SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 23, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

384 The People of the State of New York, Respondent, Ind. 3588/06

-against-

Ronald King,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered February 27, 2007, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the third degree and resisting arrest, and sentencing him, as a second felony drug offender, to an aggregate term of 6 years, unanimously affirmed.

The People made a sufficiently particularized showing of an overriding interest justifying the court's closure of the courtroom to the general public during the undercover officer's

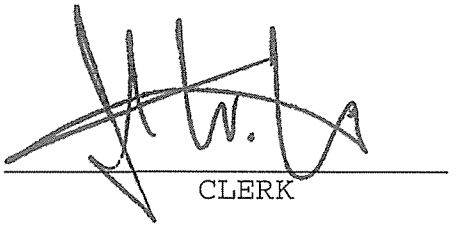
testimony (*see People v Ramos*, 90 NY2d 490, 498-500 [1997], *cert denied sub nom. Ayala v New York*, 522 US 1002 [1997]). The undercover officer testified that he continued to work in the specific area of defendant's arrest and expected to resume undercover operations there in the near future. He had pending cases in which he expected to testify, including cases in the same courthouse. The officer testified that he was concerned for his safety and that he had occasionally been recognized and threatened. Thus, there was a substantial probability that the officer's safety and effectiveness would be jeopardized by his testimony in open court (*see People v Jones*, 96 NY2d 213, 220 [2001]).

We reject defendant's arguments regarding the sufficiency and weight of the evidence supporting the possession conviction (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant was charged with possession under an acting in concert theory, and the evidence established his accessorial liability for the codefendant's actual possession of the drugs. The only reasonable inference was that defendant and the codefendant were working together as a team, and that they jointly possessed a

supply of drugs available for sale (*see e.g. People v Falls*, 256 AD2d 243 [1998], *lv denied* 93 NY2d 970 [1999]).

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

ENTERED: APRIL 23, 2009



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Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

385 In re Ivan B.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about June 24, 2008, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of assault in the second degree, menacing in the second degree, criminal possession of a weapon in the fourth degree and unlawful imprisonment in the second degree, and that he also committed the act of unlawful possession of a weapon by a person under 16, and placed him on probation for 12 months, unanimously affirmed, without costs.

The court's finding 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 determinations concerning credibility. The evidence established that while appellant was choking the

victim, he took a razor blade from his book bag and cut the back of the victim's neck, causing an injury that satisfied the physical injury element of second-degree assault (*see People v Chiddick*, 8 NY3d 445 [2007]; *People v Guidice*, 83 NY2d 630, 636 [1994]). We have considered and rejected appellant's remaining claims.

THIS CONSTITUTES THE DECISION AND ORDER
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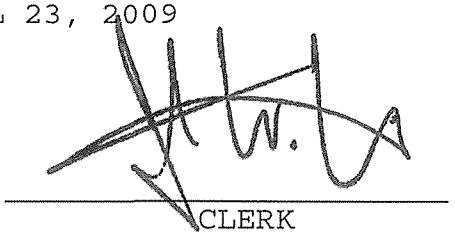
ENTERED: APRIL 23, 2009



CLERK

Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

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

-against-

Manuel Rosario, Defendant-Appellant.

SCI 631/07

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

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered on or about July 3, 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.

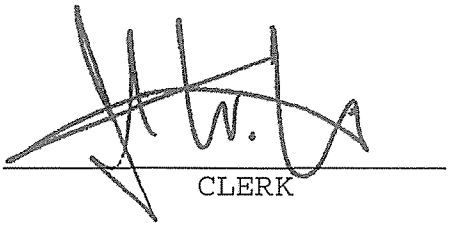
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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: APRIL 23, 2009



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Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

387 Kayla James, etc., et al., Index 16954/02
Plaintiffs-Respondents,

-against-

Loran Realty V Corp., et al.,
Defendants,

Frank Palazzolo, et al.,
Defendants-Appellants.

Hass & Gottlieb, Scarsdale (Lawrence M. Gottlieb of counsel), for appellants.

Gregory J. Cannata & Associates, Irvington (Diane Welch Bando of counsel), for respondents.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered September 17, 2008, which denied the motion of defendants-appellants Frank Palazzolo and Carmine Donadio for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Appellants' moving papers failed to meet their initial burden of demonstrating entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Appellants failed to address the key evidentiary submission in opposition to their prior motion to dismiss, raised again on this motion - a Mortgage Spreader Agreement, which consolidated more than $38 million in debt between 35 corporations and was found by this Court to support "plaintiffs' factual allegations setting forth a web of corporate financing arrangements evidently

initiated [by appellants] for the purpose of leaving real properties . . . over-indebted and judgment-proof" (22 AD3d 291, 292 [2005]). Even if appellants had met their burden, plaintiffs' opposition created a triable issue of fact concerning whether the corporate veil should be pierced. Plaintiffs showed that appellants exercised domination and control over the corporate defendant, by use of the Mortgage Spreader Agreement and other means, in such a way as to prevent recovery by plaintiffs in the event of a finding of liability on plaintiffs' claim of injuries due to lead paint poisoning (*see Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]).

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

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

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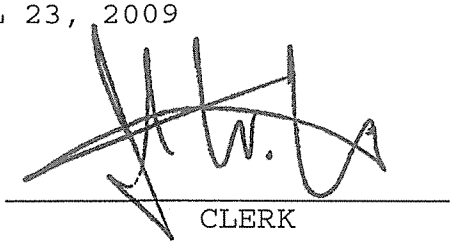

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Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

389-
389A AGCO Corporation, Index 604174/06
Plaintiff,

-against-

Northrop Grumman Space & Mission
Systems Corporation, et al.,
Defendants-Respondents,

LucasVarity Automotive Holding Company, et al.,
Defendants-Appellants.

Weinstein Tippetts & Little LLP, Houston, TX (David R. Tippetts, of the Texas Bar, admitted pro hac vice, of counsel), for appellants.

Hunton & Williams LLP, Atlanta, GA (Matthew J. Calvert, of the Georgia Bar, admitted pro hac vice, of counsel), for respondents.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered June 12, 2008, which denied defendants' motions for summary judgment, and order, same court and Justice, entered July 28, 2008, which found that any indemnification obligations to plaintiff would be owed by the TRW defendants rather than by the Northrop Grumman defendants, unanimously affirmed, with costs.

In the Master Purchase Agreement (MPA) at issue, which is governed by Delaware law, defendant TRW agreed to assume all "Automotive Liabilities," which are defined as "all Liabilities arising primarily from the conduct of the Automotive Business, . . . including . . . any such Liabilities arising out of or related to asbestos-related product liability Claims or

Liabilities." "Automotive Business" is defined as "the business of designing, manufacturing and selling steering, suspension, braking, engine, safety, electronic, engineered fastening and other components and systems for passenger cars, light trucks and commercial vehicles." The parties agree that tractors are neither "passenger cars" nor "light trucks," but disagree as to whether they are "commercial vehicles."

The court properly denied the summary judgment motions of both sets of defendants. Contrary to their claims, the MPA is ambiguous because "the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings" (*Rhone-Poulenc Basic Chems. Co. v American Motorists Ins. Co.*, 616 A2d 1192, 1196 [Del 1992]). Ordinarily, a reference to "passenger cars, light trucks and commercial vehicles" would not evoke tractors. TRW's argument that "commercial vehicle" does not include a tractor is thus reasonable. However, the MPA says "Schedule 5.9 to the Northrup Grumman Disclosure Letter sets forth a list of all pending lawsuits . . . that relate to the Automotive Business," and that includes seven Massey Ferguson asbestos lawsuits. Therefore, Northrop Grumman's argument that those asbestos claims are Automotive Liabilities (i.e., "all Liabilities arising primarily from the conduct of the Automotive Business") is also reasonable.

