SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 16, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Mazzarelli, Buckley, McGuire, DeGrasse, JJ.

4621N NYCTL 1996-1 Trust and the Bank of New York, etc., Plaintiff-Respondent, -against- EM-ESS Petroleum Corp., et al., Defendants, Joseph Stern, Successful Bidder-Appellant. Index 6922/98

Law Office of Sol Mermelstein, Brooklyn (Sol Mermelstein of counsel), for appellant.

Phillips Lytle LLP, Rochester (Mark J. Moretti of counsel), for respondent.

Order, Supreme Court, Bronx County (Dianne T. Renwick, J.), entered on or about February 20, 2008, which, to the extent appealed from as limited by the briefs, denied the motion of Joseph Stern, the successful bidder in a foreclosure sale, to compel the Referee to transfer the deed without charging him the post-sale interest and property taxes that accrued during the delay of more than eight years in closing, affirmed, without costs.

Stern purchased an abandoned gas station at a foreclosure sale on June 8, 1999. He subsequently learned that the New York

State Department of Environmental Conservation (DEC) had designated the property an "oil spill site" and that, although DEC had expended approximately $1.5 million in cleanup costs, substantial cleanup remained to be completed. Stern's title insurance company refused to insure the property until it was free of any current or future liens or obligations associated with the cleanup. The Referee who conducted the auction offered to return Stern's deposit, because the oil contamination had not been disclosed at or before the auction. Stern elected instead, however, to pursue a settlement with DEC for the eventual cost of the cleanup. The cleanup proceeded over the course of several years, and in 2007, a closing was tentatively scheduled. It was not held, however, because the parties could not resolve their dispute as to whether Stern was required to pay the property taxes and interest on the purchase price accrued between the date of the auction and the date of delivery of the deed (April 9, 2008). Stern then brought the instant motion.

Real Property Actions and Proceedings Law § 1354(2) provides that "[t]he officer conducting the sale shall pay out of the proceeds all taxes, assessments, and water rates which are liens upon the property sold." Contrary to Stern's contention, the word "sale" in the statute refers to the auction sale, not to the delivery of the deed; hence, Stern, the purchaser, is required to pay the taxes that became liens on the property after the auction

(*Wagner v White*, 225 App Div 227 [1929]).

The Referee's terms of sale recited the payment of 10% of the purchase price at the time of Stern's bid with the balance to be paid on July 8, 1999 "when the Referee's deed will be ready for delivery" at the Referee's office. Therefore, it is beyond cavil that July 8, 1999, the date on which the deed was to have been delivered, was the closing date. Under the terms of sale, the Referee reserved the right to unilaterally conduct another foreclosure sale upon Stern's failure to comply with any of the terms of sale, including the closing date. The terms of sale also provided for Stern's payment of interest on the entire purchase price in the event of his failure to close the deal on the date specified "unless the Referee shall deem it proper to extend the time for the completion of said purchase." As noted above, the closing was postponed because Stern was not ready to close on the date specified. Stern contends that the Referee waived the payment of interest by acquiescing in his request for an adjournment of the closing pending completion of the environmental cleanup.

A referee's terms of sale which comports with a judgment of foreclosure is treated as a contract (*cf. Crisona v Macaluso,* 33 AD2d 569 [1969]). Hence, upon Stern's failure to close on July 8, 1999, the Referee had the option to cancel the transaction and conduct another sale or grant an adjournment subject to Stern's

payment of interest. As Stern would have it, the Referee waived interest and deemed it proper to extend the closing date, within the meaning of the contract, simply by granting his request for an adjournment. As a practical matter, a sales transaction cannot be adjourned without the consent of both the buyer and the seller. Nevertheless, under Stern's interpretation, interest would have been waived whether the closing was adjourned at his instance or that of the Referee. Such a construction would render the interest provision meaningless because it could not be invoked in either event. Contracts should be construed to give force and effect to their provisions and not in a manner so as to render them meaningless (*Yoi-Lee Realty Corp. v 177th St. Realty Assoc.*, 208 AD2d 185, 190 [1995]). Under a proper construction, interest would be waived where the closing is adjourned at the Referee's instance. CPLR 5001(a), the provision cited by the motion court, is inapplicable because the instant dispute does not involve a sum of money awarded upon a judgment. We will not, however, disturb the five percent rate of interest fixed by the court considering that Stern and plaintiff's counsel agreed to an even higher rate of interest by letters dated September 25 and October 9, 2007.

All concur except McGuire, J., who dissents in part as follows:

McGUIRE, J. (dissenting in part)

I agree with the majority that Supreme Court correctly concluded that Stern, the successful bidder at the auction, is responsible for taxes that were assessed on the property after the auction but before the closing. I disagree, however, that we should affirm that aspect of Supreme Court's order that, in effect, directed Stern to pay interest on the amount of his bid for the period between the auction and the closing. Rather, I would modify the order to the extent of remanding the matter to Supreme Court for a hearing on the issue of whether Stern should pay interest and, if so, the amount of that interest.

Stern purchased a tract of land at an auction held on June 8, 1999. The tract was sold by a Referee pursuant to a judgment of tax foreclosure and sale. Stern and the referee entered into a memorandum of sale on the date of the auction that stated the terms of sale. One of the terms is that "[t]he Referee is not required to send any notice to the purchaser; if purchaser neglects to call at the time and place . . . specified to receive his deed, he will be charged with interest thereafter on the whole amount of his purchase, *unless the Referee shall deem it proper to extend the time for the completion of said purchase*" (emphasis added).

Following the auction, Stern learned that the State had undertaken environmental remediation efforts on the tract; a gas

station had previously operated there and the soil was contaminated with petroleum. According to Stern, he wanted to wait to close on the property until the State both had completed its remediation efforts and determined whether to seek reimbursement from him for all or part of the costs of the cleanup. Apparently, one of Stern's primary concerns was that he could not obtain title insurance against liabilities associated with the environmental cleanup efforts until those efforts were complete. Stern's claim that he wanted to forestall the closing for these reasons is corroborated by a June 16, 2005 letter by the former counsel to plaintiff, the company prosecuting the tax foreclosure action. In the letter, counsel stated that he had informed plaintiff and the Referee of Stern's concerns regarding the cleanup efforts on the tract. Counsel also stated that he "advised [Stern] that he may at his option wait for the determination by [the] State" and that Stern "told [counsel] [that] [Stern] will wait for the final outcome by the State . . . and close the sale at the time when the cleanup ha[s] been completed and [the] State decide[s] whether it would pursue [Stern] for reimbursement of any part of the fines or lien[s] imposed against the property."

According to the Referee, she

> "did not grant any extensions to close based upon an environmental oil spill. Instead, the former counsel to the Plaintiff gave the successful bidder the option to wait until there was some sort of resolution

> regarding the oil spill prior to the closing. This problem was not disclosed until after the public auction sale. At that time the successful bidder could have elected not to proceed with the terms of sale and his deposit would have been returned under these particular set of facts. Instead, the successful bidder elected to negotiate a settlement associated with the costs of the clean-up.
>
> "It was never contemplated that this issue would take several years to be resolved. No closing was ever scheduled by the Referee, or any attempt to close by the Plaintiff's counsel or counsel for the successful bidder until April, 2007, until it appeared that the spillage problem was resolved to the bidder's satisfaction. By letter dated April 20, 2007, the referee sent a letter declaring time was of the essence to close."

While the Referee's April 20 letter stated that Stern was to comply with the terms of sale contained in the memorandum of sale and complete the sale within 30 days, she subsequently extended Stern's time to close pending his receipt of a response to his letter to plaintiff's counsel objecting to paying interest on the amount of the bid. By a subsequent letter, the Referee stated that Stern's time to close had expired and that she was not consenting to extend the time to close to resolve Stern's objection to her directive that he pay at the closing tax obligations that were assessed after the auction. She went on to state that Stern and plaintiff should amicably resolve the tax issue and schedule a mutually agreeable date for the closing.

After Supreme Court denied Stern's motion to compel the Referee to deliver the deed to the tract to him free of any charges for interest and taxes assessed after the auction, and

granted plaintiff's cross motion to compel the Referee to complete the sale pursuant to the terms of sale, the parties entered into a stipulation. The stipulation provided that (1) the closing would occur and Stern would pay the balance of the amount due on his bid, and (2) Stern would place in escrow the amount of the interest and taxes assessed after the auction pending the resolution of his appeal from the order.

The relevant language of the terms of sale with respect to Stern's obligation to pay interest on the amount of his bid states that "[t]he Referee is not required to send any notice to the purchaser; if purchaser neglects to call at the time and place . . . specified to receive his deed, he will be charged with interest thereafter on the whole amount of his purchase, *unless the Referee shall deem it proper to extend the time for the completion of said purchase*" (emphasis added). Based on the evidence in the record, an issue of fact exists regarding whether the Referee extended the time for the completion of the purchase. Stern averred that the Referee extended the time for closing the sale by acquiescing in his request that the closing be conducted after the State's cleanup efforts were completed and the State determined whether it would seek from Stern reimbursement for the costs of those efforts. Stern's position is buttressed by the letter of plaintiff's former counsel indicating that the Referee was aware of Stern's concerns regarding the state of the tract

and that both plaintiff and Stern were content to conduct the closing after the State completed its work on the tract and made a decision regarding whether to seek reimbursement from Stern. Notably, the Referee never scheduled a closing date and, prior to April 2007, did not seek to compel the parties to conduct the closing. The Referee's averment that she "did not grant any extensions to close based upon an environmental oil spill" does not require the rejection of Stern's contention that the Referee acquiesced in his request that the closing be conducted after the State's remediation efforts were completed and it had determined whether to seek reimbursement from Stern.

In concluding that a hearing is not warranted on the issue of whether the Referee extended the time to conduct the closing, the majority finds that the closing was scheduled for July 8, 1999 and that Stern "failed to close" on that date. To be sure, the terms of sale provide that the balance of the purchase price was supposed to be tendered to the Referee at her office on July 8, 1999. However, nothing in the record sheds any light on why a closing was not conducted on that date and the Referee averred that "[n]o closing was ever scheduled by [her]" and no "attempt [was made] to close by the Plaintiff's counsel or counsel for the successful bidder until April, 2007." Indeed, plaintiff does not even suggest that a closing was scheduled for July 8, 1999. Thus, whether July 8, 1999 was a closing date, and if so, whether

the Referee "deem[ed] it proper to extend the time" for conducting the closing are factual issues that cannot be resolved on this record.

