SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 24, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Richter, Abdus-Salaam, Román, JJ.

2982 The People of the State of New York, Respondent, Ind. 3043/06

-against-

Gerard Johnson,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Frank Glaser of counsel), for respondent.

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered September 6, 2007, convicting defendant, upon his plea of guilty, of assault in the first degree as a hate crime, and sentencing him to a term of 17 years, unanimously affirmed.

In exchange for defendant's plea, the court promised to impose a sentence of 15 years, and defendant signed a waiver of his appellate rights in conjunction with the plea. The waiver explicitly covered any excessive sentence claim. As part of his plea allocution, defendant was advised that his sentence could be increased up to the maximum of 25 years if he committed any crime between the plea and sentencing.

Before sentencing, the court conducted a hearing into an allegation that shortly after the plea, defendant committed the crime of promoting prison contraband by possessing a toothbrush with a sharpened handle in his cell. The sentencing court found, by a preponderance of the evidence, that defendant committed the crime of promoting prison contraband and sentenced him to a term of 17 years.

The court's finding that defendant committed a new crime between his plea and sentence was fully supported by the evidence at the hearing. Captain Manuel Olivari testified that he was summoned to defendant's cell and asked to search defendant because the warden believed that defendant had hidden something which could be a weapon under the mattress. Captain Olivari did not actually take part in the search because defendant had to be removed after he was involved in a struggle with some officers. Captain Michael Morales, a long term employee of the Department of Correction, testified that he was instructed by a deputy warden to search defendant's cell. He was present when Officer Escalona conducted the search and he actually saw Officer Escalona recover a toothbrush from under the mattress. The toothbrush was sharpened at the end. No one else occupied the cell with defendant. Captain Morales was present when a photograph of the sharpened toothbrush was taken and he also was

present when a photocopy of the picture was made. That photocopy was introduced at the hearing. Defendant did not testify or present any witnesses at the hearing. As a result of this incident, defendant was indicted in the Bronx for promoting prison contraband.

The sentencing court, which had an opportunity to observe the correction witnesses, found them credible, and no basis exists in the record to set that finding aside. The record does not show the witnesses had any particular bias against defendant. Defendant did not argue that the sharpened toothbrush was not contraband. Although defendant focuses on the fact that the toothbrush was not introduced at the hearing, this was not required.[1] Captain Morales was present when it was recovered and he identified the photograph of the contraband. The item is described on the form introduced at the hearing as a "6 inch sharpened plastic toothbruch [*sic*]" and it is apparent from the photograph that the toothbrush has a sharp point at the end. This unrefuted evidence was more than sufficient for the sentencing court to find that defendant possessed contraband.

Similarly, the sentencing court's finding should not be set aside merely because a videotape made by the Department of

[1] At the hearing, the prosecutor apprised the court that the toothbrush had been vouchered in the Bronx District Attorney's office and he had given defense counsel a copy of the voucher.

Correction was not produced at the hearing. The prosecutor, at the hearing, noted that he had been apprised that the videotape may have only shown the area outside the cell, not inside the cell where the contraband was recovered. In any event, it is apparent that the videotape was not in the prosecution's possession and that the prosecution had not been involved in any erasure of the tape. If the tape was erased by the Department of Correction, no adverse inference or other sanction was appropriate in this case (*see People v Allgood*, 70 NY2d 812 [1987][inadvertent destruction of rape kit provides no basis for reversal]).

Defendant also focuses on the fact that a hearing captain in the Department of Correction determined that defendant had not violated department rules in this incident. The hearing captain was not called as a witness and no transcript was produced. Thus, we can only speculate as to the basis for that ruling. In any event, the sentencing court was not bound by that decision and could reach its own conclusion based on the evidence before it. The argument that the court did not have a reliable basis for its determination is difficult to understand because it seems to ignore the testimony of Captain Morales, while speculating about evidence that was not before the sentencing court. Here, the court, based on a preponderance of the evidence standard, had

more than a legitimate basis for its ruling, and its enhancement of the sentence should be upheld.

Defendant's excessive sentence claim is foreclosed by his valid waiver of appeal.

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

ENTERED: AUGUST 24, 2010

CLERK

Gonzalez, P.J., Andrias, Catterson, Renwick, Manzanet-Daniels, JJ.

3103-
3104
M-2572
M-2866 Commandment Keepers Ethiopian Hebrew Congregation of the Living God, Pillar and Ground of Truth, Inc., Plaintiff-Appellant, Index 106102/07

-against-

31 Mount Morris Park, LLC, et al., Defendants-Respondents,

John Does, 1-200, et al., Defendants.

_____

David M. Doré, New York, for appellant.

Herrick, Feinstein LLP, New York (M. Darren Traub of counsel), for respondents.

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Judgment, Supreme Court, New York County (Richard A. Braun, J.), entered February 5, 2009 (a) granting the motion by defendants 31 Mount Morris Park (31 MMP) and Taylor for summary judgment declaring 31 MMP the record owner of the subject real property, (b) awarding said defendants summary judgment dismissing the complaint except as to plaintiff's claims regarding personal property and for damages, and (c) awarding 31 MMP summary judgment on its first counterclaim; and order, same court and Justice, entered March 27, 2009, which granted 31 MMP's motion to cancel a notice of pendency filed against the subject property, unanimously affirmed, without costs.

A bona fide purchaser or encumbrancer for value is protected in its title unless it had previous notice of the fraudulent intent of its immediate grantor (Real Property Law § 266). 31 MMP made a prima facie showing that it was a bona fide purchaser by demonstrating it had paid valuable consideration for the property, in good faith and with no knowledge of the alleged fraud. Moreover, at the time of the purchase, the buyers relied on two orders from Supreme Court, obtained pursuant to Religious Corporation Law § 12(1) and Not-For-Profit Corporation Law § 511, expressly authorizing the purchase of the property from the seller (*see Congregation Yetev D'Satmar v 26 Adar N.B. Corp.*, 219 AD2d 186 [1996], *lv denied* 88 NY2d 808 [1996]).

The buyers further demonstrated that a title search conducted prior to the closing revealed that the seller was the record owner of the property and that there were no liens, encumbrances or other notices that would prevent 31 MMP from purchasing the property. Plaintiff failed to raise an issue of fact to the contrary.

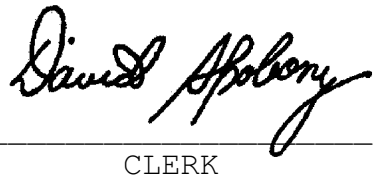
Since the buyers were properly declared the record owners of the subject real property and plaintiff's causes of action with respect to its alleged interests therein were dismissed, plaintiff does not have a valid claim against the buyers and the notice of pendency was properly cancelled (CPLR 6514[b]; *see Fleming-Jackson v Fleming*, 41 AD3d 175 [2007]).

M-2572 & 2866 Commandment Keepers v 31 Mount Morris Park, et al.,

Motion to strike portion of brief and for other related relief denied, and motion to dismiss appeal as moot denied as academic.

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

ENTERED: AUGUST 24, 2010



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

4937 The People of the State of New York, Ind. 52835C/06
Appellant,

-against-

Carlos Miranda,
Defendant-Respondent.

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Robert T. Johnson, District Attorney, Bronx (Stanley R. Kaplan of counsel), for appellant.

The Bronx Defenders, Bronx (Kathryn E. Miller of counsel), for respondent.

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Order, Supreme Court, Bronx County (Michael A. Gross, J.), entered on or about October 9, 2007, which granted defendant's motion to suppress evidence, unanimously reversed, on the law and the facts, the motion denied, and the matter remanded for further proceedings on the accusatory instrument.

At the suppression hearing, the People called one witness, a police officer. Supreme Court "adopt[ed] his testimony in its entirety," finding that the officer, who was not cross-examined at the hearing, "testified candidly, credibly and to the best of his recollection." The officer testified that he approached defendant in a park in which various illegal activities occurred, for the purpose of issuing him a summons for being in the park after dusk. When defendant was taking out his identification in response to the officer's request, "his jacket exposed the knife

that was clipped to his pocket." The officer was then asked, "Can you describe how you first observed this knife?" He responded: "As he moved to get the ID lifting the jacket exposed the knife that was clipped to his pocket." Asked what his reaction was, the officer testified that "[w]hen I saw it, I asked him 'What was that?' As he is giving me a response, I proceeded to grab the knife and I got it out." The knife turned out to be a gravity knife, and the officer placed defendant under arrest for possessing a per se weapon (Penal Law § 265.01[1]).