If a contract is ambiguous, a court can consider extrinsic

evidence in determining the parties' intent (*see e.g. Northwestern Natl. Ins. Co. v Esmark, Inc.*, 672 A2d 41, 43 [Del 1996]). However, after looking at the extrinsic evidence submitted by the parties, we find that neither side's "cause of action or defense" was "established sufficiently to warrant the court as a matter of law in directing judgment in favor of [that] party" (CPLR 3212[b]). For example, Northrop Grumman relies heavily on Schedule 5.9, but TRW submitted evidence showing that the schedule contained mistakes and was not drafted specifically for the MPA. The parties' history of accepting Massey Ferguson claims is not determinative; each side accepted some tenders, and the MPA contains a non-waiver clause.

Turning to the later decision after hearing, we note that a fact-finding court's decision "should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence" (*Claridge Gardens v Menotti*, 160 AD2d 544, 545 [1990], quoted in *Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]). The court's conclusion that the indemnification obligations claimed by plaintiff are owed, if at all, by the TRW defendants can be reached under a fair interpretation of the evidence.

The purpose of contract interpretation is "to give effect to the intention of the parties" (*Northwestern*, 672 A2d at 43). The parties to the MPA were defendant Northrop Grumman Corporation

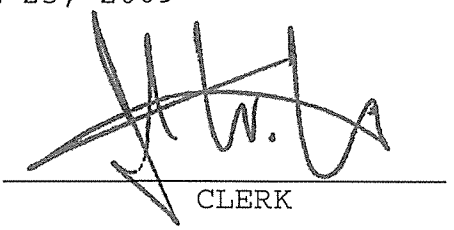
and nonparty BCP Acquisition Company. (It is true that defendant TRW Automotive Inc. and nonparty TRW Inc. became parties to the MPA on December 20, 2002. However, the provisions of the MPA at issue on this appeal did not change materially between the original November 18, 2002 contract and the second amendment on February 28, 2003.) The Northrop Grumman defendants submitted the deposition testimony of Malcolm Swift, who was intimately involved in the negotiations for the Northrop Grumman-BCP deal. By contrast, the TRW defendants did not submit the testimony of anyone involved in the MPA negotiation. Swift's testimony about the intent of the parties to the MPA, while arguably self-serving, was nonetheless uncontradicted, and lends support to the IAS court's decision. This is consistent with the testimony of one of the TRW defendants' in-house lawyers that when potential purchasers of TRW's automotive business did due diligence, she included Massey Ferguson in her disclosure of asbestos liability.

The TRW defendants contend the IAS court's decision is contradictory because it found tractors were not commercial vehicles, but also found TRW was responsible for the asbestos claims arising from Massey Ferguson tractors. However, "[c]ontracts must be construed as a whole" (*id.*). Too narrow a focus on words like "commercial vehicle" would be mistaken (*see e.g. OSI Sys. v Instrumentarium Corp.*, 892 A2d 1086, 1092 n 19 [Del Ch 2006]). The ultimate issue is whether Massey Ferguson

asbestos liabilities are Automotive Liabilities. There was sufficient evidence on which the IAS court could conclude they were.

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

ENTERED: APRIL 23, 2009



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Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

390 Venice Anglero, Index 102802/06
Plaintiff, 590698/06

-against-

The George Units, LLC, et al.,
Defendants/Third-Party
Plaintiffs-Appellants,

-against-

RLI Insurance Company,
Third Party Defendant-Respondent.

Stahl & Zelmanovitz, New York (Evan M. Newman of counsel), for appellants.

Goldberg Segalla LLP, Buffalo (Carrie P. Appler of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered August 19, 2008, which granted third-party defendant's motion for summary judgment declaring that it has no duty to defend or indemnify defendants/third-party plaintiffs (insureds) in the underlying action, unanimously affirmed, without costs.

The motion court properly found that the insureds' one-year delay in notifying third-party defendant of the subject accident was unreasonable as a matter of law (*see Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742 [2005]). The record shows that after falling on a wet floor in the insureds' premises, the plaintiff in the underlying action was taken away from the

accident location by ambulance, and that the insureds' superintendent had knowledge of the accident on the day it occurred and subsequently saw plaintiff on the premises using a cane. Under the circumstances, there are no triable issues as to whether the insureds' delay in giving notice was reasonably founded upon a good-faith belief of nonliability (*see Tower Ins. Co. of N.Y. v Lin Hsin Long* Co., 50 AD3d 305, 307-308 [2008]; *Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 240-242 [2002]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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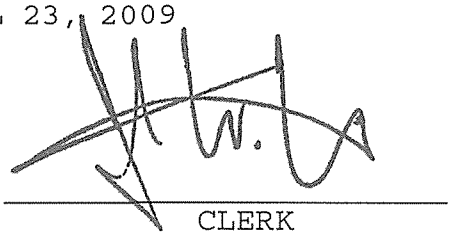

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Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

392 Arden Kaisman, et al., Index 114829/07
Plaintiffs-Appellants,

-against-

Yahaira Hernandez, et al.,
Defendants-Respondents.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for appellants.

Fred Lichtmacher, New York, for respondents.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered March 14, 2008, which granted defendants' motion to dismiss the complaint for failure to state a cause of action, unanimously affirmed, with costs.

Plaintiff Arden Kaisman is a pain management doctor who previously shared a work space with defendant Brisson, a spinal surgeon. After a series of sexually inappropriate acts allegedly perpetrated in the workplace by Dr. Kaisman, Dr. Brisson broke off their business relationship, started his own practice, and offered jobs to the remaining defendants. In April 2007, those employee defendants commenced an action against Dr. Kaisman, alleging sexual harassment in a hostile work environment, and assault and battery. In moving to dismiss that action, Dr. Kaisman admitted having sent several e-mails to those defendants, including a video of a sexually suggestive act. In October 2007, plaintiffs brought the instant action, alleging intentional

infliction of emotional distress and prima facie tort, as well as a derivative cause of action for loss of services.

Only "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress" (*Fischer v Maloney*, 43 NY2d 553, 557 [1978], quoting Restatement [Second] of Torts § 46[1]). Prima facie tort requires a showing of intentional infliction of harm, without excuse or justification, by an act or series of acts that would otherwise be lawful, resulting in special damages (*see Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 332 [1983]).

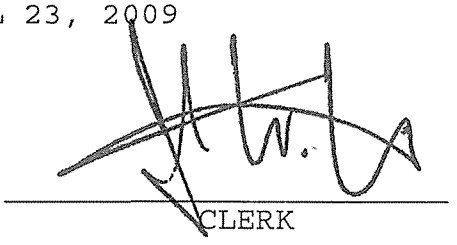
Although on a motion addressed to the sufficiency of a complaint, the facts pleaded are presumed to be true and accorded every favorable inference, allegations consisting of bare legal conclusions, as well as factual claims that are inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration (*Kliebert v McKoan*, 228 AD2d 232 [1996], *lv denied* 89 NY2d 802 [1996]). The documentary evidence here contradicted any finding that Dr. Kaisman may have suffered the intentional infliction of emotional distress. Attached to his motion to dismiss the prior lawsuit was an affidavit in which he admitted, inter alia, sending sexually suggestive e-mails to various employees, including the employee defendants herein. That admission constituted an informal

judicial admission that was properly considered by the court in this action (*Matter of Union Indem. Ins. Co. of N.Y.*, 89 NY2d 94, 103 [1996]). Dr. Kaisman cannot sustain a claim for the intentional infliction of emotional distress based on acts that he himself initiated. Moreover, he cannot establish an injury at the hands of these defendants resulting in special damages with respect to his business, as he himself initiated this conduct in the workplace, and thus failed to establish a requisite element of the claim of prima facie tort.

The failure of Dr. Kaisman's substantive claims is fatal to his wife's derivative claim for loss of consortium (*Young v Robertshaw Controls Co., Uni-Line Div.*, 104 AD2d 84, 88 [1984], *appeal dismissed* 64 NY2d 885 [1985]). Finally, the dismissal as against defendant Deebs was proper because she was only added as a party to this case via an untimely and unauthorized second amended complaint.

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

ENTERED: APRIL 23, 2009



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 April 23, 2009.

