

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed  
by the Court of Appeals Clerk's Office  
**September 26 through October 2, 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.**

BLOOMINGDALES, INC. v NEW YORK CITY TRANSIT AUTHORITY:

1<sup>ST</sup> Dept. App. Div. order of 5/15/08; reversal with dissents;  
leave to appeal granted by App. Div., 9/16/08;

LIMITATION OF ACTIONS - WHEN CAUSE OF ACTION ACCRUES - SEVERANCE  
OF STORM DRAINPIPE - PLAINTIFF'S EASEMENT TO SEWER - TIMELINESS  
OF TRESPASS AND PRIVATE NUISANCE CLAIMS FOR COSTS TO RESTORE CUT  
DRAINPIPE - APPLICABILITY OF CONTINUOUS WRONG DOCTRINE;

Supreme Court, New York County, among other things, granted  
motions by defendant Transit Authority and third-party defendants  
Judlau Contracting, Inc. and M-Track Enterprises, Inc. to  
dismiss, as time-barred, plaintiff's causes of action for  
trespass and nuisance; App. Div. reversed, denied the motions and  
reinstated the causes of action for trespass and nuisance.

BUCHANAN (INGVUE E.), PEOPLE v:

4<sup>TH</sup> Dept. App. Div. order of 6/6/08; affirmance with dissents; leave to appeal granted by Fahey, J., 9/15/08; CRIMES AND CRIMINAL PROCEDURE - PHYSICAL RESTRAINT OF DEFENDANT IN MURDER TRIAL - REQUIREMENT THAT DEFENDANT WEAR STUN BELT UNDER CLOTHING AT TRIAL - CLAIMED VIOLATION OF DUE PROCESS AND FAIR TRIAL; Chautauqua County Court convicted defendant, upon a jury verdict, of murder in the second degree; App. Div. affirmed.

JOY BUILDERS, INC., et al. v TOWN OF CLARKSTOWN, et al.:

2<sup>ND</sup> Dept. App. Div. order of 9/9/08; affirmance; 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; MUNICIPAL CORPORATIONS - ZONING - FINAL PLAT APPROVAL SUBJECT TO \$558,250 PAYMENT IN LIEU OF PARKLAND DEDICATION PURSUANT TO TOWN LAW § 277(4) - APPLICATION OF DOLAN v CITY OF TIGARD (512 US 374) - "INDIVIDUALIZED DETERMINATION" AND "ROUGH PROPORTIONALITY" -- TIMING OF TOWN'S IMPOSITION OF CONDITION REQUIRING PAYMENT IN LIEU OF PARKLAND DEDICATION; Supreme Court, Rockland County, partially denied a CPLR article 78 petition to review a determination of the Planning Board of the Town of Clarkstown, which, among other things, required the petitioners to pay a fee in lieu of parkland dedication as a condition of subdivision approval of a cluster residential development; App. Div. affirmed.

MAHONEY-BUNTZMAN v BUNTZMAN:

2<sup>ND</sup> Dept. App. Div. order of 5/13/08; modification and affirmance; leave to appeal granted by Court of Appeals, 9/16/08; HUSBAND AND WIFE - DIVORCE - VALUATION DATE FOR CORPORATE STOCK - CREDIT TO WIFE FOR ONE-HALF OF MAINTENANCE PAYMENTS MADE DURING MARRIAGE TO HUSBAND'S FORMER SPOUSE - CREDIT TO WIFE FOR ONE-HALF OF COST OF HUSBAND'S ADVANCED DEGREE - WHETHER CERTAIN MONIES WERE PROPERTY RATHER THAN INCOME; Supreme Court, Westchester County, among other things, fixed plaintiff wife's distributive award, did not award plaintiff a 50% credit with respect to separate property debts of defendant husband, did not direct defendant to continue paying the parties' children's college tuition and expenses to age 21, and set various asset valuation dates; App. Div. modified by increasing plaintiff's distributive award and by adding a provision directing defendant to pay for the parties' children's college tuition and expenses until they reach age 21, and affirmed the judgment as so modified.