Under these facts the motion to suppress should have been denied. The officer's approach and request for identification unquestionably were lawful and defendant concedes as much. When the officer saw the knife, he was justified in removing it from defendant's person (*see People v Davenport*, 9 AD3d 316 [2004], *lv denied* 3 NY3d 705 [2004]). That the officer did not have probable cause to conduct a full-blown search of defendant's person and arrest him until the officer subsequently ascertained that the knife was a gravity knife is of no moment. Supreme Court also erred in concluding that the officer acted unlawfully because he "only saw a portion of the knife sticking out of defendant's pocket" and that "only a portion of the handle [of the knife] was visible to him." As is clear from the testimony quoted above, the officer unequivocally testified that he saw a

knife. No evidence at the hearing undercut or contradicted that testimony. To be sure, after the foregoing testimony, the officer also was asked by the prosecutor, "Once you saw what you believed to be a knife in his pocket, how did you remove that object?" However, there was no antecedent testimony from the officer that he merely believed the object to be a knife or that it was "in" rather than clipped to defendant's pocket. A question that by its terms assumes a fact does not constitute evidence of that "fact." Nor did the officer in responding to this question ratify the unsupported assumptions in the question. Rather, the officer responded simply by saying, "With my right hand by removing it from his pocket." The officer's testimony that the knife was "clipped *to* [defendant's] pocket" is not contradicted by his testimony that he removed the knife "*from*" his pocket. Even assuming the question did create an ambiguity concerning what the officer saw, granting the motion nonetheless was erroneous. The officer's repeated and unequivocal testimony that he saw a knife clipped to defendant's pocket was more than sufficient to meet the People's burden of going forward, and defendant failed to meet his ultimate burden of establishing the illegality of the officer's conduct (*see People v Berrios*, 28 NY2d 361 [1971]). Moreover, even assuming that the officer "only saw a portion of the knife," it hardly would follow that he did

not see a knife. Finally, we note that neither the knife nor the object by which it was clipped to defendant's pocket was introduced into evidence and no testimony was elicited concerning the nature or size of that object.

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

ENTERED: AUGUST 24, 2010

CLERK

Andrias, J.P., Sweeny, McGuire, DeGrasse, JJ.

5316 The People of the State of New York, Ind.19145C/06
Respondent,

-against-

Allen Mack,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Elizabeth B. Emmons of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Kayonia L. Whetstone of counsel), for respondent.

_____

Upon remittitur from the Court of Appeals (__ NY3d __, 2010 NY Slip Op 4662 [June 3, 2010]) for consideration of the facts and issues raised on the appeal but not yet determined, judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered August 16, 2006, convicting defendant, after a nonjury trial, of attempted assault in the third degree and harassment in the second degree, and sentencing him to an aggregate term of 90 days, unanimously affirmed.

Defendant did not preserve his challenges to the legal sufficiency of the evidence and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. We further find that 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

court's determinations concerning credibility. With respect to the harassment conviction, defendant's course of conduct supports the inference that he struck the victim with requisite intent to "harass," annoy or alarm" (Penal Law § 240.26).

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

ENTERED: AUGUST 24, 2010

CLERK

Tom, J.P., Mazzarelli, Acosta, DeGrasse, Richter, JJ.

2594 Fisk Building Associates LLC, Index 108647/08
Plaintiff-Respondent,

-against-

Shimazaki II, Inc., et al.,
Defendants-Appellants.

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Hoffinger Stern & Ross, LLP, New York (Philip S. Ross of counsel), for appellants.

Robert A. Sternbach, New York, for respondent.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered July 22, 2009, which, to the extent appealed from, granted plaintiff's motion for partial summary judgment dismissing the first and third affirmative defenses and the counterclaim, and to quash a subpoena, and denied defendants' cross motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Under the first affirmative defense, it was averred that plaintiff's eviction of defendant Shimazaki II was illegal. Contrary to defendants' assertion, plaintiff did not improperly execute on a stale warrant or obtain a warrant for rent that accrued after the commencement of the prior nonpayment summary proceeding. Rather, as was its right pursuant to Article 2(H) of the lease, plaintiff applied Shimazaki II's September and October 2006 payments to current charges instead of arrears.

As to defendants' cross motion for summary judgment dismissing the complaint, we find an issue of fact based on the version of facts most favorable to plaintiff. Plaintiff submitted the affidavit of its managing agent, saying that it accepted Shimazaki II's November and December 2006 payments solely on account of Shimazaki II's rent arrears and without any intention of reinstating its tenancy. Defendants' argument that plaintiff should have submitted the underlying business records, as opposed to an affidavit, is unpreserved (*see e.g. Empire Purveyors, Inc. v Weinberg*, 66 AD3d 508, 509 [2009]).

Defendants failed to create a triable issue of fact sufficient to warrant denial of plaintiff's motion to dismiss the first affirmative defense that Shimazaki II's eviction was illegal as based on an improperly issued warrant. We further reject defendants' argument that plaintiff's acceptance of rent after the issuance of the warrant created an issue of fact as to whether plaintiff "intended to revive the tenancy" (*see J.A.R. Mgt. Corp. v Foster*, 109 Misc 2d 693, 694 [App Term, 2d Dept. 1980]. By statute, the issuance of a warrant of eviction cancels a lease and annuls the landlord-tenant relationship (RPAPL 749 [3]). A purpose of the statute is to protect the tenant from further liability for rent (*see People v Stadtmore*, 52 AD2d 853, 854 [1976]). Under the terms of the instant commercial lease,

however, the tenant's obligation to pay rent survives the expiration or termination of the tenancy. Unless public policy is implicated, parties to an agreement, such as a commercial lease, may waive the benefit of a statute and assume obligations beyond the statutory provisions which would otherwise control (*see Teleprompter Corp. v City of New York,* 82 AD2d 145, 149 [1981], *appeal withdrawn* 56 NY2d 808 [1982]). A lease provision that a tenant's obligation to pay rent shall survive the termination of a tenancy is not contrary to public policy (*see Slater v Von Chorus,* 120 App Div 16 [1907]). Defendants' assertion that they needed discovery to oppose plaintiff's motion is unpreserved and without merit.

As to their third affirmative defense, defendants did not show detrimental reliance, a necessary element of equitable estoppel (*see BWA Corp. v Alltrans Express U.S.A.*, 112 AD2d 850, 853 [1985]).

Dismissal of the counterclaim was also proper. "Abuse of process has three essential elements: (1) regularly issued process . . ., (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective" (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]). Defendants failed to raise a triable issue of fact as to the second and third elements (*see G & T Term. Packaging Co., Inc. v Western Growers Assn.*, 56 AD3d 266, 268 [2008], *lv*

dismissed 12 NY3d 729 [2009]).

Defendants issued the contested subpoena in connection with their first and third affirmative defenses. Since those defenses have been dismissed, there is no longer any need for the subpoena.

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

ENTERED: AUGUST 24, 2010

CLERK

Saxe, J.P., Friedman, Nardelli, Freedman, Abdus-Salaam, JJ.

2755 Gary Meade, Index 103585/08
Plaintiff-Appellant,

-against-

OTA Hotel Owner LP doing business as On the Ave Hotel, et al.,
Defendants-Respondents.

_____

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Debra A. Adler of counsel), for OTA Hotel Owner LP, respondent.

Faust Goetz Schenker & Blee, LLP, New York (Christopher B. Kinzel of counsel), for Ver-Tech Elevator Co. Inc., respondent.

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Order, Supreme Court, New York County (Carol Robinson Edmead, J.), entered October 28, 2009, which granted defendant Ver-Tech's motion for summary judgment dismissing the complaint and all cross claims against it, and denied plaintiff's cross motion for partial summary judgment against defendant OTA, affirmed, without costs.

Ver-Tech, an elevator service contractor, established prima facie its entitlement to summary dismissal of a hotel guest's negligence action and all cross claims against it by proving that it had no prior notice of any defective condition of the subject elevator and that it regularly maintained and inspected that elevator (*see Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 713

[2005]). In opposition, plaintiff failed to raise a triable issue of fact whether the elevator, which had stopped after its governor switch was tripped, was functioning properly. Although the circumstances that prompted the governor switch to trip remained unresolved, to infer negligence on the part of Ver-Tech in the face of evidence establishing that the switch required no repair and was otherwise fully operational would be speculative (*see Zuckerman v City of New York*, 49 NYS2d 557, 562 [1980]).

Even assuming, arguendo, an issue of fact exists as to Ver-Tech's negligence in connection with the elevator's stalling midway between two floors in the hotel, there is no evidence that that negligence was a proximate cause of plaintiff's injuries. Plaintiff was uninjured when the elevator stopped, with no indication of an emergency situation. The injury occurred after he attempted to exit the elevator using a method he felt best accommodated his preexisting knee condition and his 360-pound frame. Plaintiff slid backward out of the elevator, even after hotel employees advised that he sit forward on the edge of the elevator floor and jump down onto the second-floor level. As he slid backward, he became fatigued, lost his grip, and slipped under the elevator car, into the open shaftway below. The hotel employees who were there to assist plaintiff's evacuation failed, among other things, to block the open shaftway and to grab hold of him as he fell. On this record, the intervening, ill-advised

and negligent actions of both plaintiff and the hotel employees were not foreseeable, in the ordinary course of events, as arising from a stalled elevator. Plaintiff's injuries arose from a superseding cause, severing any potential liability on the part of Ver-Tech (*see e.g. Egan v A.J. Constr. Corp.*, 94 NY2d 839, 841 [1999].

Reliance upon the doctrine of res ipsa loquitur is misplaced, since plaintiff did not establish that Ver-Tech had exclusive control of the elevator (*see Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986]).

As to OTA, while we agree with the dissent that there is substantial evidence of OTA's negligence, issues of fact as to comparative fault preclude summary judgment in favor of plaintiff. On this record, there are issues of fact as to, among other things, whether plaintiff's injury was in part attributable to his decisions to exit the elevator and to do so in the manner in which he did, despite the apparent absence of an emergency at the time.