Present - Hon. Luis A. Gonzalez, Presiding Justice
Angela M. Mazzarelli
David B. Saxe
Karla Moskowitz
Rosalyn H. Richter, Justices.

The People of the State of New York, SCI 3517/06
Respondent,

-against- 396

Timothy Crawford,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (John Collins, J.), rendered on or about April 24, 2008,

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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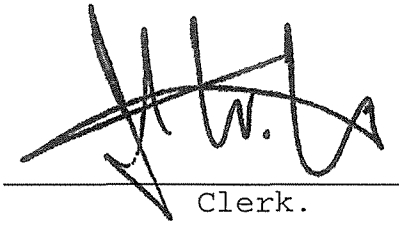


Clerk.

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

Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

397-
397A In re The State of New York, Index 250763/08
Petitioner-Respondent,

-against-

Bernard D.,
Respondent-Appellant.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Deborah P. Mantell of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Robert C. Weisz of counsel), for respondent.

Order, Supreme Court, Bronx County (Michael A. Gross, J.), entered October 28, 2008, which, sua sponte, reconsidered an order, same court and Justice, entered October 22, 2008, inter alia, granting petitioner State of New York's motion to videotape any psychiatric examination of respondent conducted in connection with this civil management proceeding pursuant to Mental Hygiene Law article 10, and adhered to the prior order, unanimously reversed, on the law, without costs, and the motion denied. Appeal from the October 22, 2008 order unanimously dismissed, without costs, as subsumed in the appeal from the October 28, 2008 order.

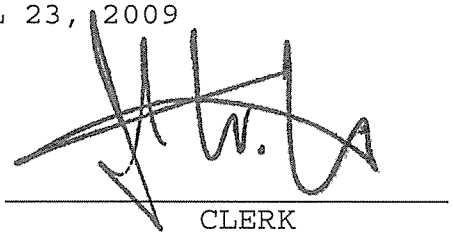
The State does not have a right to videotape Mental Hygiene Law (MHL) § 10.06 psychiatric examinations (*Matter of State of New York v R.H.*, 21 Misc 3d 1127[A], 2008 NY Slip Op 52249[U]

[Nov 5, 2008]; *Matter of State of New York v Rosado*, 20 Misc 3d 468 [2008]). Article 10 contains no express provision authorizing such videotaping, unlike other contexts in which litigants are given the right to videotape (*see Matter of Charles S.*, __ AD3d __, 2009 NY Slip Op 2369 [2nd Dept.]; 22 NYCRR 202.15, implementing CPLR 3113[b] [civil depositions]; Family Court Act § 1038[c] [psychiatric examinations in certain child protective proceedings]). Indeed, by limiting discovery of section 10.06 examinations to the production of the examiners' reports (MHL 10.06[d],[e]), and leaving the methodology of examinations up to the examiner (MHL 10.08[b]), article 10 indicates that the Legislature intended that the courts not have the discretion to order the videotaping of section 10.06 examinations. Although in the context of criminal cases in which a psychiatric defense is advanced, the Court of Appeals has held that fundamental fairness requires that the State have a reciprocal right to observe a defendant's psychiatric examination for the purposes of trial preparation (*Matter of Lee v County Court of Erie County*, 27 NY2d 432, 444 [1971], *cert denied* 404 US 823 [1971]; *see also* CPL 250.10[3]), and although the same fairness concerns are implicated in article 10 proceedings, they are mitigated by the State's right to examine the respondent before the latter's right to counsel attaches (MHL 10.05[e], 10.06[c]), to subject him or her to a rebuttal examination after

it reviews the report of his or her examiner (MHL 10.06[d]), and to have access to any relevant medical, clinical or other information generated by any State agency, office or department (MHL 10.08[c]). We have considered the State's other arguments and find them unavailing.

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

ENTERED: APRIL 23, 2009



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Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

398 The People of the State of New York, Ind. 5828/05
Respondent,

-against-

Yeong Sook Shin,
Defendant-Appellant.

Jonathan Strauss, New York, for appellant.

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

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered October 16, 2006, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 17½ years to life, unanimously affirmed.

Defendant did not preserve his challenges to the legal sufficiency of the evidence (*see People v Hines*, 97 NY2d 56, 61 [2001]), and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. We further find that the verdict 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. The evidence, which included the testimony of numerous eyewitnesses as well as defendant's statements to the police and his own trial testimony, established that defendant acted with an "utter disregard for the value of human life," as required to establish that he acted with

the culpable mental state of depraved indifference (*People v Feingold*, 7 NY3d 288, 296 [2007]). Defendant drove at a fast speed into a crowd that had spilled into the street after a party. He did not honk, apply his brakes, or try to avoid striking the pedestrians. This behavior persisted even after defendant hit five people and one of them landed on the hood of the car, remained on the hood for three fourths of a block, and fell off, resulting in his death. Additionally, defendant, whose conduct was apparently connected to a prior dispute between members of two ethnic groups, admitted to police he was "showing off."

Defendant expressly waived any objection to the court's charge on depraved indifference, and there is no merit to his claim that he preserved his present challenge to that charge. We decline to review this issue in the interest of justice. As an alternative holding, we find that the court's charge, which tracked the language employed by the Court of Appeals in *Feingold* (7 NY3d at 296) and *People v Suarez* (6 NY3d 202, 214 [2005]), conveyed the proper standards.

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

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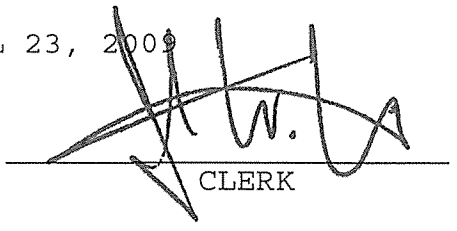

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Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

400-
400A Pierette Coleman, Index 17594/07
Plaintiff-Appellant,

-against-

Leoncio Maclas, et al.,
Defendants-Respondents.

Arnold I. Bernstein, White Plains (Susan R. Nudelman of counsel), for appellant.

Richard T. Lau & Associates, Jericho (Keith E. Ford of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Nelson S. Roman, J.), entered April 9, 2008, denying plaintiff's motion for partial summary judgment on the issue of liability, granting defendants' cross motion for summary judgment and dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice entered March 20, 2008, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff, a passenger in a vehicle, seeks damages from defendants for injuries sustained in an accident in which that vehicle collided at an intersection with a vehicle driven by defendant Fresia Maclas.

The court properly denied plaintiff's motion for partial summary judgment. In support of her claim, plaintiff submitted her affidavit that was wholly conclusory as to defendants' negligence and failed to meet her prima facie burden establishing

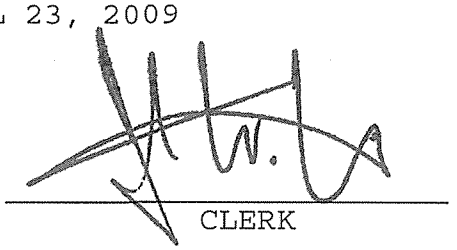
negligence on the part of defendants (*see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The motion court properly disregarded the uncertified police report and unauthenticated photographs as they were inadmissible hearsay (*see Figueroa v Luna*, 281 AD2d 204, 206 [2001]). Further, the affirmation by plaintiff's counsel, who had no personal knowledge of the accident, was not admissible evidence and, therefore, was insufficient to establish defendants' negligence (*see Johnson v Phillips*, 261 AD2d 269, 270-271 [1999]).

Defendants met their initial burden of establishing their entitlement to summary judgment by submitting evidence that defendant Fresia Maclas was confronted with an emergency (*see Rivera v New York City Tr. Auth.*, 77 NY2d 322, 326-327 [1991]). Fresia Maclas averred that she was confronted with an emergency situation when the vehicle in which plaintiff was a passenger veered into her lane of travel, leaving her with no alternative but to move as far to the right as possible to avoid the collision, but was hampered in her efforts due to the location of a fence near her vehicle. In opposition, plaintiff failed to raise an issue of fact (*see Zuckerman*, 49 NY2d at 562).

