SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 26, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Tom, Andrias, Saxe, JJ.

4024 The People of the State of New York, Respondent, Ind. 5112/04

-against-

Valeressa Jackson,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Timothy C. Stone of counsel), for respondent.

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered January 3, 2006, convicting defendant, after a jury trial, of assault in the second degree, and sentencing her, as a second violent felony offender, to a term of 6 years, unanimously affirmed.

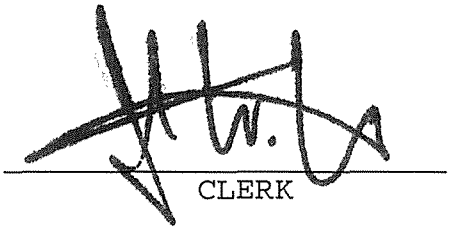
The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations concerning the resolution of conflicting testimony. The victim's prior inconsistent statements concerning the cause of her injuries were fully

explained by her fear of defendant.

The court properly exercised its discretion in denying defendant's mistrial motion, made after a witness inadvertently referred to defendant's previous incarceration, since the reference was brief and the court issued prompt curative instructions to the jury to disregard the remark (*see e.g. People v Greene*, 250 AD2d 547 [1998], *lv denied* 92 NY2d 925 [1998]). The jury is presumed to have followed those instructions (*see People v Davis*, 58 NY2d 1102, 1104 [1983]).

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

ENTERED: JUNE 26, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on June 26, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
David Friedman
Luis A. Gonzalez
James M. Catterson, Justices.

Allison L. Wey,
Plaintiff-Respondent-Appellant,

Index 602510/05

-against-

2128

The New York Stock Exchange, Inc., et al.,
Defendants-Appellants-Respondents.

- - - -

Allison L. Wey,
Plaintiff-Appellant,

-against-

2128A

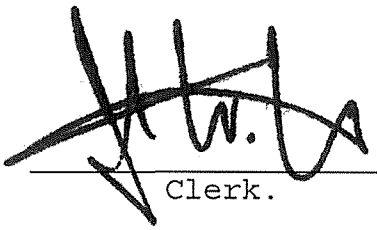
The New York Stock Exchange, Inc., et al.,
Defendants-Respondents.

Cross appeals having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Charles Edward Ramos, J.), entered on or about April 16, 2007, and order, same court and Justice, entered November 13, 2007,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated June 13, 2008,

It is unanimously ordered that said appeals be and the same are hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTER:



Clerk.

Lippman, P.J., Tom, Andrias, Saxe, JJ.

4025 Bed Bath & Beyond Inc., Index 601227/05
Plaintiff-Respondent, 590049/06

-against-

Ibex Construction, LLC,
Defendant/Third-Party
Plaintiff-Appellant,

-against-

Travelers Casualty & Surety Company of America,
Third-Party Defendant-Respondent.

Goetz Fitzpatrick LLP, New York (Neal M. Eiseman of counsel), for appellant.

Peckar & Abramson, P.C., New York (Gregory H. Chertoff of counsel), for respondents.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered December 10, 2007, which denied defendant's (Ibex) motion for summary judgment dismissing the complaint while continuing its counterclaims against plaintiff, and granted plaintiff's and third-party defendant's cross motion for summary judgment to the extent of declaring that the Letter of Intent (LOI) and expressly incorporated documents constituted a valid and enforceable contract between plaintiff and Ibex, and dismissing Ibex's counterclaim for quantum meruit relief, unanimously affirmed, with costs.

The motion court properly determined that the LOI entered into by plaintiff and Ibex in connection with a construction

project was a binding agreement. The plain language of the LOI manifests the parties' intent to be bound by its terms (*see Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 399 [1977]; *Henri Assoc. v Saxony Carpet Co.*, 249 AD2d 63, 66 [1998]); it does not contain an express reservation by either party of the right not to be bound until a more formal agreement is signed (*see Emigrant Bank v UBS Real Estate Sec., Inc.*, 49 AD3d 382, 383-384 [2008]), and clearly sets forth the price, scope of work to be performed, and time for performance (*see T. Moriarty & Son v Case Contr.*, 287 AD2d 390 [2001]).

Contrary to Ibex's contention, use of the language "subject to" in the LOI, and reference to the execution of a Construction Agreement as a "qualification," do not amount to an express reservation of the right not to be bound (*see Emigrant Bank*, 49 AD3d at 383-84), or a condition precedent to the formation of a binding contract (*cf. Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 691 [1995]). Similarly, the fact that the parties' writing is denominated a "Letter of Intent" and calls for the execution of a more formal Construction Agreement does not render it an unenforceable agreement to agree (*see Hajdu-Nemeth v Zachariou*, 309 AD2d 578 [2003]). Furthermore, the record demonstrates that by moving forward with the project even in the absence of the fully executed Construction Agreement, Ibex

manifested its intent to be bound by the LOI (*see T. Moriarty & Son*, 287 AD2d at 390).

Because a binding agreement governing the construction project exists, Ibex's counterclaim for quantum meruit relief was appropriately dismissed (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

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

ENTERED: JUNE 26, 2008

Lippman, P.J., Tom, Andrias, Saxe, JJ.

4026 In re David J.B.,
Petitioner-Appellant,

-against-

Monique H.,
Respondent-Respondent.

Soto, Sanchez & Negron, LLP, Yonkers (Wilson Soto of counsel), for appellant.

Anne Reiniger, New York, for respondent.

Carol Sherman, The Children's Law Center, Brooklyn (Barbara H. Dildine of counsel), Law Guardian.

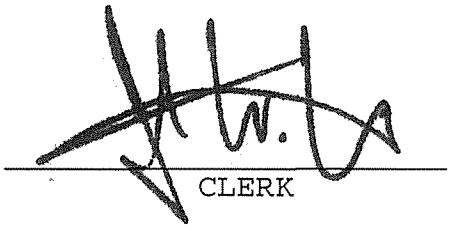
Order, Family Court, Bronx County (Diane Kiesel, J.), entered on or about September 6, 2006, which granted a final order of custody to respondent mother, including permission to relocate with the subject children to Florida, and a final order of visitation to petitioner father, unanimously affirmed, without costs.

"It is well established that in reviewing relocation and other custody issues, deference is to be accorded to the determination rendered by the factfinder, unless it lacks a sound and substantial basis in the record" (*Yolanda R. v Eugene I.G.*, 38 AD3d 288, 289 [2007]). Here, the record shows that in considering the custody and relocation issues, the court properly

considered the "best interests" of the children (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]; *Matter of Tropea v Tropea*, 87 NY2d 727, 739-741 [1996]), and a preponderance of the evidence supports the court's award of custody to respondent mother, including permitting her to remain in Florida with the children.

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

ENTERED: JUNE 26, 2008



CLERK

Lippman, P.J., Tom, Andrias, Saxe, JJ.

4027 GENC Realty LLC, Index 570608/04
Petitioner-Respondent,

-against-

Selman Nezaj,
Respondent-Appellant,

"John Doe," etc., et al.,
Respondents.

Altman & Altman, Bronx (Joseph A. Altman of counsel), for appellant.

Buglione, Cohen & Fritz, LLC, Bronx (Mark H. Cohen of counsel), for GENC Realty LLC, respondent.

Order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered on or about November 22, 2006, which affirmed a judgment of the Civil Court, Bronx County (Brenda S. Spears, J.), entered on or about September 24, 2004, awarding possession of the subject apartment to petitioner landlord upon a finding that respondent's right to occupy the apartment was an incident of his employment as superintendent of the building, and, as such, terminated along with his employment, unanimously affirmed, without costs.

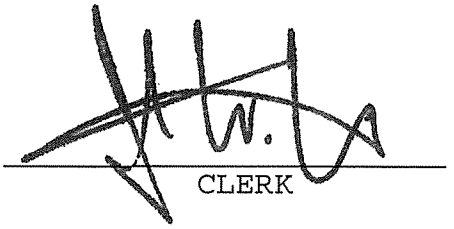
Although respondent, as the husband of the tenant of record of another apartment in the building, was previously protected under the Rent Stabilization Law (*see Festa v Leshen*, 45 AD2d 49 [1989]; *Matter of Waitzman v McGoldrick*, 20 Misc 2d 1085 [Sup Ct, Kings County 1953]), when he accepted employment as the

superintendent, and moved into the separate superintendent's apartment, he "exchanged his status of tenant for that of employee and the landlord-tenant relationship ceased to exist" (*Marsar Gardens v Guevara*, 108 Misc 2d 817, 819 [Civ Ct, Queens County 1981]; *compare Mohr v Gomez*, 173 Misc 2d 553 [App Term, 1st Dept 1997] [respondent's occupancy dependent on employment where he moved from his rent stabilized apartment to the super's apartment in same building upon becoming super], *with Yui Woon Kwong v Guido*, 129 Misc 2d 211 [Civ Ct, NY County 1985] [respondent's occupancy not dependent on employment where he remained in his rent stabilized apartment upon becoming super]). The undated, handwritten note introduced by respondent, allegedly initialed by petitioner's representative when respondent became superintendent, and purporting to promise respondent a renewable, regulated two-year lease in the event his employment as superintendent were terminated, lacks probative value. Petitioner's representative denied ever having initialed this paper, and respondent himself originally testified that there was no written agreement. We have also considered and rejected

respondent's argument that the petition fails to state a cause of action.

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

ENTERED: JUNE 26, 2008



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Lippman, P.J., Tom, Andrias, Saxe, JJ.

4028 The People of the State of New York, Respondent, Ind. 255/06

-against-

Marvin Soberanis, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Jung Park of counsel), for respondent.

Judgment, Supreme Court, New York County (Arlene Goldberg, J.), rendered November 17, 2006, convicting defendant, after a jury trial, of criminal possession of a weapon in the second and third degrees, and sentencing him to concurrent terms of 12 years and 7 years, respectively, unanimously affirmed.

Defendant's legal sufficiency argument is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also find that the verdict was based on legally sufficient evidence. Furthermore, the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Although it is undisputed that defendant was justified in using a firearm against an armed assailant, the evidence supports the conclusion that the weapon defendant used was already in his possession prior to his justified use of it, and defendant's argument to the contrary is

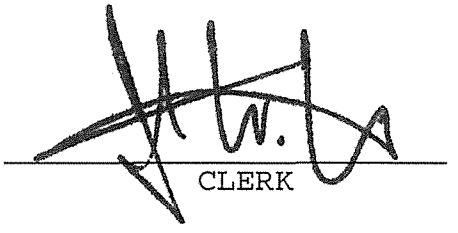
speculative. We also reject defendant's ineffective assistance of counsel claim relating to these issues (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

Since the court gave the jury the instruction defendant expressly requested, and since defendant did not object to the instruction as delivered, his challenge to the court's discussion of circumstantial evidence in its charge is unpreserved (*see People v Lewis*, 5 NY3d 546, 551 [2005]; *People v Whalen*, 59 NY2d 273, 280 [1983]) and we decline to review it in the interest of justice. As an alternative holding, we find that there was no need to instruct the jury on the standard of proof in a wholly circumstantial case, since the People did not rely entirely on circumstantial evidence (*see People v Daddona*, 81 NY2d 990, 992 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 26, 2008



CLERK

Lippman, P.J., Tom, Andrias, Saxe, JJ.

4029 Boslow Family Limited Partnership, et al.,
Plaintiffs-Appellants,

-against-

Kaplan & Kaplan, PLLC, et al.,
Defendants-Respondents.

Index 110731/03

Llorca & Hahn, LLP, New York (Richard E. Hahn of counsel), for appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Thomas A. Leghorn of counsel), for respondents.

Order, Supreme Court, New York County (Marcy Friedman, J.), entered November 1, 2007, which granted defendants' motion for summary judgment dismissing the complaint as time-barred and denied plaintiffs' cross motion for summary judgment dismissing defendants' second affirmative defense based on the statute of limitations, unanimously affirmed, with costs.

Since plaintiffs' claim, while cast in contract, is essentially that defendants failed to perform services in a professional, non-negligent manner, it is governed by the three-year statute of limitations (*Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co., Inc.]*, 3 NY3d 538 [2004]). Plaintiffs have not identified any particular provision of a written retainer agreement whereby defendants contracted to

provide a particular result above and beyond what they might be expected to accomplish using due care (*id.* at 542-543; *see also Sarasota, Inc. v Kurzman & Eisenberg, LLP*, 28 AD3d 237 [2006]).

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

ENTERED: JUNE 26, 2008

CLERK

Lippman, P.J., Tom, Andrias, Saxe, JJ.

4030-
4030A Maria Teresa Bacani, etc., et al., Index 118041/05
Plaintiffs-Appellants,

-against-

Lisa Rosenberg, M.D., et al.,
Defendants-Respondents.

Bubb Grogan & Cocca, LLP, Morristown, NJ (Christopher L. Deininger of counsel), for appellants.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Deirdre E. Tracey of counsel), for Lisa Rosenberg, M.D., respondent.

Russo, Keane & Toner, LLP, New York (Thomas F. Keane of counsel), for Deepak Nanda, M.D., respondent.

Benvenuto, Arciero & McAndrew, Manhasset (James W. Tuffin of counsel), for Arthur Fougner, M.D., respondent.

Bartlett, McDonough, Bastone & Monaghan, LLP, White Plains (Gina Bernardi Di Folco of counsel), for Adiel Fleischer, M.D. and Long Island Jewish Medical Center, respondents.

Bondi & Iovino, Garden City (Desirée Lovell Fusco of counsel), for Sonoscan, Inc., respondent.

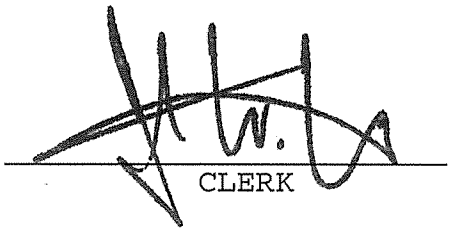
Order, Supreme Court, New York County (Stanley L. Sklar, J.), entered June 6, 2007, which granted defendants' motions to dismiss the third cause of action in the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered February 15, 2007, for similar relief, unanimously dismissed, without costs.

The court properly dismissed the wrongful death claim on behalf of a stillborn fetus in this medical malpractice action.

It has long been the law in this State that there is no right of recovery under our wrongful death statute (EPTL 5-4.1) for a fetus stillborn as a result of injuries received while en ventre sa mere (*Endresz v Friedberg*, 24 NY2d 478, 485 [1969]). We find no basis for departing from this long-standing and well-settled interpretation of the statute (*see Matter of Knight-Ridder Broadcasting v Greenberg*, 70 NY2d 151, 157 [1987]).

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

ENTERED: JUNE 26, 2008



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Lippman, P.J., Tom, Andrias, Saxe, JJ.

4031 The People of the State of New York, Respondent, Ind. 5687/04 1750/03

-against-

Ambioris Ortiz, Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Renee White, J. at plea and sentence), rendered on or about July 24, 2005, unanimously affirmed.

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

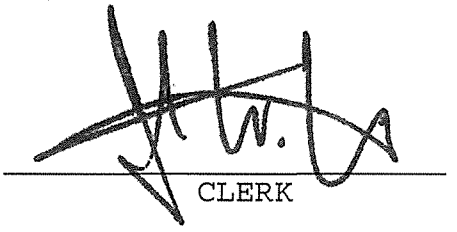
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

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

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

ENTERED: JUNE 26, 2008



CLERK

Lippman, P.J., Tom, Andrias, Saxe, JJ.

4032-
4033 Patricia O. Loftman, Index 121601/02
Plaintiff-Appellant,

-against-

Columbia University,
Defendant-Respondent.

Rachel J. Minter, New York, for appellant.

Putney, Twombly, Hall & Hirson LLP, New York (Michael T. McGrath of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 2, 2007, which, to the extent appealed from as limited by the brief, after a nonjury trial, dismissed the cause of action for disparate pay based on race, unanimously affirmed, without costs.

Plaintiff failed to meet her initial burden of establishing prima facie that she, an African-American, received a lower salary than that of similarly situated midwives under circumstances giving rise to an inference of race discrimination (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). In any event, defendant introduced evidence of legitimate reasons for its salary determinations, and plaintiff failed to prove that those reasons were false and that discrimination was the real reason (*see id.*). The evidence established that defendant's hiring of new midwives at higher

rates of pay while not increasing plaintiff's salary was prompted by short-staffing, a wage freeze for on-staff midwives, and the salary demands of prospective new hires; that, in order to increase salaries notwithstanding the freeze, defendant revised the job description to include night and weekend work and work at a satellite clinic; and that when the new job description was offered to the on-staff midwives, plaintiff accepted the offer and received a substantial increase in salary.

