SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 19, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Andrias, Williams, McGuire, JJ.

3055 IDT Corp., et al., Index 601321/04
Plaintiffs-Respondents,

-against-

Tyco Group, S.A.R.L., et al.,
Defendants-Appellants.

Dewey Pegno & Kramarsky LLP, New York (Thomas E.L. Dewey of counsel), for appellants.

Grayson & Kubli, P.C., Vienna, VA (Alan M. Grayson of the Virginia bar, admitted pro hac vice, of counsel), for respondents.

Order, Supreme Court, New York County (Charles Edward Ramos, J.), entered October 11, 2007, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for partial summary judgment on the issue of liability and denied that portion of defendants' cross motion seeking summary judgment dismissing the complaint, unanimously reversed, on the law, with costs, plaintiffs' motion for partial summary judgment denied, that portion of defendants' cross motion seeking summary judgment dismissing the complaint granted, defendants' counterclaims severed, and the matter remanded to Supreme Court for further proceedings. The Clerk is directed to enter judgment dismissing

the complaint.

This action is for breach of a settlement agreement. The agreement was entered into on October 10, 2000, was partially performed by the dismissal of all of the then-pending litigation between the parties, and requires defendants to provide specified amounts of fiber optic capacity, at specified times, at a specified price, in a specified configuration, and with specified endpoints. It also expressly calls for further written agreements between the parties, including an Indefeasible Right of Use (IRU). These further agreements are required to be consistent with defendants' standard agreements for similarly situated customers and "in any event" consistent with the settlement agreement. The settlement agreement thus leaves room to negotiate the terms of the IRU and the other agreements it contemplated, but makes clear that each side has the right to insist that those terms be as set forth in defendants' standard agreements except to the extent any such term was inconsistent with the settlement agreement. Accordingly, although the settlement agreement "reflect[s] a meeting of the minds on all the issues perceived to require negotiation" (*Brown v Cara*, 420 F3d 148, 153 [2d Cir 2005] [applying New York law; internal quotation marks deleted]), all of its essential terms are not contained within its four corners. The parties agreed that the remaining terms could and should be negotiated but provided an

alternative mechanism for determining those terms in the event negotiations were not successful.

Because defendants' standard agreements, including in particular the IRU, were not in existence at the time the settlement agreement was entered into, essential terms of the settlement agreement remained indeterminate, and thus the settlement agreement was not a fully enforceable agreement when the parties entered into it. Once the content of defendants' standard agreements became determinate, however, the contract would have been fully enforceable if either side insisted that the open terms be as set forth in defendants' standard agreements (except to the extent any particular term of a standard agreement was inconsistent with the settlement agreement). In essence, the settlement agreement is indistinguishable from a written agreement in which the parties agree on many but not all of the essential terms of their relationship, and further agree that a third party, through binding arbitration or otherwise, is to resolve the remaining terms if they are not resolved by the further negotiations called for in the agreement. We think it plain that if one of the parties to such an agreement refused to perform after the third party resolved the remaining terms, the party refusing to perform could not avoid liability for breach of contract on the ground that the agreement was not fully enforceable when it was executed.

In *Brown* (*id.*), the Second Circuit stated that "binding preliminary agreements fall into one of two categories" (420 F3d at 153 [internal quotation marks omitted]). A "Type I preliminary agreement[] [is] complete, reflecting a meeting of the minds on all the issues perceived to require negotiation" (*id.* [internal quotation marks omitted]). "Because it is complete, a Type I preliminary agreement binds both sides to their ultimate contractual objective" (*id.* [internal quotation marks omitted]). By contrast, "Type II preliminary agreements . . . are binding only to a certain degree, reflecting agreement on certain major terms, but leaving other terms open for further negotiation" (*id.* [internal quotation marks omitted]). "Type II agreements do not commit the parties to their ultimate contractual objective but rather to the obligation to negotiate the open issues in good faith in an attempt to reach the . . . objective within the agreed framework" (*id.* [internal quotation marks omitted]).

The settlement agreement reflects a third, hybrid category of preliminary agreement, one that is incomplete but nonetheless "binds both sides to their ultimate contractual objective" upon the subsequent occurrence of a contingency, here, either the insistence of one party on the terms of the standard agreements after they come into existence or a resolution of the remaining terms through further negotiation. Under this hybrid, which

might be called a "contingent Type I agreement," both parties were required to "negotiate the open issues in good faith" unless and until one party were to insist on the terms of the standard agreements. Thus, we reject both plaintiffs' contention that the settlement agreement is a "Type I" agreement and defendants' contention that it is a "Type II" agreement.

