SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 26, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Friedman, Nardelli, Williams, Acosta, JJ.

2929-
2929A Trinity Associates, Inc., Index 601250/03
Plaintiff-Respondent,

-against-

Telesector Resources Group, Inc.,
doing business as Verizon Services
Group, Inc.,
Defendant-Appellant.

Dewey & LeBoeuf, LLP, New York (Alan B. Howard of counsel), for appellant.

Greenfield Stein & Senior, LLP, New York (Paul T. Shoemaker of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard B. Lowe, III, J.), entered May 24, 2007, awarding plaintiff the principal sum of $1,251,895, and bringing up for review an order, same court and Justice, entered May 10, 2007, to the extent it denied in part defendant's motion to set aside the jury's verdict, affirmed, with costs. Appeal from the order dismissed, without costs, as subsumed in the appeal from the judgment.

Defendant contends that as a matter of law, it was permitted to suspend the parties' contract, and plaintiff's February 14, 2001 letter could not have modified the contract because it was

not signed by both parties. Both of these arguments were raised unsuccessfully in a prior appeal (38 AD3d 282), and thus will not be entertained on this appeal (*see Sharp v Stavisky*, 242 AD2d 447 [1997], *lv dismissed* 91 NY2d 956 [1998]).

In order to overturn the jury's verdict as based on insufficient evidence, we would have to find that it was "utterly irrational" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). At trial, evidence was presented that defendant had sent plaintiff a letter on January 22, 2001, stating it wanted to retain the emergency repair services provided by plaintiff, and "If there is a cost associated with retaining this service please let us know." Plaintiff responded on February 14, 2001, that the total cost would be "$291,782 plus job expense per year." Defendant then utilized plaintiff's continuing emergency services without interposing any objection to the price quoted.

The jury could have reasoned that plaintiff's February 14, 2001 letter set forth its yearly fee, and that defendant accepted this offer without objection and subsequently ordered continuation of plaintiff's emergency services (*see Costello Assoc. v Standard Metals Corp.*, 99 AD2d 227, 231 [1984], *appeal dismissed* 62 NY2d 942 [1984]). Furthermore, the jury could have reasonably calculated its verdict on damages, based on the price quoted plus annual job expense, which would be consistent with the period alleged of breach, 4 years and 106 days.

We have considered defendant's remaining arguments and find them unavailing.

All concur except Friedman and Williams, JJ. who dissent in a memorandum by Friedman, J. as follows:

FRIEDMAN, J. (dissenting)

For the following reasons, I believe that the motions by defendant Telesector Resources Group, Inc. d/b/a Verizon Services Group, Inc. (Verizon) for a directed verdict, and for judgment notwithstanding the verdict, should have been granted insofar as such motions were addressed to the only claim at issue on this appeal, namely, the second cause of action (characterized as "Breach of Subsequent Agreement") set forth in the amended complaint. Accordingly, I would reverse the judgment in favor of plaintiff Trinity Associates, Inc. (Trinity), grant the aforementioned motions, and dismiss the amended complaint. I therefore respectfully dissent from the affirmance of the judgment.

As noted in the decision rendered on the prior appeal in this case, Trinity, "a supplier of electrical power testing and troubleshooting services, entered into an as-ordered maintenance and testing work agreement with [Verizon] that authorized the latter to modify the scope of the work or cancel the contract" (38 AD3d 282 [2007]). To reiterate, the agreement, which was executed in 1999, was for services to be provided on an "as-ordered" basis over a prescribed period of time, which, as amended in 2000, was set to terminate on May 31, 2005. Section 1.1 of the 1999 agreement specifically provided that this was "an 'as-ordered' agreement which means that it covers Services as

they are ordered by [Verizon]," and that Verizon "is not promising to purchase any quantity of Services from [Trinity]." Further, section 7.3 of the 1999 agreement provided that Verizon would not pay anything in addition to the specified service rate to cover Trinity's overhead expenses:

> "The prices specified in this Agreement are the total prices and there shall be no other charges whatsoever. Unless otherwise specified, the prices set forth in this Agreement or in a [purchase order] include all incidental costs, including transportation, entertainment and the use of all necessary tools, products and equipment. . . . [Trinity] is responsible for all of [Trinity's] own overhead, equipment, tools, telephone calls, transportation, materials and any costs of any nature unless this Agreement specifically provides otherwise."

By letter dated January 22, 2001, Verizon notified Trinity that, due to "budget reductions," Verizon was "suspend[ing] indefinitely" all services previously authorized under the 1999 agreement. The letter further stated: "Verizon would like to retain the emergency repair service and response time as per the [1999 agreement's] specifications. If there is a cost associated with retaining this service please let us know."

In response, Trinity sent Verizon a letter, dated February 14, 2001, which, for the most part, complained about Verizon's failure to order all the services Trinity had contemplated. The letter also noted: "You asked me to think about the cost of providing emergency service. . . . [T]he total price for emergency response is $291,782 plus job expense per year." The annual figure of $291,782 was based on a rather slapdash estimate

of the labor cost of keeping electricians available to respond to Verizon's emergency needs.

Verizon did not respond to Trinity's February 14, 2001 letter, but did continue to order emergency services thereafter, for which Trinity billed at the rates set forth in the 1999 agreement. In 2002, the parties executed a written amendment of the 1999 agreement, raising the base hourly rate for services under the contract by 50%, from $60 to $90. As Trinity's principal admitted at trial, Verizon paid all of Trinity's invoices, but Trinity never sent Verizon a single invoice for payment of an annual fee of $291,782 for holding itself ready to provide emergency services.

Ultimately, the parties' relationship broke down, leading to the commencement of this action in 2003. In its amended complaint, Trinity asserted a cause of action for breach of the 1999 agreement, and a separate cause of action for breach of "a new agreement" allegedly formed by the parties' aforementioned "2001 exchange of correspondence," under which Verizon allegedly agreed to pay Trinity an annual fee of $291,782 to compensate Trinity for the costs of holding itself ready to provide emergency services. In this Court's prior decision affirming the denial of Verizon's pretrial motion for partial summary judgment, we held that issues of fact existed as to whether Verizon had a "right to suspend [Trinity's] services, whether such suspension

constituted a modification or cancellation of the contract, and whether [Trinity] was acting under the terms of the [1999] agreement or some new arrangement when it continued to perform emergency services for [Verizon]" after the suspension (38 AD3d at 283).

