SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 2, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Friedman, McGuire, Acosta, JJ.

4944 Ava also known as Maximilia Cordero, Index 115597/07
Plaintiff-Respondent-Appellant,

-against-

NYP Holdings, Inc. doing
business as New York Post, et al.,
Defendants-Appellants-Respondents,

News Corporation, etc., et al.,
Defendants.

Hogan & Hartson, LLP, New York (Slade R. Metcalf of counsel), for appellants-respondents.

Jacqueline Mari, New York for respondent-appellant.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered June 26, 2008, which, to the extent appealed from, denied that portion of the motion by defendants NYP Holdings, Inc. d/b/a New York Post, Dareh Gregorian, Lucy Carne, Peter Cox, and Michelle Gotthelf s/h/a Gotthielf to dismiss the first cause of action insofar as it alleges libel regarding a purported sexual fantasy, and denied plaintiff's cross motion to seal certain court records, unanimously modified, on the law, that portion of the Post defendants' motion seeking dismissal of the first cause of action premised on libel regarding a purported sexual fantasy

granted, and otherwise affirmed, without costs.

In October 2007, plaintiff[1] commenced an action to recover damages against, among others, Jeffrey Epstein. In that action, plaintiff alleged that Epstein, a wealthy money manager, had sexually exploited plaintiff when she was a minor by requesting both that she perform sex acts on him and permit him to perform sex acts on her in exchange for his assistance in helping her obtain a modeling career. The complaint contains graphic allegations regarding the specific sex acts plaintiff and Epstein allegedly performed.

Several days before plaintiff commenced the action against Epstein, defendant New York Post ran a story about the allegations in the complaint. The front page of the paper contained a picture of plaintiff with the headline "Teen Model: My kinky sex with billionaire. Bombshell Lawsuit." On page seven, a picture appeared of plaintiff sitting on the lap of her friend and former attorney William Unroch; a picture of Epstein also appeared on that page. The article summarized the graphic allegations in the complaint, and contained statements from Epstein's attorney disparaging the lawsuit and opining that it

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[1]Plaintiff was born a biological male but has been diagnosed with "Gender Identity Disorder" and identifies herself as a female (*see generally Matter of Brian L. v Administration for Children's Servs.*, 51 AD3d 488 [2008], *lv denied* 11 NY3d 703 [2008]). In accordance with plaintiff's preference, we refer to her using feminine pronouns.

was time-barred. The article also contained brief statements from Unroch regarding the lawsuit. Information regarding the extent of Epstein's wealth and social connections was imparted in the article, as was the status of a criminal case against him for soliciting underage prostitutes that was pending in Florida at the time the article was published.

On October 23, 2007, the New York Post published another story regarding plaintiff's lawsuit against Epstein. The article was entitled "GENDER-BEND SHOCKER, Kinky-sex suit gal is a man," and featured two pictures of plaintiff, one of Epstein and one of the front page of the prior edition of the New York Post that first reported on the *Cordero v Epstein* lawsuit. The article reads:

> "The stunning model wannabe who says she was pressured into a hush-hush affair with billionare Jeffrey Epstein when she was only 16 has an even bigger secret - she's a man.
>
> "Maximilia Cordero, who stepped forward last week with a lawsuit claiming she'd engaged in 'bizarre and unnatural sex acts' with Epstein while in her teens, was born Maximillian Cordero in 1983, records show.
>
> "He was dressing up as a girl by age 12, and has been living as a female since his early teens, sources close to Cordero told The Post. Cordero has had cosmetic work done and has taken hormone treatments for almost a decade to look more like a woman, one source said.
>
> "On one of at least three Myspace pages featuring her pictures, she lists her gender as 'male.'
>
> "She is listed as female on the other two. On one, she gives a graphic depiction of a 'masturbatory

fantasy' she has of being with multiple men and then multiple women, and on the other, the 23-year-old describes herself as 'a 17 year old model from New York City.'

"'I'm a spoiled bit*h and really mean,' the page says.

"I love to have fun, hang out and party! Oh and I'm a junk head (pills, designer substances. . ..'

"While her suit says she was too 'disabled as a result of severe mental disease and defect' to bring a suit against Epstein earlier than seven years after he allegedly sexually abused her, her purported Myspace page indicates she's been able to live a productive life. 'I'm currently attending F.I.T. part time (because of modeling) to earn my fashion degree,' her page says.

"Epstein's spokesman, Howard Rubenstein, called the revelations 'shocking,' and said Cordero's claims of being victimized by Epstein should not be believed.

"Epstein, 54, is expected to plead guilty in the next month and serve 18 months in jail for allegedly having sex with an underage prostitute at his Florida estate. Investigators in Palm Beach had claimed he'd had numerous liaisons with underage - and troubled - girls there. Rubinstein said that's made him an easy target 'for money-seeking lawyers and their women.'

"Epstein lawyer Gerald Lefcourt said there haven't been any allegations of his client trysting with underage boys.

"'He's never been accused of that,' he said, calling Cordero's suit 'ridiculous.'

"Cordero's lawyer, roommate and ex-boyfriend, William Unroch, 57, denied she's a he.

"She's female, and she's always been female. I may also be female. I'm checking with my doctors,' he said.

"He did acknowledge that she's had problems with drugs. 'Everybody knows that,' he said. 'She's

mentally unwell and on medication for her psychosis.'

"Unroch had acknowledged being in a romantic relationship with Cordero last year, when The Post did a story on a dispute they were having with one of their neighbors, but says now they're just 'friends' and he's her 'landlord.'

"When approached by a reporter last week, Cordero looked sickly and didn't want to talk about her past.

"'I'm deeply hurt by what I went through,' she said.

"Lefcourt said he's girding for more craziness with people trying to go after his client's money.

"'It wouldn't surprise me if the next claim was from the Loch Ness monster,' he said."[2]

Shortly after the October 23 article was published, plaintiff commenced this action against, among others, the New York Post, and certain staff of that publication (collectively, the Post defendants). The complaint asserts a number of causes

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[2]A third article regarding the *Cordero v Epstein* action appeared in the New York Post on December 15, 2007, shortly after the action giving rise to this appeal was commenced. Entitled "Kinky suit's romp & circumstances," the article recounted the basis of plaintiff's suit against Epstein (and emotional and mental injuries that Epstein's conduct allegedly caused) and reported that Epstein was seeking dismissal of the suit on the grounds that plaintiff was not credible and that the suit was time-barred. The article reported that plaintiff had brought another, similar action against another man, an "ex-lover," claiming that he had an inappropriate sexual relationship with her when she was a minor, and that, according to Epstein's lawyer, the prior lawsuit "vaporized after Cordero's correct date of birth -- revealing that she was not a minor - was brought to the attention of the court." Finally, the article stated that plaintiff had commenced a defamation action against the New York Post -- the action giving rise to this appeal -- and that The Post believed that the action was "without merit."

of action, including one for libel, the only claim relevant to this appeal. Plaintiff claims that the article referred to and quoted from three Myspace pages that she did not maintain and did not place material on, and that the Post defendants knew that plaintiff did not maintain the pages and that they were "forgeries." Although plaintiff alleges that several statements in the article are defamatory, only one is relevant on appeal. Thus, plaintiff alleges that the statement that "[o]n one [of the Myspace pages], [plaintiff] gives a graphic depiction of a 'masturbatory fantasy' she has of being with multiple men and then multiple women" implied that she is "a promiscuous slut" and is libelous per se.

The Post defendants moved under CPLR 3211(a)(7) to dismiss the causes of action asserted against them, and plaintiff cross-moved to seal the record in the action. Supreme Court granted the motion to the extent of dismissing all of the claims asserted against the Post defendants except for that aspect of the libel claim premised on the alleged implication in the article that plaintiff is "a promiscuous slut." The court denied plaintiff's cross motion to seal the record in the case, finding no reason to do so because plaintiff disclosed "the details of her life" in her court filings in her action against Epstein, and Unroch, her original attorney in the action against the Post defendants, spoke to the media about that lawsuit. The Post defendants

appeal from that portion of Supreme Court's order that denied their motion to dismiss the libel claim in its entirety, and plaintiff cross appeals from that portion of the order that denied her cross motion to seal certain portions of the record in this action.

Defamation, the making of a false statement about a person that "tends to expose the p[erson] to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him [or her] in the minds of right-thinking persons, and to deprive him [or her] of their friendly intercourse in society" (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379 [1977], *cert denied* 434 US 969 [1977]; *see Golub v Enquirer/Star Group*, 89 NY2d 1074 [1997]), can take one of two forms -- slander or libel. Generally speaking, slander is defamatory matter addressed to the ear while libel is defamatory matter addressed to the eye (2 PJI2d 3:23, at 196 [2009]; *see* Prosser and Keeton On Torts, § 112, at 786 [5th ed]; Sack on Defamation, § 2.3, at 2-9 [3d ed]). Libel is broken down into two discrete forms -- libel per se, where the defamatory statement appears on the face of the communication, and libel per quod, where no defamatory statement is present on the face of the communication but a defamatory import arises through reference to facts extrinsic to the

communication (*see* 2 PJI2d 3:23, at 197, 3:24, at 275; *see also Hinsdale v Orange County Publs.*, 17 NY2d 284 [1966]; *Cole Fischer Rogow, Inc. v Carl Ally, Inc.*, 29 AD2d 423, 426 [Stevens, J., 1968], *affd* 25 NY2d 943 [1969]).[3]

Plaintiff's libel cause of action is predicated on the theory that the October 23 article was libelous per se because the statement that "[o]n one [of the Myspace pages], [plaintiff] gives a graphic depiction of a 'masturbatory fantasy' she has of being with multiple men and then multiple women" implies that she is "a promiscuous slut." Obviously enough, plaintiff can only recover damages on her libel cause of action if she can establish that the article was in fact defamatory -- "tend[ing] to expose [her] to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of [her] in the minds of right-thinking persons, and to deprive [her] of their friendly intercourse in society" (*Rinaldi*, 42 NY2d at 379). The Post defendants argue that the statement does not have a defamatory meaning because the statement only reported that plaintiff had a sexual *fantasy*; it

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[3]Where the defamatory statement is libelous per se the plaintiff can recover damages without pleading and proving "special harm" (2 PJI2d 3:23, at 197-199, 3:24, at 275-276), i.e., "the loss, usually monetary, of some gain or advantage which would have come to the plaintiff but for the defamation" (*id.*, 3:23, at 198). If, however, the defamatory statement is libelous per quod, the plaintiff can only recover damages if she pleads and proves such harm (*id.* at 197-199, 3:24, at 275-276). As her brief makes plain, plaintiff's theory on her libel cause of action is that the October 23 article is libelous per se.

did not report that plaintiff actually engaged in sexual conduct with multiple men and multiple women or otherwise acted on the fantasy. For that reason, according to the Post defendants, the statement does not imply that plaintiff is promiscuous and therefore is not actionable. Plaintiff argues that the statement suggests that she is so perverted that she publishes an online diary of masturbatory fantasies of group sex and therefore implies that she is promiscuous. Thus, according to plaintiff, the statement is defamatory.