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: JUNE 26, 2008

CLERK

Lippman, P.J., Tom, Andrias, Saxe, JJ.

4034 ALIB, Inc., et al., Index 20285/06
Plaintiffs-Appellants,

-against-

Atlantic Casualty Insurance Company, et al.,
Defendants-Respondents,

Nerio Lopez, et al.,
Defendants.

Bertram Herman, P.C., Mount Kisco (Bertram Herman of counsel), for appellants.

Nixon Peabody LLP, New York (Aidan M. McCormack of counsel), for Atlantic Casualty Insurance Company, respondent.

Fiedelman & McGaw, Jericho (Andrew Zajac of counsel), for Roger Metzger Associates, Inc., respondent.

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered July 20, 2007, which, in a declaratory judgment action seeking a declaration and damages with respect to obligations under an insurance policy, granted the motion of defendant Roger Metzger Associates, Inc. (RMA) pursuant to CPLR 3211(a)(7) to dismiss the complaint as against it, granted the cross motion of defendant Atlantic Casualty Insurance Company (Atlantic) for summary judgment dismissing the complaint as against it, and denied plaintiffs' cross motion for summary judgment, unanimously affirmed, without costs.

Plaintiff ALIB, Inc. was not afforded additional insured status under the insurance policy issued by Atlantic to AFA

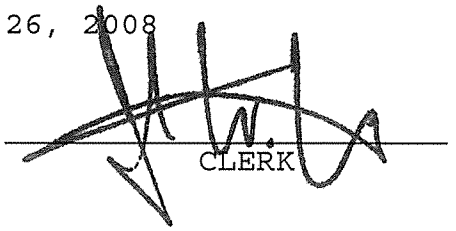
Construction Co., where the written contract entered into between AFA and ALIB did not require AFA to name ALIB as an additional insured, as required by the subject policy (*see Nicotra Group, LLC v American Safety Indem. Co.*, 48 AD3d 253, 254 [2008]). Nor did the certificate of insurance, which contained the disclaimer that it was "issued as a matter of information only and confers no rights upon the certificate holder" and that it did not "amend, extend or alter the coverage afforded" by the subject policy, confer additional insured status (*id.; see Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d 337, 339 [2003]), even if assurances were provided that ALIB was an additional insured (*see American Ref-Fuel Co. of Hempstead v Resource Recycling, Inc.*, 248 AD2d 420, 423-424 [1998]).

Furthermore, even if there was coverage, the claim is barred by the policy's employee exclusionary clause (*see Moleon,* 304 AD2d at 339-340 [2003]), and contrary to plaintiffs' contention, the record shows that Atlantic's disclaimer, issued 20 days after receiving notice of the claim, was timely *(see Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40, 44-45 [2002]).

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

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

ENTERED: JUNE 26, 2008



Lippman, P.J., Tom, Andrias, Saxe, JJ.

4035 The People of the State of New York, Respondent,

-against-

Adedayo Ilori, Defendant-Appellant.

Ind. 3541/06

Curtis J. Farber, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Alan Gadlin of counsel), for respondent.

Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered May 21, 2007, convicting defendant, after a jury trial, of three counts of criminal possession of a forged instrument in the second degree, and sentencing him, as a second felony offender, to concurrent terms of 2½ to 5 years, unanimously affirmed.

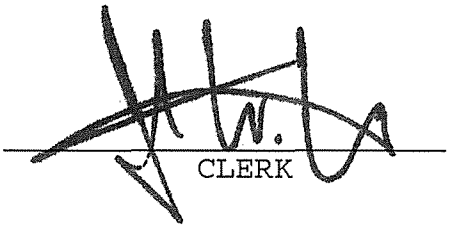
Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they primarily involve matters outside the record concerning trial counsel's investigation, preparation and strategy (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

Defendant's challenges to the court's preliminary jury

instructions, and to its overall conduct of the trial, are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that neither claim warrants reversal.

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

ENTERED: JUNE 26, 2008



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Lippman, P.J., Tom, Andrias, Saxe, JJ.

4036 Carmen Garcia, et al., Index 21287/05
Plaintiffs-Respondents,

-against-

Mack-Cali Realty Corporation, et al.,
Defendants-Respondents-Appellants,

Matthew and Tony General Landscaping, Inc.,
Defendant-Respondent-Respondent,

Antonio Greco, Inc. doing business as
TG Landscaping, Inc.,
Defendant-Appellant-Respondent.

Guararra & Zaitz, New York (Michael J. Guararra of counsel), for appellant-respondent.

Savona, D'Erasmo & Hyer LLC, New York (Joseph F.X. Savona of counsel), for respondents-appellants.

Law Offices of Kenneth A. Pryor, LLC, Mineola (Kenneth A. Pryor of counsel), for Carmen Garcia and Gilberto Cruz, respondents.

Brill & Associates, P.C., New York (Corey M. Reichardt of counsel), for Matthew and Tony General Landscaping, Inc., respondent.

Order, Supreme Court, Bronx County (Alan J. Saks, J.), entered on or about November 26, 2007, which, in an action for personal injuries sustained in a slip and fall on ice in a parking lot, denied the motion of defendant Antonio Greco, Inc. (AGI) for summary judgment dismissing the complaint and all cross claims as against it, granted the cross motion of defendant Matthew and Tony General Landscaping, Inc. (M & T) for summary judgment dismissing the complaint as against it, denied the cross

motion of defendant landowners (Mack-Cali) to the extent they sought summary judgment dismissing the complaint and all cross claims as against them and granted so much of Mack-Cali's cross motion for conditional summary judgment as against M & T for indemnification to the extent M & T had not already assumed a duty to defend and indemnify, and as limited by Mack-Cali's negligence, if any, found to be a substantial factor in the cause of plaintiff Garcia's injuries, unanimously affirmed, without costs.

Plaintiff Garcia was injured when she slipped and fell on a patch of ice in the parking lot of Mack-Cali's office complex. Mack-Cali contracted with M & T to perform snow removal at the location, and M & T subcontracted such work to AGI. The record establishes that triable issues of fact exist regarding whether Mack-Cali retained a measure of control over the snow removal operations it contracted out to M & T. The contract between Mack-Cali and M & T was not comprehensive and exclusive (*see e.g. Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]), and testimonial evidence shows that Mack-Cali retained some oversight of, and, on occasion, participated in, the snow/ice removal process (*see e.g. Prenderville v International Serv. Sys., Inc.*, 10 AD3d 334, 337-338 [2004]). However, M & T's subcontract with AGI was, by its terms, comprehensive and exclusive as to AGI, and there was no evidence that M & T had retained any control over

the performance of the subcontract.

Plaintiff's testimony that there was a two-inch snowfall the day before her fall, and that there were large patches of ice in the parking lot where she fell, raise issues of fact as to notice of the alleged hazardous condition. Furthermore, the subcontract called for the application of sand and salt where necessary, and AGI agreed to monitor temperature fluctuations and the potential for re-freezing. Accordingly, there are factual questions regarding whether AGI properly performed its obligations under the subcontract (*compare Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 361 [2007]). Contrary to the argument that dismissal of the complaint was warranted because the patch of ice plaintiff slipped on was open and obvious, plaintiffs' negligence claims were primarily based on the alleged failure to maintain the premises in a safe condition, not on a failure to warn (*see Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72 [2004]). Even assuming that the hazardous condition was open and obvious, such evidence would go toward the issue of comparative negligence (*id.* at 72-73).

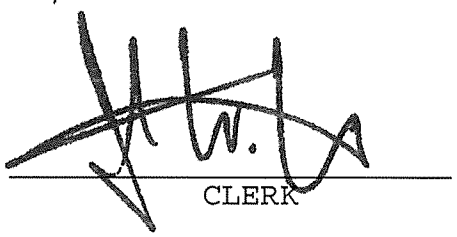
Based on the evidence that the conduct of Mack-Cali could have been a substantial factor in causing plaintiff's injury, the motion court properly granted Mack-Cali conditional summary judgment on its contractual indemnification claim as against M & T to the extent indicated (*see Prenderville,* 10 AD3d at 338).

M-2354 - ***Garcia, et al., v Mack-Cali Realty Corporation, et al.,***

Motion seeking leave to strike brief denied.

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

ENTERED: JUNE 26, 2008



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Lippman, P.J., Tom, Andrias, Saxe, JJ.

4037 The People of the State of New York, Respondent, Ind. 29/00 5514/00

-against-

Noel Marty, Defendant-Appellant.

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

Order, Supreme Court, New York County (Bruce Allen, J.), entered on or about August 15, 2007, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the

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

M-2079 - *People v Noel Marty*

Motion seeking assignment of new appellate counsel and for other related relief denied.

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

ENTERED: JUNE 26, 2008

CLERK

Lippman, P.J., Tom, Andrias, Saxe, JJ.

4038 The People of the State of New York, Ind. 6385/04
Respondent,

-against-

Esteban Savinon, etc.,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Aaron Ginandes of counsel), for respondent.

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered June 30, 2005, convicting defendant, upon his plea of guilty, of assault in the first degree, and sentencing him to a term of 8 years, unanimously affirmed.

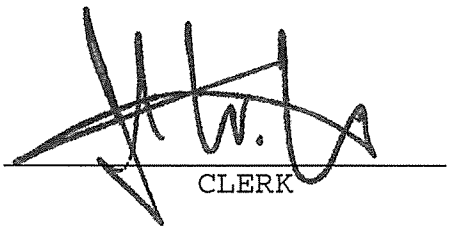
The court properly exercised its discretion in denying defendant's motion to withdraw his plea, without granting a hearing (*see People v Frederick*, 45 NY2d 520 [1978]). The record establishes that the plea was knowing, intelligent and voluntary (*see People v Fiumefreddo*, 82 NY2d 536, 543 [1993]), and the court, which accorded defendant a suitable opportunity to be heard, had sufficient information upon which to conclude that his

claims of ineffective assistance were without merit.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 26, 2008



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Lippman, P.J., Tom, Andrias, Saxe, JJ.

4039 Zamil Uddin, Index 101040/05
Plaintiff-Respondent,

-against-

The City of New York,
Defendant,

L&L Painting Co., Inc., et al.,
Defendants-Appellants.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Stacy I. Malinow of counsel), for appellants.

Hans Bruce Fischer, New York, for respondent.

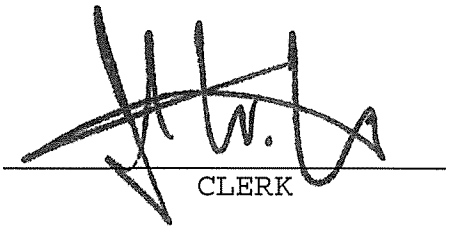
Order, Supreme Court, New York County (Paul G. Feinman, J.), entered November 30, 2007, which denied the motion by defendants L&L and Alpha for summary judgment, unanimously affirmed, without costs.

Defendants' motion was based solely on plaintiff's testimony, at a General Municipal Law § 50-h examination, that his accident was caused when three or four gallons of water and debris fell onto his windshield from the upper level of the Queensboro Bridge. His observation that construction was taking place on the upper level at the time was confirmed in an affidavit by a City employee. Plaintiff has not yet had the opportunity to conduct any discovery of defendants. Under the

circumstances, the motion was premature (*Rengifo v City of New York*, 7 AD3d 773 [2004]).

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

ENTERED: JUNE 26, 2008



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Lippman, P.J., Tom, Andrias, Saxe, JJ.

4040 Hae Mook Chung, etc., Index 115343/06
Plaintiff-Respondent,

-against-

Maxam Properties, LLC, et al.,
Defendants-Appellants.

Jeffrey H. Roth, New York, for appellants.

Stephen Latzman, New York, for respondent.

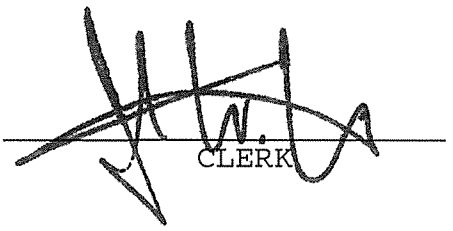
Order, Supreme Court, New York County (Jane S. Solomon, J.), entered April 20, 2007, insofar as it found defendants guilty of criminal and civil contempt, unanimously reversed, on the law and the facts, without costs, and plaintiff's application to hold defendants in contempt denied.

The injunction that defendants allegedly disobeyed was not clear and unequivocal enough to warrant a contempt finding (*see e.g. Gerelli Ins. Agency, Inc. v Gerelli*, 23 AD3d 341 [2005]; *Howard S. Tierney, Inc. v James*, 269 App Div 348, 354-355 [1945]). "At best, the order . . . was ambiguous" (*Lubitz v Mehlman*, 187 AD2d 97, 103 [1993], *lv dismissed* 82 NY2d 705 [1993]), and "[a]ny ambiguity in the court's mandate should be

resolved in favor of the would-be contemnor" (*Richards v Estate of Kaskel*, 169 AD2d 111, 122 [1991], *lv dismissed in part, denied in part* 78 NY2d 1042 [1991]).

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

ENTERED: JUNE 26, 2008



Lippman, P.J., Tom, Andrias, Saxe, JJ.

4041 The People of the State of New York, Ind. 7418/04
Respondent,

-against-

Victor Suarez,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Nancy E. Little of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Sheryl Feldman of counsel), for respondent.

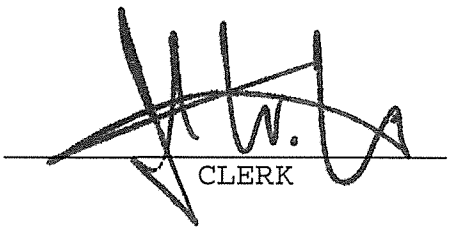
Order, Supreme Court, New York County (Edward J. McLaughlin, J.), entered on or about May 31, 2006, adjudicating defendant a level two sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant, who was assessed 120 points, which is 10 points over the threshold for a level three adjudication, and who received a downward departure to level two, seeks a further downward departure to a level one adjudication. We perceive no basis for a further departure (*see People v Guaman*, 8 AD3d 545 [2004]). The Board of Examiners' recommendation for a downward departure to level two took into account mitigating factors

relating to the underlying sex crime, and defendant failed to show any other factors warranting a further departure.

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

ENTERED: JUNE 26, 2008



Lippman, P.J., Tom, Andrias, Saxe, JJ.

4042 In re Breeze Carting Corp., Index 107859/07
Petitioner-Appellant,

-against-

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

Sullivan Gardner PC, New York (Peter Sullivan of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Cheryl Payer of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Edward H. Lehner, J.), entered April 9, 2008, which denied the petition and dismissed the proceeding brought pursuant to CPLR article 78 seeking to vacate the determination of respondent New York City Business Integrity Commission denying petitioner an exemption from licensing requirements and for issuance of a registration to operate as a trade waste broker, unanimously affirmed, without costs.

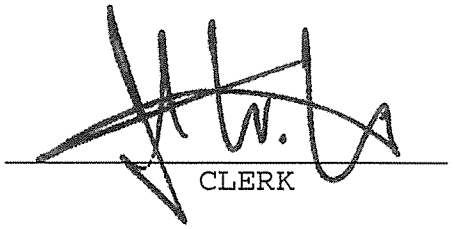
There was a rational basis for the finding that petitioner failed to demonstrate eligibility for exemption from licensing on the ground that petitioner's president was convicted of bribing a public official and identified as an associate in organized crime, and where petitioner rejected a reasonable condition of registration, namely the submission of a monitor to oversee

operations for one year (Administrative Code of the City of New York § 16-504; § 16-511). The denial was also properly based on petitioner's knowing provision of false information and failure to provide information in its application (*see* Administrative Code § 16-509; *Matter of Sindone v City of New York*, 2 AD3d 125, 126 [2003]; *Tocci Bros. v Trade Waste Commn. of City of N.Y.*, 251 AD2d 160 [1998], *lv denied* 92 NY2d 812 [1998]). Contrary to petitioner's contention, the granting of a registration is not a ministerial act (*see EdCia Corp. v McCormack,* 44 AD3d 991, 994 [2007]; *Matter of Attonito v Maldonado*, 3 AD3d 415, 418 [2004], *lv denied* 2 NY3d 705 [2004]).

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

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

ENTERED: JUNE 26, 2008



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Lippman, P.J., Tom, Andrias, Saxe, JJ.