The case was tried before a jury, and resulted in a verdict finding Verizon liable for breach of both the 1999 agreement (the first cause of action) and the alleged 2001 modification thereof (the second cause of action). The jury's award to Trinity comprised two components: (1) lost-profit damages of $92,500 for the breach of the 1999 agreement; and (2) $1,251,895 for the breach of the alleged 2001 modification. The latter component of the award represented an approximation of the result of multiplying the $291,782 annual figure in Trinity's February 14, 2001 letter by the approximately 4.3 years that remained, as of February 14, 2001, on the term of the 1999 agreement (which, again, was set to expire on May 31, 2005). Although the award on the second cause of action is based on the $291,782 annual figure in the February 14, 2001 letter, which was based on Trinity's estimate of the yearly labor costs of staying ready to provide emergency services to Verizon, at trial Trinity claimed only to have incurred $338,601.84 over a five-year period -- somewhat less than $70,000 annually -- on all expenses required to maintain readiness to perform all parts of the agreement with

Verizon (not just emergency services).[1]

After trial, the court granted Verizon's motion for judgment notwithstanding the verdict solely to the extent of setting aside the jury's $92,500 award for breach of the 1999 agreement, on the ground that Trinity failed to present any nonspeculative basis for determining the profits it allegedly lost by reason of the alleged breach. The court declined, however, to disturb the much larger award for breach of the alleged 2001 modification. Verizon now appeals from the ensuing judgment. No appeal has been taken by Trinity.

At the outset, it should be noted that the trial court's setting aside of the entire award for breach of the original 1999 agreement (i.e., as it existed prior to the alleged 2001 modification), from which no appeal has been taken, renders essentially moot the question of whether there was evidence to support the jury's finding that Verizon breached the original 1999 agreement. Thus, we need only consider issues relating to the second cause of action, based on the alleged breach of the alleged 2001 modification.

I do not, of course, take issue with this Court's holding on the prior appeal that, on the pretrial record, a triable issue

---

[1]It is also noteworthy that the amended complaint's ad damnum clause requested compensatory damages only "in the amount of not less than $700,000.00," and Trinity never moved to conform the pleadings to the proof.

existed as to "whether [Trinity] was acting under the terms of the [1999] agreement or some new arrangement when it continued to perform emergency services" (38 AD3d at 283) after receiving Verizon's January 2001 letter "suspend[ing]" the performance of other services under the 1999 agreement. Thus, I take it as given that a rational factfinder could conclude, based on the *pretrial* record, that Verizon's January 22, 2001 letter and Trinity's February 14, 2001 letter (both of which were rather vague and ambiguous) gave rise to a modification of the terms of the 1999 agreement. Based on the trial record, however, I fail to see how a rational factfinder could reach such a conclusion in view of the trial testimony of Trinity's own principal, Alan Loch. It seems to me that the following testimony by Loch completely destroys any rational basis for finding that the early 2001 letter exchange gave rise to any new or modified agreement between the parties:

> "Q. Now, there was only one contract, correct?
>
> "A. Yes.
>
> "Q. This one contract that was the subject of your letter and there was one contract only.
>
> "A. Yes, ma'am.
>
> "Q. You had no separate side agreements with Verizon for the 291 [thousand dollars], did you?
>
> "A. No, we didn't."

Later, the testimony continued as follows:

"Q. Where is the $291,000 that Verizon supposedly agreed to pay you?

"A. It had nothing to do with this amendment [raising the hourly rate], didn't have anything to do with it.

"Q. Because Verizon never agreed to pay that, correct?

"A. They didn't agree to do the honorable thing. They broke one promise after another.

"Q. Did they ever promise to pay you $291,000 a year?

"A. They never --

"Q. Did they, sir, yes or no?

"A. Al Mora [at Verizon], it was hard to even contact him.

"Q. Did they promise to pay you $291,000?

"A. No, they didn't."

Further confirming that there never any agreement that Verizon would pay Trinity $291,782 per year, Loch admitted that Trinity never sent Verizon an invoice for the payment of any such annual fee. By contrast, throughout the relationship, Verizon was billed at the contractual rates for the services Trinity provided, and all such invoices were paid in full:

"Q. Anywhere, you have any invoice anywhere that says oh, by the way, you owe me $291,782 times two, you have a single invoice --

"A. I asked Verizon to cancel the contract.

"Q. Did you ever invoice them for the money?

"A. I did not.

"Q. Did they pay you every cent you invoiced them?

"A. They didn't pay me every cent they owed me but they paid --

"Q. What you invoiced, they paid, correct?

"A. Yes."

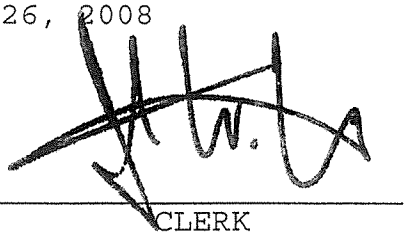
Still more confirmation that no agreement on an annual fee arose from the letters exchanged in early 2001 is provided by two letters from Loch to Verizon, one from October 2001 and the other from March 2002 (the latter of which led to the amendment increasing Trinity's hourly rates). While each of these letters complains bitterly about the effect on Trinity of Verizon's suspension of most services under the 1999 agreement, there is not a word in either one of them suggesting that, since February 2001, Trinity had been earning a fixed annual fee of $291,782, in addition to the fees it earned for services actually performed.

In view of the foregoing trial evidence, I believe that Verizon was entitled to dismissal of Trinity's second cause of action as a matter of law. It is plain that the verdict was based, not on the evidence, but on sympathy for a small business that entered into a disadvantageous agreement with a corporate giant. In our legal system, this is not an appropriate basis for

the imposition of liability.

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

ENTERED: AUGUST 26, 2008



CLERK

Tom, J.P., Nardelli, Williams, McGuire, Moskowitz, JJ.

2800 Arts4All, Ltd., et al., Index 101123/03
Plaintiffs-Respondents-Appellants,

-against-

Judith L. Hancock,
Defendant-Appellant-Respondent.

- - - -

Judith L. Hancock
Counterclaim Plaintiff-Appellant-Respondent,

-against-

Daniel YC Ng, et al.,
Additional Defendants on the Counterclaims,

Peter Osgood,
Additional Defendant on the Counterclaims-
Respondent-Appellant.