On a motion to dismiss a claim for libel on the ground that the offending statement is not defamatory, the court must determine "whether the contested statements are reasonably susceptible of a defamatory connotation" (*Armstrong v Simon & Schuster*, 85 NY2d 373, 380 [1995]; *see James v Gannett Co.*, 40 NY2d 415, 419 [1976]). In determining whether the statement is reasonably susceptible of a defamatory meaning, the court must examine not only the particular words claimed by the plaintiff to be defamatory but the entire communication in which those words appeared (*James*, 40 NY2d at 419-420; *see Aronson v Wiersma*, 65 NY2d 592, 594 [1985]; *see also Cole Fischer Rogow, Inc.*, 29 AD2d at 426, *affd* 25 NY2d 943 [headline and item to which it is attached must be considered together]). The court must also read the alleged defamatory words against the background of their issuance, giving due consideration to the circumstances

underlying the publication of the communication in which the words appeared (*James*, 40 NY2d at 420). Thus, the context in which the allegedly defamatory statement was made is critical (*see* Sack on Defamation, § 2.4.2.2, at 2-22 ["Context is . . . typically determinative"]). If the words used in the communication, "tested by [their] effect on the average reader" (*James*, 40 NY2d at 420), are not reasonably susceptible of a defamatory meaning, "they are not actionable and cannot be made so by a strained or artificial construction" (*Aronson*, 65 NY2d at 594).

A communication that states or implies that a person is promiscuous is defamatory (*James*, 40 NY2d at 419; *see Leser v Penido*, ___ AD3d ___, 2009 NY Slip Op 03845 [1st Dept, May 14, 2009]; *Rejent v Liberation Publs.*, 197 AD2d 240 [1994, Sullivan, J.]; *Ward v Klein*, 10 Misc 3d 648 [Sup Ct, NY County 2005, Richter, J.]). Here, however, tested by the October 23 article's effect on the average reader, the article is not reasonably susceptible of the defamatory connotation that plaintiff is promiscuous.

The October 23 article reported on an unusual lawsuit commenced by a transgender individual who sued a well-known, well-connected billionaire, claiming that the billionaire had sexually exploited her when she was a minor. The article was a follow-up piece to an article that had appeared in the Post

approximately one week earlier that described plaintiff's sexually charged suit against Epstein. The initial article did not indicate or suggest that plaintiff was a transgender individual; instead, it was based on the premise that plaintiff was a biological female. The Post defendants apparently learned that plaintiff was a biological male after running the initial piece and, after learning that information, decided to run another story about the lawsuit. Thus, reading the alleged defamatory words against the background of their issuance (*James*, 40 NY2d at 420), the thrust of the October 23 article was that the young woman who commenced the lawsuit is a transgender individual who was born a biological male. The headline and sub-headline of the article -- "GENDER-BEND SHOCKER, Kinky-sex suit gal is a man" -- highlight that the purpose of the article was to provide an update regarding plaintiff's sexual identity (*see generally Cole Fischer Rogow, Inc.*, 29 AD2d at 426, 428, *affd* 25 NY2d 943).

The references to the Myspace pages merely served to highlight the ambiguity regarding the sexual identity of the person who sued the billionaire, an ambiguity that lay at the heart of the October 23 article. Thus, the article stated:

> "On one of at least three Myspace pages featuring her pictures, she lists her gender as 'male.'
>
> "She is listed as female on the other two. On one, she gives a graphic depiction of a 'masturbatory fantasy' she has of being with multiple men and then

> multiple women, and on the other, the 23-year-old describes herself as 'a 17 year old model from New York City."

The words plaintiff complains of -- "On one [of the Myspace pages], [plaintiff] gives a graphic depiction of a 'masturbatory fantasy' she has of being with multiple men and then multiple women" -- do no more than report that plaintiff described on an Internet page a "masturbatory fantasy" she had involving multiple men and women. Nothing in that sentence or elsewhere in the article supports the inference that plaintiff in fact was promiscuous (*see generally James*, 40 NY2d at 420-421). Additionally, the references to the Myspace pages were cabined by statements regarding plaintiff's lawsuit against Epstein and her sexual identity, further reinforcing the thrust of the article -- that although the young person who had commenced the lawsuit had purported to be a woman, that person is in fact a transgender individual who was born a biological male.

At bottom, plaintiff's claim of defamation rests on the contention that the average reader reasonably would infer that someone with such a lewd fantasy also is in fact sexually promiscuous. That some readers might draw this inference does not render it reasonable. In light of the context in which the allegedly defamatory words appeared, those words, as a matter of law, are not reasonably susceptible of a defamatory connotation (*see James, supra; see also Morrow v Wiley*, 73 AD2d 859 [1980]).

This case must be contrasted with *Rejent v Liberation Publications* (*supra*). In *Rejent*, a photograph of the plaintiff, a male model, was used in an advertising campaign in The Advocate, a magazine advocating homosexuality and featuring sexually oriented material. The advertising campaign promoted a book published by the publisher of The Advocate. That book, entitled "Lust - The Body Politic," was "a collection of photographs of naked, sexually aroused men engaged in explicit and autoerotic acts" (*id.* at 241). In the photograph, which appeared in at least four issues of The Advocate, the plaintiff was "on a leopard skin couch, bare from the waist up, cigarette dangling from his lips, hair tousled, holding his crotch area with both hands, one atop the other" (*id.* at 242). The advertisement stated:

> "A PHOTO SHOWCASE FROM THE EDITORS OF THE ADVOCATE
>
> "Lust is swirling and seething, lithe and languid, omnipresent and omnipotent.
>
> "Lust in the 90's-tough, humorous, unrelenting and romantic.
>
> "LUST - THE BODY POLITIC is 128 pages of the most exquisite color and black-and-white photographs from the world's hottest and newest photographers with an introduction by one of America's most controversial authors, Dennis Cooper. Flawlessly printed on 11 x 15 heavyweight paper, LUST-THE BODY POLITIC is the perfect gift. Order now to guarantee delivery for yourself, for a friend. LUST-when a body is much more than a work of art" (*id.* [brackets omitted]).

The plaintiff commenced an action against the publisher,

alleging, among other things, that the advertisement implied that he was sexually lustful and promiscuous, and was therefore defamatory. The publisher moved to dismiss the defamation claim on the ground that the advertisement was not susceptible of the defamatory meaning the plaintiff ascribed to it. Supreme Court denied the motion and we affirmed.

Writing for the majority, Justice Sullivan stated that

> "The allegations of the complaint are . . . sufficient to state a cause of action for defamation based on the publication of plaintiff's picture in a sexually suggestive manner allegedly falsely implying that he is sexually lustful and promiscuous, that he advertises erotic photographs and that he endorses and subscribes to the sexual attitudes and views expressed in [the publisher's] publications. The sexual overtones of his photograph are underscored by the text of the advertisement, which, in part, states, 'Lust is swirling and seething, lithe and languid, omnipresent and omnipotent' and 'LUST-when a body is much more than a work of art.'
>
> "In this context, the word lust carries a negative overtone of sexual promiscuity. Given the strong implication of the language used, the suggestive nature of plaintiff's picture and the obviously provocative collection of photographs his picture was exploited to advertise, [the publisher]'s advertisement is reasonably susceptible of the defamatory connotation that plaintiff is lustful and sexually promiscuous" (*id.* at 243 [footnote omitted]).

Justice Sullivan also stressed that the advertisement had to be considered in the context of the entire edition of the magazine in which it appeared (*id.*). Thus, he observed that

> "plaintiff's picture was surrounded by innumerable other suggestive advertisements of live sex videos, telephone sex talk, erotic devices and sexual literature. Several of the advertisements depict naked

> men with unzipped pants grasping their genitals and often contain provocative language . . . The context in which plaintiff's picture appears in The Advocate, in the midst of these other advertisements, only heightens the allegedly false and defamatory impression that plaintiff is sexually lustful and promiscuous" (*id.* at 243-244).

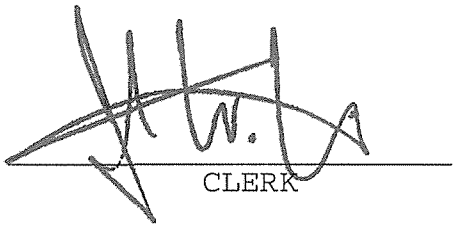
Unlike the defamatory material in *Rejent*, which appeared in a publication that featured sexually oriented material, the October 23 article appeared in a daily newspaper. The defamatory material in *Rejent*, i.e., the advertisement, included a picture of the plaintiff in a sexually provocative pose, and the magazine in which the advertisement appeared contained numerous other sexually provocative pictures and advertisements. The allegedly defamatory statement in the October 23 article, however, was not accompanied by any sexually suggestive photographs of plaintiff and there is no suggestion that material elsewhere in that day's edition of the Post contained any sexually suggestive material. Moreover, the defamatory material in *Rejent* was an advertisement that was itself sexually suggestive and promoted a product that was sexually provocative. Here, the allegedly defamatory material was part of a newspaper article providing a follow-up report to a prior article discussing an unusual lawsuit.

Finally, the court providently exercised its discretion in refusing to seal those portions of the record containing certain of plaintiff's medical records. Plaintiff failed to demonstrate that "good cause" exists to seal the record (*see* 22 NYCRR 216.1).

Notably, plaintiff herself made her medical records public by filing them in court in her action against Epstein without requesting that they be filed under seal.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



CLERK

Gonzalez, P.J., Mazzarelli, Friedman, Catterson, Renwick, JJ.

5277 William Rivera, et al., Index 20053/05
Plaintiffs-Appellants,

-against-

Berrios Trans Service Inc., et al.,
Defendants-Respondents.

Alpert & Kaufman, LLP, New York (Morton Alpert of counsel), for appellants.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Joel M. Simon of counsel), for respondents.

Order, Supreme Court, Bronx County (Yvonne Gonzalez, J.), entered January 7, 2008, which, in an action for personal injuries sustained in a motor vehicle accident, granted defendants' motion for summary judgment dismissing the complaint, reversed, on the law, without costs, the motion denied, the complaint reinstated, and the matter remanded for further proceedings, including disposition of that branch of defendants' motion for summary judgment dismissing plaintiff Isabel Rivera's complaint on the ground that she did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d).

It cannot be said as a matter of law that plaintiff driver's conduct was the sole proximate cause of the subject car accident. Although a stop sign regulated the approach of plaintiff driver into the intersection and no traffic control devices regulated defendant driver's approach, the record presents triable issues

of fact, including, inter alia, whether plaintiff stopped for the stop sign and which vehicle was in the intersection first (*see Nevarez v S.R.M. Mgt. Corp.*, 58 AD3d 295 [1st Dept 2008]; *Wilson v Trolio*, 30 AD3d 255 [2006]; *Hernandez v Bestway Beer & Soda Distrib.*, 301 AD2d 381 [2003]).

Because the motion court denied, as moot, the branch of defendants' motion for summary judgment dismissing plaintiff Isabel Rivera's complaint on the ground that she did not sustain a "serious injury," the matter is remanded for disposition of that branch of defendants' motion.

All concur except Gonzalez, P.J. who concurs, and Catterson, J. who dissents, in separate memoranda as follows:

GONZALEZ, P.J. (concurring)

Although I am in agreement with the reasoning of my dissenting colleague, I nevertheless feel constrained by our decision in *Nevarez v S.R.M. Mgt Corp.*, (58 AD3d 295 [2008]), and therefore concur with the majority.