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: APRIL 23, 2009



CLERK

Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

401N Warburg, Pincus Equity Partners, L.P., Plaintiff-Appellant, Index 602626/03

-against-

Michael David Keane, Defendant-Respondent.

Wilkie Farr & Gallagher LLP, New York (Mary Eaton and Roger Netzer of counsel), for appellant.

William A. Thomas, New York, for respondent.

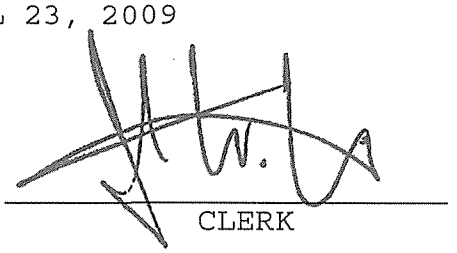
Order, Supreme Court, New York County (Herman Cahn, J.), entered August 31, 2007, which denied plaintiff's motion to confirm the report of the Special Referee to the extent of reducing the recommended award of attorneys' fees and expenses to of $150,761.02, unanimously modified, on the facts, to increase said award to $196,436.52, and otherwise affirmed, with costs in favor of plaintiff.

The order that referred the matter to the Special Referee limited plaintiff's recovery of attorneys' fees and expenses to those incurred before July 3, 2006, the date of the order (*see Jamie v Jamie*, 19 AD3d 330 [2005]). Plaintiff's documentation sufficiently supported its claim for legal fees to that date. 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: APRIL 23, 2009



CLERK

Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

402N Henderson Greaves, Index 107729/08
Plaintiff,

-against-

Obayashi Corporation, et al.,
Defendants-Appellants,

EIC Associates, Inc.,
Defendant,

Total Safety Consulting, LLC,
Defendant-Respondent.

- - - - -

Obayashi Corporation, et al.,
Third-Party Plaintiffs-Appellants,

EIC Associates, Inc.,
Third-Party Plaintiff,

-against-

Total Safety Consulting, LLC,
Third-Party Defendant-Respondent.

Zaklukiewicz Puzo & Morrissey, LLP, Islip Terrace (Stephen F. Zaklukiewicz of counsel), for appellants.

Gruvman, Giordano & Glaws, LLP, New York (Charles T. Glaws of counsel), for respondent.

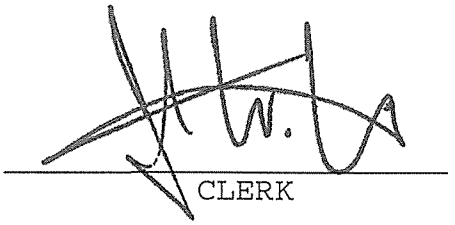
Order, Supreme Court, New York County (Carol Edmead, J.), entered June 5, 2008, which, upon reargument, granted defendant Total Safety's motion for summary judgment dismissing plaintiff's Labor Law § 240(1) cause of action as well as all third-party and cross claims against it, unanimously reversed, on the law, without costs, the motion denied, and the complaint and claims against Total Safety reinstated.

When a concrete wall on which plaintiff was working collapsed, concrete blocks fell against the unsecured scaffold he was standing on, knocking it over and causing him to fall to the ground. The portion of the wall where plaintiff was working was neither braced nor secured, and he was not wearing a harness.

Upon reargument, the court erred in determining that there was no issue of fact as to whether Total Safety had the authority to supervise and control plaintiff's use of the scaffold (*compare Barraco v First Lenox Terrace Assoc.*, 25 AD3d 427, 428 [2006], *with Doherty v City of New York*, 16 AD3d 124 [2005]). The evidence indicates that pursuant to the general contract with defendant Howell, Total Safety's site safety manager was at the worksite on a daily basis, inspected the workers and the scaffold several times a day, and was required to "make certain" that the scaffold was properly equipped.

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

ENTERED: APRIL 23, 2009



CLERK

Mazzarelli, J.P., Moskowitz, Renwick, Freedman, JJ.

5173-
5174

Ravindra Tamhane, et al.,
Plaintiffs-Respondents-Respondents,

-against-

Citibank, N.A.,
Defendant-Respondent-Appellant,

Antonia Gibney Campbell, etc.,
Defendant-Appellant,

One Source Facility Services, Inc.,
Defendant,

Temco Service Industries, Inc.,
Defendant-Appellant-Respondent.

[And a Third-Party Action]

Citibank, N.A.,
Second Third-Party Plaintiff-
Respondent-Appellant,

-against-

One Source Facility Services, Inc.,
Second Third-Party Defendant,

Temco Service Industries, Inc.,
Second Third-Party Defendant-
Appellant-Respondent.

- - - - - - - - - - -

Temco Service Industries, Inc.,
Third Third-Party Plaintiff-
Appellant-Respondent,

-against-

L.I.S.R., Inc.,
Third Third-Party Defendant-
Respondent-Appellant.

- - - - - - - - - - -

Index 110136/06
590825/06
590939/06
590329/07
590541/07

Citibank, N.A.,
Fourth Third-Party Plaintiff-
Respondent-Appellant,

-against-

Temco Building Maintenance, Inc.,
Fourth Third-Party Defendant-
Appellant-Respondent.

Lester, Schwab, Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for Temco Service Industries, Inc., and Temco Building Maintenance, Inc., appellants-respondents.

White & McSpedon, P.C., New York (Michael Cannella of counsel), for Citibank, N.A., respondent-appellant, and Antonia Gibney Campbell, appellant.

Wade Clark Mulcahy, New York (William Kirrane of counsel), for L.I.S.R., Inc., respondent-appellant.

Arnold E. DiJoseph, III, New York, for respondents-respondents.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 26, 2008, that denied the motion of defendants Citibank, N.A. and Campbell to preclude testimony of plaintiffs' experts, unanimously affirmed, without costs. Order, same court and Justice, entered September 17, 2008, which, insofar as appealed from, denied Citibank's motion for summary judgment dismissing the complaint as against it and for summary judgment on its claim for indemnification against defendant Temco Service Industries, Inc. and Temco Building Maintenance, Inc. (Temco), and denied Temco's and third third-party defendant L.I.S.R., Inc.'s (L.I.S.R.) motions for summary judgment dismissing all claims and cross claims against them, unanimously modified, on

the law, to grant summary judgment to third-party defendant L.I.S.R. and otherwise affirmed, without costs. The Clerk is directed to enter judgment in favor of third third-party defendant L.I.S.R. dismissing the third third-party complaint and all cross clains against it.

Plaintiff slipped at or close to the entranceway to the East Meadow branch of Citibank on Saturday morning March 4, 2006 on what he claimed was a transparent bit of ice. There was no visible snow or ice in the parking lot or near the entrance where he slipped.

Plaintiff and his wife sued Citibank and Citibank then served a third-party complaint against Temco, its general maintenance and custodial services contractor. Plaintiffs then amended their complaint to cross-claim against Temco, who brought a third party action against L.I.S.R. (Long Island Snow Removal). Citibank cross-claimed against L.I.S.R., the company that Temco hired pursuant to an oral agreement to remove snow from Citibank's East Meadow branch. The agreement between Temco and L.I.S.R., that had existed since 1994, provided that the latter would clear snow from the parking lot and sidewalks and salt when at least one inch had fallen and would also come upon request. It is undisputed that there had been snow and rain on March 1 and 2 and that L.I.S.R. had shoveled and salted the parking lot and entrance area on March 2nd and returned upon request for further

salting on March 3, 2006. L.I.S.R. completed the salting by 5 p.m. that day.

Plaintiffs' bill of particulars and their experts' affidavits aver that plaintiff slipped on ice that formed because snow on the roof of the Citibank building and on a sign attached to the building melted, causing water to drip onto the ground in front of the entranceway. The water then froze, causing a thin sheet of "invisible" ice to form.