Judith L. Hancock, New York, appellant pro se.

Law Offices of Zachary R. Greenhill, P.C., New York (Zachary R. Greenhill of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Rolando T. Acosta, J.), entered July 25, 2006, which dismissed plaintiffs' remaining cause of action and defendant's counterclaims for failure to comply with discovery and effectively denied defendant's request for signed transcripts, affirmed, without costs. Appeal from the October 31, 2005 ruling imposing sanctions against defendant dismissed, without costs.

Supreme Court providently exercised its discretion to strike the pleadings (CPLR 3126[3]). The parties have offered no excuse for their repeated noncompliance with the court's disclosure

orders, and their conduct throughout the course of this litigation has been "dilatory, evasive, obstructive and ultimately contumacious" (*Henry Rosenfeld, Inc. v Bower & Gardner*, 161 AD2d 374, 374 [1990]). It is a "court's prerogative to control its calendar and expeditiously dispose of the volume of cases before it" (*People v Alston*, 191 AD2d 176, 177 [1993]; *see also Kriger v Holland Furnace Co.*, 12 AD2d 44, 46 [1960]). Appellate courts have recognized that, under the Individual Assignment System, substantial deference should be accorded to the trial court's considerable discretion to compel compliance with discovery orders, and, absent clear abuse, a penalty imposed in accordance with CPLR 3126 should not readily be disturbed (*see Sawh v Bridges*, 120 AD2d 74, 79 [1986], *appeal dismissed* 69 NY2d 852 [1987]). The public policy favoring resolution of cases on their merits is not promoted by permitting a party to a single such matter to impose an undue burden on judicial resources to the detriment of all other litigants. Nor is the efficient disposition of the business before the courts advanced by undermining the authority of the trial court to supervise the parties who appear before it (*cf. id.* at 80).

The record, which reflects a personal animus between defendant and plaintiff Humphrey, amply demonstrates the parties' willful, contumacious defiance of court orders via excessive, frivolous and retaliatory motion practice involving disclosure

and other issues. In this simple action for breach of the no-disparagement clause of a general release, the parties, in a relatively short period of time, interposed approximately 18 motions, several of which involved voluminous disclosure demands and charges of misconduct, improper disclosure requests and noncompliance with such demands. The court's September 29, 2005 order vacating all disclosure stays, admonishing both sides for their dilatory tactics and directing the parties to complete disclosure within 30 days, effectively afforded them the opportunity to begin anew. The parties' conduct, nevertheless, quickly segued into abuse despite the court's proactive efforts to provide a firm discovery schedule, a restriction on motion practice, rapid access to court assistance in resolving disputes, and progressive warnings and sanctions.

For example, over one year after it had been issued, plaintiffs still had not complied with the court's June 8, 2005 order enforcing defendant's shareholder inspection rights to certain videotapes, financial statements and other corporate documents (including items sought in defendant's Schedule J), notwithstanding the court's repeated reiteration of this directive. Thus, plaintiffs also engaged in willful misrepresentation and dilatory conduct when they filed a note of issue on January 13, 2006 stating that all disclosure had been completed. Several months later, on April 6, 2006, the court

ordered the parties to its jury room and several hours were spent working out an agreement as to the Schedule J items, with some degree of success. But upon their return to court that same day, plaintiffs sought to renege on the agreement, informing the court that they would be filing a CPLR 3126 motion to strike defendant's amended counterclaims.

Defendant's response to the September 29, 2005 discovery order was to wait until nearly the mandated initial disclosure completion date, November 18, 2005, before serving her discovery responses together with voluminous discovery requests, thus rendering compliance with the court's order virtually impossible. Defendant filed a 45-page initial discovery response on October 19, 2005, a notice to admit facts on October 14, 2005, a notice to admit genuineness of documents (with 28 documents attached) on October 17, 2005, another notice to admit genuineness of documents (with 12 documents attached) on October 18, 2005, and her own notice of deposition on October 24, 2005.

Defendant failed to appear at the deposition scheduled for October 24, 2005. The record shows that when counsel was served with notice of the deposition, he requested that it be rescheduled due to, among other things, his observance of a religious holiday. Despite the court's denial of an adjournment, defendant defaulted in appearance. At the October 31, 2005 hearing in connection with the default, defendant's counsel

informed the court that he had made an error, believing that October 24 was a Jewish holiday and only later learning that the holiday fell on October 25 and 26. Counsel apologized for creating the impression that "we have also played fast and loose with the Court." The court fined defendant $500 for her failure to appear at the deposition, and issued a briefly extended but more rigid disclosure schedule and a warning to both parties that further failure to adhere to the disclosure schedule would result in dismissal of the offending party's pleadings.

It is significant that both sides made motions pursuant to CPLR 3126 to strike each other's pleadings despite their own willful and contumacious disregard for the court's discovery orders - plaintiff did so on three separate occasions. Furthermore, the record indicates that the conduct at issue cannot be blamed solely on the parties' attorneys. As the court noted in the decision on appeal:

> "It is only upon listening to and observing the parties during oral argument and their utter lack of respect for each other that this Court came to its conclusion that the parties have no interest in resolving this dispute nor [to] allow the Court or a jury to do so, but instead are intent on using the court as a weapon to harass each other."

The motion court's finding that the parties' conduct was willful and contumacious is supported by the record, and "[i]t would not be appropriate, at bar, for this Court to substitute its discretion for that of the Justice sitting in the IAS Court"

(*Spira v Antoine*, 191 AD2d 219, 219-220 [1993], citing *Sawh v Bridges*, 120 AD2d at 77). In view of the obstreperous, dilatory and evasive conduct engaged in by the parties, the motion court did not abuse its discretion in dismissing the complaint and the counterclaims. As stated by the Court of Appeals:

> "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a 'court may make such orders . . . as are just,' including dismissal of an action (CPLR 3126). . . [C]ompliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully" (*Kihl v Pfeffer*, 94 NY2d 118, 123)

Finally, the contention that the dismissals caught the parties unawares is without merit. Indeed, the record shows that from September 29, 2005 forward the court repeatedly warned the parties of the risk of having their pleadings dismissed for disclosure abuse. While it is true that, during the proceedings on April 6 and May 11, 2006, the court stated that it was not likely to dismiss pleadings, on the former date it granted plaintiffs permission to submit a CPLR 3126 motion and adjourned defendant's CPLR 3126 motion so as to make both returnable on May 11, 2006 for argument. At that time, the parties' final court appearance before the decision on appeal was entered, they vigorously argued for dismissal of each other's pleadings. The court noted with disgust that defendant's submission on its

motion, contrary to the court's instructions, had been unnecessarily voluminous. The court also admonished plaintiff:

> "you know, you are not giving me any choices. I am going to have to dismiss your cause of action as a sanction for failure to abide by several court orders that this Court has issued. I mean, what else, what other choice do I have other than continuing with this game that you folks are playing?"