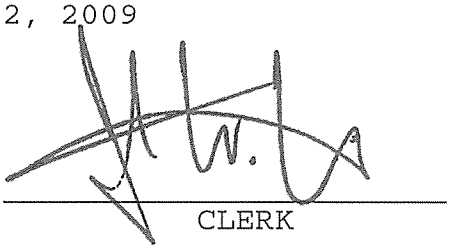
CATTERSON, J. (dissenting)

I am compelled to dissent for the reasons stated in my dissent in Nevarez v. S.R.M Mgt. Corp. (58 A.D.3d 295, 299, 867 N.Y.S.2d 431, 434-435 (2008)) because I believe that the facts of

the two cases present the same issue, namely: the duty of drivers on both dominant and subservient streets when approaching a stop sign.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



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Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

999 The People of the State of New York, Ind. 6674/03
Respondent,

-against-

Paris Fyall,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Gregory S. Chiarello of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Malancha Chanda of counsel), for respondent.

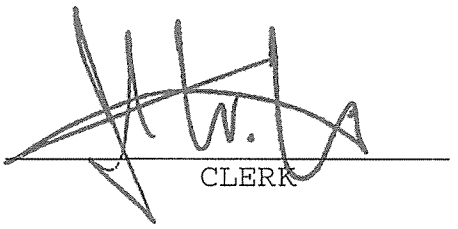
Order, Supreme Court, New York County (Renee A. White, J.), entered on or about March 20, 2007, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-c), unanimously affirmed, without costs.

Clear and convincing evidence supported the assessment of 15 points for the risk factor of drug or alcohol abuse. With this assessment, defendant qualifies as a level three offender without an upward departure. In any event, the record also supports the court's upward departure, based on aggravating factors that were established by clear and convincing evidence and were not adequately taken into account by the risk assessment instrument

(*see e.g. People v Sullivan*, 46 AD3d 285 [2007], *lv denied* 10 NY3d 704 [2008]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



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Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

1000 The People of the State of New York, Ind. 6425/06
Respondent,

-against-

Emiliano Zapata,
Defendant-Appellant.

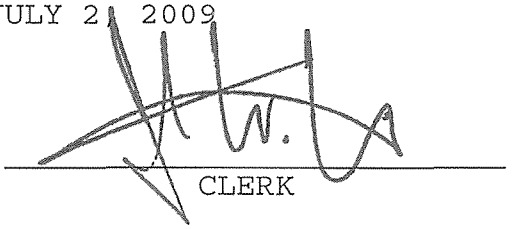
Robert S. Dean, Center for Appellate Litigation, New York (Jonathan M. Kirshbaum of counsel), for appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered on or about March 22, 2007,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: JULY 21, 2009



CLERK

Counsel for appellant is referred to §606.5, Rules of the Appellate Division, First Department.

Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

1002 The People of the State of New York, Ind. 547/07
Respondent,

-against-

Sharbu Redd,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Lisa A. Packard of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Grace Vee of counsel), for respondent.

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered January 11, 2008, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree and criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to concurrent terms of 8 years and 5 years, respectively, unanimously affirmed.

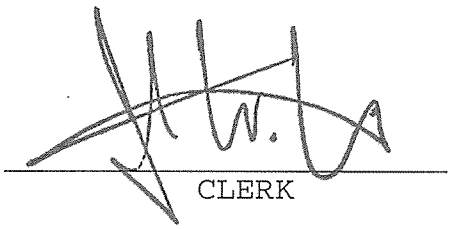
The court properly exercised its discretion in denying defendant's motion to withdraw his guilty plea without a hearing and without appointing new counsel. Defendant received a sufficient opportunity to present his assertions both in writing and at sentencing (*see People v Frederick*, 45 NY2d 520, 525 [1978]). The motion consisted of vague and conclusory allegations of innocence, lack of comprehension and ineffective assistance of counsel. The court was entitled to rely on the

plea colloquy, which contradicted defendant's assertions. That counsel did not join in defendant's motion to withdraw his plea, and that counsel briefly responded to defendant's assertion that counsel had not discussed the plea with him, did not create a conflict of interest (*see e.g. People v Mangum*, 12 AD3d 207 [2004], *lv denied* 4 NY2d 765 [2005]).

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



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Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

1003 The People of the State of New York, Ind. 5063/06
Respondent,

-against-

Jose Torres,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

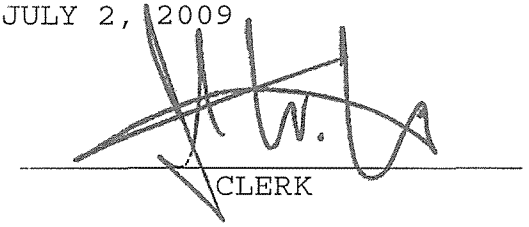
Robert M. Morgenthau, District Attorney, New York (Paula-Rose Stark of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about April 4, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: JULY 2, 2009



CLERK

Counsel for appellant is referred to §606.5, Rules of the Appellate Division, First Department.

Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

1004 In re Sebastian M., and Others,

Dependent Children Under
Eighteen Years of Age, etc.,

Lizette M.,
Respondent-Appellant,

-against-

Harlem Dowling-Westside Center,
Petitioner-Respondent.

The Center for Family Representation, New York (Susan Jacobs of counsel), for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Waksberg of counsel), and Proskauer Rose LLP, New York (David A. Lewis of counsel), Law Guardian.

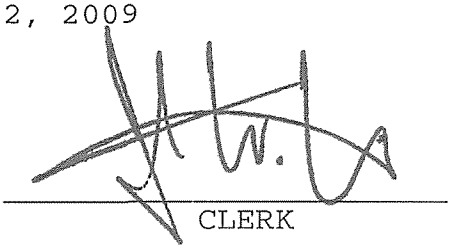
Order of disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about July 19, 2007, which, upon a finding of mental illness, terminated respondent mother's parental rights to the subject children, and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding that respondent was mentally ill and is, by reason of such illness, presently and for the foreseeable future, unable to properly and adequately care for the subject children, was supported by clear and convincing evidence, including medical

records and expert testimony (*see Matter of Mitchell Randell K.*, 41 AD3d 119 [2007]; *Matter of Nadaniel Jackie P.*, 35 AD3d 305 [2006]; Social Services Law § 384-b[4][c]; [6][a]). Contrary to respondent's argument, the court provided her with ample opportunity to counter the expert testimony as to her mental illness and to establish that she was complying with the requisite treatment, and did not commit error in sustaining objections to irrelevant questions pertaining to whether the agency referred respondent to her current therapist or whether she sought out the therapist on her own accord.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



CLERK

Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

1005 The Rogers Revocable Trust U/A/D 12/31/81, Plaintiff-Appellant-Respondent, Index 601133/04

-against-

Bank of America, N.A., Defendant-Respondent-Appellant.

Friedman Kaplan Seiler & Adelman LLP, New York (Eric Seiler of counsel), for appellant-respondent.

Davis Polk & Wardwell, New York (Robert F. Wise, Jr. of counsel), for respondent-appellant.

Judgment, Supreme Court, New York County (Herman Cahn, J.), entered November 14, 2008, after a nonjury trial, declaring defendant's adjustment of a stock option price proper and binding, unanimously affirmed, with costs in favor of defendant.

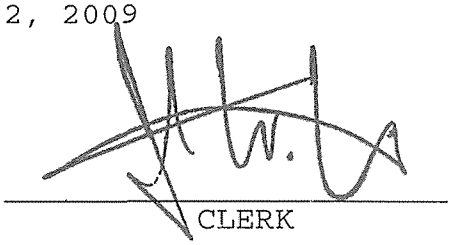
The calculation of the post-merger adjustment was not manifest error (*see Structured Credit Partners v Paine Webber Inc.*, 306 AD2d 132 [2003]), and the trial court fairly interpreted the evidence in concluding that it was not done in bad faith (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]). It was commercially reasonable for defendant to account for its increased risk as a result of a merger and the consequent loss of position (*see generally Morgenroth v Toll Bros., Inc.*, 60 AD3d 596 [2009]), particularly where its counterparty was a trust for the benefit of a corporate insider holding the shares involved in the transaction. The sophisticated parties were

represented by counsel in the underlying transaction, and had plaintiff wished to circumscribe defendant's discretion in calculating the adjustment it could have sought a prophylactic provision in the agreement.

In view of the foregoing, it is unnecessary to address the parties' other contentions.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



CLERK

Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

1006 The People of the State of New York, Ind. 3722/06
Respondent,

-against-

Morris LaSalle,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Sara Gurwitch of counsel), for appellant.

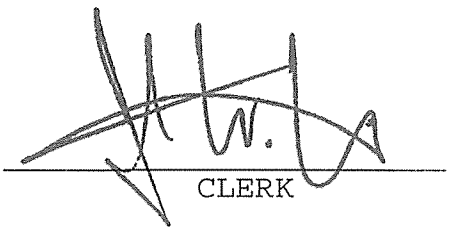
Robert M. Morgenthau, District Attorney, New York (David P. Stromes of counsel), for respondent.

Judgment, Supreme Court, New York County (James A. Yates, J.), rendered February 22, 2007, convicting defendant, upon his plea of guilty, of attempted burglary in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 12 years to life, unanimously affirmed.

Defendant's constitutional challenge to the procedure under which he was sentenced as a persistent violent felony offender is without merit (*see Almendarez-Torres v United States*, 523 US 224 [1998]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



CLERK

Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

1007 The People of the State of New York, Ind. 1458/05
Respondent,

-against-

Engracia (Eugracia) Soto,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Carol A. Zeldin of counsel), for appellant.

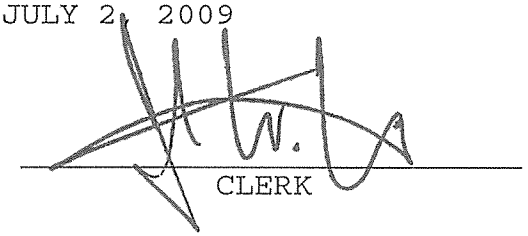
Robert M. Morgenthau, District Attorney, New York (Britta Gilmore of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J.), rendered on or about May 18, 2007,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: JULY 21, 2009



CLERK

Counsel for appellant is referred to §606.5, Rules of the Appellate Division, First Department.

Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

1008 Juan Carlos Morel, an infant under the age of 18 years by his mother and natural guardian, Carmen Hernandez, et al., Plaintiffs-Respondents-Appellants, Index 26763/04

-against-

Ben Schenker, Defendant,

164 & 172 Holding LLC, Defendant-Appellant-Respondent.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Anna A. Higgins of counsel), for appellant-respondent.

Philip Newman, PC, Bronx (Steven J. Mines of counsel), for respondents-appellants.

Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered January 13, 2009, which denied defendant Holding's motion for summary judgment dismissing the complaint and denied plaintiffs' cross motion for leave to amend their complaint, unanimously modified, on the law, plaintiffs' cross motion for leave to amend granted, and otherwise affirmed, without costs.

The underlying action arose out of two separate incidents: the infant plaintiff's alleged exposure to mold, dust and vermin in or about October 2000, and alleged injury to plaintiff mother (introduced in the bill of particulars) from a ceiling collapse on February 23, 2003. Triable issues of fact exist as to whether Holding was a proper party to the litigation. Although Holding's

application to the motion court was predicated solely on its lack of ownership of the subject property, it now argues on appeal that there is no proof it had any duty toward the property, maintained the property, or employed anyone who appeared at depositions on behalf of the property. However, admissions made by counsel on behalf of their clients are binding (*see Matter of Union Indem. Ins. Co. of N.Y.*, 89 NY2d 94, 103 [1996]), and Holding's discovery responses create issues of fact as to whether work or repairs made by its employees may have caused plaintiffs' injuries.

