

COURT OF APPEALS NEW FILINGS

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

**September 3 through September 9, 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.**

BECOATS (COREY), PEOPLE v:

4<sup>TH</sup> Dept. App. Div. order of 3/26/10; modification; leave to appeal granted by Jones, J., 8/20/10;  
CRIMES - TRIAL - ADJOURNMENT - WHETHER THE APPELLATE DIVISION CORRECTLY HELD THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT DEFENDANT AN ADJOURNMENT TO SECURE THE ATTENDANCE OF A WITNESS WHO WAS IN FEDERAL CUSTODY; CLAIM THAT ROBBERY COUNT WAS DUPLICITOUS BECAUSE DEFENDANT WAS CHARGED WITH STEALING "A BB GUN AND/OR A PAIR OF SNEAKERS" - PRESERVATION; Supreme Court, Monroe County convicted defendant of murder in the second degree and robbery in the first degree; App. Div. modified by reducing the conviction of murder in the second degree to manslaughter in the second degree, vacating the sentence imposed on count two of the indictment and vacating the sentence imposed on count four of the indictment; affirmed the judgment as so modified; and remitted to Supreme Court for sentencing on the conviction of manslaughter in the second degree and for resentencing on the conviction of robbery in the first degree.

BIRNBAUM, MATTER OF v NEW YORK STATE DEPARTMENT OF LABOR et al.:

3<sup>RD</sup> Dept. App. Div. order of 7/1/10; reversal; leave to appeal granted by Court of Appeals, 8/31/10;

CIVIL SERVICE - COMPENSATION AND BENEFITS - LEAVE FOR ORDINARY DISABILITY - 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 petitioner's CPLR article 78 petition to annul a determination of respondent Department of Labor placing petitioner on involuntary leave of absence; App. Div. reversed and dismissed the petition.

CRAGG v ALLSTATE INDEMNITY CORP.:

4<sup>TH</sup> Dept. App. Div. order of 5/7/10; affirmance; leave to appeal granted by Court of Appeals, 9/2/10;

INSURANCE - HOMEOWNER'S INSURANCE - DUTY TO DEFEND OR INDEMNIFY - EXCLUSION FOR CLAIMS BASED ON DEATH OF INSURED - POLICY PROVISION EXCLUDING COVERAGE FOR "BODILY INJURY TO AN INSURED PERSON ... WHENEVER ANY BENEFIT OF THIS COVERAGE WOULD ACCRUE DIRECTLY OR INDIRECTLY TO AN INSURED PERSON" - APPLICABILITY OF EXCLUSION TO INSURED DEFENDANTS IN WRONGFUL DEATH ACTION BROUGHT BY NON-INSURED FATHER OF AN INSURED DECEDENT AS ADMINISTRATOR OF DECEDENT'S ESTATE;

Supreme Court, Erie County granted defendant Allstate Indemnity Corporation's motion for summary judgment declaring that Allstate has no obligation to defend or indemnify its insureds with respect to an underlying personal injury/wrongful death action arising out of the death of an insured person; App. Div. affirmed.

MARRACCINI v RYAN, et al.:

2<sup>ND</sup> Dept. App. Div. order of 3/30/10; reversal; leave to appeal granted by Court of Appeals, 8/31/10;

LICENSES - HOME IMPROVEMENT CONTRACTORS - WHETHER THE APPELLATE DIVISION ERRED IN DETERMINING THAT PLAINTIFF WAS UNLICENSED AS A HOME IMPROVEMENT CONTRACTOR WITHIN THE MEANING OF THE WESTCHESTER COUNTY ADMINISTRATIVE CODE WHERE HE PERFORMED THE WORK AT ISSUE UNDER HIS REAL NAME BUT HAD A HOME IMPROVEMENT LICENSE ISSUED UNDER A TRADE NAME;