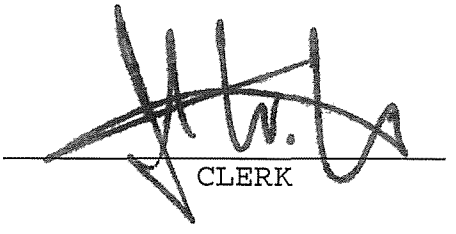
Plaintiffs erroneously contend that defendants breached the settlement agreement when, on June 12, 2001, defendants proposed an IRU that contained terms -- such as a provision that would have required plaintiffs to relinquish their right to use the fiber optic network without charge for 15 years, and another provision that would have required plaintiffs to forgo their damages remedies in the event defendants breached the settlement agreement -- that plaintiffs contend were inconsistent with the settlement agreement. Nothing in the settlement agreement prohibited defendants or plaintiffs from merely proposing terms that were inconsistent with the settlement agreement. The proposal that defendants made, moreover, was hardly "the sort of definite and final communication" of "an intent to forgo [their] obligations" that is "necessary to justify a claim of anticipatory breach" (*Canali U.S.A. v Solow Bldg. Co.*, 292 AD2d 170, 171 [2002] [internal quotation marks omitted]).

After receiving the June 12 proposal, plaintiffs did not insist that defendants perform in accordance with the terms of

defendants' standard agreements. Nor did plaintiffs take the position that defendants thereby had breached the settlement agreement. Rather, the parties did what the settlement agreement required: they negotiated the open terms. The negotiations continued, albeit in desultory fashion, until March 2004, shortly before plaintiffs commenced this action. Because the parties' submissions on the motion and cross motion establish that defendants never made a "definite and final communication" of "an intent to forgo [their] obligations" (*id.*) prior to the commencement of this action, defendants did not, as a matter of law, breach the settlement agreement. Thus, plaintiffs' motion for partial summary judgment on liability should have been denied, and that aspect of defendants' cross motion for summary judgment dismissing the complaint should have been granted.

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

ENTERED: AUGUST 19, 2008



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Gonzalez, J.P., Catterson, McGuire, Moskowitz, JJ.

3699N-
3699NA Art Capital Group LLC, et al, Index 601389/05
Plaintiffs-Appellants,

-against-

Andrew C. Rose, et al.,
Defendants-Respondents.

Hahn & Hessen LLP, New York (Zachary G. Newman of counsel), and Arent Fox PLLC, New York (David N. Wynn of counsel), for appellants.

Todtman, Nachamie, Spizz & Johns, P.C., New York (Matthew E. Hoffman of counsel), for respondents.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered October 20, 2006, that, insofar as appealed from as limited by the briefs, in an action for unfair competition against former employees, denied so much of plaintiffs' motion to compel production of certain attorney-client communications between defendant Rose and his attorneys, unanimously affirmed, with costs. Order, same court and Justice, entered August 14, 2007, that, insofar as appealable, upon renewal, adhered to the October 20, 2006 order, unanimously affirmed, with costs.

Defendants Christopher Krecke and Andrew Rose were employees of plaintiffs and are now plaintiffs' competitors. Rose's departure from plaintiffs preceded Krecke's. Apparently, Krecke, while still in plaintiffs' employ, assisted Rose, who had left plaintiffs, in establishing Rose's competing business. Krecke

may have, inter alia, helped to obtain financing, offered business advice and participated in certain transactions. In this capacity, Krecke was copied on some e-mails and was an active correspondent on other e-mails that also involved communications with Rose's law firm Todtman, Nachamie, Spizz & Johns, P.C. (Todtman). The motion court ordered the production of all e-mails that included Krecke as a correspondent, holding that defendants had waived the privilege that otherwise existed between Rose and Todtman with respect to these documents by sending them to Krecke.

Plaintiffs had also sought production of documents between Rose and Todtman that did not copy Krecke under the crime/fraud exception to the attorney-client privilege on the theory that Krecke and Rose were engaged in a conspiracy to usurp plaintiffs' business opportunities and the documents solely between Rose and Todtman were in furtherance of that scheme. However, the court ruled that the crime/fraud exception was not available to pierce the privilege.

Discovery proceeded accordingly with defendants producing the documents the court had ordered them to produce, including the e-mails between Todtman and Rose that copied Krecke. Thereafter, plaintiffs used these documents to move to reargue and renew their prior motion to compel. Plaintiffs claimed that the new documents indicated that the privileged communications

between Rose and Todtman furthered Rose and Krecke's fraudulent scheme to compete unfairly with plaintiffs. The court once again rejected plaintiffs' attempt to pierce the privilege. Plaintiffs argue that the court erred by rejecting their request to invoke the crime/fraud exception to the attorney-client privilege.

A party may not invoke the attorney-client privilege where "it involves client communications that may have been in furtherance of a fraudulent scheme, an alleged breach of fiduciary duty or an accusation of some other wrongful conduct" (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 AD3d 223, 224 [2003]).

Regardless of whether Krecke breached his duty of loyalty to his employer, defendants have already produced the e-mails between Rose and Todtman that involve Krecke. Nothing defendants have shown regarding Krecke would lead to claims involving Rose or Todtman, as neither of these defendants owed plaintiffs a fiduciary duty. Nor is there a showing that the e-mails between Rose and Todtman were in furtherance of the alleged breach of Krecke's duty of loyalty to his employer. Thus, refusing to allow plaintiffs to invade the privilege between Rose and Todtman constituted a proper exercise of the court's broad discretion in the supervision of pretrial disclosure.

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

M-2230 - ***Art Capital Group LLC, et al. v Andrew C. Rose, et al.,***

Motion seeking leave to strike reply brief denied.

