SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**FEBRUARY 17, 2009**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

4244-
4245 The People of the State of New York, Respondent,

-against-

Anthony Danvers,
Defendant-Appellant.

- - - - - - - - -

The People of the State of New York,
Respondent,

-against-

Alvin Washington,
Defendant-Appellant.

Ind. 4703/05

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Curtis J. Farber, New York, for appellants.

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

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Judgment, Supreme Court, New York County (Gregory Carro, J. on speedy trial motions; Edwin Torres, J. at jury trial and sentence), rendered March 27, 2007, convicting defendant Anthony Danvers of coercion in the first degree and criminal possession of a weapon in the second degree and sentencing him to concurrent terms of 2⅓ to 7 years and 4 years, and convicting defendant Alvin Washington of coercion in the first degree and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

This Court held the appeal in abeyance and remanded the matter to the Supreme Court, New York County "to schedule an expeditious hearing with respect to the issue of the knowing and intelligent consent of the respective defendants to joint representation by retained counsel Curtis Farber, including the waiver of any claims regarding potential conflicts of interest" (55 AD3d 362, 326 [2008]).

Supreme Court held a hearing, pursuant to *People v Gomberg* (38 NY2d 307 [1975]), on November 13, 2008, during which time the Court explained to both defendants, in the presence of Mr. Farber, that each was entitled to a separate lawyer on appeal, that the State would provide one if a defendant could not afford a lawyer, and that it was possible that their interests, defenses, and/or arguments might be different or in conflict. The court was satisfied that each defendant knowingly waived his right to separate counsel, and there is no basis to challenge that finding.

On the merits, to the extent that defendants are challenging the court's *Sandoval* ruling insofar as it permitted the prosecutor to question them about their possession of a quantity of cocaine recovered from Danvers's apartment, which was the location where defendants had taken the victim in this case, we find that this ruling was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). Defendants did not preserve

any of their arguments relating to uncharged crimes evidence and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. In particular, we conclude that evidence of drugs and money found on defendants' persons and in the apartment in question was highly probative of motive in this drug-related crime, and corroborated the victim's testimony as to the events in question (*see generally People v Till*, 87 NY2d 835 [1995]). The probative value of this evidence outweighed its prejudicial effect. The court also properly received evidence tending to link certain weapons to each other, and in turn to defendants.

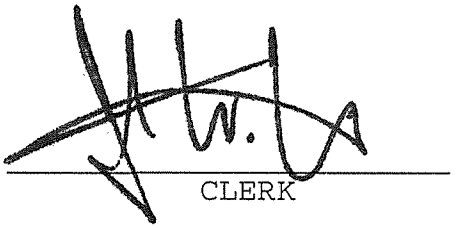
The court properly exercised its discretion when it precluded defendants from calling Danvers's landlord as a witness, since their offer of proof was insufficient to alert the court to the relevance of the witness's testimony (*see People v Arroyo*, 77 NY2d 947 [1991]). Initially, we note that this witness was apparently reluctant to appear in court, and there is no indication that defendants ever interviewed him or sought to subpoena him. Although defendants now assert that the witness might have been able to shed light on the defense claim that the victim was not held against her will, that claim is speculative, and is beyond their offer of proof, which was limited to potential testimony that would have been cumulative to that of other witnesses or that would have raised a Fourth Amendment

issue outside the province of the jury. Since defendants never asserted a constitutional right to call this witness, their present constitutional claim is unpreserved (*see People v Lane*, 7 NY3d 888, 889 [2006]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The court's ruling did not deprive defendants of a fair trial or their right to present a defense (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]).

The court properly denied defendants' speedy trial motions. The record supports the motion court's findings as to excludability with regard to time attributable to motion practice and the absence of defense counsel.

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

ENTERED: FEBRUARY 17, 2009



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Tom, J.P., Andrias, Friedman, Catterson, Acosta, JJ.

4587 In re 80 Lafayette Associates, Petitioner, Index 106717/07

-against-

Kumiki Gibson, as Commissioner of the New York State Division of Human Rights, etc., Respondent.

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Franklin, Gringer & Cohen, P.C., Garden City (Martin Gringer, J. of counsel), for petitioner.

Caroline J. Downey, Bronx (Michael K. Swirsky of counsel), for respondent.

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Determination of respondent Commissioner of the New York State Division of Human Rights, dated March 30, 2007, which, insofar as challenged in this proceeding brought pursuant to Executive Law § 298 (transferred to this Court by order of the Supreme Court, New York County [Joan A. Madden, J.], entered on or about July 12, 2007), found that petitioner discriminated against complainant Nashat Atalla on the basis of national origin, and rendered an award in Atalla's favor, unanimously annulled, on the law, without costs, the petition granted, the cross petition for judicial enforcement of the award denied, and Atalla's complaint dismissed.

Administrative proceedings were commenced against petitioner 80 Lafayette Associates (80 Lafayette), the owner of the commercial office building at 80 Lafayette Street in Manhattan,

based on complaints filed with the State Division of Human Rights (DHR) by five of 80 Lafayette's former employees. The complainants, each of whom was of Egyptian descent, charged that 80 Lafayette had discriminated against them on the basis of their national origin. After a hearing at which the five complainants and certain 80 Lafayette managers testified, the presiding administrative law judge (ALJ) found that none of the complainants had sustained the burden of proving discrimination, and recommended that all of the complaints be dismissed. While the Commissioner adopted the ALJ's recommendation to the extent of dismissing four of the complaints, she rejected the recommendation to dismiss the complaint of Nashat Atalla, and instead rendered an award in Atalla's favor, predicated on his claim that 80 Lafayette had discharged him in September 1989 on the basis of his national origin. As this determination is not supported by "sufficient evidence on the record considered as a whole" (Executive Law § 298), we now annul it.

Atalla conceded having committed the act that 80 Lafayette adduced as the basis for his termination. Specifically, Atalla admitted that, in defiance of the direct order of his superior, he took an envelope from a desk in the 80 Lafayette manager's office and left with it. This blatantly insubordinate act plainly constituted a legitimate, nondiscriminatory business reason for terminating Atalla, thereby rebutting his prima facie

case (*Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]). Accordingly, the burden shifted to Atalla to prove that the facially valid reason for his termination was merely a pretext for an action that was, in fact, motivated by invidious bias (*id.* at 629-630).

As found by the ALJ, Atalla failed to carry the burden of proving that he was terminated based on his national origin, especially in view of the prior determination rendered in Atalla's union grievance proceeding. The arbitrator in that proceeding determined that Atalla had committed the acts complained of in 80 Lafayette's termination letter and that such acts constituted misconduct that permitted his summary dismissal. The sole evidence Atalla offered to show that the discharge was based on his national origin was his hearing testimony (given more than a decade after the relevant events) that the manager who fired him told him at the time that he did not want "Egyptians working in the building." However, the four-page handwritten complaint that Atalla filed with DHR in February 1990, a few months after his termination, made no mention of any such statement. Neither was any such statement mentioned in the complaint submitted on Atalla's behalf in the union grievance proceeding, which complaint is quoted in the arbitrator's decision.

In rejecting the ALJ's findings as to Atalla, the

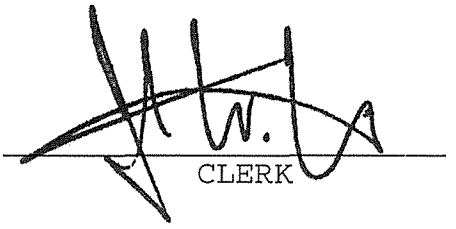
Commissioner simply ignored the fact (which the ALJ had acknowledged) that, in Atalla's unsuccessful union grievance proceeding, the arbitrator had determined in 1992 that 80 Lafayette "had just cause to discharge [him]." While the arbitrator's finding was not binding on the Commissioner, it was inappropriate for her to reach a contrary conclusion without explanation (*see Collins v New York City Tr. Auth.*, 305 F3d 113, 119 [2d Cir 2002]). Further, the Commissioner's determination in favor of Atalla was also based in substantial part on a mischaracterization of the record. Specifically, contrary to the assertion in the Commissioner's decision that the manager who fired Atalla "did not deny that he made derogatory comments [about Egyptians] upon terminating [Atalla's] employment," the record shows that the manager did deny making such comments.

In sum, the Commissioner's rejection of the findings of the ALJ is not supported by "sufficient evidence on the record considered as a whole" (Executive Law § 298), given that the those findings, involving primarily issues of credibility, were entitled to substantial weight inasmuch as it was the ALJ, not the Commissioner, who had the opportunity to see and hear the live testimony of the witnesses, and the Commissioner failed to articulate sufficient reasons for departing from the ALJ's

findings (*see Matter of Kelly v Murphy*, 20 NY2d 205, 209-210 [1967]; *Matter of Alegre Deli v New York State Liq. Auth.*, 298 AD2d 581, 582 [2002]; *Matter of Lewis v Cambridge Filter Corp.*, 132 AD2d 802, 803 [1987]; *cf. Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). Accordingly, the Commissioner's determination is annulled, and Atalla's complaint is dismissed.

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

ENTERED: FEBRUARY 17, 2009



Tom, J.P., Nardelli, McGuire, Acosta, DeGrasse, JJ.

4724 Lorimer P. Brooks, Index 600413/07
Plaintiff-Appellant-Respondent,

-against-

Harold Haidt, etc., et al.,
Defendants-Respondents-Appellants.

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James M. Maloney, Port Washington, for appellant-respondent.

Cowan, Liebowitz & Latman, P.C., New York (J. Christopher Jensen of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Helen E. Freedman, J.), entered October 25, 2007, which, in an action for a partnership accounting and related relief, granted defendants' motion to dismiss the complaint, affirmed, without costs.