Supreme Court, Westchester County, as relevant here, denied those branches of defendant John and Pam Ryan's motion which was for summary judgment dismissing the complaint insofar as asserted against them, and to vacate a mechanic's lien and cancel the notice of pendency filed against their property; App. Div. reversed and, as relevant here, (1) granted those branches of the motion by defendants John and Pam Ryan for summary judgment dismissing the complaint insofar as asserted against them and to vacate the mechanic's lien and cancel the notice of pendency filed against their property, and (2) remitted to Supreme Court for the entry of an order directing the Westchester County Clerk to vacate the mechanic's lien and cancel the notice of pendency

MURRELL (DOMINIQUE), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 5/20/10; affirmance; leave to appeal granted by Ciparick, J., 9/1/10;

CRIMES - SENTENCE - POST-RELEASE SUPERVISION (PRS) - PRS IMPOSED IN JUDGMENT OF RESENTENCE AFTER DEFENDANT HAD SERVED ALL BUT 8 WEEKS OF HIS 10-YEAR PRISON SENTENCE AND AFTER HIS SENTENCE HAD BEEN CONSIDERED PREVIOUSLY BY THE TRIAL COURT AND APPELLATE DIVISION WITH NO MENTION OF PRS - ALLEGED VIOLATION OF DOUBLE JEOPARDY AND DUE PROCESS RIGHTS;

Supreme Court, New York County resentenced defendant to concurrent terms of 10 years, with 5 years' post-release supervision; App. Div. affirmed.

PRENDERGAST (JOHN), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 3/23/10; affirmance; leave to appeal granted by Graffeo, J., 8/26/10;

CRIMES - SENTENCE - POST-RELEASE SUPERVISION (PRS) - PRS IMPOSED UPON RESENTENCE AFTER DEFENDANT SERVED PART OF HIS PRISON SENTENCE AND WHILE HE WAS STILL CONFINED - ALLEGED VIOLATION OF DOUBLE JEOPARDY AND DUE PROCESS RIGHTS; WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT "THE RESENTENCING COURT WAS NOT REQUIRED TO EXERCISE ITS DISCRETION TO CONSIDER WHETHER THE SENTENCE AS A WHOLE WAS APPROPRIATE IN VIEW OF THE FACT THAT THE SENTENCE WOULD NOT INCLUDE A PERIOD OF PRS";

Supreme Court, Queens County resentenced defendant, upon his conviction of robbery in the first degree and criminal possession of a weapon in the fourth degree, upon a jury verdict, to include a mandatory five-year period of post-release supervision; App. Div. affirmed.

RODDY v NEDERLANDER PRODUCING COMPANY OF AMERICA, INC., et al.:

1<sup>ST</sup> Dept. App. Div. order of 5/20/10; affirmance; leave to appeal granted by Court of Appeals, 9/2/10; Rule 500.11 review pending;

JUDGMENTS - COLLATERAL ESTOPPEL - LAW OF THE CASE - WHETHER PLAINTIFF DANCER HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE THE ISSUE OF THE NEGLIGENCE OF DEFENDANTS NEDERLANDER PRODUCING COMPANY OF AMERICA, INC. AND THE GERSHWIN THEATRE IN A NEGLIGENCE ACTION TO RECOVER FROM A FALL ON STAGE DURING THE BROADWAY SHOW RIVERDANCE; PRIOR LITIGATION OF THE GERSHWIN THEATRE'S INDEMNIFICATION CLAIM AGAINST THE DANCER'S EMPLOYER;

Supreme Court, New York County, in effect, granted renewal and reargument of an order entered 7/22/08 granting the motion of defendants Nederlander Producing Company and the Gershwin Theatre to dismiss the complaint and all cross claims against them, and adhered to the original decision; App. Div. affirmed.