The evidence that the ice upon which plaintiff slipped was formed by a longstanding thaw-refreeze condition is sufficient to raise triable issues of fact at to whether Citibank and Temco had constructive notice of the alleged ice condition (*see Pasqua v Handels-En Productiemaatschappij De Schouw, B.V.*, 43 AD3d 647 [2007], *lv dismissed* 10 NY3d 790 [2008]). Temco's contention that it owed no direct duty to plaintiff is unavailing, as the record contains evidence sufficient to raise triable issues of fact whether Temco may have exacerbated the alleged recurring thaw-refreeze condition or had displaced Citibank's duty to maintain the premises safely *(Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]). These issues of fact also preclude summary dismissal of common-law contribution and indemnification claims against Temco (*see Phillips v Young Men's Christian Assn.*, 215 AD2d 825, 827 [1995]).

Similarly, Citibank may recover from Temco under the

indemnity provisions of their written contract to the extent, if any, it is determined to be without fault in causing plaintiff's injuries (*see Prenderville v International Serv. Sys., Inc.*, 10 AD3d 334, 338 [2004] ; *Pardo v Bialystoker Ctr. & Bikur Cholim, Inc.*, 10 AD3d 298, 301 [2004]).

However, the motion court should have dismissed the claims against L.I.S.R. Based on plaintiffs' theory of the case that plaintiff slipped on ice that formed from water that dripped from defendant Citibank's roof and then froze, and the paucity of evidence as to any other source of the ice upon which plaintiff allegedly slipped, there is no view of the evidence that would support liability on the part of L.I.S.R. L.I.S.R. was hired to plow and salt the parking lot and sidewalks after one inch of snow fell or when requested. It is uncontroverted that all snow had been removed on March 2nd, and documents show that L.I.S.R. performed further salting on March 3rd after Citibank requested it. Nowhere does plaintiff claim that inadequate snow removal caused the ice to form.

Plaintiffs' expert's affidavit avers that L.I.S.R.'s principal, who had serviced the site, should have known about what must have been a recurring condition, and either shoveled the roof or displayed warning cones. However, L.I.S.R. had no contractual or other duty to shovel the roof or provide cones, and there is no reason to believe that L.I.S.R., as a snow

removal subcontractor, either knew about a condition that occurred after it left the premises or had any obligation to do anything about it. Although defendant Temco raises the possibility that based on the presence of ice on March 6th L.I.S.R. either inadequately performed its function or somehow exacerbated a condition, for the trier of fact to reach such a conclusion would amount to rank speculation.

Where, as here, a snow removal contract was not the type of comprehensive and exclusive property maintenance obligation, as Temco had, that could provide a basis for liability, a snow removal contractor owes no duty to a third party (*Espinal*, 98 NY2d at 140-141). Here Temco, under contract for general maintenance, and Citibank, as the tenant in possession, had the duty to maintain the premises in safe condition. In *Espinal*, the Court of Appeals found that a snow removal contractor owed no duty of care to a person who slipped and fell on an icy parking lot that the contractor failed to properly clear of snow. Although the *Espinal* Court acknowledged that a contractor who created or exacerbated a dangerous condition might be liable, as in the case here, plaintiff has not offered any support for the allegations that L.I.S.R.'s activities increased the hazardous condition of the lot. Merely plowing snow and salting, after one inch falls or on request, as required by a contract, is insufficient for a factual finding that the work either created

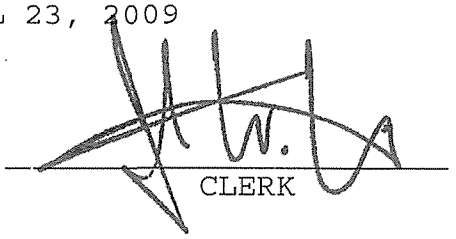
or exacerbated a dangerous condition and is also insufficient to impose a duty of care toward a third person (*Fung v Japan Airlines Co. Ltd.*, 9 NY3d 351, 360-61 ([2007]).

The motion court properly denied Citibank's motion to preclude plaintiffs' experts' testimony. Those opinions that the ice on which plaintiff allegedly slipped was formed by a longstanding "thaw-refreeze" condition whereby snow and ice collect on the roof of the bank building, then thaw and drip onto the ground and refreeze, do not present any insuperable conflict with plaintiffs' position of no defect in the roof design. The existence of the thaw-refreeze condition that plaintiffs' experts discuss is supported by evidence apart from the experts' own affidavits, such as the testimony of L.I.S.R.'s principal. The water stains on the underside of the sign merely supplement this evidence. The experts' testimony thus may be submitted for the purpose of explaining to the jury the nature of the alleged thaw-refreeze condition and its longstanding existence (*see e.g. Taylor v Bankers Trust Co.*, 80 AD2d 483, 484-486 [1981]), and will also be helpful in explaining measures that could have been taken to ameliorate the condition.

We have considered the parties' remaining contentions for affirmative relief and find them unavailing.

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

ENTERED: APRIL 23, 2009



CLERK

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

239 Evelyn Santiago, as Administratrix of the Estate of Edgar A. Torres, Plaintiff-Appellant, Index 26094/01

-against-

The City of New York, Defendant-Respondent.

Brian J. Isaac, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Barry Salman, J.), entered November 19, 2007, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

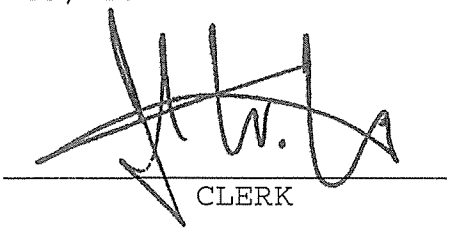
Plaintiff, seeking damages for the wrongful death of her decedent, who was her partner and the father of her child, claims that decedent's death was caused by allegedly defective roadway conditions. Decedent, who had no motorcycle license and had been drinking, borrowed a friend's motorcycle and apparently lost control while allegedly operating it at high speed. He was thrown from or fell off the motorcycle and pronounced dead at the scene.

Plaintiff's failure to connect decedent's motorcycle accident with the alleged roadway defects requires dismissal of

her cause of action (*see Zanki v Cahill*, 2 AD3d 197, 199 [2003]; *affd* 2 NY3d 783 [2004]; *Oettinger v Amerada Hess Corp.*, 15 AD3d 638, 639 [2005]). Although an alleged eyewitness affidavit purporting to state the cause of the accident was submitted by plaintiff in opposition to summary judgment, the witness did not state that he saw decedent's motorcycle hit a defect in the roadway and the witness provided no factual basis for what amounted to his conclusion that the "bumpy" condition of the roadway caused decedent to lose control of the motorcycle. Nor did plaintiff's expert's affidavit raise a triable issue of fact with respect to causation. The expert's conclusory opinion that the condition of the roadway caused the accident is based on the eyewitness affidavit and therefore lacks a factual basis (*see Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 725-726 [1984]). Under these circumstances, any finding of proximate cause would be impermissibly speculative (*see Oettinger*, 15 AD3d at 639).

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

ENTERED: APRIL 23, 2009



CLERK

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

250N The State of New York, et al., Index 400440/07
Plaintiffs,

-against-

Philip Morris Incorporated, et al.,
PM Defendants-Respondents,

RJR Nabisco Holdings Corp., et al.,
PM-Defendants,

Carolina Tobacco Company, et al.,
NPM Defendants-Appellants,

Alternative Cigarette, Inc., et al.,
NPM Defendants,

Senecan Cayuga Nation, et al.,
Native American Defendants.

Farrell Fritz, P.C., New York (Peter A. Mahler of counsel), for Carolina Tobacco Company, appellant.

Jones Garneau, LLP, Scarsdale (Michael K. Stanton, Jr. of counsel), for Dosal Tobacco Corporation, appellant.

Law Offices of Lisa M. Solomon, New York (Lisa M. Solomon of counsel), for Seneca-Cayuga Tribal Tobacco Corporation, appellant.

Fredericks, Peebles & Morgan LLP, Omaha, NE (Ben Fenner of counsel), for Smokin Joes, appellant.