Plaintiff's accounting cause of action accrued upon the dissolution of the subject partnership (Partnership Law § 74) and is barred by the six-year statute of limitations under CPLR 213(1) (*see Sagus Mar. Corp. v Rynne & Co.*, 207 AD2d 701, 702 [1994]). Contrary to plaintiff's assertion, the partnership agreement does not provide otherwise. We note that, contrary to the IAS court's determination, the action is not barred by the doctrine of res judicata, where plaintiff's prior action involving the same claims was dismissed under 22 NYCRR 202.27(b) in an order that was without prejudice to a motion to have the matter restored and did not otherwise indicate an intention to

dismiss on the merits (*see Espinoza v Concordia Intl. Forwarding Corp.*, 32 AD3d 326, 328 [2006]).

The denial of sanctions against plaintiff was not improvident.

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

McGUIRE, J. (concurring)

Although I agree with the majority that the order dismissing the complaint should be affirmed, that the cause of action for an accounting is time-barred and that Supreme Court providently exercised its discretion in declining to impose frivolity sanctions against plaintiff, I disagree with the majority's conclusion that plaintiff was not precluded by res judicata from relitigating his six causes of action seeking damages.

On December 8, 2003, plaintiff commenced an action in Supreme Court, Westchester County, against defendants seeking damages for negligence and fraud, alleging that defendants engaged in tortious conduct that maximized defendants' shares in the parties' law firm to plaintiff's detriment. Plaintiff also alleged that defendants failed to pay plaintiff for his capital contribution to the firm. That action was dismissed by Supreme Court on April 4, 2005 pursuant to 22 NYCRR 202.27 based on plaintiff's failure to appear at a compliance conference and failure to provide court-ordered disclosure. A motion by plaintiff to vacate this order was denied on June 21, 2005, the court finding, among other things, that plaintiff failed to demonstrate that his action had merit. The Appellate Division, Second Department, affirmed the order denying plaintiff's motion to vacate (30 AD3d 365 [2006], *lv dismissed in part and denied in part* 7 NY3d 856 [2006]).

On February 8, 2007, plaintiff commenced this action in Supreme Court, New York County, against defendants asserting the same claims he had asserted in the Westchester County action and a cause of action for an accounting. Defendants moved to dismiss this new action on the grounds that plaintiff was barred by res judicata from asserting the claims raised in the prior action and that the cause of action for an accounting was time-barred. Defendants also moved for frivolity sanctions against plaintiff. Supreme Court granted those portions of the motion that sought dismissal of the complaint and denied that portion of the motion that sought sanctions.

"Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter . . . The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again" (*Matter of Hunter*, 4 NY3d 260, 269 [2005]). "The primary purposes of res judicata are grounded in public policy concerns and are intended to ensure finality, prevent vexatious litigation and promote judicial economy" (*Xiao Yang Chen v Fischer*, 6 NY3d 94, 100 [2005]).

Here, the order of Supreme Court, Westchester County, denying plaintiff's motion to vacate his default, which was affirmed by the Second Department, precludes plaintiff from

relitigating the claims brought in his prior action. In denying that motion, Supreme Court found that plaintiff failed to demonstrate the merits of his claims, a necessary precondition to relief under CPLR 5015(a)(1) from a 22 NYCRR 202.27 dismissal. That finding was not disturbed by the Second Department. The primary purposes of res judicata -- to ensure finality, prevent vexatious litigation and promote judicial economy -- would be undermined by permitting plaintiff to relitigate the first six causes of action he asserts in this action because he already "has had his day in court" on those claims (*Good Health Dairy Prods. Corp. v Emery*, 275 NY 14, 18 [1937]).

*Espinoza v Concordia Intl. Forwarding Corp.* (32 AD3d 326 [2006]) is distinguishable because the plaintiff in *Espinoza* did not move to vacate the dismissal of her prior action, which was dismissed under § 202.27. Rather, the plaintiff, within the applicable statute of limitations, commenced a new action on the same claims. Thus, no determination on the merits of her claims was made or needed to be made, and her subsequent action was therefore not barred by res judicata.[1]

Additionally, plaintiff's new cause of action for an accounting, which is based on the same facts and transactions

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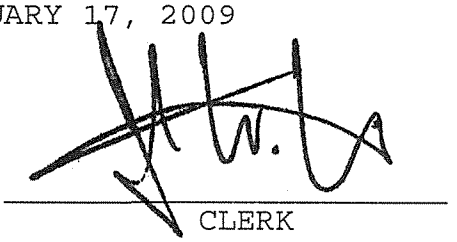
[1]While the majority determines that plaintiff is not barred by res judicata from relitigating the six causes of action he asserted in the prior action, it offers no rationale for its affirmance of those portions of Supreme Court's order dismissing those claims.

that were the subject of the prior action seeking only damages, is barred by res judicata because that doctrine "applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation" (*Matter of Hunter*, 4 NY3d at 269). This cause of action should be dismissed for an independent reason -- it is, as the majority concludes, time-barred.

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

ENTERED: FEBRUARY 17, 2009



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

4872 Sara Kinberg, Index 1628/06
Plaintiff-Appellant,

-against-

Yoram Kinberg,
Defendant-Respondent.

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Sara Kinberg, appellant pro se.

Jane Bevans, New York, for respondent.

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Order, Supreme Court, Bronx County (Ellen Gesmer, J.), entered November 2, 2007, which, in this action alleging, inter alia, breach of the parties' settlement agreement and judgment of divorce, insofar as appealed from as limited by the briefs, granted defendant's cross motion to dismiss the complaint to the extent of dismissing the first, third through tenth, twelfth and thirteenth causes of action, and awarded judgment in favor of defendant in the amounts of: a) $19,778.14 with interest from June 1, 2004; b) $65,270 with interest from July 1, 2001; and c) $250 with interest from April 1, 2002, minus d) $15,000 with interest from January 31, 2007; e) $2,500 with interest from December 31, 1998; and f) $2,850 with interest from December 31, 2001, unanimously modified, on the law, to the extent of 1) vacating the award of $19,778.14 with interest to defendant, representing the surplus in the education fund 2) vacating the award of $65,270 with interest from July 1, 2001 as defendant's

share of the proceeds from the sale of the parties' apartment in Haifa, Israel; 3) reinstating plaintiff's claim for damages for loss of value of stock due to its late transfer by defendant in breach of the settlement agreement; 4) reinstating plaintiff's first cause of action alleging defendant's breach of the settlement agreement by failing to obtain a religious divorce (Get) within 30 days of the execution of the settlement agreement, and her third cause of action seeking the transfer of funds due and owing to her from the excess balance account portion of defendant's retirement account, and otherwise affirmed, without costs, and the matter remanded for further proceedings consistent herewith.

The record raises factual questions with respect to the issue of whether a surplus is due and owing to defendant from the education fund established pursuant to the settlement agreement to provide for the college education of the parties' daughter. There is an absence of documentation with respect to the payment of college living expenses, and the parties' affidavits are in conflict. The record also raises questions regarding whether plaintiff's contribution to the education fund was deficient by $9,000 and whether defendant failed to comply with a prior court order of March 25, 2002 requiring him to add $9,000 to the fund, with interest.

The motion court properly declined to accept the contract

price in determining the proceeds of the sale of the parties' apartment in Israel. The June 2001 transfer of the apartment to the parties' daughter does not constitute an arm's length transaction at market value, as contemplated by the settlement agreement. Plaintiff submitted documentary evidence establishing that the amount derived from the sale was $53,000, and defendant submitted a letter from Israeli counsel indicating that either the sale price, or the value, of the apartment was $160,000. The questionable and conflicting nature of the proof precludes summary disposition of this issue.

Plaintiff's claim for damages resulting from the loss of value of stock as a result of defendant's failure to timely effect its transfer to her under the settlement agreement is not barred by collateral estoppel. On her prior motion, plaintiff sought an order directing defendant to transfer the stock or, in the alternative, a money judgment in the amount of its value as of the fall of 2000. In the ensuing order, the court directed defendant to transfer the stock within 10 days or judgment would be entered against him equal to the value of the stock, with interest from October 27, 2000 (10 ten days after entry of the judgment of divorce). The court did not determine the value of the stock, requesting that it be set forth in an affidavit of noncompliance to be submitted prior to entry of judgment. Thus, the issue was not specifically resolved against plaintiff on the

prior motion (*see generally Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). Furthermore, when the prior motion was submitted in April 2001, the extent of any loss in the value of the stock due to the delay in transfer could not be estimated.

We disagree that plaintiff's first cause of action for breach of contract is barred by res judicata. On her prior motion, plaintiff sought to compel defendant to obtain a Get, together with legal fees incurred in obtaining defendant's compliance with the settlement agreement. Defendant finally granted plaintiff a Get in June 2007, six years after she made her motion. On the present application, plaintiff seeks a different measure of damages, to wit, compensation for her inability to remarry according to the Jewish faith during that time. Likewise, plaintiff could not have anticipated the ensuing delay so as to assert this issue on the prior motion (*see e.g. Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347-349 [1999]).

As to plaintiff's third cause of action seeking transfer of the excess balance of defendant's retirement account, the motion court misconstrued the nature of the claim, concluding that the excess balance account did not fall within the "Later Discovered Property" provision of the settlement agreement because it was disclosed prior to its execution. Plaintiff does not dispute the disclosure of the account. Rather, she contends that the

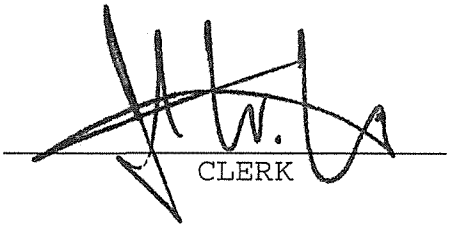
availability of transfer by a qualified domestic relations order was not disclosed, and the funds have not been received. While accounted for in the agreement, it remains that the excess balance account was never transferred to plaintiff, and this cause of action should not have been dismissed.