4044N Francoise Peter-MacIntyre, Index 603863/05
Plaintiff-Appellant,

-against-

Lynch International, Inc.,
Defendant-Respondent.

Smith Dornan & Dehn P.C., New York (Eamonn Dornan of counsel), for appellant.

Laurel A. Wedinger, Staten Island, for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered June 5, 2007, which, insofar as appealed from, granted defendant's motion to vacate its default in opposing a prior motion by plaintiff to reargue a prior order vacating defendant's default in appearance, upon condition that defendant pay plaintiff $250, and, upon vacatur, sub silencio denied plaintiff's prior motion to reargue, unanimously affirmed, without costs.

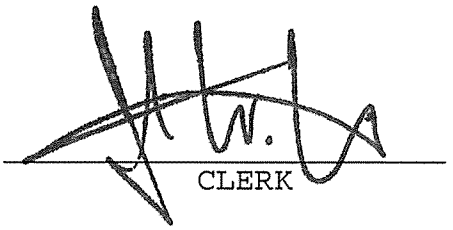
In support of defendant's motion to vacate its default in opposing plaintiff's January 10, 2007 motion to reargue the December 5, 2006 order vacating defendant's default in appearance, defendant's attorney represented that she did not know about the January 10, 2007 motion, purportedly served by mail on January 10, 2007, or the notice of entry of the January 30, 2007 order granting that motion, purportedly served by mail on February 6, 2007, until February 12, 2007, when she happened

to call plaintiff's attorney about the case. On the merits of plaintiff's prior motion to reargue, defendant's attorney argued that the motion merely repeated the arguments that plaintiff had previously made unsuccessfully in opposing vacatur of defendant's default in appearance, and thus would not have been granted had there been opposition. In opposition, plaintiff's attorney argued that affidavits of service by mail raised a presumption of receipt that defendant's attorney's allegations of nonreceipt failed to rebut. We reject plaintiff's argument because the January 11, 2007 "Affirmation of Service" on which she relies as proof of the alleged January 10, 2006 service of the January 10, 2007 motion to reargue is defective. That affirmation states that "I caused a copy of plaintiff's motion for leave to reargue to be sent by first class mail to [defendant's attorney] at the following address . . .." Such affirmation is defective because it does not specifically state that the affiant, who is plaintiff's attorney, himself mailed the motion (*Metzger v Esseks*, 168 AD2d 287, 287 [1990]; *Gigante v Arbucci*, 34 AD3d 425, 425 [2006]). Plaintiff's argument that defendant's original motion to vacate its default in appearance should have been denied for lack of a reasonable excuse and meritorious defense is not properly before the Court since plaintiff did not appeal the

December 5, 2006 order; in any event, it appears that the default was properly vacated.

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

ENTERED: JUNE 26, 2008



CLERK

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

1410-
1410A 57th Street Arts, LLC, Index 602317/06
Plaintiff-Respondent,

-against-

Calvary Baptist Church, et al.,
Defendants,

Demetrios K. Stratis,
Defendant-Appellant.

Molod Spitz & DeSantis, P.C., New York (Frederick M. Molod of counsel), for appellant.

Rosenberg & Estis, P.C., New York (Michael E. Feinstein of counsel), for respondent.

Order, Supreme Court, New York County (Karla Moskowitz, J.), entered December 12, 2006, insofar as it denied so much of defendants' motion to dismiss the third cause of action against defendant Stratis, unanimously reversed, on the law, without costs, and that part of the motion granted. The Clerk is directed to enter judgment in favor of defendant Stratis dismissing the complaint against him. Appeal by defendant Calvary Baptist Church and cross appeal by plaintiff from the aforesaid order, and appeal by plaintiff from judgment, same court and Justice, entered February 7, 2007, unanimously withdrawn pursuant to stipulation among the parties to this action other than defendant Stratis.

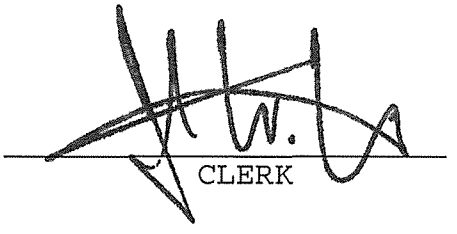
Even assuming plaintiff has sufficiently shown an

enforceable lease with the Church, it has failed to set forth sufficient facts showing that Stratis, executive administrator and general counsel for the Church, intentionally procured a breach of the lease by the Church. Conclusory assertions of wrongful, intentional, malicious or improper actions, for personal profit or constituting independent torts, are inadequate to spell out a claim here for tortious interference with contract. The record is devoid of evidence of any act by Stratis that could be construed as having induced the Church's Board of Deacons to reach its 7-to-1 vote to reject the amended lease with plaintiff *(see Courageous Syndicate v People-To-People Sports Comm., 141 AD2d 599 [1988]; Citicorp Retail Servs. v Wellington Mercantile Servs.,* 90 AD2d 532 [1982]).

The Decision and Order of this Court, entered herein on March 18, 2008 (49 AD3d 401), is hereby recalled and vacated.

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

ENTERED: JUNE 26, 2008



Andrias, J.P., Friedman, Buckley, McGuire, Moskowitz, JJ.

2950 The Association for Community Reform Now ("ACORN"), et al., Petitioners-Appellants, Index 114729/05

-against-

Mayor Michael Bloomberg, et al., Respondents-Respondents.

Kramer Levin Naftalis & Frankel, LLP, New York (Jeffrey L. Braun of counsel), for appellants.

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

Order and judgment (one paper), Supreme Court, New York County (Michael D. Stallman, J.), entered September 21, 2006, which, to the extent appealed from, denied the petition and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioners challenge respondents' determination to build a new solid waste marine transfer station (MTS) on City-owned property located at East 91st Street and the East River in Manhattan. Respondents plan to build the new MTS on the site of an existing but inoperable MTS that will be demolished. The article 78 court properly found that respondents' determination to build the new MTS was rational (*see* CPLR 7803[3]; *Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). The record indicates that the waterfront location offers operational

convenience for transferring waste collected in the area, that no rezoning of the site is required, and that the use of an existing City-owned property is more cost-effective than the alternative of purchasing and condemning waterfront property elsewhere.

The court properly found that the proposed MTS will not cause any significant or drastic changes to the existing land uses or the overall character of the neighborhood. The record indicates that the FDR Drive separates neighboring land uses from the site, that a new access ramp to the site will include 14-foot-high sound barriers, and that the tipping floor in the processing building will eliminate on-street queuing of collection trucks in the neighborhood. Moreover, surrounding recreational facilities and residences came into being while the existing MTS was in operation.

The court properly rejected petitioners' contention that construction of the new MTS violates the purpose of respondent Department of Sanitation's (DSNY) own siting rule, which prohibits the construction of any new transfer station within 400 feet of a residential district, hospital, public park or school (16 RCNY 4-32[b][1][ii]). As petitioners concede, the subject rule does not apply to City-owned transfer stations (*see* 16 RCNY 4-31; Administrative Code of City of N.Y. § 16-130[b]).

We reject petitioners' contention that respondents' determination is irrational because the Zoning Resolution

Performance Standard for noise cannot be met at a particular point on the site boundary. DSNY's Final Environmental Impact Statement (FEIS) indicated that the background noise levels at that point already exceeded the Zoning Resolution Performance Standard and therefore that the theoretical exceedance at the boundary could not be perceived.

We decline to address petitioners' argument that the court should have determined that the M1-4 (light industrial) zoning designation for the site is no longer appropriate, because they did not request such relief in the petition (*see e.g. Dominguez v Lafayette-Boynton Hous. Corp.*, 240 AD2d 310, 313 [1997]).

The court properly rejected petitioners' contention that the proposed MTS is inconsistent with the City's initiative to rezone the East River waterfront in the Greenpoint and Williamsburg sections of Brooklyn. The rezoning in Brooklyn is a neighborhood-specific project that is irrelevant to the appropriateness of building the MTS at East 91st Street in Manhattan.

Petitioners failed to preserve their argument that the proposed MTS is inconsistent with subpolicies 1.1., 1.2, and 2.2 and policies 8, 9 and 10 of the City's Waterfront Revitalization Program (WRP), and we decline to consider it (*see Gregory v Town of Cambria*, 69 NY2d 655 [1986]). Were we to consider this argument, we would reject it, because the record indicates that

the proposed MTS will not substantially hinder the achievement of any of the policies of the WRP and indeed will advance one or more of the policies (*see* WRP at http://www.nyc.gov/html/dcp/html/wrp/wrp.shtml).

The court properly rejected petitioners' contention that respondents' determination was irrational because they rejected four alternative sites in Manhattan based in part on their proximity to parks and residences. Respondents rationally rejected the alternative sites for various reasons, including technical reasons that did not apply to the East 91st Street MTS.

The court properly found that respondents took the requisite "hard look" at the relevant areas of environmental concern and made a "reasoned elaboration" of the basis for their determination (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]). The FEIS consists of two volumes containing nearly 3000 pages of text, tables and figures and a third volume of technical appendices issued on compact disc. It includes an executive summary of the overall potential environmental impacts of, and mitigation measures for, the proposed project, as well as the alternatives considered.

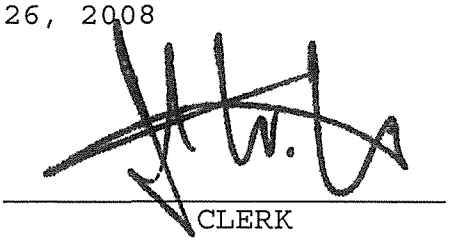
Contrary to petitioners' contention, DSNY's analysis of the environmental impacts at less than the maximum capacity of 5,280 tons per day (tpd) was not arbitrary and capricious or a

violation of the law (*see Matter of Neville v Koch*, 79 NY2d 416, 428 [1992]). DSNY reasonably exercised its discretion in analyzing the on-site impacts based on a worst-case scenario of 4,290 tpd, since the maximum 5,280 tpd would be reached only under rare circumstances (*see id.* at 427; *Matter of Fisher v Giuliani*, 280 AD2d 13, 21 [2001]). DSNY also reasonably exercised its discretion in analyzing off-site impacts based on a capacity of 1,873 tpd, which is almost 25% higher than the amount that the MTS would experience on an average day.

Contrary to petitioners' contention, DSNY's analysis of alternatives to the proposed project was sufficient. DSNY considered "a *reasonable range* of alternatives to the proposed project" (*Matter of C/S 12th Ave. LLC v City of New York*, 32 AD3d 1, 7 [2006]). It was not required to consider every conceivable alternative (*see Aldrich v Pattison*, 107 AD2d 258, 266 [1985]). DSNY rationally rejected a Harlem River Yard site in the Bronx based on the policy objective of avoiding the trucking of "Manhattan waste" to a facility in another borough.

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

ENTERED: JUNE 26, 2008



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Gonzalez, J.P., Nardelli, Sweeny, McGuire, JJ.

3657 Brian Cooper, Index 70819/91
Plaintiff-Respondent,

-against-

Karen Wenig Cooper,
Defendant-Appellant.

Tarnow Law Firm, PL, New York (Christine M. Pellegrino of counsel), for appellant.

Leitner & Getz LLP, New York (Jerome M. Leitner of counsel), for respondent.

Judgment, Supreme Court, New York County (Steven E. Lieberman, Special Referee), entered May 12, 2006, distributing the couple's marital assets and fixing maintenance and child support based on valuation of those assets, unanimously modified, on the law, defendant awarded half the $273,000 cash value remaining in the Guardian Annuity at the time plaintiff transferred it to his father for no consideration, and otherwise affirmed, without costs.

The Special Referee properly credited the neutral forensic accountant to the extent he found that the parties lived a lavish lifestyle based on the mortgaging of most of their assets, and that plaintiff had not improperly dissipated marital assets, with one exception. It is uncontested that at the time plaintiff transferred the couple's Guardian Annuity to his father, it had a cash value of $273,000, and there is no evidence of any

consideration for this transfer (*see Davis v Davis*, 175 AD2d 45, 47 [1991]). Therefore, defendant is entitled to half the value of this marital asset. However, it was not a dissipation of assets for plaintiff to decide not to try to make payments on the marital home, or any other home, by using that home's line of credit to avoid foreclosure. These assets were already burdened with debt, and taking on further debt to pay the mortgages would only have put off the inevitable. While the forensic accountant was not able to account for every expenditure, the record supports his conclusion that the parties' expenditures reasonably approximated the consumption of capital assets. Thus, the Special Referee properly concluded that there was no reason to believe plaintiff secreted marital funds or further dissipated marital assets.

The Special Referee also properly found that the property at 1200 Broadway in Manhattan was plaintiff's separate property. It is uncontested that this apartment was purchased prior to the marriage. While a mortgage was taken out on the property during the marriage and was repaid with marital assets, there is no evidence that any of the mortgage proceeds were used to enhance the value of the apartment or that defendant contributed to its value in any way. The record supports the conclusion that the proceeds of this mortgage were used to maintain the couple's extravagant lifestyle, and was tantamount to a loan from this

separate property to the marriage. It did not convert the property into a marital asset (*compare Heine v Heine*, 176 AD2d 77 [1992], *lv denied* 80 NY2d 753 [1992]; *Zelnik v Zelnik*, 169 AD2d 317 [1991]).

The Special Referee also properly found that the property at 222 East 80th Street was defendant's separate property. While defendant testified that this property belonged to her parents, her former lawyer testified that defendant had admitted to him the property was, in fact, hers, but kept in her parents' names. We find no reason to disturb the Special Referee's credibility determination in this regard (*see generally McManus v McManus*, 298 AD2d 189 [2002]).

While there was evidence that plaintiff received assistance from his wealthy father, the Special Referee did, in fact, impute to plaintiff income of $165,000 per year (*see Isaacs v Isaacs*, 246 AD2d 428 [1998]), and defendant offers no reason why this amount was inadequate.

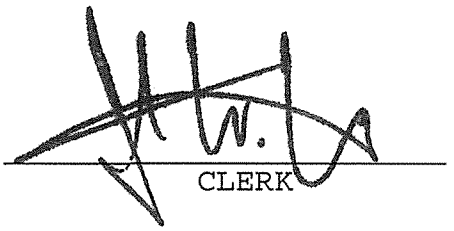
Defendant is not entitled to a new hearing based on the admittedly excessive delay in the decision by the Special Referee. She never sought a new hearing prior to the filing of the decision (CPLR 4319). Defendant asserts that the file was misplaced and certain exhibits lost, but cites nothing in the record to substantiate this assertion. In any event, she makes no persuasive argument as to how the delay or purportedly lost

exhibits prejudiced her, except to express her displeasure with the result of the decision.

We have examined defendant's remaining contentions and find them unavailing.

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

ENTERED: JUNE 26, 2008



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Saxe, J.P., Nardelli, Moskowitz, Acosta, DeGrasse, JJ.

4003 The People of the State of New York, Ind. 972/99
Respondent,

-against-

Eugene Brown,
Defendant-Appellant.

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

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

Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about January 30, 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 court properly determined that the risk assessment instrument failed to adequately take into account defendant's extensive record of violent felonies and the fact that he also committed three sexual offenses against fellow prison inmates. These aggravating factors were not duplicative of the factors relied upon in the risk assessment instrument and guidelines, and they supported the discretionary upward departure by the court to

a level three adjudication (*see People v Wilkens*, 33 AD3d 399 [2006], *lv denied* 8 NY3d 801 [2007]). We have considered and rejected defendant's remaining claims.

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

ENTERED: JUNE 26, 2008

CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on June 26, 2008.

Present - Hon. David B. Saxe, Justice Presiding
Eugene Nardelli
Karla Moskowitz
Rolando T. Acosta
Leland G. DeGrasse, Justices.

Viga Investments, Inc.,
Plaintiff-Appellant-Respondent, Index 602294/07

-against-

Mittal Steel USA, Inc., 4004-
Defendant-Respondent-Appellant. 4004A

- - - -

Mittal Steel USA, Inc., et al.,
Plaintiffs-Respondents-Appellants,

-against-

Viga Investments, Inc., et al.,
Defendants-Appellants-Respondents,

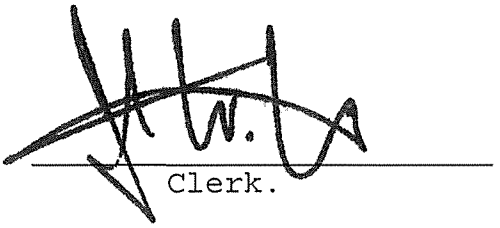
UBS AG,
Nominal-Defendant.