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

ENTERED: AUGUST 19, 2008

Gonzalez, J.P., Catterson, McGuire, Moskowitz, JJ.

3700N-
3700NA Wilfredo Rosado, etc., et al., Index 603214/04
Plaintiffs-Appellants,

-against-

Edmundo Castillo Inc., et al.,
Defendants-Respondents.

Caraballo & Mandall, LLC, New York (Dolly Caraballo of counsel), for appellants.

Edward W. Hayes, P.C., New York (Edward W. Hayes of counsel), for Edmundo Castillo and Edmundo Castillo, Inc., respondents.

Harvey & Hackett, New York (Thomas Harvey of counsel), for Money Tree Inc., B&D Financial Strategies, Inc. and Denise Cassano, respondents.

McAloon & Friedman, P.C., New York (Timothy J. O'Shaughnessy of counsel), for McAloon & Friedman, P.C., respondent pro se.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 12, 2006, which (1) denied that part of plaintiff Wilfred Rosado's motion for contempt against all defendants except Edmundo Castillo for events occurring up to November 4, 2004, and continued the motion against all defendants for all other periods of time, (2) denied that part of the motion seeking sanctions against defendants, and (3) denied that part of the motion seeking discovery sanctions against defendants with leave to renew, unanimously modified, on the law, the branch of the motion seeking contempt against Edmundo Castillo Inc., Money Tree Inc., B&D Financial Strategies, Inc. and Denise Cassano for

events that occurred up to November 4, 2004 reinstated, and otherwise affirmed, without costs, and the matter remanded for further proceedings. Order, same court and Justice, entered April 18, 2007, which, to the extent appealable, denied plaintiff's motion to renew his prior motion, unanimously affirmed, without costs.

The IAS court improperly denied that part of plaintiff's initial motion for contempt against Edmundo Castillo Inc. (ECI), Money Tree Inc., B&D Financial Strategies, Inc. and Denise Cassano for those events occurring between October 4, 2004, when the temporary restraining order was issued, and November 4, 2004, the date counsel for defendants Money Tree Inc., B&D Financial Strategies, Inc. and Denise Cassano (the Cassano defendants) appeared in court to accept service of the restraining order. Even if the Cassano defendants were not served with the TRO until the later date, the record indicates they had knowledge of the terms of the TRO, and thus were not entitled to avoid its effects by failing to appear at the October 4 hearing or inquire further about the proceeding (*see e.g. Matter of McCormick v Axelrod*, 59 NY2d 574, 585 [1983]). To the extent the IAS court denied the motion against ECI for those events occurring up to November 4, the motion should be reinstated, since it is undisputed that ECI was served with the TRO.

The court providently exercised its discretion in

determining that plaintiff's motion for contempt against all defendants with respect to all other periods of time should be tried with the balance of this action, since the issue of defendants' possible contempt is largely related to plaintiff's action against defendants, and the court was not required to determine the issue prior to trial.

The court also properly denied that part of plaintiff's initial motion for monetary sanctions against defendants. There is no indication defendants or their attorneys intentionally prepared and altered exhibits (*compare Sakow v Columbia Bagel, Inc.*, 32 AD3d 689 [2006], *with 317 W. 87 Assoc. v Dannenberg*, 159 AD2d 245 [1990], *and PDG Psychological, P.C. v State Farm Ins. Co.*, 9 Misc 3d 172 [2005]).

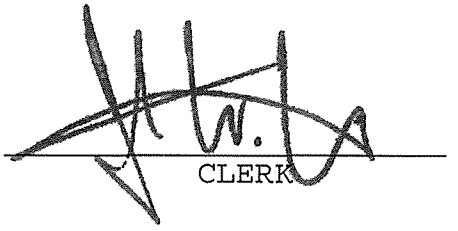
Denial of that branch of plaintiff's initial motion that sought discovery sanctions pursuant to CPLR 3126 with leave to renew was also a proper exercise of discretion. Since plaintiff never made a formal discovery request pursuant to CPLR 3120, and defendants have complied with some informal discovery requests and discovery orders, it cannot be said that the latter's delay in disclosing certain documents was willful or contumacious (*see e.g. Guzetti v City of New York*, 32 AD3d 234 [2006]).

Plaintiff's motion to renew was properly denied since he failed to offer a reasonable excuse for not presenting the new evidence on the prior motion (CPLR 2221[e][3]) when it could have

been obtained through discovery (*see Cohoes Realty Assoc. v Lexington Ins. Co.*, 266 AD2d 11 [1999], *lv dismissed* 94 NY2d 875 [2000]). To the extent plaintiff seeks to appeal the denial of so much of his motion as sought reargument, that portion of the order is not appealable.

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

ENTERED: AUGUST 19, 2008



SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Jonathan Lippman, P.J.
Luis A. Gonzalez
Karla Moskowitz
Rolando T. Acosta, JJ.

3555N
Index 109510/07

x

In re Virginia Parkhouse,
Petitioner-Appellant,

-against-

Scott M. Stringer, Borough President
of Manhattan, et al.,
Respondents-Respondents.