All concur except Saxe, J.P. who dissents in part in a memorandum as follows:

SAXE, J.P. (dissenting in part)

While I agree with my colleagues that the action was properly dismissed as against defendant Ver-Tech, I submit that plaintiff's cross motion for partial summary judgment against the owner of the hotel should have been granted. The actions of OTA Hotel's employees constitute unassailable grounds for holding the hotel liable for plaintiff's severe injuries.

Plaintiff Gary Meade and other members of his family were guests at defendant hotel, located at 77th Street and Broadway in Manhattan. On several occasions during their stay there the Meades had used two of the building's four elevators to reach their fourth-floor rooms without any problem until the incident at issue here. On their way to visit friends outside of the hotel, plaintiff, his father and his sister entered one of the elevators and pressed the "Lobby" button. The doors closed normally and the elevator began to descend slowly, but stalled between the second and third floors; the door of the elevator did not open.

Plaintiff and his father and sister pressed the elevator's alarm button, which worked properly. Luis Santana, a hotel security guard stationed in the lobby, heard the alarm and immediately contacted another on-duty security guard, Drinton Krasniqi, by walkie-talkie. Krasniqi was already aware of the

alarm and had alerted the hotel's on-duty engineer, Andrew Sotero.

After about five minutes from the time the elevator stalled, Krasniqi arrived on the second floor and spoke to the Meades through the closed elevator doors. Sotero arrived next and opened the elevator doors at the second floor. The floor of the elevator car was several feet above the second floor landing, creating a large gap directly beneath the floor of the elevator car, exposing the elevator shaft, which descended several floors to the hotel's basement.

Although none of the passengers in the elevator appeared to be injured or in danger, Sotero and Krasniqi decided to attempt to extricate the trapped passengers from the elevator car. Notably, according to Krasniqi, the hotel did not have any set procedures on how to evacuate guests from an elevator. Sotero and the hotel's director of security, Daniel O'Brien, testified that since the gap between the elevator floor and the second floor was more than 24 inches, the hotel's procedure dictated that they call 911, which they admittedly did not do.

The hotel workers first instructed plaintiff's sister, Sarah Meade, to exit. They told Sarah to sit on the elevator floor with her legs hanging over the second-floor hallway, and then to jump. Sarah did as instructed, and fell forward when she reached the second-floor landing, but was uninjured.

Plaintiff, who weighed 360 pounds and had a preexisting knee injury, declined to jump forward as his sister had done. He told the workers he was going to back out of the elevator and that he needed their assistance in grabbing him and pulling him backwards. He proceeded to lie face down on the elevator floor with his legs toward the open elevator door, then move backward out of the elevator, legs first. When plaintiff got to the point where only his torso rested on the elevator floor, he became fatigued and asked whether the workers had control of him. He claimed that the workers assured him that they had him. Plaintiff soon thereafter lost his grip. His legs swung into the open gap, and he fell backward out of the elevator car, first striking his back against the edge of the second floor, then falling down the elevator shaft.

Sotero acknowledged in his deposition testimony that there was a ladder and plank board readily available in the hotel's basement that could have been used to block the elevator shaft opening. Santana, too, recognized at deposition that use of the ladder and wood from the hotel's basement might have prevented plaintiff's fall, and that the hotel employees at the scene should not have disregarded the elevator shaft opening.

Nothing in the evidentiary materials submitted indicates that anyone instructed the Meades that it would be dangerous to jump out of the elevator car or advised against it. The only

evidence is to the contrary.

Plaintiff's claim against the hotel is based on the theories that its employees were not properly trained, there were no oral or written procedures in place regarding elevator evacuation, an available ladder was not provided, the open shaft-way was not guarded, and the employees failed to assist him in getting down from the elevator. He also submitted an affidavit from Thomas Davies, an expert in elevator safety, who asserted that the hotel failed to follow standard procedures and protocol in evacuating the Meades from the elevator. Davies observed that the hotel did not have a written emergency evacuation plan, and that it failed to contact 911 or appropriate emergency personnel before it attempted to extricate the Meades, and asserted that the hotel should not have undertaken the evacuation of the elevator's occupants without proper tools and equipment, such as a ladder and plank board to guard the open elevator shaft.

All of the foregoing assertions are unassailable. The hotel's employees should have called 911 and waited for assistance. They should not have proceeded with removing the elevator's trapped occupants without first covering the opening to the elevator shaft and retrieving a ladder. Because the hotel owner had a nondelegable duty to maintain the elevators (*see Rogers v Dorchester Assoc.*, 32 NY2d 553, 562 [1973]), its liability is irrefutable.

Nor do I agree with the motion court that the plaintiff may be found to bear some liability for his injuries, necessitating the denial of his motion for partial summary judgment against the hotel.

Comparative negligence is "conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection" (*Sundt v New York State Elec. & Gas Corp.*, 103 AD2d 1014, 1015 [1984] [internal quotation marks and citation omitted], *appeal dismissed* 63 NY2d 771 [1984]). The question of comparative negligence "comes down to whether a reasonable man" would have acted as the plaintiff did in the situation under consideration (*id.*). The burden is on defendant to establish comparative negligence, and "the injured person is presumed to have used due . . . care" in his actions (*Rossman v La Grega*, 28 NY2d 300, 304 [1971] [internal quotation marks and citation omitted]). While the apportionment of liability and comparative negligence ordinarily present questions for jury resolution, it may be decided as a matter of law where, based on the evidence, no valid line of reasoning permits the conclusion that the plaintiff was negligent (*see Perales v City of New York*, 274 AD2d 349, 350 [2000]).

In the face of the obvious grounds for a finding of liability against the hotel, the hotel's claim of comparative

negligence borders on specious. It was not the task of plaintiff, a guest at the hotel, to inform hotel employees as to hotel procedures in the event an elevator got stuck. It was not within plaintiff's knowledge, as a hotel guest, whether more or better trained assistance would be arriving any time soon. It was assuredly not the task of the hotel guest stuck in that elevator to discern the gap directly beneath the floor of the elevator, in order to ascertain how to best protect himself from falling into the elevator shaft in the course of descending to the landing below. Indeed, I can only wonder at the hotel's suggestion, in opposition to plaintiff's cross motion, that the open shaft condition would have been "open and obvious" to plaintiff, as he sat directly above it.

I further reject the argument that a finding of comparative negligence on plaintiff's part may arise out of his decision to back out of the elevator rather than follow the instructions of the hotel staff to sit facing forward and jump. Since he lacked the knowledge of the gap, which was exclusively known to those on the floor, plaintiff had every reason to assess the means of descent that would be least likely to injure his knees on impact, and to modify accordingly the method suggested by defendants' employees, who had not considered his particular concerns when recommending a method of descent. Plaintiff's modification of the recommended method bears no comparison to the negligence of

an occupant trapped in a misleveled elevator who rushed out in a panic as soon as the doors were manually opened, and tripped due to the misleveling (*see Del Terzo v City of New York*, 189 AD2d 556 [1993]). Nor was plaintiff's situation comparable to that of an experienced worker who should have known that he should wait for the engineer to restart the elevator (*see Antonik v New York City Hous. Auth.*, 235 AD2d 248 [1997], *lv denied* 89 NY2d 813 [1997]), or that of an elevator occupant who should have known that he should wait in the elevator car because he had been instructed that help was on the way (*see Jennings v 1704 Realty, L.L.C.*, 39 AD3d 392 [2007]).

While plaintiff's actions arguably may have contributed in some way to his injury, there was nothing about those actions that may properly be termed negligent. Accordingly, there was no ground for a finding of comparative negligence that would contraindicate plaintiff's right to partial summary judgment against the hotel. I would therefore modify the motion court's order in that respect.

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

ENTERED: AUGUST 24, 2010

CLERK

Saxe, J.P., Catterson, Renwick, Richter, Abdus-Salaam, JJ.

2822 In re Amber B.,

A Person Alleged to be
A Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about February 18, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she had committed the act of unlawful possession of a weapon (ammunition) by a person under 16, and an act which, if committed by an adult, would constitute the crime of possession of pistol ammunition in violation of Administrative Code of the City of New York § 10-131(i)(3), and placed her with the Office of Children and Family Services for a period of 12 months, unanimously reversed, on the facts, without costs, and the petition dismissed.

On October 28, 2008, police officers responded to a 911 call placed by Camille B., appellant's mother. Ms. B. reported that appellant's stepfather had found a gun in their daughter's

bedroom. The gun was a .25 caliber semiautomatic pistol. After the officers recovered the gun, they picked up appellant from school around 12:15 p.m. and transported her to a police precinct for questioning.

Upon arriving at the precinct, appellant was escorted to the juvenile room. It is a small room with a desk, chairs and a metal bar along the wall. The bar is used to handcuff juveniles when they are under arrest. At this time, appellant was not restrained as she was not under arrest. When appellant's mother arrived, an officer read appellant her *Miranda* rights. Appellant and her mother acknowledged several times that they understood the *Miranda* warnings and the two of them signed a form acknowledging that.

In response to the officer's questions, appellant stated the gun was hers and she bought it the previous week. The officer told appellant he did not believe her story. At around 2:00 p.m., appellant was arrested and had one hand handcuffed to the metal bar because they did not have cells for juveniles. Since appellant was now a prisoner, her mother was asked to wait outside the room.