This heated proceeding ended with the court tersely withdrawing its order, issued earlier in the proceeding, directing that certain long-delayed disclosure be provided to defendants and stating that it would issue its decision within 60 days. Taken in context, these events clearly apprised the parties that the court, despite its expressed unwillingness to dismiss the pleadings, was considering such action based upon their conduct during disclosure. Thus, the parties were on notice that CPLR 3126 dismissal was a real option, the court's comments to the contrary notwithstanding.

Given the court's dismissal of the remainder of the parties' claims, it was not error to simultaneously decline to rule upon, and thus implicitly deny, defendant's request for signed transcripts of three oral, disclosure-related rulings rendered academic by the dismissals. One such ruling was the court's sua sponte imposition during oral argument on October 31, 2005 of a $500 sanction against defendant. Apart from being unappealable here because the transcript was not "so ordered" by the court (*see Matter of Grisi v Shainswit*, 119 AD2d 418, 420 [1986]),

defendant's challenges lack merit. She erroneously asserts that the sanction, for noncompliance with a CPLR 3107 deposition notice, was improperly imposed since the notice was void on its face. CPLR 3107 provides, inter alia, that 20 days' notice shall be given for a deposition upon oral examination, "unless the court orders otherwise." Here, although only 13 days' notice was given, the record shows that the court considered and rejected defendant's request to revise the disclosure schedule prior to the deposition. Defendant also wrongly asserts that the court erred in imposing the sanction orally, in violation of 22 NYCRR 130-1.2. The record shows that the sanction was imposed pursuant to CPLR 3126, which is distinct from, and not subject to the constraints of, a sanction imposed under the Court's rules (Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3126:11; *see also Hilley v Sanabria*, 12 AD3d 1188, 1189 [2004]).

We have considered and rejected the parties' remaining arguments for affirmative relief.

All concur except Nardelli and McGuire, JJ. who dissent in a memorandum by McGuire, J. as follows:

MCGUIRE, J. (dissenting)

In my view, Supreme Court erred in dismissing pursuant to CPLR 3126 plaintiffs' remaining cause of action and all of defendant's counterclaims since the drastic sanction of dismissal was not warranted. Accordingly, I would modify the July 25, 2006 order to impose against both sides the lesser sanction of terminating their respective rights to any further disclosure, reinstate the dismissed claims and remand the matter for a trial on the merits.

As we have recognized, "[b]ecause of the strong public policy in this State against limiting audience before the court, and in favor of resolving disputes on the merits, courts have reserved dismissal [under CPLR 3126] for rare cases where the extreme nature of the abuse warrants depriving a party of the opportunity to litigate the claim" (*Corsini v U-Haul Intl.*, 212 AD2d 288, 291 [1995] [citation omitted], *lv dismissed in part and denied in part*, 87 NY2d 964 [1996]), i.e., when the failure to disclose was willful, contumacious or due to bad faith (*e.g. Cespedes v Mike & Jac Trucking Corp.*, 305 AD2d 222, 222 [2003]). Moreover, in reviewing disclosure sanctions we are guided by the principle that any such sanction should be commensurate with the nature and extent of the disobedience the sanction was designed

to punish (*Weissman v 20 E. 9th St. Corp.*, 48 AD3d 242, 243 [2008]; *Christian v City of New York*, 269 AD2d 135, 137 [2000]; Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3126:8, at 462 [2005]).

By an order entered July 25, 2006, Supreme Court dismissed plaintiffs' remaining cause of action and defendant's counterclaims pursuant to CPLR 3126. While the record reflects the court's understandable frustration with the parties' extensive motion practice, until September 29, 2005, just 30 months after the filing of the first amended complaint in May 2003, there had been no suggestion from the court that the parties were risking a possible dismissal of their pleadings on account of their conduct. Indeed, the part of the court to which the case was originally assigned had dismissed the complaint under CPLR 3211 in an order entered September 25, 2003, and this court reinstated some of the causes of action in an order entered March 2, 2004 (5 AD3d 106). Furthermore, when defendant moved for summary judgment on July 28, 2005, a stay of disclosure went into effect pursuant to CPLR 3214(b). Thus, the window for disclosure had been effectively limited to the 17-month period between March 2, 2004 and July 28, 2005. In actuality, this period was even shorter since disclosure demands realistically could not have been served immediately upon the issuance of this Court's March 2, 2004 order reinstating some of the causes of

action.

On September 29, 2005, Supreme Court, among other things, vacated the CPLR 3214(b) stay of disclosure, directed completion of all depositions within 30 days and ordered plaintiffs to file a note of issue by November 18, 2005. Only at that point did the court advise that it had "reached [its] limit" with the parties' motion practice, most of which, until that time, had involved motions to dismiss the various pleadings and for summary judgment and motions regarding plaintiffs' answer to defendant's counterclaims. This was the first time the parties were actually placed on notice of any kind of disclosure deadline.

Plaintiffs did not serve their notice for defendant's deposition until October 11, 2005, and then demanded that defendant appear on October 24, 2005, a notice period less than the 20 days provided by CPLR 3107. By letter dated October 17, 2005, defendant's counsel asked the court, among other things, to extend the disclosure deadline, and advised that he would not be available on October 24 because it was a religious holiday. The court notified defendant's counsel by letter that his request was denied, but the letter did not arrive at counsel's office until October 24. In the letter, however, the court advised that it was amenable to rescheduling the deposition if the attorneys could agree to do so. Thus, defendant's counsel called plaintiffs' counsel four times on October 24 in an effort to

reschedule the deposition; none of defendant's counsel's calls were taken by plaintiffs' counsel and the calls were not returned. Defendant's counsel had also sent a letter on October 21 to plaintiffs' counsel requesting that the deposition be rescheduled from October 24 to October 27; plaintiffs' counsel did not respond to that letter, but advised the court that defendant had not appeared for the deposition. Notably, the requested reschedule date was within the 30-day time limit set by the court for completing depositions.