- - - -

New York Civil Liberties Union,
Amicus Curiae.

x

Petitioner appeals from an order of the Supreme Court, New York County (Herman Cahn, J.), entered on or about October 22, 2007, which denied her application to quash a subpoena served by respondent Department of Investigation of the City of New York; granted respondents' motion to compel compliance with the subpoena; and denied her cross motion to strike certain matters from respondents' investigatory filings as scandalous and prejudicial, to have New York City Charter § 803(d) declared unconstitutional as applied to her, and to enjoin respondents from interfering with her exercise of free speech.

Whitney North Seymour, Jr., New York and Gabriel North Seymour, Falls Village, CT, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Alan G. Krams and Leonard Koerner of counsel), for respondents.

Matthew Faiella, Arthur Eisenberg and Daniel J. Freeman, New York, for New York Civil Liberties Union, amicus curiae.

ACOSTA, J.

This matter presents two significant issues. The first is whether the Department of Investigation of the City of New York (DOI) has the authority, while conducting an investigation, to subpoena testimony from a private citizen who, although not a New York City employee or in privity with the City, has information relevant to a DOI investigation. If this issue is resolved in the affirmative, then the second must be addressed - whether petitioner is entitled to First Amendment protection regarding her statements at a New York City Landmarks Preservation Commission (LPC) hearing, in which she allegedly spoke on behalf of an elected official without authorization, and then misstated that official's position. We hold that DOI has the authority to subpoena petitioner, and that petitioner's First Amendment rights will not be unconstitutionally infringed upon if she complies with DOI's subpoena.

Petitioner is a long-standing volunteer of Landmark West!, a nonprofit community group whose mission is to preserve the architectural heritage of the Upper West Side of Manhattan. As a committed volunteer, petitioner's activities on behalf of Landmark West! include testifying at public hearings before LPC, which is the agency charged with identifying and designating

landmarks and buildings in the City's historic districts.[1]

The facts of this case stem from LPC's public hearing held on October 17, 2006 to determine whether the historic Dakota Stables and New York Cab Company Stables should be given landmark status. Petitioner offered into evidence an altered version of a letter written by respondent Borough President Stringer, which she had obtained through her affiliation and volunteer work with Landmark West!.

Stringer's letter in support of landmark status for the two stables was dated August 14, 2006 and addressed to LPC's Chair, with a copy sent to Landmark West!. In relevant part, the letter stated:

> I am writing regarding two historic stable buildings . . . Both are historic fixtures of Manhattan's Upper West Side and should be preserved. I strongly urge you to calendar these two important buildings for public hearing by the Landmarks Preservation Commission.

* * *

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[1]LPC conducts public hearings pursuant to Title 25, chapter 3 of the Administrative Code of the City of New York. Section 25-313(b) provides: "At any such public hearing, the commission shall afford a reasonable opportunity for the presentation of facts and the expression of views by those desiring to be heard, and may, in its discretion, take the testimony of witnesses and receive evidence; provided, however, that the commission, in determining any matter as to which any such hearing is held, shall not be confined to consideration of the facts, views, testimony or evidence submitted at such hearing."

> I ask that you move to calendar these two buildings and protect an important part of the history of the development of the Upper West Side.

After circulating the letter, Stringer learned that one of the stables' original facades had already been destroyed, and thus decided to no longer support landmark designation for that structure. However, according to the record, he had no further communication with LPC regarding the stables or his change of position. When Stringer learned that the stables' landmark status would be considered at an LPC meeting to be held on October 17, 2006, he declined to attend, but sent an aide to monitor the proceedings.

Petitioner attended this meeting, signing in as a representative of Landmark West!. She asked to speak, stating that she was "volunteering today to *read* the statement of Borough President Scott Stringer" (emphasis added). Petitioner then read an altered version of Stringer's August 14th letter, removing Stringer's request that the two stables be calendared by LPC, and inserting alternative language, as follows:

> I am writing regarding two historic stables. . . Both are historic figures [*sic*] of Manhattan's Upper West Side and should be preserved. ~~I strongly urge you to calendar these two important buildings for public hearing by the [LPC].~~

* * *

> I ask that you ~~move to calendar these two buildings and~~ ***immediately*** protect ~~an~~ ***the*** important part of ~~the~~ history of ~~the development~~ of the Upper West Side ***and landmark these buildings.***

Petitioner then submitted the letter, with her handwritten changes, to LPC.[2] These handwritten changes, however, were not specifically identified as coming from petitioner, and could have been construed as changes made by Stringer himself.[3]

In a letter dated November 27, 2006 Stringer's counsel informed LPC that petitioner was not authorized to speak on Stringer's behalf and that neither she nor Landmark West! had any affiliation with Stringer. Counsel's letter also stated that Stringer was

> concerned that any person and/or organization may have falsely induced reliance from a public agency based on representations appearing to derive from the authority of an elected official or public servant. Such conduct is highly inappropriate and, if pursued with

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[2] Petitioner claims that she did not recite that part of Stringer's letter requesting the "calendaring" of these two stables since the public hearing was already taking place, thus making it an outdated request. This, nonetheless, was clearly a material alteration of the letter Stringer had drafted.