Kirkland & Ellis LLP, New York (Mark W. Rasmussen of counsel), for R.J. Reynolds Tobacco Company, Philip Morris USA and Lorillard Tobacco Company, respondents.

Leader & Berkon LLP, New York (Joshua K. Leader of counsel), for Commonwealth Brands, Inc.; Liggett Group LLC; P.T. Djarum; Sherman 1400 Broadway N.Y.C., Inc.; Top Tobacco L.P.; Daughters & Ryan, Inc.; House of Prince A/S; Japan Tobacco International U.S.A., Inc.; King Maker Marketing; Kretek International, Inc.;

Lignum-2, Inc.; Lane Limited; Compañía Industrial de Tabacos; Monte Paz S.A.; Von Eicken Group; Sante Fe Natural Tobacco Co; Vector Tobacco, Inc.; Vibo Corporation and Farmers Tobacco Company of Cynthiana, Inc., respondents.

Appeal from order, Supreme Court, New York County (Charles E. Ramos, J.), entered January 22, 2008, which, to the extent appealed from, granted motions to compel arbitration, unanimously dismissed, without costs.

This declaratory judgment action was commenced by the State against numerous cigarette manufacturers and relates to the tobacco settlement reached between, among others, the State and certain cigarette manufacturers. In another appeal concerning the settlement, the Court of Appeals provided the following narrative regarding the settlement:

> "In 1998, the Attorneys General of 46 states (including New York) and five island territories and the Corporation Counsel of the District of Columbia signed a Master Settlement Agreement (MSA) with counsel for the largest tobacco manufacturers in the United States. The MSA was approved, as to New York State, by Supreme Court. The claims brought against the tobacco manufacturers included wrongful marketing and advertising of cigarettes and other tobacco products. Various states sought damages based on the costs of treating smoking-related illnesses. In exchange for a release of liability, the tobacco manufacturers agreed to make annual payments, to be allocated among the Settling States. They also agreed to extensive marketing and advertising restrictions. The Original Participating Manufacturers, as they are known, were later joined by more than 40 smaller tobacco companies, referred to as the Subsequent Participating Manufacturers (SPMs) . . . .
>
> "Not all U.S. tobacco manufacturers have joined the MSA. In order to neutralize cost disadvantages

suffered by the Participating Manufacturers (PMs) relative to Non-Participating Manufacturers (NPMs), the MSA provides the Settling States with a strong incentive to enact statutes requiring NPMs to make annual payments toward the costs of treating smoking-related illnesses equivalent to those made by the PMs. The MSA sets out a Model Statute, which, if appropriately enacted, 'shall constitute a Qualifying Statute.' If a Settling State fails to enact, or does not diligently enforce, a Qualifying Statute, PM payments to that state may be subject to the Non-Participating Manufacturer adjustment (NPM adjustment).

"In brief, NPM adjustment can be applied to reduce PM payments to a Settling State if (1) PMs collectively lost market share to NPMs in the preceding year and (2) disadvantages resulting from the MSA were a 'significant factor' contributing to that loss. But payment to a Settling State is *not* subject to the NPM adjustment

> 'if such Settling State continuously had a Qualifying Statute . . . in full force and effect during the entire calendar year immediately preceding the year in which the payment in question is due, and diligently enforced the provisions of such statute during such entire calendar year.'

"Settling States that have diligently enforced their respective Qualifying Statutes are not subject to the NPM adjustment; instead, the adjustment is to be reallocated pro rata among Settling States that are subject to the NPM adjustment, reducing the payments they receive. A decision regarding one Settling State's enforcement of its Qualifying Statute could therefore potentially affect the calculation of amounts due to all other Settling States" (*State of New York v Philip Morris Inc.*, 8 NY3d 574, 577-578 [2007] [footnotes omitted]).

New York State's "qualifying statute" is codified in article 13-G of the Public Health Law. Pursuant to the statute, NPMs selling cigarettes in New York must make annual escrow deposits. The amount of money a particular NPM must deposit annually is

based on the number of "units sold" by that manufacturer. "Units sold," in turn, is determined by the amount of excise tax collected by the State on packs of the manufacturer's products. The State, however, has maintained a policy, both before and after the State entered into the MSA, that cigarettes sold on tribal lands within the State are exempt from taxation. Because of both the manner in which "units sold" is calculated and the State's policy regarding cigarettes sold on tribal lands, NPMs who sell cigarettes on tribal lands are not required to make annual escrow deposits.

PMs complained to the State that it "does not diligently enforce" the qualifying statute as required by the MSA because of the State's policy regarding cigarettes sold on tribal lands. The PMs believe that the State is required under the MSA to collect escrow deposits on sales of cigarettes on tribal lands, and that the State's failure to do so has triggered the NPM adjustment. If the PMs are correct and the State is required to collect escrow deposits on cigarettes sold on tribal lands, then the State, consistent with the phrase "units sold" in the qualifying statute, would have to impose excise taxes on those cigarettes. Certain Native American tribes and NPMs object to the taxation of cigarettes sold on tribal lands.

The State commenced this action seeking a declaration that "units sold" excludes cigarette sales on which excise taxes have

not been collected as a matter of public policy. Certain PMs moved to compel arbitration of the issues raised in the declaratory judgment action. The motions were based on terms of the MSA requiring that disputes over whether New York enacted and diligently enforced its "qualifying statute" be resolved by arbitration. The State opposed the motions, as did NPMs Carolina Tobacco Co., Dosal Tobacco Corp. and Smokin Joes. NPM Seneca-Cayuga Tribal Tobacco Corporation moved for leave to intervene as a party plaintiff and opposed the motion and cross motion to compel arbitration. Supreme Court granted the motion and cross motion to compel arbitration, stayed the action, and, in effect, denied Seneca-Cayuga's motion to intervene pending the outcome of the arbitration proceeding. The only entities that have appealed from the order and filed appellants' briefs are NPMs Carolina Tobacco Co., Dosal Tobacco Corp., Smokin Joes and Seneca-Cayuga (appellant-NPMs).

We agree with respondent-PMs that appellant-NPMs are not "aggrieved" by the order and we therefore dismiss this appeal. Only an "aggrieved" party may appeal from an order (CPLR 5511). A party is "aggrieved" by an order where the party "has a direct interest in the controversy which is affected by the result and . . . the adjudication has a binding force against the rights,

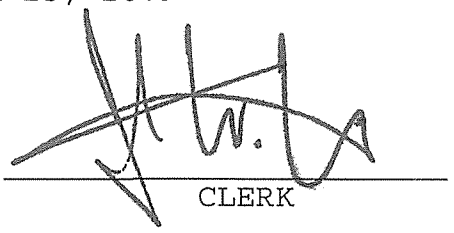
person or property of the party . . . seeking to appeal" (*Matter of Richmond County Socy. for Prevention of Cruelty to Children*, 11 AD2d 236, 239 [1960], *affd* 9 NY2d 913 [1961]; *see Matter of DeLong*, 89 AD2d 368, 370 [1982]; *see also Schwartzberg v Kingsbridge Hgts. Care Ctr. Inc.*, 28 AD3d 465 [2006]). That "the adjudication 'may remotely or contingently affect interests which the party represents does not give it a right to appeal'" (*DeLong*, 89 AD2d at 370, quoting *Ross v Wigg*, 100 NY 243, 246 [1885] [brackets omitted]). Thus, that a party "may be disappointed or even have been deprived of a financial benefit by the adjudication does not, without more, make [the] party 'aggrieved'. It must be shown that the party had some legal right or interest in the subject of the determination which was adversely affected thereby" (*id.*).

