

COURT OF APPEALS NEW FILINGS

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

**December 19, 2014 through December 25, 2014**

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 within 60 days after the appeal was taken; respondent's brief to be filed within 45 days after the due date for the filing of appellant's brief; and a reply brief, if any, to be filed within 15 days after the due date for 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.**

BARNEY-YEBOAH v METRO-NORTH COMMUTER RAILROAD, &c.:

1<sup>ST</sup> Dept. App. Div. order of 9/4/14; reversal; leave to appeal granted by App. Div., 12/4/14; Rule 500.11 review pending;  
NEGLIGENCE - RES IPSA LOQUITUR - SUMMARY JUDGMENT - TRAIN CEILING UTILITY PANEL SWUNG OPEN AND STRUCK PASSENGER - EXCLUSIVE CONTROL - WHETHER THERE IS A TRIABLE ISSUE OF FACT AS TO WHETHER THE INSTRUMENTALITY CAUSING THE ACCIDENT WAS WITHIN DEFENDANT'S EXCLUSIVE CONTROL;  
Supreme Court, New York County, denied plaintiff's motion for partial summary judgment on the issue of liability; App. Div. reversed and granted plaintiff's motion for partial summary judgment on the issue of liability.

EXETER BUILDING CORP., MATTER OF v TOWN OF NEWBURGH:

2<sup>ND</sup> Dept. App. Div. order of 2/13/14; reversal; leave to appeal granted by Court of Appeals, 12/16/14;

MUNICIPAL CORPORATIONS - ZONING - NONCONFORMING USE - COMMON-LAW VESTED RIGHT - WHETHER PROPERTY OWNER ESTABLISHED A VESTED RIGHT UNDER THE COMMON LAW TO DEVELOP PROPERTY UNDER A FORMER ZONING REGULATION BY TAKING VARIOUS ACTIONS IN RELIANCE UPON CONDITIONAL APPROVAL OF A SITE PLAN;

Supreme Court, Orange County, in a hybrid CPLR article 78 proceeding to review a determination of the Town of Newburgh Zoning Board of Appeals dated 11/24/09, made after a hearing, that Exeter Building Corp. and 17K Newburgh, LLC have no vested right to develop certain real property under the R-3 zoning regulations in effect prior to 3/6/06, and action for a judgment declaring that Exeter Building Corp. and 17K Newburgh, LLC have a vested right to develop the real property in accordance with those prior zoning regulations, after a hearing, granted that branch of the petition which was to review the determination that Exeter Building Corp. and 17K Newburgh, LLC have no vested right to develop the property under those prior zoning regulations and declared that Exeter Building Corp. and 17K Newburgh, LLC have a vested right to develop the property in accordance with those prior zoning regulations; App. Div. reversed the order and judgment insofar as appealed from, confirmed the determination, denied that branch of the petition which was to review the determination that Exeter Building Corp. and 17K Newburgh, LLC, have no vested right to develop the property under the R-3 zoning regulations in effect prior to 3/6/06, and remitted the matter to Supreme Court for the entry of an amended judgment, as relevant here, dismissing the proceeding on the merits and declaring that Exeter Building Corp. and 17K Newburgh, LLC have no vested right to develop the subject property under the R-3 zoning regulations in effect prior to 3/6/06.

GONZALEZ, PEOPLE ex rel. v SMITH, &c.:

3<sup>RD</sup> Dept. App. Div. order of 11/13/14; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

HABEAS CORPUS - WHEN REMEDY APPROPRIATE - CLAIMS THAT COULD HAVE BEEN OR WERE PREVIOUSLY RAISED ON DIRECT APPEAL AND IN COLLATERAL PROCEEDINGS;

Supreme Court, Ulster County, denied petitioner's application for a writ of habeas corpus, in a proceeding pursuant to CPLR article 70, without a hearing; App. Div. affirmed.

JORDAN, &c. v METROPOLITAN JEWISH HOSPICE, et al.:

2<sup>ND</sup> Dept. App. Div. order of 11/12/14; affirmance; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right;

JUDGMENTS - DEFAULT JUDGMENT - WRONGFUL DEATH ACTION - DENIAL OF MOTION FOR DEFAULT JUDGMENT UPON THE GROUND THAT PLAINTIFF WAS NOT AUTHORIZED TO COMMENCE THE ACTION;

Supreme Court, Kings County, in an action to recover damages for wrongful death, denied plaintiff's motion for leave to enter a default judgment against defendants Roslyn L. Blackman, Lenna S. Jordan, Helen Browne, Olive T. Jordan and Margaret L. Jordan; App. Div. affirmed.

