

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed
by the Court of Appeals Clerk's Office
June 12 through June 18, 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.

AMERICAN STANDARD, INC. v OAKFABCO, INC., &c.:

1ST Dept. App. Div. order of 1/15/09; modification and affirmance; leave to appeal granted by Court of Appeals, 6/9/09; PRODUCTS LIABILITY - LIABILITY OF MANUFACTURER'S SUCCESSOR CORPORATION - WHETHER AN ASSUMPTION OF LIABILITY CLAUSE APPLIED ONLY TO TORT CLAIMS ACTUALLY ASSERTED BEFORE THE DATE OF THE AGREEMENT OR EXTENDED TO ALL TORT CLAIMS BY PLAINTIFFS INJURED BY BOILERS SOLD OR INSTALLED BEFORE 1970 - ALLEGED CONFLICT BETWEEN APPELLATE DIVISION DECISION AND HOWARD ASSOCS. v GENERAL HOUSEWARES CORP. (63 NY2d 291) - DEFENDANT PERMANENTLY ENJOINED FROM RELITIGATING ITS ASSUMPTION OF LIABILITY IN ANY FORUM; DENIAL OF CROSS MOTION FOR A DECLARATORY JUDGMENT UPON THE GROUNDS THAT DEFENDANT DID NOT PLEAD ANY COUNTERCLAIMS FOR DECLARATORY RELIEF AND THAT, IN ANY EVENT, THE CROSS MOTION DID NOT PRESENT A JUSTICIABLE CONTROVERSY; Supreme Court, New York County granted plaintiff's motion for summary judgment to the extent of declaring that "in this jurisdiction, [defendant] is liable for injuries sustained as a result of tortious conduct in connection with Kewanee boilers installed prior to 1970," and granted defendant's cross motion for summary judgment declaring that, notwithstanding any

assumption by defendant of plaintiff's obligations to persons claiming personal injury as a result of exposure to Kewanee boilers manufactured before 1970, plaintiff remained directly liable to personal injury plaintiffs for injuries caused by Kewanee boilers installed before 1970; App. Div. modified to add the words "sold, leased or" immediately before the word "installed" in the declaration, to delete the phrase "in this jurisdiction" from the declaration, to permanently enjoin defendant from relitigating its assumption of the aforementioned obligations in any forum, and to deny defendant's cross motion, and otherwise affirmed.

ASSI (MAZIN), PEOPLE v:

1ST Dept. App. Div. order of 3/26/09; affirmance; leave to appeal granted by Pigott, J., 6/12/09;
CRIMES - HATE CRIMES - WHETHER HATE CRIMES ACT OF 2000 APPLIES TO CRIMES DIRECTED AT BUILDINGS - MOLOTOV COCKTAIL THROWN AGAINST DOOR OF SYNAGOGUE - WHETHER CRIME TOOK PLACE BEFORE OR AFTER EFFECTIVE DATE OF THE STATUTE; JURORS - PEOPLE'S ALLEGED INTENTIONAL EXCLUSION OF YOUNG ADULTS FROM THE JURY;
Supreme Court, Bronx County convicted defendant, upon a jury verdict, of attempted arson in the third degree as a hate crime, criminal mischief in the third degree as a hate crime, criminal possession of a weapon in the third degree (two counts) and aggravated harassment in the first degree, and imposed sentence; App. Div. affirmed.

DALY (JOHN), PEOPLE v:

2ND Dept. App. Div. order of 12/23/08; modification and affirmance; leave to appeal granted by Graffeo, J., 6/9/09;
CRIMES - TRIAL - ALLEGED PREJUDICIAL "SPILLOVER EFFECT" OF ROSARIO AND BRADY VIOLATIONS FOR WHICH CONVICTIONS ON COUNTS ARISING OUT OF AN INCIDENT AT ONE SITE WERE VACATED WITH RESPECT TO JOINTLY-TRIED COUNTS ARISING OUT OF A SEPARATE INCIDENT AT A DIFFERENT SITE AS TO WHICH CONVICTIONS WERE AFFIRMED;
Nassau County Court denied defendant's CPL 440.10 motion to vacate a judgment of the same court rendered January 6, 2003, convicting defendant, upon a jury verdict, of robbery in the first degree (six counts), assault in the first degree (two counts) and attempted robbery in the first degree (two counts), and imposing sentence by an amended sentence dated February 4, 2003; App. Div. modified by deleting the provision of the order denying that branch of defendant's CPL 440.10 motion which was to vacate that portion of the January 6, 2003 judgment convicting defendant of robbery in the first degree under counts one through six of the indictment, and assault in the first degree under count eight of the indictment, and substituting therefor a provision granting that branch of the defendant's motion and

vacating the sentences imposed thereon by the amended sentence dated February 4, 2003; affirmed the order as so modified; and remitted to County Court for a new trial on counts one through six and eight of the indictment.

DEVONE (DAMIEN), PEOPLE v:

3RD Dept. App. Div. order of 12/24/08; reversal; leave to appeal granted by Read, J., 5/26/09;
CRIMES - SUPPRESSION HEARING - WHETHER REASONABLE SUSPICION OF DRUG-RELATED CRIMINAL CONDUCT IS A PREREQUISITE TO A CANINE SNIFF OF THE EXTERIOR OF A CAR STOPPED FOR A TRAFFIC VIOLATION; SEARCH; Schenectady County Court granted defendant's motion to suppress evidence; App. Div. reversed, denied defendant's motion to suppress evidence, and remitted the matter to Schenectady County Court for further proceedings not inconsistent with the decision.

GLATZER v BEAR, STERNS & CO., et al.; Glatzer v Cardozo, et al.:

1ST Dept. App. Div. order of 4/30/09; dismissal of appeals; sua sponte examination whether so much of the App. Div. order as denies a motion for a stay finally determines an action within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right;

APPEAL - CHALLENGE TO APPELLATE DIVISION ORDER GRANTING DEFENDANTS' MOTIONS AND CROSS MOTIONS TO DISMISS PLAINTIFF'S APPEALS FROM SUPREME COURT ORDERS AND DENYING PLAINTIFF'S MOTION FOR A STAY;

Supreme Court, Bronx County granted defendants' motion to dismiss the complaint in Glatzer v Bear, Sterns & Co.; the same court (different Justice) denied plaintiff's order to show cause to strike defendants' motions to dismiss as untimely and granted defendants' motions to dismiss the complaint in Glatzer v Cardozo; App. Div. granted defendants' motions and cross motions to dismiss plaintiff's appeals from the Supreme Court orders and denied plaintiff's motion for a stay of further proceedings with respect to the appeals pending resolution of proceedings pending in federal court.

PETTIGREW (AVERY), PEOPLE v:

1ST Dept. App. Div. order of 2/19/09; affirmance; leave to appeal granted by Court of Appeals, 6/11/09;
CRIMES - SEX OFFENDERS - SEX OFFENDER REGISTRATION ACT (SORA) - CHALLENGE TO DESIGNATION OF DEFENDANT AS A LEVEL THREE SEX OFFENDER - WHETHER CLEAR AND CONVINCING EVIDENCE SUPPORTED COUNTY COURT'S POINT ASSESSMENTS UNDER THE RISK FACTORS OF BEING ARMED WITH A DANGEROUS INSTRUMENT, HISTORY OF DRUG ABUSE AND FAILURE TO ACCEPT RESPONSIBILITY;
Supreme Court, New York County adjudicated defendant a level three sex offender under SORA (Correction Law article 6-C); App. Div. affirmed.