Cross appeals having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Helen E. Freedman, J.), entered on or about February 13, 2008, and order, same court and Justice, entered February 15, 2008,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated June 13, 2008,

It is unanimously ordered that said appeals be and the same are hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTER:



Clerk.

Saxe, J.P., Nardelli, Moskowitz, Acosta, DeGrasse, JJ.

4005 In re Vladlena B.,
Petitioner-Appellant,

-against-

Mathias G.,
Respondent-Respondent.

Jody N. Gerber, New York, for appellant.

Robert S. Michaels, P.C., New York (Robert S. Michaels of counsel), for respondent.

Order, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about December 20, 2006, which denied petitioner mother's objections to an October 3, 2006 Support Magistrate's order directing that the child support obligation be shared equally by the parties and that respondent father pay the monthly sum of $1,566.67 to petitioner for child support as well as half of the child's unreimbursed medical expenses, unanimously affirmed, without costs.

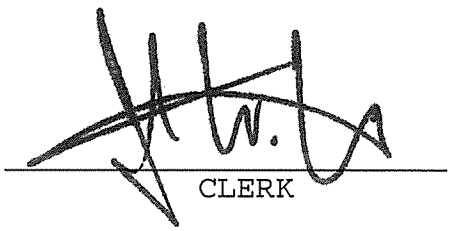
The court's imputation of equal income to both parties was amply supported by the record. The testimony supported the magistrate's findings that petitioner maintained a high standard of living and received regular, consistent and recurring financial support from her ex-husband and family.

In high-income cases, the proper determination for an award of child support with respect to parental income in excess of $80,000 should be based on the child's actual needs and the

amount required for a lifestyle appropriate for the child, not the wealth of one or both parties (*see Matter of Brim v Combs*, 25 AD3d 691, 693 [2006], *lv denied* 6 NY3d 713 [2006]). Petitioner has failed to provide evidence of the child's actual expenses, other than testimony found to be incredible. The court set a fair sum of child support ($3,133.34 per month), of which respondent was ordered to pay half.

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

ENTERED: JUNE 26, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on June 26, 2008.

Present - Hon. David B. Saxe, Justice Presiding
Eugene Nardelli
Karla Moskowitz
Rolando T. Acosta
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 5191/06
Respondent,

-against- 4006

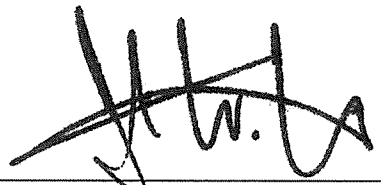
James Keno,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about September 20, 2007,

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

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

ENTER:



Clerk.

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

Saxe, J.P., Nardelli, Moskowitz, Acosta, DeGrasse, JJ.

4007 In re Doris Lavianca Abreu, Index 113373/05
Petitioner-Appellant,

-against-

New York City Housing Authority
East River Houses,
Respondent-Respondent.

Santoriella, Ditomaso & Fort, P.C., Brooklyn (Rachel N. King of counsel), for appellant.

Ricardo Elias Morales, New York (Byron S. Menegakis of counsel), for respondent.

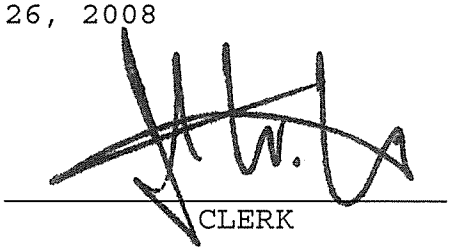
Order, Supreme Court, New York County (Jane S. Solomon, J.), entered September 7, 2006, which denied the petition brought pursuant to CPLR article 78 seeking to annul respondents' determination, dated June 1, 2005, dismissing petitioner's grievance seeking to succeed to the tenancy of the deceased tenant as a remaining family member, unanimously affirmed, without costs.

Petitioner does not qualify as a remaining family member because she did not enter the apartment lawfully, respondent never gave the tenant of record written permission for petitioner to join her household, and petitioner admitted that no such permission was ever obtained. This was further corroborated by the tenant's annual income affidavits for the years petitioner allegedly lived in the apartment, in which the tenant listed no occupants other than herself, and by the testimony of the Housing

Assistant that prior to the tenant's death, she had never requested that anyone join her household (*see Jamison v New York City Hous. Auth.-Lincoln Houses*, 25 AD3d 501 [2006]). The record affords no legal basis for relieving petitioner of the written notice requirement, since she failed to establish that respondent knew or implicitly approved of her permanent residency in the apartment (*see Matter of McFarlane v New York City Hous. Auth.*, 9 AD3d 289 [2004]). We further note that petitioner was not in compliance with the one-year-occupancy rule (*see Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 329 [2007]).

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

ENTERED: JUNE 26, 2008



CLERK

Saxe, J.P., Nardelli, Moskowitz, Acosta, DeGrasse, JJ.

4009 The People of the State of New York, Ind. 52354C/05
Respondent,

-against-

Damon Jacobs,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Allen H. Saperstein of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Denis J. Boyle, J.), rendered July 5, 2006, convicting defendant, after a jury trial, of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. Defendant's pattern of conduct toward the victim before, during and after the incident supports the conclusion that, at the time of the theft, he intended to permanently deprive her of her cell phone even though he ultimately returned it as the result of subsequent

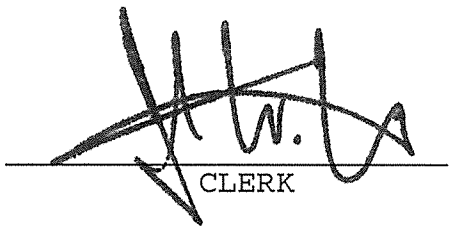
circumstances (*see People v Ramos*, 12 AD3d 316 [2004], *lv denied* 95 NY2d 961 [2001]; *People v Quinones*, 162 AD2d 175 [1990], *lv denied* 76 NY2d 863 [1990]).

The People introduced testimony that defendant returned the phone with an extremely vulgar photograph stored in its memory, and that the photograph's date and time stamp established it was taken while the phone was in defendant's possession. Although this information was relevant to establish the duration of defendant's possession of the phone and had some bearing on defendant's hostility to the victim, who had rejected his romantic advances, it was not necessary to show the jury the photograph itself, as well as an enlargement thereof. However, we find that any error in this regard was harmless. The other evidentiary rulings at issue on appeal were proper exercises of discretion.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 26, 2008



CLERK

Saxe, J.P., Nardelli, Moskowitz, Acosta, DeGrasse, JJ.

4010-
4010A-
4010B

Robert Bradley, et al.,
Plaintiffs-Appellants-Respondents,

Index 108416/04
590989/04
591184/04

-against-

IBEX Construction, LLC,
Defendant-Respondent,

Home Depot U.S.A., Inc., et al.,
Defendants-Respondents-Appellants,

Ruttura & Sons Construction Co.,
Defendant.

- - - -

[And A Third-Party Action]

- - - - -

IBEX Construction, LLC,
Second Third-Party Plaintiff-Appellant,

-against-

Sage Electrical Contracting, Inc.,
Second Third-Party Defendant-Respondent.

Harry I. Katz, P.C., New York (Paul F. McAloon of counsel), for appellants-respondents.

French & Rafter, LLP, New York (Howard K. Fishman of counsel), for IBEX Construction, LLC, respondent/appellant.

D'Amato & Lynch, LLP, New York (Arturo M. Boutin of counsel), for Home Depot U.S.A., Inc. and 23rd St. Properties, LLC, respondents-appellants.

O'Connor, O'Connor, Hintz & Deveney, LLP, Melville (Eileen M. Baumgartner of counsel), for Sage Electrical Contracting, Inc., respondent.

Judgment, Supreme Court, New York County (Walter J. Relihan, Jr., J. at trial and posttrial motion to set aside verdict; Louis

B. York, J. on posttrial motion to dismiss third-party action and cross claims), entered December 5, 2007, after a jury verdict in favor of defendants on the issue of liability under Labor Law § 240(1), unanimously modified, on the law, plaintiffs' motion to set aside the verdict granted, judgment directed in favor of plaintiffs on the issue of liability pursuant to § 240(1), the matter remanded for trial on damages and apportionment of fault among defendants, and otherwise affirmed, without costs. Appeals from orders, same court (Rosalyn Richter, J.), entered June 8, 2006, and (Walter J. Relihan, J.), entered December 15, 2006, which, to the extent appealed from as limited by the briefs, denied plaintiffs' respective motions for partial summary judgment on their § 240(1) claim, and to set aside the verdict, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The motion court properly denied plaintiffs' motion for partial summary judgment. Plaintiffs established a prima facie case that defendants and second third-party defendant violated Labor Law § 240(1) by failing to ensure the proper placement of the ladder due to the condition of the floor, but a triable issue of fact was raised by the accident report, which indicated that plaintiff worker had tripped on the plastic-covered floor and did

not fall from the ladder (*see e.g. Potter v NYC Partnership Hous. Dev. Fund Co., Inc.*, 13 AD3d 83, 85 [2004]; *cf. Klein v City of New York*, 89 NY2d 833, 835 [1996]). The court properly determined that the accident report was admissible as a business record (*see Buckley v J.A. Jones/GMO*, 38 AD3d 461, 462-463 [2007]). A proper foundation was established for admission of the accident report into evidence under the business record exception to the hearsay rule (*see Petrocelli v Tishman Constr. Co.*, 19 AD3d 145 [2005]). Accordingly, denial of plaintiffs' motion for a directed verdict on the issue of liability was proper because the accident report raised an issue of fact as to whether the alleged violation of § 240(1) proximately caused his accident (*see e.g. Holt v Welding Servs.*, 264 AD2d 562, 563 [1999], *lv dismissed* 94 NY2d 899 [2000]). The trial court properly charged the jury as to sole proximate cause (*see* PJI3d 2:217, at 1153 [2008]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]).

However, the motion court improperly denied plaintiffs' posttrial motion to set aside the verdict and for judgment notwithstanding the verdict. Since the jury determined that plaintiff worker fell off the ladder, it could not have reasonably concluded, in light of the evidence, that the ladder was placed and used so as to give him proper protection in the performance of his work. Other than the accident report, which

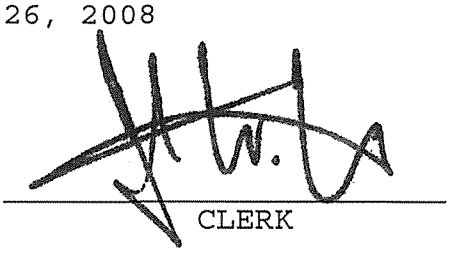
the jury clearly rejected, defendants and second third-party defendant failed to present any evidence controverting plaintiffs' version of the accident, i.e., that the ladder had slipped on the plastic-covered floor. Furthermore, there was no evidence to suggest that plaintiff worker's own actions were the sole proximate cause of his injury (*see Bonanno v Port Auth. of N.Y. & N.J.*, 298 AD2d 269 [2002]). The inconsistencies between his trial testimony and his prior statements were not material to the issue of how the accident occurred, and he consistently testified that he had fallen because the ladder had slipped on the plastic (*see e.g. Ernish v City of New York*, 2 AD3d 256, 257 [2003]).

The motion court properly granted second third-party defendant's motion to dismiss that third-party action and any cross claims for indemnification against it. The trial court clearly directed that any posttrial motions, including motions regarding indemnification, be submitted to the court within 15 days of the verdict. Since defendants IBEX, Home Depot and 23rd St. failed to move within the 15 days or to assert their indemnification claims in response to plaintiffs' timely motion as required by CPLR 4406, and failed to give an adequate reason

for the delay, their claims were properly dismissed (*compare Tesciuba v Cataldo*, 189 AD2d 655 [1993], *lv dismissed* 82 NY2d 846 [1993], with *Brown v Two Exch. Plaza Partners*, 146 AD2d 129, 140 [1989], *affd* 76 NY2d 172 [1990]).

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

ENTERED: JUNE 26, 2008



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Saxe, J.P., Nardelli, Moskowitz, Acosta, DeGrasse, JJ.

4011 George Aldrich, et al., Index 605336/99
Plaintiffs-Appellants,

-against-

Marsh & McLennan Companies, Inc., et al.,
Defendants-Respondents.

Law Offices of David L. Trueman, P.C., Mineola (David L. Trueman of counsel), for appellants.

Willkie Farr & Gallagher LLP, New York (Christopher J. St. Jeanos of counsel), for respondents.

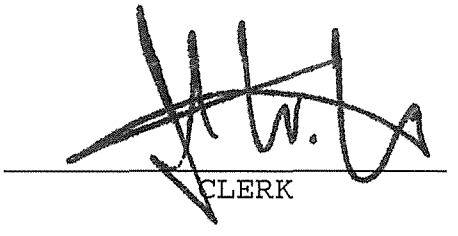
Order, Supreme Court, New York County (Herman Cahn, J.), entered June 7, 2007, which, in an action by former investors in Lloyd's of London against defendants brokers arising out of the brokers' alleged failure to disclose, in procuring insurance for a nonparty manufacturer of asbestos products, facts relating to the magnitude of the manufacturer's exposure to asbestos claims, inter alia, granted defendants' motion to confirm a Special Referee's report recommending dismissal of plaintiffs' causes of action for fraud as barred by the statute of limitations, unanimously affirmed, with costs.

Plaintiffs do not have a right to a jury trial on the issue of whether their fraud claims are barred by the two-year imputed discovery time limitation in CPLR 213(g) (*cf. Nussbaum v Steinberg*, 269 AD2d 192 [2000] [plaintiff not entitled to a jury trial on whether plaintiff was under disability of insanity so as

to toll statute of limitations, and for what period of time]). On the merits, a finding that plaintiffs were on inquiry notice of the alleged fraud, and could have, with reasonable diligence, discovered the alleged fraud well before the beginning of the controlling two-year period (*see Lucas-Plaza Hous. Dev. Corp. v Corey*, 23 AD3d 217, 218 [2005], citing *Watts v Exxon Corp.*, 188 AD2d 74, 76 [1993]), is supported by the extensive information that was available to plaintiffs in the public domain. Such information included the lawsuits commenced in the early 1980s by the manufacturer, first against certain Lloyd's syndicates and then against defendant broker Marsh & McLennan itself, both raising issues involving nondisclosure of material information in connection with the procurement of insurance for the manufacturer covering the risk of exposure to asbestos claims. We have considered plaintiffs' other contentions and find them unavailing.

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

ENTERED: JUNE 26, 2008



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Saxe, J.P., Nardelli, Moskowitz, Acosta, DeGrasse, JJ.

4012 In re David Beach, Index 113372/06
Petitioner-Respondent,

-against-

Raymond Kelly, etc.,
Respondent-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for appellant.

The Law Offices of John S. Chambers, New York (John S. Chambers of counsel), for respondent.

Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered May 30, 2007, annulling respondent's revocation of petitioner's pistol license and directing reinstatement of the license, unanimously reversed, on the law, without costs, the petition denied, respondent's determination reinstated and confirmed, and the proceeding dismissed.

Petitioner held a premises residence pistol permit that had been suspended on two prior occasions for violation of the license terms. This time, he took his handgun to Nevada to attend a gun convention, even though the license permitted him to carry the firearm only to small arms ranges/shooting clubs and authorized hunting areas.

Petitioner argues that notwithstanding any other provision of law, rule or regulation of any state, the Firearm Owners' Protection Act (FOPA, 18 USC § 926A) permits the transportation

of firearms for any lawful purpose between two places where an individual may "lawfully possess and carry" the firearm. Since he was permitted to carry his gun in New York and held a license to carry a firearm in Nevada, he asserts the agency's determination was arbitrary and capricious.

Possession of a handgun is a privilege, not a right, and is subject to the broad discretion of the New York City Police Commissioner (*Matter of Papaioannou v Kelly*, 14 AD3d 459 [2005]). The power to issue a license for such purpose necessarily and inherently includes the authority to impose conditions and restrictions (*People v Thompson*, 92 NY2d 957, 959 [1998]). The fact that it was lawful for him to carry his firearm to a small arms range/shooting club or designated hunting area is beside the point. Petitioner violated the terms of his premises residence license when he carried his firearm to and from the airport for his trip to Nevada.