Although not barred by the statute of limitations, as the motion court determined, plaintiff's claim for medical expenses was nevertheless properly dismissed. Plaintiff failed to sustain her burden to prove what, if any, medical expenses, defendant failed to pay.

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

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

ENTERED: FEBRUARY 17, 2009



Saxe, J.P., Friedman, Nardelli, Sweeny, DeGrasse, JJ.

5134 Clarissa Alexander, Index 8215/06
Plaintiff-Respondent,

-against-

The Sisters of Charity of St. Vincent
De Paul of New York, etc.,
Defendant,

The College of Mount Saint Vincent,
Defendant-Appellant.

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Law Offices of Thomas K. Moore, New York (Carol R. Finocchio and Lawrence B. Goodman of counsel), for appellant.

Burns & Harris, New York (Brett E. Rubin of counsel), for respondent.

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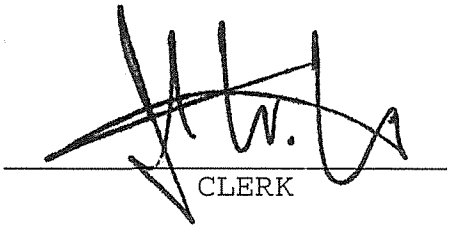
Order, Supreme Court, Bronx County (Barry Salman, J.), entered May 20, 2008, which denied defendant College of Mount Saint Vincent's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed.

Even crediting the narrative plaintiff provided at her deposition regarding how she fell from her elevated bed, nothing in the record before us establishes that plaintiff's fall was caused by any negligence on the part of defendant College of Mount Saint Vincent (CMSV). Plaintiff's evidence is insufficient to create a question of fact as to either causation or negligence on the part of CMSV. Nothing in plaintiff's evidence established why she lost her footing. Her characterization of the bed as

"rickety" and her vague statement, "I think the bed kind of lifted up a little before I fell," were insufficient to establish that defendant had supplied her with a dangerous or defective bed; nor does the lack of a ladder to the elevated bed establish a defect since there were bars situated on the headboard for the purpose of access. Summary judgment should therefore have been granted in favor of CMSV.

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

ENTERED: FEBRUARY 17, 2009



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Saxe, J.P., Friedman, Nardelli, Sweeny, DeGrasse, JJ.

5136 The People of the State of New York, Ind. 1521/00
Respondent,

-against-

Nathaniel Wilson,
Defendant-Appellant.

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

Nathaniel Wilson, appellant pro se.

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Order, Supreme Court, Bronx County (Bruce Allen, J.), rendered on or about September 27, 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. We have considered and rejected the arguments raised in defendant's pro se brief.

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

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

M-380 ***People v Nathaniel Wilson***

Motion seeking leave to proceed pro se granted to the extent of accepting the pro se brief for filing.

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

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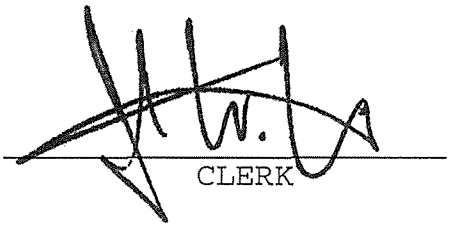

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At a term of the Appellate Division of
the Supreme Court held in and for the
First Judicial Department in the County
of New York, entered on February 17, 2009.

Present - Hon. Peter Tom, Justice Presiding
David B. Saxe
James M. McGuire
Karla Moskowitz
Helen E. Freedman, Justices.

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The People of the State of New York,
Respondent, Ind. 6832/06

-against- 5218

Edward Wilson,
Defendant-Appellant.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about July 12, 2007,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated January 30, 2009,

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

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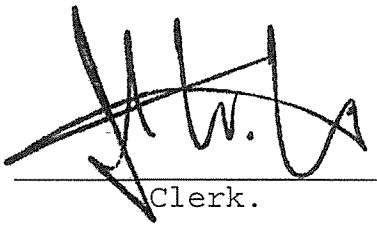

Clerk.

Friedman, J.P., Gonzalez, Buckley, Renwick, JJ.

5236 The People of the State of New York, Ind. 6004/04
Respondent,

-against-

David Chavis,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Heather L. Holloway of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Britta Gilmore of counsel), for respondent.

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Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered July 27, 2005, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 4½ to 9 years, unanimously affirmed.

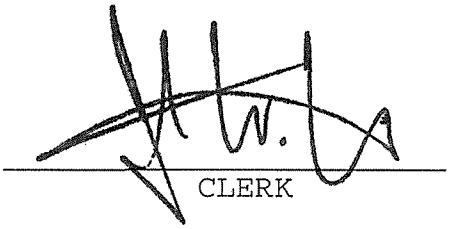
The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]; *People v Pavao*, 59 NY2d 282, 292 [1983]). The convictions at issue were probative of defendant's willingness to place his interests above those of society, and were not unduly prejudicial.

Defendant failed to preserve his argument that he was denied a fair trial because of the trial court's interference during the prosecutor's direct examination and defense counsel's cross-

examination of the People's witnesses and defense counsel's summation (*see e.g. People v Charleston*, 56 NY2d 886, 888 [1982]), and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal. While both before and after defendant's trial we have expressed our disapproval of this trial justice's continued practice of improperly interjecting herself into the proceedings (*see e.g. People v Canto*, 31 AD3d 312 [2006], *lv denied* 7 NY3d 900 [2006], and cases cited therein), the court's conduct in this case did not deprive defendant of a fair trial (*see People v Moulton*, 43 NY2d 944 [1978]).

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

ENTERED: FEBRUARY 17, 2009



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Friedman, J.P., Gonzalez, Buckley, Renwick, JJ.

5239 In re Desmond K., and Another,

Dependent Children Under the
Age of Eighteen Years, etc.,

Kevin K.,
Respondent-Appellant,

Cardinal McCloskey Services,
Petitioner-Respondent.

---

Nancy Botwinik, New York, for appellant.

David H. Berman, Larchmont, for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), Law Guardian.

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Orders of disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about March 31, 2008, which, to the extent appealed from, determined that respondent father's consent was not required for the adoption of the subject children and committed custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The record demonstrates that respondent waived his contention that he was entitled to a hearing on his motion to be deemed a consent father (*see Matter of Jamize G.*, 40 AD3d 543, 544 [2007], *lv denied* 9 NY3d 808 [2007]). Respondent never objected to the court's instruction that the motion for the

hearing be made in writing, he was granted three adjournments over a period of more than five months, and was still not prepared to submit his motion at the end of that extended period of time. Under these circumstances, it was not an improvident exercise of discretion for the court to deny him still yet another adjournment (*see Matter of Christina Marie B.*, 155 AD2d 277 [1989]). Nor was respondent deprived of his constitutional due process rights by the denial of an adjournment, as the court provided him with numerous opportunities to be heard (*id.*).

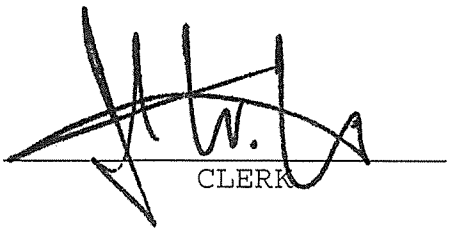
The court properly denied respondent's request, made at the start of the dispositional hearing, to relieve his assigned counsel. Counsel's representation of respondent was vigorous, and the record is devoid of evidence of any serious conflict between respondent and counsel (*see e.g. People v Sides*, 75 NY2d 822, 824 [1990]).

The court's determination that it would be in the children's best interests to free them for adoption is supported by a preponderance of the evidence (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). There is no indication that respondent, who was incarcerated at the time of the dispositional hearing, is capable of caring for his children, and his plan to send the children to his relatives, whom the children did not know, was not in their best interests. Furthermore, the children's foster parents were described as supportive, tended to

Destiny's special needs, and expressed a desire to adopt the children.

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

ENTERED: FEBRUARY 17, 2009



CLERK

Friedman, J.P., Gonzalez, Buckley, Renwick, JJ.

5240 The People of the State of New York, Ind. 2790/03
Respondent,

-against-

Antonio Otero,
Defendant-Appellant.

---

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

---

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about April 13, 2005, unanimously affirmed.

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

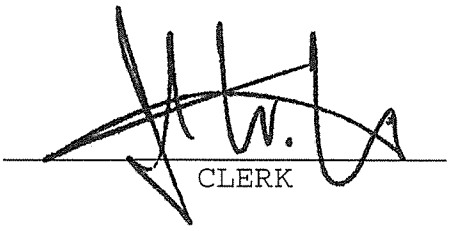
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

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

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

ENTERED: FEBRUARY 17, 2009



Friedman, J.P., Gonzalez, Buckley, Renwick, JJ.

5241 German Serrano,
Plaintiff-Respondent,

-against-

Index 119133/01
59107/03
59008/04
590671/05

432 Park South Realty Co., LLC,
Defendant-Appellant.

- - - - -

[And a Third-Party Action]

- - - - -

432 Park South Realty Co., LLC,
Second Third-Party Plaintiff-Appellant,

-against-

Fortune Interior Dismantling Corp.,
Second Third-Party Defendant-Respondent.

[And a Third Third-Party Action]

---

Mauro Goldberg & Lilling LLP, Great Neck (Barbara DeCrow Goldberg of counsel), for appellant.

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for German Serrano, respondent.

McCusker, Anselmi, Rosen & Carvelli, P.C., New York (John B. McCusker of counsel), for Fortune Interior Dismantling Corp., respondent.

---

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered October 22, 2007, upon a jury verdict finding that plaintiff did not suffer a "grave injury" within the meaning of Workers' Compensation Law § 11 and awarding him $600,000 for past pain and suffering, $4,240,000 for future pain and suffering, and $2,302,425 for future medical expenses (including $710,556 for care, $443,405 for rehabilitation, and $150,111 for household

services), unanimously modified, on the law and the facts, to reduce the award for future medical expenses by $150,111 and to vacate the award for future pain and suffering and remand for a new trial solely as to such damages, and otherwise affirmed, without costs, unless plaintiff, within 30 days of service of a copy of this order, stipulates to reduce the award for future pain and suffering to $2,500,000 and to the entry of an amended judgment in accordance therewith.

