

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed
by the Court of Appeals Clerk's Office
January 30 through February 5, 2009

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.

AFFRI v BASCH:

2ND Dept. App. Div. order of 11/13/07; reversal; leave to appeal granted by Court of Appeals, 1/13/09;

LABOR - SAFE PLACE TO WORK - HOMEOWNER'S EXEMPTION - WHETHER DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT BASED ON APPLICATION OF THE HOMEOWNER EXEMPTION IN LABOR LAW § 240(1) - EXISTENCE OF FACT ISSUES AS TO WHETHER DEFENDANTS EXERCISED SUPERVISORY CONTROL OVER WORK;

Supreme Court, Kings County denied defendants' motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1); App. Div. reversed, granted defendants' motion for summary judgment dismissing the complaint and affirmed the order insofar as cross-appealed from.

BALZARINI, MATTER OF v SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES:

2ND Dept. App. Div. judgment of 9/2/08; leave to appeal granted by App. Div., 1/9/09;

SOCIAL SERVICES - MEDICAL ASSISTANCE - COMMUNITY SPOUSE INCOME ALLOWANCE - MEANING OF "EXCEPTIONAL CIRCUMSTANCES RESULTING IN SIGNIFICANT FINANCIAL DISTRESS" - 42 USC § 1396r-5(e)(2)(B) - SOCIAL SERVICES LAW § 366-c(8)(b);

App. Div. granted CPLR article 78 petition to the extent of annulling so much of the determination dated December 16, 2005 as affirmed so much of a determination dated May 26, 2005 as denied that portion of petitioner's application which was to increase the minimum monthly maintenance needs allowance to include expenses for housing, utilities, automobile, Medicare, food, clothing, medical care and home maintenance; vacated so much of the determination dated May 26, 2005 as denied that portion of the application; granted that portion of the application to the extent of remitting the matter to the New York State Department of Health for the calculation of the increase in the minimum monthly maintenance needs allowance; otherwise denied the petition; otherwise confirmed the determination dated December 16, 2005; and otherwise dismissed the proceeding on the merits.

BARBARA D. v FRANCIS D.(AND RELATED PROCEEDING):

1ST Dept. App. Div. order of 1/8/09; affirmance with dissents; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution and whether a jurisdictional basis otherwise exists to support an appeal as of right;

PARENT AND CHILD - VISITATION - SUPERVISED VISITATION; HABEAS CORPUS;

Supreme Court, New York County, among other things, denied former wife's motion for an order authorizing her to have unsupervised visitation with the parties' child, and dismissed proceeding for a writ of habeas corpus as moot; App. Div. affirmed.

BUFFALO PROFESSIONAL FIREFIGHTERS ASSOCIATION v MASIELLO, et al.:

4TH Dept. App. Div. order of 2/1/08; modification and affirmance; leave to appeal granted by Court of Appeals, 1/15/09;

ARBITRATION - CONFIRMING OR VACATING AWARD - COMPULSORY PUBLIC INTEREST ARBITRATION - WHETHER THE APPELLATE DIVISION PROPERLY MODIFIED AN ARBITRATION AWARD - SCOPE OF REVIEW - DEFERENCE TO ARBITRATION PANEL'S DETERMINATION OF THE SCOPE OF THE ISSUES BEFORE IT;

Supreme Court, Erie County, among other things, granted a petition to vacate a compulsory public interest arbitration award dated July 18, 2005; App. Div. modified by denying the petition in part and confirming the arbitration award with respect to wage increases, and affirmed the order as so modified.

BRADDOCK v BRADDOCK:

1ST Dept. App. Div. order of 1/6/09; modification and affirmance; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution; PLEADING - SUFFICIENCY OF PLEADING - CHALLENGE TO APPELLATE DIVISION ORDER HOLDING THAT THE COMPLAINT STATED CAUSES OF ACTION FOR FRAUD, BREACH OF FIDUCIARY DUTY AND PROMISSORY ESTOPPEL; Supreme Court, New York County granted defendants' motion to dismiss the complaint for failure to state a cause of action; App. Div. modified and denied defendants' motion to dismiss the complaint for failure to state a cause of action in part so as to reinstate the first, second, third, seventh, eighth and eleventh causes of action, and otherwise affirmed.

DINARDO v CITY OF NEW YORK et al.:

1ST Dept. App. Div. order of 12/23/08; affirmance with dissents; SCHOOLS - NEGLIGENCE - SPECIAL DUTY - LIABILITY OF BOARD OF EDUCATION - TEACHER INJURED WHILE BREAKING UP A FIGHT BETWEEN TWO STUDENTS IN HER CLASS; Supreme Court, Bronx County amended judgment awarding plaintiff damages in the total amount of \$512,465 against Board of Education and dismissing complaint as against City of New York; App. Div. affirmed.