ROSARIO (ANGEL), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 12/22/09; reversal; leave to appeal granted by Read, J., 8/27/10;

CRIMES - SEXUAL ABUSE - SEXUAL CONDUCT AGAINST A CHILD - WHETHER NOTE MINOR COMPLAINANT WROTE APPROXIMATELY 3 MONTHS AFTER DEFENDANT'S ALLEGED ABUSE ENDED WAS ADMISSIBLE UNDER THE "PROMPT OUTCRY" EXCEPTION TO THE HEARSAY RULE - ADMISSIBILITY OF

Supreme Court, New York County convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree, rape in the first and second degrees and incest in the third degree, and sentenced him to an aggregate term of 15 years; App. Div. reversed on the law and remanded for a new trial.

RUEDA, &c., MATTER OF v CHARMAINE D.:

1<sup>ST</sup> Dept. App. Div. order of 8/17/10; affirmance with dissents; sua sponte examination whether this matter is moot; INCAPACITATED AND MENTALLY DISABLED PERSONS - INVOLUNTARY ADMISSION - WHETHER EMERGENCY ROOM PSYCHIATRIST WHO TREATED RESPONDENT PROPERLY APPLIED FOR HER INVOLUNTARY ADMISSION TO A HOSPITAL PURSUANT TO MENTAL HYGIENE LAW § 9.27 WHERE HE COULD HAVE APPLIED FOR SUCH ADMISSION PURSUANT TO MENTAL HYGIENE LAW § 9.39; MOOTNESS - APPLICABILITY OF MOOTNESS EXCEPTION; Supreme Court, Bronx County granted the petition to retain respondent at hospital for involuntary psychiatric care; App. Div. affirmed.

SHIAMILI, &c. v THE REAL ESTATE GROUP OF NEW YORK, INC., et al.:

1<sup>ST</sup> Dept. App. Div. order of 12/17/09; reversal; leave to appeal granted by Court of Appeals, 8/31/10; TELECOMMUNICATIONS - INTERNET SERVICES - ACTION FOR DEFAMATION AND UNFAIR COMPETITION BY DISPARAGEMENT BASED ON COMMENTS POSTED ON AN INTERNET WEBSITE - WHETHER THE APPELLATE DIVISION ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS THE COMPLAINT UPON THE GROUND THAT PLAINTIFF'S CLAIMS WERE BARRED BY THE FEDERAL COMMUNICATIONS DECENCY ACT (CDA) (47 USC § 230) BECAUSE DEFENDANTS WERE NOT "INFORMATION CONTENT PROVIDERS" WITHIN THE MEANING OF THE CDA; Supreme Court, New York County denied defendants' motion to dismiss the complaint as barred by the Federal Communications Decency Act of 1996; App. Div. reversed, granted the motion, dismissed the complaint and directed the Clerk to enter judgment accordingly.

WRIGHT (JASON L.), PEOPLE v:

4<sup>TH</sup> Dept. App. Div. order of 6/12/09; modification; leave to appeal granted by Jones, J., 8/20/10; CRIMES - CLAIM THAT ROBBERY COUNT WAS DUPLICITOUS BECAUSE DEFENDANT WAS CHARGED WITH STEALING "A BB GUN AND/OR A PAIR OF SNEAKERS" - ALLEGED INEFFECTIVENESS OF TRIAL COUNSEL - THEORY UPON WHICH JURY FOUND DEFENDANT GUILTY - SUFFICIENCY OF THE EVIDENCE SUPPORTING CONVICTION OF ROBBERY IN THE FIRST DEGREE; Supreme Court, Monroe County convicted defendant, upon a jury verdict, of murder in the second degree and robbery in the first degree; App. Div. modified by (1) reducing the conviction of murder in the second degree to manslaughter in the second degree, (2) vacating the sentence imposed on count two of the indictment and (3) vacating the sentence imposed on count four of the indictment; affirmed the judgment as so modified; and remitted to Supreme Court for sentencing on the conviction of manslaughter in

the second degree and for resentencing on the conviction of robbery in the first degree.