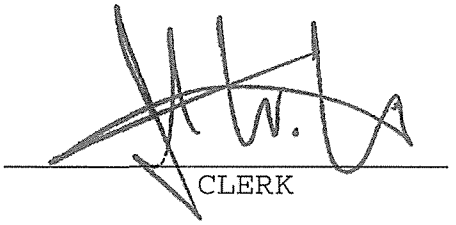
As to the proposed amendment to the complaint to add additional defendants, a claim asserted against a new party will relate back to the date upon which plaintiffs' claim was previously interposed against the original named defendant, despite the fact that the new party was not named in the originally served process, but only if (1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is "united in interest" with the original defendant and thus can be charged with notice of the initiation of the action without being prejudiced in maintaining his defense on the merits, and (3) the new party knew or should have known that but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well (*Brock v Bua*, 83 AD2d 61, 69 [1981]). Here, defendant and the

proposed defendants produced the deposition testimony of the superintendent of the subject premises, who stated that he was an employee of COB Holding, one of the proposed defendants. This testimony directly contradicted a discovery response on August 17, 2005, in which Holding conceded that the employee "was the superintendent on the alleged date of loss, 2/23/03 and is still currently employed by . . . Holding . . . as superintendent." Further, the proposed defendants, along with Holding, were identified as named insureds on the same general insurance policy applicable to the subject premises. Holding shared the same address with the proposed defendants. Under the circumstances, we find that plaintiffs have provided sufficient evidence entitling them to amend their complaint.

Holding's argument that certain evidence attached to plaintiffs' cross motion papers should be stricken as inadmissible because it is unauthenticated is raised for the first time in reply, and is thus rejected (*Matter of Kelly's Sheet Metal, Inc. v Thompson*, 52 AD3d 220 [2008]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



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Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

1009 In re David F. Dobbins, Index 106208/08
Petitioner-Appellant,

-against-

Riverview Equities Corp., et al.,
Respondents-Respondents.

Patterson Belknap Webb & Tyler LLP, New York (Nicolas Commandeur of counsel), for appellant.

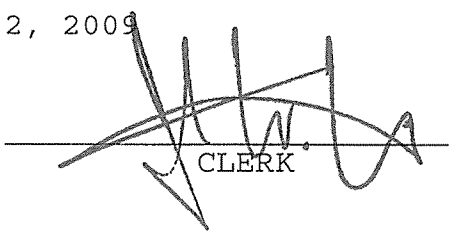
Balber Pickard Maldondo & Van Der Tuin, PC, New York (John Van Der Tuin of counsel), for respondents.

Judgment, Supreme Court, New York County (Joan A. Madden, J.), entered January 12, 2009, denying the petition to set aside respondent cooperative corporation's riser policy as violative of paragraph 18(a) of the proprietary lease and to obtain reimbursement of the costs of an assessment imposed pursuant thereto, and dismissing this proceeding as time-barred, unanimously affirmed, with costs.

This proceeding was untimely commenced under CPLR article 78, having been commenced more than four months after respondents' determination became final and binding upon petitioner.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



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Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

1010 The People of the State of New York, Respondent,

Ind. 5732/05

-against-

Aaron Bright,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Daniel A. Warshawsky of counsel), and Dorsey & Whitney LLP, New York (Joseph J. Perkovich of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Vincent Rivellese of counsel), for respondent.

Judgment, Supreme Court, New York County (Eduardo Padro, J.), rendered August 7, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal sale of a controlled substance in or near school grounds, and sentencing him, as a second felony drug offender whose prior conviction was a violent felony, to concurrent terms of 6 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. The evidence established that defendant acted as a steerer and order taker in a team of drug dealers.

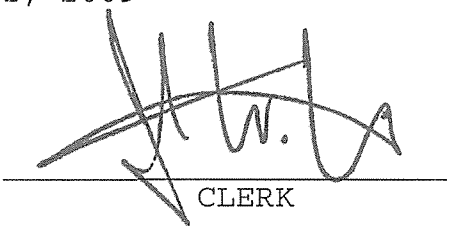
After making a showing that was concededly sufficient to warrant closure of the courtroom to the general public during the testimony of an undercover officer, the People also made a

sufficiently particularized showing to warrant exclusion of defendant's brother, who lived in the vicinity of the present drug sale and had prior drug convictions, one of which involved conduct that occurred across the street from the location of the present sale (*see People v Nieves*, 90 NY2d 426 [1997]; *People v DeJesus*, 305 AD2d 170 [2003], *lv denied* 100 NY2d 619 [2003]). Defendant's remaining arguments on this issue are without merit.

The challenged portions of the prosecutor's summation did not deprive defendant of a fair trial (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



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Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

1011N Concourse Rehabilitation and Nursing Center, Inc., et al., Plaintiffs-Respondents, Index 303124/07

-against-

Gracon Associates, etc., et al., Defendant-Appellants.

Richard L. Yellen & Associates, LLP, New York (Richard L. Yellen of counsel), for appellants.

Neiman & Mairanz P.C., New York (Marvin Neiman of counsel), for respondents.

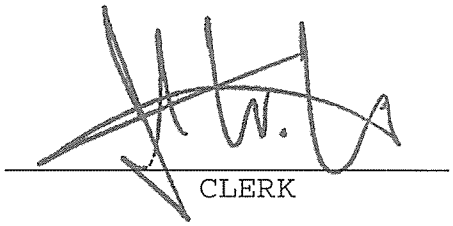
Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered on or about June 13, 2008, which, inter alia, granted plaintiffs' motion for a preliminary injunction and enjoined defendants from taking any action to terminate plaintiffs' lease and from holding plaintiffs in violation of the lease terms, unanimously affirmed, with costs.

Plaintiffs demonstrated the requisite likelihood of success on the merits, irreparable injury absent an injunction and balance of the equities in their favor (*see Doe v Axelrod*, 73 NY2d 748, 750 [1988]). If defendants were permitted to treat the lease as terminated, plaintiffs would lose their substantial interest in real property (*see generally EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 52 [2004], *lv dismissed* 3 NY3d 656 [2004], *lv denied* 3 NY3d 607 [2004] ["each parcel of real property is unique"]), although it appears from the record that they were

never in arrears by more than a month or two and defendants will not be prejudiced by the injunction (*see J. N. A. Realty Corp. v Cross Bay Chelsea*, 42 NY2d 392, 398-400 [1977]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



CLERK

Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

1012N Patrick D. Islar, etc., et al.,
Plaintiffs-Appellants,

Index 106294/06

-against-

New York City Board of Education, et al.,
Defendants-Respondents.

Mark L. Lubelsky & Associates, New York (Mark L. Lubelsky and David Gottlieb of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Susan Choi-Hausman of counsel), for respondents.

Order, Supreme Court, New York County (Karen S. Smith, J.), entered March 16, 2009, which granted plaintiffs' motion to strike defendants' answer only to the extent of directing defendants to produce three specified witnesses for depositions and awarding plaintiffs costs of the depositions, including reasonable attorneys fees, unanimously affirmed, without costs.

The court exercised its discretion in a provident manner in imposing a lesser sanction than that requested (*see Kugel v City of New York*, 60 AD3d 403 [2009]). The record indicates that the missing witness statements from defendants' internal investigation of the alleged sexual assault of infant plaintiff were not crucial to the prosecution of plaintiffs' claims, inasmuch as each of the witnesses was available for deposition, and other investigative proof, including police records, suggested that the witness' statements were not supportive of

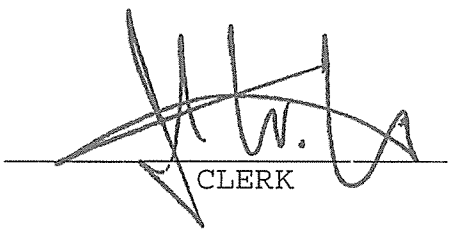
plaintiffs' claims (*see Jordan v Doyle*, 24 AD3d 107 [2005], *lv denied* 7 NY3d 705 [2006]). Although constituting hearsay, the court properly relied, in part, on police investigative records in deciding the motion.

Furthermore, defendants' conduct in not providing a definitive answer as to the availability of the witness statements during an 18-month period, albeit during which 8 discovery orders were issued, did not amount to willful and contumacious conduct on defendants' part, since defendants could not locate the statements despite a thorough search for them. Even assuming that plaintiffs met their initial burden of showing that defendants' conduct was willful and contumacious, defendants offered a reasonable excuse for their failure to comply with discovery orders, namely that the statements could not be located (*see Palmenta v Columbia Univ.*, 266 AD2d 90 [1999]).

We have considered plaintiffs' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

1014N-
1015N Thomas Molyneaux, et al., Index 23469/04
Plaintiffs-Respondents,

-against-

The City of New York, et al.,
Defendants-Appellants.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for appellants.

Finz & Finz, P.C., Jericho (Jay L. Feigenbaum of counsel), for respondents.

Order, Supreme Court, Bronx County (Alan J. Saks, J.), entered January 24, 2008, which granted plaintiffs' motion pursuant to CPLR 3126 to strike defendants' answer for noncompliance with a prior conditional discovery order, and directed an assessment of damages, unanimously reversed, on the law and the facts, without costs, the motion denied and the answer reinstated. Appeal from order, same court (Edgar G. Walker, J.), entered August 10, 2007, which, inter alia, deemed defendants' cross motion to renew and reargue their prior cross motion for summary judgment as a motion to reargue, and, so considered, denied the motion as untimely, unanimously dismissed, without costs, as abandoned.

The injured plaintiff alleges that he sustained personal injuries when his car was hit in the rear by a commercial garbage truck. According to plaintiff, defendant police officer arrived

at the scene, told plaintiff to stay in his car, assured him that he and the other responding officers would obtain the names of the truck's owner and driver and the truck's licence number and that a report of the accident would be available at the 52nd Precinct. Although the officers then proceeded to gather the information, when plaintiff went to the precinct and requested a copy of the report, he was told that no such report had been filed, and plaintiff has since been unable to obtain the information necessary to locate the owner or driver of the truck. The theory of the action is that because of the negligent mishandling of the report by defendants City and police officer, plaintiff, and his wife, who sues derivatively, were "deprived of the opportunity to seek recourse for [their] injuries."

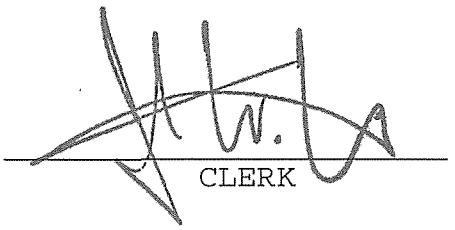
The court improperly granted plaintiffs' CPLR 3126 motion in the absence of the required affirmation by their attorney that the latter had conferred with defendants' attorney in a good faith effort to resolve the issues raised by the motion (22 NYCRR 202.7[a][2]; *see Cerreta v New Jersey Tr. Corp.*, 251 AD2d 190 [1998]). In addition, there was also no clear showing that any failure by the City to comply with the conditional order was willful, contumacious or in bad faith (*see Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 171 [2004]).

Defendants represent in their brief that they "recently filed a stipulation withdrawing [their] appeal from the August

[10] 2007 Order" denying their cross motion seeking, inter alia, renewal of their motion for summary judgment; such withdrawal apparently was in response to such leave having been granted during the pendency of the appeal. The stipulation, however, is not on file with the Clerk of this Court. Accordingly, we deem the appeal from the August 10, 2007 order abandoned, and dismiss it.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



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Mazzarelli, J.P., Andrias, Friedman, Renwick, Freedman, JJ.