GOMEZ, MATTER OF v STOUT, et al.:

2ND Dept. App. Div. judgment of 5/27/08; leave to appeal granted by Court of Appeals, 12/17/08; ADMINISTRATION LAW - ADMINISTRATIVE REVIEW - WHETHER THE COMMISSIONER OF THE WESTCHESTER COUNTY DEPARTMENT OF PARKS, RECREATION AND CONSERVATION COULD PROPERLY APPOINT COUNTY PUBLIC WORKS COMMISSIONER TO REVIEW A HEARING OFFICER'S RECOMMENDATION REGARDING THE EMPLOYMENT OF AN EMPLOYEE OF THE COUNTY DEPARTMENT OF PARKS, RECREATION AND CONSERVATION; EMPLOYEE'S ENTITLEMENT TO REINSTATEMENT, BACK PAY AND BENEFITS; App. Div. granted the CPLR article 78 petition; annulled the determination of the Commissioner of Westchester County Department of Parks, Recreation and Conservation which, upon a decision of the Commissioner of the Westchester County Department of Public Works, as designated agent, adopted the recommendation of a hearing officer, made after a hearing, finding the petitioner guilty of misconduct and incompetence and terminating petitioner's employment as Assistant Games Manager, Grade VII; and remitted to respondent for the appointment of a duly-qualified individual authorized to review the recommendation of the hearing officer.

HALE, MATTER OF v SELSKY:

3RD Dept. App. Div. judgment of 12/11/08; sua sponte examination whether any basis exists for an appeal as of right;

PRISONS AND PRISONERS - DISCIPLINE OF INMATES - WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE DETERMINATION OF GUILT WITH RESPECT TO REFUSING A DIRECT ORDER, CREATING A DISTURBANCE AND HARASSING AN EMPLOYEE; CLAIMED VIOLATION OF PRISONER'S RIGHTS TO CALL WITNESSES AND PRESENT DOCUMENTS;
App. Div. confirmed determination of Commissioner of Correctional Services which found petitioner guilty of violating certain prison disciplinary rules.

HOTALING, et al. v CITY OF NEW YORK et al.:

1ST Dept. App. Div. order of 10/21/08; reversal; leave to appeal granted by App. Div., 1/13/09; Rule 500.11 review pending;
NEGLIGENCE - MAINTENANCE OF PREMISES - NEGLIGENT DESIGN - STANDARD FOR ADMISSION OF EXPERT OPINION EVIDENCE ON GENERALLY ACCEPTED STANDARDS AND PRACTICES;
Supreme Court, New York County judgment upon a jury verdict in favor of plaintiffs and against defendants; App. Div. reversed and dismissed the complaint.

NEW YORK CHARTER SCHOOLS ASSOCIATION, INC., et al., MATTER OF v DINAPOLI et al.:

3RD Dept. App. Div. order of 1/15/09; reversal;
CONSTITUTIONAL LAW - SCHOOLS - CONSTITUTIONALITY OF GENERAL MUNICIPAL LAW § 33(2) AND EDUCATION LAW § 2854(1)(c), WHICH GRANT AUTHORITY TO STATE COMPTROLLER TO AUDIT CHARTER SCHOOLS;
Supreme Court, Albany County, among other things, granted petitioners' application, in a combined article 78 proceeding and declaratory judgment action, for a declaration that certain legislation violates New York Constitution, article V, § 1, to the extent that the statutes authorize respondent Comptroller to audit charter schools; App. Div. reversed, dismissed the petition/complaint and declared that the challenged statutes have not been shown to be unconstitutional.

RONDAK CONSTRUCTION SERVICES v KAATSBAAN INTERNATIONAL DANCE CENTER, et al.:

2ND Dept. App. Div. order of 9/23/08; reversal; leave to appeal granted by App. Div., 1/9/09;
EXECUTION - SHERIFF'S SALE - CHALLENGE TO APPELLATE DIVISION ORDER GRANTING MOTION TO SET ASIDE A JUDICIAL SALE OF REAL PROPERTY AND TO COMPEL SHERIFF TO ACCEPT DEFENDANT'S CERTIFIED CHECK IN FULL SATISFACTION OF A JUDGMENT AGAINST IT - CPLR ARTICLE 52 - TIFFANY v ST. JOHN, (65 NY 314);
Supreme Court, Dutchess County denied those branches of defendant's motion which were to set aside the judicial sale of certain real property owned by it and to compel the Dutchess County Sheriff to accept its certified check in full satisfaction of a judgment entered 2/23/06, which was in favor of plaintiff and against it in the total sum of \$105,631.05, and granted that

branch of the cross motion of nonparty TBays, LLC, the successful bidder at auction, which was pursuant to CPLR 5236(f) to direct the Dutchess County Sheriff to execute, and deliver to TBays, LLC, proofs of publication, service and posting of the notice of the sale and a deed conveying to TBays, LLC, the right, title and interest in the real property; App. Div. reversed, granted those branches of defendant's motion which were to set aside the judicial sale of the real property and to compel the Dutchess County Sheriff to accept its certified check in full satisfaction of the judgment, and denied that branch of the cross motion which was pursuant to CPLR 5236(f).

JOSEPH SINGER, DECEASED, MATTER OF (SINGER v SINGER):

2ND Dept. App. Div. order of 6/10/08; affirmance; leave to appeal granted by Court of Appeals, 1/20/09;

WILL - PROBATE - WHETHER RESPONDENT'S DEPOSITION OF TESTATOR'S FORMER ATTORNEY, WHICH IS NOT EXPRESSLY PROTECTED BY SAFE HARBOR PROVISIONS OF EPTL 3 - 3.5(b)(3)(D) AND SCPA 1404(4), VIOLATED IN TERROREM CLAUSES OF WILL EVEN THOUGH RESPONDENT NEVER OBJECTED TO PROBATE THEREOF;

Surrogate's Court, Kings County granted petition, determined that Alexander Singer violated the in terrorem clauses of the will and revoked his bequest under the will; App. Div. affirmed.