SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 15, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Tom, Gonzalez, Buckley, JJ.

2769N City of New York, Index 401866/07
Plaintiff-Appellant,

-against-

Untitled LLC,
Defendant-Respondent,

Yun Hing Yau, et al.,
Defendants.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for appellant.

Ravi Ivan Sharma, New York, for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered May 30, 2007, which denied plaintiff's motion for a preliminary injunction, unanimously reversed, on the law, without costs, and the matter remanded for an evidentiary hearing to determine whether plaintiff has made a prima facie showing of a public nuisance and satisfied the requirements for preliminary injunctive relief.

In this action pursuant to the Nuisance Abatement Law (Administrative Code of City of NY § 7-701 *et seq.*), the City seeks to permanently enjoin defendants from operating certain premises known as "Sutra," based on three separate sales of

alcohol to underage auxiliary police officers within a 15-month period in violation of Alcoholic Beverage Control Law § 65(1) and § 123. The City's complaint alleges that the incidents in question constitute a public nuisance under both Administrative Code § 7-703(h) (defining a public nuisance as "[a]ny building, erection or place . . . used for any of the unlawful activities described in [§ 123] of the alcoholic beverage control law"), and Administrative Code § 7-703(l) (defining public nuisance as "[a]ny building . . . wherein there is occurring a criminal nuisance as defined in section 240.45 of the penal law").

The City also moved for a preliminary injunction, as well as temporary restraining and closure orders (*see* Administrative Code of City of NY § 7-707, § 7-709, § 7-710, § 7-711). Defendants opposed, arguing that there was no pattern of illegal sales to minors sufficient to constitute a public nuisance and that the affidavits of the police witnesses alleging the sales were based, in part, on incompetent hearsay.

Supreme Court granted the temporary restraining order but denied temporary closure. As to the preliminary injunction, the court denied the City's motion primarily on the ground that three instances of underage sales in the time period alleged were insufficient to constitute a pattern of illegal activities giving rise to a public nuisance. The court further noted that there was no evidence of "trafficking" in alcohol or any proof that the

summonses for underage sales led to convictions.

Supreme Court erred in summarily denying the City's motion for preliminary injunctive relief without a hearing. The City correctly notes that, unlike other types of public nuisances listed in Administrative Code § 7-703 that specifically require a minimum number of violations before a nuisance is established (*see e.g.* § 7-703[g] [requiring "three or more" violations of penal statutes pertaining to controlled substances, marijuana and gambling within the year preceding commencement of an action]), § 7-703(h) does not expressly require multiple violations of the Alcoholic Beverage Control Law ("*any* of the unlawful activities described in [§ 123] of the alcoholic beverage control law" [emphasis added]). Whether this discrepancy is the product of legislative design or oversight is debatable (*see City of New York v Dorrian*, NYLJ, Nov. 3, 2006, at 22, col 1 [Sup Ct NY County] [it appears "anomalous" for city council to have intended that a single sale of alcohol to a minor constitutes a public nuisance, while a different subdivision of the same section requires three convictions for selling narcotics within one year]), but what is clear from the statutory scheme is that a hearing is required prior to any determination on a motion for preliminary injunctive relief. Under Administrative Code § 7-710(a), where, as here, a court grants a temporary restraining order, "the court *shall* direct the holding of a hearing for the

preliminary injunction at the earliest possible time but in no event later than three business days from the granting of such order" (emphasis added).

In this case, the court granted a temporary restraining order but never held the hearing on the preliminary injunction required by § 7-710. Instead, it simply denied the preliminary injunction based upon the parties' written submissions, essentially rejecting the City's entire nuisance complaint on the merits. By proceeding in this manner, the court deprived the City of a fair opportunity to demonstrate that the three alleged sales to underage persons in this case constitute a public nuisance within the meaning of § 7-703(h). The court's precipitous action also prejudiced defendants, who were denied an opportunity to contest the factual allegations underlying the three summonses, which, according to the record, have all been dismissed.

Even if, as the City maintains, no pattern of violations is required to demonstrate a public nuisance under the express wording of § 7-703(h), the motion court's summary denial gave inadequate consideration to the three-prong test for preliminary injunctive relief, which is applicable in cases under the

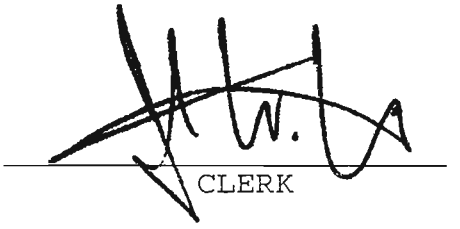
Nuisance Abatement Law (*City of New York v Love Shack*, 286 AD2d 240, 242 [2001]; *but see City of New York v Bilynn Realty Corp.*, 118 AD2d 511, 512-513 [1986] [municipality need not satisfy three-prong test for injunctive relief in action to abate nuisance in form of zoning violation]).