MISICKI v 430-50 SHORE ROAD CORPORATION:

2<sup>ND</sup> Dept. App. Div. order of 5/6/08; reversal; leave to appeal granted by Court of Appeals, 9/16/08;

LABOR - SAFE PLACE TO WORK - LABOR LAW § 241(6) - WHETHER 12 NYCRR 23-9.2(a) IS SUFFICIENTLY SPECIFIC TO IMPOSE A NONDELEGABLE DUTY UPON OWNERS AND CONTRACTORS TO REMEDY AN UNSAFE CONDITION IN POWER-OPERATED EQUIPMENT UPON THE EMPLOYER'S NOTICE OF SUCH CONDITION;

Supreme Court, Kings County order, as amended by an order of the same court dated June 25, 2007, as upon reargument of that branch of defendant's prior motion which was for summary judgment dismissing the Labor Law § 241(6) cause of action insofar as asserted against it to the extent that it was premised upon and alleged violation of 12 NYCRR 23-9.2(a), which had been granted by a prior order of the same court dated April 11, 2006, vacated that portion of the prior order and denied that branch of its prior motion; App. Div. reversed the order dated March 8, 2007 as amended and, upon reargument, adhered to the original determination in the order dated April 11, 2006, granting that branch of the defendant's prior motion which was for summary judgment dismissing the Labor Law § 241(6) cause of action insofar as asserted against it to the extent that it was premised upon an alleged violation of 12 NYCRR 23-9.2(a).

PASSINO (KRISTERFER), PEOPLE v:

3<sup>RD</sup> Dept. App. Div. order of 7/3/08; affirmance; leave to appeal granted by Spain, J., 9/23/08; Rule 500.11 review pending; CRIMES AND CRIMINAL PROCEDURE - CONFESSION - QUESTIONING OF INMATE - WHETHER INMATE WAS SUBJECTED TO CUSTODIAL INTERROGATION - MIRANDA v ARIZONA (384 US 436) - PEOPLE v ALLS (83 NY2d 94); Washington County Court convicted defendant, upon his guilty plea, of placing a false bomb or hazardous substance in the second degree; App. Div. affirmed.

SELVY, MATTER OF (DECEASED):

2<sup>ND</sup> Dept. App. Div. order of 8/12/08; denial of poor person relief and enlargement of time to perfect an appeal; sua sponte examination whether the Appellate Division order finally determines the proceeding, whether a substantial constitutional question is directly involved to support the appeal taken as of right and whether the notice of appeal was properly filed pursuant to CPLR 5515(1); APPEAL - APPELLATE DIVISION - MOTION FOR POOR PERSON RELIEF; EXECUTORS AND ADMINISTRATORS - PROCEEDING REGARDING ESTATE; Surrogate's Court, Suffolk County order not provided; App. Div. denied appellant's motion for poor person relief, enlarged appellant's time to perfect the appeal until 9/15/08, and directed that no further enlargement of time shall be granted.

STERN v BLUESTONE:

1<sup>ST</sup> Dept. App. Div. order of 1/31/08; affirmance with dissents;

leave to appeal granted by App. Div., 9/25/08;

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CONSUMER - TELEPHONE CONSUMER PROTECTION ACT (TCPA) (47 USC § 227) - SUMMARY JUDGMENT - WHETHER "ATTORNEY MALPRACTICE REPORTS" DEFENDANT FAXED TO PLAINTIFF CONSTITUTED PROHIBITED ADVERTISEMENTS WITHIN THE MEANING OF THE TCPA - DEFENDANT'S WILLFUL AND KNOWING VIOLATION OF THE TCPA - STATUTE OF LIMITATIONS APPLICABLE TO THE TCPA - WHETHER "ATTORNEY MALPRACTICE REPORTS" CONSTITUTED PROTECTED SPEECH UNDER THE FEDERAL AND STATE CONSTITUTIONS;

Supreme Court, New York County, among other things, granted plaintiff's motion for partial summary judgment as to liability on his cause of action pursuant to the Telephone Consumer Protection Act of 1991 (47 USC § 227) and dismissed defendant's second affirmative defense; App. Div. affirmed.