On October 31, the attorneys appeared before the court. Defendant's counsel advised the court that he had been mistaken in his belief that October 24 was a religious holiday. Defendant's counsel stated:

> "I had notified the Court I was unavailable that day. As I subsequently told [the justice's law clerk] I had made an error. I'm deeply embarrassed by it because I looked at my calendar and was confused as to which days the Jewish holidays were and thought I was unavailable on the 24 when in fact I was unavailable on the 25 and 26 ... I communicated this to [the justice's law clerk] as soon as I realized I made an error. I tried to tell [plaintiffs' counsel]."

During that appearance, the court fined defendant $500 for failing to appear for the deposition.

A matter of critical importance to the resolution of this appeal is that defendant's counsel's failure to appear with his client for the October 24 deposition was *not* by any means an instance of willful, contumacious or bad faith conduct. Notably,

Supreme Court made no such finding in the course of imposing the $500 fine. Nor did Supreme Court find that defendant's counsel was not credible either when he expressed his embarrassment at his mistake or when he went on to represent to the court that he had notified the court's law clerk and had tried to contact plaintiffs' counsel. Indeed, plaintiffs' counsel has never disputed defendant's counsel's representations that he called plaintiffs' counsel four times on October 24 after having sent a letter to plaintiffs' counsel on October 21.

Not surprisingly, the majority does not purport to make its own finding of willful, contumacious or bad faith conduct in this regard. Even if there were some basis for making this finding, and there is not, defendant's failure to attend the deposition on October 24 would not warrant the striking of her counterclaims (*see Rodriguez v Sklar*, 56 AD2d 537, 538 [1977] [where there is some doubt whether a party's failure to appear for a deposition was willful the party should be permitted one last chance to appear to be deposed before the drastic sanction of striking the party's pleading is imposed]). Moreover, as the court recognized in its July 11, 2006 order, defendant did appear for a deposition

at a later date. Thus, she was fined $500 for not having appeared initially, but her counterclaims nonetheless were dismissed even though she was eventually deposed (*see Cambry v Lincoln Gardens*, 50 AD3d 1081, 1082 [2008] ["Belated but substantial compliance with a discovery order undermines the position that the delay was a product of willful or contumacious conduct"]).

Contrary to the majority's conclusion, Supreme Court's finding that defendant engaged in willful and contumacious conduct warranting the dismissal of her counterclaims pursuant to CPLR 3126 is not supported by this record. Other than failing to appear for the October 24 deposition, the only other conduct by defendant specified by the majority was her serving disclosure requests several weeks before the initial November 18 target date for the close of disclosure. These requests were made in mid-October, only three weeks after the court issued the September 29 disclosure order, hardly an inordinate period of time, and nearly a month before the November 18 date specified in that order for the close of disclosure. Nothing in the September 29 order, moreover, required defendant to serve all her disclosure requests within one or two rather than three weeks of its issuance. Furthermore, in addition to trying to complete disclosure by the court's deadline, defendant's counsel was preparing defendant's brief and supplemental record for appeals and cross appeals from

several of the court's orders in this action (25 AD3d 453 [2006], *lv dismissed* 6 NY3d 891 [2006]). Indeed, apparently recognizing the impracticality of its deadline, the court repeatedly extended the time for completing disclosure and filing a note of issue. The court ultimately set January 13, 2006 as the deadline for filing the note of issue; defendant filed the note of issue on that date but only did so because the court had so ordered. Nonetheless, disclosure continued through the spring of 2006.

Nor should plaintiffs' remaining cause of action have been dismissed. On April 6, 2006, as the majority notes, the parties gathered in the jury room for a lengthy period of time to discuss unresolved disclosure issues. When the parties returned to the courtroom, they advised that certain issues were still in dispute, although many had been resolved. After additional colloquy, the court determined that the remaining issues should be the subject of motions and the court set a briefing schedule. Plaintiffs did not, as the majority contends, "[seek] to renege" on matters on which the parties had already agreed. Rather, as the court itself stated, the jury room understandings "would still be an agreement." Thus, even at that late date, seven months after the court had advised the parties that it was reaching the limits of its patience, it gave no hint to the parties that the submission of further motions would place their pleadings in jeopardy. To the contrary, it conveyed the

impression that the motions would clear the last obstacles to the close of disclosure.

The parties' conduct was simply not egregious enough to warrant the ultimate sanction of dismissal of all pleadings, which, as noted, "is appropriate only where the moving party demonstrates that the non-disclosure was willful, contumacious or due to bad faith" (*Weissman*, 48 AD3d at 243; *see Christian*, 269 AD2d at 137; *Palmenta v Columbia University*, 266 AD2d 90, 91 [1999]). Again, the bulk of the disclosure in the case was completed, albeit belatedly, which further undermines the notion that the parties' conduct was willful or contumacious (*see Suh v Kim*, 51 AD3d 883 [2008]; *Cambry, supra*; *Pascarelli v City of New York*, 16 AD3d 472 [2005]; *see also Carlos v 395 E 151st St.*, 41 AD3d 193 [2007]). Under the circumstances, the termination of disclosure and a trial on the merits would be a remedy commensurate with the parties' conduct (*see generally* CPLR 3126; *Torian v Lewis*, 90 AD2d 600, 601-602 [1982] ["The court has broad discretion ... in fashioning just remedies concerning failure to comply with a discovery order"]).[1]

The majority, however, apparently believes that the penalty of terminating disclosure and ordering the parties to trial is

---

[1]Another appropriate remedy would be to refer the matter to a referee for an abbreviated but comprehensively supervised disclosure process, with an understanding that the imposition of appropriate sanctions hung over the parties' heads (*see Lowitt v Korelitz*, 152 AD2d 506, 508 [1989]).

not more commensurate with the parties' conduct than the penalty of dismissal it affirms, despite the fact that a substantial amount of disclosure has been completed. By affirming the dismissal of plaintiffs' remaining cause of action and defendant's counterclaims at this stage of the litigation, the majority declares a judicial plague on the houses of both of these contentious Montagues and Capulets. The majority not only denies all parties a trial on the merits of their disputes, its decision results in a waste of the time, energy and resources of the parties and their attorneys, as well as a waste of the substantial judicial resources that have been devoted to this case.

