

COURT OF APPEALS NEW FILINGS

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

November 8, 2013 through November 14, 2013

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.

HEATHER A.C., MATTER OF v MICHAEL J.N.:

4TH Dept. App. Div. order of 6/14/13; reversal; 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;
PARENT, CHILD AND FAMILY - CUSTODY - MODIFICATION - CHANGED CIRCUMSTANCES - CHILD'S ANXIETY OVER LIVING WITH FATHER - BEST INTEREST ANALYSIS;
Family Court, Oneida County, in a proceeding pursuant to Family Court Act article 6, dismissed that part of the petition seeking a modification of custody; App. Div. reversed, granted the petition in part by awarding primary physical custody of the child to petitioner mother and visitation to respondent father, and remitted the matter to Family Court to fashion an appropriate visitation schedule.

DELLAPORTE, MATTER OF v NEW YORK CITY DEPARTMENT OF BUILDINGS, et al.:

1st Dept. App. Div. order of 5/7/13; reversal; leave to appeal granted by App. Div., 10/15/13; Rule 500.11 review pending; PROCEEDING AGAINST BODY OR OFFICER - CERTIORARI - LICENSE OR EMPLOYMENT APPLICATION - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT THE DETERMINATION OF RESPONDENT NEW YORK CITY DEPARTMENT OF BUILDINGS DENYING PETITIONER'S APPLICATION TO RENEW HIS STATIONARY ENGINEER LICENSE LACKED A RATIONAL BASIS; Supreme Court, New York County, denied a CPLR article 78 petition to annul a determination that denied petitioner's application to renew his stationary engineer license, and dismissed the proceeding; App. Div. reversed, vacated the judgment, granted the petition and remanded the matter to respondent New York City Department of Buildings.

JOHNSON (JEFFREY), PEOPLE v:

1st Dept. App. Div. order of 8/27/13; reversal with dissents; leave to appeal granted by Andrias, J., 10/17/13; Rule 500.11 review pending; CRIMES - SUPPRESSION HEARING - DEFENDANT COMING DOWN STAIRS IN PUBLIC HOUSING BUILDING ASKED FOR IDENTIFICATION BY POLICE - WHETHER CIRCUMSTANCES IN POLICE ENCOUNTER PROVIDED AN OBJECTIVE CREDIBLE REASON FOR A LEVEL ONE REQUEST FOR INFORMATION; Supreme Court, Bronx County, convicted defendant of attempted criminal possession of a weapon in the fourth degree, and attempted possession of ammunition, and sentenced him to an unconditional discharge; App. Div. reversed, granted defendant's suppression motion, and dismissed the accusatory instrument.

KIGIN, MATTER OF v STATE OF NEW YORK WORKERS' COMPENSATION BOARD:

3rd Dept. App. Div. order of 7/18/13; affirmance; leave to appeal granted by Court of Appeals, 10/22/13; WORKERS' COMPENSATION - TREATMENT AND CARE OF INJURED EMPLOYEES - WORKERS' COMPENSATION BOARD'S AUTHORITY TO PROMULGATE MEDICAL TREATMENT GUIDELINES (GUIDELINES) - WHETHER THE GUIDELINES IMPROPERLY SHIFT THE BURDEN OF PROOF TO MEDICAL TREATMENT PROVIDERS TO DEMONSTRATE MEDICAL NECESSITY FOR THE CARE THEY SEEK TO PROVIDE TO WORKERS' COMPENSATION CLAIMANTS - ALLEGED DUE PROCESS VIOLATION; App. Div. affirmed a Workers' Compensation Board determination that denied claimant's request for a variance from the Medical Treatment Guidelines which set forth the medical procedures, and the scope and duration of those procedures, that do not require pre-authorization from the employer/carrier.

