REQUIRING UNLIMITED LIABILITY IN WORKERS' COMPENSATION INSURANCE POLICIES PRECLUDES ENFORCEMENT OF A \$100,000 LIMIT IN AN EMPLOYERS' LIABILITY INSURANCE POLICY ISSUED IN NEW JERSEY;

Supreme Court, Rockland County denied plaintiff's motion for summary judgment declaring that it is not obligated to defend and indemnify the defendant in the underlying personal injury action, and granted Northern Assurance Company of America's (s/h/a One Beacon Insurance Company) cross motion for summary judgment declaring that plaintiff is obligated to defend and indemnify the defendant in the underlying action; App. Div. affirmed.

REGIONAL ECONOMIC COMMUNITY ACTION PROGRAM, INC., MATTER OF, v BERNASKI:

2ND Dept. App. Div. order of 5/22/07; affirmance; leave to appeal granted by Court of Appeals, 10/11/07;

TAXATION - EXEMPTIONS - WHETHER PROPERTIES OWNED BY TAX-EXEMPT CORPORATION ARE EXEMPT FROM TAXATION UNDER RPTL 420-a - USE OF PROPERTY PRIMARILY FOR CHARITABLE PURPOSES;

Supreme Court, Orange County denied a CPLR article 78 petition to review 12 determinations of the respondent which denied petitioner's applications for real property tax exemptions for properties owned by it and to direct respondent to grant a real property tax exemption for the tax year 2004-2005, and dismissed the proceeding; App. Div. affirmed.

SCARANGELLA &c., et al. v LABORDE a/k/a MAJID:

2ND Dept. App. Div. order of 8/8/07; denial of motion to reargue; sua sponte examination whether a substantial constitutional question is directly involved to support the appeal taken as of right and whether the order appeal from finally determines the action;

MOTIONS AND ORDERS - REARGUMENT OR RENEWAL - DENIAL OF MOTION FOR LEAVE TO REARGUE MOTION TO ENLARGE TIME TO PERFECT APPEAL;

App. Div. denied appellant's motion for leave to reargue his motion to enlarge the time to perfect an appeal from a July 26, 2006 judgment of Supreme Court, Dutchess County, which was determined by order dated May 4, 2007, and, in effect, to vacate so much of the May 4, 2007 order as dismissed the appeal, or, in the alternative, for leave to appeal to the Court of Appeals from the May 4, 2007 order.

TUTRANI, et al. v COUNTY OF SUFFOLK, et al.:

2ND Dept. App. Div. order of 7/17/07; reversal; leave to appeal granted by Court of Appeals, 10/18/07;

NEGLIGENCE - PROXIMATE CAUSE - PLAINTIFF, WHO STOPPED HER VEHICLE AND AVOIDED HITTING POLICE CAR THAT CAME TO ABRUPT STOP IN FRONT OF HER, WAS HIT BY ANOTHER CAR FROM BEHIND - DETERMINATION THAT POLICE OFFICER WAS NOT A PROXIMATE CAUSE OF THE ACCIDENT AS A MATTER OF LAW;

Supreme Court, Suffolk County awarded judgment in favor of plaintiffs and against the County defendants on the issue of liability, following a jury verdict on the issue of liability finding defendant police officer 50% at fault in the happening of the accident, upon the denial of the County defendants' application pursuant to CPLR 4401 for judgment as a matter of law made at the close of the evidence, and upon the denial of their oral application pursuant to CPLR 4404(a) to set aside the jury verdict and for judgment as a matter of law; App. Div. reversed, granted the County defendants' application pursuant to CPLR 4401 for judgment as a matter of law and dismissed the complaint insofar as asserted against those defendants.

TAG 380, LLC v ComMET 380, INC.:

1ST Dept. App. Div. order of 2/13/07; modification; leave to appeal granted by Court of Appeals, 10/16/07;

LANDLORD AND TENANT - LEASE - WHETHER THE PARTIES' LEASE REQUIRES THE TENANT TO MAINTAIN INSURANCE ON THE PREMISES NOT EXCLUDING TERRORISM AS A CAUSE FOR THE SPECIFICALLY COVERED PERILS; DECLARATORY JUDGMENT; DAMAGES; ATTORNEYS' FEES; REIMBURSEMENT FOR INSURANCE PREMIUMS PAID BY LANDLORD;

Supreme Court, New York County, among other things, granted defendant summary judgment on its first counterclaim and declared that defendant has a duty under section 6.01 of the parties' lease to obtain insurance which does not exclude coverage for terrorism; granted defendant summary judgment on its second counterclaim for attorneys' fees and the cost of premiums paid by defendant in October 2002 for terrorism insurance, and referred the matter to a special referee to assess damages; App. Div. modified to the extent of declaring that plaintiff has no duty under the lease to maintain terrorism coverage on the leased premises and vacating the award of damages and attorneys' fees to defendant, and awarded judgment in favor of plaintiff dismissing the counterclaims.

VAN NOSTRAND v FROEHLICH et al.:

2ND Dept. App. Div. order of 7/17/07; reversal;

INTEREST - PREJUDGMENT INTEREST - DATE FROM WHICH PREJUDGMENT INTEREST IS TO BE CALCULATED UNDER CPLR 5002 IN AN AUTOMOBILE-RELATED PERSONAL INJURY ACTION WHERE THE SERIOUS INJURY THRESHOLD IS AN ISSUE;

Supreme Court, Nassau County, in a second amended judgment, awarded plaintiff \$373,650, with interest calculated from the date of the jury verdict on the issue of damages; App. Div. reversed the second amended judgment, denied defendants' motion to modify the date of accrual of interest and reinstated the amended judgment with interest calculated from the date the order granting summary judgment was served with notice of entry.