[3] At this same meeting, another representative of Landmark West!, Lindsay Miller, inaccurately signed in as representing Assembly Member Linda Rosenthal and read a letter written by Rosenthal three months earlier, but changing the text so that instead of recommending that the stables be *calendared for consideration* by LPC, LPC was told that Rosenthal *advocated* the stables' designation. Rosenthal later wrote to LPC, complaining about the deception.

> the intent to mislead, a potential violation of New York Penal Law Section 190.25 proscribing criminal impersonation, an offense that includes acting with intent to cause another to rely upon pretended official authority.

In February 2007, LPC filed a complaint with DOI, alleging that petitioner had misrepresented the content of Stringer's letter at the October 17, 2006 meeting. Thereafter, DOI commenced an investigation and sought to interview petitioner. She refused a consensual meeting and was consequently served with an administrative subpoena ad testificandum on May 24, 2007.

In response to petitioner's motion to quash the subpoena and in support of DOI's cross motion to compel, Walter M. Arsenault, First Deputy Commissioner for DOI, averred that although petitioner had taken the position that there was no reason for DOI to interview her, "several unanswered questions remain." For example, he noted that a "first-hand" account of petitioner's and Miller's roles in the process would "help DOI better understand whether Petitioner, Ms. Miller and/or Landmarks [*sic*] West! engaged in a deliberate effort to improperly influence official government proceedings." It would also help DOI determine whether to make "policy and procedure recommendations . . . to LPC in order to ensure that persons who appear before LPC are in fact representing who they claim to represent." Lastly, DOI

wanted to obtain petitioner's "side of the story before determining whether or not to make a criminal referral" of the matter.

As a threshold matter, we must determine whether petitioner is subject to DOI's jurisdiction. New York City Charter § 803(d) gives DOI's Commissioner jurisdiction over "any agency, officer, or employee of the city, or any person or entity doing business with the city, or any person or entity who is paid or receives money from or through the city or any agency of the city."[4] Moreover, DOI may subpoena private individuals as part of its investigatory powers pursuant to § 805.[5] Indeed, the City's investigatory and subpoena power extends to "any person, even though unconnected with city employment, when there are grounds

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[4] Section 803(b) of the Charter authorizes and empowers the commissioner "to make any study or investigation which in his opinion may be in the best interests of the city, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency."

[5] NYC Charter § 805 states, "(a) For purpose of ascertaining facts in connection with any study or investigation authorized by this chapter, the commissioner and each deputy shall have full power to compel the attendance of witnesses, to administer oaths and to examine such persons as he may deem necessary.

"(b) The commissioner or any agent or employee of the department duly designated in writing by him for such purposes may administer oaths or affirmations, examine witnesses in public or private hearing, receive evidence and preside at or conduct any such study or investigation."

present to sustain a belief that such person has information relative to the subject matter of the investigation" (*Matter of Weintraub v Fraiman,* 30 AD2d 784, 784-785 [1968] *affd* 24 NY2d 918 [1969]). It is evident that petitioner's testimony at LPC's hearing was "relative" to DOI's investigation.

Petitioner argues that inasmuch as she is not an employee, agent or officer of a City agency and does not receive money from or through the City or any of its agencies, DOI cannot subpoena her because she cannot be the subject of an investigation. This argument, however, is unavailing because DOI is investigating LPC's public hearing procedures, not petitioner. Although petitioner's actions at the October 17, 2007 hearing gave rise to DOI's inquiry, thus making her a material party, she is not the target of the investigation (*see C.S.A. Contr. Corp. v Stancik,* 259 AD2d 318 [1999]).

Petitioner also asserts that DOI's subpoena and investigation violates her rights to freedom of expression under the Federal and New York State[6] Constitutions because it chills

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[6] New York State Constitution, article I, § 8 states: "Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for

her speech and impermissibly forces her to explain the logic and rationale of her statements, which she and the amicus characterize as political speech. Notwithstanding petitioner's legitimate concerns with the potential of a government investigation dampening the spirited nature of the public's participation in public hearings and debate, we do not find that the nature or extent of DOI's investigation amounts to the chilling of petitioner's speech rights inasmuch as the investigation is not aimed at the content of petitioner's speech. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content" (*Police Dept. of Chicago v Mosley*, 408 US 92, 95 [1972]).

Here, DOI is examining LPC's procedures, which, as they stand, could allow citizens to misrepresent their affiliations with public officials or other groups and undermine the legitimacy and efficacy of the public hearing process. DOI is not conducting a content-based inquiry by investigating or condemning the actual words spoken by petitioner or other participants at the hearing. "The principal inquiry in determining content neutrality, in speech cases generally . . .

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justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."

is whether the government has adopted a regulation of speech because of disagreement with the message it conveys" (*Ward v Rock Against Racism*, 491 US 781, 791 [1989]) and not because of offensive behavior identified with its delivery (*see Hill v Colorado*, 530 US 703, 737 [2000], Souter, J., concurring).