The majority's assertion that, "upon Stern's failure to close on July 8, 1999, the Referee had the option to cancel the transaction and conduct another sale or grant an adjournment subject to Stern's payment of interest" is manifestly wrong. The plain meaning of the terms of sale show that the Referee had a third option under the agreement, one that would relieve Stern of the obligation to pay interest: "deem it proper to extend the time" to conduct the closing. For this reason, contrary to the majority's claim, Stern is not committed to the proposition that the Referee waived interest "simply by granting his request for an adjournment."

According to the majority, "[u]nder a proper construction" of the interest provision, "interest would be waived where the closing is adjourned at the Referee's instance." The majority thus improperly rewrites the relevant clause of the interest provision. Although the clause specifies that the purchaser will be charged interest "unless the Referee shall deem it proper to extend the time for the completion of [the] purchase," the majority's "proper construction" reads it as if it stated "unless the Referee shall have adjourned the completion of the purchase." This is error (*see Matter of Salvano v Merrill Lynch, Pierce,*

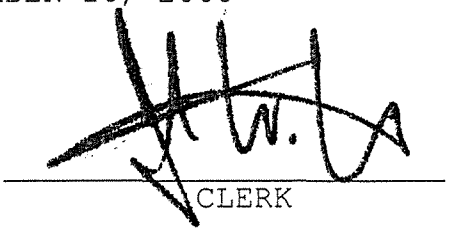
Fenner & Smith, 85 NY2d 173, 182 [1995] ["The court's role is limited to interpretation and enforcement of the terms agreed to by the parties; it does not include the rewriting of their contract and the imposition of additional terms"]).

Supreme Court relied on CPLR 5001(a) to support its conclusion that Stern should pay interest on the amount of his bid for the period between the auction and the closing. CPLR 5001, however, is wholly inapplicable to the issue of whether Stern must pay interest. That statute dictates when a court may award interest on a *verdict or decision* on a cause of action. Here, however, interest is not being sought on a verdict or decision but on the amount of Stern's bid. Thus, the issue of interest on the amount of the bid must be resolved by reference to the contract between the parties.

Accordingly, I would remand the matter for a hearing on the issue of whether "the Referee . . . deem[ed] it proper to extend the time for the completion of [the] purchase" and, if not, the amount of interest that has accrued under the terms of sale.

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

ENTERED: DECEMBER 16, 2008



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Tom, J.P., Saxe, Sweeny, Catterson, DeGrasse, JJ.

4639 Michael Jaglom, et al., Index 603574/06
Plaintiffs-Respondents,

-against-

Insurance Company of Greater New York,
Defendant-Appellant.

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for appellant.

Ohrenstein & Brown, LLP, Garden City (Michael D. Brown of counsel), for respondents.

Order, Supreme Court, New York County (Rolando T. Acosta, J.), entered June 7, 2007, which denied defendant's motion to dismiss the complaint, affirmed, without costs.

Plaintiffs seek a judgment declaring that defendant must defend and indemnify them in an underlying libel action. Defendant moved to dismiss the complaint, pursuant to CPLR 3211(a)(1) and (7), on the ground that the insureds failed to give it timely notice of the offense and resulting claim against them. In opposition to the motion, plaintiffs submitted an affidavit by plaintiff Jaglom and an affirmation by their counsel explaining that they did not provide notice to defendant until they were served with a summons and complaint, because until then they believed in good faith that they were not liable for defamation (*see Argentina v Otsego Mut. Fire Ins. Co.*, 86 NY2d 748, 750 [1995]). While we disagree with the motion court's

conclusion that *as a matter of law* plaintiffs did not fail to timely notify defendant and therefore did not breach a condition precedent to the insurance contract, we affirm the denial of the dismissal motion because we conclude that questions of fact are presented regarding the existence and the reasonableness of the insured's professed good-faith belief that the party that has since commenced the defamation action against them would not seek to hold the insured liable (*id.*). The April 19, 2005 attorney's letter complaining of a retransmission of an allegedly defamatory letter dated July 21, 2004 did not establish as a matter of law an intent to bring an action such as would require notice of the expected claim to the insurer at that time.

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

CATTERSON, J. (dissenting)

Because I believe that the court erred when it denied the defendant's motion to dismiss the complaint based on the plaintiffs' failure to provide timely notice of a claim or occurrence, I respectfully dissent.

There is no dispute that the plaintiffs waited a significant amount of time before notifying the defendant of the defamation claim. The plaintiffs assert, however, that there existed a reasonable excuse for the delay. In support of their position, the plaintiffs proffered the affirmation of their counsel and the affidavit of Jaglom as explanations for the delay. Both explained that the plaintiffs did not provide notice to the defendant until they were served with a summons and complaint, because until then they believed in good faith that they were not liable for defamation. See Argentina v. Otsego Mut. Fire Ins. Co., 86 N.Y.2d 748, 750, 631 N.Y.S.2d 125, 126, 655 N.E.2d 166, 167 (1995).

This misapprehends the nature of a good-faith belief in nonliabilty. The question is whether the insured learned of an occurrence that may result in the assertion of liability against the insured and had a reasonable "good-faith belief of nonliability." Great Canal Realty Corp. v. Seneca Ins. Co., Inc., 5 N.Y.3d 742, 743, 800 N.Y.S.2d 521, 522, 833 N.E.2d 1196, 1197 (2005). I believe that, at best, the plaintiffs merely have

demonstrated that they believed that they could successfully defend against the former tenants' libel claim. Following the tenants' attorney's letter of April 19, 2005, there could be little doubt that the tenants intended to assert, inter alia, a claim against the plaintiffs for libel. In my view, failure to promptly notify the defendant of this potential claim requires dismissal of the plaintiff's action against the defendant insurer.

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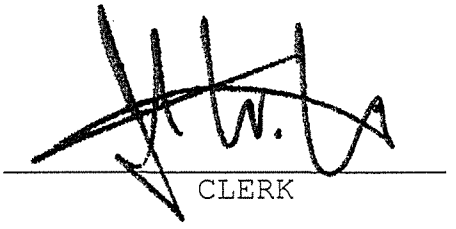
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 16, 2008



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Mazzarelli, J.P., Friedman, Nardelli, Buckley, Freedman, JJ.

4687 In re Sidney Eisenberg, Index 111391/06
Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal, et al.,
Respondents-Respondents.

Thomas S. Fleishell & Associates, P.C., New York (Susan C. Stanley of counsel), for appellant.

Gary R. Connor, New York (Aida P. Reyes of counsel), for DHCR, respondent.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for Columbus Limited Partnership and Rockrose Development Corp., respondents.

Order and judgment (one paper), Supreme Court, New York County (Paul G. Feinman, J.), entered July 5, 2007, denying the petition and dismissing the proceeding brought pursuant to CPLR article 78 to annul the determination of respondent New York State Division of Housing and Community Renewal (DHCR), dated July 3, 2006, which affirmed an order of the Rent Administrator deregulating petitioner's apartment based on his alleged default in answering the petition for high income rent deregulation, unanimously reversed, on the law, the facts and in the exercise of discretion, without costs, and the petition granted to the extent of remanding the matter to DHCR for further proceedings to consider additional evidence bearing on whether good cause exists

to excuse petitioner's failure either to timely answer or to retain proof of the alleged timely mailing of his answer.

Given petitioner's failure to submit any objective proof that he had mailed his answer, it was neither arbitrary and capricious nor contrary to law for DHCR to find him in default (*see Matter of Szaro v New York State Div. of Hous. & Community Renewal*, 13 AD3d 93 [2004]). Nonetheless, in view of petitioner's advanced age and Housing Court's appointment of a guardian ad litem for him in the related holdover proceeding, the matter should be reopened at the administrative level for the reception of additional evidence bearing on whether good cause exists to excuse petitioner's failure either to timely answer or to retain proof of the alleged timely mailing of his answer (*see Matter of Dworman v New York State Div. of Hous. & Community Renewal*, 94 NY2d 359, 373 [1999]). We note that DHCR does not object to reopening the matter for this purpose.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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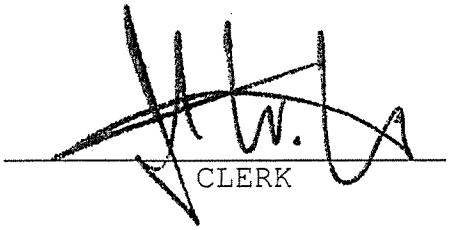


Andrias, J.P., Nardelli, Sweeny, DeGrasse, Freedman, JJ.

4824 The People of the State of New York, Ind. 146/02
Respondent,

-against-

Daniel Vives,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Susan Gliner of counsel), for respondent.

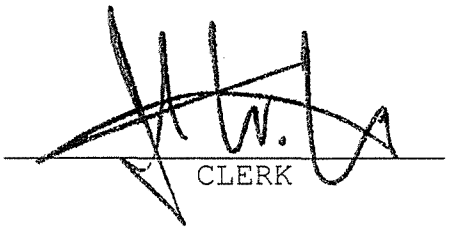
Order, Supreme Court, New York County (Michael J. Obus, J.), entered on or about March 15, 2007, which adjudicated defendant a level three sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports the court's discretionary upward departure to a level three sex offender adjudication. There was ample evidence to support aggravating factors not adequately accounted for in the risk assessment instrument (*see e.g. People v O'Flaherty*, 23 AD3d 237 [2005], *lv denied* 6 NY3d 705 [2006]), and there was no improper double counting. These aggravating factors demonstrated that defendant is a dangerous pedophile with

a grave risk of reoffending, notwithstanding his conclusory claims of having been rehabilitated during his incarceration.

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

ENTERED: DECEMBER 16, 2008



Andrias, J.P., Nardelli, Sweeny, DeGrasse, Freedman, JJ.

4825 Awilda Cortez, as Administratrix of the Goods, Chattels and Credits of Juan Cortez, Deceased, Plaintiff-Appellant, Index 24481/02

-against-

Delmar Realty Co., Inc., et al., Defendants-Respondents.

David A. Kapelman, New York, for appellant.

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for respondents.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered October 11, 2005, which granted defendants' motion for summary judgment dismissing the complaint and denied plaintiff's cross motion to amend the complaint to add a cause of action for violation of Real Property Law § 231(2), unanimously affirmed, without costs.