Contrary to the majority's suggestion, modifying Supreme Court's order to terminate disclosure and reinstate the remaining cause of action and the counterclaims, and remanding the matter for a trial, will not "undermin[e] the authority of the trial court to supervise the parties who appear before it." Rather, so modifying the order represents nothing more than a recognition that a trial judge may impose a penalty under CPLR 3126 that is not commensurate with the nature and extent of the disobedience the sanction was designed to punish, and we may modify such a penalty when we conclude that the trial court improvidently exercised its discretion. As Justice Bracken (joined by Justice Lazer) stated in rejecting the notion that the Appellate Division

should only disturb a disclosure sanction imposed by Supreme Court where the court abused its discretion:

> "I must ... register my disagreement with my colleagues' conclusion that affirmance of the order dismissing the complaint is necessary in order to effectuate the expedient and efficient disposition of cases under the Individual Assignment System .... Although the statute (CPLR 3126) provides the trial court with broad discretion in fashioning penalties for failure to comply with discovery notices and orders, th[e] [Second Department] has not hesitated to act where, in our view, the imposition of a particular sanction by the trial court constituted an improvident exercise of its discretion. I am unable to find any evidence that the IAS was intended to abrogate or limit the power heretofore exercised by an intermediate appellate court to review discretionary rulings and, in appropriate cases to substitute its own discretion for that of a trial court" (*Sawh*, 120 AD2d 74, 82 [1986, Bracken, J., dissenting]).

Of course, our precedents comport with Justice Bracken's view. Thus, while the nature and degree of a penalty pursuant to CPLR 3126 is a matter committed to the discretion of Supreme Court and we give deference to the determinations of Supreme Court in that regard (*Palmenta*, 266 AD2d at 91), we may disturb disclosure penalties imposed by Supreme Court in the absence of an abuse of discretion (*Monica W. v Milevoi*, 252 AD2d 260, 264 [1999]). Regardless of whether Supreme Court did abuse its discretion, we should disturb the penalty the court imposed because it is not commensurate with the conduct the penalty was meant to punish (*see e.g. Weissman, supra; Colucci v Jennifer Convertibles*, 283 AD2d 224, 225 [2001]; *Christian*, 269 AD2d at 137; *see also Quinn v City Univ. of N.Y.*, 43 AD3d 679 [2007]).

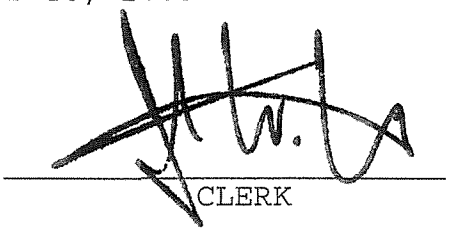
Finally, there does not appear to have been any justification for the court's refusal to sign the transcript of the proceedings in which it imposed a sanction of $500 due to defendant's failure to appear at the deposition. Even if the counterclaims had otherwise been properly dismissed, defendant was entitled to appellate review of the order imposing this sanction.

M-120 - ***Arts4All v Judith L. Hancock***

Motion to dismiss respondents' cross appeal, and for other relief denied.

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

ENTERED: AUGUST 26, 2008



CLERK

Nardelli, J.P., Williams, Sweeny, Catterson, JJ.

2989N Hunts Point Terminal Produce Cooperative Association, Inc., Petitioner-Respondent, Index 6647/06

-against-

New York City Economic Development Corporation, et al., Respondents,

Baldor Specialty Foods, Inc., Respondent-Appellant.

Phillips Nizer LLP, New York (Helen Davis Chaitman of counsel), for appellant.

Whiteman Osterman & Hanna LLP, Albany (Howard A. Levine of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Lucy Billings, J.), entered November 29, 2006, which, to the extent appealed from, denied respondent Baldor's cross motion for sanctions, unanimously affirmed, with costs.

Respondent New York City Economic Development Corporation (EDC) awarded a lease opportunity within the Hunts Point Food Distribution Center to Baldor. Petitioner's challenge to that award as arbitrary, capricious and an abuse of discretion was not frivolous within the meaning of 22 NYCRR 130-1.1(a), in that it did not manifest the extreme behavior that courts have traditionally found to merit such sanctions (*see e.g. Tsabbar v Auld*, 26 AD3d 233 [2006]).

Petitioner did prevail on its first cause of action - that

EDC had engaged in a "sham" bidding process - after a 13-day trial, and was reversed by this Court only on the issue of standing (36 AD3d 234 [2006], *lv denied* 8 NY3d 827 [2007]). It was not unreasonable, however, for petitioner, as one of the losing bidders, to assert standing in challenging the EDC determination (*see Matter of Transactive Corp. v New York State Dept. of Social Servs.*, 92 NY2d 579, 587 [1998]).

All concur except Catterson, J. who concurs in a separate memorandum as follows:

CATTERSON, J. (concurring)

I concur with the majority's view that there are no grounds upon which sanctions could be imposed against petitioner. I write separately on the issue of respondent Baldor's ad hominem attack on petitioner's counsel in the underlying article 78 proceeding.

In the context of the instant sanctions application, Baldor personally attacked the Cooperative's counsel, asserting that he had "systematically brought similar baseless lawsuits" against City agencies "nearly identical" in their allegations to this case.

The mere fact that counsel often litigates before city agencies is irrelevant to the merits of this case. Furthermore, the Cooperative accurately points out that counsel was recently victorious against the City in litigation that alleged a sham bidding process with respect to the New Fulton Fish Market, a theory counsel pursued vigorously in this case.

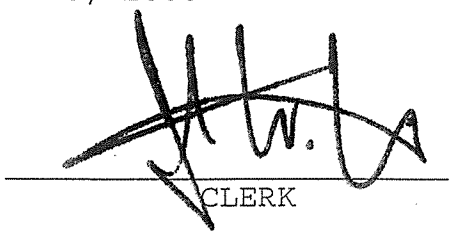
While there is clearly animus between the parties, I find the attacks on counsel for vigorously representing his client nothing less than reprehensible and antithetical to our justice system. The Cooperative challenged what it alleged was a "sham" bidding process based on the need to renovate the "antiquated" Terminal Market, and the alleged economic decline that would result from "unfair" competition with Baldor. Baldor accused the

Cooperative of efforts to thwart the expansion of a "non-union" employer. While the merits of these allegations were sharply in dispute and heavily litigated, the fact remains that, based on the record, the Cooperative's claims were not patently false, or solely intended to harass Baldor.