The court properly left it to the jury to determine whether plaintiff suffered a grave injury of his left hand (Workers' Compensation Law § 11; *see Mustafa v Halkin Tool, Ltd.*, 2004 WL 2011384, *10, 2004 US Dist LEXIS 16128, *30-31 [ED NY 2004]). The jury's verdict that plaintiff did not suffer a grave injury within the meaning of Workers' Compensation Law § 11 was not against the weight of the evidence (*see Torricelli v Pisacano*, 9 AD3d 291 [2004], *lv denied* 3 NY3d 612 [2004]; *McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206-207 [2004]).

The award for past pain and suffering does not deviate materially from what would be reasonable compensation (CPLR 5501[c]; *see Cabezas v City of New York*, 303 AD2d 307 [2003]). In addition to the wrist fracture addressed in *Cabezas*, plaintiff suffered a herniated disc, for which he underwent an operation, and developed reflex sympathetic dystrophy and posttraumatic stress disorder associated with major depressive disorder.

However, the award for future pain and suffering is excessive (*see Cabezas, supra*; *Hayes v Normandie LLC*, 306 AD2d 133 [2003], *lv dismissed* 100 NY2d 640 [2003]; *Brown v City of New York*, 309 AD2d 778 [2003]; *Valentine v Lopez*, 283 AD2d 739, 740 & n *, 744) [2001]).

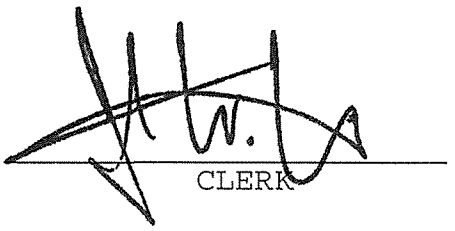
The rehabilitation (physical therapy) award is supported by plaintiff's testimony that, as of the time of trial, he was going to physical therapy twice a month and that he would go more frequently if he had the money and the testimony of a physician specializing in pain management that plaintiff will need physical therapy twice a week for the rest of his life, at a cost of approximately $120 per visit.

The award for care is supported by a psychiatrist's testimony that plaintiff will probably need someone to care for him for the rest of his life and a life care planner and medical case manager's testimony that plaintiff will need two hours of assistance per day until age 55 and four hours per day thereafter and that he cannot rely forever on his family. The testimony of an economist establishes that "care" means the assistance provided by the home attendant mentioned by the life care planner. However, it cannot be determined from the evidence what the category of "household services" is meant to cover. We therefore vacate the $150,111 award for household services (*see*

*McDougald v Garber*, 135 AD2d 80, 96 [1988], *mod on other grounds* 73 NY2d 246 [1989]).

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

ENTERED: FEBRUARY 17, 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 February 17, 2009.

Present - Hon. David Friedman, Justice Presiding
Luis A. Gonzalez
John T. Buckley
Dianne T. Renwick, Justices.

---

Nazario Leon,
Plaintiff-Respondent, Index 16194/05

-against- 5242

St. Vincent De Paul Residence,
Defendant-Appellant.

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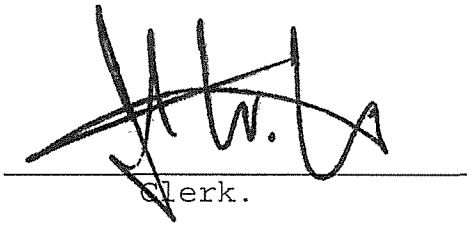
An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Betty Owen Stinson, J.), entered on or about October 27, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated January 14, 2009,

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

ENTER:



Clerk.

Friedman, J.P., Gonzalez, Buckley, Renwick, JJ.

5243 In re Minerva R.,
Petitioner-Appellant,

-against-

Jorge L. A.,
Respondent-Respondent.

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Minerva Ramos, appellant pro se.

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Order, Family Court, Bronx County (Carol A. Stokinger, J.), entered on or about March 13, 2008, which, insofar as appealed from as limited by the briefs, denied petitioner's objections to the modified order of support of the Support Magistrate, dated December 17, 2007, unanimously modified, on the facts, to the extent of remanding the matter to determine the parties' combined income for 2007 and the percentage of that income earned by respondent, and otherwise affirmed, without costs.

Great deference should be given to the findings of the Support Magistrate, who is in the best position to assess the credibility of the witnesses and the evidence presented (*see e.g Matter of Steven J.K. v Leah T.K.*, 46 AD3d 421, 422 [2007], *lv denied* 11 NY3d 703 [2008]; *Matter of Musarra v Musarra*, 28 AD3d 668, 669 [2006]).

Here, there is no support in the record for petitioner's claim that the Support Magistrate was biased against her. Rather, the Support Magistrate and the court both found that the

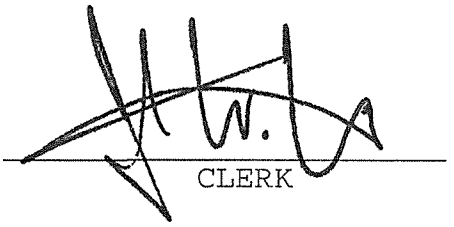
parties were lacking credibility. The Support Magistrate went to great lengths to assure the accuracy of the records which were used to determine the parties' income, and the record is devoid of any evidence of unreported income by respondent. Petitioner's argument that respondent intentionally frustrated resolution of the matter is belied by the record showing that the delays were due to both parties' lack of cooperation. Furthermore, contrary to petitioner's contention that the support for the eldest child of the marriage was improperly terminated while he was still in college, said support was terminated by operation of law when he attained the age of 21 (*see* Family Court Act § 413[1][a]).

However, we modify to the extent indicated because the record does not reflect the parties' combined income for 2007 and the percentage of that income earned by respondent.

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

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

ENTERED: FEBRUARY 17, 2009



CLERK

Friedman, J.P., Gonzalez, Buckley, Renwick, JJ.

5244 The People of the State of New York, Respondent, Ind. 3171/06 1936/06

-against-

Todd Branham, Defendant-Appellant.

---

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

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

---

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered May 29, 2007, convicting defendant, upon his plea of guilty, of four counts of robbery in the first degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 20 years to life, unanimously reversed, on the law, the plea vacated, and the matter remanded for further proceedings.

The court improperly denied defendant's request for substitution of counsel without giving defendant any opportunity to explain why he wanted a different lawyer. At the outset of a suppression hearing, defendant requested to address the court, which refused to permit him to be heard. Defendant managed to advise the court of his belief that he and his attorney had a "conflict of interest," but the court stated it was "not taking that application." Thus the court evinced its understanding that

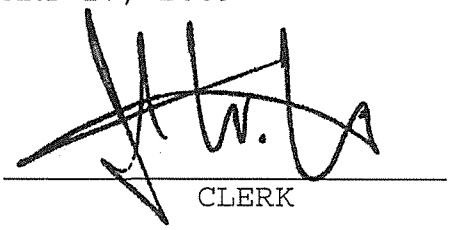
defendant was asking for new counsel, but expressly denied that application and refused to permit defendant to provide any details. Even though the request for new counsel may well have been a delaying tactic, and even though the "conflict" may well have been defendant's unjustified dissatisfaction with his attorney, the court had no basis to deny the application without hearing any explanation (*see People v Sides*, 75 NY2d 822 [1990]; *People v Rodriguez*, 46 AD3d 396 [2007], *lv denied* 10 NY3d 844 [2008]; *People v Bryan*, 31 AD3d 295 [2006]).

Moreover, at sentencing, the court should have made further inquiry before denying defendant's pro se motion to withdraw his plea. Although the motion consisted of boilerplate, it contained an allegation that the plea was involuntary because defendant was unaware he had a valid defense to the charges. Under the circumstances of the case, this claim had sufficient substance to at least warrant some inquiry (*compare People v Frederick*, 45 NY2d 520 [1978]). Although defendant pleaded guilty to four counts of first-degree robbery under Penal Law § 160.15(4), his plea allocution raised an affirmative defense under that section when he stated that he had simulated a firearm (*see People v Pariante*, 283 AD2d 345 [2001]). In addition, use of a simulated firearm was apparently the People's theory of the case, as indicated by the suppression hearing testimony. Finally, we also

note that defense counsel inappropriately disparaged defendant's plea withdrawal motion (*People v Vasquez*, 70 NY2d 1 [1987]).

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

ENTERED: FEBRUARY 17, 2009



CLERK

Friedman, J.P., Gonzalez, Buckley, Renwick, JJ.

5245 Pamela Moore,
Plaintiff-Appellant,

Index 108232/03
592286/03
5590170/05

-against-

158 St. Riverside Drive Housing Co., Inc.,
Defendant-Respondent,

River Terrace Apartments,
Defendant.

- - - - -

158 St. Riverside Drive Housing Co., Inc.,
Third-Party Plaintiff-Respondent,

-against-

Edwin Gould Foundation for Children, Inc.,
Third-Party Defendant,

Edwin Gould Services for Children, sued herein as
Edward Gould Services for Children, et al.,
Third-Party Defendants-Respondents.

- - - - -

158 St. Riverside Drive Housing Co., Inc.,
Second Third-Party Plaintiff-Respondent,

-against-

Kingsland Service Fund, Inc.,
Second Third-Party Defendant-Respondent.

---

Michelstein & Associates PLLC, New York (Joseph S. Rosato of counsel), for appellant.

Goldberg & Carlton, PLLC, New York (Gary M. Carlton of counsel), for 158 St. Riverside Drive Housing Co., Inc., respondent.