Furthermore, the argument of petitioner and the amicus seems to be premised upon the erroneous assertion that petitioner had a First Amendment right, when appearing before LPC, to falsely convey that she spoke on behalf of Borough President Stringer and to disseminate false information regarding his position. To the contrary, she does not have a constitutionally protected right to disseminate false information in a public forum, since "[s]preading false information in and of itself carries no First Amendment credentials" (*Herbert v Lando*, 441 US 153, 171 [1979] [permitting defamation plaintiff to inquire into editorial processes of newspaper alleged to have circulated falsehoods]). The record is devoid of any evidence that petitioner stated her own political opinion at LPC's hearing; her introductory remarks at the hearing that she was "volunteering today to read the statement of Borough President Scott Stringer" belie any such argument.

Even if DOI's investigation was aimed at investigating the actual words spoken by petitioner, which it is not, First

Amendment jurisprudence would still deem this government action content-neutral since it is motivated by a permissible content-neutral purpose *(Renton v Playtime Theatres*, 475 US 41, 47-49 [1986]), namely to investigate and recommend changes to LPC's current practices and procedures. DOI has a mandate, based on the City's Charter, to ensure that the practices and procedures of City agencies are legitimate, do not lead to abuse of process, and are in the best interests of the City. Thus, petitioner's argument that DOI's investigation unconstitutionally infringes upon her right to express her political opinion is unpersuasive.

Contrary to petitioner's contentions, the record offers no support for a finding that DOI's investigation was intended to harass her or prevent her from properly and passionately advocating on behalf of the causes she holds dear, and we find petitioner's allegations in this regard to be conclusory (*see Matter of Grand Jury Subpoenas Served upon Ken Kronberg*, 95 AD2d 714, 716 [1983], *affd* 62 NY2d 853 [1984].

The goal of citizen participation in public hearings is to give individuals an opportunity to voice their concerns freely, whether as private citizens on behalf of a civic group, or on behalf of a public official, if authorized to do so. By participating in these hearings, the City is able to take into account the views of all stakeholders and reach the best-informed

decision. Furthermore, public hearings themselves are expressions of our First Amendment rights to freedom of speech (*see 600 W. 115th St. Corp. v Von Gutfeld,* 80 NY2d 130, 136-137 [1992], describing the New England town meeting and, by extension, community public hearings, as expressions of our society's embodiment of the First Amendment). Debate and freedom of speech are bedrock principles of our democracy and should never be compromised. "[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error" (John Stuart Mill, On Liberty, at 35-36 [Ticknor and Fields 1863]).

Here, there is simply no evidence in the record that petitioner was censored or harassed at LPC's hearing. As stated, DOI's investigation is aimed at LPC's current public hearing practices and procedures that have allowed or could allow an individual to testify pretending to represent an elected

official.[7] Indeed, the record points to evidence that two public officials were misrepresented at the hearing on October 17, 2006. In addition to Borough President Stringer's complaint that his views were mischaracterized and unauthorized for undue influence, Assemblymember Linda Rosenthal complained by letter to LPC that her authorized representative was not permitted to speak at the hearing because a Landmark West! volunteer (a nonparty to this action) had already signed in on her behalf and read an allegedly altered and unauthorized statement.

Therefore, far from chilling speech and discouraging public debate on an issue of public concern, DOI's investigation here could have the opposite effect and actually increase citizen participation in public hearings by ensuring that such participation is legitimate and free of unintentional or intentional misrepresentations.

Petitioner insists that the proper action, in lieu of a DOI investigation, would be for Stringer and any other aggrieved

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[7]The kinds of questions to which DOI's investigation seeks answers include: What proof of identification is requested when individuals signs in to speak on behalf of themselves, a group, or, as in this case, a public official? If no identification is requested, does this support or undermine the integrity of the public hearing process? What safeguards are in place to ensure that the testimony given at a public hearing expresses the true sentiments of those testifying or those on whose behalf the testimony is presented?

parties to make their views known before LPC. However, this argument is misplaced. The "marketplace of ideas" approach to our freedom-of-speech jurisprudence presupposes that the target is the content of petitioner's speech rather than a properly tailored investigation into an administrative agency's policies and procedures. After all, this is not a defamation action where the actual words are at issue (*cf. 600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, *supra*). Petitioner's suggested alternative would place public officials in the impossible position of having to police every opinion in the public domain purported to be theirs in order to safeguard against later mischaracterization or use in an unauthorized forum.

Finally, petitioner's Fifth Amendment self-incrimination argument, explicitly rejected as meritless by the motion court, is premature inasmuch as the investigation does not concern any criminality by petitioner. However, to the extent that DOI's investigation shifts focus and attempts to determine whether a criminal referral for petitioner's conduct at the hearing should be made, she can not be compelled to inculpate herself, and should be given immunity in exchange for her testimony (*see Matter of Brasky v City of N.Y. Dept. of Investigation*, 40 AD3d 531, 535 [2007]).