Plaintiff's decedent, a tenant in defendants' building, was assaulted by an illegal subtenant of the building who was suspected of dealing drugs and ultimately evicted for nonpayment of rent. Dismissal of the complaint alleging that defendants' failure to provide proper security in the building proximately caused the decedent's injuries was proper since "a landlord is under no duty to safeguard a tenant against attack by another tenant 'since it cannot be said that the landlord had the ability

or a reasonable opportunity to control [the assailant]'" (*Wright v New York City Hous. Auth.*, 208 AD2d 327, 331 [1995], quoting *Blatt v New York City Hous. Auth.*, 123 AD2d 591, 592 [1986], *lv denied* 69 NY2d 603 [1987]; *see Britt v New York City Hous. Auth.*, 3 AD3d 514 [2004], *lv denied* 2 NY3d 705 [2004]).

The court also properly denied the cross motion to amend the complaint to add a claim alleging that defendants knowingly permitted drug activity on the premises in violation of Real Property Law § 231(2). The proposed claim is not viable in light of the lack of evidence that defendants were on notice of repeated criminal activity on the premises, or that the decedent's injuries were a foreseeable result of defendants' inaction in failing to remove the alleged drug dealers from the building (*see Maria S. v Willow Enters.*, 234 AD2d 177, 178-179 [1996]).

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

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

ENTERED: DECEMBER 16, 2008

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Andrias, J.P., Nardelli, Sweeny, DeGrasse, Freedman, JJ.

4826 In re Melissa Marie G.,
Petitioner-Respondent,

-against-

John Christopher W.,
Respondent-Appellant.

Anne Reiniger, New York, for appellant.

Steven N. Feinman, White Plains, for respondent.

Order of protection, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about April 17, 2007, directing respondent, inter alia, to stay away from petitioner, and to stay away from the parties' child except for court-ordered visitation, both for a period of five years, unanimously affirmed, without costs.

A preponderance of the evidence (Family Ct Act § 832) supports Family Court's findings that respondent committed acts constituting the family offenses of assault in the third degree, attempted assault in the third degree, menacing in the third degree, and harassment in the second degree (Family Ct Act § 812), and that such acts caused petitioner physical injury warranting a five-year order of protection (Family Ct Act § 842, § 827[a][vii]). No basis exists to disturb the court's findings of credibility (*see Matter of Hunt v Hunt*, 51 AD3d 924, 925 [2008]). While it was not an improper exercise of discretion to

permit petitioner's rebuttal witness to contradict respondent's testimony about a collateral matter, even if it were, the error was harmless since the rebuttal testimony did not directly implicate respondent in the alleged family offenses (*see People v Lucas*, 160 AD2d 330 [1990], *lv denied* 76 NY2d 860 [1990]).

THIS CONSTITUTES THE DECISION AND ORDER
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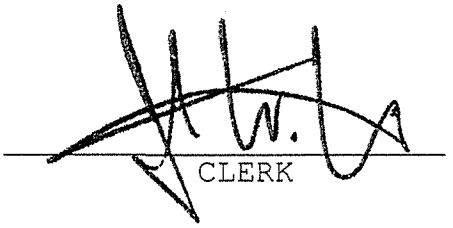

Andrias, J.P., Nardelli, Sweeny, DeGrasse, Freedman, JJ.

4827 Nedim Erdogan, Index 109541/05
Plaintiff-Respondent,

-against-

Toothsavers Dental Services, P.C., et al.,
Defendants-Appellants.

- - - - -

Sol S. Stolzenberg, D.M.D., et al., 590794/06
Third-Party Plaintiffs-Appellants,

-against-

Barry Gordon, D.D.S.,
Third-Party Defendant-Appellant.

Gordon & Silber, P.C., New York (Eldar Mayouhas of counsel), for Toothsavers Dental Services, P.C., and Stolzenberg, appellants.

Marulli, Lindenbaum, Edelman & Tomaszewski, LLP, New York (Francesca M. Erichsen of counsel), for Robert Winegarden, D.D.S., appellant.

Landman Corsi Ballaine & Ford P.C., New York (Melanie K. Suhrada of counsel), for Barry Gordon, D.D.S., appellant.

Lutfy & Santora, Staten Island (James L. Lutfy of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered October 15, 2007, which denied the summary judgment motions of defendant practitioners, unanimously modified, on the law, the motions granted to the extent of dismissing the claims for medical malpractice and lack of informed consent against defendant Gordon and against defendant Stolzenberg in his individual capacity, and otherwise affirmed, without costs.

Plaintiff commenced this action in July 2005 against

Toothsavers and Drs. Stolzenberg and Winegarden for injuries sustained due to alleged dental malpractice and failure to inform regarding foreseeable risks and alternatives associated with procedures performed between May and August 2003. The complaint was amended in September 2005 to include Dr. Gordon as a party defendant, but plaintiff was unable to serve him.

In September 2006, Toothsavers and Dr. Stolzenberg commenced a third-party action against Dr. Gordon, and shortly thereafter, plaintiff amended his summons and complaint (CPLR 1009) to reflect Dr. Gordon's true identity. Dr. Gordon answered this amended complaint and moved to dismiss on the ground of statute of limitations (CPLR 214-a), as well as for summary judgment.

Even though the claims against Dr. Gordon were filed in a timely fashion in 2005, service was never effected upon him within the statutory period of limitation. Plaintiff never sought an extension of time to serve his complaint, and the record is devoid of any genuine effort on his part to ascertain Dr. Gordon's correct identity and address prior to the running of the statute (*see e.g. Tucker v Lorieo*, 291 AD2d 261 [2002]). Plaintiff failed to establish the applicability of the relation-back doctrine whereby Dr. Gordon might or should have known that the September 2005 complaint would have been brought against him as well (*see Cintron v Lynn*, 306 AD2d 118 [2003]). Accordingly,

plaintiff's action as against Dr. Gordon must be dismissed as untimely.

Toothsavers' motion for summary judgment was properly denied in that it failed to establish, as a matter of law, that it was not vicariously liable for the actions of the treating dentists (*see Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]). The part of Toothsavers' motion, as well as Dr. Winegarden's motion for summary judgment, on the ground that they did not commit dental malpractice, was also properly denied. Questions of fact were presented (*cf. Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]) by the experts' conflicting opinions as to whether these defendants departed from the prevailing standard of dental care, and if so, whether such departure resulted in plaintiff's injuries, and whether defendants failed to inform plaintiff of foreseeable risks and alternatives associated with the dental procedures to be performed.

Plaintiff's action against Dr. Stolzenberg, individually, must be dismissed pursuant to a stipulation between the parties.

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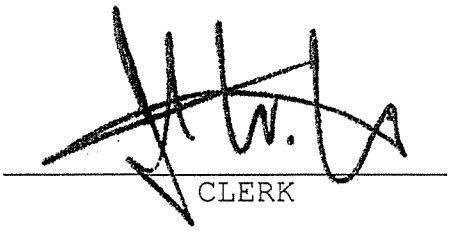

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Andrias, J.P., Nardelli, Sweeny, DeGrasse, Freedman, JJ.

4828 The People of the State of New York, Respondent, Ind. 6596/04

-against-

Lorenzo Culbero, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Jaime Bachrach of counsel), for respondent.

Judgment, Supreme Court, New York County (Arlene R. Silverman, J. at suppression hearing; Maxwell Wiley, J. at jury trial and sentence), rendered January 11, 2006, convicting defendant of burglary in the second degree (two counts) and criminal possession of stolen property in the fifth degree, and sentencing him, as a persistent violent felony offender, to consecutive terms of 16 years to life concurrent with a term of 1 year, unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that all sentences run concurrently, and otherwise affirmed.

There was no violation of defendant's right to be present during jury selection. The record, viewed as a whole and in light of the course of conduct of the court and counsel, sufficiently establishes that the challenged portions of the voir dire occurred in the courtroom after the court excused all

individuals not concerned, and that defendant was actually present (*see People v Watson*, 243 AD2d 426 [1997], *lv denied* 92 NY2d 863 [1998]). The colloquies with prospective jurors were not sidebars, and the record supports the conclusion that defendant had the same opportunity to see and hear the panelists that he would have had at every other stage of jury selection. "Since the [balance of the panel] was not in the courtroom, it would be entirely speculative to conclude that the [voir dire] was conducted in a hushed dialogue out of defendant's hearing" (*People v Gonzalez*, 203 AD2d 192 [1994], *lv denied* 84 NY2d 826 [1994]).

We reject defendant's claim under *Brady v Maryland* (373 US 83 [1963]), based on the People's failure to disclose information regarding a testifying police witness's pursuit of a job in the District Attorney's office. There is no reasonable probability, or even a reasonable possibility, that the nondisclosure affected the verdict, particularly since the jury could be expected to have viewed the witness as being aligned with the prosecution simply by virtue of his status as the arresting officer, and the additional disclosure would have added little or nothing.

The court properly denied defendant's suppression motion. There was probable cause for defendant's arrest, based on information that an individual with defendant's unusual name had pawned stolen property, and that defendant was under parole

supervision due to a prior criminal conviction (*see People v Cameron*, 268 AD2d 307 [2000], *lv denied* 94 NY2d 917 [2000]).

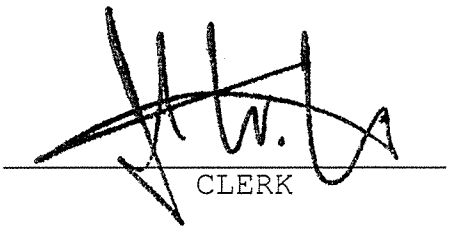
We find the sentence excessive to the extent indicated.

M-5330 ***People v Lorenzo Culbero***

Motion seeking leave to file pro se supplemental brief denied.

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

ENTERED: DECEMBER 16, 2008



CLERK

Andrias, J.P., Nardelli, Sweeny, DeGrasse, Freedman, JJ.

4829 Michael Driscoll, Index 105310/08
Plaintiff-Appellant,

-against-

Neyda Delarosa,
Defendant,

New York State Attorney General
Litigation Unit,
Defendant-Respondent.

Michael Driscoll, appellant pro se.

Andrew M. Cuomo, Attorney General, New York (Diana R.H. Winters of counsel), for respondent.

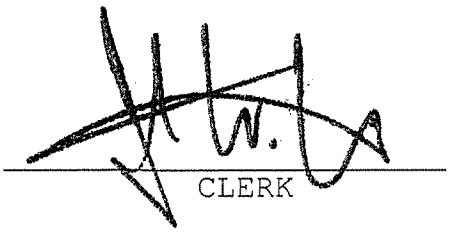
Appeal from order, Supreme Court, New York County (Laura E. Drager, J.), entered on or about May 14, 2008, which declined to sign an order to show cause, unanimously dismissed, without costs, as taken from a nonappealable paper.