Lester Schwab Katz & Dwyer, LLP, New York (Howard R. Cohen of counsel), for Edwin Gould Services for Children, Edwin Gould Services for Children & Families and Kingsland Service Fund, Inc., respondents.

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Order, Supreme Court, New York County (Barbara R. Kapnick,

J.), entered on or about August 14, 2007, which insofar as appealed from as limited by the briefs, granted defendant/third-party plaintiff's motion for summary judgment dismissing plaintiff's claim for common law negligence, unanimously affirmed, without costs.

The court properly dismissed plaintiff's claim for common law negligence. In support of summary judgment, defendant asserted that it had no duty to plaintiff, citing the Occupancy Agreement for the cooperative unit, which placed the duty to maintain and repair the light fixtures on the unit owner, not on defendant, the owner of the building. Plaintiff, an employee of the lessee of the unit, third-party defendant Edwin Gould Services for Children, who was injured when she attempted to change a light bulb, failed to offer any evidence to rebut defendant's prima facie showing of entitlement to summary judgment (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Contrary to plaintiff's contention, the record shows that defendant sought dismissal of plaintiff's entire complaint in the main body of its moving papers, not for the first time in its reply papers.

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

ENTERED: FEBRUARY 17, 2009

CLERK

Friedman, J.P., Gonzalez, Buckley, Renwick, JJ.

5246-
5246A-
5246B

The People of the State of New York,
ex rel. Jisun Allah,
Petitioner-Appellant,

-against-

Warden of the Penitentiary of the
City of New York, etc., et al.,
Respondents-Respondents.

Index 51460/05

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Romano & Kuan, PLLC, New York (Julia P. Kuan and Anthony Cecutti of counsel), for appellant.

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Appeal from order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered September 29, 2005, which denied a writ of habeas corpus, unanimously dismissed as moot, without costs. Appeals from orders, same court and Justice, entered October 27, 2005 and January 10, 2006, which, upon reargument, adhered to the earlier order, unanimously dismissed as moot, without costs.

The appeal is moot, the Attorney General having informed the Court that petitioner has been released from custody (*People ex rel. Wilder v Markley*, 26 NY2d 648 [1970]).

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

ENTERED: FEBRUARY 17, 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 February 17, 2009.

Present - Hon. David Friedman, Justice Presiding
Luis A. Gonzalez
John T. Buckley
Dianne T. Renwick, Justices.

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The People of the State of New York, Ind. 1167/07
Respondent,

-against- 5247

Lascelle Slowley,
Defendant-Appellant.

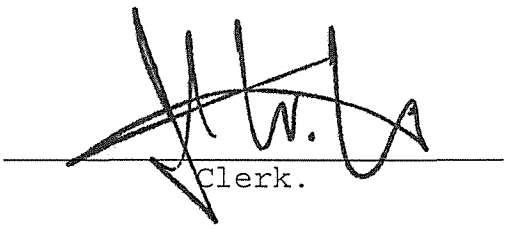
---

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee A. White, J.), rendered on or about September 18, 2007,

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

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

ENTER:



Clerk.

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

Friedman, J.P., Gonzalez, Buckley, Renwick, JJ.

5249 The People of the State of New York, Respondent,

-against-

Eric Washington, Defendant-Appellant.

Ind. 4297/06

---

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

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

---

Judgment, Supreme Court, New York County (Michael R. Ambrecht, J.), rendered July 9, 2007, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 8 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility. The undercover officer made a reliable identification of defendant, which was corroborated by physical and circumstantial evidence.

The imposition of mandatory surcharges and fees by way of court documents, but without reference to the specific amounts of those assessments in the court's oral pronouncement of sentence,

was lawful (*see People v Harris*, 51 AD3d 523 [2008], *lv denied* 10 NY3d 935 [2008]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 17, 2009

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 February 17, 2009.

Present - Hon. David Friedman, Justice Presiding
Luis A. Gonzalez
John T. Buckley
Dianne T. Renwick, Justices.

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The People of the State of New York, Ind. 2206/06
Respondent,

-against- 5250

Raheem Moore,
Defendant-Appellant.

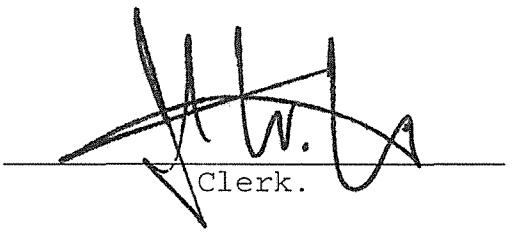
---

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee A. White, J.), rendered on or about June 7, 2007,

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

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

ENTER:



Clerk.

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

Friedman, J.P., Gonzalez, Buckley, Renwick, JJ.

5252 The People of the State of New York, Ind. 3454/02
Respondent,

-against-

Jose Savinan, also known as Norberto Gonzalez,
Defendant-Appellant.

---

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

Robert M. Morgenthau, District Attorney, New York (Marc Krupnick of counsel), for respondent.

---

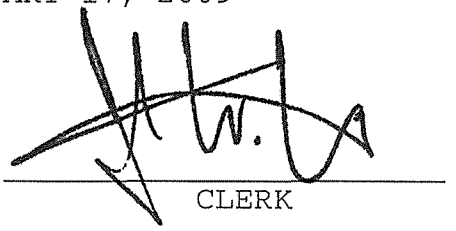
Order, Supreme Court, New York County (William A. Wetzel, J.), entered on or about August 6, 2007, which denied defendant's motion to be resentenced pursuant to the 2005 Drug Law Reform Act, unanimously affirmed.

The court properly recognized the degree of discretion it possessed (*compare People v Arana*, 32 AD3d 305 [2006]), and providently exercised its discretion when it determined that substantial justice dictated denial of defendant's resentencing application. The magnitude of defendant's involvement in drug trafficking outweighed his favorable prison record (*see e.g. People v Rizo*, 51 AD3d 436 [2008]; *People v Arana*, 45 AD3d 311 [2007], *lv dismissed* 9 NY3d 1031 [2008]).

We have considered and rejected defendant's remaining arguments.

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

ENTERED: FEBRUARY 17, 2009



CLERK

Friedman, J.P., Gonzalez, Buckley, Renwick, JJ.

5253 Steven B. Tanger, Index 603217/07
Plaintiff-Appellant,

-against-

114 East 32nd Realty Corporation, et al.,
Defendants-Respondents.

---

The Brown Law Group, P.C., New York (Rodney A. Brown of counsel), for appellant.

Flemming Zulack Williamson Zauderer LLP, New York (Mark C. Zauderer of counsel), for respondents.

---

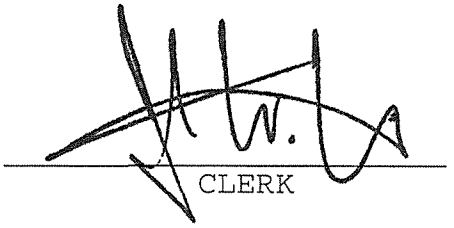
Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 13, 2008, which granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

The market study agreement clearly and unambiguously provided that plaintiff was to be paid for the services he had rendered thereunder if certain monetary thresholds were met upon the sale or refinancing of the subject property (*see Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002]; *Slamow v Del Col*, 79 NY2d 1016 [1992]). It further provided clearly and unambiguously that the agreement terminated upon the sale or refinancing of the property. Since the property was refinanced

in 1986, plaintiff's time to commence this breach of contract action expired in 1992 (*see* CPLR 213[2]).

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

ENTERED: FEBRUARY 17, 2009



CLERK

Friedman, J.P., Gonzalez, Buckley, Renwick, JJ.

5254 Alejandro Merino, an Infant by his Mother and Natural Guardian, Neirma Encarnacion, et al., Plaintiffs-Respondents, Index 20420/01

-against-

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

---

Steven F. Goldstein, LLP, Carle Place (Christopher R. Invidiata of counsel), for appellants.

Raymond Schwartzberg & Associates, PLLC, New York (Raymond B. Schwartzberg of counsel), for respondents.

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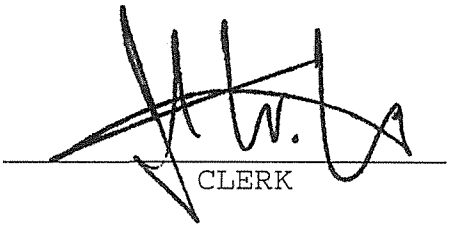
Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered April 28, 2008, which, in an action for personal injuries sustained when the infant plaintiff was hit in the eye with a tossed bat during a softball game at defendants' summer camp, denied defendants' motion for summary judgment dismissing the complaint on the ground of assumption of risk, unanimously affirmed, without costs.

An issue of fact exists as to whether plaintiff assumed the risk of playing catcher without any catcher protective gear. Such issue is raised by evidence that plaintiff was nine years old at the time of the accident and had never played the position of catcher before, and that camp counselors organized and supervised the game, instructed plaintiff to play catcher, did not instruct game participants on the risks of playing softball

without appropriate protective gear, and were in charge of supplying protective gear but did not do so (*see e.g. Moschella v Archdiocese of N.Y.*, 48 AD2d 856 [1975]; *Muniz v Warwick School Dist.*, 293 AD2d 724 [2002]; *Stryker v Jericho Union Free School Dist.*, 244 AD2d 330 [1997]; *see generally Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 657-659 [1989]).

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

ENTERED: FEBRUARY 17, 2009



Friedman, J.P., Gonzalez, Buckley, Renwick, JJ.

5255N-
5255NA In re Carl Ginsberg, et al., Index 500036/07
Petitioners-Respondents,

-against-

Annie Larralde, etc.,
Respondent-Appellant,

Stanley Parness, et al.,
Respondents.

---

Louis F. Burke, P.C., New York (Leslie Wybiral of counsel), for appellant.

Katsky Korins LLP, New York (Elan R. Dobbs of counsel), for Gingsberg, respondents.