To obtain a preliminary injunction, the City was required to demonstrate a likelihood of success on the merits of its public nuisance claim, irreparable harm in the absence of the injunctive relief, and a balancing of the equities in its favor (*Love Shack* at 242; *City of New York v West Winds Convertibles Intl., Inc.*, 16 Misc 3d 646, 652-654 [Sup Ct Kings County 2007] [Battaglia, J.] [applying three-prong test for injunctive relief in statutory nuisance abatement action]). Such a showing was especially important in this case, given the limited number of alleged violations over a fairly lengthy period of time (*cf. Castro*, 160 AD2d at 652 [preliminary injunction warranted by evidence of six separate gambling violations]; *City of New York v Partnership 91*, 277 AD2d 164, 164 [2000] [granting preliminary injunction based on City's "proof of illegal operations at the premises over an extended period"]). Accordingly, a remand is necessary for the

court to hold a hearing on the request for a preliminary injunction contemplated by § 7-710 of the Nuisance Abatement Law.

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

ENTERED: MAY 15, 2008



CLERK

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

3067 The People of the State of New York, ex rel. Jackie Lewis, etc., Petitioner-Respondent, Index 75052/06

-against-

Warden, Otis Baum Correctional Center, et al., Respondents-Appellants.

Andrew M. Cuomo, Attorney General, New York (Laura R. Johnson of counsel), for appellants.

Steven Banks, The Legal Aid Society, New York (Elon Harpaz of counsel), for respondent.

Order, Supreme Court, Bronx County (Caesar D. Cirigliano, J.), entered December 14, 2006, which granted the petition for a writ of habeas corpus seeking to vacate a parole warrant charging petitioner with violation of conditions of post-release supervision (PRS), unanimously affirmed, without costs.

Supreme Court properly concluded that petitioner's sentence did not include PRS, and that the term of PRS administratively imposed by the Department of Correctional Services (DOCS) was a nullity (*see* 14 Misc 3d 468 [2006]). The sentencing court failed to mention PRS at the time sentence was imposed. Even if petitioner was advised that he was subject to a term of PRS at his plea proceeding, petitioner was not sentenced to PRS because the PRS term "was not 'pronounced' [by the court] as required by

CPL 380.20 and 380.40" (*People v Sparber*, 2008 NY Slip Op 3946, *6 [2008]).

Although the absence of PRS results in a sentence that is not in compliance with Penal Law § 70.45, DOCS lacks the authority to administratively impose a term of PRS, as "the sentencing judge - and only the sentencing judge - is authorized to pronounce the PRS component of a defendant's sentence" (*Matter of Garner v New York Dept. of Correctional Servs.*, 2008 NY Slip Op 3947, *3 [2008]).

"[H]abeas corpus is an appropriate proceeding to test a claim that the relator has been imprisoned after having been deprived of a fundamental constitutional or statutory right in a criminal prosecution, including, but not limited to, the right to be tried and sentenced by a court having jurisdiction over the charge and the person" (*People ex rel. Keitt v McMann*, 18 NY2d 257, 262 [1966]; *see* CPLR 7002 [a]). Since the parole warrant

alleged a violation of a nonexistent portion of petitioner's sentence, it was not a valid basis for his detention.[1]

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

ENTERED: MAY 15, 2008

[1] This decision is without prejudice to an appropriate application for resentencing in the proper forum (*see Garner*, 2008 NY Slip Op 3947, *4 n 4).

Lippman, P.J., Gonzalez, Sweeny, Catterson, JJ

3111 Isaac Ainetchi, et al., Index 118597/02
Plaintiffs-Respondents-Appellants,

-against-

500 West End LLC,
Defendant-Appellant-Respondent.

Franklin R. Kaiman, New York, for appellant-respondent.

Connors and Sullivan, P.C., Brooklyn (Edward R. Dorney of counsel), for respondents-appellants.

Judgment, Supreme Court, New York County (Debra A. James, J.), entered September 5, 2006, after a nonjury trial, inter alia, awarding plaintiffs the mechanical room, legal fees and disbursements to the extent incurred in prosecuting their first cause of action, and a credit of $24,902.50 on their reimbursement and corrective claims, and awarding defendant $190,329.87 plus interest, unanimously modified, on the law, the facts and in the exercise of discretion, to the extent of staying enforcement of the judgment and remanding the matter for further proceedings consistent herewith, and otherwise affirmed, without costs.

The trial court correctly found that defendant substantially performed the construction contract. In arguing otherwise, plaintiffs incorrectly include amounts that they received or claim they should have received as reimbursement for their own expenditures on the construction; however, since this was work

that was actually performed, the only issue is who was responsible for payment. Plaintiffs also incorrectly include amounts that they claim were awarded to them in the body of the order underlying the judgment but were erroneously omitted from the conclusion of that order and the final judgment; however, it is clear that the paragraphs appearing to award plaintiffs these additional amounts were erroneously left in the body of the order and were meant to be taken out.

In any event, there is no merit to plaintiffs' claims of nonperformance, which involve three items -- allegedly improper construction of the interior staircase and purported damages to the penthouse floors and terrace -- for which plaintiffs claim a right to reimbursement for sums paid by them to contractors. Concerning the staircase, plaintiffs rely on the June 21, 2001 or "BKS" plans and the as-built drawings, asserting that the stairs were not built as they appear in the plans, and that they never agreed in writing to a modification of the plans as required by the parties' agreements. However, the record shows that the parties regularly modified the plans and plaintiffs' payment schedules without any writing whatsoever (*see Rose v Spa Realty Assoc.*, 42 NY2d 338, 343-344 [1977]), and no basis exists to disturb the trial court's findings crediting the testimony of defendant's witness that the modification to the staircase was discussed with and agreed to by plaintiff Ainetchi, testimony

supported by Ainetchi's daily presence at the job site and the fact that the changes to the staircase were readily apparent (*see Matter of Albrecht Chem. Co. [Anderson Trading Corp.]*, 298 NY 437, 440 [1949]).