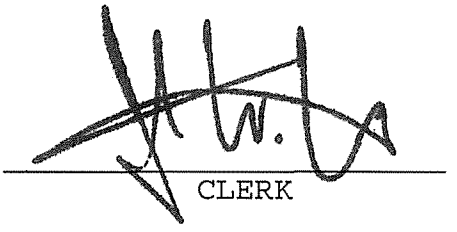
It is not necessary to permit holders of premises residence firearms licenses to transport guns to another state in order to harmonize the law of this State with the provisions of FOPA. Section 926A permits a licensee, in certain circumstances, to transport a firearm "from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm." Where the licensee is not permitted by the terms of the license to lawfully carry the

firearm at the time he embarks on a trip to another state, FOPA is inapplicable.

Moreover, petitioner testified at the administrative hearing that he had been informed by personnel of the License Division that he was not permitted to take his gun to Nevada without written permission from the Division. He chose to disregard this advice and follow his own interpretation of the law. The agency's determination that petitioner violated the terms of his premises residence firearms license was not arbitrary and capricious.

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

ENTERED: JUNE 26, 2008



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Saxe, J.P., Nardelli, Moskowitz, Acosta, DeGrasse, JJ.

4013-
4014 The People of the State of New York, Ind. 5054/04
Respondent, SCI 6399/05

-against-

Rafael Tabares,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

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

Judgments, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered January 13, 2006, convicting defendant, upon his pleas of guilty, of burglary in the third degree and robbery in the third degree, and sentencing him, as a second felony offender, to consecutive terms of 3½ to 7 years, unanimously affirmed.

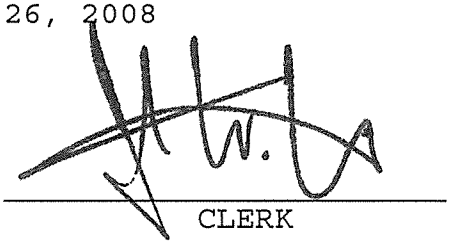
Since defendant's plea withdrawal motion was based on a completely different claim from the one he raises on appeal, his present claim that his plea was coerced by the court's alleged misrepresentation as to his sentencing exposure had he gone to trial is unpreserved (*see People v Cerveira*, 6 AD3d 294 [2004], *lv denied* 3 NY3d 704 [2004]), and we decline to review it in the interest of justice. As an alternative holding, we find the claim without merit. The court's statement that defendant would have faced a mandatory minimum sentence of 16 years to life as a

persistent violent felony offender, had he rejected the plea bargain and been convicted after trial of second-degree burglary, was entirely correct. Although, at the time of the plea, the court reduced the second-degree burglary charge to third-degree burglary under CPL 210.20(1-a), it is clear from the record that the reduction was for purposes of disposition.

Defendant made a valid waiver of his right to appeal (*see People v Ramos*, 7 NY3d 737 [2006]), which forecloses his excessive sentence claim. As an alternative holding, we perceive no basis for reducing the sentence.

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

ENTERED: JUNE 26, 2008



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Saxe, J.P., Nardelli, Moskowitz, Acosta, DeGrasse, JJ.

4017 The People of the State of New York, Ind. 3470/05
Respondent,

-against-

Jesus Cazares,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered June 9, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first degree, criminal possession of a weapon in the fourth degree (two counts) and criminal possession of marijuana in the fourth degree, and sentencing him to an aggregate term of 8 years, unanimously affirmed.

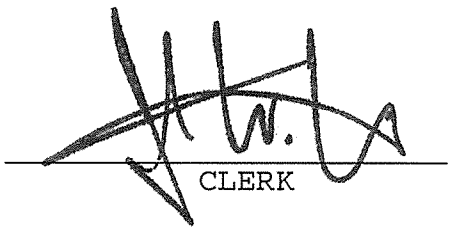
The court properly exercised its discretion in denying defendant's mistrial motion, made when a prosecution witness began to refer to a portion of the nontestifying codefendant's statement that incriminated defendant. An objection cut this testimony off in mid-sentence, and the court struck it from the record. The court's curative action was sufficient to prevent any prejudice (*see People v Santiago*, 52 NY2d 865 [1981]). In any event, any error was harmless in view of the overwhelming

evidence of defendant's guilt (*see People v Smith*, 97 NY2d 324 [2002]), which included multiple witnesses, wiretap evidence, and defendant's own confession.

The challenged portions of the prosecutor's summation remarks generally constituted fair comment on properly admitted evidence (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]), and the prosecutor did not attempt to exploit the stricken testimony. Although the prosecutor mischaracterized the extent of defendant's statements, the error was likewise harmless. Defendant's argument concerning the prosecutor's allegedly improper display of an exhibit to the jury during summation is unreviewable for lack of a sufficient record.

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

ENTERED: JUNE 26, 2008



CLERK

Saxe, J.P., Nardelli, Moskowitz, Acosta, DeGrasse, JJ.

4018 The People of the State of New York, Ind. 18334C/05
Respondent,

-against-

Ivan Santiago,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (John Carter, J.), rendered on or about January 11, 2007, unanimously affirmed.

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

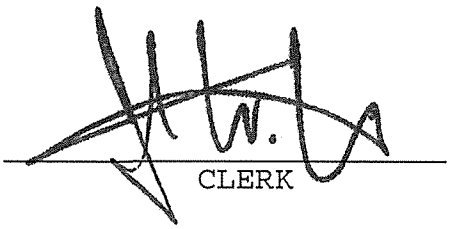
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

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

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

ENTERED: JUNE 26, 2008



CLERK

Saxe, J.P., Nardelli, Moskowitz, Acosta, DeGrasse JJ.

4019 Lalasis Trading PTE, Ltd., Index 601095/05
Plaintiff-Appellant,

-against-

Janata Bank,
Defendant-Respondent.

Levy, Ehrlich & Petriello, New York (John J. Petriello of counsel), for appellant.

Robert E. Anderson, Allendale, NJ, for respondent.

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered October 22, 2007, which denied plaintiff's motion for summary judgment in lieu of complaint and, upon a search of the record, granted summary judgment to defendant dismissing the complaint for lack of subject matter jurisdiction, unanimously affirmed, with costs.

Plaintiff, a Singapore corporation in the textile business, seeks recognition and enforcement of a foreign judgment against defendant, a bank incorporated in Bangladesh and owned by its government. The judgment was issued in Singapore in connection with defendant's failure to honor an irrevocable letter of credit issued by it.

Defendant is a foreign state under the Foreign Sovereign Immunities Act (*see* 28 USC § 1602 *et seq.*), and is entitled to presumptive sovereign immunity from suit in the United States,

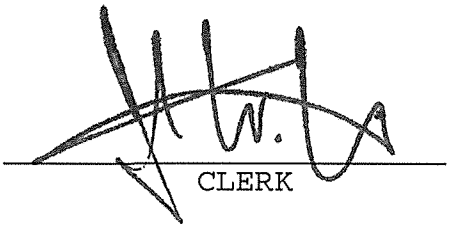
unless a specified exception to such immunity applies (*see City of New York v Permanent Mission of India to the United Nations*, 446 F3d 365, 369 [2006], *affd* ___ US ___, 127 S Ct 2352 [2007]). Although the act of issuing a letter of credit falls within the scope of "commercial activity" as defined by 28 USC § 1603(d) (*see Texas Trading & Milling Corp. v Federal Republic of Nigeria*, 647 F2d 300, 310 [1981], *cert denied* 454 US 1148 [1982]), the subject activity lacks the requisite nexus to the United States to fall within the "commercial activity" exception to sovereign immunity (*see* 28 USC § 1605[2]).

The dishonored letter of credit involved foreign entities, with a Singapore branch of an international bank acting as the advising bank, and did not have a "direct effect" in the United States. The United States was not identified as the place of performance of any obligation under the letter of credit, and the fact that a New York branch of the advising bank may have been used for some tangential purpose does not create the necessary "direct effect" in the United States (*see Goodman Holdings v Rafidain Bank*, 26 F3d 1143, 1146-1147 [1994], *cert denied* 513 US 1079 [1995]; *International Housing Ltd v Rafidain Bank Iraq*, 893 F2d 8, 11-12 [1989]). Accordingly, in the absence of an exception to sovereign immunity, the court was without subject matter jurisdiction to hear the matter, and, upon searching the record, properly dismissed the complaint (*see* CPLR 3212[b]).

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: JUNE 26, 2008



Saxe, J.P., Nardelli, Moskowitz, Acosta, DeGrasse, JJ.

4020 Ralph Ronda, Index 20827/05
Plaintiff-Appellant,

-against-

Friendly Baptist Church, et al.,
Defendants-Respondents.

Popick, Rutman & Jaw, New York (Rick J. Rutman of counsel), for appellant.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for respondents.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered August 27, 2007, which, inter alia, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants carried their initial burden of showing that plaintiff's shoulder tendon tear and other injuries were not proximately caused by the subject accident (*see Pommells v Perez*, 4 NY3d 566, 574-575 [2005]), by submitting reports of plaintiff's previous line-of-duty injuries and the opinion of their examining orthopedist, based in part on the MRI report describing arthritic changes in the shoulder joint as degenerative, that the shoulder injury was among plaintiff's preexisting conditions. Plaintiff failed to meet his burden to adduce evidence rebutting the

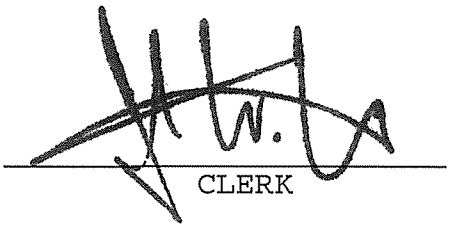
asserted lack of causation (*see Knoll v Seafood Express*, 5 NY3d 817 [2005]; *Becerril v Sol Cab Corp.*, 50 AD3d 261 [2008]).

We note that neither the minor curtailment of his activities nor his need to be placed on light duty upon his return to work raised an inference that plaintiff was unable to perform his usual and customary daily activities for 90 of the first 180 days following the accident (*see* Insurance Law § 5102[d]; *Cartha v Quin*, 50 AD3d 530 [2008]).

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

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

ENTERED: JUNE 26, 2008



CLERK

Saxe, J.P., Nardelli, Moskowitz, Acosta, DeGrasse, JJ.

4021N Kalman Yeger, et al., Index 602589/04
Plaintiffs-Appellants,

-against-

E*Trade Securities LLC,
Defendant-Respondent.

Sanford Wittels & Heisler, LLP, New York (William R. Weinstein of counsel), for appellants.

Arnold & Porter LLP, New York (H. Peter Haveles, Jr. of counsel), for respondent.

Order, Supreme Court, New York County (Herman Cahn, J.), entered February 28, 2007, which denied plaintiffs' motion to amend the complaint, unanimously affirmed, with costs.

Plaintiffs failed to show merit to their proposed amendment, which would have added a new theory of recovery (*Glenn Partition v Trustees of Columbia Univ. in City of N.Y.*, 169 AD2d 488 [1991]), and further offered no valid reason for their delay in proposing it, even though they knew about its basis in 2001.

The de minimis nature of the alleged damages for the proposed claim does not impact on its merit (*see Weinberg v Hertz Corp.*, 116 AD2d 1 [1986], *affd* 69 NY2d 979 [1987]), but plaintiffs were refunded the account fees they had contested. Accordingly, the motion court providently determined, in its discretion, that they would not be proper class representatives for the proposed claim, and the theory sought to be added would

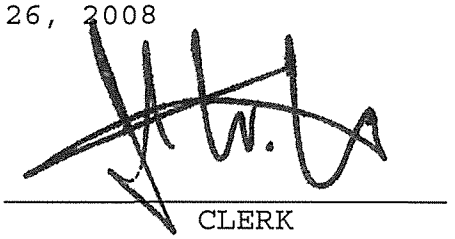
not be appropriate for class-action treatment.

The court also properly disallowed plaintiffs' effort to restore a cause of action based on General Business Law § 349, which it had previously dismissed.

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

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

ENTERED: JUNE 26, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on June 26, 2008.

Present - Hon. David B. Saxe, Justice Presiding
Eugene Nardelli
Karla Moskowitz
Rolando T. Acosta
Leland G. DeGrasse, Justices.

In re Alvin Peterson,
Petitioner,

4023
-against- [M-2357]

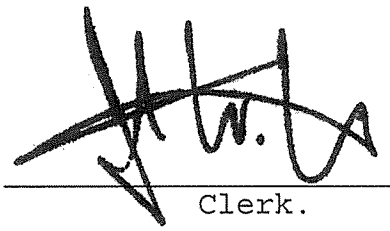
Clerk of the Court, et al.,
Respondent.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTER:



Clerk.

JUN 26 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
Milton L. Williams
James M. McGuire, JJ.

2250
Ind. 3314/04

The People of the State of New York,
Respondent,

-against-

Neville Wells,
Defendant-Appellant.

Defendant appeals from a judgment of the Supreme Court, New York County (Richard D. Carruthers, J.), rendered June 29, 2005, convicting him, after a nonjury trial, of murder in the second degree, assault in the first degree, vehicular manslaughter in the second degree, assault in the second degree, and vehicular assault in the second degree and imposing sentence.

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

Robert M. Morgenthau, District Attorney, New York (Patricia Curran and Alice Wiseman of counsel), for respondent.

TOM, J.P.

This appeal raises the issue of whether a death resulting from defendant's operation of a motor vehicle at a high rate of speed through the streets of lower Manhattan, while severely impaired by alcohol intoxication, supports his conviction of depraved indifference murder (Penal Law § 125.25[2]). The law in effect at the time defendant was convicted is delineated by *People v Register* (60 NY2d 270 [1983], *cert denied* 466 US 953 [1984]), and we hold that the evidence is sufficient to sustain the judgment under the *Register* standard, the verdict is consistent with the weight of the evidence, and the trial court properly declined to entertain the defense of intoxication to negate the culpable mental state of depraved indifference or to accept expert testimony concerning defendant's chronic alcoholism. Were we to analyze this case under the standard of *People v Feingold* (7 NY3d 288 [2006]), as urged by defendant, we would reach the same result.

On June 14, 2004 at 2:00 A.M., Robert Smith drove from his home in Nassau County to the Fulton Fish Market, where he ran a wholesale seafood business. He was accompanied by his daughter, Judith Gubernikoff, 37 years of age, who had begun working for the family business that month after moving from Chicago to New York with her husband, Dr. George Gubernikoff, and their three

young children so that Dr. Gubernikoff could accept a position at a Long Island hospital. Robert Smith testified that it was his custom to take the Williamsburg Bridge into Manhattan and drive south along Allen Street, which is a six-lane, divided roadway with a median separating the north- and south-bound lanes. Smith stated that he customarily traveled at 25 miles an hour to coincide with the timing of the traffic signals; however, he had no recollection of the events of that fatal morning.

At about 2:45 A.M., Adam Falek was in his pickup truck waiting at a red light on Waverly Street. As he made a right turn onto Broadway after the light changed, a blue van traveling south on Broadway came "flying" through the red light and almost hit his vehicle, causing him to swerve to the right to avoid a collision. Falek followed the blue van, pulling up alongside it at the next light, and began to yell at the driver, who paid no attention. Falek observed that the van's driver was rolling his head and looked "disheveled," "incoherent," "out of it," and "totally wasted." Without even looking over, he "just punched the gas and took off," stopping only momentarily after hitting a parked car about two blocks later. Falek continued to follow the van because it was going in his direction. However, he broke off the chase after the van ran through two more red lights: "he was going a high rate of speed and I was afraid, so I said it's not

worth it." Falek estimated that, at the point he decided to discontinue the pursuit, his own vehicle was traveling at "[f]ifty, sixty miles an hour," and the distance between the two vehicles was increasing.

At approximately 2:55 A.M., Martin Clemente was in his Dodge Caravan in the west-bound lane of Grand Street, facing the intersection with Allen Street, waiting for the light to change. There were still people coming back from the Hispanic Day parade crossing Grand Street directly in front of his vehicle. Looking straight ahead towards the traffic light with an unobstructed view of the intersection, he observed a Saturn proceeding south on Allen Street at about 30 miles an hour into the intersection. Suddenly, a blue minivan "came out of nowhere" from the easterly direction on Grand Street going "very fast," and without braking or slowing down entered the intersection against a red light. The front end of the van struck the passenger side of the Saturn. The force of the impact caused the minivan to spin around and come to a stop facing west in the intersection. "The Saturn went up in the air," propelled end over end, "doing a three-sixty, hit the floor, did another three-sixty," and landed on the fence of the divider on the northbound side of Allen Street.