Stanley Parness, New York, respondent pro se and for respondent Elisabeth Masse-Nihous.

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Order and judgment (one paper), Supreme Court, New York County (William P. McCooe, J.), entered December 31, 2007, which, inter alia, appointed a temporary guardian of the property of respondent Annie Larralde, an alleged incapacitated person, and awarded fees to the temporary guardian of the person and his representative in France, unanimously affirmed, without costs. Order, same court and Justice, entered December 31, 2007, which, inter alia, and referred for a hearing the issue of the fair and reasonable value of petitioners' attorneys' fees, unanimously affirmed, without costs.

While traveling in France, the alleged incapacitated person (AIP) suffered a stroke and was hospitalized, first in Paris and

then in Uzes, France. Upon the Uzes hospital's application, the County Court of Uzes appointed a guardian for the AIP, with primary focus on the management of her assets. Contrary to the AIP's contention, the motion court did not err in accepting the French court's findings as her need for a guardian in determining that the appointment of a temporary guardian in New York was necessary (*compare* Mental Hygiene Law § 81.23[a][1] [temporary guardian may be appointed "upon showing of danger in the reasonably foreseeable future to the health and well being of the alleged incapacitated person, or danger of waste, misappropriation, or loss of the property of the alleged incapacitated person"] *with* Mental Hygiene Law § 81.02 [(permanent) guardian may be appointed upon determination that person is incapacitated, which determination "shall be based on clear and convincing evidence"]; *see Matter of Sulzberger*, 159 Misc 2d 236, 238 [1993]). Moreover, the record establishes that the stroke severely compromised the AIP's ability to communicate with others and therefore to manage her property, and the court limited the powers of the temporary guardian to preserving the AIP's estate and paying her obligations.

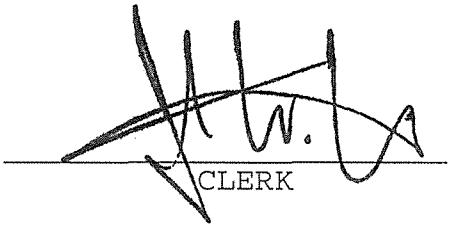
The statutorily required showing having been made, the court did not err in appointing the temporary guardian without holding a hearing (Mental Hygiene Law § 81.23[a][1]); *see generally*

*Matter of Hoffman*, 288 AD2d 892 [2001]; *Matter of Astor*, 13 Misc 3d 862, 864-865 [2006]). Nor did the court improperly dispense with the appointment of a court evaluator (*see* Mental Hygiene Law § 81.10[g]). The court-appointed temporary guardian of the AIP's person in turn appointed an individual to represent the AIP's interests in France, and the AIP was represented by counsel of her own choosing at all stages of the proceeding (*see Matter of Sulzberger*, 159 Misc 2d 236, 240-241 [1993]).

In view of our finding that the temporary guardian of the property was properly appointed in the absence of a hearing, the AIP's remaining contention is without merit.

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

ENTERED: FEBRUARY 17, 2009



Friedman, J.P., Gonzalez, Buckley, Renwick, JJ.

5256N Fortress Credit Opportunities I LP, Index 600820/08
Plaintiff-Respondent,

-against-

Walter Netschi,
Defendant-Appellant.

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Spears & Imes LLP, New York (Debra A. Karlstein of counsel), for appellant.

Mayer Brown LLP, New York (Susan Butler Farkas of counsel), for respondent.

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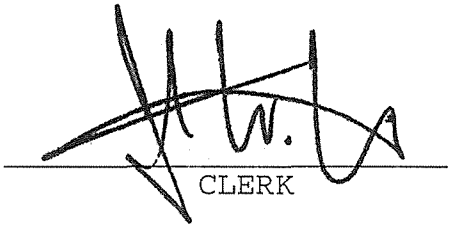
Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered September 12, 2008, which denied defendant's motion pursuant to CPLR 2201 to stay the proceedings pending the conclusion of related criminal proceedings, unanimously affirmed, without costs.

The motion court appropriately exercised its discretion in denying the motion for a stay of the action and a stay of discovery pending federal criminal investigation of defendant. The assertion of the privilege against self-incrimination is an insufficient basis for precluding discovery (*see Access Capital, Inc. v DeCicco*, 302 AD2d 48, 52-53 [2002]). Even if a criminal prosecution had been pending, the motion court was not

obligated to stay the civil matter (*see Campbell v New York City Transit Auth.*, 32 AD3d 350, 352 [2006]; *Stuart v Tomasino*, 148 AD2d 370, 373 [1989]). Finally, the court did not improvidently exercise its discretion in denying defendant's motion for a protective order. Defendant did not demonstrate that his deposition in New York would cause him substantial hardship (*see Kenney, Becker, LLP v Kenney*, 34 AD3d 315, 316 [2006]).

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

ENTERED: FEBRUARY 17, 2009



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David B. Saxe
John T. Buckley
James M. Catterson, JJ.

3199-
3199A
Ind. 107777/05
105521/05

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Palestine Monetary Authority,
Plaintiff-Respondent,

-against-

David Strachman, as Administrator
of the Estate of Yaron Ungar, et al.,
Defendants-Appellants,

The Bank of New York,
Defendant.

- - - - -

The Estate of Yaron Ungar, etc., et al.,
Plaintiffs-Appellants,

-against-

The Palestinian Authority, also know as
The Palestinian Interim Self-Government
Authority, et al.,
Defendants-Respondents.

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Defendants/plaintiffs appeal from an order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 21, 2005, which, inter alia, modified a restraining order to delete the restraint against the Palestine Monetary Authority (PMA), granted the PMA's motion for

a preliminary injunction, directed the Bank of New York to release a restraint on all funds resulting from transfer orders on the PMA's behalf and to honor all the PMA's pending and future transactions, and an order and judgment (one paper), same court and Justice, entered April 10, 2007, to the extent that it granted the PMA's motion for summary judgment, declared that it is a separate juridical entity from the Palestinian Authority and that the restrained funds should be released, and dismissed the judgment creditors' counterclaims and their cross claims against the Bank of New York for a turnover of the restrained funds.

Jaroslawicz & Jaros, LLC, New York (Robert J. Tolchin of counsel), for appellants.

Lynch Daskal Emery LLP, New York (James R. Lynch of counsel), for respondents.

CATTERSON, J.

This action arises from attempts to enforce a judgment of more than $116,000,000 against the Palestinian Authority and the Palestine Liberation Organization for terrorist activities that resulted in the death of an American citizen and his Israeli wife. A federal judgment was domesticated in New York and the judgment creditors also issued restraining notices pursuant to CPLR 5222, which subsequently led the Bank of New York to freeze millions of dollars in wire-fund transfers involving the two judgment debtors, as well as entities purportedly associated with them. One of the entities, the Palestine Monetary Authority (hereinafter referred to as "PMA"), initiated this action seeking a declaration that $30,000,000 of the frozen funds transfers where the PMA was either the sender or the designated beneficiary were improperly restrained. This appeal focuses on three main issues: ownership of the frozen funds; whether the funds may be used to satisfy the judgment in part; and significantly for New York's banking industry, whether the restraint on the funds violates New York's banking laws, specifically the provisions of Uniform Commercial Code article 4-A governing creditor process and injunctions on wire-fund transfers.

The following facts are undisputed: On January 27, 2004, the children and heirs of Yaron and Efrat Ungar (hereinafter

referred to as the "Ungars") secured a judgment in the amount of $116,400,000 against the Palestinian Authority (hereinafter referred to as "PA") and the Palestine Liberation Organization (hereinafter referred to as "PLO") in connection with the brutal murder of both parents on a street in Israel by members of Hamas, a terrorist organization controlled by the PA and PLO. Estates of Ungar ex rel. Strachman v. Palestinian Authority, 304 F.Supp.2d 232 (D.R.I.,2004), aff'd, 402 F.3d 274 (1st Cir. 2005), cert. denied, 546 U.S. 1034, 126 S.Ct. 715, 163 L.Ed.2d 575 (2005).

Acknowledging that the PA and PLO did not intend to honor the judgment, on May 5, 2005, the federal court in Rhode Island granted the Ungars an injunction against the PA, the PLO "and their officers, agents [...] and any natural or legal persons in privity with them and/or acting on their behalf and/or in active concert and participation with them" enjoining the withdrawal, sale or transfer of any of their assets in the United States.

The Ungars domesticated the federal judgment in New York County and on the same day served a number of financial institutions including the Bank of New York (hereinafter referred to as "BNY") with a notice of the federal injunction and information subpoenas with statutory restraining notices. The latter included the following paragraph: "the assets and property

in which the judgment-debtors have an interest are held and/or titled under the names Palestine Authority, Palestine Liberation Organisation, [...] Palestine National Authority [...] Palestine Monetary Authority."

Between May 16, 2005 and June 9, 2005, the BNY responded by freezing millions of dollars of transactions by issuing a "Stop Payment. Funds suspended" instruction. The majority of the transactions were wire transfers by the Palestinian National Authority's Ministry of Finance, Gaza to the National Authority's embassies. There is no issue or controversy with respect to these funds. However, $30,000,000 of the frozen funds involved the PMA. Those are the funds at issue here.

As to the PMA itself, the sum of what is undisputed is that the PMA was established by the PA, a nonstate entity which itself was created by the Oslo Accords, a series of agreements between the sovereign state of Israel and the PLO. Article IV of the Oslo Accords gave the PA the right to create a "monetary authority" and in 1997, Yasser Arafat, President of the PA and Chairman of the PLO issued a decree entitled Monetary Authority Law (hereinafter referred to as "MAL") creating the PMA.