Concerning the flooring, no basis exists to disturb the trial court's findings crediting defendant's expert (*see Watts v State of New York*, 25 AD3d 324 [2006]), who testified that the minor "cupping" was not caused by the lack of a vapor barrier but was a natural consequence of the width of the wood, to which plaintiffs had agreed. Concerning the terrace, the record shows that the parties agreed to change the initial plans by expanding the scope of the terrace. Defendant's witness credibly testified to conversations with Ainetchi regarding these changes, and Ainetchi's direct payment to the vendors for the additional materials required by the changes substantiates his agreement to assume this cost. Ainetchi's testimony that he paid these vendors only because they threatened not to do the work unless they were paid by him was rendered incredible by invoices showing that he paid the contractors after the work was completed.

The trial court properly precluded plaintiffs' expert's report as to the cost of repairs, and certain testimony regarding these costs, as they were based largely on unidentified subcontractors' quotes unsupported by any evidence of reliability

(*see Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 725-726 [1984]; *cf. Sigue v Chemical Bank*, 284 AD2d 246, 247 [2001]). While some of the subcontractors later testified, arguably satisfying the test in *Hambsch*, there is no indication that plaintiffs sought to have the court reconsider its ruling after this testimony. In any event, any error was harmless as plaintiffs' claims with respect to the staircase and the terrace were, as noted, properly rejected for reasons having nothing to do with the contractors' estimates, and, with respect to the flooring, the court heard the testimony of plaintiffs' contractor but properly rejected it on credibility grounds.

We modify, however, to vacate that portion of the court's verdict and judgment awarding the mechanical room to plaintiffs, the purchasers of Penthouse West. There is conflicting evidence in the record regarding whether the mechanical room at issue, designated "W-212" on the primary architectural plans, belongs to Penthouse West or Penthouse East.

Plaintiffs argue that because the relevant purchase agreement identifies Penthouse West as the unit displayed in the BKS Plans and the Plans accompanying the condominium plan declaration, and such plans clearly designate the subject mechanical room as "W-212," then the mechanical room is necessarily part of Penthouse West. Moreover, Ainetchi himself testified that he discussed this particular room as being his

unit's mechanical room with defendant's builder, and that he stored light fixtures in such room and had a key to it prior to the aborted closing. Plaintiffs also suggest that certain mechanical equipment or conduits for Penthouse West are located in, or are connected to, room W-212.

Defendant, on the other hand, points out that the room designated W-212 is physically connected to Penthouse East, and is not contiguous at all to Penthouse West. Defendant also notes that the floor plans for Penthouse West attached to the original offering plan do not include the mechanical room eventually designated W-212. It was further noted that the "Description of Additions" attachment to the offering plan provides that "[m]echanical equipment for Penthouse West will be located inside the unit as well as on the roof of this [u]nit," and that room W-212 clearly is not "inside the unit." Finally, defendant argues that the ambiguity in the BKS Plans is demonstrated by the fact that there are two separate rooms designated "W-212" on such plans. Clearly, a drafting error exists on the BKS Plans, making it difficult to determine whether room W-212 was conveyed to plaintiffs as part of Penthouse West.

Although the trial court acknowledged that the BKS Plans were ambiguous, it nevertheless excluded the testimony of the drafter of the plans, called by defendant to testify that the designation "W-212" was a scrivener's error made during a

modification to the plans. The court initially excluded the testimony on hearsay grounds, and prohibited further attempts by defense counsel to rephrase or to introduce documentary evidence as an improper attempt to reform the contract without making it the subject of a counterclaim.

The court's exclusion of the drafter's testimony was an improvident exercise of discretion and was not harmless. The testimony regarding the scrivener's error was clearly relevant and based on personal knowledge; any hearsay problem could easily have been obviated. Given the importance of this testimony to a crucial issue in the case, and because plaintiffs had the opportunity to offer their own testimony concerning ownership of the room, we find that the trial court should not have excluded the testimony, which should be admitted upon retrial. Defendant's failure to amend its counterclaim is no bar to raising this argument at trial, given the court's established authority to permit amendment of the pleadings to conform to the proof at trial (CPLR 3025[c]). In light of the erroneous evidentiary ruling, we remand for a new trial limited to the issue of whether the mechanical room designated W-212 on the BKS Plans and other plans is part of Penthouse East or Penthouse West.

The court properly awarded plaintiffs attorneys' fees solely on their claim for specific performance associated with closing

on the penthouse. The parties' settlement agreement indicated that once any unit in the building closed, plaintiffs were entitled to close on the penthouse, regardless of the status of construction, its readiness for occupancy, or plaintiffs' payment of the entire purchase price, all such issues to survive the closing. Thus, plaintiffs had an unqualified right to close, and, on that issue, they prevailed and are entitled to attorneys' fees (*see Board of Mgrs. of 55 Walker St. Condominium v Walker St.*, 6 AD3d 279 [2004]). Any hearing on the amount of attorneys' fees to be awarded should await the outcome of the trial relating to the mechanical room.