Appellant-NPMs are not parties to the MSA and therefore not parties to the arbitration. They are NPMs, and, as all parties on this appeal acknowledge, NPMs cannot be bound by the determinations, if any, of the arbitration panel. Thus, these entities have no direct interest in the arbitration proceeding compelled by Supreme Court's order and the outcome of that proceeding will not have binding force against them. Appellant-NPMs argue that the arbitration panel "*could* . . . effectively overrule the State's interpretation of its own laws and its longstanding public policy against collecting state taxes related

to cigarette sales on tribal lands," which *could* lead the State to seek escrow payments from the NPMs for cigarette sales on tribal lands, and that these potential events "*could* immensely affect" the NPMs' interests (emphasis added). This argument simply highlights that the arbitration proceeding "'may remotely or contingently affect'" (*DeLong*, 89 AD2d at 370, quoting *Ross*, 100 NY at 246) the NPMs' interests, but neither those remote or contingent effects nor any disappointment that the NPMs may experience as a result of the outcome of that proceeding are sufficient to confer on the NPMs the right to appeal from the order compelling arbitration between the State and the PMs.

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

ENTERED: APRIL 23, 2009



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APR 23 2009

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David B. Saxe
David Friedman
Rolando T. Acosta
Leland G. DeGrasse, JJ.

5000
Index 104471/05

x

Morton M. Hirsch,
Petitioner-Appellant,

-against-

Elaine Stewart,
Respondent-Respondent,

"John Doe" and "Jane Doe,"
Respondents.

x

Petitioner appeals from an order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered on or about May 23, 2007, which affirmed an order of the Civil Court, New York County (Maria Milin, J.), entered on or about May 17, 2006, granting respondent Elaine Stewart's motion to dismiss the holdover petition.

Silversmith & Veraja, LLP, New York (Robert G. Silversmith and Rachel A Siskind of counsel), for appellant.

Housing Conservation Coordinators, Inc., New York (Susan K. Crumiller of counsel), for respondent.

MAZZARELLI, J.P.

On this appeal we must determine whether Rent Stabilization Code (RSC) (9 NYCRR) § 2524.2(b) requires an owner who seeks to occupy an apartment for his own use, pursuant to RSC 2524.4(a), to state the facts underlying his decision in the nonrenewal notice.

Appellant landlord is the owner of the building known as 459 West 43rd Street. Respondent has been a rent-stabilized tenant in apartment 1A in the building for nearly 30 years. In July 2005, the landlord served a notice on the tenant advising her as follows:

> "PLEASE TAKE NOTICE, that your lease...will expire on October 31, 2005, and that your tenancy is hereby terminated as of October 31, 2005. Furthermore, the landlord will not renew your lease based upon the fact that the Landlord seeks possession of [the apartment] for the Landlord's own use. The Landlord seeks to recover possession of [the apartment] for the personal use and occupancy of himself as his primary residence in the City of New York."

The tenant did not vacate the premises and the landlord commenced a holdover proceeding in Housing Court. Respondent moved to dismiss the petition, arguing that the notice contravened RSC 2524.2(b), which provides:

> "Every notice to a tenant to vacate or surrender possession of a housing accommodation shall state the ground under

> section 2524.3 or 2524.4 of this Part, upon which the owner relies for removal or eviction of the tenant, *the facts necessary to establish the existence of such ground*, and the date when the tenant is required to surrender possession" (emphasis added).

The tenant argued that the notice was jurisdictionally defective because it merely stated the ground for termination by tracking the language of RSC § 2524.4(a)(1). That section permits an owner to terminate a tenancy where he

> "seeks to recover possession of a housing accommodation for such owner's personal use and occupancy as his or her primary residence in the City of New York and/or for the use and occupancy of a member of his or her immediate family as his or her primary residence in the City of New York..."

The tenant asserted that the plain language of RSC 2524.2(b) required the landlord to give a fact-based explanation of why the landlord was choosing to rely on that ground.

In opposition to the motion, the landlord argued that the notice as served was sufficient. He claimed that it was proper for an "owner's use" notice to simply track the language of RSC 2524.4(a). This, he argued, is because an owner establishes the existence of the "owner's use" ground simply by asserting that he intends to use the apartment for personal use as his primary residence. The landlord maintained that any additional facts in his notice would have been superfluous. He also posited that the

tenant should have simply engaged in discovery, instead of moving for dismissal. By doing so, the landlord argued, the tenant would have learned that the landlord has an office in the building on the same floor as the apartment, and that the landlord desired to move into the apartment to shorten his commute to work.

The Housing Court granted the tenant's motion and dismissed the petition. It agreed with the tenant that the landlord's notice of nonrenewal merely tracked the language of RSC 2524.4(a) and that a recitation of the facts motivating the landlord's desire to occupy the apartment was required. Appellate Term unanimously affirmed, and this Court granted the landlord's motion for leave to appeal.

This Court has interpreted RSC 2524.2(b)[1] pursuant to its "plain language" and held that it must be "enforce[d]...as written" (*Berkeley Assoc. Co. v Camlakides*, 173 AD2d 193, 195 [1991], *affd* 78 NY2d 1098 [1991]). Thus, in *Berkeley Assoc. Co.* this Court affirmed the dismissal of a holdover petition in a nonprimary residence case, stating that the assertion in the

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[1] The New York State Division of Housing and Community Renewal (DHCR) promulgated the current version of the Rent Stabilization Code pursuant to specific authority delegated to it by the Legislature (*see* L 1985, ch 888, § 2; *Festa v Leshen*, 145 AD2d 49, 54 [1989]).

notice that the tenants "'do not occupy the Premises as [their] primary residence' simply stated the ground for the non-renewal. It was not a statement of facts supporting that ground." (*id.* at 194).

Similarly, where the owner is seeking to recover possession of an apartment for his own use and asserts only that he intends to occupy the apartment as his primary residence, he is "simply stat[ing] the ground for non-renewal." Under *Berkeley Assoc. Co.*, that notice would be insufficient.

However, the landlord in this case asserts that *Berkeley Assoc. Co.* is inapplicable in an "owner's use" case because, he argues, unlike the case of a nonprimary residence, the facts supporting a decision not to renew a tenancy based on "owner's use" are, by necessity, the same as the "ground" for nonrenewal. In other words, the landlord maintains that all that an owner must establish to avail himself of the "owner's use" ground is his intention to recover the apartment for his own use, and to use it as his primary residence. He contrasts this with the nonprimary residence ground, which he notes depends on a showing of facts supporting the owner's allegation that the tenant does not primarily reside in the apartment. Indeed, the landlord claims that it is impossible to provide factual support in an "owner's use" notice because an owner's intent is "a state of

mind not necessarily susceptible to a statement of facts."

This argument ignores the plain language of section 2524.2(b), which does not differentiate among the various types of grounds for terminating a lease. Rather, that section requires a statement of the ground and the facts underlying the ground in "*[e]very* notice to a tenant to vacate or surrender possession of a housing accommodation" (emphasis added). It does not create any exceptions for grounds which may or may not be "fact-intensive."

Moreover, the landlord's position is belied by his own statement, in his affidavit opposing the tenant's motion to dismiss the petition. There he identified the facts behind his intent to occupy the apartment, that is, the proximity of the apartment to his office and his desire to live closer to where he worked. Those were precisely the types of facts required by section 2524.2(b) and which, if proven, "establish the existence of such ground" (*id.*).

The landlord also asserts that when DHCR amended the Rent Stabilization Code in 1987 it tacitly negated any requirement that the notice of nonrenewal in an "owner's use" case state facts which, if proven, suggest that the owner is acting in good faith. This argument arises from the omission of the words "good faith" in RSC 2524.4(a)(1), the analog to section 54 of the "Old

Code".[2] Section 54 required a landlord to serve a notice before declining to renew a lease where, among other things, "the owner seeks *in good faith* to recover possession of a dwelling unit for his or her own personal use and occupancy or for the use and occupancy of his immediate family" (emphasis added). The landlord also argues that his position is supported by RSC 2524.4(a)(5), which had no precursor in the Old Code. It provides that:

> "The failure of the owner to utilize the housing accommodation for the purpose intended after the tenant vacates, or to continue in occupancy for a period of three years, may result in a forfeiture of the right to any increases in the legal regulated rent in the building in which such housing accommodation is contained for a period of three years, unless the owner offers and the tenant accepts reoccupancy of such housing accommodation on the same terms and conditions as existed at the time the tenant vacated, or the owner establishes to the satisfaction of the DHCR that circumstances changed after the tenant vacated which prevented the owner from utilizing the housing accommodation for the purpose intended, and in such event, the housing accommodation may be rented at the appropriate guidelines without a vacancy allowance."

