

COURT OF APPEALS NEW FILINGS

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

October 29 through November 4, 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.

CASADO, et al., MATTER OF v MARKUS &c., et al.:

1ST Dept. App. Div. order of 6/22/10; affirmance; leave to appeal granted by Court of Appeals, 10/26/10;

LANDLORD AND TENANT - RENT REGULATION - POWERS OF NEW YORK CITY RENT GUIDELINES BOARD (RGB) - WHETHER THE RGB HAS AUTHORITY TO CREATE A NEW CLASSIFICATION OF HOUSING ACCOMMODATIONS SUBJECT TO MINIMUM DOLLAR AMOUNT RENT INCREASE FOR APARTMENTS THAT HAD NOT BEEN SUBJECT TO VACANCY INCREASES FOR THE PREVIOUS SIX YEARS; Supreme Court, New York County vacated Rent Guidelines Board Orders No. 40 of 2008 and 41 of 2009 insofar as they provided for minimum dollar rent increases for rent stabilized apartments renting for less than \$1,000 that had not been subject to vacancy increases for the preceding six years; App. Div. affirmed.

KEMPER MUTUAL INSURANCE COMPANY et al., MATTER OF v RUSSELL:

3RD Dept. App. Div. order of 7/1/10; modification; leave to appeal granted by Court of Appeals, 10/19/10;
INSURANCE - AUTOMOBILE INSURANCE - UNDERINSURED MOTORIST ENDORSEMENT - WHETHER THE CONDITION PRECEDENT TO THE OBLIGATION OF AN INSURER TO PAY UNDER THE SUPPLEMENTARY UNINSURED/UNDERINSURED MOTORIST (SUM) INSURANCE COVERAGE, REQUIRING EXHAUSTION OF THE LIMITS OF LIABILITY OF ALL BODILY INJURY LIABILITY BONDS OR INSURANCE POLICIES APPLICABLE AT THE TIME OF THE ACCIDENT, MAY BE SATISFIED THROUGH SETTLEMENT WITH A THIRD PARTY INSTEAD OF THE PRIMARY INSURER; ARBITRATION;
Supreme Court, Schenectady County partially granted petitioners' application pursuant to CPLR 7503 to stay arbitration between the parties; App. Div. modified by reversing so much thereof as partially denied petitioners' application, granted the application in its entirety and stayed arbitration between the parties and affirmed as so modified.

KOZIOL, MATTER OF:

3RD Dept. App. Div. order of 9/23/10; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right from the September 23, 2010 Appellate Division, Third Department order and whether an appeal pursuant to CPLR 5601(d) lies to obtain review of a February 5, 2010 Appellate Division, Fourth Department order;
ATTORNEY AND CLIENT - DISCIPLINARY PROCEEDINGS - APPELLATE DIVISION ORDER FINDING ATTORNEY GUILTY OF PROFESSIONAL MISCONDUCT AND SUSPENDING HIM FROM THE PRACTICE OF LAW FOR ONE YEAR;
App. Div. granted petitioner Grievance Committee's motion to confirm two Referees' reports sustaining in part charges of professional misconduct alleged in a petition filed in August 2008 and sustaining in full charges of professional misconduct alleged in a petition filed in May 2009; denying respondent attorney's cross motion to, among other things, set aside both reports and dismiss the petitions; finding respondent guilty of professional misconduct as set forth in the court's decision; and suspending respondent from the practice of law for a period of one year.

MAKARIUS v PORT AUTHORITY OF NEW YORK and NEW JERSEY, et al.:

1ST Dept. App. Div. order of 9/7/10; modification with dissents; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution;
LABOR - SAFE PLACE TO WORK - PLAINTIFF AT CONSTRUCTION SITE INJURED WHEN TRANSFORMER THAT HAD BEEN AFFIXED TO THE WALL FELL AND STRUCK PLAINTIFF ON THE HEAD - WHETHER THE INJURY THAT OCCURRED WAS AMONG THE TYPES OF HAZARDS INTENDED TO BE COVERED BY LABOR LAW § 240(1); SUMMARY JUDGMENT;
Supreme Court, New York County, among other things, denied defendant Port Authority's motion for summary judgment dismissing

and for common law negligence (the first order); in a separate order, the same court granted plaintiff's motion for partial summary judgment on the issue of defendant Port Authority's liability under Labor Law § 240(1) (the second order); App. Div. modified the first order by dismissing the cause of action under Labor Law § 240(1), otherwise affirmed the first order and dismissed as academic defendant Port Authority's appeal from the second order.

SHELLFISH, INC. v NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, et al.:

2ND Dept. App. Div. order of 9/14/10; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support the appeal taken as of right and whether the proceeding is moot;

ENVIRONMENTAL CONSERVATION - HUNTING AND FISHING LICENSES - SURF CLAM PERMIT - CHALLENGE TO APPELLATE DIVISION ORDER HOLDING, AMONG OTHER THINGS, THAT OWNER OF A PERMIT-HOLDING VESSEL'S FAILURE TIMELY TO NOTIFY NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION OF THE VESSEL'S SALE, TRANSFER OR REPLACEMENT PRECLUDED OWNER "FROM SEEKING TO REVIVE THE OTHERWISE ACADEMIC QUESTION OF WHETHER IT WAS PROPERLY DENIED THE 2008 PERMIT FOR A SECOND VESSEL";

Supreme Court, Suffolk County order and judgment that, as relevant here, dismissed the hybrid CPLR article 78 proceeding and declaratory judgment action upon the ground that it had been rendered academic; App. Div. affirmed on other grounds.