

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed
by the Court of Appeals Clerk's Office
January 18 through January 24, 2008

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.

BERNSTEIN, MATTER OF (A DISBARRED ATTORNEY):

2ND Dept. App. Div. order of 11/19/07; 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;

ATTORNEY AND CLIENT - DENIAL OF MOTION TO VACATE ORDER DISBARRING RESPONDENT FROM THE PRACTICE OF LAW IN NEW YORK;

App. Div. denied respondent's motion to vacate an 8/20/01 order disbarring him from the practice of law in New York based on one charge of professional misconduct.

EPISCOPAL DIOCESE OF ROCHESTER, et al. v HARNISH, et al.:
4TH Dept. App. Div. orders of 9/28/07; affirmance; leave to appeal granted by Court of Appeals, 1/15/08;
RELIGIOUS CORPORATIONS AND ASSOCIATIONS - DETERMINATION OF CLAIM TO REAL PROPERTY - WHETHER SUPREME COURT AND APPELLATE DIVISION PROPERLY CONCLUDED, AS A MATTER OF LAW AND APPLYING NEUTRAL PRINCIPLES OF LAW, THAT ALL SAINTS PROTESTANT EPISCOPAL CHURCH HELD THE REAL PROPERTY AT ISSUE IN TRUST FOR THE EPISCOPAL DIOCESE OF ROCHESTER; SUMMARY JUDGMENT;
Supreme Court, Monroe County, among other things, granted the Episcopal Diocese of Rochester's motion for summary judgment awarding the real property at issue to it and dismissed All Saints Protestant Episcopal Church's CPLR article 78 proceeding; App. Div. affirmed in separate orders.

FARKAS v FARKAS:
1ST Dept. App. Div. order of 5/1/07, bringing up for review a prior nonfinal Appellate Division order of 6/2/98; reversal with dissents; leave to appeal granted by Court of Appeals, 1/10/08;
HUSBAND AND WIFE - EQUITABLE DISTRIBUTION - AWARD OF MARITAL ASSETS TO WIFE; EFFECT OF MARITAL OR ECONOMIC MISCONDUCT BY HUSBAND;
Supreme Court, New York County, among other things, awarded all marital assets to plaintiff wife; App. Div. affirmed;
thereafter, Supreme Court awarded plaintiff wife the principal sum of \$750,000 against defendant husband; App. Div. reversed, vacated the judgment and dismissed the claim underlying the judgment as abandoned pursuant to 22 NYCRR 202.48(b).

HAVANA CENTRAL NY2, LLC v LUNNEY'S PUB, INC.:
1ST Dept. App. Div. order of 12/27/07; modification, affirmance and dismissal with dissents; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution;
TORTS - INTERFERENCE WITH CONTRACTUAL RELATIONS - WHETHER DEFENDANT HOLDOVER TENANT WAS ENTITLED TO SUMMARY JUDGMENT DISMISSING CLAIM THAT IT INDUCED ITS LANDLORD TO BREACH A LEASE PROVISION TO TIMELY DELIVER THE LEASEHOLD PREMISES TO PLAINTIFF;
Supreme Court, New York County, granted so much of defendant's summary judgment motion as dismissed the second and third causes of action against the corporate defendant, denied such relief as to the first cause of action and denied without prejudice plaintiff's cross motion to amend and supplement the complaint (the "first order"); thereafter, Supreme Court granted the corporate defendant's motion to renew and reargue the prior order, adhered thereto and denied plaintiff's cross motion to renew (the "second order"); App. Div. modified the second order only to the extent of granting that branch of the cross motion seeking renewal of the motion to amend the complaint

to add HMU Lunney Restaurant Corp. as an additional party defendant and otherwise affirmed the order, and dismissed the appeal from the first order as superseded by the cross appeal from the second order.