Plaintiffs' request to strike the supplemental record is denied.

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

ENTERED: MAY 15, 2008

CLERK

Mazzarelli, J.P., Friedman, Sweeny, Moskowitz, JJ.

3564 Arlindo Andrade,
Plaintiff-Appellant,

Index 14709/00
82844/01
83971/04

-against-

Triborough Bridge & Tunnel Authority doing business as MTA Bridges & Tunnels, et al.,
Defendants-Respondents,

City of New York,
Defendant.

[And Other Actions]

Arnold E. DiJoseph, III, New York, for appellant.

Law Offices of Kenneth Arthur Rigby, PLLC, New York (Kenneth Arthur Rigby of counsel), for Triborough Bridge & Tunnel Authority and Perini Contracting, respondents.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for Warde Electric Contracting, Inc., respondent.

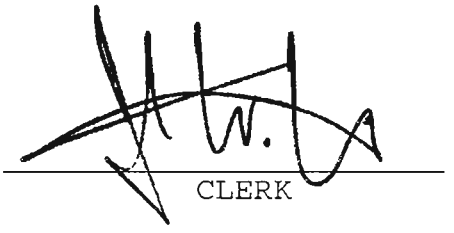
Judgment, Supreme Court, Bronx County (Barry Salman, J.), entered August 17, 2006, inter alia, dismissing plaintiff's claims under Labor Law § 240(1), unanimously affirmed, without costs.

There is no dispute that at the time of the accident plaintiff had completed his work of painting the archway of a bridge, and that the proper safety devices necessary to complete that work had been provided and did not fail to work. Thus, the hazard posed by the hole in the sidewalk of the bridge into which plaintiff fell while exiting the bridge was unrelated to the risk

that brought about the need for the safety devices in the first place. Accordingly, there is no section 240(1) liability (*see Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267; *Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 916 [1999]). The additional relief plaintiff seeks is unnecessary in view of this Court's prior order reinstating certain of his negligence claims (35 AD3d 256, 257 [2006]).

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

ENTERED: MAY 15, 2008



CLERK

Mazzarelli, J.P., Friedman, Buckley, Sweeny, Renwick, JJ.

3669 The People of the State of New York, Ind. 6212/06
Respondent,

-against-

Andre Batista,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Abigail Everett of counsel), and Chadbourne & Parke LLP, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Dennis Rambaud of counsel), for respondent.

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered May 16, 2007, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of 3 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]. The evidence established that an officer saw defendant obtain a handgun from another person.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 15, 2008

CLERK

Mazzarelli, J.P., Friedman, Buckley, Sweeny, Renwick, JJ.

3670 Susan Lowenstein, Index 112845/04
Plaintiff-Respondent,

-against-

The Normandy Group, LLC, doing
business as, Il Pomodoro Restaurant, et al.,
Defendants-Appellants.

Kalison, McBride, Jackson and Murphy, P.A., New York (Robert B. Hille of counsel), for appellant.

Godosky & Gentile, P.C., New York (Brian J. Isaac of counsel), for respondent.

Judgment, Supreme Court, New York County (Judith J. Gische, J., and a jury), entered May 10, 2007, awarding plaintiff, inter alia, $300,000 for past pain and suffering and $1,500,000 for future pain and suffering, unanimously modified, on the facts, to vacate the award for future pain and suffering and to direct a new trial solely on damages for future pain and suffering, and otherwise affirmed, without costs, unless plaintiff, within 30 days of service of a copy of this order, stipulates to a reduction of the award for future pain and suffering to $850,000, and to entry of an amended judgment in accordance therewith.

Defendant's argument that the verdict is inconsistent in finding that plaintiff was negligent but that her negligence was not a proximate cause of her injuries was not raised before the jury was discharged and is unpreserved (*see Martinez v New York City Tr. Auth.*, 41 AD3d 174, 175 [2007]). In any event, the

verdict can be reconciled with a reasonable view of the evidence (*see id.*). Plaintiff sustained injuries when she fell through an open sidewalk door into a cellar while exiting a restaurant owned and operated by defendant-appellant. The jury could have found that plaintiff's negligence in failing to observe the open vault on a dark, rainy night, after she took two steps to the left out of a recessed doorway, in which direction she was required to walk because defendant's employee, who was holding the door halfway open, blocked her path, was superseded by defendant's negligence in violating its own rules regarding the operation of the vault (that whenever someone went down to the basement another person had to stand over the open sidewalk covering) and in failing to warn plaintiff of the open covering (*see Kelly v City of New York*, 6 AD3d 188, 189 [2004]; *Caldas v City of New York*, 284 AD2d 192, 192-193 [2001]).