RIVERA (ALEX), PEOPLE v:

2ND Dept. App. Div. order of 3/10/09; modification and affirmance; leave to appeal granted by Lippman, Ch. J., 6/10/09; CRIMES - VERDICT - PROPRIETY OF TRIAL COURT'S REJECTION OF JURY'S PARTIAL VERDICT; ADJUDICATION OF DEFENDANT AS A PERSISTENT VIOLENT FELONY OFFENDER - SPECIFICITY OF PROOF OF VIOLENT FELONY; RIGHT TO COUNSEL - ALLEGED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL;

Supreme Court, Kings County convicted defendant, upon a jury verdict, of robbery in the first degree (three counts), criminal possession of a weapon in the third degree, burglary in the first degree, burglary in the third degree, petit larceny, and unlawful imprisonment in the second degree (three counts), and sentenced him to consecutive terms of 25 years to life imprisonment on each of the three counts of robbery in the first degree, to run concurrently with the terms of 25 years to life imprisonment on the convictions of criminal possession of a weapon in the third degree, burglary in the first degree, and burglary in the third degree, and determinate terms of one year imprisonment on convictions of petit larceny and unlawful imprisonment in the second degree (three counts); App. Div. modified the judgment by (1) vacating the sentence imposed on the count of burglary in the third degree and (2) providing that the remaining sentences imposed shall run concurrently with each other; affirmed the judgment as so modified; and remitted to Supreme Court for resentencing on the count of burglary in the third degree in accordance with Penal Law § 70.10(2), with that sentence to run concurrently with the sentences imposed on the remaining counts.

VETTER, MATTER OF v BOARD OF EDUCATION, RAVENA-COEYMANS-SELKIRK CENTRAL SCHOOL DISTRICT, et al.:

3RD Dept. App. Div. order of 7/10/08; modification; leave to appeal granted by Court of Appeals, 6/9/09; PROCEEDING AGAINST BODY OR OFFICER - CPLR ARTICLE 78 PROCEEDING BY PROBATIONARY TEACHER TERMINATED WITHOUT 30 DAYS NOTICE PURSUANT TO EDUCATION LAW § 3019-a - RIGHT TO ATTORNEYS' FEES AS A "PREVAILING PARTY" PURSUANT TO 49 USC § 1988 WHERE RESPONDENT VOLUNTARILY PROVIDED THE REQUESTED NAME-CLEARING HEARING AND NO CONSENT DECREE OR COURT JUDGMENT WAS ENTERED; EMPLOYMENT RELATIONSHIPS;

Supreme Court, Albany County denied petitioner's application for 30 days pay, granted petitioner's application for attorney's fees with respect to the portion of the petition seeking a name-clearing hearing, and directed petitioner to provide an itemized list of the time spent on that portion of petitioner's claim; App. Div. modified by reversing so much of the Supreme Court order as awarded petitioner counsel fees, and dismissed the petition to that extent.

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

3RD Dept. App. Div. order of 4/16/09; affirmance; sua sponte examination whether any jurisdictional basis exists to support an appeal as of right;

PRISONS AND PRISONERS - MEDICAL AND SURGICAL TREATMENT - DISMISSAL OF CPLR ARTICLE 78 PROCEEDING CHALLENGING RESPONDENT'S ALLEGED FAILURE TO PROVIDE NECESSARY MEDICAL CARE;

Supreme Court, Albany County dismissed petitioner's application, in a CPLR article 78 proceeding, to review a determination of the Central Office Review Committee denying a grievance he filed seeking to compel facility medical personnel to provide him with certain medication; App. Div. affirmed.

WORD, MATTER OF v SUPERINTENDENT OF BEDFORD HILLS CORRECTIONAL FACILITY, et al.:

2ND Dept. App. Div. order of 6/2/09; dismissal of appeal; 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;

GRAND JURY - APPLICATION BY PRISONER FOR SUPREME COURT TO IMPANEL GRAND JURY REGARDING ALLEGED MISCONDUCT BY DEPARTMENT OF CORRECTIONAL SERVICES MEDICAL PERSONNEL; APPEAL - APPELLATE DIVISION - DISMISSAL OF APPEAL - SUPREME COURT ORDER NOT APPEALABLE AS OF RIGHT - CPLR 5701(b);

Supreme Court, Westchester County denied petitioner's application for the court to impanel a grand jury; App. Div. dismissed appeal.