Thereafter the officer processed appellant's arrest. The process took approximately 4½ hours. An officer testified that this amount of time is not unusual because gun crimes require extra paperwork and procedures that need to be followed.

After the arrest was processed, appellant's mother was brought back into the room and an officer read appellant *Miranda* warnings for a second time. Appellant then admitted the gun belonged to her boyfriend and that she had put the gun under her bed. Appellant stated that the day before her boyfriend asked her to hold the gun because there were cops downstairs and he did not want to get caught with it. She also stated she did not know if the gun was loaded or not. In response to additional questions posed by the officers, appellant said she had never heard of her boyfriend or his friends being involved in any robberies. Thereafter appellant committed her statement to writing. The officers did not make any promises of leniency.

Family Court properly denied appellant's motion to suppress her written confession. Viewing as a whole the chain of events leading to the written statement, we conclude that it was voluntary under all the circumstances (*see Arizona v Fulminante*, 499 US 279, 285-286 [1991]; *People v Mateo*, 2 NY3d 383, 413-416 [2004], *cert denied* 542 US 946 [2004]). All the relevant events took place in a designated juvenile room with appellant's mother present or nearby. The time appellant was in police custody was reasonable, given the delays involved in processing a firearm arrest, and her statement was not the product of a promise of leniency.

Family Court's determination that appellant possessed

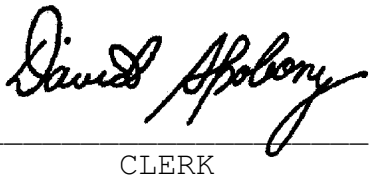
ammunition is against the weight of the evidence. "While great deference is ordinarily accorded to the determination of the trier of facts, . . . this deference 'must give way when the appellate court determines that the fact findings under review are against the weight of the evidence'" (*Matter of Gregory J.*, 204 AD2d 68, 70 [1994] citing *People v Lopez*, 95 AD2d 241, 252 [1983], *lv denied* 60 NY2d 968 [1983]).

Here, in arguing that appellant knowingly possessed ammunition, the presentment agency relied on her statement that she did not know whether the gun was loaded or not. While this statement, on its face, is sufficient to prove that appellant knew she possessed a gun, it does not prove that appellant knowingly possessed ammunition. The statement merely indicates that appellant knew her boyfriend's gun, like all guns, could be loaded. Nonetheless, Family Court found appellant had the requisite mental culpability for the ammunition counts because her statement showed that she knew one of the options was the gun could be loaded. However, there was no evidence that appellant knew whether the gun was recently fired or that appellant and her boyfriend discussed whether the gun was loaded. There also was no evidence appellant actually knew how guns worked. Thus, the court's decision was based solely on the hypothetical possibility that appellant may have known that there was ammunition in the gun.

Given the lack of inculpatory evidence in the record, we would have to apply a strict liability standard to find that appellant committed the charged crimes. The presentment agency did not make such an argument below and the lower court's findings are correctly based on a knowing possession standard. Under that standard, the findings are against the weight of the evidence and must be set aside.

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

ENTERED: AUGUST 24, 2010



CLERK

Mazzarelli, J.P., McGuire, DeGrasse, Freedman, Richter, JJ.

2929 John Tipaldo, Index 106057/97
Plaintiff-Appellant,

-against-

Christopher Lynn, etc., et al.,
Defendants-Respondents.

_____

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Mordecai Newman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered March 5, 2009, which, in an action commenced by plaintiff City employee pursuant to Civil Service Law § 75-b, after a nonjury trial, awarded plaintiff $175,000 in back pay without interest, unanimously modified, on the law, to the extent of ordering defendants to reinstate plaintiff to the same position held by him before the retaliatory personnel action, or to an equivalent position, and remanding the matter to Supreme Court to recalculate the award in accordance with this order, and otherwise affirmed, without costs.

In August 1996, plaintiff, a long-time manager with the New York City Department of Transportation (DOT), was promoted to the position of Acting Assistant Commissioner for Planning. At the time of the promotion, plaintiff was earning a salary of $55,000

and was told that he would receive a $25,000 increase if the position became permanent. He was also informed that the permanent position would carry a managerial pay plan class of M4, as compared to the M1 class attached to the acting title. In February 1997, plaintiff was demoted from the new position. As previously determined by this Court, the demotion was in retaliation for plaintiff's having reported to the Department of Investigation that a superior violated bidding rules (*see* 48 AD3d 361 [2008]). Because he was demoted, the new position never became permanent and he never received the $25,000 increase. This appeal is from an order following a nonjury trial on the issue of damages.

At the trial, plaintiff called an economics expert to establish the amount of back pay to which he was entitled. The expert's analysis assumed that, had he not been demoted, plaintiff would have been permanently named to the position of Assistant Commissioner for Planning and received the $25,000 raise. Thus, the expert assumed that plaintiff would have been making $81,000 at the time he was demoted. To calculate the amount of money plaintiff would have earned through the time of trial had he not been demoted, the expert compared plaintiff to two other managers who she asserted were similarly situated to plaintiff and who were earning, at the time of trial, an average of $143,500. Attributing this number to plaintiff, and

extrapolating through the 10 years lost by plaintiff as a result of his demotion, the expert testified that plaintiff lost $388,243 in earnings as a direct result of the retaliatory actions taken by defendants. The expert further testified that, applying the statutory interest rate of 9% to the lost earnings, plaintiff was owed a total of $662,721.

Supreme Court, without any explanation for how it arrived at the figure, awarded plaintiff $175,000 in back pay. It denied his request for pre-determination interest, finding that neither of the two statutes upon which plaintiff relied, Labor Law § 740 and CPLR 5001(a), provide for interest on a back-pay award. The court did not directly address plaintiff's claim for consequential damages and reinstatement to his original position or a position equivalent thereto.

We disagree with the amount of back pay awarded by the court and with its decision not to award pre-determination interest or reinstatement. The back pay award calculated by plaintiff's expert had ample support. The salary the expert assumed plaintiff would have earned had he been promoted on a permanent basis was based on plaintiff's credible and unchallenged testimony that he would have received a $25,000 raise if the promotion had become permanent. Indeed, additional evidence confirms that plaintiff was likely to have received the raise. For example, the report by the Department of Investigations which

concluded that plaintiff had been the victim of retaliation, stated that, according to the DOT Director of Personnel, "if an Assistant Commissioner position is eventually posted, the person in the 'acting' status, also known as a 'provisional,' usually receives the permanent appointment and a salary increase."

Defendants argue that the $25,000 raise was rejected by Richard Malchow, the DOT Deputy Commissioner who co-orchestrated plaintiff's demotion, *before* plaintiff reported the unlawful bid-rigging. Defendants base this theory on the written report of an interview with Joan McDonald, who allegedly promised the raise. The report, prepared on February 13, 1997, after plaintiff's demotion, does state that Malchow rejected the raise. However, it does not state when he rejected the raise, and the report can just as easily be read as reflecting a statement by McDonald that Malchow rejected the raise at a time *after* plaintiff accused him of improper behavior.

Defendants also assert that it is unrealistic that plaintiff would have been given a raise of $25,000, because it would have resulted in his earning a salary that was only approximately $1,200 less than the salary being earned at the time by his immediate supervisor. However, plaintiff neutralizes this argument by demonstrating that the result of his not receiving the increase was that his own subordinates were earning *more* than he was.

Defendants also object to the use of the two "comparators" employed by plaintiff's expert to calculate how much plaintiff would have made but for the adverse job action. We conclude, however, that the comparators were appropriate because they were "similarly situated in all material respects" to plaintiff (*see Shumway v United Parcel Serv., Inc.*, 118 F3d 60, 64 [2d Cir 1997]). Both comparators had qualifications similar to plaintiff's insofar as they are licensed engineers and were made Assistant Commissioners in 2001. If anything, plaintiff is more qualified than the comparators by virtue of his doctoral degree. Defendants maintain that comparator Jay Jaber's salary history is a poor projector of what plaintiff's trajectory would have been because Jaber testified that, when he received his promotion to manager, he was given an inflated salary intended to make up for extensive overtime pay he had earned in his previous position, and for which he would be ineligible as a manager. However, Jaber also testified that he continues to work overtime hours as a manager to nearly the same extent as his previous position (albeit for which he is not paid), despite assurances he had received that as a manager his hours in the office would be reduced. This undermines defendants' position that Jaber's increase in salary when he became a manager was not a straightforward raise to which plaintiff would also have been entitled.

Finally, we note that defendants chose not to call their own expert to offer an alternative theory of the earnings which plaintiff would have lost had he not been the victim of retaliation, or to explain why plaintiff's expert's analysis was flawed in any respect. Accordingly, the only expert opinion before us is plaintiff's, and we see no reason to disturb it.