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[2] The "owner's use" ground was eliminated in 1982, apparently through the inadvertence of the Rent Stabilization Association, which at the time was charged with the responsibility to promulgate the Code (*see Rubman v Waller*, 118 Misc 2d 116, 117 [Civil Ct NY County 1983]). DHCR reinstated the ground when it revised the Code in 1987.

The amendment, the landlord posits, reflects DHCR's realization that an owner's good faith cannot be tested at the time the owner notifies a tenant that he or she intends to occupy an apartment but can only be divined in retrospect, after possession is recovered. This position is purely speculative and the landlord offers no support for it in the legislative history or anywhere else. Moreover, at the same time, the landlord acknowledges that an owner claiming "owner's use" is required to demonstrate his or her good faith at the trial of a holdover proceeding *before* recovering possession. These two positions are diametrically opposed and the landlord makes no attempt to reconcile them. Indeed, the landlord's interpretation of the Code and the case law would permit a legal sleight of hand whereby an owner could conceal the basis for a desire to occupy an apartment until a trial is already in full pitch. Such "trial by ambush" would cut against every notion of fairness found in this State's jurisprudence.

The landlord's interpretation of the amended Code section is unpersuasive for several other reasons. First, nothing in section 2524.4(a) addresses the requirements for a notice of non-renewal. Second, this new section is merely a re-working of the Old Code section. The words "good faith" have been removed from the language identifying the grounds in RSC 2524.4(a)(1).

However, the concept that the owner must act in good faith is clearly embodied in the language of RSC 2524.4(a)(5) and accepted by all parties.

The argument that the penalties imposed by RSC 2524.4(a)(5) were intended as the sole remedy against a landlord whose intention to use the apartment personally turns out, in retrospect, not to have been genuine, is incorrect. Subsequent to the promulgation of that section, the Court of Appeals and this Court have continued to adhere to the rule that an owner is not entitled to a judgment of possession in the first instance if the owner cannot prove his or her good faith intention *prior* to evicting the tenant. For example, as recently as last year, the Court of Appeals considered the "owner's use" ground in *Pultz v Economakis* (10 NY3d 542 [2008]). The issue in that case was whether RSC 2524.4(a), as opposed to section 2524.5(a)(1) (which requires DHCR approval where the owner seeks to recover the apartment for a business use), applied where the owners desired to recover possession of all of the rent-stabilized apartments in a building so that they could convert them into a single-family dwelling and reside there. The Court held that the former section applied. In so doing, it stated that:

> "we underscore that [the owners] may not recover the stabilized apartment units unless and until they establish in Civil Court (at holdover proceedings against plaintiffs) their *good faith intention* to recover possession of the subject apartments for the husband owner's personal use as the primary residence" (emphasis added) (10 NY3d at 548).

The good faith requirement was also referenced by this Court in *Horsford v Bacott* (32 AD3d 310 [2006]). In that case the landlords sought to recover possession of an apartment for use by their daughter. They testified at trial that the need for the apartment was motivated by the fact that other family members were moving into the room occupied by the daughter at their current residence. The issue on appeal was whether the daughter herself had to testify as to her intention to actually occupy the subject apartment. This Court, with two Justices dissenting, upheld the Housing Court's determination that the testimony of the daughter was unnecessary. However, the majority itself reiterated that the burden on the owners was to "prov[e] a *good faith intention* to have their daughter use the apartment." (emphasis added) (32 AD3d at 312).

The landlord further argues that any factual recitation in an "owner's use" notice would be futile because, unlike the case of a notice to cure, there is no immediate course of action the tenant can take that would be guided by the notice. In other

words, the landlord claims that the tenant would be no worse off if she were to simply wait for a holdover trial, at which, through cross-examination of the landlord facilitated by pre-trial discovery, she could reveal that the landlord's intentions were not genuine. This argument is contrived and clearly fallacious. First, again, it ignores the plain language of RSC 2524.2(b), which requires a statement of the ground and the facts in "*[e]very* notice to a tenant to vacate or surrender possession of a housing accommodation" (emphasis added).

Second, the landlord does not explain why, if he is correct, a factual recitation in a notice terminating a lease based on the ground of nonprimary residence, which he acknowledges is unquestionably required, would not be similarly superfluous. After all, in a nonprimary residence proceeding it is also the case that the tenant cannot cure based on the information contained in the notice. Indeed, the need for facts in an "owner's use" notice is even more compelling than in a non-primary residence notice, where the tenant knows whether he or she is utilizing the apartment as his or her primary residence. In an "owner's use" case, only the owner knows what his or her true intentions are.

Third, the landlord's argument also fails because discovery is not available as of right in a summary proceeding (CPLR 408;

952 Assoc., LLC v Palmer, 52 AD3d 236 [2008]). Were a tenant served with a barebones notice like the one in this case to be denied leave to conduct discovery, he or she would be completely at sea in an ensuing holdover proceeding. The tenant would simply be unable to defend.

Last, the landlord's position is contrary to the notion of judicial economy. The lack of sufficient details to enable a tenant to assess, from the notice, whether the owner has a good faith intention of occupying the apartment, would generate a great number of holdover proceedings. A court proceeding would be required in each case for the tenant to confirm whether the nonrenewal notice is worth contesting. Vast resources would be preserved if the tenant could make that assessment upon receipt of the notice.

Finally, the landlord's position has been repeatedly rejected by the Appellate Term, First Department. That court has consistently held in "owner's use" cases that it is not enough for the nonrenewal notice to merely track the language of RSC 2524.4(a). For example, in *Isdahl v Pogliani* (22 Misc 3d 14 [2008]), the owners served a notice which merely stated when they acquired the building, and the fact that their daughter intended to occupy the apartment as her primary residence. The court held that the owners' failure to describe the circumstances

surrounding their desire to have their daughter occupy the apartment "provided tenant with no more useful information than simply [alleging that the] owners want the apartment for...the use of an unnamed family member, the type of unadorned assertion[] which fall[s] far short of satisfying the Code's specificity standards" (22 Misc 3d at 15 [internal quotation marks omitted]).

In *Haruvi v Rose* (10 Misc 3d 137(A) [2005]), the owner's notice alleged only that he intended to vacate his apartment a few blocks away and occupy the tenant's apartment as his primary residence. In affirming dismissal of the petition, the Appellate Term stated that the notice "was entirely uninformative as [to] why [landlord] would rather live in the [tenants'] rent stabilized apartment than his current two story residence" (*id.* at *2 [internal quotation marks omitted]). The Appellate Term, Second Department, recently adopted the First Department's position (*see Giancola v Middleton*, 21 Misc 3d 34 [2008]).

Rather than distinguishing these cases, the landlord boldly states that they were wrongly decided. They were not. In these cases the Appellate Term correctly recognized that the plain language of RSC 2524.2(b) requires a nonrenewal notice premised on "owner's use" to afford the tenant enough information to prepare a defense to a subsequent holdover proceeding if he or

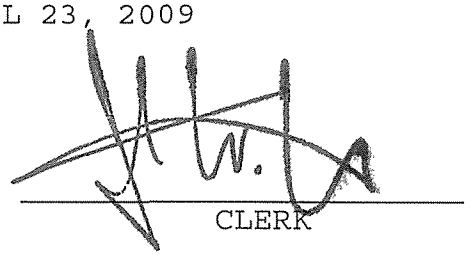
she does not believe that the owner's intention is genuine. The notice of nonrenewal in this case was facially deficient because it failed to meet this standard.

Accordingly, the order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered on or about May 23, 2007, which affirmed an order of the Civil Court, New York County (Maria Milin, J.), entered on or about May 17, 2006, granting respondent tenant's motion to dismiss the holdover petition, should be affirmed, with costs.

All concur.

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

ENTERED: APRIL 23, 2009



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