An order declining to sign an order to show cause is not appealable (CPLR 5701[a][2]; *Heath v Wojtowicz*, 48 AD3d 214 [2008], *lv denied* 10 NY3d 708 [2008]). We would add that to the extent plaintiff seeks damages against the State, Supreme Court

lacks subject matter jurisdiction (Court of Claims Act § 8, § 9; *Pollicina v Misericordia Hosp. Med. Ctr.*, 82 NY2d 332, 339 n 3 [1993]).

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

ENTERED: DECEMBER 16, 2008



CLERK

Andrias, J.P., Nardelli, Sweeny, DeGrasse, Freedman, JJ.

4830 Kenneth Hamrick, Index 602235/07
Plaintiff-Appellant,

-against-

Roland P. Perdue, III, etc., et al.,
Defendants-Respondents.

Jonathan B. Altschuler, New York, for appellant.

Jackson Lewis LLP, Melville (Roger H. Briton of counsel), for Roland P. Perdue, III and Fifth Avenue Presbyterian Church, respondents.

Montfort, Healy, McGuire & Salley, Garden City (Donald S. Neumann, Jr. of counsel), for The Presbytery of New York City, respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered May 29, 2008, which denied plaintiff's motion for summary judgment and an immediate trial of the issue of damages and granted defendants' cross motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this defamation action, defendants met their burden of showing that defendant Perdue's statements that plaintiff misrepresented his academic credentials in connection with his employment by defendant Presbytery were true (*see Silverman v Clark*, 35 AD3d 1, 12 [2006]). Plaintiff failed to raise a triable issue as to the falsity of the statements (*see id.* at 13).

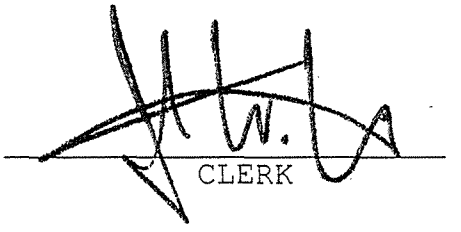
Perdue's statement to church staff and choir members that the "resulting lack of credibility and trust toward [plaintiff]

caused by this matter has rippled through [the church and choir staff] and beyond" was made in the context of explaining why plaintiff had been terminated and was an expression of opinion, not fact (*see Mann v Abel*, 10 NY3d 271, 276 [2008]; *Galasso v Saltzman*, 42 AD3d 310, 311 [2007]).

We have considered plaintiff's remaining argument and find it unavailing.

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

ENTERED: DECEMBER 16, 2008



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

4831 German Nande, etc., Index 126908/02
Plaintiff-Appellant,

-against-

JP Morgan Chase & Company, et al.,
Defendants-Respondents.

Scott M. Zucker, Woodbury (Andrew B. Schultz of counsel), for appellant.

Orrick, Herrington & Sutcliffe LLP, New York (John D. Giansello of counsel), for respondents.

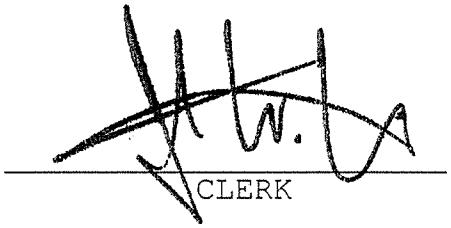
Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered September 27, 2007, dismissing the complaint pursuant to an order that granted defendants' motion for summary judgment, unanimously affirmed, without costs.

Defendants produced a legitimate, non-discriminatory reason for its termination of plaintiff, to wit, a work-force reduction during which associates in plaintiff's hiring class were either promoted or reduced according to each area's needs. In response, plaintiff failed to raise a triable issue of fact as to whether the reasons offered for his termination were merely pretextual (*see Jordan v Bates Adv. Holdings, Inc.*, 46 AD3d 440 [2007], *lv denied* 11 NY3d 701 [2008]). Furthermore, contrary to plaintiff's contentions, defendants did not fail to reasonably accommodate his disability in violation of Executive Law § 296(3)(a) and Administrative Code of the City of New York § 8-107(15)(a).

Rather, there is ample evidence that defendants provided plaintiff with various accommodations to assist him with his debilitating back injury.

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

ENTERED: DECEMBER 16, 2008



CLERK

Andrias, J.P., Nardelli, Sweeney, DeGrasse, Freedman, JJ.

4832 The People of the State of New York, Respondent, Ind. 2218/05

-against-

John Pauling, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Stephen Lessard of counsel), for respondent.

Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered January 10, 2006, convicting defendant, after a jury trial, of burglary in the second degree, criminal impersonation in the second degree and petit larceny, and sentencing him, as a second felony offender, to an aggregate term of 6 years, unanimously affirmed.

In this case where defendant was accused of acting in concert with two other men in a burglary where all three men impersonated police officers and displayed what appeared to be police shields, the court properly exercised its discretion when it admitted evidence that, approximately six months after the crime, the police recovered a total of three purported police shields from the car and apartment of a separately tried codefendant. Although the burglary victim was not asked to identify these shields, the evidence supported a reasonable

inference that they were used in the burglary, and any question as to the identity of the shields went to the weight to be accorded the evidence, not its admissibility (*see People v Mirenda* 23 NY2d 439, 452-454 [1969]; *People v Del Vermo*, 192 NY 470, 478-482 [1908]; *People v Smith*, 265 AD2d 175 [1999], *lv denied* 95 NY2d 938 [2000]). To the extent that defendant is raising a constitutional claim, such claim is both unpreserved and without merit.

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

ENTERED: DECEMBER 16, 2008

CLERK

Andrias, J.P., Nardelli, Sweeny, DeGrasse, Freedman, JJ.

4833-
4833A Evelyn Paulino, Index 6467/05
Plaintiff-Respondent,

-against-

Lifecare Transport, et al.,
Defendants-Appellants.

Hardin, Kundla, McKeon & Poletto, P.A., New York (Stephen P. Murray of counsel), for appellants.

Ross, Legan, Rosenberg, Zelen & Flaks, LLP, New York (Evan N. Ross of counsel), for respondent.

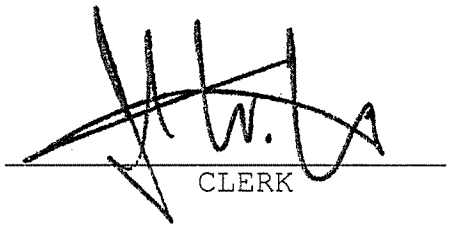
Orders, Supreme Court, Bronx County (Wilma Guzman, J.), entered January 14, 2008 and May 1, 2008, respectively, which, in an action for personal injuries sustained while operating the wheelchair lift of an ambulette, denied the motions of defendant Lifecare Transport (Lifecare) and defendant The Jewish Home and Hospital For Aged (JHHA) for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motions granted and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff's action is barred by the exclusivity of the remedy under Workers' Compensation Law § 11. JHHA submitted evidence demonstrating that defendants, as well as plaintiff's nonparty employer, were all part of a single integrated entity in that they operated under the control of the same parent corporation, shared payroll services and an employee manual, and

were covered by the same Workers' Compensation insurance policy (*see Hernandez v Sanchez*, 40 AD3d 446 [2007]; *Ramnarine v Memorial Ctr. for Cancer & Allied Diseases*, 281 AD2d 218 [2001]). Although Lifecare failed to submit documentary evidence in support of its motion, we find that it is entitled to summary judgment based upon the documentation submitted by JHHA.

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

ENTERED: DECEMBER 16, 2008



CLERK

Andrias, J.P., Nardelli, Sweeny, DeGrasse, Freedman, JJ.

4835 174 Second Equities, Corp., Index 104926/04
Plaintiff-Respondent,

-against-

Hee Nam Bae,
Defendant-Appellant.

Yoon & Kim LLP, New York (Jay H. Kim of counsel), for appellant.

Cutler Minikes & Adelman LLP, New York (Jonathan Z. Minikes of counsel), for respondent.

Order, Supreme Court, New York County (John E.H. Stackhouse, J.), entered April 11, 2007, which, after a nonjury trial, awarded plaintiff $58,867.37 on the second and third causes of action, unanimously affirmed, with costs.

Plaintiff was the landlord of premises leased by a company owned by defendant, who signed a personal guaranty in the event of default. In January 2004, the company delivered the keys to plaintiff and vacated the premises, leaving behind various clothing, machinery, equipment and chemicals it used in its dry cleaning and leather treatment business. After several written demands for removal of this property were ignored by defendant, plaintiff contracted with two companies to restore the premises to broom-clean condition, as required by the lease.

After trial, the court concluded that defendant was liable for the cost of the cleanup and the rent for the period when the premises were being cleaned. Defendant challenged this finding

on grounds, inter alia, that the machinery and equipment left behind were fixtures that were, under the lease, the property of the landlord; the court improvidently exercised its discretion in denying him additional time to subpoena witnesses; and he should have been permitted to challenge the amount of attorney fees sought by plaintiff.

Machinery is deemed a fixture where it is installed in such manner that removal would result in material damage to it or the realty, or where the building in which it is housed was specially designed for that purpose, or where there is other evidence that its installation was of a permanent nature (*Matter of City of New York [Whitlock Ave.]*, 278 NY 276, 281-282 [1938]). Improvements used for business purposes, which would lose substantial value if removed, may also qualify as fixtures (*Rose v State of New York*, 24 NY2d 80, 86 [1969]). The equipment and machinery at issue were affixed to the walls and floor of the building by pipes, hoses and brackets, and were purchased by the company from a prior tenant. The machinery could be and was removed without substantial damage to the premises, and no evidence was provided that the installation was of a permanent nature. Thus, they were not fixtures, and under the lease the company was required to remove them when it vacated the premises. Even if the machinery and equipment were deemed to be fixtures, under the lease plaintiff could disclaim ownership and timely demand their

removal from the premises, which it did. In any event, the lease provided that trade fixtures, which were an integral part of the company's business, remained the property of the company.

The court correctly held that defendant was liable for the rent for the period necessary for restoring the premises to broom-clean condition, as required by the lease. Despite delivery of the keys by the company in January, the lease was not terminated until the company's property was removed in March.

The court did not improvidently exercise its discretion in denying defendant's request for an adjournment in order to subpoena two unnamed witnesses. A court is vested with broad discretion to control its calendar. In deciding a request for an adjournment, the court should conduct a balanced review of all relevant factors, including the merit of the action, prejudice or lack thereof to the plaintiff, and whether or not there was an intent to deliberately default or abandon the action. This trial commenced in mid-October and was concluded in late December. Defendant had ample opportunity to compel the presence of witnesses on his behalf, but waited until the eleventh hour, and even then failed to provide the court with any information on the identity of the witnesses or the relevance of their testimony.