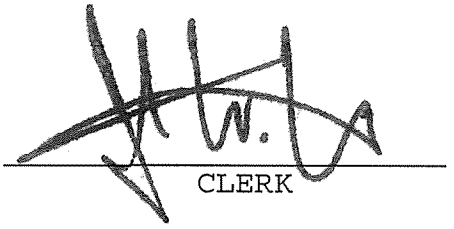
Accordingly, the order of Supreme Court, New York County

(Herman Cahn, J.), entered on or about October 22, 2007, which denied petitioner's application to quash a subpoena served by DOI; granted respondents' motion to compel compliance with the subpoena; and denied petitioner's cross motion to strike certain matters from respondents' investigatory filings as scandalous and prejudicial, to have New York City Charter § 803(d) declared unconstitutional as applied to her, and to enjoin respondents from interfering with her exercise of free speech, should be modified, on the law, to the extent of granting petitioner criminal immunity for her testimony, and otherwise affirmed, without costs.

All concur.

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

ENTERED: AUGUST 19, 2008



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Angela M. Mazzarelli
Milton L. Williams
John W. Sweeny, Jr., JJ.

3459
Index 102698/07

x

Gabrielle N. Karr,
Petitioner-Appellant,

-against-

Melissa Black, et al.,
Respondents-Respondents.

x

Petitioner appeals from an order of the Supreme Court, New York County (Jacqueline W. Silbermann, J.), entered on or about March 14, 2007, which denied her application for grandparent visitation.

Devitt Spellman Barrett, LLP, Smithtown (John M. Denby of counsel), for appellant.

Leslie I. Levine, White Plains, for respondents.

TOM, J.P.

Petitioner seeks visitation with her grandchild over the objection of the child's parents, respondents Melissa Black, petitioner's daughter, and Mark Black. The infant is in the care of an intact nuclear family, the record establishes that respondents have a sound basis for their objection to visitation, and petitioner has no existing relationship with the child or the family. Thus, we conclude that petitioner lacks standing to warrant judicial intervention and that Supreme Court properly declined to conduct a hearing to inquire whether visitation would be in the best interest of the child.

Due to petitioner's long history of mental illness, Melissa Black was raised by her father. Upon his divorce from petitioner in 1980, he was awarded exclusive custody of his daughter. Melissa had limited contact with petitioner while growing up and throughout her adult years, as petitioner continued to manifest mental illness. The court received psychiatric testimony indicating that petitioner was "a deeply troubled and disturbed" manic-depressive "requiring continuous treatment . . . largely dependent upon [her] voluntary cooperation," and noted the potential for "extensive mental trauma accompanied by a significant probability of permanent emotional damage" to her daughter should she not be removed from petitioner's care.

Following her parents' divorce, Melissa Black had limited contact with petitioner, stating that on occasions when petitioner was present at family gatherings, "[h]er behavior ranged from bizarre to confrontational."

Petitioner's psychiatric history is well documented. In 1996, she was placed on disability leave from her position as a caseworker with the Human Resources Administration. The report of an Administrative Law Judge reflects that, throughout much of 1995, petitioner had engaged in bizarre and threatening behavior toward her co-workers. A psychiatrist determined that her mental illness rendered her "seriously impaired, precluding her functioning on the job, and that the psychotic extent of her mental status renders her volatile, unpredictable and threatening in terms of her relations with her co-workers."

Between late 2002 and late 2004, Melissa Black assisted in securing her mother's admission to a series of psychiatric facilities. A September 2004 memorandum by an attending psychiatrist at Queens Hospital Center notes a "long [history] of mental illness and multiple prior psychiatric admissions dating back to 1980." It describes petitioner as suffering from "major depression . . . with poor impulsivity, low frustration tolerance." A note by the same physician on the date of her discharge indicates that petitioner had been hospitalized for a

period of two months for treatment of "dementia." Melissa Black submitted an affidavit attesting to the strain that the efforts to assist her mother placed on her relationship with her husband.

Petitioner's recent attempts to establish contact with the family were hardly welcome. In June 2006, petitioner's ex-husband was issued an order of protection after he complained that she was harassing him. Petitioner was subsequently convicted of criminal contempt in the second degree for violation of that order. Respondent Mark Black was issued a temporary order of protection in 2006 after petitioner made repeated calls to him and coworkers at his place of business. The temporary order was elevated to a five-year permanent order of protection in May 2007.

Petitioner commenced this proceeding in February 2007 seeking visitation with her grandchild. Her supporting affidavit states that her daughter, Melissa, and her grandchild are her only living descendants and that she seeks visitation "to share with her grandchild the family history . . . and establish a bond with this child prior to making final decisions on whom [*sic*] to leave my substantial estate." Respondents opposed and submitted, inter alia, documentation in support of petitioner's mental illness and her emotionally abusive behavior. Supreme Court denied the petition on the submitted papers.

On appeal, petitioner contends that it was an improvident exercise of Supreme Court's discretion to dismiss the petition without conducting a hearing. She argues that the court, in deciding the issue of her standing to maintain the proceeding, failed to examine all relevant facts, neglecting to consider the parents' frustration of her attempts to establish a relationship with her grandchild. She maintains that without receiving evidence to rebut the opposing proof submitted by respondents, "[t]he record is devoid of competent evidence suggesting that visitation with petitioner would negatively affect the child."

