

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed
by the Court of Appeals Clerk's Office
October 24 through October 30, 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.

ALLSTATE INSURANCE COMPANY, MATTER OF v RIVERA, et al.:
2ND Dept. App. Div. order of 4/1/08; affirmance; leave to appeal granted by Court of Appeals, 10/23/08;
INSURANCE - AUTOMOBILE INSURANCE - UNDERINSURED MOTORIST ENDORSEMENT - WHETHER THE TORTFEASOR'S VEHICLE WAS UNINSURED OR UNDERINSURED FOR PURPOSES OF TRIGGERING COVERAGE UNDER SUPPLEMENTARY UNINSURED/UNDERINSURED MOTORIST ENDORSEMENT (SUM) 11 NYCRR 60-2.3(f);
Supreme Court, Suffolk County granted a petition filed pursuant to CPLR article 75 to permanently stay arbitration of claims for underinsured motorist benefits; App. Div. affirmed.

BALIC (DZEMIL), PEOPLE v:

1ST Dept. App. Div. order 6/3/08; affirmance; leave to appeal granted by Court of Appeals, 10/16/08;
CRIMES AND CRIMINAL PROCEDURE - SEX OFFENDER REGISTRATION ACT (SORA) - WHETHER A CRIMINAL COMPLAINT, PREPARED BY A POLICE OFFICER BASED ON INFORMATION FROM THE VICTIM AND ALLEGING THAT DEFENDANT COMMITTED A SEX CRIME OF WHICH HE WAS NEVER CONVICTED, CONSTITUTES "RELIABLE HEARSAY" WITHIN THE MEANING OF CORRECTION LAW § 168-n(3) AND "CLEAR AND CONVINCING" EVIDENCE OF THE FACTS ALLEGED;
Supreme Court, New York County order adjudicating defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law article 6-C); App. Div. affirmed.

CLARENDON, MATTER OF v NUNEZ, et al.:

2ND Dept. App. Div. order of 2/5/08; reversal; leave to appeal granted by Court of Appeals, 10/23/08;
INSURANCE - AUTOMOBILE INSURANCE - UNDERINSURED MOTORIST ENDORSEMENT - WHETHER THE TORTFEASOR'S VEHICLE WAS UNINSURED OR UNDERINSURED FOR PURPOSES OF TRIGGERING COVERAGE UNDER SUPPLEMENTARY UNINSURED/UNDERINSURED MOTORIST ENDORSEMENT (SUM) - 11 NYCRR 60-2.3(f);
Supreme Court, Kings County denied a petition filed pursuant to CPLR article 75 to permanently stay arbitration of claims for underinsured motorist benefits; App. Div. reversed, granted the petition and permanently stayed arbitration.

MATTER OF BERKMAN (AN ATTORNEY):

2ND Dept. App. Div. order of 9/2/08; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;
ATTORNEY AND CLIENT - DISCIPLINARY PROCEEDING - SUSPENSION OF ATTORNEY - CLAIMED VIOLATION OF DUE PROCESS;
App. Div., among other things, granted petitioner's motion to confirm the Special Referee's report, and suspended respondent attorney for a period of three years.

INFANTE &c., MATTER OF v DIGNAN &c., et al:

4TH Dept. App. Div. order of 10/3/08; reversal with dissents;
PROCEEDING AGAINST BODY OR OFFICER - MANDAMUS - ARTICLE 78 PROCEEDING BY ESTATE ADMINISTRATOR SEEKING TO ANNUL THE MEDICAL EXAMINER'S DETERMINATION THAT DECEDENT'S DEATH WAS DUE TO SUICIDE AND TO COMPEL RESPONDENTS TO DETERMINE THAT THE DEATH WAS ACCIDENTAL OR DUE TO UNDETERMINED CIRCUMSTANCES - PRESUMPTION AGAINST SUICIDE; COUNTY LAW § 674(3); STANDARD OF REVIEW;
Supreme Court, Monroe County dismissed the CPLR article 78 petition; App. Div. reversed, granted the petition, annulled the determination and directed respondents to amend the death certificate of Rosemary A. Infante forthwith to state that the manner of death was accidental or undetermined circumstances.

JANONYMOUS, et al. v CITY OF ROCHESTER, et al.:

4TH Dept. App. Div. order of 10/10/08; reversal with dissents; CONSTITUTIONAL LAW - VALIDITY OF STATUTE - JUVENILE CURFEW - CHALLENGE TO APPELLATE DIVISION RULING THAT CHAPTER 45 OF THE CODE OF THE CITY OF ROCHESTER IS UNCONSTITUTIONAL UNDER THE UNITED STATES AND NEW YORK CONSTITUTIONS AND IS INCONSISTENT WITH FAMILY COURT ACT § 305.2 AND PENAL LAW § 30.00; Supreme Court, Monroe County denied plaintiff's motion for judgment declaring that certain sections of chapter 45 of the Code of the City of Rochester are unconstitutional and for an injunction enjoining defendants from enforcing that chapter and granted defendants' motion to dismiss the complaint; App. Div. reversed; denied defendants' motion, reinstated the complaint, granted plaintiffs' motion and granted judgment in favor of plaintiffs declaring that chapter 45 of the Code of the City of Rochester is unconstitutional under the United States and New York Constitutions and enjoining defendants from enforcing chapter 45 of the Code of the City of Rochester.

