

COURT OF APPEALS NEW FILINGS

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

**November 12 through November 18, 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.**

BRADSHAW (JAY JOMAR), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 8/10/10; reversal; leave to appeal granted by Fisher, J., 10/14/10;

CRIMES - APPEAL - WAIVER OF RIGHT TO APPEAL - WHETHER DEFENDANT'S WAIVER OF HIS RIGHT TO APPEAL WAS KNOWING AND VOLUNTARY;

Supreme Court, Kings County convicted defendant, upon his guilty plea, of rape in the first degree, and imposed sentence; App.

Div. reversed, vacated the plea, suppressed the identification testimony, and remitted the matter to Supreme Court for further proceedings consistent with the Appellate Division decision.

GARDNER (DAMIAN), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 3/26/10; dismissal of appeal; leave to appeal granted by Jones, J., 11/8/10;

CRIMES - APPEAL - ABSENCE OF DEFENDANT - INVOLUNTARY DEPORTATION - WHETHER THE APPELLATE DIVISION ERRED IN DISMISSING DEFENDANT'S APPEAL ON THE GROUND THAT HE HAD BEEN DEPORTED AND WAS NO LONGER AVAILABLE TO OBEY THE MANDATE OF THE COURT WHERE DEFENDANT SERVED HIS SENTENCE, HAD BEEN PAROLED TO THE CUSTODY OF IMMIGRATION AND CUSTOMS ENFORCEMENT, AND ARGUED ON APPEAL THAT THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT HIS CONVICTION;

App. Div. granted respondent's motion to dismiss an appeal from a 6/30/08 Supreme Court, Queens County judgment on the ground that appellant has been deported and is no longer available to obey the mandate of the court, and dismissed the appeal.

HENDERSON v MANHATTAN and BRONX SURFACE TRANSIT OPERATING AUTHORITY, et al.:

1<sup>ST</sup> Dept. App. Div. order of 6/24/10; affirmance; leave to appeal granted by App. Div., 10/28/10; Rule 500.11 review pending; DISCLOSURE - PENALTY FOR FAILURE TO DISCLOSE - ANSWER STRICKEN PURSUANT TO CONDITIONAL ORDER FOR DEFENDANTS' FAILURE TO FULLY COMPLY WITH DISCOVERY DEMANDS;

Supreme Court, Bronx County denied defendants' motion to vacate a 6/20/07 order of the same court granting plaintiff's motion to strike the answer unless defendant fully complied with certain discovery demands within 60 days after service of the order and paid a \$1,000 penalty to plaintiff; App. Div. affirmed.

L&M BUS CORP., et al., MATTER OF v THE NEW YORK CITY DEPARTMENT OF EDUCATION, et al.:

1<sup>ST</sup> Dept. App. Div. order of 12/22/09; affirmance; leave to appeal granted by Court of Appeals, 10/26/10;

MUNICIPAL CORPORATIONS - BIDS AND BIDDERS - REQUEST FOR BIDS - WHETHER EMPLOYEE PROTECTION PROVISIONS VIOLATE THE PUBLIC BIDDING LAWS;

Supreme Court, New York County invalidated numerous specifications in a bid solicitation for a school transportation contract; App. Div. affirmed.

PAGAN (JORGE), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 8/10/10; affirmance; leave to appeal granted by Moskowitz, J., 10/30/10; Rule 500.11 review pending; CRIMES - UNLAWFUL SEARCH AND SEIZURE - ORDER ENLARGING CONDITIONS OF PROBATION TO INCLUDE WARRANTLESS SEARCHES OF DEFENDANT'S HOME - CPL 410.20 and 410.50(3) - ISSUANCE OF HOME SEARCH ORDER IN ABSENCE OF REASONABLE CAUSE TO BELIEVE THAT DEFENDANT VIOLATED CONDITIONS OF PROBATION;

Supreme Court, Bronx County enlarged the conditions of defendant's sentence of probation to permit searches of his home, concomitant with home visits by the Department of Probation; App. Div. affirmed.

RICHARDS, MATTER OF v CUOMO:

Supreme Court, Franklin County judgment of 10/22/10; dismissal of petition; sua sponte examination whether any jurisdictional basis exists to support an appeal as of right pursuant to CPLR 5601(b)(2);

PROCEEDING AGAINST BODY OR OFFICER - PROHIBITION - CHALLENGE TO SUPREME COURT JUDGMENT THAT, AMONG OTHER THINGS, DISMISSED A CPLR ARTICLE 78 PETITION IN THE NATURE OF PROHIBITION; Supreme Court, among other things, dismissed a CPLR article 78 petition in the nature of prohibition.

YENEM CORP. v 281 BROADWAY HOLDINGS [AND OTHER ACTIONS]:

1<sup>st</sup> Dept. App. Div. order of 8/3/10; reversal; leave to appeal granted by App. Div., 11/4/10;

NEGLIGENCE - VIOLATION OF STATUTORY DUTY - LIABILITY FOR DAMAGE CAUSED BY EXCAVATION WORK ON ADJOINING PROPERTY - WHETHER A MUNICIPAL ORDINANCE THAT IMPOSES A DUTY UPON THOSE PERFORMING EXCAVATION WORK 10 FEET BELOW THE CURB LEVEL TO "PRESERVE AND PROTECT" ADJOINING STRUCTURES (ADMINISTRATIVE CODE OF THE CITY OF NY FORMER § 27-1031[b][1] [NOW ADMINISTRATIVE CODE OF THE CITY OF NY § 28-3309.4]) IMPOSES ABSOLUTE LIABILITY SO AS TO WARRANT SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY IN FAVOR OF PLAINTIFFS, THE OWNER AND TENANT OF PREMISES ALLEGEDLY DAMAGED BY DEFENDANTS' EXCAVATION WORK ON THE ADJACENT PROPERTY - CONSIDERATION OF PRIOR CONDITION OF BUILDING AND ADEQUACY OF PRECAUTIONS IN DETERMINING LIABILITY; LEAVE GRANTED TO DEFENDANTS TO ASSERT COUNTERCLAIMS AGAINST PLAINTIFF RANDALL CO. LLC; Supreme Court, New York County granted plaintiff Randall Co. LLC's motion for summary judgment on the issue of liability and denied the cross motion of defendants 281 Broadway Holdings and The John Buck Co. for, among other things, leave to amend their answer; App. Div. reversed, denied plaintiff's motion, and granted defendants leave to amend their answer to assert counterclaims against plaintiff.