We also find that Supreme Court erred in not awarding plaintiff pre-determination interest. Plaintiff commenced this action pursuant to Civil Service Law § 75-b. This provides that a public employee may not be disciplined for reporting an actual or perceived violation of law and that, if he or she is indeed so disciplined, he or she may commence an action "under the same terms and conditions as set forth in article twenty-C of the labor law" (Civil Service Law § 75-b [3][c]) (which governs retaliatory actions against whistleblowers by private employers). Labor Law § 740(5), in turn, states that

> "In any action brought pursuant to subdivision four of this section, the court may order relief as follows:
>
> > "(a) an injunction to restrain continued violation of this section;
> >
> > "(b) the reinstatement of the employee to the same position held before the retaliatory personnel action, or to an equivalent position;
> >
> > "(c) the reinstatement of full fringe benefits and seniority rights;
> >
> > "(d) the compensation for lost wages, benefits and other remuneration; and

> "(e) the payment by the employer of reasonable costs, disbursements, and attorney's fees."

Interest is not specifically enumerated in that section as an element of compensation. However, that does not end the analysis. As the Court of Appeals has held, one must look to the legislative intent underlying the statute to determine whether interest was meant to be available (*see Matter of Aurecchione v New York State Div. of Human Rights*, 98 NY2d 21 [2002]).

In *Aurecchione*, the plaintiff prevailed in an employment discrimination action commenced under the Human Rights Law. That statutory scheme, like Labor Law article 20-c, does not expressly provide that a back-pay award must include pre-judgment interest. However, the Court recognized that

> "[t]o ensure the protection of [the right to obtain employment without discrimination] the Legislature enacted a comprehensive statutory scheme that provides employees with both the means to combat employment discrimination and a framework for redress. The remedial nature of the statute evinces a legislative intent to compensate fully victims of employment discrimination" (98 NY2d at 25).

The Court then analogized the Human Rights Law to Title VII of the Civil Rights Act of 1964 (42 USC § 2000e *et seq.*), which it noted addresses the same type of discrimination targeted by the Human Rights Law, and which federal courts have concluded permits recovery of pre-judgment interest despite silence in the statute. For example, the *Aurecchione* court cited *Loeffler v Frank* (486 US

549 [1988]), in which the United States Supreme Court stated that "the backpay award authorized by § 706(g) of Title VII is a manifestation of Congress' intent to make persons whole for injuries suffered through past discrimination" and that "[p]rejudgment interest, of course, is an element of complete compensation" (486 US at 558 [internal quotation marks and citations omitted]). As further noted by the Court of Appeals in *Aurecchione*, "the Second Circuit has consistently held that '[t]o the extent . . . that the damages awarded to the plaintiff represent compensation for lost wages, 'it is ordinarily an abuse of discretion *not* to include pre-judgment interest'" (*Aurecchione* at 26, quoting *Gierlinger v Gleason*, 160 F3d 858, 873 [2d Cir 1998], quoting *Saulpaugh v Monroe Community Hosp.*, 4 F3d 134, 145 [2d Cir 1993], *cert denied* 510 US 1164 [1994]). The *Aurecchione* court concluded that a plaintiff who prevails in a discrimination lawsuit brought under the Human Rights Law is also entitled to pre-judgment interest, because, like Title VII, "a central concern of the Human Rights Law is to make such victims whole" (98 NY2d at 26 [internal quotation marks and citation omitted]).

Finally, the *Aurecchione* court declined to extend its holding to every discrimination case, allowing that the Commissioner of the New York State Division of Human Rights has some discretion in setting compensation in discrimination cases, subject to appellate review for abuse (98 NY2d at 27). In other

words, an appellate court considering whether interest should have been awarded in an employment discrimination case must determine whether there was some rational basis in the record to support the award. As discussed below, we find that Labor Law § 740 is analogous to the Human Rights Law for purposes of compensation, and that *Aurecchione* therefore supports plaintiff's position that pre-determination interest generally applies to claims under Civil Service Law § 75-b. Accordingly, we must also determine whether, on *this* record, such an award is warranted.

Like the Human Rights Law, Civil Service Law § 75-b has the goal of remediating adverse employment actions which, if allowed, would undermine an important public policy, that is, encouraging public employees to expose fraud, waste and other squandering of the public fisc. It makes no sense that the Legislature would have intended victims of employment discrimination to be made "whole" through an award of pre-judgment interest, but not whistleblowers like plaintiff. Moreover, we do not read Labor Law § 740, which provides "compensation for lost wages, benefits and other remuneration" (Section 740[5][d]), as affording a narrower form of relief than Executive Law § 297(4)(c)(iii), which provides for "compensatory damages." Further, the fact that the former statute also permits recovery of "reasonable costs, disbursements, and attorney's fees" (Labor Law § 740[5][e]) confirms that the Legislature did indeed intend to

make prevailing plaintiffs "whole." Denying pre-determination interest would conflict with that obvious goal.

Defendants' reliance on *Matter of Bello v Roswell Park Cancer Inst.* (5 NY3d 170 [2005]), is misplaced. *Bello* involved public employees who prevailed in an action in which they alleged that they were unlawfully laid off. They sought back pay, with interest, pursuant to Civil Service Law § 77. That section provides that a person unlawfully removed from, and then restored to, his position, "shall receive . . . the salary or compensation which he would have been entitled by law to have received in such position but for such unlawful removal, from the date of such unlawful removal to the date of such restoration." The Court of Appeals found that the relief described in the statute did not include interest. The Court held that the statute did not provide a general right to compensation, stressing that the statute specified that a person aggrieved by a violation was entitled to receive only "salary or compensation" (5 NY3d at 173). Like the statutes at issue in *Aurecchione* and in *Matter of Greenberg v New York City Tr. Auth.* (7 NY3d 139 [2005] [holding that Workers Compensation Law § 120 provides pre-judgment interest to workers retaliated against for filing claims since the section "evinces a legislative intent to compensate fully victims of . . . discrimination" (internal quotation marks and citation omitted)]), and unlike the statute at issue in *Bello*,

Labor Law § 740(5) creates a "general right to compensation" (7 NY3d at 142-143 [internal quotation marks and citations omitted]).

Also, contrary to defendants' contention, this Court's decision in *Scaduto v Restaurant Assoc. Indus.* (180 AD2d 458 [1992]) does not compel a different result from the one reached herein. The sole issue in *Scaduto* was whether Labor Law § 740(5) entitles a plaintiff to have a jury determine damages in connection with an adverse employment action taken by a private employer against a whistleblowing employee. This Court found that a jury was not available because section 740(5) explicitly states that "the court may order" the available relief (180 AD2d at 459). We further observed that, in contrast to Executive Law § 297(4)(c)(iii), which, again, provides simply for "compensatory damages," the relief set out by Labor Law § 740(5) is equitable in nature. *Scaduto* did not attempt to answer the entirely unrelated question, however, of whether the purpose of Labor Law § 740(5) is to make plaintiffs whole, such that an interest award would be appropriate.

Based on the foregoing, we hold that predetermination interest is generally available to whistleblowers who claim under Civil Service Law § 75-b. We further find that, under the specific circumstances of this case, where defendants have offered no "justification for the denial of pre-determination

interest," it was an abuse of discretion for Supreme Court not to make an interest award (*Aurecchione*, 98 NY2d at 27). Because we find that plaintiff is entitled to an interest award under Civil Service Law section 75-b, we need not, and do not, decide whether such an award is also authorized by CPLR 5001.

Finally, we find that the record supports plaintiff's request that he be reinstated "to the same position held before the retaliatory personnel action, or to an equivalent position" (Labor Law § 740[5][b]). Plaintiff's decisions in 2000, 2001 and 2002 to decline promotions do not militate against reinstatement now. That is because the undisputed testimony of his current supervisor was that, at the time of the offers, plaintiff continued to fear that any promotion would be met with retaliatory action by defendants.

We have considered plaintiff's other contentions and find them unavailing.

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

ENTERED: AUGUST 24, 2010

CLERK

Andrias, J.P., Saxe, Friedman, Nardelli, Acosta, JJ.

3188-		Index 102887/07
3188A	Vincent Campione, et al.,	590500/07
	Plaintiffs-Respondents,	590891/07
		104089/07
	-against-	590592/07
		590892/07
	New Hampshire Insurance Company, et al.,	591124/08
	Defendants,	
	Meltzer/Mandl Architects, P.C.,	
	Defendant-Appellant.	
	[And Other Actions]	

Donovan Hatem LLP, New York (Douglas M. Marrano of counsel), for appellant.

Wilkofsky, Friedman, Karel & Cummins, New York (David B. Karel of counsel), for respondents.

Appeal from order, Supreme Court, New York County (Karen S. Smith, J.), entered April 27, 2009, to the extent it struck the answer of Meltzer/Mandl Architects, unanimously dismissed in light of our further disposition herein. Order, same court and Justice, entered November 6, 2009, which, to the extent appealed from, denied said defendant's motion to vacate the prior order and reinstate its answer, unanimously reversed, on the law, without costs, the motion granted, and the answer reinstated, on condition that said defendant's attorney pay $3,500 to plaintiffs' counsel within 30 days of service of a copy of this order with notice of entry.

Given the specific facts of this case and New York's strong preference for disposing of cases on the merits, Meltzer/Mandl should have been allowed to interpose its answer (*Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213, 215 [2002]). Plaintiffs concede that Meltzer/Mandl complied with the discovery demands of all parties, except for answering interrogatories.