On June 3, 2005 the PMA commenced the instant action against the Ungars and the BNY, seeking a declaratory judgment disassociating PMA from the PA and PLO. On June 6, 2005, the PMA

brought an order to show cause for a preliminary injunction requiring the BNY to release the frozen PMA transactions. In the order to show cause, the annexed affidavit of George Abed, the Governor of the PMA, stated that the PMA possesses an "autonomous corporate character financially independent from the [PA] and [PLO]" and deals exclusively with privately owned commercial banks. The PMA claimed its purpose is to facilitate normal banking activity and help maintain financial stability by providing liquidity to those banks through the PMA's bank, the Palestine International Bank (hereinafter referred to as "PIB"), which acts as a clearing house for those banks whose interbank transactions in U.S. dollars are cleared through the BNY. Abed denied that the PMA holds or manages any funds of the PA or the PLO, and stated that because the PA is not yet a sovereign state, the PMA does not hold any gold reserves or act as PA's fiscal agent.

On June 23, 2005, the Ungars answered the PMA complaint and counterclaimed for a declaratory judgment that the PMA and the PA are indistinguishable, and for a turnover from the PMA of any and all PA assets held. They also cross-claimed against the BNY for turnover of the PMA's assets. The Ungars argued that the PMA is a shield for the PA's financial activities and assets and that the PA is de facto in control of the PMA. The Ungars relied on

the MAL to assert that the PMA's initial capital was to come from the PA, its shortfall was to be paid by the PA, and its profits were to be paid to the PA. As to management, the PMA's governor is appointed by the PA chairman as are its board members; their salaries are determined by him, and he has the right to terminate the PMA board members and officers. Additionally, the Ungars showed that the PMA regularly used the PA's letterhead.

On June 30, 2005 the motion court heard arguments on the PMA's order to show cause for a preliminary injunction. The court stated that there were two issues that needed to be determined: whether the PMA is the alter ego or an agent of the PA or the PLO; and even if it is not, whether or not it holds any funds of the PA or the PLO. The hearing was inconclusive. The Ungars requested discovery on whether the private banks, the claimed owners of the restrained funds, had either complained or asserted claims against the PMA, whether the PMA had paid them from other funds, and on the sources of the PMA's reserves of more than $500 million. The court decided that a factual hearing was necessary, which was scheduled and held over four days in the first week of August 2005. The court limited pre-hearing discovery.

The testimony and evidence adduced at the hearing focused on the ownership of the funds as of a time prior to the PMA's

issuance of payment orders, that is before the funds transfers were set in motion. Mr. Abu-Habsa, executive director of the PMA's banking supervision department for the 2½ years prior to the hearing, testified that a summary chart in evidence reflected holdings of various commercial banks and not of the PMA itself.

He testified that the PMA's capital came from its revenues over the years, and not from an infusion of funds from another source (such as the PLO or the PA). He explained that the PMA took required reserves from commercial banks and invested that amount, and then used the investment revenue to pay expenses; the PMA had its account at the PIB. Thus, a 2003 PMA circular which provided certain operating rules for banks in the Palestinian Territories required that they cover their current accounts in dollars by transferring reserves to the PMA's account with the PIB at the BNY. According to Abu-Habsa, all of the frozen BNY accounts were commercial bank reserves belonging to those banks; however, he did not know whether the funds were required reserves or were reserves with interest.

Jessica Goodwin, a long-time BNY employee who had effected the freeze, identified the BNY's summary list of the transfers in the frozen "suspense account," with the PMA as the originator of 14 transfers and the beneficiary of 5 transactions totaling about $30 million; all of the PMA transactions were bank-to-bank

transfers.

PIB general manager, Usama Mohamed Khader, confirmed that the PMA had its clearinghouse account with the PIB, which was used in the checks and payments settlement process between banks, and testified that the BNY freeze evoked complaints from the affected commercial banks that owned the funds.

Abed, the PMA governor, reiterated the contents of his affidavit regarding the PMA's role as a regulator, details of its enabling law (the MAL) and its failure to issue currency or hold gold reserves despite the law's "aspirational" provisions. He opined, based on his prior experience with the International Monetary Fund, that, with the above exceptions, the PMA's operations were typical of central banks. He denied taking any direction from the PLO, the PA, or any other government officials. He denied that the PMA is the "fiscal agent" for the PLO or the PA.

Abed explained that the PMA invests the reserves deposited by the commercial banks and keeps some of the interest, thereby generating a profit for itself. After paying expenses, it then pays over the remainder of the profit to the PA as required under the MAL.

Significantly, the court precluded the Ungars' attempts to cross-examine Abed regarding any discussions he may have had with

the PA ministry of finance or anyone at the PA concerning the instant judgment.

A central bank expert called by the PMA, who had worked for the Federal Reserve and the International Monetary Fund, also opined, over the Ungars' objection, that the frozen funds belonged to the commercial banks. Notably, when the Ungars' wire-transfer expert testified about the mechanics of such transfers, on cross-examination the PMA's counsel referred to UCC article 4-A, which governs wire transfers. However, at the hearing, the PMA's counsel did not use the statute substantively to attack the Ungars' claims.

At the conclusion of the hearings, the parties submitted post-hearing memoranda and briefs. The PMA, for the very first time, relied on the Uniform Commercial Code (UCC) §§ 4-A-502 and 4-A-503 to assert that the Ungars' judgment could not be enforced against funds in an intermediary bank like the BNY during a wire transfer and that anyway, title to the funds had passed from the PMA. The focus thus shifted to the issue of ownership of the funds during transfer, and specifically their ownership once they reached the intermediary bank, the BNY as determined by the provisions of the UCC article 4-A.

In an order entered October 21, 2005, the motion court, inter alia, modified the state restraining notice by deleting the

PMA on the grounds that pursuant to UCC 4-A the BNY holds no property belonging to the PMA because all funds frozen by the BNY were transfers. At that juncture, the court held that title to the funds had passed from the PMA. The court, however, recognized that the funds were still restrained pursuant to the federal injunction, but nevertheless found that the PMA was likely to prevail on the issue of its separate status from the PA. Thus, it granted the preliminary injunction and ordered the funds released upon a posting of a $30 million bond.[1]

Further, the action against the BNY was dismissed upon a stipulation of the parties. Finally, the court acknowledged that discovery was limited and that upon full discovery the evidence might show the PMA does hold funds of the PA or the PLO. The court therefore subsequently made a verbal order approving discovery. However, despite repeated requests and the submission to the court of a discovery deficiency summary, no discovery was forthcoming.

On December 23, 2005, the Ungars served a restraining notice on the PMA, restraining it from transferring its 2005 net profits

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[1] In fact, the PMA funds at the BNY have not been released because other judgment creditors of the PA have restrained them in enforcement proceedings brought in federal court. The federal court stayed proceedings in that case pending this Court's disposition of the instant appeal.

to the PA, payable to the PA according to the MAL. Two months later, the Ungars filed an order to show cause seeking turnover of those profits pursuant to CPLR 5225 and CPLR 5227. In April 2006, the PMA opposed and cross-moved stating that the PA had waived the taking of its profits. On June 30, 2006, the PMA filed a motion for summary judgment seeking final resolution of all claims, counter-claims and cross-claims. It further sought a release of the restrained funds and a protective order barring discovery. The Ungars cross-moved to amend their counterclaim to assert a claim against the PA for fraudulent conveyance and "money had and received," because the PA had waived receipt of the PMA's 2005 profits.

In an order and judgment (one paper) entered April 10, 2007, the court determined that the PMA's status as a separate juridical entity was a nonjusticiable issue preempted by a Treasury Department determination. The court further held that even if it was a justiciable question, the restrained funds would have to be released on the grounds that UCC 4-A prohibits restraint by an intermediary bank, and that, in any event, title to the funds had passed from the PMA. Additionally, the court held that it cannot order the turnover of the PA funds held by the PMA outside the jurisdiction in the Palestinian Territories. It dismissed the Ungars' counterclaims for a contrary

declaration, their cross claim for turnover of the PMA's funds; and denied the Ungars' request to amend their complaint to assert claims of fraudulent conveyance and "money had and received"; it further denied the Ungars' motion to compel discovery and the PMA's motion for a protective order as moot. The Ungars timely appealed from the orders entered October 21, 2005 and April 10, 2007.

On appeal, the Ungars argue that the motion court erred in holding that the issue of the PMA's relationship with the PA is nonjusticiable. The Ungars assert that, in fact, the PMA is ultimately controlled by the PA and the PLO as a shield for their financial activities. They further argue that the PA's waiver of 2005 profits from the PMA constitutes a conveyance subject to a claim for fraudulent conveyance and "money had and received"; that the motion court misinterpreted the provisions of UCC 4-A; and that the enjoined wire transfers are subject to turnover.

The PMA asserts that the court correctly found that the BNY holds no property of the PMA because when the funds were restrained title had passed from the PMA pursuant to UCC 4-A; further that the restrained funds are, in any event, commercial bank reserves belonging to commercial banks in the Palestinian Territories and other third parties. It further asserts that the court properly determined that its profits are beyond the

jurisdictional reach of the New York courts because the situs of its debt to the PA is in Palestine, not New York. The PMA denies that its filing of this action in New York subjects it to jurisdiction here. It further asserts that the motion court was right in holding that its independence from the PA has been preemptively decided in a U.S. Treasury Department Office of Foreign Asset Control (hereinafter referred to as "OFAC") license that refers to it as an "independent agent." For the reasons that follow, we reverse, and remand the matter for further proceedings consistent with this decision.

There are three lines of inquiry on which the court should have ordered full discovery: First, whether the PMA is the alter ego or agent of the PA or the PLO so that the restrained funds, if owned by the PMA, can be levied to enforce the judgment. Second, whether the PMA holds any funds or owes any debts to the PA that could be subject to restraint or turnover pursuant to CPLR article 52, even if PMA is a separate legal entity. Third, whether the funds restrained in the BNY, in fact, belong to the PMA to the extent that they can be made subject of a turnover order to satisfy the judgment against the PA and the PLO.

