



*State of New York
Court of Appeals*

Vol. 43 - No. 39
10/11/23

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COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed
by the Court of Appeals Clerk's Office

September 29, 2023 through October 5, 2023

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. For those appeals that proceed to briefing in the normal course, the briefing schedule generally will be: appellant's brief to be filed within 60 days after the appeal was taken; respondent's brief to be filed within 45 days after the due date for the filing of appellant's brief; and a reply brief, if any, to be filed within 15 days after the due date for the filing of respondent's brief.

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.

122 EAST 42nd STREET LLC v SCHARF:

1st Dept. App. Div. order of 12/15/22; affirmance; leave to appeal granted by the Court of Appeals, 9/21/23;

Suretyship and Guarantee—Scope of Guarantee—Whether plaintiff's guarantee against defendants as guarantors of the lease with nonparty tenant was enforceable; Supreme Court, New York County, granted plaintiff's motion under CPLR 3213 for summary judgment in lieu of complaint on the parties' guarantee; Supreme Court, New York County, entered judgment in favor of plaintiff and against defendants in the amount of \$1,273,299.36; App. Div. affirmed.

MATTER OF BODENMILLER v DINAPOLI:

3rd Dept. App. Div. order of 4/13/23; confirmation of determination; leave to appeal granted by the Appellate Division 9/15/23;

Civil Service—Retirement and Pension Benefits—Whether Matter of Kelly v DiNapoli, 30 NY3d 674 (2018), permit the denial of an application for accidental disability retirement benefits upon a finding that a condition should have been “reasonably anticipated”; whether a determination that an applicant should have “reasonably anticipated” the hazard resulting in injury support a denial of an application when the record otherwise fails to demonstrate that the hazard was an inherent risk of the applicant’s job or that the application had actual or direct knowledge of the hazard;

App. Div., in a proceeding pursuant to CPLR article 78 to review a determination of respondent denying petitioner’s application for accidental disability retirement benefits, confirmed determination, and dismissed the petition.

MATTER OF BOISE v CITY OF PLATTSBURGH:

3rd Dept. App. Div. order of 8/17/23; modification; sua sponte examination of whether the order appealed from finally determines the proceeding within the meaning of the Constitution;

Environmental Conservation—Environmental Impact Statement—Whether petitioners had standing to challenge findings under State Environmental Quality Review Act; Whether respondents ZBA and Planning Board failed to take the requisite hard look at the environmental impacts of the project with regard to the common loon and the disturbance of contaminated soil at the project site; Supreme Court, Clinton County, granted petitioners’ application, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, to, among other things, annul a determination of respondent City of Plattsburgh Planning Board granting the request of respondent Prime Plattsburgh, LLC for subdivision and site plan approval; App. Div., with two Justices dissenting, modified, by reversing so much of the judgment as annulled the portion of the SEQRA findings statement of respondents City of Plattsburgh Planning Board and City of Plattsburgh Zoning Board of Appeals as to the common loon; dismissed said portion of petitioner’s CPLR article 78 proceeding and declaratory judgment action; and, as so modified, affirmed.

FARAGE v AIM CORP:

1st Dept. App. Div. order of 11/10/22; affirmance; leave to appeal granted by the Court of Appeals, 9/19/23;

Limitations of Actions—Contractual Limitations Period—Whether the courts below erroneously applied the doctrines governing contractual reductions of statute of limitations in insurance policies that require completion of repairs before a suit can commence when the repairs take longer to complete than the contractually altered statute of limitations; whether the lower courts decisions are in contravention of this Court’s holding in *Executive Plaza, LLC v Peerless Insurance Co.*, 22 NY3d 511 (2014);

Supreme Court, New York County, granted defendants Tower Insurance Company of New York, AmTrust Financial Services, Inc., AmTrust North America, Castlepoint

Insurance Company, Tower Risk Management Corp., Tower Group, Inc., and Tower Group Companies' (Tower defendants) motion to dismiss the complaint in its entirety pursuant to CPLR 3211 (a) (1) and (7), and denied as moot defendants E.G. Bowman Co. and Mark Lauria Associates, Inc.'s (broker defendants) motions to dismiss the complaint, plaintiff's motion to amend the complaint to add causes of action for negligence against the broker defendants, and plaintiff's motion for leave to serve a second supplemental summons and amended complaint to add Technology Insurance Company, Inc. as a defendant; App. Div. affirmed.

GURVEY v STATE OF NEW YORK:

Court of Claims order of 8/15/23; denial; sua sponte examination of whether a direct appeal lies from the Court of Claims order; Rule 500.11 review pending;

Appeal—Direct Appeal—Court of Claims order denying permission to file a claim; Court of Claims, denied permission to file a claim.

LAWSON (CLEVELAND) A/K/A MARKS (EMANUEL), PEOPLE v:

1st Dept. App. Term order of 4/17/23; affirmance; leave to appeal granted by Singas, J., 9/22/23;

Crimes—Suppression Hearing—Whether the trial court has the authority to revisit its suppression ruling and grant suppression based on a new legal theory that was not litigated at the suppression hearing;

Criminal Court, New York City, convicted defendant, upon his guilty plea, of driving while intoxicated, and imposed sentence; App. Term affirmed.

MATTER OF McCABE v 511 WEST 232nd:

1st Dept. App. Div. order of 3/23/23; affirmance; leave to appeal granted by the Court of Appeals, 9/21/23;

Condominiums and Cooperatives—Board of Directors—Whether determination of respondent, which denied petitioner's request to transfer the shares and proprietary lease of the subject cooperative unit to petitioner, resulted from marital status discrimination; Supreme Court, Bronx County, denied the petition to annul the determination of respondent cooperative board, dated October 27, 2021, which declined to transfer the shares and proprietary lease for the subject cooperative unit to petitioner, and dismissed the CPLR article 78 proceeding; App. Div. affirmed.

AMBER R. v PEDIATRIC & ADOLESCENT URGENT CARE:

4th Dept. App. order of 7/28/23; reversal; Rule 500.11 review pending;

Judgments—Summary Judgment—Whether defendants established entitlement to summary judgment in medical malpractice action; allegation that doctor acted negligently in intubation of infant;

Supreme Court, Erie County, denied in part the motion of defendants for summary judgment dismissing the amended complaint; App. Div., with two Justices dissenting, reversed, granted the motion, and dismissed the amended complaint.

SZYPULA v SZYPULA:

3rd Dept. App. Div. order of 11/23/22; modification; leave to appeal granted by the Court of Appeals, 9/19/23;

Husband and Wife and Other Domestic Relationships—Equitable

Distribution—Whether pension credits earned prior to the marriage, but acquired during the marriage with marital funds, are martial or separate property;

Supreme Court, Tompkins County, ordered, among other things, equitable distribution of the parties' marital property upon a decision of the court; App. Div. modified the judgment by reversing so much thereof as determined that defendant's military pension credits earned prior to the marriage were marital property and directed equitable distribution thereof equally to the parties based on *Majauskas v Majauskas*, remitted to Supreme Court for further proceedings not inconsistent with the Court's decision, and, as so modified, affirmed.