

COURT OF APPEALS NEW FILINGS

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

January 1 through January 7, 2010

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.

ANONYMOUS, MATTER OF, AN APPLICANT FOR ADMISSION TO THE BAR:

3RD Dept. App. Div. order of 11/19/09; denial of motion; 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;

ATTORNEY AND CLIENT - ADMISSION TO PRACTICE - CHALLENGE TO APPELLATE DIVISION ORDER DENYING BAR APPLICANT'S MOTION TO VACATE APPELLATE DIVISION ORDER DENYING HIS APPLICATION FOR ADMISSION TO THE BAR AND FOR OTHER RELIEF;

App. Div. denied applicant's motion to vacate a 4/16/09 order denying his application for admission to the Bar, and for other relief.

DEJESUS v ALBA:

1ST Dept. App. Div. order of 6/9/09; reversal with dissents; leave to appeal granted by App. Div., 11/5/09; Rule 500.11 review pending;

MOTOR VEHICLES - INJURIES TO PEDESTRIANS - WHETHER TRIABLE ISSUE OF FACT EXISTED PRECLUDING SUMMARY JUDGMENT FOR DEFENDANTS; Supreme Court, Bronx County denied defendants' motion for summary judgment dismissing the complaint; App. Div. reversed, granted defendants' motion for summary judgment and directed the Clerk to enter judgment in defendants' favor dismissing the complaint.

EANONYMOUS, MATTER OF, AN APPLICANT TO THE BAR:

2ND Dept. App. Div. order of 12/1/09; denial of motion; 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;

ATTORNEY AND CLIENT - ADMISSION TO PRACTICE - CHALLENGE TO APPELLATE DIVISION ORDER DENYING APPLICANT'S MOTION FOR LEAVE TO REARGUE HIS PETITION FOR ADMISSION OR FOR LEAVE TO APPEAL TO THE COURT OF APPEALS;

App. Div. denied applicant's petition for admission to the bar and dismissed the proceeding; thereafter, the same court denied applicant's motion for reargument or leave to appeal to the Court of Appeals.

L&L PAINTING COMPANY, INC. v THE CONTRACT DISPUTE RESOLUTION BOARD OF THE CITY OF NEW YORK, et al.:

1ST Dept. App. Div. order of 12/17/09; affirmance with dissents; Rule 500.11 review pending;

PROCEEDING AGAINST BODY OR OFFICER - CONTRACTS - WHETHER A RATIONAL BASIS SUPPORTED THE CONTRACT RESOLUTION BOARD OF THE CITY OF NEW YORK'S DETERMINATION THAT THE CONTRACT DOCUMENTS WERE AMBIGUOUS;

Supreme Court, New York County denied a CPLR article 78 petition to annual a determination of respondent Contract Dispute Resolution Board that rejected petitioners' claim for compensation for additional work under a contract with respondent Department of Transportation; App. Div. affirmed.

LEVY (MORDEKHAY), PEOPLE:

2ND Dept. App. Div. order of 9/8/09; affirmance; leave to appeal granted by Ciparick, J., 12/14/09;

CRIMES - TRADEMARK COUNTERFEITING - PENAL LAW § 165.72 - WHETHER A TRADEMARK MUST BE REGISTERED FOR THE GOODS ON WHICH THEY APPEAR - WHETHER THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT A DEFENDANT MUST KNOW THAT A TRADEMARK IS COUNTERFEIT;

SEARCH WARRANT - PROBABLE CAUSE SUPPORTING SEARCH WARRANT;

Supreme Court, Queens County convicted defendant of two counts of trademark counterfeiting in the second degree, upon a jury verdict, and imposed sentence; App. Div. affirmed.

LIFE RECEIVABLES TRUST v GOSHAWK SYNDICATE 102 AT
LLOYD'S, et al.:

1st Dept. App. Div. order of 10/13/09; affirmance; leave to appeal granted by App. Div., 12/22/09; Rule 500.11 review pending;

ARBITRATION - PROPER FORUM - ARBITRATION AGREEMENT SUBJECT TO AMERICAN ARBITRATION ASSOCIATION RULES - WHETHER MOTION COURT AND APPELLATE DIVISION ERRED IN FINDING THAT ISSUES OF ARBITRABILITY WERE FOR THE ARBITRATOR TO DETERMINE; FEDERAL ARBITRATION ACT; Supreme Court, New York County denied plaintiff's motion to stay or enjoin arbitrations pending before the American Arbitration Association; App. Div. affirmed.

MIDLER v CRANE:

1ST Dept. App. Div. order of 11/19/09; affirmance with dissents; Rule 500.11 review pending;

PHYSICIANS - MALPRACTICE - INCONSISTENT VERDICTS - VERDICT FINDING THAT DEFENDANT RHEUMATOLOGIST WAS NOT NEGLIGENT IN FAILING TO DIAGNOSE PLAINTIFF'S LUPUS BUT WAS NEGLIGENT IN FAILING TO PROPERLY MONITOR PLAINTIFF - VERDICT FINDING THAT ENDOCRINOLOGIST WAS NEGLIGENT IN NOT GIVING RHEUMATOLOGIST RESULTS OF URINALYSIS, BUT THAT SUCH NEGLIGENCE WAS NOT A SUBSTANTIAL FACTOR IN CAUSING PLAINTIFF'S INJURIES; JURY CHARGE - WHETHER TRIAL COURT ERRED IN NOT INSTRUCTING THE JURY THAT IT COULD FIND FOR DEFENDANT PHYSICIAN IF IT DETERMINED THAT HE HAD COMMITTED AN "ERROR IN PROFESSIONAL JUDGMENT"; Supreme Court, New York County judgment awarding plaintiff the principal sums of \$500,000 for past pain and suffering and \$2 million for future pain and suffering; thereafter, the same court denied defendant's post-trial motion to set aside or reduce the verdict; App. Div. affirmed.