After calling 911 to report the accident, Clemente went over to the Saturn. Smith appeared to be in shock, and Judith

Gubernikoff was unconscious. Her seat was "crushed together" with the driver's seat, and both seats were tilted backwards, "so she was trying to gasp for air with her head back." From a distance of about 25 feet, Clemente watched defendant get out of the driver's side of the minivan. He appeared "dizzy" and was "walking around in circles."

At the same time, Coss Marte, who was standing in the vicinity with some friends, heard a loud crash and ran to the intersection of Allen and Grand Streets, where he saw the blue van in the middle of the intersection and the Saturn on top of the fence located on the median island. Marte also called 911. As the sound of ambulance sirens became audible, defendant attempted to "run away," "zigzagging" along Grand Street towards Eldridge Street. Marte chased defendant and, a minute or two later, Marte and another man grabbed defendant and brought him back to the accident scene. Marte and the other man had to "grab" defendant's arms because he was attempting to get away. Although defendant was mumbling incomprehensibly, he did not appear to have sustained injury.

Officer Christopher Owen, who responded to the 911 call, testified that defendant appeared disheveled, his clothes were messy, his eyes were bloodshot and a strong odor of alcohol emanated from his person. The officer "had to prop him up with

my right hand under his arm to walk him towards the ambulance, and he was stumbling, stumbling as we walked." The officer added, "He appeared very confused, disoriented, seemed like he didn't know what was going on," and was unresponsive to questioning. Apart from "some blood coming from his nose," defendant did not appear to be injured.

Ms. Gubernikoff was brought to Bellevue Hospital's emergency room, where she was treated by Dr. Richard Moreno. A thoracotomy was performed, which revealed that she had sustained a hemopericardium-the accumulation of blood between the heart and the pericardial sac surrounding it. Because the injury prevented her heart from contracting appropriately, the pericardium was opened and the blood drained. At that point, Dr. Moreno observed a hole in the right atrium of the heart, an injury that is consistent with blunt force trauma sustained in a motor vehicle collision. Dr. Moreno testified that the force generated in the thoracic cavity necessary to cause the heart to rupture was "high velocity." While performing surgery to repair the hole, the medical team was unable to maintain blood pressure, and Gubernikoff was pronounced dead on the operating table at 4:50 A.M.

Robert Smith was also taken to Bellevue Hospital. A CAT scan revealed that blood had accumulated in his chest and behind

the abdominal organs, near his kidneys. His injuries included a lacerated intercostal artery, and the internal bleeding required surgical intervention, without which he would have bled to death. Smith, who awoke three weeks later, remained in the intensive care unit until June 30, 2004. He was discharged from the hospital on July 9 and treated at a rehabilitation center for another two weeks. He was unable to return to work for approximately six months and experienced memory deficits, difficulty walking and climbing, and reduced stamina for months after the crash.

After the victims were taken to the hospital, an accident investigation team arrived at the accident scene. Detective Patrick Rooney, an expert in the field of collision investigation and reconstruction, observed no pre-crash skid marks, from which he deduced that neither driver had applied the brakes before the vehicles collided. The absence of skid marks prevented him from calculating the speed of the van. In addition, the doors and roof of the Saturn had been cut off to extricate the passengers, precluding calculation of its speed from "crush evidence." However, judging from the damage sustained by both vehicles and their respective weights (2,500 pounds for the Saturn and 4,300 pounds for the Ford Windstar minivan), the distance the Saturn traveled following the collision, its abrupt change of direction

from south to southeast upon impact and the fact that it became airborne, Rooney concluded that the van must have been going from 50 to 55 to as much as 60 miles an hour when the vehicles collided. He further testified that both occupants of the Saturn were wearing seat belts, which had been cut to facilitate extrication. From the absence of any imprint on the van's safety harness, meaning that it did not lock on impact, the witness concluded that defendant was not wearing his seat belt at the time of the collision.

Two blood samples were obtained from defendant at about 5:00 A.M. on the morning of the accident. Since he had passed out, the samples were taken with his implied consent by an emergency room doctor. Analysis of the two samples revealed a blood alcohol concentration of 0.25 and 0.27 percent, respectively. It was stipulated that defendant had previously attended an intoxicated driver rehabilitation course.

Defendant presented testimony from Nicholas Bellizzi, a civil engineer and expert in the field of engineering and accident reconstruction. Bellizzi testified that, in the absence of skid marks, there are two methods of accident reconstruction used to determine speed: conservation of kinetic energy and conservation of linear momentum. The first method is based on a calculation of the amount of force required to create the damage

caused to the vehicles in a collision. Due to the damage done to the Saturn in removing the passengers, he was unable to use the conservation of kinetic energy method to calculate the van's speed. Using the conservation of linear momentum method, he estimated that the van had been traveling between 36 and 37 miles an hour and the Saturn had been traveling about 13 miles an hour at the time of impact, with a five percent margin of error. Bellizzi made his calculations using the heaviest Saturn model, which weighed 900 pounds more than the Smith vehicle. He worked from police diagrams and photographs without conducting any examination of the vehicles. From offset crash barrier tests performed by the Insurance Institute for Highway Safety, he opined that defendant's van would have sustained more severe damage to the occupant compartment had it been traveling at 55 miles an hour and that defendant, unrestrained by a seat belt, would have been propelled through the windshield. However, he conceded that vehicle damage inflicted by an offset crash would be greater since a smaller area of the vehicle absorbs the impact. The impact during an offset crash test is deliberately confined to the driver's side and not distributed over the full frontal width as in the case of a "frontal barrier impact" (such as the collision herein), where the entire front of the car strikes the barrier. Nor, he conceded, are offset crash tests

designed to simulate the collision of vehicles in different weight classes. Bellizzi did not take into account that the Saturn had flipped over because the conservation of linear momentum method does not utilize such data. Finally, he did not estimate how far the Saturn might have traveled had it not come into contact with the median fence, although from the minimal damage to the fence he concluded that it would not have traveled much farther.

The trial court, in a nonjury trial, refused to permit a psychologist to testify that, based on his examination, defendant suffered from chronic alcoholism, rejecting defendant's argument that this condition bore on his capacity to formulate the mens rea necessary for depraved indifference murder. Rather, the court held that voluntary intoxication is not a material consideration with respect to a crime involving reckless behavior.

The court found defendant guilty of murder in the second degree for causing the death of Judith Gubernikoff as a result of his reckless and wanton conduct. The court further found defendant guilty of assault in the first degree for "causing serious physical injury to Mr. Robert Smith that was occasioned by the same recklessness and indifference to human life that resulted in Mrs. Gubernikoff's death." Defendant was also found

guilty of all lesser noninclusory concurrent counts in the indictment--vehicular manslaughter in the second degree, vehicular assault in the second degree and assault in the second degree. On July 29, 2005, the court sentenced defendant to a cumulative concurrent term of imprisonment of 17 years to life.

On appeal, defendant contends that the evidence is insufficient to sustain conviction of murder in the second degree and assault in the second degree because it failed to establish that his conduct was so morally deficient and devoid of concern for life as to warrant exposing him to the same criminal liability that the law imposes for intentional conduct (citing *People v Payne*, 3 NY3d 266, 271 [2004]). Relying on *People v Feingold* (7 NY3d 288, 296 [2006], *supra*), he argues that the evidence fails to show, even circumstantially, that he was capable of formulating the mens rea that delineates depraved indifference murder because his extreme intoxication rendered him "incapable of possessing the culpable mental state necessary to prove depraved indifference" (citing *People v Coon*, 34 AD3d 869, 870 [2006]). He maintains that the trial court erred in refusing to receive relevant testimony concerning his chronic alcoholism. Finally, defendant asserts that even when examined under the pre-*Feingold* standard of *Register*, his conduct falls far short of the extreme recklessness of drivers found similarly culpable, who

generally appeared to be well aware of the risks they posed to others (*e.g. People v Gomez*, 65 NY2d 9 [1985] [driving on sidewalk at high speed]; *People v Williams*, 184 AD2d 437 [1992], *lv denied* 80 NY2d 935 [1992] [high-speed chase through construction site]). Defendant's contentions are unavailing.

Depraved indifference murder is committed when, "[u]nder circumstances evincing a depraved indifference to human life," a person "recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person" (Penal Law § 125.25[2]). Similarly, assault in the first degree under a depraved indifference theory is committed when, "[u]nder circumstances evincing a depraved indifference to human life," a person "recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to another person" (Penal Law § 120.10[3]). A person acts recklessly "when he is aware of and consciously disregards a substantial and unjustifiable risk" (Penal Law § 15.05[3]). The law in effect at the time of defendant's trial did not evaluate depraved indifference under the subjective mens rea standard announced in *Feingold* (7 NY3d 288 [2006], *supra*), but instead referred to an objective standard reflected by the "factual setting in which the risk creating conduct must occur" (*see Register*, 60 NY2d at 276).

Prior to *Feingold*, our jurisprudence had not progressed to the point where recklessness had been abandoned in favor of the mens rea of depraved indifference to human life, and then only by a closely divided Court of Appeals, whose dissenters saw no reason to overrule *Register* (*see id.* at 300 [Ciparick, J., dissenting], 301 [Kaye, Ch. J., dissenting], 305 [Graffeo, J., dissenting]).

Defendant never objected that the trial court was required to find that he acted with a mental state beyond recklessness or that depraved indifference referred to anything other than the circumstances under which the risk-creating conduct took place. Indeed, in his motion to dismiss at the conclusion of the People's case after the close of evidence, defendant explicitly cited *Register*, arguing merely that the People had failed to establish his commission of the crimes charged under *circumstances* evincing a depraved indifference to human life. This objection did not suffice to apprise the trial court of the contention now advanced by defendant that depraved indifference must be evaluated *subjectively* from his mental state and not *objectively* from the surrounding circumstances (*see People v Hines*, 97 NY2d 56, 62 [2001]; *People v Gray*, 86 NY2d 10, 20-21 [1995]; *People v Lawrence*, 85 NY2d 1002, 1004 [1995]). Furthermore, the Court of Appeals' purpose in effecting this change in the law was "to dispel the confusion between

intentional and depraved indifference murder, and thus cut off the continuing improper expansion of depraved indifference murder" (*Policano v Herbert*, 7 NY3d 588, 603 [2006] [change in the law not retroactively applicable to convictions that have become final upon exhaustion of appellate review]). The People's reliance "on *Register's* objectively determined degree-of-risk formulation" (*id.* at 604) in this matter does not implicate such concerns since there is no suggestion that defendant harbored any intent to cause harm. Thus, the court's evaluation of the sufficiency of proof according to the *Register* standard, which represented the prevailing law at the time defendant was convicted (*see People v Woods*, 36 AD3d 525, 526 [2007], *lv denied* 8 NY3d 951 [2007]), went unchallenged, and its failure to apply a mens rea standard, as now urged, is unpreserved for review (*see id.*, citing *Gray*, 86 NY2d 10, *supra*; *see also People v Orcutt*, 49 AD3d 1082, 1085 [2008]; *People v Zephirin*, 47 AD3d 649 [2008]), and we decline to reach the issue in the interest of justice.

Under *Register*, depraved indifference murder requires that a defendant's act be imminently dangerous, present a very high risk of death to others and be committed under circumstances that evince a wanton indifference to human life or a depravity of mind (*see Register*, 60 NY2d at 274). The requirement of depraved indifference refers neither to the mens rea nor to the actus

reus; rather, it refers to "the factual setting in which the risk creating conduct must occur" (*id.* at 276).

The evidence adduced in this case overwhelmingly supports defendant's conviction of depraved indifference murder and depraved indifference assault. Having chosen to drive while heavily intoxicated, defendant proceeded to drive in an extremely reckless manner, creating a grave risk of death to pedestrians and other drivers in a densely populated area of lower Manhattan.

The People's proof showed that defendant was driving at a speed of between 50 and 60 miles an hour and speeding through red lights before entering the subject intersection against a red traffic signal and plowing into Smith's Saturn. Defendant was operating a motor vehicle while, by his own admission, "barely *conscious* due to his intoxication" (emphasis in original),[1] and analysis showed his blood alcohol level was close to three times the legal limit. Falek observed defendant "flying" through several red lights and hitting a parked car, and Clemente observed defendant's van coming out of nowhere, traveling "very fast" as it entered the intersection. Detective Rooney, based on his training and experience, estimated that the van had been traveling at 50 to 55 miles an hour, and possibly as high as 60

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[1] As acknowledged in support of his application to introduce evidence of his chronic alcoholism.

miles an hour, an opinion supported both by the damage to the vehicles and by the testimony of eyewitnesses. The impact between defendant's minivan and Smith's Saturn was sufficiently severe to cause the Saturn to become airborne and flip end-over-end two times before landing on top of a fence located on the median island. Defendant made no attempt to brake before hitting the Saturn, as indicated by the absence of pre-crash skid marks.

Defendant drove not only at a high rate of speed but dangerously, as evinced by his striking a parked car and nearly striking Falek's pickup truck before colliding with the Saturn. Defendant narrowly avoided striking Falek's vehicle under much the same circumstances under which he struck the Smith vehicle moments later--speeding through a red light toward a vehicle that was passing through the intersection with the right of way. Just as defendant made no apparent effort to avoid the collision with Smith's Saturn, he made no effort to avoid Falek, who was forced to swerve to the right to get out of the way. The fact that defendant continued driving in the same manner after almost striking Falek--indeed, reacting to Falek's attempt to get his attention by "punching" the gas pedal and speeding off again--demonstrated a depraved disregard of the very high risk of death or serious physical injury that his conduct posed to others. Thus, the evidence supports defendant's conviction of depraved

indifference murder and assault (*see People v Gomez*, 65 NY2d 9 [1985], *supra* [defendant's excessive rate of speed and failure to brake while proceeding along a busy city street and partly onto its sidewalk satisfied depraved indifference element of crime]; *People v Hoffman*, 283 AD2d 928 [2001], *lv denied* 96 NY2d 919 [2001] [drinking and driving, excessive rate of speed, disobeying traffic signals, and failing to brake before he broadsided vehicle, killing and injuring the passengers therein, legally sufficient evidence of depraved mind murder]; *People v Padula*, 197 AD2d 747 [1993], *lv denied* 82 NY2d 928 [1994] [excessive rate of speed, failure to brake or take other evasive action, and decision to get behind the wheel of vehicle after becoming intoxicated, legally sufficient evidence of depraved mind murder]).

Further, while extremely intoxicated, defendant was not so impaired that he was unaware of what he had done, as indicated by his attempt to flee from the scene of the crash and his struggle with those who thwarted his escape. Moreover, it was conceded that defendant had previously attended a rehabilitative course for intoxicated drivers, which certainly would have alerted him to the grave danger that drinking and driving poses to others.

The verdict comported with the weight of the evidence, and the trial court properly credited the speed estimates proffered

by the People's witnesses. The import to be accorded to expert testimony is generally within the province of the trier of fact (*see People v Schwartz*, 21 AD3d 304, 309 [2005], *lv denied sub nom. People v Belkin*, 6 NY3d 845 [2006], *Finkelstein*, 7 NY3d 755, [2006], and *Schwartz*, 7 NY3d 763 [2006]), which may determine whether to accept or reject it (*see People v Drake*, 7 NY3d 28, 33 [2006]). The trial court properly assessed the probative value of the witnesses' conflicting testimony (*see People v Bleakley*, 69 NY2d 490, 495 [1987]) and was warranted in rejecting defendant's expert's calculations and crediting the testimony of People's eyewitnesses and an experienced police accident investigator that the minivan's speed was from 50 to 55 to as much as 60 miles an hour at the time of impact. When he first spotted defendant's van, Falek described it as "flying" through the red light, and estimated its speed at 50 to 60 miles an hour as it sped away. Falek pursued defendant's van for some distance and was in an excellent position to assess its speed from that of his own vehicle. He testified that, at the time he gave up his pursuit, his own vehicle was traveling at a speed of 50 to 60 miles an hour, and the distance between the two vehicles was increasing. While the van's speed was contested by defendant's expert, Bellizzi, who estimated a modest 36 to 37 miles an hour, he did not personally inspect the vehicles. His calculation

utilized an exaggerated weight of the Saturn and employed a mathematical model of "linear momentum" that did not account for the fact that the vehicle had flipped over. The result of Bellizzi's computation was only as good as the variables that went into it. His determination of the critical "point of impact" (from which all the other measurements flowed) was itself flawed in that it relied upon the location of scuff marks, the exact coordinates of which were unavailable.