Analysis appropriately begins with the observation that "the courts should not lightly intrude on the family relationship against a fit parent's wishes. The presumption that a fit parent's decisions are in the child's best interests is a strong one" (*Matter of E.S. v P.D.*, 8 NY3d 150, 157 [2007]; *see also Troxel v Granville*, 530 US 57, 70 [2000]). In the absence of automatic standing based on the death of one of the child's parents (*see Matter of E.S.*, 8 NY3d at 157), the court must make a threshold determination that the grandparent has "established the right to be heard" (*Matter of Emanuel S. v Joseph E.*, 78 NY2d 178, 181 [1991]) by demonstrating the existence of "circumstances in which equity would see fit to intervene" (*id.*). Only after standing has been established is it necessary or permissible to

"determine if visitation is in the best interest of the grandchild" (*id.*; *see Matter of McArdle v McArdle*, 1 AD3d 822, 823 [2003]). In exercising its discretion to confer standing on the grandparent, the court is obliged to "examine[] all the relevant facts" (*Matter of Emanuel S.*, 78 NY2d at 182), among which are whether the family is intact, "the nature and basis of the parents' objection to visitation," and "the nature and extent of the grandparent-grandchild relationship" (*id.*).

Supreme Court properly found that petitioner lacks standing to seek visitation (Domestic Relations Law § 72). The child is in the care of an intact family, the record establishes that respondents have a sound basis for their objection to visitation, and petitioner has no existing relationship with the child or the family (*see Matter of Emanuel S.*, 78 NY2d at 182).

There is no merit to petitioner's contention that respondents frustrated her attempts to establish a relationship with her grandchild. While petitioner complains of "respondents' action in preventing the formation of such a relationship," there is a qualitative difference between frustration and protection. Here, adult members of petitioner's family found it necessary to obtain their own orders of protection against her, for which petitioner exhibited her contempt. Under these circumstances, the parents' actions to prevent contact between petitioner and

their child is legally cognizable as protective, not obstructive. In view of the opinions of mental health professionals who characterized petitioner's behavior – variously – as psychotic, volatile, unpredictable, bizarre, threatening and confrontational, the parents cannot be faulted for shielding their child from an association that, through long personal experience, they knew to be destabilizing and to pose the threat of emotional harm.

Petitioner's contention that "[t]he record is devoid of competent evidence suggesting that visitation with petitioner would negatively affect the child" is disingenuous, as is her contention that she was unfairly deprived of an opportunity to rebut respondents' opposing proof. It is settled that a special proceeding is subject to the same standards and rules of decision as apply on a motion for summary judgment, requiring the court to decide the matter "upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised" (CPLR 409[b]; *Matter of Port of N.Y. Auth. [62 Cortlandt St. Realty Co.]*, 18 NY2d 250, 255 [1966], *cert denied sub nom. McInnes v Port of N.Y. Auth.*, 385 US 1006 [1967]).

It was petitioner's burden to establish the right to be heard (*Matter of Emanuel S.*, 78 NY2d at 181). The affirmation in support of the petition acknowledges that "the Court must first

determine whether equitable circumstances exist that provide the grandparents with standing to seek visitation," and that "the nature and basis of the parents' objection to visitation" is central to that determination. Given her involvement in the various proceedings conducted in connection with the two protective orders, petitioner was well aware that her unstable mental condition was at issue. Having failed in support of her petition to even allege any improvement in her mental status, let alone submit evidence to that effect, petitioner has failed to meet her evidentiary burden and is not entitled to a further opportunity, by hearing or otherwise, to remedy the deficiencies in her proof (*see generally Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1992]).

Petitioner's contention that the court declined to conduct a hearing to determine whether the best interest of the child would be served by directing visitation merely because the family is intact (*Matter of Emanuel S.*, 78 NY2d at 182) is belied by the record. The court held that the petition

> "has not met the two-prong test as described by counsel. There has been no ongoing relationship between this child [*sic*]. The parents are in a united front for what, on the face of it, appears to be even good and sufficient reason not allowing [*sic*] the Court any right to intervene in this matter."

In view of the threat petitioner was found to present to her own

daughter in 1980, her history of mental illness, and her recent harassment of family members, it would be presumptuous in the extreme for the courts to interfere with the parents' right to protect their child from a relationship that they have knowingly concluded presents the potential for emotional harm.

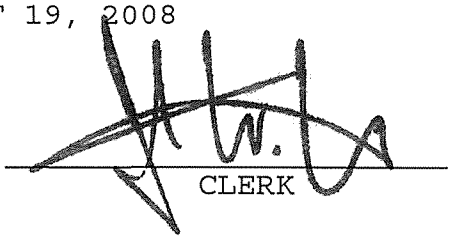
In short, petitioner has established no reason why Supreme Court should have even considered substituting its judgment as to what is in the best interest of the child for that of the parents (*Matter of E.S.*, 8 NY3d at 157). To hold otherwise under the circumstances of this matter would render nugatory the requirement that a grandparent establish standing in order to warrant a hearing on whether visitation is in the best interest of the child.

Accordingly, the order of the Supreme Court, New York County (Jacqueline W. Silbermann, J.), entered on or about March 14, 2007, which denied petitioner's application for grandparent visitation, should be affirmed, without costs.

All concur.

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

ENTERED: AUGUST 19, 2008



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