

COURT OF APPEALS NEW FILINGS

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

February 19 through February 25, 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.

BOVIS LEND LEASE LMB, INC., et al. v GARITO CONTRACTING, INC., et al.:
1ST Dept. App. Div. order of 9/8/09; modification with dissents;
leave to appeal granted by App. Div., 2/9/10; Rule 500.11 review
pending;

INSURANCE - DUTY TO DEFEND AND INDEMNIFY - APPELLATE DIVISION
DETERMINED THAT PLAINTIFF GENERAL CONTRACTOR, AN ADDITIONAL
INSURED UNDER A POLICY ISSUED TO DEFENDANT SUBCONTRACTOR, IS NOT
ENTITLED TO INDEMNIFICATION BASED UPON THE JURY VERDICT IN THE
UNDERLYING PERSONAL INJURY ACTION IN WHICH THE JURY CONCLUDED
THAT THE SUBCONTRACTOR'S NEGLIGENCE WAS NOT A SUBSTANTIAL FACTOR
IN CAUSING THE PERSONAL INJURY PLAINTIFF'S ACCIDENT - RENEWAL -
WHETHER APPELLATE DIVISION ERRED IN NOT FOLLOWING ITS PRIOR
DECISION IN THIS CASE - APPLICATION OF WORTH CONSTRUCTION CO. v
ADMIRAL INS. CO. (10 NY3d 411);

Supreme Court, New York County granted motions of defendant insured Garito Contracting, Inc. and defendant insurer Twin City Fire Insurance Co. to renew their prior motions for dismissal of the complaint and summary judgment, respectively, and, upon renewal, adhered to the prior order declaring that plaintiff general contractor Bovis Lend Lease LMB, Inc. is an additional insured entitled to coverage; App. Div. modified to the extent of declaring that Bovis Lend Lease LMB is not entitled to indemnification.

CARGILL FINANCIAL SERVICES INTERNATIONAL, INC. v BANK FINANCE AND CREDIT, LIMITED, &c.:

1ST Dept. App. Div. order of 2/11/10; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support the appeal taken as of right and whether the App. Div. order finally determines the action; ATTACHMENT - BANK ACCOUNTS - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT IT WAS WITHIN THE TRIAL COURT'S DISCRETION TO DENY PLAINTIFF'S APPLICATION TO ATTACH ALL FUNDS IN CORRESPONDENT BANK ACCOUNTS BECAUSE THE ATTACHMENT OF ALL FUNDS "WOULD HAVE INTERFERED WITH INNOCENT THIRD PARTIES' ACCESS TO THEIR MONEY"; Supreme Court, New York County denied plaintiff's application for an order of attachment of all funds contained in defendant's correspondent accounts located in New York and vacated a temporary restraining order previously granted by the court; App. Div. affirmed.

KAUFMAN &c., et al. v QUICKWAY, INC., et al.:

3RD Dept. App. Div. order of 7/9/09; reversal; leave to appeal granted by Court of Appeals, 2/18/10; Rule 500.11 review pending; DISMISSAL AND NONSUIT - DISMISSAL OF COMPLAINT - SUMMARY JUDGMENT - WHETHER WITNESS'S HEARSAY STATEMENT IN AFFIDAVIT CREATED AN ISSUE OF FACT SUFFICIENT TO DEFEAT A MOTION FOR SUMMARY JUDGMENT; DRAM SHOP ACT ACTION - GENERAL OBLIGATIONS LAW § 11-101(1) - ALCOHOLIC BEVERAGE CONTROL LAW § 65 - ALLEGEDLY SELLING ALCOHOLIC BEVERAGE TO VISIBLY INTOXICATED PURCHASER; Supreme Court, Delaware County denied defendants' motion for summary judgment dismissing the complaint; App. Div. reversed and granted defendants' motion.

McALPIN (CHRIS), PEOPLE v:

1ST Dept. App. Div. order of 12/3/09; reversal with dissents; leave to appeal granted by McGuire, J., 2/11/10; Rule 500.11 review pending; CRIMES - PLEA OF GUILTY - VACATUR - POST-RELEASE SUPERVISION (PRS) - WHETHER COURT WAS REQUIRED TO ADVISE DEFENDANT OF PRS DURING PLEA ALLOCUTION WHERE DEFENDANT WAS TOLD THAT HE WOULD RECEIVE A "DEFERRED SENTENCE" WITH A POSSIBILITY OF PROBATION AND

YOUTHFUL OFFENDER TREATMENT IF HE ENROLLED IN AND SUCCESSFULLY COMPLETED A CERTAIN PROGRAM OR, IF HE FAILED TO DO SO OR WAS ARRESTED FOR ANOTHER CRIME IN THE INTERIM, THAT HE WOULD BE SENTENCED TO A MINIMUM OF THREE YEARS AND A MAXIMUM OF 15 YEARS IN PRISON - COLLATERAL OR DIRECT CONSEQUENCES OF PLEA; PRESERVATION - WAIVER - SUFFICIENCY OF RECORD FOR APPELLATE REVIEW;

Supreme Court, New York County convicted defendant, upon his guilty plea, of robbery in the second degree, and sentenced him to a term of 3 1/2 years followed by five years' post-release supervision; App. Div. reversed, vacated the plea, reinstated the indictment and remitted for further proceedings.

MEEGAN, JR., MATTER OF v BROWN (AND ANOTHER PROCEEDING AND ACTION):

4TH Dept. App. Div. order of 6/12/09; affirmance; leave to appeal granted by Court of Appeals, 2/16/10;

CIVIL SERVICE - COMPENSATION AND BENEFITS - WHETHER, UNDER PUBLIC AUTHORITIES LAW § 3858(2)(c)(i) AND (iii), PROMOTIONAL SALARY STEP INCREASES WERE SUSPENDED AND DID NOT ACCRUE DURING A WAGE FREEZE PERIOD SO THAT, UPON THE LIFTING OF THE WAGE FREEZE, UNION EMPLOYEES WERE ENTITLED ONLY TO ONE SALARY STEP INCREASE RATHER THAN FOUR SALARY STEP INCREASES;

Supreme Court, Erie County, among other things, granted in pertinent part the amended petitions in proceedings No. 1 and 2 and granted plaintiffs' motion for summary judgment in action No. 1; App. Div. affirmed.

WASHINGTON, PEOPLE ex rel., v NAPOLI:

3RD Dept. App. Div. order of 1/14/10; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

HABEAS CORPUS - SENTENCE - CONSECUTIVE SENTENCES - WHETHER PETITIONER'S SENTENCES WERE TO RUN CONCURRENTLY OR CONSECUTIVELY WITH THE UNDISCHARGED PORTIONS OF HIS PREVIOUS SENTENCES;

CHALLENGE TO STATUS AS SECOND FELONY OFFENDER;

Supreme Court, Chemung County denied petitioner's application for a writ of habeas corpus, without a hearing; App. Div. affirmed.