

COURT OF APPEALS NEW FILINGS

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

**January 22 through January 28, 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. For those appeals that proceed to briefing in the normal course, the briefing schedule generally will be: appellant's brief to be filed 60 days after the appeal was taken; respondent's brief to be filed 45 days after the filing of appellant's brief; and a reply brief, if any, to be filed 15 days after 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.**

ALONZO (JOSE), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 5/5/09; affirmance; leave to appeal granted by Read, J., 1/19/10;

CRIMES - INDICTMENT - DISMISSAL OF INDICTMENT COUNTS AS MULTIPLICITOUS - CPL 210.20 - WHETHER GROPING OF TWO BODY PARTS CONSTITUTED A SINGLE CONTINUOUS ACT;

Westchester County Court granted that branch of defendant's omnibus motion which was to dismiss counts two and five of the indictment; App. Div. affirmed.

APONTE (HERBERT), PEOPLE v:

App. Term 2<sup>nd</sup>, 11<sup>th</sup> and 13<sup>th</sup> Judicial Districts order of 6/29/09; affirmance; leave to appeal granted Read, J., 1/19/10; CRIMES - STALKING - ATTEMPTED STALKING - WHETHER THE CRIME OF ATTEMPTED STALKING IN THE THIRD DEGREE IS A LEGALLY COGNIZABLE OFFENSE; INTENT; Criminal Court, Queens County convicted defendant of attempted stalking in the third degree and harassment in the first degree; App. Term affirmed.

PEOPLE &c., BY ANDREW M. CUOMO v WELLS FARGO INSURANCE SERVICES, INC. et al.:

1<sup>st</sup> Dept. App. Div. order of 5/5/09; affirmance; leave to appeal granted by Court of Appeals, 1/19/10; INSURANCE - AGENTS AND BROKERS - WHETHER COMPLAINT STATED A CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY BY INSURANCE BROKER; ATTORNEY GENERAL - ENJOINING FRAUDULENT OR ILLEGAL ACTS - WHETHER COMPLAINT STATED A CAUSE OF ACTION FOR FRAUD UNDER EXECUTIVE LAW § 63(12) WITH SUFFICIENT PARTICULARITY; Supreme Court, New York County dismissed the complaint, pursuant to a 1/15/08 Supreme Court order that, among other things, granted defendants' motion to dismiss the causes of action for breach of fiduciary duty and fraud under Executive Law § 63(12); App. Div. affirmed.

DICKINSON, MATTER OF v DAINES &c., et al.:

4<sup>th</sup> Dept. App. Div. order of 12/30/09; reversal with dissents; PROCEEDING AGAINST BODY OR OFFICER - MANDAMUS - CPLR ARTICLE 78 PROCEEDING SEEKING A JUDGMENT VACATING AN AMENDED DECISION AFTER FAIR HEARING AND REINSTATING A PRIOR DECISION AFTER FAIR HEARING REVERSING THE DEPARTMENT OF SOCIAL SERVICES' DENIAL OF MEDICAID BENEFITS TO PETITIONER - 90-DAY PERIOD FOR DEPARTMENT OF HEALTH TO TAKE "FINAL ADMINISTRATIVE ACTION" (18 NYCRR 358-6.4); Supreme Court, Onondaga County granted a CPLR article 78 petition to the extent of directing the Onondaga County Department of Social Services to comply with a 12/21/07 decision after fair hearing; App. Div. reversed and dismissed the petition.

LEHMAN v NORTH GREENWICH LANDSCAPING, LLC et al.:

2<sup>nd</sup> Dept. App. Div. order of 9/29/09; reversal; leave to appeal granted by Court of Appeals, 1/19/10; NEGLIGENCE - MAINTENANCE OF PREMISES - DUTY TO SAFELY MAINTAIN PARKING LOT - WHETHER SNOW REMOVAL CONTRACT WAS COMPREHENSIVE AGREEMENT THAT DISPLACED DUTY OF DEFENDANT HORTON SCHOOL ASSOCIATES TO MAINTAIN PARKING LOT; SUMMARY JUDGMENT - WHETHER TRIABLE ISSUE OF FACT EXISTS; SNOW AND ICE - SLIP AND FALL ON ICE; Supreme Court, Westchester County denied defendant North Greenwich Landscaping, LLC's motion for summary judgment dismissing the complaint and all cross claims against it; App. Div. reversed and granted defendant North Greenwich Landscaping, LLC's motion for summary judgment dismissing the complaint and

LEROY M., MATTER OF [PRESENTMENT AGENCY]:

1<sup>st</sup> Dept. App. Div. order of 8/25/09; reversal; leave to appeal granted by Court of Appeals, 1/19/10;

INFANTS - JUVENILE DELINQUENTS - SEARCH OF JUVENILE SUSPECT'S HOME AFTER THEFT OF LAPTOP COMPUTER FROM A MIDDLE SCHOOL - EFFECT OF SUSPECTS'S SISTER'S CONSENT TO THE POLICE OFFICER'S SEARCH OF THEIR HOME; EVIDENCE - SUPPRESSION HEARING;

Family Court, Bronx County adjudicated respondent a juvenile delinquent upon a fact-finding determination that respondent had committed an act which, if committed by an adult, would constitute the crime of criminal possession of stolen property in the fifth degree, and placed him with the Office of Children and Family Services for a period of 12 months; App. Div. reversed, granted the motion to suppress and dismissed the petition.