The argument advanced by defendant that the element of depraved indifference to human life "may be negatived by evidence of intoxication," was explicitly rejected in *Register*, which holds that depraved indifference "is not an element in the traditional sense but rather a definition of the factual setting in which the risk creating conduct must occur--objective circumstances which are not subject to being negatived by evidence of defendant's intoxication" (60 NY2d at 276). Furthermore, Penal Law § 15.05(3) expressly precludes evidence of intoxication as a defense to a reckless crime, providing that "[a] person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly." Thus, defendant's intoxication at the time of the collision, no matter how debilitating, is immaterial, as is his history of chronic alcoholism, and the trial court properly declined to consider

such evidence.

The act of driving a vehicle while in a highly intoxicated state, at high speed, on city streets, ignoring traffic signals and failing to stop after striking a parked vehicle demonstrates reckless conduct that created a grave risk of death to others so as to constitute depraved indifference to human life.

Defendant did not preserve his objection to the trial court's evaluation of the evidence under the *Register* standard, and we decline to review it in the interest of justice. As an alternative holding, we further reject, on the merits, defendant's argument that he was incapable of forming the mens rea required for depraved indifference murder. Even subjecting his conviction to analysis under *Feingold*, as defendant now urges, we conclude that the evidence nevertheless supports a finding that his conduct evinced a depraved indifference to human life. Operation of a vehicle weighing in excess of two tons at a high rate of speed on city streets while highly intoxicated is the very epitome of depraved indifference to human life, culpably equivalent to "shooting into a crowd, placing a time bomb in a public place, or opening the door of the lion's cage at the zoo" (*Payne*, 3 NY3d at 272 [internal quotation marks omitted]). It demonstrates "an utter disregard for the value of human life--a willingness to act not because one intends harm, but because one

simply doesn't care whether grievous harm results or not" (*Feingold*, 7 NY2d at 296 [internal quotation marks omitted]). *People v Coon* (34 AD3d 869, 870 [2006]), relied upon by the concurrence, is distinguishable. There, the defendant, in a state of cocaine intoxication delirium, assaulted his sister with a knife. The Third Department held that defendant was too intoxicated to possess the culpable mental state necessary to sustain conviction for a depraved indifference offense.

Here, defendant's mental state at the time of the collision, as attested by numerous witnesses, is not dispositive; rather, culpability is appropriately assessed at the time defendant made the conscious decision to embark on a course of conduct that inevitably resulted in his operation of a motor vehicle while in a state of extreme intoxication. The mens rea of depraved indifference in this case is established by circumstantial evidence demonstrating that defendant made a conscious decision to drink and then, after consuming an excessive amount of alcohol to the point of becoming "totally wasted," to drive on city streets at a high rate of speed through red traffic lights, thereby creating a grave risk of death to pedestrians and occupants of other vehicles. The distinction between depraved indifference and intentional conduct does not detract from the wisdom of the observation aptly made by the Court of Appeals in

Register:

> "In utilitarian terms, the risk of excessive drinking should be added to and not subtracted from the risks created by the conduct of the drunken defendant for there is no social or penological purpose to be served by a rule that permits one who voluntarily drinks to be exonerated from failing to foresee the results of his conduct if he is successful at getting drunk" (60 NY2d at 280-281).

Defendant's depraved indifference is further supported by his comprehension of the dangers of drinking and driving. Having stipulated to attending an intoxicated driver rehabilitation course, there is record support for the conclusion that defendant was well aware of the risk that drunk driving posed to others. Thus, we conclude that the sufficiency and weight of the evidence prove beyond a reasonable doubt, even under *Feingold*, that defendant engaged in reckless conduct that created a grave risk of death to others and that he disregarded such risk under circumstances evincing a depraved indifference to human life, thereby causing the death of Judith Gubernikoff and serious physical injury to Robert Smith.

Accordingly, the judgment of the Supreme Court, New York County (Richard D. Carruthers, J.), rendered June 29, 2005, convicting defendant, after a nonjury trial, of murder in the second degree, assault in the first degree, vehicular

manslaughter in the second degree, assault in the second degree, and vehicular assault in the second degree, and sentencing defendant to concurrent terms of 17 years on the murder conviction, 15 years on the first-degree assault conviction, 7 years on the second-degree assault conviction, 2⅓ to 7 years on the vehicular manslaughter conviction, and 1⅓ to 4 years on the second-degree vehicular assault conviction, should be affirmed.

All concur except McGuire, J. who concurs in a separate Opinion:

McGUIRE, J. (concurring)

I agree with the majority that defendant's challenge to the sufficiency of the evidence, to the extent it is based on the holding in *People v Feingold* (7 NY3d 288 [2006]) that depraved indifference to human life is a culpable mental state, is not preserved for review. At defendant's trial, the clear understanding of the court and the parties, consistent with the holding in *People v Register* (60 NY2d 270 [1983], *cert denied* 466 US 953 [1984]), was that the only mental state required for the depraved indifference murder and assault counts was recklessness. Defendant made no argument or protest to the contrary. For this reason, defendant is wrong in contending that his current claim that depraved indifference is a culpable mental state is preserved for review merely because the court, in the course of ruling on a different issue that was in dispute, correctly stated the contrary holding in *Register* (*see People v Colon,* 46 AD3d 260, 263 [2007] [ruling by trial court on issue of law did not preserve issue for review when court's ruling was not made in response to a protest by a party]). I also agree with the majority that we should not review this unpreserved claim in the interest of justice. To the extent defendant is claiming on this appeal that the evidence was legally insufficient even when

evaluated under the *Register* standard, I agree with the majority that the evidence was legally sufficient.

Although there was no jury to be instructed, the clear understanding of the parties that recklessness was the only mental state required for these crimes renders this case indistinguishable from a jury trial in which the jury is charged, without objection, under an incorrect or subsequently invalidated standard (*see People v Danielson*, 9 NY3d 342, 349 [2007]; *People v Johnson*, 43 AD3d 288, 291-292 [2007], *revd on other grounds* ___ NY3d __, 2008 NY Slip Op 4902 [2008]). Because for this reason we must weigh the evidence in light of the elements of the depraved indifference crimes as they were defined in *Register,* I agree with the majority that the verdict convicting defendant of those crimes is not against the weight of the evidence.

After making clear that it is not reviewing in the interest of justice defendant's unpreserved challenge under *Feingold*, the majority alternatively holds as follows: "Even subjecting [defendant's] conviction to analysis under *Feingold* ..., we conclude that the evidence nevertheless supports a finding that his conduct evinced a depraved indifference to human life." We need not and should not decide, however, whether the evidence is sufficient under *Feingold*. By not deciding that issue, we would avoid the need to address and decide the question of law that is

at the core of defendant's challenge to the sufficiency of the evidence under *Feingold*: whether voluntary intoxication remains irrelevant as a defense in a prosecution for depraved indifference murder.

Under the last sentence of Penal Law § 15.05(3), a person who is unaware solely by reason of voluntary intoxication that his conduct creates a particular risk nonetheless acts recklessly with respect to that risk. In *Register*, this sentence played a decisive role in the Court's conclusion that the requirement of conduct evincing a depraved indifference to human life "does not create a new and different *mens rea* ... which can be negatived by evidence of intoxication" (60 NY2d at 279; *see also id.* at 275-276).

However, because voluntary intoxication does not negate the mens rea of recklessness, it hardly follows that it does not or cannot negate the distinct mens rea of depraved indifference, "an additional requirement of the crime -- beyond mere recklessness and risk -- which in turn comprises both depravity and indifference" (*People v Suarez*, 6 NY3d 202, 214 [2005]; *see Feingold*, 7 NY3d at 294). If voluntary intoxication remains irrelevant under *Feingold* as a defense to a depraved indifference prosecution, it must be that an individual can be depravedly indifferent to a risk without being aware of it. How that could

be is far from obvious. Notably, as defendant stresses, a panel of the Third Department has concluded that voluntary intoxication can negate the mens rea of depraved indifference (*People v Coon*, 34 AD3d 869, 870 [2006] ["as defendant was too intoxicated to form a specific criminal intent, he also would be incapable of possessing the culpable mental state necessary to prove depraved indifference"]).

As I read the majority's opinion, it does not decide this question sub silentio. After all, although it correctly notes the specific holding of *Register* on the irrelevance of voluntary intoxication in a prosecution for depraved indifference murder, it does not mention, let alone discuss, the issue of whether that holding remains good law after *Feingold*. Nor does the majority mention that defendant argues at length that under *Feingold* the mens rea of depraved indifference can be negated by evidence of intoxication, or state whether it agrees with the conclusion of the Third Department in *Coon*.[1] Clearly, moreover, the issue is best left for another day.

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[1]The majority, however, prefaces the two sentences it devotes to the opinion in *People v Coon* with a confounding sentence. Thus, it writes, "*People v Coon ..., relied upon by the concurrence*, is distinguishable" (emphasis added). My point of course is that we need not and should not decide whether voluntary intoxication can negate the mens rea of depraved indifference. Accordingly, and just as obviously, I do not "rel[y]" upon *People v Coon*.

Relatedly, I would reject as unpreserved defendant's current claim that he was deprived of his constitutional right to present a defense because the trial court improperly precluded the testimony of his expert regarding his chronic alcoholism. At trial, defendant never alerted the trial court to his current claim that the testimony related to a depraved indifference mens rea. Rather, defendant argued that the testimony bore on the mens rea of recklessness and on whether the objective circumstances surrounding his reckless conduct rose to the level of depraved indifference. Having never protested that the testimony related to a depraved indifference mens rea, defendant's claim is not preserved for review (CPL 470.05[2]; *People v Johnson*, 43 AD3d at 291-292, *revd on other grounds* ___ NY3d___, 2008 NY Slip Op 4902 [2008]), and I would not review it in the interest of justice.

I disagree in part with the majority's statement that "defendant's mental state at the time of the collision ... is not dispositive; rather, culpability is appropriately assessed at the time defendant made the conscious decision to embark on a course of conduct that inevitably resulted in his operation of a motor vehicle while in a state of extreme intoxication." A defendant's actions prior to the commission of the actus reus allegedly constituting the crime charged certainly can shed light on his

mens rea at the time of the actus reus, but the defendant's guilt turns on what his mens rea was at the time of the actus reus (*cf. People v Gallagher,* 69 NY2d 525 [1987]). I agree that defendant's mens rea at the exact moment of the collision is not determinative. The focus, however, must be on defendant's mens rea when he engaged in the conduct -- which included driving at high speed on city streets through red lights -- that caused the victim's death.[2] Thus, "culpability is appropriately assessed" at that time, not at any earlier point in time when, according to the majority, "defendant made the decision to embark on a course of conduct that inevitably resulted in his operation of a motor vehicle while in a state of extreme intoxication."

I also disagree that any "conscious decision to drink" defendant made "*inevitably* resulted in his operation of a motor vehicle while in a state of extreme intoxication" (emphasis added). This unexplained assertion that defendant's operation of a motor vehicle while in a state of extreme intoxication was the inevitable consequence of some earlier decision is unsupported by the evidence and contrary to common experience. Finally, the

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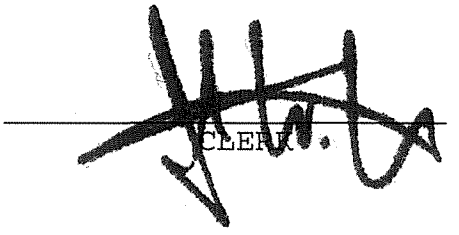
[2]That mens rea need not be identical to or as culpable as the mens rea of a person who decides to drive after drinking to excess. Obviously, not everyone who drives while intoxicated creates the same risk of death to others that defendant's driving created.

jury of course heard no testimony about defense counsel's contention in his memorandum of law that the evidence at trial would prove that defendant was "barely conscious due to his intoxication" (emphasis deleted). Accordingly, the majority errs in considering that contention to be evidence (indeed, an admission by defendant) that he was "barely conscious" as a result of his intoxication.

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

ENTERED: JUNE 26, 2008



JUN 26 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David B. Saxe
Luis A. Gonzalez
John T. Buckley
Rolando T. Acosta, JJ.

3004
Index 113788/06

x

In re Daniel Peckham,
Petitioner-Respondent,

-against-

Judith A. Calogero, as Commissioner
of the State of New York's Division of
Housing and Community Renewal, et al.,
Respondents-Respondents,

Chelsea Partners, LLC (Landlord),
Respondent-Appellant.

- - - - - - -

327-329 West 22nd Street, LLC,
Redding Properties, Inc.,
Idlewild 94-100 Clark, LLC,
Idlewild 182 State St., LLC,
Idlewild 186 State St., LLC,
Idlewild 188 State St., LLC and
Idlewild 217 St. Johns, LLC,
Amici Curiae.

x

Respondent Chelsea Partners, LLC appeal from an order and judgment (one paper) of the Supreme Court, New York County (Paul G. Feinman, J.), entered July 12, 2007, which granted this article 78 petition to the extent of remanding the matter to respondent Division of Housing and Community Renewal (DHCR) for further findings and determination.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz, Kristine L. Grinberg, Sherwin Belkin and Kara Schechter Rakowski of counsel), for appellant.

Stuart W. Lawrence, New York (Stuart W. Lawrence, Aurore C. DeCarlo, Susan Crumiller and Carrie Goldberg of counsel), for Daniel Peckham, respondent.

Gary R. Connor, New York (Caroline M. Sullivan and Roderick J. Walters of counsel), for DHCR respondents.

Kossoff & Unger, New York (Lester Breisblatt of counsel), for amici curiae.

SAXE, J.

Once an administrative agency has decided a matter, based upon a proper factual showing and the application of its own regulations and precedent, the parties to that matter are entitled to have the determination treated as final. Although a remand may be appropriate where the agency has made the type of substantial error that constitutes an "irregularity in vital matters" (*Matter of Porter v New York State Div. of Hous. & Community Renewal*, __ AD3d __, 857 NYS2d 110 [2008]), no remand is appropriate where the agency is "merely seeking a second chance to reach a different determination on the merits" (*Matter of Pantelidis v New York City Bd. of Stds. & Appeals*, 43 AD3d 314, 315 [2007], *affd* 10 NY3d 846 [2008] [internal quotation marks & citation omitted]). There was no proper basis for the remand to DHCR ordered by the motion court in this matter, and we therefore reverse.

The ruling made by DHCR on petitioner's petition for administrative review (PAR) properly disposed of the presented issues and was not arbitrary, capricious, irrational, or contrary to law; nor was it based upon an incomplete factual record. There was, in short, no legitimate reason for a remand. Although DHCR now takes the position that the motion court was correct and that the agency's own PAR ruling was improper because it was not

founded upon a conclusive agency definition of "demolition," DHCR certainly did not take that position at any point in the underlying proceeding prior to this appeal. Moreover, even assuming that such a conclusive definition by DHCR were currently lacking, the present matter does not turn on the fine points of such a definition; under any definition previously used by the agency or the courts, the plan submitted by respondent Chelsea Partners constitutes a demolition. Nor was it necessary, or appropriate, to remand the matter on the issue of Chelsea Partners' financial ability to complete the project.

Facts

Respondent Chelsea Partners owns a building located at 244 West 21st Street. Petitioner is the sole remaining rent-stabilized tenant therein. In May 2004, Chelsea Partners filed an application with DHCR, requesting permission not to renew petitioner's lease because it was going to demolish the building. The existing building is 4 stories and 40 feet deep, with 8 residential units. Chelsea Partners planned to construct a 6-story, 70-foot-deep building with 12 dwelling units. Its plan explained that:

> "The Demolition will entail the removal of (a) the roof, (b) entire interior of the Building, (c) all partitions, (d) floor joints [*sic*], (e) subfloors, and (f) building systems. In addition, much of the facade, and the entire rear wall of the Building will be

> removed. Once the demolition is completed, one will be able to stand on the roof of an adjoining building and look straight down to the basement of this Building."

In opposition, petitioner argued that Chelsea Partners' application with the Department of Buildings (DOB) listed the job as a reconstruction or an alteration. He also argued that the evidence of financial ability could not be relied upon because it established that the funds in question were held in the name of an entity other than Chelsea Partners.

On December 13, 2005, the Rent Administrator granted Chelsea Partners' application, stating:

> "[T]he owner has satisfied the conditions set forth under Section 2524.5(a)(2)(i) of the New York City Rent Stabilization Code. [¶] The owner has submitted evidence that they [*sic*] have obtained the necessary approval from the New York City Department of Buildings[.] Also, the owner submitted evidence of financial ability to complete the project."