Defendant's challenge to three jury charges is partially unpreserved (*see* CPLR 4110-b) and unavailing. Defendant's former porter, as both a former employee and a participant in the accident who, having left his post guarding the open vault, had a motive to shield himself from blame, was properly charged as an

interested witness (*see Coleman v New York City Tr. Auth.*, 37 NY2d 137, 141-142 [1975]; *Kalam v K-Metal Fabrications*, 286 AD2d 603, 604 [2001]; *Hill v Arnold*, 226 AD2d 232, 233 [1996]); he was also interested in testifying consistently with the deposition testimony he gave while still defendant's employee. We reject defendant's argument that Administrative Code of City of NY § 19-119, regulating the opening of vaults "under any street," applies only to vaults under a street, not cellar vaults under a sidewalk, and was therefore erroneously charged (*cf.* Administrative Code § 19-101[c], § 1-112[13] [defining "street" to include any "sidewalk"; *Fleming v Fifth Ave. Coach Lines*, 23 AD2d 726 [1965], *lv denied* 16 NY2d 485 [1965]). The trial court also properly charged that a pedestrian may assume that a sidewalk is kept in proper condition (*see Sparks v City of New York,* 31 AD2d 660 [1968]).

Plaintiff sustained a bi- or tri-malleolar ankle fracture treated with open reduction and internal fixation, and a three-part shoulder fracture treated with immobilization. As a result, plaintiff was in the hospital for 12 days, received in-patient care at a rehabilitation facility for four weeks, had to reside with a relative for approximately three months before returning home, and was unable to return to work for 18 months. Plaintiff continues to suffer constant sharp ankle pain, reduced range of motion, inability to return to recreational activities, and has

an increased risk of arthritis, but no future surgery is indicated. The award for past pain and suffering does not deviate from what would be reasonable compensation. The award for future pain and suffering over 28 years deviates from what would be reasonable compensation to the extent indicated (*compare Ruiz v New York City Tr. Auth.*, 44 AD3d 331 [2007]; *Singh v Gladys Towncars Inc.*, 42 AD3d 313 [2007]; *Bingham v New York City Tr. Auth.*, 25 AD3d 433 [2006], *affd on other grounds* 8 NY3d 176 [2007]; *Uriondo v Timberline Camplands, Inc.*, 19 AD3d 282 [2005], *lv denied* 6 NY3d 704 [2006]; *Murakami v Machinist*, 3 AD3d 336 [2004]).

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

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

ENTERED: MAY 15, 2008

CLERK

Mazzarelli, J.P., Friedman, Buckley, Sweeny, Renwick, JJ.

3671 Peter Schorr, et al., Index 102300/05
Plaintiffs-Respondents,

-against-

Fores Persaud,
Defendant-Appellant.

Aronwald & Pykett, White Plains (William I. Aronwald of counsel), for appellant.

Joseph P. Dineen, Garden City, for respondents.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered September 13, 2007, which, to the extent appealed from, denied defendant's motion to dismiss the complaint for lack of personal jurisdiction, unanimously affirmed, without costs.

Plaintiffs satisfied their burden of establishing personal jurisdiction over defendant by service pursuant to CPLR 308(2). The process server testified at the traverse hearing that he delivered the summons with notice to a security guard at defendant's place of business who agreed to accept the documents for defendant (*see Cowan, Liebowitz & Latman v New York Turkey Corp.*, 111 AD2d 93 [1985]), and also mailed a copy to the place of employment. On this record, there is no basis for disturbing

the court's findings as to the process server's credibility (*see Kardanis v Velis*, 90 AD2d 727 [1982]).

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

ENTERED: MAY 15, 2008

CLERK

Mazzarelli, J.P., Friedman, Buckley, Sweeny, JJ.

3673-
3674 The People of the State of New York, Ind. 2832/04
Respondent,

-against-

Daniel Blanding,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Andrew S. Holland of counsel), for respondent.

Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered on or about May 17, 2006, unanimously affirmed. No opinion. Order filed.

Mazzarelli, J.P., Friedman, Buckley, Sweeny, Renwick, JJ.

3676 Savoy Management Corporation, Index 601503/07
Plaintiff-Appellant,

-against-

Leviev Fulton Club, LLC, et al.,
Defendants-Respondents.

Ganfer & Shore, LLP, New York (Steven J. Shore of counsel), for appellant.

Herzfeld & Rubin, P.C., New York (Neil R. Finkston of counsel), for Leviev Fulton Club, LLC and Fulton Club, LLC, respondents.

Law Office of Yevgeny Tsyngauz, Brooklyn (Yevgeny Tsyngauz of counsel), for Wonder Works Construction Corp., respondent.

Wachtel & Masyr, LLP, New York (Jeffrey T. Strauss of counsel), for Conway Stores, Inc., respondent.

Order, Supreme Court, New York County (Leland DeGrasse, J.), entered January 9, 2008, which, to the extent appealed from, granted defendants' motions to dismiss the first cause of action, unanimously affirmed, without costs.

The stipulation of settlement declared, in part, that in the event defendants were thereafter to file plans or apply to the New York City Department of Buildings [DOB] and commence construction of residential or commercial space higher than the highest roof on the current structure, the $2 million termination fee due plaintiff would be increased by another $1.5 million. Plaintiff alleged, in its first cause of action, that defendants breached that provision, entitling it to the additional

termination fee.