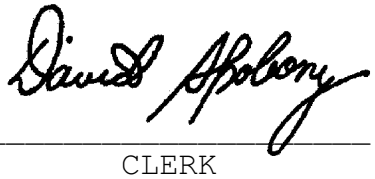
However, several of Supreme Court's compliance orders on which plaintiffs rely did not even note defense counsel's presence, so it remains unclear whether Meltzer/Mandl was aware of those orders. While a lack of knowledge alone does not excuse noncompliance, the record does not reveal whether Meltzer/Mandl willfully, contumaciously or in bad faith disregarded any discovery orders (*see Roman v City of New York*, 38 AD3d 442 [2007]).

Defense counsel affirmed that since January 2009 he has been traveling between New York and Kentucky to deal with his stepson's serious injuries suffered during a military deployment to Iraq. He further affirmed that he was under the impression that an attorney in his firm had in fact answered the interrogatories. When counsel was apprised of the oversight, he provided answers to plaintiffs' interrogatories within two days.

Furthermore, plaintiffs have failed to demonstrate that they have been prejudiced.

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

ENTERED: AUGUST 24, 2010



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The Following Order was Entered and Filed on August 17, 2010

Freedman, J.P., Richter, Abdus-Salaam, Manzanet-Daniels, Román, JJ.

3233-
3233A Samuel H. Sloan, Index 401051/10
Petitioner-Appellant,

-against-

Chris Edes,
Respondent-Respondent.
- - - - - -
Samuel H. Sloan, 108151/10
Petitioner-Appellant,

-against-

Warren Redlich, et al.,
Respondents,

Mark Axinn,
Respondent-Respondent.

_____

Samuel H. Sloan, appellant pro se.

Mark N. Axinn, New York, respondent pro se.

_____

Appeals having been taken to this Court by the above-named appellant from orders, Supreme Court, New York County (Carol Edmead, J.), entered on or about May 26, 2010 and July 12, 2010,

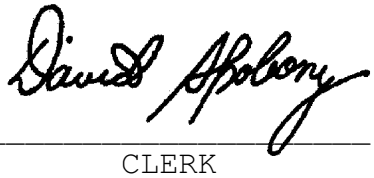
And said appeals having been argued by the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the orders so appealed from

be and the same are hereby affirmed for the reasons stated by Edmead, J., without costs or disbursements.

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

ENTERED: AUGUST 17, 2010



CLERK

Tom, J.P., Catterson, Moskowitz, DeGrasse, JJ.

2369N 61 West 62 Owners Corp., Index 107341/09
Plaintiff-Appellant,

-against-

CGM EMP LLC, et al.,
Defendants-Respondents,

The Chetrit Group LLC,
Defendant.

_____

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Christopher Cobb of counsel), for appellant.

Windels Marx Lane & Mittendorf, LLP, New York (Bruce Bronster of counsel), for CGM respondents.

Cozen O'Connor, New York (Michael C. Schmidt of counsel), for West 63 Empire Associates LLC, respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered August 3, 2009, reversed, on the law, without costs, and the matter remanded for an appropriate provisional remedy.

Opinion by Catterson, J. All concur except Tom, J.P. who dissents in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
James M. Catterson
Karla Moskowitz
Leland G. DeGrasse, JJ.

2369N
Index 107341/09

_____x

61 West 62 Owners Corp.,
Plaintiff-Appellant,

-against-

CGM EMP LLC, et al.,
Defendants-Respondents,

The Chetrit Group LLC,
Defendant.

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Debra A. James, J.), entered August 3, 2009, which denied its motion for a preliminary injunction.

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Christopher Cobb of counsel), for appellant.

Windels Marx Lane & Mittendorf, LLP, New York (Bruce Bronster, Gregory J. Kerr and Joseph Abt of counsel), for CGM respondents.

Cozen O'Connor, New York (Michael C. Schmidt and Menachem J. Kastner of counsel), for West 63 Empire Associates LLC, respondent.

CATTERSON, J.

The plaintiff is the owner of a residential cooperative apartment building. On or about June 10, 2008, the defendants began to operate a bar on the rooftop of a 12-story building adjacent to the cooperative. Less than a year later, the plaintiff commenced this action, alleging that the defendants "play or permit to be played music at extremely loud levels," thus tormenting the cooperative's residents whose apartments are near the bar. The plaintiff also alleged that the pounding and other noise often continues until 3 a.m.

The plaintiff contended the defendants created a nuisance that degraded the residents' quality of life and diminished their property values. The plaintiff sought a permanent injunction to prohibit the congregating of persons in the non-enclosed areas of the rooftop, as well as the emanating of noise at unlawfully loud levels in violation of the New York City Noise Control Code. The cooperative further asked for an award of money damages for the extreme nuisance created, should the court decide that an adequate remedy existed at law.

On May 26, 2009, the plaintiff moved by show cause order for a preliminary injunction prohibiting the bar's use of the open roof deck as well as the excessive noise attendant thereto. In support of the order to show cause, the plaintiff submitted

affidavits from nine residents of the cooperative describing the disturbances they experienced, the steps they had taken to try to deaden the noise, and the complaints they made to defendants and to the City.

The plaintiff also submitted an affidavit from a professional engineer who stated that the plans filed with the Department of Buildings (hereinafter referred to as the "DOB") show that the bar was to operate almost entirely as an enclosed structure with only a small open area on the west side of the building, the area farthest away from the cooperative. The engineer maintained there should be no use of the east terrace, the area closest to the cooperative. Furthermore, he stated that the bar was operating without a certificate of occupancy, that the area lacked sufficient live load capacity, and that its occupancy exceeded that set by the DOB with insufficient egress.

The plaintiff also submitted an affidavit from an acoustical consultant who set up sound-measuring equipment in apartment 16M of the cooperative over a period from Thursday to Sunday, April 16-19, 2009. The consultant reported that the noise level *inside* the apartment from the music played at the bar consistently exceeded 66 decibels,[1] which, in effect, was 100 times more

[1]We take judicial notice of the following: the decibel is the unit used to measure the intensity of sound, with the

intense than the legal limit of 45 decibels, and that such levels were achieved at times including 11:28 p.m. on Thursday, April 16, and 12:34 a.m. on Saturday, April 18. The consultant also stated that the sound did not come from traffic or other outside sound, and that it was clear to him that the bar had not installed sufficient soundproofing on its premises.

Jeffrey Chodorow, a member of defendant CGM, submitted an affidavit stating that the bar consists of three sections: an open-air east terrace, a smaller west terrace with a retractable roof that is opened when weather permits, and a completely enclosed indoor central area. Music is played in the central and west terrace sections during the hours of operation, Sunday through Wednesday from 5 p.m. to midnight, and Thursday through Saturday from 5 p.m. to 4 a.m., and on the east terrace until 11:30 p.m. on weekdays and 12:30 a.m. on Fridays and Saturdays, as an accommodation to the cooperative's residents. Chodorow contended that although the bar's liquor license contains no such restrictions, patrons are asked to vacate the east terrace after those times, and those who go there to smoke are reminded by

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smallest audible sound (near total silence) as 0 dB. A sound ten times louder than near silence is 10 dB; 100 times more powerful is 20 dB; 1000 times more powerful is 30 dB, etc. Thus, the logarithm underlying the acoustic measurement is a base-10 logarithm.

security to talk softly and stay as far away from the cooperative as possible. Although the temporary certificate of occupancy had expired, all work required to renew it was done, and no violations were issued. Furthermore, Chodorow asserted that the bar has never been issued any violations for noise by the New York City Department of Environmental Protection (hereinafter referred to as the "DEP").

On May 26, 2009, the parties appeared for oral argument. The defendants reiterated that despite numerous complaints and visits from City agencies, no violations were ever issued. They also questioned the efficacy of the cooperative's acoustical consultant's test, inasmuch as he had left his equipment in the control of the tenant. The defendants speculated that the tenant could have moved the equipment or put a radio on or near it, and they noted that if forced to close down, they would be unable to conduct their own testing. The plaintiff's counsel responded that the plaintiff did not want to shut down the bar, but just wanted it to comply with the noise code.

The IAS court denied the plaintiff's request for a temporary restraining order, and ultimately a preliminary injunction, noting that the plaintiff had not demonstrated a likelihood of success on the merits of the private nuisance claim, and that DEP had never issued any violations to the bar. It found that the

plaintiff's right to enjoin the operation of the bar was neither clear nor practically beyond dispute, as the issue of violation of the Noise Control Code was in stark dispute. Weighing the equities, it found no precedent for granting relief that would upset the status quo and potentially hurt the bar's business. The court noted that while it was mindful of the distress and discomfort described by the residents, the cooperative had not met the requirements for a provisional remedy interfering with the operation of a bar. For the reasons that follow, this was error, and the failure to enjoin the excessive noise was an abuse of discretion.

On appeal, the plaintiff contends that the court cited the correct standard applicable to claims of private nuisance, but failed to apply it, in that the defendants' invasion of the plaintiff's interests in the use and enjoyment of its property was indeed unreasonable. It further contends that the court should have found it entitled to a preliminary injunction, for the same reason.

At the outset, we note that the elements of the common law cause of action for a private nuisance are: "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or

failure to act". Copart Indus. v. Consolidated Edison Co. of N.Y., 41 N.Y.2d 564, 570, 394 N.Y.S.2d 169, 172-174, 362 N.E.2d 968, 971-972 (1977).