KIMSO APARTMENTS, LLC v GANDHI:

2nd Dept. App. Div. order of 3/13/13; modification; leave to appeal granted by Court of Appeals, 10/22/13; PLEADING - AMENDMENT - COUNTERCLAIM - DEFENDANT'S APPLICATION AT THE CONCLUSION OF TRIAL TO CONFORM THE PLEADINGS TO THE PROOF TO INCLUDE A COUNTERCLAIM ALLEGING THAT PLAINTIFFS BREACHED A SETTLEMENT AGREEMENT BY FAILING TO MAKE PAYMENTS ALLEGEDLY OWED

TO HIM PURSUANT TO THAT AGREEMENT AND FOR JUDGMENT IN HIS FAVOR ON THAT COUNTERCLAIM - WHETHER THE APPELLATE DIVISION ERRED IN DETERMINING THAT SUPREME COURT SHOULD HAVE DENIED DEFENDANT'S APPLICATION AS BARRED BY THE DOCTRINE OF LACHES; Supreme Court, Richmond County, among other things, granted defendant/counterclaim plaintiff's application to conform the pleadings to the proof to include a counterclaim alleging that the plaintiffs/counterclaim defendants breached a settlement agreement dated 8/14/02, by failing to make payments owed to him pursuant to that agreement and for judgment on that counterclaim; Supreme Court then awarded judgment in favor of defendant/counterclaim plaintiff and against plaintiffs/counterclaim defendants in the principal sum of \$1,700,000 on that counterclaim, dismissed the complaint, and dismissed the counterclaim for costs and fees; App. Div. modified the judgment by deleting the second, third, fourth and fifth decretal paragraphs thereof; denied the application to conform the pleadings to the proof to include a counterclaim for payments allegedly due pursuant to an 8/14/02 settlement agreement and for judgment on that counterclaim, and modified the Supreme Court order accordingly.

MOTELSON v FORD MOTOR COMPANY:

2ND Dept. App. Div. order of 12/19/12; reversal; leave to appeal granted by Court of Appeals, 10/22/13;

DAMAGES - MENTAL ANGUISH - RECOVERY BY PERSONS WITHIN ZONE OF DANGER - RECOVERY OF DAMAGES BY SON AND GRANDSON OF PERSON WHO WAS KILLED IN A CAR ACCIDENT THAT OCCURRED WHEN THE SON AND GRANDSON WERE OCCUPANTS - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT THE ISSUE OF WHETHER DECEDENT'S SON AND GRANDSON SUFFERED EMOTIONAL DISTRESS BECAUSE THEY WERE PLACED IN THE DECEDENT'S ZONE OF DANGER "WAS NOT SUBMITTED TO THE JURY"; Supreme Court, Richmond County, among other things, upon an amended order dated 3/26/09, and upon the jury verdicts, and upon the stipulations of the plaintiffs in Action No. 2 to reduce the verdicts in their favor with respect to damages, awarded damages to Michael J. Motelson, as Administrator of the Estate of Steven Motelson, in the principal sum of \$1,327,000, awarded damages to Enid Motelson in the principal sum of \$3,673,000, and directed a new trial in Action No. 1 on the issue of damages only; App. Div. (1) dismissed, as subsumed in the appeal from the judgment, Ford's appeals from so much of an amended order as denied branches of Ford's motions pursuant to CPLR 4404 to set aside the jury verdict in favor of plaintiffs and against them in Action No. 2; (2) reversed the amended order insofar as reviewed, and denied that branch of plaintiffs' cross motion which was to set aside the jury verdict in favor of Ford and against them in Action No. 1; and (3) modified Supreme Court's order and judgment by deleting the provisions thereof directing a new trial in Action No. 1 on the issue of damages only, and substituting therefor a provision directing the entry of judgment dismissing the complaint in Action No. 1 in its entirety.

SIERRA v 4401 SUNSET PARK, LLC:

2ND Dept. App. Div. order of 12/19/12; affirmance; leave to appeal granted by Court of Appeals, 10/22/13;

INSURANCE - DUTY TO DEFEND AND INDEMNIFY - NOTICE OF DISCLAIMER -
WHETHER INSURER SATISFIED THE REQUIREMENTS OF INSURANCE LAW
§ 3420(d) BY SENDING NOTICE OF DISCLAIMER TO PRIMARY INSURER BUT
NOT TO ADDITIONAL INSUREDS;

Supreme Court, Kings County, granted that branch of the motion of
defendants/third-party plaintiffs which was for summary judgment
declaring that third-party defendant Scottsdale Insurance Company
is obligated to defend and indemnify defendants/third-party
plaintiffs in the main action, and denied Scottsdale Insurance
Company's cross motion, among other things, for summary judgment
declaring that it is not obligated to defend and indemnify
defendants/third-party plaintiffs in the main action; App. Div.
affirmed and remitted the matter to Supreme Court for entry of a
judgment, among other things, declaring that third-party
defendant Scottsdale Insurance Company is obligated to defend and
indemnify defendants and third-party plaintiffs in the main
action.