Indeed, we reversed the original trial court's ruling solely on the basis of the Cooperative's standing to challenge a decision of the New York City Economic Development Corporation (hereinafter referred to as "EDC") (36 A.D.3d 234, 824 N.Y.S.2d 59 (2006), lv. denied 8 N.Y.3d 827, 828 N.Y.S.2d 287, 861 N.E.2d 103 (2007)). That ruling established for the first time that EDC, as a not-for-profit corporation under contract to the City, was not bound by our previous holding in Matter of Madison Sq. Garden L.P. v. New York Metro. Transp. Auth. (19 A.D.3d 284, 799 N.Y.S.2d 186 (2005), lv. dismissed, 5 N.Y.3d 878, 808 N.Y.S.2d 138, 842 N.E.2d 23 (2005)). I see nothing in the then-existing case law that would have prohibited the Cooperative's counsel from advancing the arguments he vigorously made in the original article 78 proceeding.

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

ENTERED: AUGUST 26, 2008



CLERK

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

3694-
3695 The People of the State of New York, Ind. 4290/05
Appellant,

-against-

Deon Cheatham,
Defendant-Respondent.

- - - - -

The People of the State of New York, Ind. 4290/05
Appellant,

-against-

Jerome McDowell,
Defendant-Respondent.

Robert M. Morgenthau, District Attorney, New York (David E. Novick of counsel), for appellant.

Steven Banks, The Legal Aid Society, New York (Allen Fallek of counsel), for Deon Cheatham, respondent.

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

Order, Supreme Court, New York County (Charles J. Tejada, J.), entered on or about May 5, 2006, which granted defendants' motions to suppress physical evidence and defendant Cheatham's motion to suppress statements and dismissed the indictment, unanimously reversed, on the law, defendant McDowell's motion to suppress denied, defendant Cheatham's motion to suppress denied except to the extent it seeks to suppress statements as involuntary, the indictment reinstated and defendant Cheatham's motion to suppress remitted to Supreme Court for it to determine

the voluntariness of his statements.

In his motion to suppress, defendant Cheatham relied solely on the statutory presumption (Penal Law § 220.25[1]) in asserting his standing to challenge the search of the vehicle in which he and defendant McDowell were passengers. For his part, McDowell made no factual assertions bearing on his standing in his motion to suppress. Although the People appear not to have addressed the issue of standing in their written responses to the motions to suppress, the prosecutor stated at the outset of the suppression hearing that he was not conceding standing and took the position that defendants "have to prove standing in the case." Defendants did not take issue before Supreme Court, and do not on this appeal, with the adequacy or timeliness of the People's contention that they lack standing. As discussed below, we conclude that the court improperly granted the suppression motions as each defendant failed to establish standing to challenge the search.

In this case, the police lawfully stopped the vehicle in which defendants were riding as passengers after the driver changed lanes without signaling (*see People v Rice*, 44 AD3d 247 [2007], *lv denied* 9 NY3d 992 [2007]), and removed the three occupants from the vehicle. Of course, defendants do have standing to challenge the stop of the vehicle (*People v Millan*, 69 NY2d 514, 520 [1987]) but, as defendants concede, the court's

conclusion that the stop was unlawful is inconsistent with our holding in *Rice*, which was decided after the court granted the motion to suppress.

The police thereafter recovered a quantity of cocaine from the right front door pocket of the car. Both defendants were arrested and defendant Cheatham later made both an oral and a written statement at the precinct. Cheatham said that he had come to New York with his friend to buy cocaine, "hooked up with a guy at 151st Street," ordered an ounce of cocaine, paid $600 and returned to the vehicle and placed the drugs in the map compartment on the front passenger door. The People contend that both defendants first must establish standing to challenge the search and seizure because the case against them is not based *solely* on the statutory presumption of possession. Rather, with respect to Cheatham, the People state that they intend to rely on Cheatham's oral and written statements and testimony that he was seated next to the door where the cocaine was found. With respect to McDowell, the People state that they will rely on testimony that after the officers activated the lights and siren, McDowell turned and looked at the police and then turned back and "dip[ped] his whole body from his waist down . . . so that he was underneath the seat area, or his hands were by his feet area," and that he remained in that position, moving around, for at least 20 to 25 seconds before he "pop[ped] back up" as the

officers approached the car. The People assert that it is reasonable to infer that McDowell was passing the cocaine up to Cheatham in the front seat or attempting to conceal it. For the reasons that follow, we conclude that the People are correct that neither defendant has "automatic standing" as the case against each does not depend entirely upon the statutory presumption.

The general rule is that a defendant "seeking to challenge a search and seizure [can]not rest upon the fact that the People had charged possession," but must "demonstrate a personal legitimate expectation of privacy in the searched premises" in order to establish standing (*People v Wesley*, 73 NY2d 351, 357 [1989]; *see Rakas v Illinois*, 439 US 128, 148-149 [1978]). The defendant has the burden of demonstrating his or her constitutional interest in seeking suppression (*People v Ponder*, 54 NY2d 160 [1981]).

The Court of Appeals in *People v Millan* (*supra*) recognized an exception to this standing requirement where the People charge the defendant with possession solely on the basis of the statutory presumption that allows a defendant to be convicted based on his or her mere presence in the automobile or room in which contraband is found (Penal Law § 220.25 [narcotics]; § 265.15 [weapons]). The *Millan* Court held, as a matter of fundamental fairness, that a defendant charged with actual possession solely on the basis of a statutory presumption has

"automatic standing" to challenge the legality of a search. The "critical factor" (69 NY2d at 518) in the Court's holding was that the charged crime was founded "only" (*id.* at 519) on the statutory presumption. Indeed, the Court stressed two more times that its holding was limited to cases in which the prosecution's case is based "solely" or "entirely" on the presumption (*id.*). Clearly, we must give effect to this unequivocal statement of the Court's holding. The fatal flaw in defendants' position is that it requires us to disregard that unequivocal statement.