It is wholly immaterial to maintaining an action for nuisance at common law whether or not DEP, or indeed any municipal authority, has issued noise ordinance violations. The plaintiff has adequately pleaded all the necessary elements, and the only question is whether or not the plaintiff is entitled to the relief afforded by a provisional remedy. The dissent's position that "[h]owever the cause of action is denominated, relief must be predicated on defendants' violation of the New York City Noise Control Code" is unsupported by citation to any authority whatsoever. To adopt such a view would make any common law cause of action dependent on the existence of an administrative code violation, a construct alien to New York law. Similarly, the dissent's extended discussion of the Noise Control Code is simply inapplicable to a cause of action sounding in nuisance.

In order to obtain a preliminary injunction, the plaintiff was required to put forth evidence demonstrating "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in [its] favor." Doe v. Axelrod,

73 N.Y.2d 748, 750, 536 N.Y.S.2d 44, 45, 532 N.E.2d 1272 (1988).

Through the affidavits of the residents, the plaintiff demonstrated that the interference was substantial in that the noise greatly exceeded the maximum allowed by ordinance. The cooperative also demonstrated that the noise was intentional and caused by another's conduct because it was a product of the bar's use of the outside roof deck in furtherance of its own commercial purposes. The noise level, as well as the time of night, also established the third and fourth elements of the cause of action, that the interference was unreasonable and affected the residents' right to use and enjoy their respective apartments. See e.g., Zimmerman v. Carmack, 292 A.D.2d 601, 602, 739 N.Y.S.2d 430, 431 (2d Dept. 2002) (allegations defendants' "outside stereo playing so loudly that the police were required to come and disconnect the wires [. . .] adequately pleaded a cause of action sounding in nuisance").

In opposition, the defendants offered nothing but the largely identical affidavits of Chodorow and the bar manager, which contained inadmissible hearsay, their own estimates that the music was not loud, and allegations that the residents failed to call and complain about the noise. Contrary to the finding of the IAS Court, the plaintiff has thus demonstrated a likelihood of success on the merits. The dissent's contention that the

cooperative's expert failed to adhere to "test conditions approved by the Commissioner of Environmental Protection" is irrelevant to the plaintiff's burden on its action for nuisance.

The plaintiff also satisfied the second element for a preliminary injunction, that of irreparable harm. The affidavit of the cooperative's expert wherein he established that the noise complained of was approximately four times the legal limit for the residential neighborhood was unrebutted by competent proof. Furthermore, the affidavits of the residents detailed the nightly assault on the quiet enjoyment of their respective apartments. See Zimmerman v. Carmack, supra; Stiglianese v. Vallone, 168 Misc.2d 446, 637 N.Y.S.2d 284 (Civil Ct. Bronx Co. 1995), rev'd, 174 Misc.2d 312, 666 N.Y.S.2d 362 (App. Term 1st Dept. 1997), rev'd and judgment reinstated, 255 A.D.2d 167, 680 N.Y.S.2d 224 (1st Dept. 1998).

Finally, the plaintiff has established that the balance of equities tips decidedly in favor of the cooperative and its residents. The plaintiff, as noted above, is the owner of a building whose residents have a right to enjoy their apartments in peace, especially during late night hours. The defendants operate a bar that has seasonal use of an outdoor roof deck. There is no evidence of record that either the use of the roof deck or the playing of music louder than permitted by law on the

deck is a significant and necessary part of the bar's business operations and income. There is no evidence of record that the bar requires the use of the roof deck in the late night hours, other than for a patrons' smoking area outside the bar's enclosed premises. Thus, were the scope of the injunction limited to the playing of music on the terrace alone, it would appear from the record to have no impact on the bar's business whatsoever. We have considered the defendants' remaining arguments and find them without merit.

Accordingly, the order of the Supreme Court, New York County (Debra A. James, J.), entered August 3, 2009, which denied the plaintiff's motion for a preliminary injunction, should be reversed, on the law, without costs, and the matter remanded for an appropriate provisional remedy.

All concur except Tom, J.P. who dissents in an Opinion:

TOM, J.P. (dissenting)

The imposition of the preliminary injunction in this case is unsupported by a sufficient record. However the cause of action is denominated, relief must be predicated on defendants' violation of the New York City Noise Control Code (New York City Administrative Code § 24-201), which governs permissible acoustic levels produced by a particular sound source. Furthermore, plaintiff's failure to pursue available legal remedies precludes this action for permanent injunctive relief and the grant of attendant provisional relief. In view of plaintiff's failure to establish a clear right to the ultimate remedy sought in the complaint, there is no basis to conclude that Supreme Court's denial of a provisional remedy was an abuse of discretion (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]; *cf. Doe v Axelrod*, 73 NY2d 748 [1988]).

This action by plaintiff cooperative corporation seeks a permanent injunction against noise emanating from The Empire Hotel Rooftop Bar and Lounge (the bar), owned and operated by defendants, which began conducting business in June 2008. Alternatively, in the event plaintiff is found to have an adequate remedy at law, the complaint seeks monetary damages in the amount of $10,000,000 on the basis of nuisance and negligence. The complaint alleged that (1) defendants are using

the premises in violation of the Building Code and Zoning Law, (2) the bar is emitting sound levels in excess of the levels permitted by the Noise Control Code and (3) the establishment is maintaining a nuisance by permitting noise at "unreasonably loud and disturbing levels." On appeal, plaintiff has abandoned its claim that the premises are operated in violation of applicable Building Code and Zoning Law provisions.

Upon commencement of the action, plaintiff sought a temporary restraining order and preliminary injunction against the bar (1) allowing patrons to congregate in unenclosed portions of the rooftop area, (2) permitting noise in excess of the levels permitted by the Noise Control Code, and (3) permitting the complained of "loud and disturbing" sound levels. Supreme Court denied the temporary restraining order and, in the order appealed from, denied the motion for preliminary relief. The court found that plaintiff, having conceded that no noise violation has ever been issued against the bar by the police or any regulatory agency, failed to demonstrate a likelihood of success on the merits of its action. The court further found "no precedent for granting relief that would upset the status quo and potentially harm the bar's business."

On an application under CPLR 6301, the "party seeking a preliminary injunction must demonstrate a probability of success

on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Nobu Next Door,* 4 NY3d at 840). As this Court has observed, "A preliminary injunction is a provisional remedy. Its function is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits" (*Residential Bd. of Mgrs. of Columbia Condominium v Alden*, 178 AD2d 121, 122 [1991]).

As to the merits of plaintiff's application, the issue is not, as the majority frames it, whether plaintiff can maintain an action for private nuisance, but whether plaintiff has stated a claim for permanent injunctive relief, and if so, whether plaintiff has established its entitlement to a provisional remedy so as to warrant a finding that Supreme Court abused its discretion in denying preliminary injunctive relief. It is not sufficient to apply the low threshold required to sustain a cause of action against dismissal to an application for a preliminary injunction, which is governed by significantly more exacting requirements.

Plaintiff has not made the requisite showing of entitlement to a provisional remedy. Defendants assert that the cooperators have called the city’s 311 assistance line to complain about noise, and as a result, the Police, Fire, Health and Buildings

Departments have visited the bar on several occasions, but no violations for noise have ever been issued. Even if, as the majority insists, the absence of any noise violations is deemed to be immaterial to plaintiff's right to maintain the action, it is immediately pertinent to deciding both whether plaintiff is likely to succeed on the merits of its claim and whether it has established a compelling need for preliminary injunctive relief.

Plaintiff's application was made prior to discovery, and the record fails to establish the strong likelihood of success on the merits necessary to warrant provisional relief. As this Court has noted, "Preliminary injunctive relief is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and the undisputed facts found in the moving papers" (*Koultukis v Phillips*, 285 AD2d 433, 435 [2001]).

The only evidence that the noise level in any cooperative dwelling unit exceeded legal limits is the affidavit of plaintiff's acoustical expert, Alan Fierstein, who placed a sound level meter in the master bedroom of apartment 16M, recording a maximum sound level of 45 decibels (dB). According to the affidavits submitted by both the expert and the apartment owners, the sound measuring equipment was placed three feet from an open window. Examination of Noise Control Code provisions, however, casts considerable doubt upon this methodology. While

Administrative Code § 24-232(a) provides that the sound level for various frequency bands shall not exceed specified corresponding levels "as measured within any room of the residential portion of the building with windows open, if possible," § 24-232(d) expressly provides that this provision "shall not apply to . . . music . . . devices or activities." Section 24-231, applicable to commercial music, provides that the sound level, "as measured inside any receiving property dwelling unit," shall not exceed 45 dB in any of certain frequency bands, but unlike § 24-232(a), does not specify that apartment windows remain open during testing. In view of similar provisions governing particular noise sources that specify a measurement be taken within three feet of an open window or door (*e.g.* § 24-227[a] "Circulation devices"), the absence of such a requirement in the commercial music provision cannot be dismissed as a mere oversight. Thus, it does not appear that the expert obtained his results under test conditions approved by the Commissioner of Environmental Protection (§§ 24-204, 24-206[b]) so as to be accepted without reservation. The expert failed to respond to the criticisms of his sound testing methodology at the hearing on May 26, 2009.