Since the order appealed from did not award a specific amount of attorney fees, that issue is not ripe for review.

We have reviewed defendant's other claims and find them without merit.

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

ENTERED: DECEMBER 16, 2008

CLERK

Andrias, J.P., Nardelli, Sweeny, DeGrasse, Freedman, JJ.

4837-
4837A-
4837B-
4837C

The People of the State of New York, ex rel Lawrence Wright,
Petitioner-Appellant,

-against-

Warden, Rikers Island Correctional Facility, et al.,
Respondents-Respondents.

Index 51010/07
75082/07
51769/07
340253/07

Steven N. Feinman, White Plains, for appellant.

Andrew M. Cuomo, Attorney General, New York (Carol Fischer of counsel), for respondents.

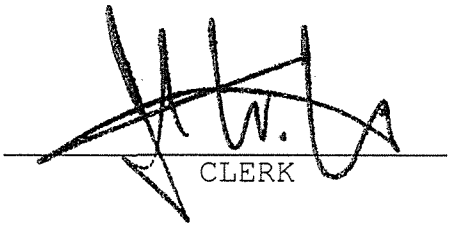
Appeals from orders, Supreme Court, Bronx County (Denis Boyle, J.), entered on or about March 13, 2007; (Ralph Fabrizio, J.), entered June 8, 2007; (Barbara Newman, J.), entered October 10, 2007; and (Ralph Fabrizio, J.), entered April 8, 2008; unanimously dismissed, without costs.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and

agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

ENTERED: DECEMBER 16, 2008



CLERK

Andrias, J.P., Nardelli, Sweeny, DeGrasse, Freedman, JJ.

4838 Olga Batyreva, Index 101313/07
Plaintiff-Respondent,

-against-

New York City Department of Education,
Defendant-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for appellant.

Olga Batyreva, respondent pro se.

Order, Supreme Court, New York County (Karen S. Smith, J.), entered May 5, 2008, which, insofar as appealed from, denied the branch of defendant Department of Education's (DOE) CPLR 3211(a)(7) motion to dismiss plaintiff teacher's cause of action under 42 USC § 1983, unanimously reversed, on the law, without costs, and that branch of the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

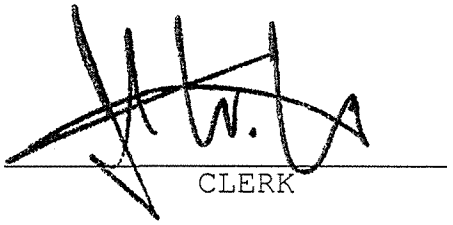
Plaintiff alleges that she was assigned to grade a Regents examination in math, that she observed other teachers improperly grading the exam with No. 2 pencils instead of red pencils or red pens, and that after reporting this violation of grading procedures to the appropriate officials, DOE wrongfully retaliated against her by, inter alia, giving her unsatisfactory evaluations ratings and instituting disciplinary proceedings falsely alleging, inter alia, incompetence. A prior article 78

proceeding challenging the unsatisfactory ratings as false and retaliatory was dismissed on a finding that the ratings were not arbitrary and capricious (*Batyreva v New York City Dept. of Educ.*, 50 AD3d 283 [2008]). With respect to plaintiff's present claim for retaliation in violation of Civil Service Law § 75 and § 75-b, the motion court dismissed the claim, and plaintiff does not appeal. With respect to plaintiff's present claim that the ratings and disciplinary proceedings were in retaliation for her exercise of free speech, in violation of 42 USC § 1983, the motion court found that the complaint sufficiently alleges that the grading procedures are a matter of public concern, and that because the complaint does not allege that plaintiff "was in a supervisory position or that it [was] part of her official responsibilities to report any suspected or real diversions from proper grading procedures," it sufficiently alleges that plaintiff was "speaking as a citizen and not in her official capacity as a public employee." Accordingly, the motion court sustained the section 1983 claim (citing *Garcetti v Ceballos*, 547 US 410 [2006]). This was error. The prior article 78 proceeding estops her from asserting that the unsatisfactory ratings and disciplinary proceeding were retaliatory violations

of her right to free speech (*see Wilkie v Robbins*, __ US __, 127 S Ct 2588, 2602 [2007] [proof that the [retaliatory] action was independently justified on grounds other than the improper one defeats the claim]; *see generally Smith v Russell Sage Coll.*, 54 NY2d 185, 192-193 [1981]). We have considered plaintiff's other arguments and claims and find them without merit.

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

ENTERED: DECEMBER 16, 2008



CLERK

Andrias, J.P., Nardelli, Sweeny, DeGrasse, Freedman, JJ.

4839 The People of the State of New York, Ind. 9766/89
Respondent,

-against-

Omar Bravo,
Defendant-Appellant.

Meyers & Meyers, LLP, Albany, (Adam M. Breault of counsel), for appellant.

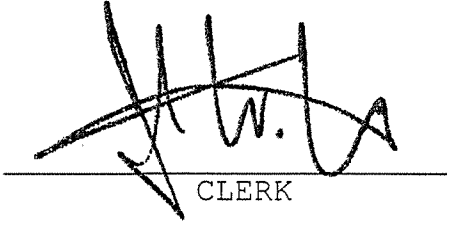
Robert M. Morgenthau, District Attorney, New York (Martin J. Foncello of counsel), for respondent.

Appeal from order, Supreme Court, New York County (Thomas Farber, J.), entered on or about November 9, 2007, which denied defendant's CPL 440.10 motion to vacate a judgment, same court (Leslie Crocker Snyder, J.), rendered August 8, 1990, unanimously dismissed, without costs.

We dismiss the appeal on the ground that defendant has been released from New York State custody and deported (*see People v Henriquez*, 47 AD3d 457 [2008]). Alternatively, we find that the court properly denied defendant's CPL 440.10 motion as both procedurally defective and without merit.

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

ENTERED: DECEMBER 16, 2008



CLERK

Andrias, J.P., Nardelli, Sweeny, DeGrasse, Freedman, JJ.

4840-
4840A The People of the State of New York, Ind. 2227/02
Respondent, 4811/03

-against-

Robert Johnson,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Marc A. Sherman of counsel), for respondent.

Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered June 7, 2007, convicting defendant, upon his plea of guilty, of manslaughter in the first degree and attempted murder in the second degree, and sentencing him, as a second violent felony offender, to concurrent terms of 20 years, unanimously modified, on the law, to the extent of vacating the DNA databank fee, and reducing the amounts of the mandatory surcharge and crime victim assistance fees from $250 and $20 to $150 and $5, respectively, and otherwise affirmed.

Judgment, same court, Justice and date, convicting defendant, upon his plea of guilty, of rape in the first degree, and sentencing him, as a second violent felony offender, to a concurrent term of 15 years, unanimously modified, on the law, to the extent of vacating the second felony offender adjudication and remanding for resentencing, including further proceedings on

defendant's second violent felony offender status, and otherwise affirmed.

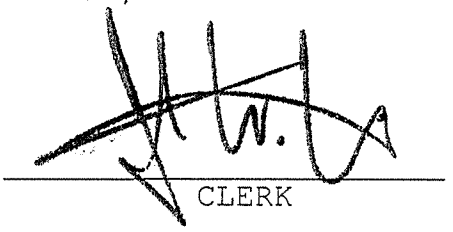
With regard to the manslaughter and attempted murder conviction under indictment No. 2227/02, as the People concede, since defendant committed these crimes prior to the effective dates of amendments to Penal Law § 60.35 providing for the imposition of DNA databank fees and increasing the mandatory surcharge and crime victim assistance fees defendant's sentence is unlawful to the extent indicated.

With regard to the rape conviction under indictment No. 4811/03, as the People concede, defendant was improperly adjudicated a second violent felony offender because the adjudication was based on a predicate conviction that did not meet the sequentiality requirement of Penal Law § 70.04(1)(b)(ii). However, under the circumstances, the People are entitled to an opportunity to establish, on the basis of a different conviction, that defendant is nonetheless a second violent felony offender (*see People v Sailor*, 65 NY2d 224 [1985], *cert denied* 474 US 982 [1985]). Since there is to be a resentencing on this indictment in any case, the sentencing court should take note that because the crime was committed on February 20, 1996, defendant is not subject to any period of

post-release supervision, and is subject to the fee and surcharge schedule applicable as of that date.

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

ENTERED: DECEMBER 16, 2008



CLERK

Andrias, J.P., Nardelli, Sweeny, DeGrasse, Freedman, JJ.

4841 Debra Gandler, Index 103281/06
Plaintiff-Respondent,

- against-

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

Hector M. Valentin, etc.,
Defendant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for appellants.

Debra Gandler, respondent pro se.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered August 31, 2007, which, to the extent appealed from, denied so much of the municipal defendants' motion for summary judgment as sought dismissal of all aspects of the complaint against them other than allegations of aiding and abetting the contractor defendant, unanimously reversed, on the law, without costs, the motion granted in its entirety and the complaint dismissed as against said defendants. The Clerk is directed to enter judgment accordingly.

Plaintiff alleges that the municipal defendants assumed and breached an affirmative duty to protect consumers like herself from building contractors' deceptive practices, pursuant to statutes governing the home improvement business (New York City Administrative Code §§ 20-385, *et seq.*). The Department of

Buildings (DOB) issued a work permit to plaintiff's agent (defendant Hector Valentin), who was unlicensed to perform home improvement renovations; on his application for the work permit, Valentin entered a fraudulent license number. Plaintiff alleges negligence, aiding deceptive business practices, and misrepresentation, and claims to have suffered damages because of Valentin's unprofessional renovation work at her residence. The municipal defendants moved for summary dismissal, arguing that plaintiff failed to raise an issue of fact as to whether a special relationship existed between herself and the City in connection with its issuance of the permit to Valentin.

The City's implementation of procedures for issuing permits does not constitute an assumption of an affirmative duty to protect homeowners like plaintiff from unscrupulous home improvement contractors. Moreover, there was no evidence of "direct contact" between the DOB's agents and plaintiff. In any event, plaintiff has not shown that using an agent to act on her behalf satisfies the "direct contact" requirement that is an element of a special relationship that would give rise to liability (*see Cuffy v City of New York*, 69 NY2d 255, 261-262 [1987]). Additionally, there was no showing of justifiable reliance, since there is no evidence that plaintiff knew about the Administrative Code's licensing requirements, or that she relied upon the DOB's authority to enforce the relevant consumer

protection laws.

