

COURT OF APPEALS NEW FILINGS

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

April 9 through April 15, 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.

BOOTHE (JAMES O.), PEOPLE v:

1ST Dept. App. Div. order of 12/1/09; modification; leave to appeal granted by Read, J., 4/1/10;

CRIMES - INSURANCE FRAUD - INSURANCE FRAUD IN THE FIRST DEGREE (PENAL LAW § 176.30) - WHETHER PENAL LAW § 176.30 APPLIES TO FRAUDULENT HEALTH CARE INSURANCE ACTS DEFINED IN PENAL LAW § 176.05(2);

Supreme Court, New York County, among other things, dismissed those counts of the indictment alleging insurance fraud in the first degree, scheme to defraud in the first degree and falsifying business records in the first degree; App. Div. modified to the extent of reinstating the scheme to defraud and falsifying records counts, and otherwise affirmed.

CASHEL v CASHEL (AND TWO OTHER ACTIONS):

2ND Dept. App. Div. order of 9/22/09; modification; leave to appeal granted by Court of Appeals, 4/6/10; Rule 500.11 review pending;

DEEDS - ACTION TO SET ASIDE A DEED ON THE BASIS OF FRAUD - RATIFICATION OF DEED BY ACCEPTING THE BENEFITS OF A PRIOR MORTGAGE ON THE PROPERTY; MORTGAGES - FORECLOSURE; HUSBAND AN WIFE - DIVORCE;

Supreme Court, Suffolk County, among other things, denied those branches of the motion of Mortgage Electronic Registration Systems, Inc. (MERS) and Fremont Investment & Loan (FLL) which were for summary judgment dismissing the first cause of action in Action No. 2, to strike the answer and defenses of the defendants in Action No. 3, for summary judgment on the complaint in Action No. 3, or alternatively, to direct defendant Thomas P. Cashel to satisfy the subject mortgage should he prevail on his claims in Action No. 3, and to appoint a referee to compute the amount due on the subject note and mortgage and to ascertain whether the premises should be sold as one parcel in Action No. 3; App. Div. modified by deleting the provision denying that branch of the motion by MERS and FLL which was for summary judgment dismissing the first cause of action in Action No. 2 insofar as asserted against them and substituting therefor a provision granting that branch of the motion, and affirmed as so modified.

EVANS (SHAREEF), PEOPLE v:

2ND Dept. App. Div. order of 1/5/10; affirmance; leave to appeal granted by Ciparick, J., 4/8/10;

CRIMES - RIGHT TO COUNSEL - EFFECTIVE REPRESENTATION - TRIAL COUNSEL'S FAILURE TO RAISE THE STATUTE OF LIMITATIONS AS A DEFENSE TO THE FIRST-DEGREE MANSLAUGHTER COUNT AND TO SEEK TO REOPEN THE SUPPRESSION HEARING;

Supreme Court, Queens County convicted defendant of manslaughter in the first degree and imposed sentence; App. Div. affirmed.

GRANT, PEOPLE ex rel. v CONNELL, &c.:

1ST Dept. App. Div. order of 3/2/10; denial of motion for poor person relief and dismissal of appeal; sua sponte examination whether any jurisdictional basis exists to support an appeal as of right;

HABEAS CORPUS - DENIAL OF PETITION FOR A WRIT OF HABEAS CORPUS; Supreme Court, New York County denied petition for a writ of habeas corpus; App. Div. denied petitioner's motion for poor person relief and dismissed the appeal.

HAMLET ON OLDE OYSTER BAY HOME OWNERS ASSOCIATION v HOLIDAY ORGANIZATION:

2ND Dept. App. Div. order of 3/2/10; denial of motion for leave to appeal to the Court of Appeals; motion to dismiss appeal pending;