PETRONE v MC CLOY, et al.:

2ND Dept. App. Div. order of 7/8/08; modification and affirmance; leave to appeal granted by App. Div., 10/14/08; ANIMALS - LIABILITY FOR ANIMAL'S BEHAVIOR - POSTAL WORKER INJURED WHEN ELUDING UNLEASHED DOG; NEGLIGENCE - WHETHER A DOG OWNER MAY BE HELD LIABLE IN NEGLIGENCE FOR VIOLATION OF A LEASH LAW IN THE ABSENCE OF EVIDENCE OF THE DOG'S PRIOR VICIOUS PROPENSITIES; Supreme Court, Queens County, among other things, granted that branch of defendant Fernandez's motion seeking summary judgment dismissing the second cause of action as against him and, upon searching the record, awarded summary judgment dismissing the second cause of action as against defendant McCloy; App. Div. modified by deleting the provision which, upon searching the record, awarded summary judgment dismissing the second cause of action insofar as asserted against defendant McCloy.

RAGHAVENDRA, MATTER OF v COMMISSIONER OF LABOR:

3RD Dept. App. Div. order of 7/31/08; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right and whether notice of appeal was properly filed in the manner required by CPLR 5515(1); UNEMPLOYMENT INSURANCE - BENEFITS - DISQUALIFICATION - CLAIMED DENIAL OF DUE PROCESS AND EQUAL PROTECTION - RIGHTS OF THE PARTIES TO CALL AND CROSS-EXAMINE WITNESSES; App. Div. affirmed a March 23, 2007 decision of the Unemployment Insurance Appeal Board which, upon reconsideration, adhered to its prior decision ruling, among other things, that claimant was disqualified from receiving unemployment insurance benefits because his employment was terminated due to misconduct.

SARGISS v MAGARELLI:

2ND Dept. App. Div. order of 4/29/08; affirmance; leave to appeal granted by Court of Appeals, 10/16/08;

LIMITATION OF ACTIONS - FRAUD - WHETHER PLAINTIFF ESTABLISHED THAT THE ALLEGED FRAUD COULD NOT HAVE BEEN DISCOVERED PRIOR TO THE TWO-YEAR PERIOD BEFORE THE COMMENCEMENT OF THE ACTION - FAILURE TO PLEAD FRAUD WITH THE SPECIFICITY REQUIRED UNDER CPLR 3016(b);

Supreme Court, Westchester County granted the motion of defendant Marlene Margarelli and the separate motion of defendants Julius Sargiss, Alice Sargiss and Panrad Automotive Industries to dismiss the complaint, among other things, pursuant to CPLR 3016(b) for failure to plead fraud with particularity, and pursuant to CPLR 3211(a)(5) as time-barred; App. Div. affirmed.

SILVESTRY (ELVIS), PEOPLE v:

2ND Dept. App. Div. order of 4/15/08; affirmance; leave to appeal granted by Pigott, J., 9/26/08; Rule 500.11 review pending;

CRIMES AND CRIMINAL PROCEDURE - SUPPRESSION HEARING - STOP AND FRISK RESULTING IN RECOVERY OF GUN - WHETHER POLICE OFFICER HAD A REASONABLE SUSPICION THAT DEFENDANT WAS ENGAGED IN CRIMINAL ACTIVITY TO JUSTIFY THE STOP AND FRISK;

Supreme Court, Queens County granted that branch of defendant's omnibus motion which was to suppress physical evidence; App. Div. affirmed.

SMALLEY v BEMBEN:

4th Dept. App. Div. order of 4/25/08; reversal; leave to appeal granted by Court of Appeals, 10/23/08;

NEGLIGENCE - SNOW AND ICE - VIOLATION OF STATUTORY DUTY - WHETHER SECTION 413-50(A) OF THE BUFFALO CITY CODE IMPOSES LIABILITY ON PROPERTY OWNERS WHO FAILED TO CLEAR SNOW FROM A SIDEWALK ABUTTING THEIR PROPERTY WHERE A THIRD PARTY SLIPS ON THE SIDEWALK AND SUSTAINS INJURIES;

Supreme Court, Erie County denied defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(7); App. Div. reversed, granted defendant's motion to dismiss the complaint and dismissed the complaint.

SWAN (TROY), PEOPLE:

4TH Dept. App. Div. order of 4/25/08; affirmance; leave to appeal granted by Smith, J., 9/15/08;

CRIMES AND CRIMINAL PROCEDURE - PLEA OF GUILTY - SUFFICIENCY OF INDICTMENT OF AND ALLOCATION TO ESCAPE IN THE SECOND DEGREE (PENAL LAW § 205.10[1]) - WHETHER ESCAPE FROM GARDEN AREA OUTSIDE JAIL CONSTITUTES ESCAPE FROM "A DETENTION FACILITY" - WITHDRAWAL OF PLEA;

Cayuga County Court convicted defendant, upon his guilty plea, of escape in the second degree; App. Div. affirmed.

VINTAGE, LLC v LAW CONSTRUCTION CORP., et al.:

1ST Dept. App. Div. order of 2/26/08; reversal; leave to appeal granted by Court of Appeals, 10/16/08;

CONTRACTS - FORMATION OF CONTRACT - WHETHER SUFFICIENT EVIDENCE EXISTED FROM WHICH A JURY COULD DETERMINE THAT A JOINT VENTURE HAD BEEN FORMED AT A PARTICULAR TIME; JURY INSTRUCTIONS;

Supreme Court, Bronx County awarded plaintiff the principal sum of \$1.5 million against defendants Laws Construction, the Westway/Law Construction joint venture and United States Fidelity and Guaranty; App. Div. reversed, vacated the award and dismissed the complaint.