Petitioner filed his PAR, arguing, inter alia, that the owner failed to provide proof of its financial ability to complete the undertaking.

On July 27, 2006, DHCR denied petitioner's PAR, saying that the owner had shown (1) that it had the financial ability to complete the undertaking, by submitting a printout from Chase Bank showing $4,800,000 in an account, and a letter from the bank stating that those funds were deposited for the purpose of funding the project at issue, and (2) that it intended to

demolish the premises, established through a letter from an architect, building plans approved by DOB, and photographs.

Petitioner then brought the underlying article 78 proceeding, arguing that DHCR determines what constitutes a "demolition" on an ad hoc basis and that a demolition is properly understood as it is defined in the dictionary, to mean "razing a structure to the ground." He also protested that DHCR fails to set forth the standard by which it determines whether an owner has demonstrated its financial ability to perform the undertaking. Despite the agency's assertion that the challenged order was properly supported, the motion court granted the petition to the extent of remanding the matter to DHCR "to clarify the standard used to determine a 'demolition' and whether this project is a 'demolition,' and to clarify the financial ability of Chelsea Partners to complete the project." Now, before this Court, DHCR reverses its position completely, asserting that clarification of the definition of demolition and the owner's financial ability is necessary.

Analysis

Initially, DHCR challenges the right of Chelsea Partners to appeal from the motion court's ruling on the article 78 petition, pointing out that Chelsea Partners has no appeal as of right and did not request leave to appeal. However, while the posture of

this matter leaves the aggrieved owner without a right to appeal at this point, justice dictates that on our own motion we grant Chelsea Partners leave to appeal (*see Matter of De Jesus v Roberts*, 296 AD2d 307, 310 n * [2002], *lv denied* 99 NY2d 510 [2003]; *Matter of Foster v Goldman*, 253 AD2d 823 [1998]). Upon appeal, we should reverse the order and dismiss the proceeding, because the issues the motion court saw fit to remand to DHCR were inappropriate for remand.

Demolition

An argument "may not be raised for the first time before the courts in an article 78 proceeding" (*Matter of Yonkers Gardens Co. v State of N.Y. Div. of Hous. & Community Renewal*, 51 NY2d 966, 967 [1980]). Petitioner argued before the Rent Administrator that Chelsea Partners' project was not a demolition because its application with DOB listed it as a reconstruction or alteration rather than a demolition. In his PAR, petitioner no longer made this argument; his only demolition-related argument was that the landlord had performed demolition before its application was approved. It was only in this article 78 proceeding that petitioner argued that DHCR lacked appropriate standards for what constitutes a demolition. Thus, the issue was not even properly before the court.

Even had the issue been properly and timely raised,

petitioner's argument would have been unavailing, since there is no true uncertainty as to the agency's definition of demolition. At least as early as 1981, DHCR's predecessor, the Conciliation and Appeals Board of the City of New York, stated that "demolition" did not require razing to the ground, and that "the total gutting of a building's interior" sufficed (*Villas of Forest Hills*, CAB Op. 15,680, at 103-04). In May 4, 1998 and April 13, 2001 opinion letters from DHCR responding to property owners' inquiries, the agency stated that it may grant a demolition application where the outer walls and structural supports of the building will remain intact, with only the interior being totally gutted.

In 2006, DHCR harbored no doubt that the landlord's gutting of the interior residential areas of a building constituted a demolition. In *Matter of Schneider* (DHCR Admin. Review Docket No. TB420052RT, at 7 [March 16, 2006]), in concluding that the owner's challenged plans constituted a demolition, the agency remarked that "the Commissioner is bound by the rent agency's definition of a demolition as set forth in, among other things, the applicable rent laws and regulations, the rent agency's prior orders, and the relevant New York case law" (*see also Matter of Mazzia*, DHCR Rent Admin. Docket No. PF-410002-OE [September 27, 2002]; *Matter of Dalabar Co.*, DHCR Admin. Review Docket No. ARL-

04567-L [Jan. 31, 1989]).

Over the years, courts reviewing the issue have reiterated and approved the agency's understanding of the term demolition to cover gutting the interior of premises (*see Application of Gioeli*, 221 NYS2d 568 [Sup Ct, NY County, Mar. 31, 1961]; *Gewritz v Altman*, NYLJ June 4, 1970, at 2 col 2, *affd* 35 AD2d 688 [1970]; *Matter of Mahoney v Altman*, 63 Misc 2d 1062 [Sup Ct, NY County, 1970]; *Matter of 412 W. 44th St. Corp.*, NYLJ, Oct. 19, 1971 at 2, col 5 [Sup Ct, NY County]).

There may have been occasions when the planned work involved something less than a total gutting, creating some legitimate question about whether it qualified as demolition, such as in *Matter of Mahoney v Altman* (63 Misc 2d 1062 [1970], *supra*, where it was held that demolition was established even where only the portion of the building in which the housing accommodations were located was being gutted. But there has not been any doubt, at any time, that a gutting which left external walls intact but removed all internal structures constituted a demolition. So, even assuming that the agency can be said to lack a conclusive definition of the term demolition to clarify all possible circumstances, that lack would be irrelevant to this matter, because there can be no question that in this case the owner's plans constituted a demolition. As DHCR itself said in denying

the PAR, this owner clearly intends to "demolish" the premises.

The cases cited by the motion court to support its assertion that there exists a "troubling" inconsistency in the agency's interpretation of the term demolition are simply inapposite and show no such inconsistency. *Matter of Robbins v Herman* (11 NY2d 670 [1962]) did not involve a gutting of the interior of the building; the plans proposed subdividing existing apartments and combining others and upgrading building systems. The *Robbins* Court's conclusion that this did not constitute a demolition is consistent with all the foregoing authorities. *Weitzen v 130 E. 65th St. Sponsor Corp.* (86 AD2d 511 [1982]) concerned a stay of demolition in view of the owner's application for an *alteration* permit from the Department of Buildings, and had nothing to do with DHCR or its definition of the term demolition. *Malta v Brown* (12 Misc 3d 1164A, 2006 NY Slip Op 51028[U] [Civ Ct, NY County, 2006]) involved an owner's use holdover proceeding; DHCR was not involved, the issue of demolition was not relevant, and Rent Stabilization Code § 2524.5(a)(2) was not applicable.

Ultimately, the only authority that can be cited to support the contention that the owner's plans here do not fall within some definition of demolition is a dictionary definition that defines demolition as "razing to the ground." This is not a sufficient ground to challenge the agency's clear and

longstanding understanding of the term demolition as applicable here.

DHCR correctly observes that there exists no specific definition of the word demolition in the rent stabilization law or the regulations. Although this absence has not, to date, caused any confusion or hampered any decision-making, the agency certainly has the right, going forward, to take any actions available to it under its authority. It may issue such operational bulletins and advisory opinions as it sees fit. What it may not be permitted to do is to rescind a ruling it properly made, upon a complete record, in which it correctly found, based upon precedent, that the planned work constituted a demolition, in order to create and apply newly-formulated definitions.

Financial Ability

In its application, Chelsea Partners submitted a printout from Chase Bank indicating that Three Stars Associates LLC had an account containing $4.8 million, and a lettter from the bank to Three Stars reciting that Larry Tauber, a member of Chelsea Partners, had indicated that those funds were to be used for the construction on the subject property. In his initial opposition to the application, petitioner argued that the fact that Three Stars had money did not prove Chelsea Partners' financial ability. However, after the Rent Administrator rejected that

argument, petitioner never made it again; he raised it neither in his petition for administrative review nor in his article 78 petition, in which he argued that "DHCR offers no ... standard against which it measures how an owner demonstrates it possesses the financial ability to perform the undertaking." He must therefore be deemed to have abandoned the currently resuscitated argument that the evidence did not establish the owner's financial ability (*see generally Matter of East Harlem Bus. & Residence Alliance v Empire State Dev. Corp.*, 273 AD2d 33, 34 [2000]).

In any event, there was nothing irrational in DHCR's determination that Chelsea Partners had the requisite financial ability. It was entitled to accept bank documentation pertaining to Three Stars as sufficiently establishing the finances of Chelsea Partners. As the motion court acknowledged, the bank's letter is addressed to Larry Tauber, who "is also the 'agent' for . . . Chelsea Partners LLC, whose address is the same as Three Stars." In *Matter of Mahoney v Altman* (63 Misc 2d 1062, 1065 [Sup Ct, NY County 1970], *supra*), the landlord had "submitted letters of credit issued by a commercial bank to the contractor hired by . . . landlord," and the court held that showing of financial responsibility to be sufficient. The equivalent showing was made here and is similarly sufficient.

Propriety of Remand

There are many appropriate grounds for remand of a matter to the agency. As this Court said in *Matter of Porter v New York State Div. of Hous. & Community Renewal* (__ AD3d __, 857 NYS2d 110 [2008]), DHCR has the authority to modify or revoke any order that was the result of illegality, irregularity in vital matters or fraud (citing Rent Stabilization Code [9 NYCRR] § 2527.8). The court may also remand a matter to the agency where fact-finding or technical analysis is needed for a proper adjudication (*see e.g. Matter of Hakim v Division of Hous. & Community Renewal*, 273 AD2d 3 [2000]). However, there is every indication that in this matter, as in *Matter of Pantelidis v New York City Bd. of Standards & Appeals* (43 AD3d 314, 315 [2007], *affd* 10 NY3d 846 [2008], *supra*), the agency was "merely seeking a second chance to reach a different determination on the merits" (internal quotation marks and citation omitted).

Our citizens rely on our administrative agencies, just as they rely on our courts, to decide matters before them neutrally, in accordance with established precedent that interprets the relevant laws, rules and opinions. Here, the record before the agency was quite sufficient to permit it to determine whether the owner had demonstrated financial ability to complete the project and whether the planned work constituted a demolition. The

agency's determinations of those issues were rational and completely in accord with well established principles. There was no legitimate ground for the remand by the motion court, and there is no valid basis to uphold it now.

Accordingly, upon granting leave to appeal to Chelsea Partners, the order and judgment (one paper) of the Supreme Court, New York County (Paul G. Feinman, J.), entered July 12, 2007, which granted this article 78 petition to the extent of remanding the matter to respondent Division of Housing and Community Renewal (DHCR) for further findings and determination, should be reversed, on the law, without costs, the petition denied, DHCR's determination permitting respondent Chelsea Partners not to renew petitioner's rent-stabilized lease confirmed, and the proceeding dismissed.

All concur except Mazzarelli, J.P. and Acosta, J. who dissent in an Opinion by Acosta, J.

ACOSTA, J. (dissenting)

Supreme Court correctly remitted the proceeding to DHCR for further fact-finding and determination. I therefore respectfully dissent and would affirm. The majority's insistence that "there is every indication" that DHCR is now seeking to reach a different result has no support in the record, other than a self-serving letter from a landlord. Under the guise of finality, the majority refuses to acknowledge DHCR's legislatively granted prerogative and duty to develop rent regulations.

The undisputed facts are straightforward. Petitioner commenced this article 78 proceeding against DHCR, and Supreme Court remanded the matter to DHCR to clarify the standards it uses to determine what constitutes a "demolition," and whether the owner has the financial ability to complete the project. Chelsea Partners thereafter sought to appeal the order, and DHCR challenged its right to do so. DHCR alternatively moved to affirm the order to the extent it permits DHCR to reconsider and review the issues raised therein. The majority is correct that Chelsea Partners does not have an appeal as of right (*see* CPLR 5701 a [a][1], [b][1]). However, under the circumstances of this case the majority is incorrect to sua sponte grant Chelsea Partners leave to appeal, reverse the order, and dismiss the proceeding without giving DHCR an opportunity to complete its

fact-finding and issue a final determination.

On appeal, DHCR concedes that there is no definition of demolition in the Rent Stabilization Law or the Rent Stabilization Code, and that it has heretofore made its determinations on a case-by-case basis. DHCR also concedes that it erroneously did not address the weakness of the evidence presented on the issue of Chelsea Partner's financial ability to complete the proposed demolition. The remand thus gave DHCR the opportunity it now requests to once and for all create the very standards that courts will scrutinize to determine if its handling of demolition applications has a rational basis.

The remand is also consistent with Rent Stabilization Code (9 NYCRR) § 2527.8, which empowers DHCR to issue a superseding order modifying or revoking **any** order issued by it where it finds "that such order was the result of . . . irregularity in vital matters" (emphasis added). Here, there is an irregularity inasmuch as DHCR lacks a standard for determining demolition applications. DHCR should therefore be encouraged, not chastised, for finally showing an interest in establishing a transparent working standard to guide its endeavors.

This point is underscored by the fact that the Legislature has recognized that certain matters require the expertise of DHCR in the first instance, and thus "has specifically authorized that agency to administer questions relating to rent regulation." (*Davis v Waterside Hous. Co.*, 274 AD2d 318, 319 [2000], *lv denied* 95 NY2d 770 [2000].) "It is clear beyond question that the Legislature intended disputes over a landlord's right to demolish a regulated building to be adjudicated by the DHCR" (*Sohn v Calderon*, 78 NY2d 755, 765-766 [1991]), and equally clear that DHCR has the inherent power in the first instance to determine whether an owner has the right under the Rent Stabilization Code to evict rent-regulated tenants and to demolish its building. (*see generally Matter of Pantelidis v New York City Bd. of Stds. & Appeals*, 43 AD3d 314, 317 [2007] *affd* 10 NY3d 846 [2008] ["Beyond question, judicial deference to administrative authority and expertise is an important principle"]).

Indeed, this very same panel stated in *Matter of Porter v New York State Div. of Hous. & Community Renewal* (__ AD3d __, 857 NYS2d 110 [2008]),

> "[The] Rent Stabilization Code (9 NYCRR) § 2527.8 provides that 'DHCR, on application of either party, or on its own initiative, and upon notice to all parties affected, may issue a superseding order modifying or revoking any order issued by it under this or any previous Code where the DHCR finds that such order was the result of illegality, irregularity in vital matters or fraud.' The Court of

> Appeals has confirmed DHCR's broad powers and authority to alter its prior determinations on remission, and this Court has held that remission for further fact-finding and determination is appropriate where, as here, DHCR concedes an error in the issuance of its determination, and where the determination resulted from an 'irregularity in vital matters'" (internal citations omitted).

The majority, in citing to *Porter*, concedes that DHCR has the authority to modify or revoke any order based on irregularity or a conceded error. It would therefore be anomalous in this instance to preclude DHCR from doing so. Indeed, as this and the *Porter* case demonstrate, the lack of a uniform and transparent standard will lead to unnecessary litigation, which will be a drain not only on DHCR and the litigants involved, but on the judiciary as well.

Once DHCR acknowledges that it has failed to provide guidance on an issue arising from the statutes that the Legislature has vested it with authority to administer, and concedes an error in reaching a determination, we should not second-guess its position. This is especially true since we may ultimately pass judgment on the revised decision and its application of a newly developed standard. A landlord's self-serving allegations should not trump a legislative policy choice to give DHCR the power to recall a nonfinal determination.

I also disagree with the majority that DHCR decided the matter upon a proper factual showing and application of its own

regulations and precedent. The majority ignores DHCR's acknowledgment that the record on Chelsea Partner's financial ability is "obviously" incomplete. Little weight should be placed on precedent based on a standard devoid of the very elements that would permit us to properly review the administrative determination. DHCR's decision to grant the application did not point to any specific facts or legal or administrative precedent that guided its decision. Rather, DHCR stated in a conclusory manner that the owner's plans constituted a demolition and that the owner had the financial ability to complete the project. Without more, there is no guidance as to how DHCR reaches its determinations and whether those determinations are arbitrary and capricious (*see generally Matter of Sherwood 34 Assoc. v New York State Div. Of Hous. & Community Renewal*, 309 AD2d 529, 532 [2003]). It is incongruous to maintain that DHCR decided the matter on a full record when its decision fails to indicate the facts that were considered and to which a transparent, uniform standard was applied.

Judicial deference is of utmost importance where, as here, the agency's function is aimed at addressing serious social concerns. The Rent Stabilization Law and regulations promulgated thereunder seek to provide safe and affordable housing to residents of New York City in an already crowded market. It is

vital that DHCR pursue this through an objective and clear process to ensure that those who are entitled to rent-stabilized housing are not literally left out in the cold. Accordingly, I respectfully dissent.

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

ENTERED: JUNE 26, 2008

CLERK