Plaintiff has not pleaded a viable claim for breach of this section of the settlement agreement. The complaint alleges that defendants filed plans and made application to the DOB in late June 2006, indicating its intention to construct residential space higher than the highest roof of the building. However, the settlement agreement, dated nearly four weeks later, stated that the termination fee would be increased only in the event that defendants were to "hereafter" file the requisite plans or make application with the DOB, in other words, subsequent to execution of the agreement.

A valid stipulation should be construed as an independent agreement subject to the well-settled principles of contractual interpretation (*Matter of Stravinsky*, 4 AD3d 75, 81 [2003]). Whether a contract is ambiguous is a question of law, and extrinsic evidence may not be considered unless the document itself is ambiguous (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278 [2005]). Since the agreement is not ambiguous, extrinsic evidence may not be used to create such an ambiguity (*see Kass v Kass*, 91 NY2d 554, 568 [1998]), and the purported documentary evidence submitted by plaintiff in opposition to defendants' motions did not remedy the defect in its complaint. Indeed, "the intention of the parties may be gathered from the four corners of the instrument and should be

enforced according to its terms" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). This agreement simply does not support plaintiff's contention that the additional termination fee provision extended to plans filed before execution of the stipulation.

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

ENTERED: MAY 15, 2008

CLERK

Mazzarelli, J.P., Friedman, Buckley, Sweeny, JJ.

3678 The People of the State of New York, Ind. 824/06
Respondent,

-against-

Daniel Castillo,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (Albert Lorenzo, J. at plea; Efrain Alvarado, J. at sentence), rendered on or about September 15, 2006, 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: MAY 15, 2008

Mazzarelli, J.P., Friedman, Buckley, Sweeny, Renwick, JJ.

3679 The People of the State of New York, Ind. 1673/05
Respondent,

-against-

Lorraine Washington,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Grace Vee of counsel), for respondent.

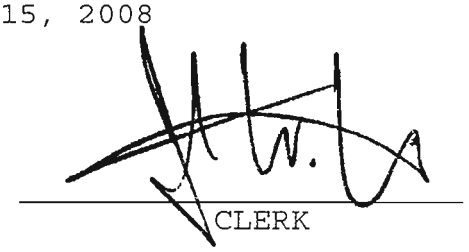
Judgment, Supreme Court, New York County (Maxwell Wiley, J.), entered December 13, 2006, convicting defendant, upon her plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing her, as a second felony drug offender, to a term of 4½ years, unanimously affirmed.

Although the record fails to establish a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

We reject defendant's claim regarding the imposition of a mandatory surcharge and fees (*see People v Harris*, __ AD3d __, Appeal No. 3681 [decided simultaneously herewith]).

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

ENTERED: MAY 15, 2008



CLERK

Mazzarelli, J.P., Friedman, Buckley, Sweeny, Renwick, JJ.

3680 Guillermo Castro, et al., Index 16134/05
Plaintiffs-Appellants,

-against-

Demetrios Mamaes, et al.,
Defendants-Respondents.

The Breakstone Law Firm, P.C., Bellmore (Jay L.T. Breakstone of counsel), for appellants.

Law Office of Thomas K. Moore, White Plains (Roula Theofanis of counsel), for respondents.

Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered May 16, 2007, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiffs' causes of action under Labor Law § 240(1) and § 241(6) as against defendants Demetrios Mamaes and Amanda Mamaes, and denied plaintiffs' cross motion for summary judgment on their cause of action under Labor Law § 240(1) as against the same defendants, unanimously affirmed, without costs.

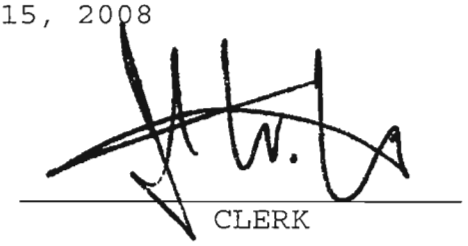
Plaintiffs were painting the exterior of defendants' single family home when the scaffold on which they were standing collapsed. Defendant Amanda Mamaes is the mother of defendants Demetrios Mamaes and Petros Mamaes. In or about 1981, the Mamaes family, including the sons' father and their grandmother, moved into the house. Following the deaths of the father and grandmother, defendants lived in the house together until in or

about 2002, at which time Amanda entered a nursing home and Demetrios got married and moved out. Before entering the nursing home, Amanda transferred title to her sons and retained a life tenancy. Petros has remained in the house until the present and maintains it. Although Demetrios has a joint ownership interest with Petros, Petros does not pay rent to Demetrios. Nor does Petros obtain any kind of income from the property. It was Petros who hired plaintiffs' employer to paint the house in 2005. While plaintiffs appear to acknowledge that all three defendants satisfy the ownership prong of the one and two-family dwelling exemption in the Labor Law, they argue that the exemption does not apply to Amanda and Demetrios because they did not reside in the house at the time of the accident and had no intention of ever doing so. We reject that argument because the key circumstance in applying the exemption is not an owner's residential status but the residential nature of "'the site and purpose of the work'" (*Sheehan v Gong*, 2 AD3d 166, 169 [2003], quoting *Khela v Neiger*, 85 NY2d 333, 337 [1995]). Here, the site, at all relevant times, has never served any commercial purpose, let alone an exclusively commercial purpose (*compare Van Amerogen v Donnini*, 78 NY2d 880, 882 [1991] [exemption not available for work on a house that had always been used exclusively for commercial purposes], *with Bartoo v Buell*, 87 NY2d 362, 367-368 [1996] [exemption, which should be applied

flexibly, available for work that directly related to residential use even though work also served a commercial purpose]). To the contrary, the only purpose of the house has been to serve as the primary residence of Mamaes family members, and the only purpose of the work that plaintiffs were performing when injured related to its residential use by Petros, the family member in residence at the time of the accident.