MASON (STEVEN), PEOPLE v:

1<sup>st</sup> Dept. App. Div. order of 10/13/09; affirmance; leave to appeal granted by Graffeo, J., 1/21/10;

CRIMES - EAVESDROPPING WARRANTS - MOTION TO SUPPRESS ELECTRONICALLY GATHERED EVIDENCE - WHETHER THE PEOPLE SATISFIED THE "EXHAUSTION" REQUIREMENT IN CPL 700.15(4) AND SHOWED "THAT NORMAL INVESTIGATIVE PROCEDURES HAVE BEEN TRIED AND HAVE FAILED, OR REASONABLY APPEAR TO BE UNLIKELY TO SUCCEED IF TRIED, OR TO BE TOO DANGEROUS TO EMPLOY";

Supreme Court, New York County convicted defendant of enterprise corruption, two counts of grand larceny in the second degree and attempted grand larceny in the second degree, and sentenced him, as a second felony offender, to an aggregate term of 7 1/2 to 15 years; App. Div. affirmed.

MCCLUSKEY v GABOR AND GABOR, et al.:

2<sup>ND</sup> Dept. App. Div. order of 12/23/09; dismissal of appeal; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution, whether a substantial constitutional question is directly involved to support an appeal as of right and whether any jurisdictional basis otherwise exists for an appeal as of right; APPEAL - APPELLATE DIVISION - DISMISSAL OF APPEAL - WHETHER APPEAL TO APPELLATE DIVISION LIES FROM SUPREME COURT ORDER DENYING REARGUMENT; LEGAL MALPRACTICE ACTION;

Supreme Court, Nassau County denied plaintiff's motion for leave to reargue; App. Div. granted defendants' motion to dismiss the appeal and dismissed the appeal.

NGOYI, MATTER OF, A DISBARRED ATTORNEY:

3<sup>RD</sup> Dept. App. Div. order of 12/21/09; denial of motion to vacate order; 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 - DISCIPLINARY PROCEEDINGS - CHALLENGE TO

App. Div. denied respondent's motion to vacate an order of  
disbarment entered on 9/3/09 upon his default.

RABB (REGINALD), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 10/13/09; affirmance; leave to  
appeal granted by Graffeo, J., 1/21/10;  
CRIMES - EAVESROPPING WARRANTS - MOTION TO SUPPRESS  
ELECTRONICALLY GATHERED EVIDENCE - WHETHER THE PEOPLE SATISFIED  
THE "EXHAUSTION" REQUIREMENT IN CPL 700.15(4) AND SHOWED "THAT  
NORMAL INVESTIGATIVE PROCEDURES HAVE BEEN TRIED AND HAVE FAILED,  
OR REASONABLY APPEAR TO BE UNLIKELY TO SUCCEED IF TRIED, OR TO BE  
TOO DANGEROUS TO EMPLOY";  
Supreme Court, New York County convicted defendant of enterprise  
corruption, two counts of grand larceny in the second degree,  
attempted grand larceny in the second degree, and criminal  
possession of a weapon in the fourth degree, and sentenced him,  
as a second felony offender, to an aggregate term of 8 1/2 to 17  
years; App. Div. affirmed.

WILEY, MATTER OF v DAWSON:

2<sup>ND</sup> Dept. App. Div. orders of 1/5/10 and 12/1/09; denial of  
motions to, among other things, vacate an order dismissing an  
appeal and dismissal of appeal; sua sponte examination whether  
the orders appealed from finally determine the action within the  
meaning of the Constitution, whether a substantial constitutional  
question is directly involved to support an appeal as of right  
and whether any jurisdictional basis otherwise exists for an  
appeal as right;  
APPEAL - APPELLATE DIVISION - DISMISSAL OF APPEAL ON THE GROUND  
THAT NO APPEAL LIES FROM AN ORDER ENTERED ON THE DEFAULT OF THE  
APPEALING PARTY - DENIAL OF MOTION TO VACATE ORDER DISMISSING  
APPEAL;  
Family Court, Westchester County on respondent Dawson's failure  
to appear, among other things, confirmed Support Magistrate's  
findings that respondent Dawson wilfully failed to obey the terms  
of the parties' judgment of divorce; App. Div. dismissed appeal  
on the basis that no appeal lies from an order entered upon the  
default of the appealing party and thereafter denied respondent  
Dawson's motions to, among other things, vacate the order  
dismissing his appeal.