Finally, the statutes at issue do not expressly authorize a private right of action, and such right cannot be implied from their language. The intent of the legislative scheme governing the home improvement business was to regulate contractors and enable homeowners to hold them accountable for their misconduct. The scheme was not intended to afford homeowners a right of action against the City for improperly enforcing the relevant statutes (*see generally Pelaez v Seide*, 2 NY3d 186 [2004]; *Garrett v Town of Greece*, 78 AD2d 773 [1980], *affd* 55 NY2d 774 [1981]).

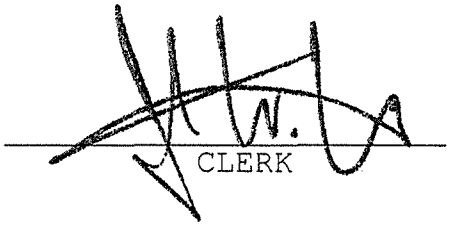
We have considered appellants' remaining arguments and find them without merit.

M-5497 ***Debra Gandler v City of NY, et al.,***

Motion seeking leave to strike reply brief granted.

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

ENTERED: DECEMBER 16, 2008



Andrias, J.P., Nardelli, Sweeny, DeGrasse, Freedman, JJ.

4842 Property Clerk of the Police Department of the City of New York, et al., Petitioners,

-against-

Jason Robinson, et al., Respondents.

Index 404478/07

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for petitioners.

Charles D. McFaul, New York, for respondents.

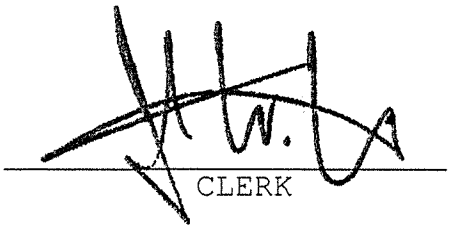
Determination of respondent New York City Office of Administrative Trials and Hearings (OATH), dated, April 20, 2007, which found that petitioners failed to establish their right to retain respondent Robinson's vehicle pending a civil forfeiture proceeding and ordered the vehicle released, unanimously annulled, on the law, without costs, and the petition in this proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Martin Shulman, J.], entered on or about August 7, 2007), granted to that extent.

Given the evidence that Robinson had committed a drug-related offense from the vehicle, that he was seen entering and exiting a house in which 49 bags of crack cocaine were found, that his car was parked outside the house, and that a ziplock bag of crack cocaine was found upon search of the car, OATH's

determination that petitioners failed to demonstrate probable cause for Robinson's arrest and a likelihood that they would succeed in the forfeiture proceeding was not supported by substantial evidence (*see Krimstock v Kelly*, 306 F3d 40 [2d Cir 2002] *cert denied* 539 US 969 [2003]). The absence of evidence as to whether Robinson had driven the car to the house or how long he had been out of the car are issues for the forfeiture hearing itself and are not necessary to the resolution of the *Krimstock* hearing (*id.* at 69-70).

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

ENTERED: DECEMBER 16, 2008



CLERK

Andrias, J.P., Nardelli, Sweeny, DeGrasse, Freedman, JJ.

4843N Anna Pezhman, Index 6889/05
Plaintiff-Appellant,

-against-

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

Anna Pezhman, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondents.

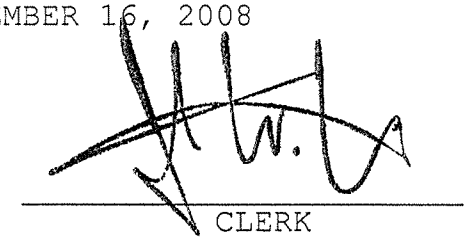
Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered June 26, 2008, which, in an action by a probationary teacher against defendants for defamation, denied plaintiff's motion to strike defendants' answer and granted defendants' cross motion for an order directing that a preliminary conference be held, unanimously affirmed, without costs.

Plaintiff's motion to strike defendants' answer was properly denied in light of her failure to submit an affirmation detailing the good faith efforts that were taken to resolve the discovery disputes (*see Chichilnisky v Trustees of Columbia Univ. in City of N.Y.*, 45 AD3d 393 [2007]; 22 NYCRR 202.7). Furthermore, plaintiff did not demonstrate that defendants' conduct during

discovery was willful, contumacious or in bad faith (*see Palmenta v Columbia Univ.*, 266 AD2d 90, 91 [1999])

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

ENTERED: DECEMBER 16, 2008



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Andrias, J.P., Nardelli, Sweeny, DeGrasse, Freedman, JJ.

4844N McMahan Securities Co. L.P., Index 603161/07
Petitioner-Appellant,

-against-

Aviator Master Fund, Ltd., et al.,
Respondents-Respondents.

Isaacs & Evans, LLP, New York (Leigh R. Isaacs of counsel), for appellant.

Gary H. Greenberg, New York, for respondents.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 16, 2008, which denied petitioner's application to stay arbitration and dismissed the proceeding, unanimously affirmed, with costs.

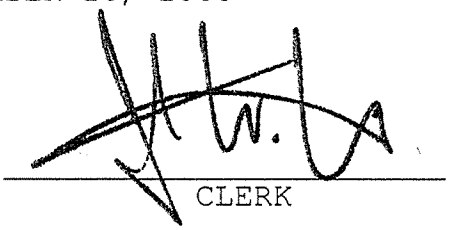
The court correctly found that respondents were the customers of petitioner, a member of the National Association of Securities Dealers (NASD) (now the Financial Industry Regulatory Authority) (*see Financial Network Inv. Corp. v Becker*, 305 AD2d 187, 188 [2003]), and therefore that petitioner must arbitrate pursuant to Rule 12200 of the NASD Code of Arbitration. Contrary to petitioner's contention, no waiver of the obligation to arbitrate is contained in the subscription agreements entered into by respondents and nonparty Strategy Real Estate Investments, Ltd.

Petitioner, which is not a signatory to any of the agreements, is not entitled to enforce the forum selection clause

as a third-party beneficiary (*see Mendel v Henry Phipps Plaza W., Inc.*, 16 AD3d 112 [2005], *affd* 6 NY3d 783 [2006]). The clear and unambiguous language of paragraph 13 of the subscription agreements explicitly excludes all but the signatories and their successors from its provisions. Nor has petitioner shown that it is a closely related entity so as to be entitled to enforce the forum selection clause (*see Freeford Ltd. v Pendleton*, 53 AD3d 32, 38-39 [2008]).

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

ENTERED: DECEMBER 16, 2008



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Jonathan Lippman, P.J.
Peter Tom
Richard T. Andrias
David B. Saxe, JJ.

4043N-4043NA-4043NB
Index 601175/07

Hotel 71 Mezz Lender LLC,
Plaintiff-Respondent,

-against-

Robert D. Falor, et al.,
Defendants-Appellants,

Amy Mitchell,
Defendant.

Defendants appeal from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered February 8, 2008, which, inter alia, granted plaintiff's motion to confirm an order of attachment, and from an order and supplemental order, same court and Justice, entered April 7, 2008, which, inter alia, granted plaintiff's motion for the appointment of a receiver, authorized the receiver to exercise dominion and control over designated property, and restrained defendants from disposing of or diverting their ownership and/or management interests in certain entities.

Tashjian & Padian, New York (Bradley M. Rank and Gerald Padian of counsel), for Robert D. Falor, David Falor, Chris M. Falor and Geoffrey L. Hockman, appellants.

Kilpatrick Stockton LLP, New York (Joseph Petersen and Christopher Lick of counsel), for Jennifer Falor, appellant.

Patterson Belknap Webb & Tyler, LLP, New York (Stephen P. Younger and Sarah E. Zgliniec of counsel), and Berger & Webb LLP, New York (Steven A. Berger and Thomas E. Hone of counsel), for Guy T. Mitchell, appellant.

Gibson, Dunn & Crutcher LLP, New York (Robert L. Weigel of counsel), and Akin Gump Strauss Hauer & Feld LLP, New York (John W. Berry and Robert H. Hotz, Jr. of counsel), for respondent.

Andrias, J.

On this appeal, appellants seek to vacate the pre-judgment order confirming the ex parte attachment of their membership interests in 23 entities, including Delaware, Georgia and Florida limited liability companies and a solely owned Florida corporation, and the subsequent orders conditionally appointing a receiver of those out-of-state interests.

The facts and the procedural history of the case are not in dispute. In March 2005, plaintiff made a $27,338,801 mezzanine loan to Chicago H&S Senior Investors, LLC for the purpose of acquiring and renovating Hotel 71 in downtown Chicago. Repayment of this loan was personally guaranteed by appellants. By its terms, the guaranty is governed by New York law and the guarantors submitted to the jurisdiction of any federal or state court in the City of New York. After the borrower defaulted on the loan and filed for bankruptcy, plaintiff commenced this action, in April 2007, to enforce the guaranty. On September 25, 2007, after defendants had appeared and answered, asserting counterclaims, plaintiff moved in the Commercial Division, pursuant to CPLR 6201, for an ex parte order of attachment because of the likelihood that if defendants were provided with notice they would avoid entering the jurisdiction. The court signed the ex parte order, but, according to its subsequent order confirming the order of attachment, stayed service of the levy

upon defendant Mitchell to afford him the opportunity to oppose the application.

On October 23, 2007, Mr. Mitchell appeared at the New York County courthouse for his deposition, in the course of which he was informed that the order of attachment had been issued four weeks earlier and that the court was waiting to hear counsel on the matter. After hearing counsel, the court instructed the Sheriff to serve Mr. Mitchell in the courtroom. Thereafter, by order to show cause dated November 2, 2007, plaintiff moved pursuant to CPLR 6211 to confirm the order of attachment and for expedited disclosure pursuant to CPLR 6220. Plaintiff later moved, by order to show cause dated January 25, 2008, to strike the answer and for summary judgment in the event any of the appellants, other than Jennifer Falor, did not appear for their scheduled depositions. That motion and any resulting order or judgment is not the subject of these consolidated appeals. Subsequently, by order to show cause dated March 19, 2008, plaintiff moved pursuant to CPLR 5228 for appointment of a receiver because of appellants' alleged refusal to produce documents related to their finances and their refusal to attend duly noticed depositions.

In the first order appealed from, entered February 8, 2008, the court granted plaintiff's motion to confirm the order of attachment in the sum of $65,149,926.00, on the grounds that

plaintiff demonstrated the statutory requisites to confirm attachment and that the court, in its discretion, found that attachment was necessary in aid of security. Thereafter, in the second order and supplemental order appealed from, entered April 7, 2008, the court granted plaintiff's motion pursuant to CPLR 3126 and 5228, conditioned upon the entry of judgment, and appointed a receiver of the personal property of all appellants, which is identified in the order as their ownership and/or management interests in various out-of-state limited liability companies. In so ruling, the court found that such relief was warranted by the defendants' refusal to produce documents related to their finances and their refusal to appear at depositions as ordered by the court.