RASHAUN S., MATTER OF (ANONYMOUS):

1ST Dept. App. Div. order of 12/20/07; affirmance with dissents; Rule 500.11 review pending;

INFANTS - JUVENILE DELINQUENTS - WHETHER EVIDENCE WAS LEGALLY SUFFICIENT TO ESTABLISH RESTRAINT ELEMENT (PENAL LAW § 135.00[1]) OF UNLAWFUL IMPRISONMENT IN THE SECOND DEGREE;

Family Court, New York County order of a disposition adjudicating appellant a juvenile delinquent upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of unlawful imprisonment in the second degree and menacing in the third degree, and placed him on probation for a period of one year; App. Div. affirmed.

SMITH (JAMIE), PEOPLE v:

2ND Dept. App. Div. order of 10/23/07; affirmance; leave to appeal granted by Court of Appeals, 1/10/08;

CRIMES - SEX OFFENDERS - SEX OFFENDER REGISTRATION ACT (SORA) - WHETHER COUNTY COURT PROPERLY ASSESSED 20 POINTS UNDER CATEGORY 7 OF THE RISK ASSESSMENT INSTRUMENT BECAUSE THE VICTIM WAS A STRANGER OR THE RELATIONSHIP WAS ESTABLISHED FOR PURPOSES OF VICTIMIZATION;

Suffolk County Court designated defendant a level two sex offender pursuant to Correction Law article 6-C; App. Div. affirmed.

STRINGER v MUSACCHIA, et al.:

3RD Dept. App. Div. order of 12/27/07; modification with dissents;

LABOR - SAFE PLACE TO WORK - LABOR LAW §§ 200, 240(1) AND 241 - WHETHER PLAINTIFF, WHO FELL FROM A LADDER WHILE CONSTRUCTING A SHED ON DEFENDANTS' PROPERTY, WAS A VOLUNTEER OR AN EMPLOYEE FOR PURPOSES OF PROTECTION UNDER LABOR LAW § 240; SUMMARY JUDGMENT; Supreme Court, Greene County, granted defendants' motion for summary judgment dismissing the complaint to the extent of dismissing the causes of action based on common law negligence and Labor Law §§ 200 and 241, and otherwise denied the motion; and granted plaintiff's cross motion for summary judgment on liability pursuant to Labor Law § 240(1); App. Div. modified by reversing so much of the order as granted plaintiff's cross motion for partial summary judgment and partially denied defendants' motion for summary judgment; denied plaintiff's cross motion; granted defendants' motion in its entirety; and dismissed the complaint.

TYDINGS v GREENFIELD, STEIN & SENIOR, LLP:

1ST Dept App. Div. order of 9/13/07; reversal; leave to appeal granted by App. Div., 1/15/08;

JUDGMENTS - COLLATERAL ESTOPPEL - PRECLUSIVE EFFECT, IF ANY, OF AN ORDER SUBSEQUENTLY REVIEWED ON APPEAL WHERE THE APPELLATE COURT UPHELD THE RESULT REACHED BY THE COURT OF FIRST INSTANCE BUT DID NOT USE THE SAME LEGAL REASONING AS THAT COURT - ALTERNATIVE HOLDING; LIMITATION OF ACTIONS - COMMENCEMENT OF LIMITATIONS PERIOD IN AN ACTION FOR AN ACCOUNTING BY A TRUSTEE; Supreme Court, New York County, granted defendant's motion to dismiss the complaint; App. Div. reversed, denied defendant's motion and reinstated the complaint.

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

2ND Dept. App. Div. order of 7/10/07; affirmance; leave to appeal granted by Court of Appeals, 1/10/08;

CONTRACTS - BREACH OF CONTRACT - CONTRACT FOR SALE OF REAL PROPERTY - SUPREME COURT JUDGMENT AGAINST NON-PARTY CHURCH IN UNJUST ENRICHMENT ACTION BETWEEN PRIOR OWNERS OF REAL PROPERTY WHICH CHURCH HAD CONTRACTED TO PURCHASE - CHURCH AS SIGNATOR TO STIPULATION TO SETTLE ACTION; DUE PROCESS; SUMMARY JUDGMENT; DECLARATORY JUDGMENT;

Supreme Court, Westchester County, among other things, declared that nonparty Korean Presbyterian Church breached a contract for the sale of real property between it and defendants Rose Ellen Benjamin, Joan C. Levy and Jerald Jay Levy and a stipulation of settlement; App. Div. affirmed.