694N Orix Financial Services, Inc., etc., Index 107258/07

-against-

Operation Shuttle, Inc., et al.,
Defendants-Respondents.

Stein & Stein, Haverstraw (William M. Stein of counsel), for appellant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Jane S. Solomon, J.), entered April 18, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed for the reasons stated by Solomon, J., with costs and disbursements.

ENTERED: JULY 2, 2009

CLERK

Andrias, J.P., Sweeny, McGuire, Acosta, Richter, JJ.

975 The People of the State of New York, Ind. 9516/98
Respondent,

-against-

Danny Coronel,
Defendant-Appellant.

Law Offices of Laura M. Miranda, New York (Laura M. Miranda of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (John B.F. Martin of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael R. Ambrecht, J.), rendered April 5, 2004, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of 1 to 3 years, unanimously affirmed.

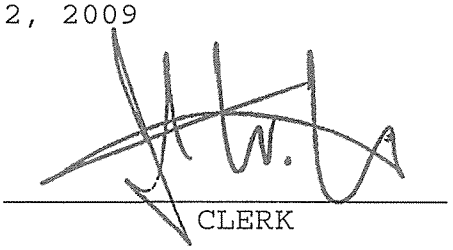
Defendant's ineffective assistance of counsel claim is not reviewable on direct appeal, since it is based on conversations between defendant and his attorney that are not reflected in the record (*see People v Love*, 57 NY2d 998 [1982]; *People v Santer*, 30 AD3d 1129 [2006], *lv denied* 7 NY3d 928 [2006].

We perceive no basis for reducing the sentence, which defendant has completed in any event. To the extent defendant is requesting a reduction of his conviction to a lesser offense,

there is no basis upon which to do so (*see People v Velasquez*, 25 AD3d 501 [2006], *lv denied* 6 NY3d 854 [2006]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



CLERK

Andrias, J.P., Sweeny, McGuire, Acosta, Richter, JJ.

976 Beth M. Garnett, Index 119073/06
Plaintiff-Respondent,

-against-

Strike Holdings LLC, et al.,
Defendants-Appellants,

Speedworld Indoor Racing, Inc., etc.,
Defendant.

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Carla Varriale of counsel), for appellants.

Finz & Finz, P.C., Mineola (Jay L. Feigenbaum of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 4, 2008, which denied the Strike defendants' motion to dismiss the action as against them, unanimously affirmed, without costs.

Plaintiff's allegations sufficiently state causes of action for negligence, negligent and defective design, strict products liability, failure to warn, and breach of warranty. Accepting the facts alleged in the amended complaint as true and according plaintiff the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the allegations that the Strike defendants leased and rented the go-karts are consistent with the inference that they placed those vehicles into the distributive chain, sufficiently stating product

liability claims against them. Accordingly, their motion to dismiss those causes of action was properly denied (*see Winckel v Atlantic Rentals & Sales*, 159 AD2d 124 [1990]).

As it is undisputed that plaintiff paid the Strike defendants a fee to use the go-kart at the recreational facility owned or operated by them, we also find the EXPRESS ASSUMPTION OF RISK, WAIVER, INDEMNITY AND AGREEMENT NOT TO SUE, which they required of drivers, to be "void as against public policy and wholly unenforceable" against plaintiff by reason of General Obligations Law § 5-326 (*see Tuttle v TRC Enters., Inc.*, 38 AD3d 992, 993 [2007]). Therefore, the purported waiver provides neither a defense based on "documentary evidence" (CPLR 3211[a][1]) nor grounds for dismissal as a form of release (CPLR 3211[a][5]) (*see Leftow v Kutsher's Country Club Corp.*, 270 AD2d 233 [2000]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009

CLERK

Andrias, J.P., Sweeny, McGuire, Acosta, Richter, JJ.

978 Senarh S.A., Index 602387/06
Plaintiff-Respondent-Appellant,

-against-

Paul Morgan,
Defendant-Appellant-Respondent.

Marc Bogatin, New York, for appellant-respondent.

The Abramson Law Group, PLLC, New York (Robert Frederic Martin of counsel), for respondent-appellant.

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered June 10, 2008, upon a jury verdict awarding plaintiff damages in the amount of $4 million, plus pre-judgment interest, costs and disbursements, and bringing up for review an order, same court and J.H.O., entered March 27, 2008, which, inter alia, denied in part defendant's motion to set aside the verdict, unanimously reversed, on the law, with costs, defendant's motion to set aside the verdict granted, the judgment vacated and the complaint dismissed. The Clerk is directed to enter an amended judgment accordingly.

In this action for fraud arising out of the purchase of soybean oil by plaintiff from defendant, the evidence presented at trial was legally insufficient to support the jury's finding that plaintiff relied upon false statements made by defendant in two letters sent to plaintiff in July 2003, in opening and maintaining a letter of credit. Plaintiff opened the June 2003

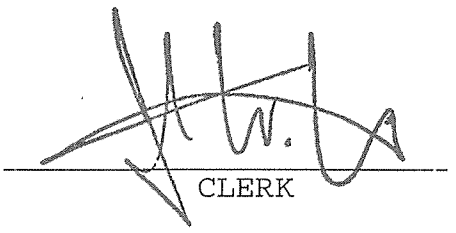
letter of credit prior to the letters being sent by defendant to plaintiff; plaintiff therefore could not have relied on those letters in opening the June 2003 letter of credit. Moreover, pursuant to the terms of the May 2003 contract entered into by plaintiff for the purchase of the soybean oil, plaintiff was obligated to post the letter of credit as the means of payment for the soybean oil. It is well settled that a party cannot be defrauded into doing that which it is legally bound to do (*see Megaris Furs v Gimbel Bros.*, 172 AD2d 209, 212-213 [1991]; *Bank Leumi Trust Co. of N.Y. v D'Evori Intl.*, 163 AD2d 26, 33 [1990]). The replacement letter of credit posted by plaintiff on August 7, 2003, was also posted as part of plaintiff's contractual obligation under the contract. Plaintiff was required to post the replacement letter of credit as a result of its own failure to post the original letter of credit in a timely fashion, and in order to accommodate its own request that the delivery date for the soybean oil be moved to mid-August. Plaintiff's claim that it relied on the false representations in the July letters after the August 7, 2003, letter of credit expired, when it posted a new letter of credit in an increased amount on August 22, 2003, is also unavailing since plaintiff posted the August 22, 2003 letter of credit in reliance upon defendant's mid-August statement that the amount of soybean oil to be shipped was greater than that contemplated in the contract, and the parties

agreed to increase the purchase price to reflect that change. Consequently, plaintiff failed to prove an essential element of its fraud claim, to wit, reliance (*see Megaris Furs*, 172 AD2d at 213), and defendant's motion to set aside the jury's verdict should have been granted.

In view of the foregoing, we need not reach the parties' remaining contentions concerning damages.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



CLERK

Andrias, J.P., Sweeny, McGuire, Acosta, Richter, JJ.

979 The People of the State of New York, Respondent,

SCI. 989N/06

-against-

Gustavo Deoleo,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Adrienne Gantt of counsel), for appellant.

Judgment, Supreme Court, New York County (Laura Ward, J.), rendered on or about February 15, 2007, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

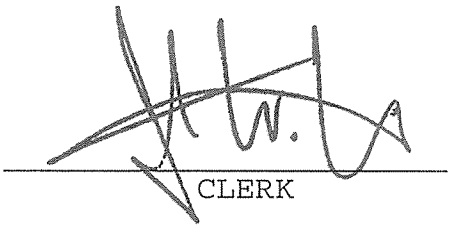
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



CLERK

Andrias, J.P., Sweeny, McGuire, Acosta, Richter, JJ.

981 The People of the State of New York, Ind. 51/08
Respondent,

-against-

Oldalys Ortega,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), for appellant.

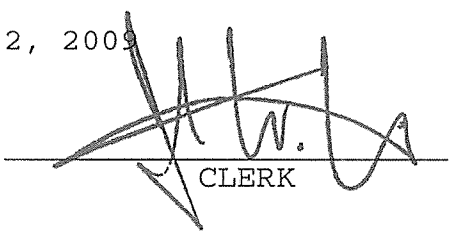
Robert M. Morgenthau, District Attorney, New York (Malancha Chanda of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered May 19, 2008, convicting defendant, after a jury trial, of two counts of criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to concurrent terms of 2 to 4 years, unanimously affirmed.

Regardless of whether the court should have made the redaction from the victim's hospital records that defendant requested, any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]), since the prior consistent statement at issue added little or nothing to the People's case.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



CLERK

Andrias, J.P., Sweeny, McGuire, Acosta, Richter, JJ.

982 Gerard Woods, et al., Index 601631/07
Plaintiffs-Appellants,

-against-

126 Riverside Drive Corp., et al.,
Defendants-Respondents.

Duane Morris LLP, New York (Sheila Raftery Wiggins of counsel), for appellants.

Marin Goodman LLP, New York (Margret M. McBurney of counsel), for respondents.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered October 15, 2008, which granted defendants' cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established that the decision to withhold approval of plaintiffs' application for a new roof deck, the scope of which far exceeded the roof deck that existed at the time of plaintiffs' purchase of their cooperative apartment more than two years earlier, was made in good faith, and in the lawful and legitimate furtherance of corporate purposes. Contrary to plaintiffs' claim that the actions of defendant Board were violative of the business judgment rule, the record shows that the Board's decision was based upon the opinions of the architect and engineer it hired to determine the feasibility of plaintiffs'

plans (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538 [1990]).

Plaintiffs' breach of fiduciary duty claim was properly dismissed, since the Board owed no fiduciary duty to plaintiffs in their purchase of the unit from the prior lessee-shareholder (*see Messner v 112 E. 83rd St. Tenants Corp.*, 42 AD3d 356 [2007], *lv denied* 9 NY3d 976 [2007]). Thereafter, any fiduciary duty would not have required the Board to approve a plan for a new roof deck or to undertake to strengthen the roof support to accommodate plaintiffs' plans.

The lack of any fiduciary relationship is also fatal to plaintiffs' fraudulent concealment claims (*see SNS Bank v Citibank*, 7 AD3d 352, 356 [2004]; *900 Unlimited v MCI Telecom. Corp.*, 215 AD2d 227 [1995]). Moreover, plaintiffs have not asserted circumstances that would support their claims of misrepresentation and fraud. Where a party has the means of discovering, by the exercise of ordinary intelligence, the true nature of a transaction it is about to enter into, it must make use of those means or it cannot be heard to complain that it was induced to enter into the transaction by misrepresentations (*see 198 Ave. B Assoc. v Bee Corp.*, 155 AD2d 273, 274-275 [1989]; *East End Owners Corp. v Roc-East End Assoc.*, 128 AD2d 366, 370-371 [1987]). As plaintiffs acknowledged in an affidavit, they had an opportunity to inspect the roof before entering into the contract

of sale and before closing. Furthermore, plaintiffs failed to allege facts from which it could be inferred that defendants made statements they knew to be false for the purpose of inducing plaintiffs to rely on those statements and that plaintiffs did indeed rely on the statements when purchasing the subject unit.

Plaintiffs' breach of contract and breach of implied contract claims were appropriately dismissed. The proprietary lease and other documents pertaining to the purchase of the subject unit demonstrate that defendants made no representations regarding the condition of the roof or the ability to replace the existing deck with a more elaborate structure. Plaintiff's argument that the lease agreement was modified by oral representations made to them by defendants prior to their purchase of the unit is precluded by the lease's express provision that its terms cannot be changed orally (*see* General Obligations Law § 15-301[1]; *Opton Handler Gottlieb Feiler Landau & Hirsh v Patel*, 203 AD2d 72 [1994]).