MARTENS, &c., et al., v NERONI et al.:

3<sup>RD</sup> Dept. App. Div. order of 10/23/14; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

PROCEEDING AGAINST BODY OR OFFICER - CERTIORARI - COMBINED CPLR ARTICLE 78 PROCEEDING AND DECLARATORY JUDGMENT ACTION CHALLENGING THE COMMISSIONER OF ENVIRONMENTAL CONSERVATION'S DETERMINATION ADOPTING AN ADMINISTRATIVE LAW JUDGE'S RECOMMENDATION TO IMPOSE A CIVIL PENALTY AGAINST FREDERICK NERONI AND TO REQUIRE REMEDIATION FOR DAMMING A PROTECTED STREAM AND CREATING AN ARTIFICIAL POND WITHOUT A PERMIT; CLAIMED DENIAL OF DUE PROCESS, LACK OF SUBJECT MATTER JURISDICTION, AND STATUTE OF LIMITATIONS VIOLATION; PRECLUSIVE EFFECT OF APPELLATE DIVISION DISMISSAL OF PRIOR APPEAL FOR FAILURE TO PROSECUTE;

Supreme Court, Delaware County, awarded a total penalty of \$30,700 plus interest in favor of plaintiffs against Frederick J. Neroni; and, among other things, granted plaintiffs' motion for summary judgment and imposed a civil penalty; App. Div. affirmed.

PASTALOVE, MATTER OF v KELLY &c., et al.:

1<sup>ST</sup> Dept. App. Div. order of 8/21/14; affirmance; leave to appeal granted by App. Div., 12/11/14; Rule 500.11 review pending;

CIVIL SERVICE - RETIREMENT AND PENSION BENEFITS - ACCIDENTAL DISABILITY RETIREMENT - POLICE OFFICER RESPONDING TO FIRE EMERGENCY - TRIP AND FALL OVER FIRE HOSE THAT WAS FILLED WITH WATER AS OFFICER WAS ATTEMPTING TO STEP OVER IT;

Supreme Court, New York County, denied a CPLR article 78 petition to annul a determination of the Board of Trustees of the Police Pension Fund, which rejected petitioner's application for an accidental disability retirement pursuant to Administrative Code of the City of New York § 13-252 in favor of an ordinary disability retirement, and dismissed the proceeding; App. Div. affirmed.

SPOLETA CONSTRUCTION, LLC v ASPEN INSURANCE UK LIMITED, &c., et al.:

4<sup>TH</sup> Dept. App. Div. order of 7/11/14; reversal; leave to appeal granted by App. Div., 11/14/14; Rule 500.11 review pending;

INSURANCE - COVERAGE - WHETHER PLAINTIFF GENERAL CONTRACTOR ON A CONSTRUCTION PROJECT PROVIDED TIMELY NOTICE OF AN "OCCURRENCE" SUCH THAT IT WAS ENTITLED TO COVERAGE AS AN ADDITIONAL INSURED UNDER THE COMMERCIAL GENERAL LIABILITY INSURANCE POLICY ISSUED BY DEFENDANT ASPEN TO SUBCONTRACTOR; DECLARATORY JUDGMENT ACTION SEEKING DEFENSE AND INDEMNIFICATION IN UNDERLYING PERSONAL INJURY ACTION BY INJURED WORKER;

County Court, Monroe County, granted the motion to defendant Aspen Insurance UK Limited, c/o Aspen Specialty Insurance Management Company (Aspen) to dismiss the complaint against it; App. Div. reversed, denied defendant Aspen's motion, and reinstated the complaint against Aspen.

STATE OF NEW YORK, MATTER OF v DENNIS K. (ANONYMOUS):

2<sup>ND</sup> Dept. App. Div. order of 8/20/14; affirmance; leave to appeal granted by Court of Appeals, 12/17/14;

CRIMES - SEX OFFENDERS - CIVIL COMMITMENT OR SUPERVISION - MENTAL ABNORMALITY - WHETHER LEGALLY SUFFICIENT EVIDENCE SUPPORTED THE JURY FINDING THAT DENNIS K. HAD A MENTAL ABNORMALITY UNDER MENTAL HYGIENE LAW § 10.03(i) - ANTISOCIAL PERSONALITY DISORDER AND PARAPHILIA NOT OTHERWISE SPECIFIED NONCONSENT; CONFINEMENT REQUIRED - WHETHER LEGALLY SUFFICIENT EVIDENCE SUPPORTED THE FINDING THAT DENNIS K. WAS A DANGEROUS SEX OFFENDER REQUIRING CONFINEMENT; TRIAL - INSTRUCTIONS - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT, IN LIGHT OF SUPREME COURT'S JURY CHARGE, THE SUMMATION REMARKS BY THE ASSISTANT ATTORNEY GENERAL DID NOT DEPRIVE DENNIS K. OF A FAIR TRIAL, AND THAT SUPREME COURT DID NOT IMPROVIDENTLY EXERCISE ITS DISCRETION IN DECLINING TO GIVE THE SPECIFIC CHARGE REQUESTED BY COUNSEL FOR DENNIS K.; DISCLOSURE - PENALTY FOR FAILURE TO DISCLOSE - PRECLUSION OF EXPERT TESTIMONY - WHETHER SUPREME COURT ERRED IN NOT PRECLUDING OR LIMITING THE TESTIMONY OF THE STATE'S EXPERT WITNESSES AT THE DISPOSITIONAL HEARING;

Supreme Court, Kings County, upon a finding, made after a jury trial, that Dennis K. suffers from a mental abnormality as defined in Mental Hygiene Law § 10.03(i), and upon a determination, made after a dispositional hearing, that he is currently a dangerous sex offender requiring civil confinement, directed that he be committed to a secure facility for care and treatment; App. Div. affirmed.