

COURT OF APPEALS NEW FILINGS

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

December 17 through December 23, 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.

EATON et al. v WAYNE TEACHERS ASSOCIATION, et al.:

4TH Dept. App. Div. order of 11/12/10; affirmance; sua sponte examination whether so much of the App. Div. order as affirmed that portion of Supreme Court's order that denied plaintiffs' motion to consolidate finally determines the action within the meaning of the Constitution and whether a substantial constitutional question is directly involved in so much of the Appellate Division order as affirmed the dismissal of the complaint to support an appeal as of right;

DISMISSAL AND NONSUIT - CHALLENGE TO APPELLATE DIVISION ORDER AFFIRMING A SUPREME COURT ORDER DISMISSING THE COMPLAINT - DISMISSAL OF CLAIMS ALLEGING BREACH OF THE DUTY OF FAIR REPRESENTATION AS BARRED BY THE STATUTE OF LIMITATIONS CONTAINED IN CPLR 217(2)(a) - DISMISSAL OF INTENTIONAL TORT CLAIMS AS BARRED BY THE ONE-YEAR STATUTE OF LIMITATIONS; SUFFICIENCY OF PLAINTIFFS' ALLEGATIONS/PROOF; DENIAL OF MOTION FOR CONSOLIDATION AS MOOT;

Supreme Court, Monroe County granted defendants' motion to dismiss the complaint pursuant to CPLR 3211, and denied as moot plaintiffs' cross motion to consolidate this action with Eaton v Hungerford (Index No. 07-044-87); App. Div. affirmed.

JOHNSON, MATTER OF v MARTINS and MATTER OF JACOBS v NASSAU COUNTY BOARD OF ELECTIONS:

2ND Dept. App. Div. order of 12/15/10; modification; leave to appeal granted by App. Div., 12/15/10;

ELECTIONS - GENERAL ELECTION FOR THE PUBLIC OFFICE OF STATE SENATOR FOR THE 7TH SENATORIAL DISTRICT - WHETHER THE COURTS BELOW ERRED IN FAILING TO ORDER A MANUAL RECOUNT OF THE ELECTION RESULTS UNDER ELECTION LAW § 16-113 - CHALLENGE TO CANVASS OF CERTAIN CONTESTED ABSENTEE AND AFFIDAVIT BALLOTS;

Supreme Court, Nassau County, as relevant here, denied those branches of the petitions which were, in effect, to direct the opening and canvassing of 48 ballots voted in affidavit envelopes or by absentee ballots in the same general election, to direct the casting and canvassing of certain ballots and to prohibit the casting of certain other ballots in the same general election, and to direct a manual audit of the voter verifiable audit records of the same general election; App. Div. modified by (1) deleting the provisions of the order that denied those branches of the petitions which were, in effect, to direct the casting and canvassing of the absentee ballots designated as Exhibits 33, 154 and 166, and substituting therefor provisions granting those branches of the petitions and directing the Nassau County Board of Elections to cast and canvass the absentee ballots designated as Exhibits 33, 154 and 166, and (2) deleting the provisions of the order that denied those branches of the petitions which were, in effect, to prohibit the casting and canvassing of absentee ballots designated as Exhibits 8 and 127 and the ballots designated as Exhibits 182 and 183, and substituting therefor provisions granting those branches of the petitions and directing the Nassau County Board of Elections not to cast and canvass the absentee ballots designated as Exhibits 8 and 127 and the ballots designated as Exhibits 182 and 183; and affirmed the order insofar as appealed from as so modified.

KEATING (PADRAIC), PEOPLE v:

2ND Dept. App. Div. order of 6/15/10; denial of writ of error coram nobis; leave to appeal granted by Lippman, Ch.J., 12/8/10; Rule 500.11 review pending;

APPEAL - EFFECTIVENESS OF APPELLATE COUNSEL - DENIAL OF APPELLANT'S APPLICATION FOR WRIT OF ERROR CORAM NOBIS;

App. Div. denied appellant's application for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, a 5/21/01 App. Div. order affirming a 12/13/96 Supreme Court, Richmond County, judgment of conviction.

RODRIGUEZ (RAFAEL), PEOPLE v:

1ST Dept. App. Div. order of 10/7/10; modification; leave to appeal granted by Ciparick, J., 12/1/10; Rule 500.11 review pending;

CRIMES - EAVESDROPPING WARRANTS - WRITTEN NOTICE REQUIREMENT (CPL 700.50[3]) - CHALLENGE TO APPELLATE DIVISION ORDER UPHOLDING SUMMARY DENIAL OF DEFENDANT'S MOTION TO SUPPRESS EAVESDROPPING EVIDENCE UPON THE GROUND THAT "SUPPRESSION OF WIRETAP EVIDENCE ... NOTICE REQUIREMENT IS NOT WARRANTED WITHOUT A SHOWING OF PREJUDICE"; WHETHER DEFENDANT WAS ENTITLED TO A MISTRIAL UPON THE GROUND THAT THE TRIAL COURT UNDULY INTERFERED WITH DEFENSE COUNSEL'S CROSS-EXAMINATION OF AN ACCOMPLICE WHO WAS COOPERATING WITH AND TESTIFYING FOR THE PROSECUTION AND THEREBY CONVEYED TO THE JURY ITS BELIEF IN THE WITNESS'S CREDIBILITY; EVIDENCE - WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE ON-LINE BOOKING SHEET CONTAINING DEFENDANT'S ALLEGED PHONE NUMBER; Supreme Court, New York County convicted defendant, after a jury trial, of criminal sale of a controlled substance in the first degree and conspiracy in the second degree, and sentenced him to concurrent terms of 17 years and 5 to 15 years; App. Div. modified to the extent of remitting the matter to Supreme Court for the sole purpose of imposing term of postrelease supervision in defendant's presence, and otherwise affirmed.

STEWART (WAYNE R.), PEOPLE v:

4TH Dept. App. Div. order of 2/11/10; affirmance; leave to appeal granted by Pigott, J., 12/6/10;

CRIMES - ASSAULT - "SERIOUS PHYSICAL INJURY" PURSUANT TO PENAL LAW §§ 10.00(10) AND 120.10(1) - SUFFICIENCY OF EVIDENCE TO SUPPORT CONVICTION OF ASSAULT IN THE FIRST DEGREE; Herkimer County Court convicted defendant, upon a jury verdict, of assault in the first degree; App. Div. affirmed.

TRUMP ON THE OCEAN, LLC, MATTER OF v CORTES-VASQUEZ et al.:

2ND Dept. App. Div. order of 9/28/10; modification; leave to appeal granted by App. Div., 12/9/10;

MUNICIPAL CORPORATIONS - ZONING - VARIANCE - DENIAL OF VARIANCE FOR PUBLIC DINING AND CATERING FACILITY AT JONES BEACH STATE PARK - VARIANCE SOUGHT FOR OCCUPIED BASEMENT TO BE CONSTRUCTED UNDER "DESIGN FLOOD ELEVATION";

Supreme Court, Nassau County granted that branch of the CPLR article 78 petition which was to annul the determination of the Southern Region, Hudson Valley Board of Review denying petitioner's application for a variance on the ground that it was arbitrary and capricious; App. Div. modified by adding a provision remitting the matter to the Southern Region, Hudson Valley Board of Review, to grant the requested variance, subject to any reasonable condition it deems appropriate.