Plaintiffs' unjust enrichment claim was not viable, where plaintiffs have not identified what benefit was conferred on defendants. Nor have they set forth an equitable basis for the court to compel defendants to return it (*see Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972], *cert denied* 414 US 829 [1973]).

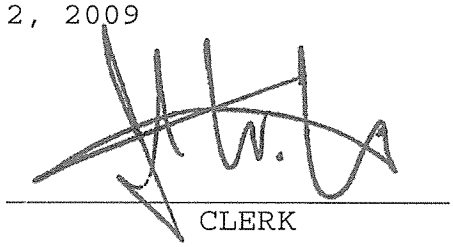
Insofar as plaintiffs claim that the motion was premature,

they failed to show that facts essential to the motion were in defendants' exclusive knowledge or that discovery might lead to facts relevant to the issues (*see Voluto Ventures, LLC v Jenkens & Gilchrist Parker Chapin LLP*, 44 AD3d 557 [2007]). Since plaintiffs were relying on statements they claim were made to them by defendants' representatives, such facts were not within defendants' exclusive knowledge.

We have considered plaintiffs' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



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Andrias, J.P., Sweeny, McGuire, Acosta, Richter, JJ.

983 Teri-Nichols Institutional Food Merchants, LLC, Plaintiff-Respondent-Appellant, Index 14679/06

-against-

Elk Horn Holding Corp., Defendant-Appellant-Respondent.

Sperber Denenberg & Kahan, PC, New York (Jacqueline Handel-Harbour of counsel), for appellant-respondent.

LeClairRyan, New York (Michael T. Conway of counsel), for respondent-appellant.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered June 9, 2008, which denied defendant landlord's motion for summary judgment dismissing the complaint and on its counterclaims, and denied plaintiff's cross motion for summary judgment dismissing the counterclaims, unanimously modified, on the law, defendant's motion for summary judgment granted to the extent of dismissing the complaint, declaring the alleged oral lease unenforceable, and awarding defendant $147,919.61 on its second counterclaim, awarding partial summary judgment on its first counterclaim and remanding for a hearing to determine fair and reasonable legal fees due defendant, and otherwise affirmed, without costs.

The parties' sublease expressly made the provisions of the overlease applicable to the sublease. Accordingly, plaintiff's claim that upon expiration of the written sublease there was an

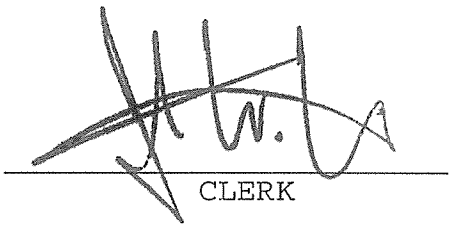
oral agreement making it a month-to-month tenant, rather than a holdover tenant, is barred by the express terms of the "no oral modification" and "no waiver" clauses in the lease (*see Richardson & Lucas, Inc. v New York Athletic Club of City of N.Y.*, 304 AD2d 462 [2003]). There is no evidence of partial performance that is unequivocally referable to the alleged oral agreement, as plaintiff was in possession pursuant to a sublease that provided for its holdover stay (*see e.g. id.; Peartree Assoc. v Naclerio*, 303 AD2d 210 [2003]). It is of no consequence that defendant billed plaintiff for the expired rent for one month as opposed to the holdover rate in view of the express "no waiver" provision of the lease, which states that receipt of a lesser rent shall not constitute a waiver of the landlord's rights (*see Elite Gold, Inc. v TT Jewelry Outlet Corp.*, 31 AD3d 338 [2006]).

Contrary to plaintiff's argument, the record reveals that defendant was the owner of the premises during the relevant period, and thus defendant has standing to enforce the holdover clause and seek legal fees in accordance with the written sublease. The holdover clause, providing for one and a half times the expired monthly rent for March and April 2006 and three times the expired monthly rent for May and June, is enforceable

(*see e.g. id.*; Thirty-Third *Equities Co. v Americo Group*, 294 AD2d 222 [2002]; *Federal Realty Ltd. Partnership v Choices Women's Med. Ctr.*, 289 AD2d 439 [2001]). Therefore, defendant is entitled to summary judgment on those counterclaims to the extent indicated.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



CLERK

Andrias, J.P., Sweeny, McGuire, Acosta, Richter, JJ.

985 The People of the State of New York, Ind. 5090/04
Respondent,

-against-

Robert Thomas,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Barbara Zolot of counsel), for appellant.

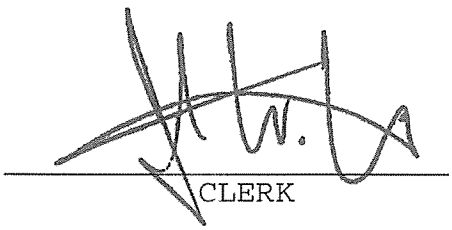
Robert M. Morgenthau, District Attorney, New York (Martin J. Foncello of counsel), for respondent.

Judgment of resentence, Supreme Court, New York County, (Carol Berkman, J.), rendered June 11, 2008, resentencing defendant to a term of 15 years with 5 years' post-release supervision, unanimously affirmed.

Defendant's double jeopardy argument, and his remaining challenges to the resentencing are unpreserved and we decline to review them in the interest of justice (*see People v Rodriguez*, 60 AD3d 452 [2009]). As an alternative holding, we find them without merit (*see People v Hernandez*, 59 AD3d 180 [2009]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



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Andrias, J.P., Sweeny, McGuire, Acosta, Richter, JJ.

986 Luis A. Maldonado, Index 23869/06
Plaintiff-Respondent,

-against-

The Law Office of Mary A. Bjork, etc.,
Defendant-Appellant.

Shapiro, Beilly, Rosenberg & Aronowitz, LLP, New York (Roy J. Karlin of counsel), for appellant.

Dominick W. Lavelle, Mineola, for respondent.

Order, Supreme Court, Bronx County (Alexander Hunter, Jr., J.), entered December 26, 2008, which, to the extent appealable, denied defendant's motion to dismiss the complaint, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

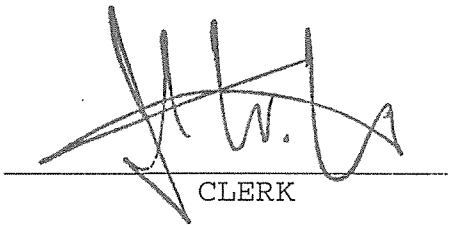
In December 2006, just before the statute of limitations expired (CPLR 214[5]), plaintiff commenced this action naming as sole defendant the driver of a car that had allegedly struck plaintiff's car, injuring plaintiff. However, that driver had died in December 2004. After trying to identify an administrator of the driver's estate and starting a second action against the driver's wife, on the mistaken belief that she was the administrator of his estate, plaintiff moved to substitute, as a party defendant, the law firm assigned to this matter by the deceased driver's liability insurer. That motion was granted on

default and the court subsequently denied the law firm's motion to vacate the default and dismiss the complaint.

Since one cannot commence an action against a deceased person, this action was a nullity from its inception (*see Marte v Graber*, 58 AD3d 1, 2-3 [2008]). Consequently, the motion court lacked jurisdiction to hear and determine the initial action and erred in denying defendant's motion to dismiss.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



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Andrias, J.P., Sweeny, McGuire, Acosta, Richter, JJ.

987 The People of the State of New York, Ind. 591/06
Respondent,

-against-

Charles R. Johnson,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Laura Boyd of counsel), for appellant.

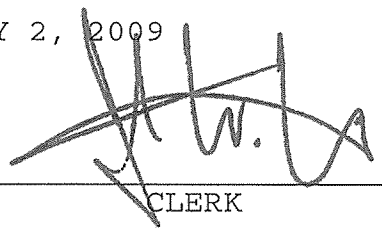
Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Troy K. Webber, J.), rendered on or about July 19, 2007,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: JULY 2, 2009



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Counsel for appellant is referred to §606.5, Rules of the Appellate Division, First Department.

Andrias, J.P., Sweeny, McGuire, Acosta, Richter, JJ.

988-
988A Jerzy Dabrowski, et al., Index 106778/07
Plaintiffs-Respondents,

-against-

Abax Incorporated, etc., et al.,
Defendants-Appellants.

Milman Labuda Law Group PLLC, Lake Success (Joseph M. Labuda of counsel), for Abax Incorporated, appellants.

Goetz Fitzpatrick, LLP, New York (Bernard Kobroff of counsel), for John Bleckman and Edward Monaco, appellants.

Virginia & Ambinder, LLP, New York (LaDonna M. Lusher of counsel), for respondents.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered May 12, 2008, which, to the extent appealed from as limited by the brief, denied so much of defendants' motion as sought to dismiss the causes of action for breach of public works contracts, quantum meruit and unjust enrichment, failure to pay New Jersey prevailing wages on New Jersey public works contracts, and piercing the corporate veil, unanimously modified, on the law, to grant so much of the motion as sought to dismiss the causes of action for quantum meruit, unjust enrichment and piercing the corporate veil, and otherwise affirmed, without costs. Order, same court and Justice, entered September 26, 2008, which denied defendants' motion to renew the prior motion, unanimously affirmed, without costs.

The motion court did not improperly schedule resolution of that part of defendant ABAX's motion that sought to deny class certification until after the answer has been served (*see David B. Lee & Co. v Ryan*, 266 AD2d 811, 812-813 [1999]).

By identifying the construction projects to which the contracts applied, listing some of the projects from the VENDEX database, and identifying the prevailing wage provision mandated by Labor Law § 220, plaintiffs pleaded the breach of contract causes of action with sufficient particularity (*see* CPLR 3013). Accordingly, regardless of whether plaintiffs' affidavits in opposition to the motion to dismiss complied with CPLR 2101(b), the breach of contract causes of action are sufficient without regard to the allegations contained in the affidavits. Nor was the inclusion of breach of contract claims based on New Jersey law inappropriate.

However, the cause of action for piercing the corporate veil to hold the individual defendants liable should have been dismissed, since the sole allegation of "domination" in the complaint is that the principals made the decisions for the corporation (*see 210 E. 86th St. Corp. v Grasso*, 305 AD2d 156 [2003]). The quantum meruit and unjust enrichment causes of action also should have been dismissed because they arise out of subject matter covered by express contracts and the validity of

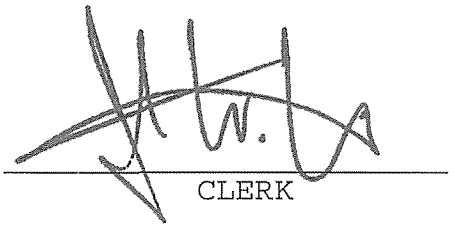
the contracts are not in dispute (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]).

With respect to the motion to renew based on the arbitration award, further development of the factual record is needed before the collateral estoppel effects, if any, of the award can be determined.

Finally, defendants' argument that the Labor Law claims are preempted by the Labor Management Relations Act has been expressly rejected (*see Wysocki v Kel-Tech Constr. Inc.*, 46 AD3d 251 [2007]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



CLERK

Andrias, J.P., Sweeny, McGuire, Acosta, Richter, JJ.