In *People v Wesley*, the Court reiterated the foundation of the *Millan* exception:

> "In *Millan* we were concerned with the unfairness created by a particular category of cases -- those in which the legal fiction of Penal Law § 265.15(3) was *alone* both probable cause to arrest and sufficient to satisfy the People's burden of proof of possession of a gun *merely* because of the circumstance of the defendant's presence in the automobile where the weapon was found . . . To deny standing in such circumstances created an anomaly we addressed in *Millan*, by holding that defendants arrested and charged on the basis of Penal Law § 265.15(3) have a right to contest the legality of the search of an automobile that the statute transformed through a legal fiction into an extension of their persons" (73 NY2d at 361 [emphasis added]).

The narrow exception recognized in *Millan* for cases in which the People rely exclusively on the statutory presumption has not been extended to cases based on "ordinary constructive possession principles" (*People v Tejada*, 81 NY2d 861, 862 [1993], citing, among other cases, *Wesley*, 73 NY2d at 357). The exception

applies "only where the criminal possessory charge is rooted *solely* in a statutory presumption attributing possession to a defendant" (*id.* at 863 [emphasis in original]).

Defendants' mere presence in the car provides a basis for charging them with possession under the automobile presumption (Penal Law § 220.25[1]). However, the People assert that at trial they will not rely solely on the statutory presumption, i.e., they will not seek "to satisfy [their] burden of proof of possession . . . merely because of the . . . defendant[s'] presence in the automobile where the [cocaine] was found" (*Wesley*, 73 NY2d at 361). Rather, with respect to Cheatham, they assert that they will rely as well on his statements and his close proximity to the drugs. We need not discuss Cheatham's proximity to the drugs. If the testimony that Cheatham made the statements is credited by the jury, the People will thus have proved Cheatham's actual possession of the cocaine. With respect to McDowell, the People assert that they will rely as well on his movements in the back seat after looking at the police car. If the testimony about that conduct is credited by the jury, the People will thus have either have proved McDowell's actual possession or will have adduced evidence tending to prove that he was in constructive possession of the cocaine, i.e., that he "exercised dominion and control over the place where [the]

contraband was seized" (*People v Manini*, 79 NY2d 561, 573 [1992]).

We do not hold that the People can avoid the automatic standing rule of *Millan* by pointing to some irrelevant fact or by resort to speculation. Rather, we give meaning to the unequivocal statement of the holding in *Millan* by holding that where, as here, the People rely on more than the defendant's mere presence in an automobile (or room) and assert that they will offer evidence reasonably tending to show the defendant's actual or constructive possession of the contraband, the People do not rely "solely" on the applicable statutory presumption and the *Millan* exception does not apply. We emphasize, too, that our holding does not mean that whenever the People do not rely "solely" on the statutory presumption, the defendant loses the right to contest the constitutionality of the search. Rather, our holding means only that such a defendant must shoulder the burden that a person charged with a crime otherwise must bear, that of "demonstrat[ing] a personal legitimate expectation of privacy in the searched premises" (*People v Wesley*, 73 NY2d at 357).

Our holding, moreover, is in accord not only with a decision of this Court, *People v Sullivan* (258 AD2d 344, 344-345 [1999], *lv denied* 93 NY2d 979 [1999]), but with decisions of the Second

and Fourth Departments, *People v Ballard* (16 AD3d 697, 698 [2d Dept 2005], *lv denied* 5 NY3d 759 [2005]) and *People v Hooks* (258 AD2d 954 [4th Dept 1999], *lv denied* 93 NY2d 972 [1999]). We merely build upon those decisions by holding that the People must point to evidence reasonably tending to show the defendant's actual or constructive possession of the contraband.

We leave for another day the issue of what the appropriate remedy might be in the event of a failure of proof by the People at trial that leaves their case resting solely on the statutory presumption. Without deciding the matter, however, we note that "under CPL 255.20(3), even after the trial has begun, the trial court must entertain a belated motion if it is 'based upon grounds of which the defendant could not, with due diligence, have been previously aware, or which, for other good cause, could not reasonably have been raised' within the specified time limits of CPL 255.20(1) and (2)" (*People v Jian Jing Huang*, 248 AD2d 73, 76 [1998], *lv denied* 93 NY2d 875 [1999]). Moreover, as this Court immediately went on to state in *Huang*, "even if these exceptions do not apply, the trial court 'in the interest of justice, and for good cause shown, may, in its discretion, at any time before sentence, entertain and dispose of the motion on the merits'" (*id.*, quoting CPL 255.20[3]; *see also* CPL 710.40[4]).

Cheatham asks that we disregard the statements he allegedly made at the precinct on the ground that they are the fruits of an

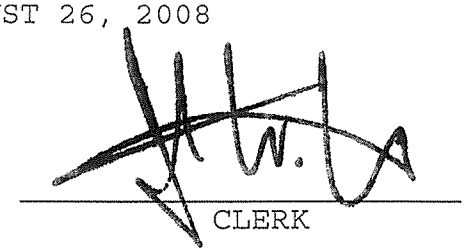
unconstitutional search, even though the issue in dispute is his standing to contest the search of the car. Thus, he argues that "it turns *Millan* on its head to say . . . that [his] subsequently obtained precinct statement[s] deprived him of his right to challenge the very violation from which the statement[s] derived." Although Cheatham cannot invoke the "automatic standing" of *Millan* because the People at trial will be relying in part on his statements, the making of the statements do not deprive him of the right to seek to establish his standing by "demonstrat[ing] a personal legitimate expectation of privacy in the searched premises" (*Wesley*, 73 NY2d at 357). Moreover, contrary to Cheatham's argument, the legality of a search cannot be determined without regard to his standing. A search is unconstitutional not in the abstract but only to the extent it impermissibly infringes on the particular defendant's reasonable expectation of privacy (*United States v Payner*, 447 US 727, 731 [1980] ["the defendant's Fourth Amendment rights are violated only when the challenged conduct invaded *his* legitimate expectation of privacy rather than that of a third party"] [emphasis in original]).

Finally, we note that given its conclusions that the stop and the search of the vehicle were unlawful, the court did not reach the issue of the voluntariness of Cheatham's statements. Accordingly, we remit his motion to suppress to Supreme Court for

the limited purpose of making findings of fact and conclusions of law with respect to the voluntariness of his statements and otherwise remand for further proceedings on the indictment.

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

ENTERED: AUGUST 26, 2008



CLERK