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

ENTERED: MAY 15, 2008



CLERK

Mazzarelli, J.P., Friedman, Buckley, Sweeny, Renwick, JJ.

3681 The People of the State of New York, Ind. 4372/05
Respondent,

-against-

Raymond Harris,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Lucy Jane Lang of counsel), for respondent.

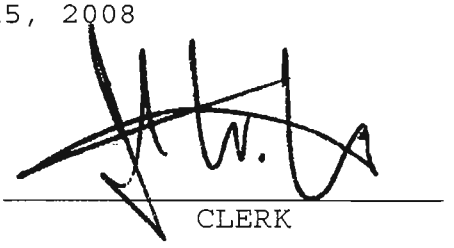
Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered December 7, 2006, convicting defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to a term of 1½ years, unanimously affirmed.

The imposition of mandatory surcharges and fees by way of court documents, but without mention in the court's oral pronouncement of sentence, was lawful. We do not find anything to the contrary in *People v Sparber* (__ NY3d __, 2008 NY Slip Op 3946). Although fees and surcharges are part of a defendant's sentence for the purpose of appealability and reviewability (*People v Hernandez*, 93 NY2d 261, 268 [1994]), they are essentially revenue-raising or cost-shifting devices (*People v Quinones*, 95 NY2d 349, 352 [2000]; *People v Barnes*, 62 NY2d 72 [1984]), and, unlike post-release supervision, are not sentencing

components of such significance that they may only be imposed in accordance with CPL 380.20 and 380.40.

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

ENTERED: MAY 15, 2008



CLERK

Mazzarelli, J.P., Friedman, Buckley, Sweeny, Renwick, JJ.

3682N-
3683N The State of New York, et al., Index 400361/97
Plaintiffs-Respondents,

-against-

Philip Morris Incorporated, et al.,
Defendants-Appellants.

- - - - -

The State of New York, et al.,
Plaintiffs-Respondents,

-against-

Philip Morris Incorporated, et al.,
Defendants-Appellants,

Commonwealth Brands, Inc., et al.,
Nonparty-Appellants.

Kirkland & Ellis LLP, New York (Peter A. Bellacosa of counsel), for R.J. Reynolds Tobacco Company, Philip Morris USA Inc. and Lorillard Tobacco Company, appellants.

Howrey LLP, Washington, DC (Robert J. Brookhiser, of the District of Columbia Bar, admitted pro hac vice, of counsel), for Commonwealth Brands, Inc., King Maker Marketing, Inc. and Sherman 1400 Broadway N.Y.C., Inc., appellants.

Andrew M. Cuomo, Attorney General, New York (Sasha Samberg-Champion of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered October 31, 2007, which, to the extent appealed from, granted plaintiffs' motion for a declaratory order and denied the cross motion of defendants R.J. Reynolds, Philip Morris and Lorillard (the Original Participating Manufacturers) to compel arbitration, unanimously reversed, on the law, without

costs, the motion denied in its entirety and the cross motion granted in its entirety. Order, same court and Justice, entered January 18, 2008, which, insofar as it denied the cross motion of the Original Participating Manufacturers and the "nonparty" Subsequent Participating Manufacturers (collectively, the Participating Manufacturers) to compel the State to participate in an arbitration in which the Participating Manufacturers constitute one side and the Settling States (defined *infra*) collectively constitute the other side, unanimously reversed, on the law, without costs, and the cross motion granted. Appeal from so much of that order as granted plaintiffs' motion to direct the Participating Manufacturers to select their arbitrator within 30 days, unanimously dismissed, without costs, as moot. Further proceedings in this action shall be before a different Justice.

On a prior appeal, the Court of Appeals concluded that "the questions whether New York enacted and diligently enforced a Qualifying Statute and whether it was correctly spared the NPM [Non-Participating Manufacturer] adjustment are arbitrable" (8 NY3d 574, 581-582). Since the issue of diligent enforcement is arbitrable, the issue of whether the June 2003 agreements between the Original Participating Manufacturers and the 52 states and territories that settled certain tobacco-related lawsuits (the Settling States) preclude the Original Participating

Manufacturers from alleging a lack of diligent enforcement is also arbitrable (*see Matter of Opark Constr. Corp. [Eureka Constructors]*, 42 NY2d 1025 [1977]; *see also e.g. State of New Hampshire v Philip Morris USA*, 155 NH 598, 609-610, 927 A2d 503, 512-513 [2007]; *State of Maryland v Philip Morris Inc.*, __ A2d __, 2008 WL 820347, *14 [Md Ct Spec App]). Plaintiffs did not argue below that the June 2003 agreements were merely collateral to the Master Settlement Agreement (the agreement containing the arbitration clause); hence, we decline to consider this argument (*see e.g. Acosta v Yale Club of N.Y. City*, 261 AD2d 261 [1999]).