989-
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991 The People of the State of New York, Ind. 763/04
Respondent,

-against-

Larry Jones,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Abigail Everett of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jean Soo Park of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered May 16, 2005, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, and sentencing him to a term of 13 years; judgment, same court and Justice, rendered May 12, 2006, convicting defendant, upon his plea of guilty, of assault in the second degree, and sentencing him to a concurrent term of 7 years; and order, same court and Justice, entered on or about May 27, 2006, which denied defendant's CPL 440.10 motion to vacate judgment, unanimously affirmed.

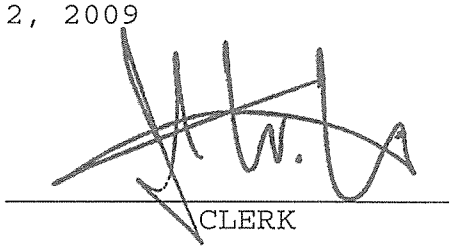
Defendant did not preserve his claim that the count upon which he was convicted after trial was duplicitous, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. There was

no violation of the requirement of a unanimous verdict, since the single count of second-degree weapon possession had a single factual basis, that is, the People's theory that, in a brief, continuing incident, defendant and his accomplice collectively possessed several handguns as part of a joint criminal enterprise (*see People v Wells*, 7 NY3d 51 [2006]; *People v Mateo*, 2 NY3d 383, 406-408 [2004], *cert denied* 542 US 946 [2004]; *People v Kaid*, 43 AD3d 1077 [2007], *appeal dismissed sub nom. People v Moghaless*, 10 NY3d 910 [2008]).

We reject defendant's argument predicated on alleged extrinsic evidence of the mental processes of certain jurors, and also reject his ineffective assistance of counsel claim.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



CLERK

Andrias, J.P., Sweeny, McGuire, Acosta, Richter, JJ.

993 Ibrahim Diallo, Index 15044/04
Plaintiff-Appellant,

-against-

Grand Bay Associates Enterprises, Inc.,
Defendant-Respondent.

Calman Greenberg, Bronx, for appellant.

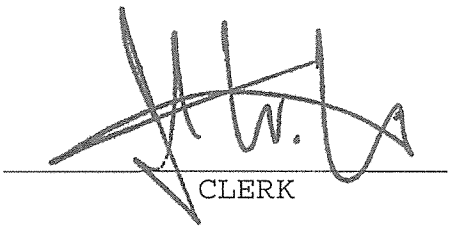
Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered December 16, 2008, which, in a declaratory judgment action involving the ownership of a condominium unit, inter alia, denied plaintiff's motion to stay, pending resolution of this action, an eviction proceeding brought by defendant against plaintiff in Civil Court, unanimously reversed, on the law and the facts, with costs, and the stay granted.

Plaintiff claims that defendant's principal and the latter's attorney defrauded him into conveying the condominium apartment in which he has resided since 1994. The sole issue on this appeal is whether Supreme Court should have granted plaintiff's motion for a stay of the eviction proceeding brought by defendant against plaintiff in Civil Court. Although defendant opposed plaintiff's application in this Court for a stay pending determination of this appeal, an application that was granted on

condition that plaintiff perfect his appeal for the March 2009 Term (2008 Slip Op 90079[U] [Nov. 25, 2008]; *see also* NY 2009 Slip Op 61625[U] [Jan. 22, 2009]), defendant has not submitted a response to the brief submitted by plaintiff. We conclude under these circumstances that a stay of the eviction proceeding, in which a warrant of eviction has been issued, should have been granted in order that any judgment in plaintiff's favor in this action not be rendered ineffectual. The decision in this action will be conclusive of the eviction proceeding; and the equities appear to be in plaintiff's favor (*see Wendling v 136 E. 64th St. Assoc.*, 128 AD2d 419, 421 [1987]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



CLERK

CORRECTED ORDER - JULY 13, 2009

Andrias, J.P., Sweeny, McGuire, Acosta, Richter, JJ.

994 Anna Corchado,
Plaintiff-Respondent,

Index 117716/05
590548/06

-against-

The City of New York,
Defendant,

Consolidated Edison Company
of New York, Inc.,
Defendant/Third Party
Plaintiff-Respondent,

-against-

The Hallen Construction Co., Inc.,
Third-Party Defendant-Appellant.

Conway, Farrell, Curtin & Kelly, P.C., New York (Jonathan T. Uejio of counsel), for appellant.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered March 18, 2008, which, in an action for personal injuries sustained in a trip and fall over a pothole allegedly created by the negligence of defendants City or Consolidated Edison, and a third-party action by Consolidated Edison against its contractor (Hallen), insofar as appealed from, denied, as untimely, Hallen's motion for summary judgment dismissing the complaint and third-party complaint, unanimously affirmed, without costs.

The parties' so-ordered stipulation clearly provided that summary judgment motions were "to be filed" within 60 days of the filing of the note of issue. Since the note of issue was filed

on October 24, 2007, summary judgment motions were to be filed by December 23, 2007. While Hallen served its motion on December 21, 2007, it did not file the motion until January 4, 2008. Plaintiff's opposition asserted the untimeliness of Hallen's motion, to which Hallen replied that its motion was timely because served within 90 days of the filing of the note of issue. We reject Hallen's argument that CPLR 3212(a) authorizes a court to set a deadline only for the making, i.e., service, not the filing, of summary judgment motions (*see e.g. Corbi v Avenue Woodward Corp.*, 260 AD2d 255, 255 [1999]) because the parties, with the court's consent, were free to chart a procedural course that deviated from the path established by the CPLR (*see Katz v Robinson Silverman Pearce Aronsohn & Berman LLP*, 277 AD2d 70, 73 [2000] ["Parties are afforded great latitude in charting their procedural course through the courts, by stipulation or otherwise"] [internal citations omitted]). Thus, we affirm the denial of Hallen's motion as untimely since Hallen offered no excuse for the late filing (*see Brill v City of New York*, 2 NY3d 648, 652 [2004]), and we decline to consider Hallen's contention that good cause exists to consider the motion because the parties misread the so-ordered stipulation and believed that the 60-day deadline applied to the serving, not the filing, of summary

judgment motions. That contention was raised improperly for the first time on appeal. In view of the foregoing, we decline to reach the merits of Hallen's motion.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009

DEPUTY CLERK

Andrias, J.P., Sweeny, McGuire, Acosta, Richter, JJ.

995-
996-
997 Hotel 71 Mezz Lender LLC, Index 601175/07
Plaintiff-Respondent,

-against-

Jennifer Falor,
Defendant-Appellant,

Robert D. Falor, et al.,
Defendants.

Kilpatrick Stockton, LLP, Raleigh, North Carolina (Raymond M. Bennett of the North Carolina Bar, admitted pro hac vice, of counsel), for appellant.

Akin Gump Strauss Hauer & Feld LLP, New York (John W. Berry of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 2, 2008, which granted plaintiff's motion for summary judgment to enforce a guaranty of payment and denied defendant Jennifer Falor's cross motion for summary judgment dismissing the complaint as against her, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered May 7, 2008, unanimously dismissed, without costs, as superseded by the appeal from the June 2, 2008 order.

Defendant, an experienced investor in complex commercial real estate transactions such as the Chicago hotel acquisition and conversion that underlies this action, had an obligation to exercise ordinary diligence to inquire and, if necessary, to seek

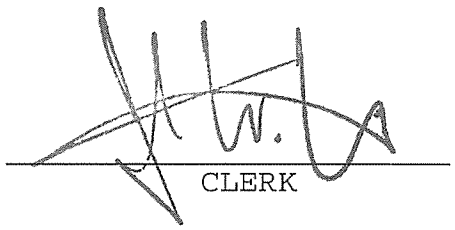
proper assistance in determining whether any additional lenders were involved and to ascertain and understand the terms of the mezzanine loan guarantee before signing it (*see Chemical Bank v Geronimo Auto Parts Corp*, 225 AD2d 461, 462 [1996]; *Chemical Bank v Masters*, 176 AD2d 591, 592 [1991]). Having failed to do so, she cannot now avoid her obligation as guarantor by claiming ignorance of the guaranty agreement's terms. Nor was defendant's duty to make inquiry and to read and understand the mezzanine loan guaranty diminished merely because she was provided with only a signature page before executing the agreement (*see Friedman v Fife*, 262 AD2d 167, 168 [1999]).

A typographical error on the guarantee's signature page did not induce defendant to enter the agreement, as the record shows that she only became aware of the error well after executing the signature page. We note also that, in conjunction with the underlying transaction's closing, defendant executed a closing legal opinion prepared by counsel, which affirmed her understanding that the guarantee of payment on the mezzanine loan was valid, legal and binding. Moreover, the understanding of her attorney that, despite the typographical error, the signature page pertained to the guaranty of payment on the mezzanine loan

may be imputed to defendant as a matter of law (*see Center v Hampton Affiliates*, 66 NY2d 782, 784 [1985]; *Cromer Fin. Ltd. v Berger*, 245 F Supp 2d 552, 560 [SD NY 2003]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



CLERK

Andrias, J.P., Sweeny, McGuire, Acosta, Richter, JJ.

998N In re Application of Hotel 71 Mezz Lender, LLC,
Petitioner-Respondent,

-against-

Albert Rosenblatt, etc.,
Respondent-Respondent,

Guy T. Mitchell, et al.,
Intervenors-Respondents-Appellants. Index 603722/08

Mitchell Silberberg & Knupp, LLP, New York (Paul D. Montclare of counsel), for appellants.

Gibson, Dunn & Crutcher, LLP, New York (Robert L. Weigel of counsel), for Hotel 71 Mezz Lender, LLC, respondent.

McCabe & Mack, LLP, Poughkeepsie (Richard R. DuVall of counsel), for Albert Rosenblatt, respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 11, 2009, which, inter alia, granted petitioner judgment creditor's application to compel respondent former receiver to turn over $1.335 million in partial satisfaction of the judgment, unanimously affirmed, with costs.

On June 30, 2008, intervenor-respondent Guy T. Mitchell, having been held liable in an action to enforce a guaranty of payment for a judgment of $52,404,066.54 (*see Hotel 711 Mezz Lender LLC v Falor*, ___ AD3d ___, 2009 NY Slip Op 04355 [June 4, 2009]), made a wire transfer in the amount of $1.335 million from a Florida bank account held solely in his own name to a New York account maintained by the receiver in the guaranty action, who

then held the funds while awaiting instructions from the court. Six months later, before any disbursal of the $1.335 million was made, this Court, among other things, modified the April 7, 2008 order and supplemental order of Supreme Court (the receivership order) granting the petitioner judgment creditor's motion for the appointment of a receiver so as to deny the motion and vacate the appointment of the receiver (58 AD3d 270 [2008]). Two days after we vacated the attachment order and receivership, petitioner levied upon the $1.335 million being held by the receiver and commenced this special proceeding pursuant to CPLR 5225(b), naming the receiver as respondent and seeking turnover of the funds in partial satisfaction of the outstanding $52,404,066.54 judgment. Intervenors-respondents contend that, pursuant to our decision in *Falor*, the former receiver is obligated to return the $1.335 million to Mitchell's personal account. We disagree.

Respondent received the $1.335 million at issue pursuant to the authority of the receivership order. Although this Court, by order dated April 24, 2008, granted a stay preventing respondent from selling or otherwise disposing of assets without prior leave of this Court, the receivership order was not otherwise stayed. Our subsequent decision vacating the receivership order did not purport to deprive respondent retroactively of the authority conferred by the order.