MONTES (OMAR), PEOPLE v:

1ST Dept. App. Div. order of 11/24/09; affirmance; leave to appeal granted by Abdus-Salaam, J., 12/22/09;

CRIMES - RIGHT OF CONFRONTATION - CROSS EXAMINATION AND IMPEACHMENT - WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A MISTRIAL OR TO STRIKE THE TESTIMONY OF A WITNESS DEFENDANT PREVIOUSLY CROSS EXAMINED WHERE THE WITNESS WAS UNAVAILABLE TO BE RECALLED AFTER IT WAS ESTABLISHED THAT SHE "WAS NOT HONEST WHEN SHE ... FAILED TO STATE THAT [ANOTHER INDIVIDUAL AT THE SCENE OF A SHOOTING DEATH] GAVE HER THE GUN OR GUNS WHEN HE RAN PAST HER AFTER THE SHOOTING OCCURRED"; Supreme Court, New York County convicted defendant, after a jury trial, of criminal possession of a weapon in the third degree and sentenced him to a term of 7 years; App. Div. affirmed.

MUHAMMAD (MUJAHID), PEOPLE v:

1ST Dept. App. Div. order of 10/6/09; affirmance; leave to appeal granted by Graffeo, J., 12/28/09;

CRIMES - JURORS - JURY INSTRUCTIONS - WHETHER THE TRIAL COURT'S CHARGE TO THE JURY WAS SUFFICIENT TO APPRISE THE JURY THT THE PEOPLE WERE REQUIRED TO PROVE DEFENDANT KNEW HE POSSESSED THE SUBJECT CREDIT CARDS - ADEQUACY OF PATTERN JURY INSTRUCTION FOR CRIMINAL POSSESSION OF A FORGED INSTRUMENT IN THE SECOND DEGREE (PENAL LAW § 170.25);

Supreme Court, New York County convicted defendant of two counts of criminal possession of a forged instrument in the second degree, and sentenced him, as a second felony offender, to concurrent terms of 3 to 6 years; App. Div. affirmed.

OURSLER &c. v BRENNAN, et. al. (AND A THIRD PARTY ACTION):

4TH Dept. App. Div. order of 8/28/09; reversal; leave to appeal granted by App. Div., 12/30/09;

INTOXICATING LIQUORS - DRAM SHOP ACT - GENERAL OBLIGATIONS LAW § 11-101 - GUILTY PARTICIPATION - WHETHER PLAINTIFF'S PURCHASE OF TWO ALCOHOLIC BEVERAGES FOR HIS WIFE (DECEDENT) AT CORPORATE DEFENDANT'S ESTABLISHMENT DURING PARTY AT WHICH SHE BECAME INTOXICATED CONSTITUTED "GUILTY PARTICIPATION" ON HIS PART AS A MATTER OF LAW, THUS REQUIRING DISMISSAL OF HIS DRAM SHOP ACT CAUSE OF ACTION BROUGHT IN HIS INDIVIDUAL CAPACITY; CAUSATION - INTERVENING EVENTS BETWEEN SALE OF ALCOHOL AND DECEDENT'S DEATH; CONTRIBUTION - WHEN CLAIM FOR CONTRIBUTION AVAILABLE - CPLR 1401 - WHETHER DEFENDANT SUBJECT TO LIABILITY UNDER WRONGFUL DEATH STATUTE MAY SEEK CONTRIBUTION FROM DEFENDANT SUBJECT TO LIABILITY PURSUANT TO DRAM SHOP ACT;

Supreme Court, Erie County granted those parts of the motion of defendant Malbeat, Inc, doing business as Malwitz's Island Lanes, for summary judgment dismissing the plaintiff's fourth cause of action under the Dram Shop Act and defendant Robert E. Brennan's cross claim for contribution against Malbeat; App. Div. reversed the order insofar as appealed from, denied in part the summary judgment motion of defendant Malbeat and reinstated plaintiff's fourth cause of action under the Dram Shop Act and defendant Robert E. Brennan's cross claim for contribution against Malbeat.

RATAJCZAK v YOONESSI &c, et al.:

4TH Dept. App. Div. order of 12/2/09; denial of third-party plaintiffs' motion; sua sponte examination whether the orders appealed from finally determine the action within the meaning of the Constitution and whether any jurisdictional basis exists to support an appeal as of right;

CHALLENGE TO, AMONG OTHER THINGS, AN APPELLATE DIVISION ORDER DENYING THIRD-PARTY PLAINTIFFS' MOTION, UPON RENEWAL, TO VACATE THE DISMISSAL OF AN APPEAL TAKEN FROM A SUPREME COURT ORDER DISMISSING THE THIRD-PARTY ACTION AND DENYING THE THIRD-PARTY PLAINTIFFS' MOTION TO VACATE A STIPULATION OF DISCONTINUANCE IN THE MAIN ACTION;

App. Div. denied third-party plaintiffs' motion, upon renewal, to vacate the dismissal of an appeal taken from a 6/27/08 Supreme Court, Erie County order.