It is long settled in New York that the fundamental rule in attachment proceedings is that "the res must be within the jurisdiction of the court issuing the process in order to confer jurisdiction" (*National Broadway Bank v Sampson*, 179 NY 213, 222 [1904]). Pursuant to that rule and for the following reasons, we reverse and vacate the order of attachment and the appointment of a receiver.

While the situs of the shares of a corporation is either "where the corporation exists" or where the shareholders are domiciled (*Matter of Enston*, 113 NY 174, 181 [1889]; *Sweeney, Cohn, Stahl & Vaccaro v Kane*, 6 AD3d 72, 79 [2004], *lv dismissed*

3 NY3d 751 [2004]), with respect to intangible interests such as debts and interests in corporate stock, the question whether the res is within the jurisdiction of the court issuing the process is less easily determined (*Sampson*, 179 NY at 223). Nevertheless, an attachment of a debt or other intangible property can only be effected as against the debtor or obligor by service upon him or her when he or she is domiciled within the state (*id.* at 223-224).

The mere fact that the order of attachment in this case was served upon defendant Mitchell, a resident and domiciliary of Florida, who was in New York temporarily solely to attend his deposition and does not dispute that he is the proper garnishee within the meaning of CPLR 5201(c)(1), does not establish the situs of the res, i.e., defendants' ownership and/or management interests, if any, in 23 entities, including Delaware, Georgia and Florida limited liability companies and a Florida corporation of which Mr. Mitchell is the sole shareholder, in New York.

The CPLR does not address the situs of such intangible property for attachment purposes (*see ABKCO Indus. v Apple Films*, 39 NY2d 670, 675 [1976]). As noted by Judge Cardozo more than 75 years ago:

> "The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them. The locality selected is for some purposes, the domicile of the creditor; for others, the domicile or place

> of business of the debtor, the place, that is to say, where the obligation was created or meant to be discharged; for others, any place where the debtor can be found. At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions" (*Severnoe Sec. Corp. v London & Lancashire Ins. Co.*, 255 NY 120, 123-124 [1931] [citations omitted]).

Since a limited liability company is a hybrid of a corporation and a limited partnership, owners of membership shares or interests not represented by certificates in a limited liability company should have rights comparable to those of corporate shareholders and limited partners (*see Bischoff v Boar's Head Provisions* Co., Inc. 436 F Supp 2d 626, 632 [SD NY 2006]). In *National Broadway Bank v Sampson* (179 NY at 219), the Court held that an interest in a limited partnership - as with a corporation - is situated where the partnership is formed and operates.

The dissent acknowledges that, "[i]n order to be subject to attachment, property must be within the court's jurisdiction" (quoting *Matter of National Union Fire Ins. Co. of Pittsburgh, Pa. v Advanced Empl. Concepts*, 269 AD2d 101, 101 [2000]) and that, unlike intangible property, "[t]angible personal property obviously has a unique location and can only be attached where it is" (quoting *ABKCO Indus.*, 39 NY2d at 675). The dissent then relies on *Harris v Balk* (198 US 215 [1905]) for the proposition that the situs of a debt is wherever the debtor can be found. However, although the *Harris* Court found that the situs of the

intangible in that case (an oral promise to repay a $180 debt) had been fixed, "the same intangible may not have the same situs in other contexts" (Siegel, New York Practice § 487, at 826 [4th ed]). The dissent also neglects to point out that the bank accounts unsuccessfully sought to be attached in *Matter of National Union* (*supra*) clearly were intangible property.

While recognizing that defendants' recitation of the law regarding the court's lack of jurisdiction over the interests sought to be attached was correct, the court nevertheless found it unpersuasive because plaintiff, rather than using the provisional remedy of attachment for jurisdictional purposes, was seeking to use it as a security device to ensure that any money judgment it obtained would be satisfied. However, whether it is being used for purposes of obtaining in rem or quasi in rem jurisdiction or for purposes of obtaining security for a potential money judgment against a nondomiciliary defendant, given the facts of this case, the fundamental principles governing the provisional remedy of attachment and the situs of intangible property are the same.

As noted by the Commercial Division, defendants voluntarily submitted to the jurisdiction of the court pursuant to the terms of the guaranty of payment sued upon. It is also undisputed that neither Mr. Mitchell and the other nondomiciliary defendants nor any of the nondomiciliary entities in which they have or are

claimed to have an attachable interest have any tangible or intangible property in New York. Defendants' only apparent assets are commercial properties located in the states where the aforementioned entities are registered or incorporated. Thus, applying the foregoing principles, we find that it was error to grant plaintiff's motion to confirm the ex parte order of attachment previously issued by the court.

Likewise, it is equally well settled that where a judgment relates strictly to the internal affairs and management of a foreign corporation, or in this case a foreign limited liability company, "the court should decline jurisdiction [to appoint a receiver] because such questions are of local administration, and should be relegated to the courts of the State or country under the laws of which the corporation [or in this case limited liability company] was organized" (*Acken v Coughlin*, 103 App Div 1, 3 [1905]). Instead of appointing a receiver of defendants' ownership and/or management interests in the foreign entities with the power to assume any management role they may have in those entities and authorizing him to seek the aid of the courts of those states in which the real estate is located in executing his duties as receiver, plaintiff, the now judgment creditor, should have been relegated to the states of the companies' situses where it could have receivers appointed upon a proper showing of necessity (*see Matter of Burge [Oceanic Trading Co.]*,

282 App Div 219 [1953], *affd* 306 NY 811 [1954]).

Finally, in determining whether the appointment of a receiver constitutes a provident exercise of discretion, we consider "the alternative remedies available to the creditor," "the degree to which receivership will increase the likelihood of satisfaction," and "the risk of fraud or insolvency if a receiver is not appointed" (*Matter of Chlopecki v Chlopecki*, 296 AD2d 640, 641 [2002], quoting *United States v Zitron*, 1990 Dist LEXIS 1049, *2 [SD NY 1990]). Here, at the time the receiver was appointed, defendants were contemporaneously restrained pursuant to CPLR 5229 from transferring or otherwise disposing of their assets, including their interests, if any, in the nondomiciliary companies, and that part of the supplemental order appealed from is affirmed.

Accordingly, the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered February 8, 2008, which, inter alia, granted plaintiff's motion to confirm an order of attachment, should be reversed, on the law, without costs, plaintiff's motion to confirm the order of attachment denied and the ex parte order of attachment, same court and Justice, dated September 25, 2007, vacated. The order and supplemental order of the same court and Justice, entered April 7, 2008, which, inter alia, granted plaintiff's motion for the appointment of a receiver, and authorized the receiver to exercise dominion and

control over certain designated property, should be modified, on the law, the motion for the appointment of a receiver denied, the order and supplemental order vacated except the tenth decretal paragraph of the supplemental order which restrains defendants from disposing of or diverting their ownership and/or management interests in the entities designated in subsections (a), (b), (c), (d), and (e) of the first decretal paragraph in the supplemental order, and otherwise affirmed, without costs.

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

SAXE, J. (dissenting)

When a plaintiff's right to a money judgment against a defendant appears to be clear, and grounds for a pre-judgment attachment of assets owned by the defendant is similarly self-evident, if means exist by which those assets may be treated as located within this state so as to be available for attachment the response of a court considering a challenge to such an attachment should not be to bend over backwards to protect such assets from the plaintiff's reach.

The position advanced in this writing, that service on a proper garnishee while that individual is in New York -- even temporarily -- is enough to permit the attachment of an intangible asset, the situs of which would otherwise be outside the state, is supported by the statutory framework of CPLR article 62 and *Harris v Balk* (198 US 215, 222 [1905]). The proposition advanced by the majority, that an attachment of intangible property can be properly effected only if the garnishee is *domiciled within this state*, finds support only in a Court of Appeals decision from 1904 (*see National Broadway Bank v Sampson* (179 NY 213 [1904]), and not in the statutory framework of CPLR article 62 or the subsequent holding of the United States Supreme Court in *Harris v Balk* (*supra*). Accordingly, in this action to enforce a guaranty of payment, I would affirm the motion court's grant of plaintiff's application to attach

defendants' interests in the specified entities.

Facts

In March 2005, plaintiff Hotel 71 Mezz Lender, LLC loaned funds to Chicago H&S Senior Investors, LLC, for the acquisition and renovation of a hotel, Hotel 71, located in downtown Chicago. Defendants Robert D. Falor, David Falor, Chris M. Falor, Jennifer Falor, Geoffrey L. Hockman and Guy T. Mitchell executed a personal guaranty of payment unconditionally agreeing to be jointly and severally liable for the borrower's obligations. The borrower thereafter defaulted on the loan, ultimately filing for bankruptcy protection in the Northern District of Illinois. It is acknowledged that the loan debt was a valid and payable claim.

Plaintiff commenced this action to enforce the guaranty, and obtained an ex parte order of attachment over defendants' interests in 23 out-of-state entities, specifically, eight Florida LLCs, nine Georgia LLCs, five Delaware LLCs and one Florida corporation. The motion court permitted the levy to be served upon defendant Guy Mitchell as garnishee and as the apparent manager of the entities, after he appeared in court to oppose the application.

Plaintiff's motion for the requisite order confirming the ex parte order of attachment (*see* CPLR 6211[b]) was granted in the first order appealed from, in which the court observed that "[d]efendants are non-domiciliaries, and have voluntarily

submitted to the jurisdiction of the court, accepted service of summons and complaint upon them, and served answers and counterclaims." As to defendants' contention that the court lacked jurisdiction, the court explained that "[r]ather than utilizing the device of attachment for jurisdictional purposes in order to obtain quasi in rem jurisdiction, the Lender is pursuing attachment to serve the second function of the provisional remedy of attachment: as a security device, to insure that a money judgment will be satisfied in the event that it is obtained." It concluded that "where, as here, the Defendants are subject to in personam jurisdiction, and the plaintiff is pursuing attachment in aid of security, the correct inquiry is whether the defendant's past or present conduct demonstrates an identifiable risk that the defendant would be unable to satisfy a future judgment," a threshold satisfied by the evidence that defendants are in a precarious financial position and likely will be unable to satisfy any judgment obtained by plaintiff. Thereafter, in the second order appealed from, the motion court granted plaintiff's subsequent motion for appointment of a receiver to administer or sell any real or personal property in which defendants had any ownership interest.