This is an instance where "the interpretation of a statute or its application involves knowledge and understanding of

underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom" (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]; *see also Matter of Dworman v New York State Div. of Hous. & Community Renewal*, 94 NY2d 359, 371 [1999]), and the "special competence or expertise of the administrative agency and its interpretive regulations" are necessary to evaluate the significance of the data (*Kurcsics*, 49 NY2d at 459; *see Matter of Howard v Wyman*, 28 NY2d 434, 438 [1971]). In short, even ignoring the lack of any opportunity by defendants to engage their own expert to conduct noise testing and fully crediting Mr. Fierstein's data, its significance is uncertain and affords an insufficient basis to support a provisional remedy. *Stiglianese v Vallone* (255 AD2d 167 [1998]), cited by the majority, does not warrant a contrary conclusion. There, this Court sustained a decision rendered after trial, at which sound level measurements taken by complainants were admitted into evidence without objection, and the trial court found that the sound level of the offending sound system was "above the legal sound limit allowed for commercial music produced by a commercial establishment, as measured inside a residential unit" (*see* 168 Misc 2d 446, 451). Thus, any issue with respect to the accuracy of plaintiffs' data was unpreserved for this Court's review.

Because of the need for special expertise, it is appropriate that the findings first be evaluated at the administrative level (*see Koultukis*, 285 AD2d at 435). Moreover, by crediting the conclusions proffered by plaintiffs' expert, at the very outset of litigation and without the opportunity for defendants to conduct their own testing, the majority offends the general principle that the weight to be accorded expert testimony is ultimately a matter for resolution by a jury (*Windisch v Weiman*, 161 AD2d 433, 437 [1990]). Plaintiff confirms that the cooperative residents have refused defendants access to their apartments in order to allow them to do their own testing. It is within the province of the trier of fact to determine the weight to be accorded to opinion testimony offered by an expert witness, as assessed against other credible evidence (*see Matter of Sylvestri*, 44 NY2d 260, 266 [1978]). Even in the absence of a conflict in testimony, expert testimony need not be credited but "ordinarily is entirely for the determination of the jury" (*Commercial Cas. Ins. Co. v Roman*, 269 NY 451, 456-457 [1936]; *see Herring v Hayes*, 135 AD2d 684 [1987] ["The trier of fact is not required to accept an expert's opinion to the exclusion of the facts and circumstances disclosed by other testimony and/or the facts disclosed on cross-examination of the expert witness"]). Since the expert's findings were questionable, the

court properly declined to rely on the cooperator's affidavits alone.

Finally, it should be noted that while a complaint of excessive noise can be stated as both a cause of action for private nuisance and a violation of the Noise Control Code, in either event a court must assess liability under the detailed criteria provided in the ordinance, rendering the private nuisance cause of action redundant. It is apparent that the majority recognizes the duplication, concluding on the basis of the minimal preliminary record that "the noise greatly exceeded the maximum allowed by ordinance."

It is the function of a court in interpreting a statute to carry out the legislative intent behind its enactment (*see Thoreson v Penthouse Intl.*, 80 NY2d 490 [1992]; McKinney's Statutes § 92[a]). It is a corollary to this principle that the "courts will not construe statutes, or rules and regulations of a government agency in such a manner as to thwart the obvious legislative intent and reach absurd and unexpected consequences" (*Matter of Friedman-Kien v City of New York*, 92 AD2d 827, 828 [1983], *affd* 61 NY2d 923 [1984]). If plaintiff is permitted to proceed on a theory of private nuisance based on the premise that the complained-of sound was subjectively disturbing, the effect would be to render nugatory the Noise Control Code's detailed

specifications of permissible sound emission levels and its commercial sound provision applicable to the bar's operation.

Zimmerman v Carmack (292 AD2d 601 [2002]) is not to the contrary. There, noise generated by an exterior stereo left playing, together with the accumulation of garbage, dog waste, diapers and rotting food adjacent to the plaintiffs' property, were found sufficient to state a cause of action for private nuisance. While Civil Court in *Stiglianese* opined that the Noise Control Code merely "supplements the common-law parameters of the extent, nature and intensity of permitted noise levels in our urban setting" (168 Misc 2d at 450), that position has never been endorsed by this Court. Meanwhile, Appellate Term stated in that case that the extent of any interference with the plaintiffs' use of their property should be assessed on the basis of "objective legal standards," not "subjective considerations" (174 Misc 2d 312, 315-316). In any event, the finding of private nuisance in *Stiglianese* does not rest exclusively on excessive noise, and that case is thus distinguishable.

The public policy sought to be advanced by the Noise Control Code is that "every person is entitled to ambient sound levels that are not detrimental to life, health and enjoyment of his or her property" (Administrative Code § 24-202). The detailed criteria for evaluating whether a particular sound level violates

that policy would be obviated if noise complaints were subjected to ad hoc evaluation by the courts attempting to substitute their limited expertise for the "special competence or expertise of the administrative agency" (*Kurcsics*, 49 NY2d at 459) charged with enforcement of the ordinance. Therefore, irrespective of whether a plaintiff can state a cause of action for private nuisance, whenever, as here, the Noise Control Code provides a precise standard for the determination of whether the complained of sound level is excessive, the courts are obliged to apply the mandated standard and any governing regulations promulgated under the ordinance.

Furthermore, while there is no question that plaintiff has standing to maintain this action on behalf of the owners of the shares allocated to two or more units "with respect to any cause of action relating to the common elements or more than one unit" (Real Property Law § 339-dd; *see e.g. East End Owners Corp. v Roc-East End Assoc.*, 128 AD2d 366, 370 [1987]), a party may pursue an equitable remedy only in the absence of the availability of other adequate relief. Simply because a party has access to the judicial forum does not automatically bestow a right to equitable injunctive relief in Supreme Court. It is settled that "the extraordinary remedies . . . of injunctive and declaratory relief are available 'only where resort to ordinary

actions or proceedings would not afford adequate relief'" (*Gaynor v Rockefeller*, 15 NY2d 120, 132 [1965] [availability of proceeding before State Commission for Human Rights precludes aid in equity], quoting *Rockland Light & Power Co. v City of New York*, 289 NY 45, 51 [1942] [declaratory judgment]; *see Cox v J.D. Realty Assoc.*, 217 AD2d 179, 181 [1995] [preliminary injunction]). Since neither plaintiff nor any of the share owners of the cooperative corporation has attempted to pursue either of two distinct administrative remedies or demonstrate the ineffectiveness of available administrative sanctions, plaintiff should not be allowed to invoke the court's equitable jurisdiction.

As to the grant of preliminary relief, plaintiff has offered no reason why it should be accorded the extraordinary relief of an injunction that — rather than preserving the status quo — awards the remedy ultimately sought in the action. While asserting in conclusory fashion in the complaint that the cooperative "has no adequate remedy at law," plaintiff offers no explanation why it has failed to pursue a more expeditious administrative remedy. While the second cause of action seeks relief under the Noise Control Code, plaintiff does not explain why the bar's habitual violations of the Noise Code have not been brought to the attention of New York City's Department of

Environmental Protection (DEP), which possesses ample power to redress the grievance including the imposition of substantial civil penalties (§ 24-257[b], Table I), the issuance of cease and desist orders (§ 24-257[b][4]) and the sealing of offending sound equipment (§ 24-257[b][3]). Nor does plaintiff explain why it did not enlist the offices of the New York State Liquor Authority, which is vested with supervisory authority over the bar and is empowered to suspend its liquor license (effectively suspending its operation) on the ground of excessive noise (*see Matter of Beer Garden v New York State Liq. Auth.*, 79 NY2d 266, 276 [1992] [disorderly conduct under Alcohol Beverage Control Law § 106(6) includes excessive noise]; *Matter of Circus Disco v New York State Liq. Auth.*, 51 NY2d 24, 35 [1980]; cf. *Matter of Culture Club of NYC v New York State Liq. Auth.*, 294 AD2d 204 [2002]).

Before Supreme Court, plaintiff attempted to discount the effectiveness of monetary sanctions that might be imposed by DEP as inadequate, representing that the maximum penalty available under the Noise Control Code for violation of its "Commercial music" provision (Administrative Code § 24-231), would be only $8,000. This is inaccurate. In fact, the maximum penalty is $8,000 for *each day* the violation persists ($16,000 for a second violation and $24,000 for a third violation found to have

occurred within a two-year period), an amount sufficient to consume the profit of a business establishment (Administrative Code § 24-257[b][5]). Plaintiff has thus not established that it lacks an adequate remedy at law so as to require resort to a proceeding in equity.

While arguing the deleterious effect of noise emanating from the bar on residents of the cooperative's building, plaintiff does not explain why it took nearly a year to pursue what it now claims is the need for immediate relief. As reflected in the complaint, while the bar has been open for business since June 2008, this action was not commenced until late May 2009. Affidavits accompanying the motion for a preliminary injunction allege that the noise condition has been extant since the bar began operation. Yet no relief was sought until the instant motion for preliminary injunctive relief was brought nearly a year later. Plaintiff has not established any change in circumstances, such as a sudden increase in the noise level, that would warrant upsetting the status quo that was in place during the year prior to the filing of the motion. Nor has plaintiff explained why, if the sound emanating from the bar was so disturbing, no effort was made to pursue alternative remedies to obtain relief for cooperative share owners. The delay in seeking a remedy in any forum for a year militates against plaintiff's

claim that immediate injunctive relief is imperative.

Accordingly, the order should be affirmed.

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

ENTERED:

CLERK