The $1.335 million did not have its source in a foreign

entity but rather belonged to Mitchell in his personal capacity, as demonstrated both by the wire transfer authorization form contained in the record and Mitchell's concession before Supreme Court that he executed a promissory note in favor of an offshore trust account from which the funds were drawn before being transferred to the receiver. There is no evidence in the record to support intervenors-respondents' contention that the funds were drawn from an account held by any other individual or entity.

CPLR 5225(b) permits a special proceeding to be brought against, and recovery to be had from, "a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee." We conclude that respondent was a transferee in possession of money in which petitioner, the judgment creditor, unquestionably had a superior interest.

As no triable issues of fact were raised, Supreme Court correctly made a summary determination on the pleadings and papers submitted by the parties (*see* CPLR 409[b]).

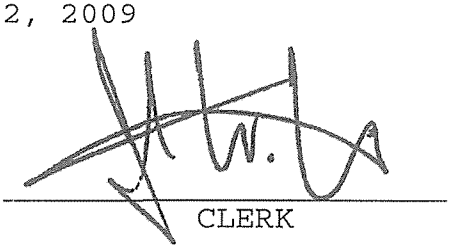
We have considered intervenors-respondents' remaining contention and find it unavailing.

M-2246 - ***Hotel 71 Mezz Lender, LLC v Albert Rosenblatt, et al.***

Motion seeking to dismiss appeal granted.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John T. Buckley
James M. McGuire
Karla Moskowitz
Rolando T. Acosta, JJ.

772N
Index 603606/07

x

Arthur Batsidis,
Plaintiff-Appellant,

-against-

Wallack Management Company, Inc., et al.,
Defendants-Respondents.

x

Plaintiff appeals from an order of the Supreme Court, New York County (Michael D. Stallman, J.), entered May 13, 2008, which, to the extent appealed from as limited by the brief, denied his motion to allow him to resume renovation of the subject premises without paying certain engineering and legal fees as set forth in the alteration agreement between the parties.

Warren S. Hecht, Forest Hills, for appellant.

Axelrod, Fingerhut & Dennis, New York (Lance Luckow of counsel), for respondents.

SAXE, J.P.

This dispute concerns the scope of a cost-shifting provision in a standard alteration agreement between the proprietary lessee of a co-op apartment and the cooperative corporation and its management company. We hold that the cost-shifting provision is proper, clear, unambiguous and enforceable as written; we reject plaintiff's contention that the provision may be applied only where the cooperative corporation is determined to be the prevailing party and the fees it incurred in relation to its oversight of the proposed alterations are determined to be reasonable. However, as a procedural matter, since defendants stipulated to allow plaintiff to recommence the work upon his completion of stated conditions, and the court so-ordered that stipulation by way of resolving plaintiff's motion for an order authorizing him to resume work, defendants must be precluded at this juncture from using plaintiff's obligation to pay those costs as an impediment to his resumption of the agreed-upon renovation work.

Defendant 225 East 57th Street Owners, Inc. is the owner of the residential cooperative located at 225 East 57th Street; defendant Wallack Management Company is its managing agent. Plaintiff is the nonresident proprietary lessee of apartment 9C.

Plaintiff sought to renovate the kitchen and one bathroom in apartment 9C and to perform minor work in the rest of the apartment. He submitted a proposal, which was reviewed by the co-op's engineer and approved. The parties entered into an alteration agreement dated June 15, 2007.

Paragraph 7 of the agreement entitles the co-op to charge the unit owner for costs it incurs with respect to the renovation work:

> "If the Corporation is required, or deems it wise, to seek legal, engineering, electrical, architectural or other advice relating to the work or this Alteration Agreement, at any time and from time to time prior to or after granting permission for the work to be performed, *the Shareholder hereby agrees to reimburse on demand all fees and disbursements incurred by the Corporation with respect to the same*, whether or not the Corporation grants permission for the performance of the work. *The Shareholder agrees to reimburse the Corporation for all such expenses promptly upon receipt of the Corporation's bill for the same*, and if permission is granted, then *all fees incurred prior to commencement of the work shall be reimbursed to the Corporation prior to such commencement*" (emphasis added).

Paragraph 32 provides that all expenses and fees required to be paid by the shareholder will be considered additional rent under the lease.

Plaintiff began work on the premises. On October 2, 2007, the resident superintendent, Larry McCool, went to the apartment

in response to a complaint of excessive noise, and observed that severe cuts had been made into a structural column, which damaged the column, and that the work undertaken exceeded the scope of the work set forth in plaintiff's renovation proposal. McCool shut down the job pursuant to paragraph 30 of the alteration agreement, which provides that upon a breach of the alteration agreement the co-op corporation has the right to suspend all work and to prevent workers from entering the building and the apartment, and to revoke its permission for performance of the work.

Plaintiff commenced this action on October 30, 2007, seeking damages for breach of contract and a mandatory injunction compelling defendants to permit him to resume work on the premises. Defendants counterclaimed for attorneys' and engineers' fees, and asserted that plaintiff's proposed renovations were not undertaken in accordance with the proposal and therefore that plaintiff was in default of his obligations under both the alteration agreement and the proprietary lease.

Plaintiff moved for preliminary injunctive relief, and on November 15, 2007, the motion's return date, it was resolved by so-ordered stipulation. The parties agreed that plaintiff would retain a licensed home improvement contractor and submit required

documentation and proof of insurance, that plaintiff's own electrical contracting firm would perform electrical work only, that any channeling and other invasive work would require advance written approval, and that repairs to the column previously channeled by plaintiff would be performed in accordance with the requirements of defendants' engineer. The stipulation allowed plaintiff to proceed with the work once those conditions were satisfied: "As soon as P[laintiff] provides the material in the immediately preceding [paragraph], P[laintiff] may complete the renovation; however[,] the channeling repair and the HVAC work may proceed before such time, i.e., w/o delay[,] in accordance with Blum's directives."

Despite this so-ordered resolution of plaintiff's application to be allowed to recommence the work, when he sought to proceed with the work in compliance with those terms, defendants would not permit its resumption until plaintiff paid the fees they claimed they incurred for the services of legal counsel and the engineer they consulted.

After an exchange of letters, plaintiff, relying on the terms of the so-ordered stipulation, brought another motion, requesting an order compelling defendants to allow the resumption of the renovations. Defendants argued that the stipulation was always subject to the alteration agreement and contained no

waiver of defendants' rights under that agreement. The motion court agreed with defendants and denied the motion.

At the outset, we reject plaintiff's contention that the cost-shifting provision of the alteration agreement may be applied only where the co-op establishes that it is the prevailing party and that the expert or legal fees it seeks to impose on plaintiff are reasonable. Nothing in law or public policy supports limiting the provision in that manner or precludes its enforcement as written. Indeed, the provision is reasonable.

Plaintiff's reliance on case law limiting successful litigants' entitlement to legal fees is misplaced. The general rule that legal fees are not awarded for the successful prosecution or defense of an action does not apply here (*see Alyeska Pipeline Serv. Co. v Wilderness Socy.*, 421 US 240, 247 [1975]; *Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21-22 [1979]). We are not dealing with "a provision in an agreement allowing the recovery of attorneys' fees that are 'incidents of litigation'" (*see Horwitz v 1025 Fifth Ave.*, Inc., 34 AD3d 248, 249 [2006]). Such provisions, including lease provisions for attorneys' fees resulting from the successful prosecution of tenant defaults, and the converse entitlement created by Real Property Law § 234, are strictly construed, so as to further the

important public policy of ensuring that people are not dissuaded from seeking judicial redress of wrongs (*see Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]).

A completely different policy concern applies to the cost-shifting provision under consideration here. The form alteration agreement used by defendants is based on a model form promulgated in 2000 by the Residential Management Council of the Real Estate Board of New York, in conjunction with the Committee on Cooperative and Condominium Law of the Association of the Bar of the City of New York. The purpose of the form agreement is "to make sure that shareholders renovate in a way that ensures the safety and comfort of the residents, the financial interests of the co-op and the physical integrity of the building" (Romano, *Your Home: Making Alterations in a Co-op*, New York Times, Oct. 22, 2000, section 11, at 5, col 1). Paragraph 7 of the agreement, which unequivocally makes the shareholder solely responsible for costs such as engineering and legal fees incurred by the co-op in connection with consideration and review of the proposed and actual work, is intended to ensure that the co-op and its other shareholders are not burdened with any expenses resulting from renovations to a shareholder's individual unit. Such expenses may arise without regard to whether any litigation occurs and, indeed, regardless of whether the proposed work is

approved or performed. To require the renovating shareholder to pay those costs is an appropriate means of allowing unit owners to perform renovations while protecting the co-op and its members from being saddled with the expenses that they incur arising out of the renovations.

To limit the application of the cost-shifting contract provision to circumstances where the co-op is determined to be the prevailing party would be senseless; frequently in such circumstances, there will not be a clear prevailing party, or even any litigation. Nor would it be appropriate to require the co-op to demonstrate to a finder of fact the reasonableness of the fees it incurred. Indeed, that would largely eviscerate the purpose of the cost-shifting measure. Of course, while the co-op initially has the right to payment, if the co-op claimed an unjustifiable amount in fees, the shareholder would be entitled to challenge that claim in a plenary action.

Although we hold that there is nothing improper about the contract provision requiring plaintiff to pay the co-op's actual costs incurred in relation to plaintiff's performance of the renovation work, the co-op's demand was made too late to be properly interposed as a condition to the resumption of the halted work. When they resolved plaintiff's motion for mandatory injunctive relief by entering into the stipulation allowing

plaintiff to resume the halted work on certain stated conditions, and -- even more importantly -- when they had the court so-order that stipulation, the parties in effect entitled plaintiff to proceed with the work that had been halted by defendants without any further conditions at that time.

Defendants are correct that the so-ordered stipulation neither superseded the parties' obligations under the alteration agreement nor waived their rights. Nevertheless, while the so-ordered stipulation did not abrogate defendants' rights under the alteration agreement, it did suspend them in the context of the resolution of an application for judicial intervention. That is, by agreeing to permit plaintiff to resume the halted renovation work as long as he satisfied the specified conditions, defendants relinquished their entitlement to halt the work or preclude its resumption once the conditions were satisfied. It was incumbent on defendants, in court on the return date of the motion, to include all conditions to be fulfilled before performance of the work could be continued. Even if the co-op did not know, at the time of the stipulation, the exact total of its costs, it knew that costs were being incurred. The co-op's failure to include at that time the condition that plaintiff first pay their fees before resuming the work precludes it from imposing that condition now and preventing plaintiff from

resuming work it already agreed to permit him to resume.

Moreover, by so-ordering the stipulation, the motion court in effect issued an order granting plaintiff's motion to the extent of directing that he be allowed to resume the halted work upon his satisfaction of the conditions set by defendants. Defendants cannot be permitted to undermine the court's directive.

The situation would be different if improprieties had newly been discovered in the work, justifying new countermeasures by defendants, but that is not the case here.

We emphasize that this ruling does not extinguish or interfere with defendants' right to collect the claimed fees in full, which they may do by a variety of means, including charging the fees as additional rent pursuant to paragraph 32 of the alteration agreement, and commencing a plenary action.

Accordingly, the order of the Supreme Court, New York County (Michael D. Stallman, J.), entered May 13, 2008, which, to the extent appealed from as limited by the brief, denied plaintiff's motion to allow him to resume renovation of the subject premises without paying certain engineering and legal fees as set forth in the alteration agreement between the parties, should be reversed,

on the law, without costs, the motion granted and plaintiff permitted to resume work, and the matter remanded for further proceedings consistent herewith.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2009