Defendants challenge both the validity of the order of attachment and the appointment of a receiver over their properties. The majority agrees with defendants' contention that

the assets in question are located out of state and are therefore not subject to attachment, and, on that ground, vacates the attachment and the subsequent orders.

Discussion

It should be emphasized at the outset that personal jurisdiction was properly asserted over defendants. The guaranty of payment was negotiated in the State of New York, involved a loan agreement that was entered into in New York and concerned funds disbursed here, and was signed by Robert D. Falor, Jennifer Falor, David Falor, Chris Falor, Amy Mitchell, Geoffrey Hockman and Guy T. Mitchell. By the broad and unconditional terms of the guaranty, defendants waived all defenses and counterclaims except actual payment (*see Citibank v Plapinger*, 66 NY2d 90, 92 [1985]; *Red Tulip, LLC v Neiva*, 44 AD3d 204, 207-209 [2007], *lv dismissed* 10 NY3d 741 [2008]), and it is undisputed that payment was never made. Plaintiff's right to seek all available relief against defendants is manifest, including the provisional remedy of attachment.

It is also plain that plaintiff made the showing necessary to confirm an ex parte attachment order (*see* CPLR 6212[a]), by establishing that it had a cause of action against defendants, who are nondomiciliaries residing outside the state (*see* CPLR 6201[1]), that there was a high probability it would succeed on the merits, and that the amount it was owed by defendants

exceeded any counterclaim that defendants might have possessed. In addition, there was ample evidence that defendants were in a precarious financial condition that presented a real risk that they would be unable to satisfy a judgment against them.

The only point at issue here is whether the properties plaintiff sought to attach were subject to the court's authority, because "[i]n order to be subject to attachment, property must be within the court's jurisdiction" (*Matter of National Union Fire Ins. Co. of Pittsburgh, Pa. v Advanced Empl. Concepts*, 269 AD2d 101, 101 [2000]; *see* 30 NY Jur 2d, Creditors' Rights § 24). Defendants contend that their ownership interests in the various limited liability companies that plaintiff sought to attach were not located in this state and therefore could not properly be attached.

To analyze this issue, it is useful to review briefly the process and parameters of attachment. "Any debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment" (CPLR 6202). This includes "[a]lmost any interest the judgment debtor has in any kind of property, real or personal, tangible or intangible" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5201:9 at 67). For instance, "[p]rominent among the commercial sources of intangible interests is the judgment debtor's interest in a partnership" (*id.*, C5201:13 at 74). "The

rule of thumb is that whatever the interest the debtor has is an interest the creditor can reach" (*id.* at 68). Indeed, the debtor may own title but not have a right of possession, or, conversely, "may have the right to the possession of an asset for a time even if title belongs to someone else"; if that which the debtor possesses or owns has any kind of value that is capable of drawing a bidder at a sheriff's sale, it is leviable (*id.*).

Real property within this state may be attached simply by the sheriff's filing a notice of attachment with the clerk of the county in which the property is located, which serves the same function as a notice of pendency. Similarly, "[t]angible personal property obviously has a unique location and can only be attached where it is" (*see ABKCO Indus. v Apple Films*, 39 NY2d 670, 675 [1976]), so to attach tangible personal property, the sheriff may either physically take possession of the property or simply serve the order of attachment on the appropriate garnishee (Siegel, NY Practice § 320, at 510 [4th ed]), defined as a "person who has in his possession or custody [the] property in which the defendant has an interest" (*id.*, § 313, at 500).

Unlike tangible personal property, an intangible ownership interest may not physically exist at any particular location. Intangible ownership interests that are embodied in formal documents, such as negotiable instruments, may be considered to be located where the written instruments are physically present

(*see ABKCO Indus.*, 39 NY2d at 675), and the situs of the shares of a corporation is either where the corporation exists or where the shareholders are domiciled (*see Sweeney, Cohn, Stahl & Vaccaro v Kane*, 6 AD3d 72, 79 [2004], *lv dismissed* 3 NY3d 751 [2004], citing *Matter of Enston*, 113 NY 174, 181 [1889]). But the question of how to pinpoint the location of an uncertificated ownership interest in a company is far less clear-cut. When it comes to a broad range of intangibles, "[t]he CPLR contains no provision as to the situs of [intangible] property for attachment purposes" (*ABKCO Indus.*, 39 NY2d at 675). In fact, it is frequently observed that determining the situs of such intangibles involves employing legal fictions (*see Severnoe Sec. Corp. v London & Lancashire Ins. Co.*, 255 NY 120, 123-124 [1931]; Kennedy, *Garnishment of Intangible Debts in New York*, 35 Yale LJ 689, 690 [1926]). Consequently, the definition in CPLR 5201(c)(1) of the proper garnishee for such uncertificated ownership interests becomes central to determining the location of the asset. As Professor David Siegel has explained, "[f]inding the garnishee is just another way of finding the asset's 'situs': if the garnishee has a New York presence, the debtor's asset in the garnishee's hands will usually be found to have a New York situs, too" (Siegel, New York Prac § 491, at 835).

The analysis that should be applied here is found in *Harris*

v Balk (198 US 215, 222, *supra*). There, the U.S. Supreme Court permitted a Maryland plaintiff who had a money claim against an out-of-state individual to attach a debt concededly owed by a third party to that out-of state individual, by serving an order of attachment on that third party when he happened to be present in Maryland temporarily. The Court explained that a debt may be attached when the garnishee is served within the state, regardless of whether the garnishee resides there or is only there temporarily. "The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes. He is as much bound to pay his debt in a foreign state when therein sued upon his obligation by his creditor, as he was in the state where the debt was contracted," and "[i]t is nothing but the obligation to pay which is garnished or attached" (*id.* at 222-223).

By a parity of reasoning, service of an order of attachment in this state on the individual who is the appropriate garnishee of intangible assets owned by defendants must result in the successful attachment of those assets. That such attachable intangible assets relate to entities that were formed out of state and own out-of-state commercial properties need not render the debtors' ownership interests in those entities unattachable. Attachment of the debtors' intangible ownership interests is not the same as attaching the out-of-state commercial properties that are assets of those entities. Just as a debtor carries his debt

when he enters another state, an individual deemed to be in possession of other individuals' uncertificated ownership interests in business entities carries those intangibles around with him, and they are attachable in this state when he is present here.

The majority offers the novel proposition that membership interests in limited liability companies should be treated as the equivalent of shares in a corporation, which are deemed to be situated either where the corporation operates or where its shareholders are domiciled. This has no support in law and merely substitutes a new legal fiction for that which has been employed in New York for decades. Therefore, I disagree with the majority's contention that the legal situs of intangible interests in out-of-state limited liability companies for attachment purposes can only be the out-of-state location where the entity was formed and where it operates. Rather, when it comes to attaching the intangible assets of defendants, we have consistently relied solely on the presence in the state, whether permanent or merely temporary, of the garnishee (*see* Siegel, New York Prac § 491, at 835). Siegel's observation, quoted by the majority, that an intangible may be considered to have different situses in different contexts (Siegel, New York Prac § 487, at 826) does not negate his recognition that "if the garnishee has a New York presence, the debtor's asset in the garnishee's hands

will usually be found to have a New York situs, too" (*id.*, § 491, at 835).

The majority relies on *National Broadway Bank v Sampson* (179 NY 213 [1904]) for the proposition that the situs of an intangible res is the *domicile* of the debtor, so that the court cannot obtain jurisdiction over the res by service upon a non-resident garnishee who was only temporarily present in this state. However, the restrictive approach to attachment of an intangible asset set out in *National Broadway Bank v Sampson* and advanced by the majority is contrary to the reasoning of and policy behind *Harris v Balk* (*supra*).

I would add only that, to the extent there is any perceived lack of certainty about whether an intangible may be treated as present in this state based upon the temporary presence of the appropriate garnishee of that intangible, the undisputed circumstances themselves weigh heavily in favor of permitting the attachment in this case. Plaintiff's entitlement to a money judgment against defendants is established, and any assets defendants possess should be made available for purposes of enforcement.

Indeed, the court's personal jurisdiction over defendants would have permitted the court to direct defendants to turn over the interest in out-of-state assets to a New York sheriff (*see Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 41 AD3d 25, 31

[2007], *lv denied* 10 NY3d 705 [2008]). The remark in *Gryphon* that "it would violate the sovereignty of another state if a New York sheriff tried to attach property in another state" (*id.*) was clearly intended to apply to property that was tangible or otherwise physically present in the other state; it was not applicable to circumstances in which the New York court had personal jurisdiction over the defendants and where the order of attachment was directed at an assignable or transferable intangible ownership interest. In fact, *Gryphon* not only recognizes that a judgment creditor may enforce its judgment by a turnover order covering out-of-state property, but, in addition, it emphasizes that no distinction should be made between "debt" and "property" for purposes of the enforcement of judgments (*id.* at 36), which provides further support for the application of the reasoning of *Harris v Balk* (*supra*) to the attachment order we consider here.

Finally, as to the court's subsequent appointment of a receiver, "[u]pon motion of a judgment creditor . . . the court may appoint a receiver who may be authorized to administer, collect, improve, lease, repair or sell any real or personal property in which the judgment debtor has an interest or to do any other acts designed to satisfy the judgment" (CPLR 5228[a]; *see Matter of Chlopecki v Chlopecki*, 296 AD2d 640, 641 [2002]). In view of defendants' complete unwillingness to cooperate with

plaintiff's effort to collect upon its judgment, the court was warranted in appointing a receiver to "aid in post-judgment enforcement" (*Old Republic Natl. Tit. Ins. Co. v Cardinal Abstract Corp.*, 14 AD3d 678, 681 [2005]), and defendants cannot contend that the receiver appointed herein will not discharge his duties faithfully.

The other defenses interposed by individual defendant Guy T. Mitchell and Jennifer Falor were properly rejected by the motion court.

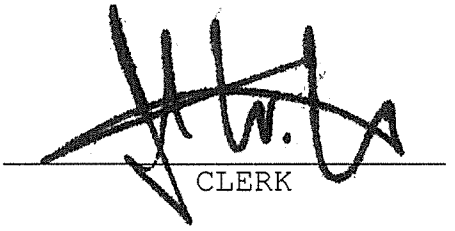
Accordingly, I would affirm.

M-2603 ***Hotel 71 Mezz Lender LLC v Guy T. Mitchell***

Motion seeking leave to enlarge record denied.

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

ENTERED: DECEMBER 16, 2008



CLERK