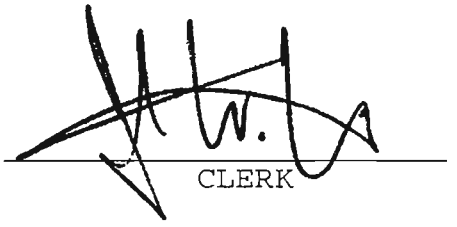
On the prior appeal, the State of New York was ordered to arbitrate whether it diligently enforced its Qualifying Statute (*see Philip Morris*, 8 NY3d at 581-582), not simply whether the independent auditor could presume that the Settling States had diligently enforced their Qualifying Statutes. This Court rejected plaintiffs' arguments that each Settling State constituted a "side" to the dispute, under section XI(c) of the Master Settlement Agreement, with the right to select its own arbitrator (30 AD3d 26, 32 [2006], *affd* 8 NY3d 574 [2007]). Other courts have also concluded that the Settling States constitute one side for purposes of the diligent

enforcement dispute (*see e.g. State of Alabama v Lorillard Tobacco Co.*, __ So 2d __, 2008 Ala LEXIS 62, *31-35; *see also State of Connecticut v Philip Morris*, 279 Conn 785, 800, 905 A2d 42, 50 n 12 [2006]; *State ex rel. Carter v Philip Morris Tobacco Co.*, 879 NE2d 1212, 1220 [Ind Ct App 2008]; *Maryland*, __ A2d at __, 2008 WL 820347, *11).

Since the Participating Manufacturers have selected their arbitrator, the appeal from that part of the order is moot.

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

ENTERED: MAY 15, 2008



Mazzarelli, J.P., Friedman, Buckley, Sweeny, Renwick, JJ.

3684
[M-1644] In re Ronald V. Pomerance,
Petitioner,

-against-

Roger Paul McTiernan, Jr., et al.,
Respondents.

Law Office of Ronald V. Pomerance, Suffern (Ronald V. Pomerance of counsel), for petitioner.

Andrew M. Cuomo, Attorney General, New York (Kate Burson of counsel), for the Departmental Disciplinary Committee of the Appellate Division, First Judicial Department, respondent.

Application for an order pursuant to article 78 of the Civil Practice Law and Rules denied and the petition dismissed, without costs or disbursements. All concur. No opinion. Order filed.

Lippman, P.J., Mazzarelli, Friedman, Sweeny, Moskowitz, JJ.

2685 Bloomingdales, Inc., Index 100214/03
Plaintiff-Appellant, 591264/03

-against-

The New York City Transit Authority,
Defendant-Respondent.

- - - -

The New York City Transit Authority,
Third-Party Plaintiff-Respondent,

-against-

M-Track Enterprises, Inc.,
Third-Party Defendant-Respondent.

- - - -

M-Track Enterprises, Inc.,
Second Third-Party Plaintiff-Respondent,

-against-

Judlau Contracting, Inc.,
Second Third-Party Defendant-Respondent,

Mass. Electric Construction Company,
Second Third-Party Defendant.

- - - -

Judlau Contracting, Inc.,
Third Third-Party Plaintiff-Respondent,

-against-

Janus Industries, Inc.,
Third Third-Party Defendant-Respondent.

Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for appellant.

Fabiani Cohen & Hall, LLP, New York (Lisa A. Sokoloff of counsel), for New York City Transit Authority, respondent.

Cerussi & Spring, P.C., White Plains (Lisa Conte of counsel), for M-Track Enterprises, Inc., respondent.

Biedermann, Hoenig & Ruff, P.C., New York (Peter H. Cooper of counsel), for Judlau Contracting, Inc., respondent.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for Janus Industries, Inc., respondent.

Order, Supreme Court, New York County (Robert D. Lippmann, J.), entered August 7, 2006, reversed, on the law, without costs, the motions of defendant Transit Authority and certain of the third-party defendant contractors to dismiss, as time-barred, plaintiff's causes of action for trespass and nuisance denied and said causes of action reinstated.

Opinion by Lippman, P.J. All concur except Friedman and Sweeny, JJ. who dissent in an Opinion by Sweeny, J.

Order filed.

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 May 15, 2008.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
David Friedman
John T. Buckley
John W. Sweeny, Jr., Justices.

The People of the State of New York, Ind. 2832/04
Respondent,

-against- 3673-
3674

Daniel Blanding,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (David Stadtmauer, J.), rendered on or about May 17, 2006,

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.

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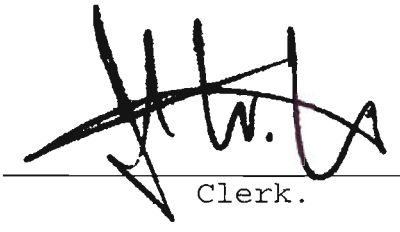

Clerk.

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

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 May 15, 2008.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
David Friedman
John T. Buckley
John W. Sweeny, Jr.
Dianne T. Renwick, Justices.

In re Ronald V. Pomerance,
Petitioner,

3684

-against-

[M-1644]

Roger Paul McTiernan, Jr., et al.,
Respondents.

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.