FRAUD - MARTIN ACT - NO PRIVATE RIGHT OF ACTION FOR COMMON-LAW

Supreme Court, Nassau County granted motion made by defendants other than defendants Charles A. DiGiovanna Architect and Charles A. DiGiovanna, to the extent of dismissing the causes of action alleging fraudulent inducement, negligent misrepresentation and negligence insofar as asserted against the moving defendants except for defendants O.B. Ventures Corp., Holcom Incorporated and Hamlet on Olde Oyster Bay Food and Beverage Corp., dismissed the causes of action for breach of fiduciary duty insofar as asserted against the moving defendants except for defendants O.B. Ventures Corp., Holcom Incorporated and Hamlet on Olde Oyster Bay Food and Beverage Corp. insofar as they sought to recover damages for a period beyond three years prior to commencement of the action, and dismissed the causes of action alleging breach of contract insofar as asserted against the moving defendants except for defendants O.B. Ventures Corp., Holcom Incorporated and Hamlet on Olde Oyster Bay Food and Beverage Corp. to the extent of directing plaintiffs to serve an amended complaint to plead the causes of action alleging breach of warranty separately from those alleging breach of contract (7/13/06 order); thereafter, Supreme Court, in effect, upon reargument, granted the moving defendants' motion to clarify the prior determination; granted defendants Charles A. DiGiovanna A. Architect and Charles A. DiGiovanna's motion to dismiss the causes of action in the amended complaint alleging breach of contract, fraudulent inducement, negligent misrepresentation and negligence/malpractice insofar as asserted against them; and granted defendants Sidney B. Bowne and Sons, LLP and Dane C. Kenny's motion for the same relief (1/8/08 order); App. Div. granted the branches of respondents' motion and cross motions (9/29/09 order) which were for leave to reargue appeals from the 7/13/06 and 1/8/08 orders, respectively; recalled and vacated it's 2/24/09 decision and order and substituted the 9/29/09 decision in its place; dismissed the appeal from the 7/13/06 order; and affirmed the 1/8/06 order insofar as appealed from.

SHEERAN, MATTER OF v NEW YORK STATE DEPARTMENT OF
TRANSPORTATION et al.:

3RD Dept. App. Div. order of 12/3/09; reversal; leave to appeal granted by Court of Appeals, 4/6/10;
CIVIL SERVICE - COMPENSATION AND BENEFITS - WHETHER CIVIL SERVICE LAW § 72 APPLIES ONLY TO EMPLOYEES PLACED ON INVOLUNTARY LEAVE FROM AN "ACTIVE" STATUS OR ALSO TO EMPLOYEES PLACED ON INVOLUNTARY LEAVE FROM VOLUNTARY SICK LEAVE STATUS;
Supreme Court, Albany County granted a CPLR article 78 petition to the extent of annulling respondent Department of Transportation's determination placing petitioner on involuntary leave of absence and remanding to the agency for reconsideration; App. Div. reversed and dismissed the petition.

SMITH (SEAN), PEOPLE v:

1ST Dept. App. Div. order of 1/12/10; affirmance; leave to appeal granted by Ciparick, J., 4/8/10;
CRIMES - SENTENCE - DIRECTION BY SUPREME COURT THAT DEFENDANT REGISTER WITH THE NEW YORK CITY POLICE DEPARTMENT PURSUANT TO GUN OFFENDER REGISTRATION ACT (GORA) (ADMINISTRATIVE CODE OF THE CITY OF NEW YORK § 10-601, ET SEQ.) - WHETHER GORA CHALLENGE CAN BE RAISED ON DIRECT APPEAL - WHETHER GORA IS PREEMPTED BY EXECUTIVE LAW § 259-a(2) GIVING THE NEW YORK STATE DIVISION OF PAROLE RESPONSIBILITY FOR SUPERVISING EX-OFFENDERS;
Supreme Court, New York County convicted defendant of criminal possession of a weapon in the second and third degrees and unlicensed driving, and sentenced him, as a second felony offender, to an aggregate term of 5 years; App. Div. affirmed.

STATE OF NEW YORK, MATTER OF v ANDREW O.:

3RD Dept. App. Div. order of 12/3/09; affirmance; leave to appeal granted by Court of Appeals, 4/1/10;
CRIMES - SEX OFFENDERS - CIVIL COMMITMENT OR SUPERVISION - CROSS-EXAMINATION OF RESPONDENT'S EXPERT REGARDING HIS RELIGIOUS BELIEFS - COMMENTS IN SUMMATION REGARDING EXPERT'S RELIGIOUS BELIEFS - ALLEGED DENIAL OF FAIR TRIAL;
Supreme Court, Saratoga County, in a proceeding pursuant to Mental Hygiene Law article 10, found respondent to be a dangerous sex offender and confined him to a secure treatment facility;
App. Div. affirmed.