As a threshold matter, the court incorrectly determined in its October 2005 order that the PMA meets all the features of an independent government instrumentality as outlined in First

National City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 626-27, 103 S.Ct. 2591, 2600 (1983) (hereinafter referred to as "Bancec"). The court observed that under Bancec, there is a presumption in the PMA's favor that it is a separate juridical entity insulated from responsibility for the PA's obligations.

In Bancec, however, the government in question was Cuba, a sovereign state. Here it is undisputed that the PA is not a sovereign state. Ungar, 402 F.3d at 292. See also Biton v. Palestinian Interim Self-Government Auth., 510 F.Supp. 2d 144, 147 (D.D.C. 2007) (holding that PA cannot assert a sovereign immunity defense).

There is no case on record that extends the Bancec standard to any entity other than a sovereign state, and the court below had no basis to invest the PA with the rights and privileges accorded to a sovereign state since that is a legislative function. Because Bancec does not apply, the presumption of independence was attributed to the PMA in error. The burden, in fact, lies with the PMA to show that it is a separate entity and not the alter ego of the PA. The PMA has not satisfied that burden. On the contrary, evidence and testimony at the hearings tended to support the contention that the PMA is legally indistinguishable from the PA.

Second, the court in its April 2007 order incorrectly determined that the issue of the PMA's separate entity status was a nonjusticiable political question under Baker v. Carr (369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)), the seminal Supreme Court case that sets the criteria for determination of justiciability. In this case, the court observed that the issue of the PMA's status had already been determined by OFAC, an agency of the Treasury Department, and therefore it was nonjusticiable because deference is due to the executive branch in the conduct of foreign affairs.

However, the court misinterpreted the OFAC characterization of the PMA as an "independent agency" to mean that the executive branch had determined that the PMA was legally distinct from the PA. As the Ungars correctly assert, the opposite conclusion is indicated.

The OFAC license at issue here, General License No. 4, set out to name those *parts of the PA* government that OFAC believed were not controlled by Hamas personnel, and therefore those parts of the PA with whom U.S. persons can deal. It lists entities, including the PMA, with which U.S. persons are authorized to engage in transactions "otherwise prohibited" in another publication, titled OFAC's Guidelines on Transactions with the Palestinian Authority. In other words, the OFAC license must be

seen as a list of entities that are part of the PA but against whom OFAC sanctions do not apply. As the Ungars correctly contend, the license at issue is a list of *parts of the PA* with whom U.S. persons can deal. Thus, the OFAC license tends to support a conclusion opposite to that reached by the court below, namely, that in fact the PMA and the PA are the same legal entity.

Nor would the OFAC license as a statement of the Department of Treasury preclude a judicial determination on the PMA's status. The enactment of the Anti-Terrorism Act, providing a civil remedy for American victims of terrorist acts, clearly represents a policy determination by Congress that courts are to be involved in such matters and there is no preclusive political question component. See Weiss v. National Westminster Bank, PLC, 242 FRD 33, 46-48 (E.D.N.Y. 2007).

As to the issue of whether the PMA, even if it is a separate entity, holds or controls any funds of the PA or PLO, like the 2005 profits that should have been paid to the PA, and which the Ungars sought to restrain, the court held that BNY "holds no property of PMA which may be restrained pursuant to [a]rticle 52 [5222(b)]."

The court also rejected the Ungars' claim of fraudulent conveyance against the PA arising out of PA's waiver of receipt

of PMA's 2005 profits. The court held that no conveyance of property had taken place and reasoned that:

> "[T]he PA had no property interest in or control of the 2005 annual profits of the PMA. [The] MAL provided that the decision as to whether any of these profits would be transferred to the PA lies with the PMA board. Consequently, the profits always belonged to the PMA and were never conveyed in violation of New York's Debtor and Creditor Law."

This was error in several respects. We agree with the Ungars that under the specific language of MAL Articles 12-13, the PMA *must* transfer its profits to the PA unless the PA specifically agrees to waive such payment by the PMA. The waiver by the PA dated February 7, 2006 which purports to relinquish any claim to the 2005 PMA profits has no preclusive effect for two reasons.

First, the waiver was granted after the funds at issue were frozen pursuant to a prior judgment; and second, the Debtor and Creditor Law plainly contemplates just such a "waiver." Debtor and Creditor Law § 270 defines the term "conveyance" as including "every payment of money, assignment, *release* [or] transfer [...] of tangible or intangible property [...]" (emphasis added).

DCL § 273-a provides that:

> "Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant

if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment."

Thus, the Ungars were only required to demonstrate that the release or "waiver" was made without fair consideration, that the PA has a judgment docketed against it, and that the PA has failed to satisfy the judgment. The record fairly supports all three requirements.

Of course, this does not end the inquiry. While the PMA may be subject to the remedies of the DCL and, as a conveyee under the jurisdiction of the court, could be ordered to deliver even out-of-state assets of the judgment-debtor to the judgment creditors (see Miller v. Doniger, 28 A.D.3d 405, 814 N.Y.S.2d 141 (1st Dept. 2006)), the focus of this appeal remains on the funds restrained in the BNY and whether they are the property of the PMA or the PA to the extent that the BNY could be ordered to turn them over to the Ungars.

The 17 transactions at issue involve approximately $30 million where the PMA was either the originator of the payment orders that initiate a wire-funds transfer or a beneficiary. As to those restrained funds, the motion court made the following determinations: that restraint of the funds violated UCC 4-A-503 because an intermediary bank like the BNY cannot be restrained from acting with respect to a funds transfer; and that the PMA

did not own the restrained funds because pursuant to UCC article 4-A, title to the funds had passed when the PMA's bank, the PIB, executed the payment orders.

The court buttressed its holding by relying on two decisions of this Court. In Bank of N.Y. v. Norilsk Nickel, 14 A.D.3d 140, 145-146, 789 N.Y.S.2d 95, 99 (1st Dept. 2004), lv. dismissed, 4 N.Y.3d 846, 797 N.Y.S.2d 423, 830 N.E.2d 322 (2005)) we held that, pursuant to UCC 4-A-502(4) and 4-A-503, title to the funds passed when the originator's payment order was executed upon transmittal to the intermediary bank, in which case the intermediary bank cannot be restrained. See also European Am. Bank v. Bank of Nova Scotia, 12 A.D.3d 189, 784 N.Y.S.2d 99 (1st Dept. 2004) (attachment of funds at intermediary bank held invalid).

UCC 4-A-503 is titled, "Injunction or Restraining Order With Respect to Funds Transfer" and provides that a court may restrain a person issuing a payment order to initiate a funds transfer or an originator's bank from executing the payment order of the originator, but "[a] court may not otherwise restrain a person from issuing a payment order [...] or otherwise acting with respect to a funds transfer."

In Norilsk, a Serbian export company, Genex, originated funds transfers by issuing payment orders to its bank, Midland

Bank, to transfer more than two million dollars to Norilsk, a company in the Soviet Union. Midland executed the order by sending a payment order to the BNY, the intermediary bank where Norilsk's bank, the International Moscow Bank, maintained a correspondent account for funds transfers in dollar transactions. The BNY accepted the payment order but froze the funds transfers pursuant to an executive order and to OFAC regulations, the objective of which was to impose economic sanctions on Serbia by blocking its access to its property and interests.

Approximately 10 years later, in 2003, all funds frozen pursuant to the OFAC regulations were released and the same release also authorized any person or government seeking attachment or restraint with respect to any property subject to the pending unblocking to do so. By the time Norilsk asked the BNY to unblock the funds in question, two creditors of Genex had served process on the BNY with respect to those funds.

One creditor served a restraining notice on a previously obtained judgment. The second creditor served an order of attachment directing levy on an amount transferred between Norilsk and Genex. Norilsk, 14 A.D.3d at 144, 789 N.Y.S.2d at 98. The BNY refused to complete the funds transfers originated by Genex in favor of Norilsk in light of the competing claims, and sought interpleader relief against Norilsk and the two

creditors. This Court applied UCC 4-A and found that title had passed from Genex when Midland Bank accepted Genex's payment orders and executed them by transmitting the payment orders to the BNY. It also found that a court cannot restrain an intermediary bank from completing a funds transfer. Norilsk, 14 A.D.3d at 145, 789 N.Y.S.2d at 99.

In this case, the facts are far less clear-cut. Here, the funds were frozen after the BNY was served with an information subpoena and a statutory restraining notice pursuant to CPLR 5222. Information subpoenas that were in essence "fishing expeditions" were sent to a number of financial institutions which the judgment creditors suspected held assets of the PA and the PLO, and of other entities in which the PA and the PLO had an interest, like the PMA. The subpoenas included questions about accounts and the value of those accounts as well as the indebtedness of the financial institution to the judgment debtors. The restraining notice read as follows:

> "[w]hereas it appears that you owe a debt to the judgment debtors [...] or are in possession or in custody of property in which one or more judgment-debtors has an interest [...] you are hereby forbidden to make or suffer any sale, assignment or transfer of, or any interference with any such property or pay over [...] any such debt."

Thus, neither the state restraining notice nor the federal injunction specifically restrained fund transfers, nor enjoined a

specific fund transfer or transfers from completion. Neither injunction was aimed at the particular fund transfers that were subsequently restrained. Clearly, the word "transfer" in the injunction and state restraining notice is not used in the same way as in the term of art, "wire-fund transfer." Additionally, in this case, it was the BNY who chose to obey the court order and froze funds, all of which happened to be wire-fund transfers. The BNY sought no relief with regard to the injunctions. Consequently, we do not find that the order by which BNY restrained the funds was improper or a violation of UCC 4-A-503.

Moreover, we find persuasive the Ungars' argument that nothing in UCC 4-A-502 prohibits the bank from honoring creditor process to turnover the funds. The Ungars point to UCC 4-A-502(4) which provides as follows:

> "Creditor process with respect to a payment by the originator to the beneficiary pursuant to a funds transfer may be served only on the beneficiary's bank with respect to the debt owed by that bank to the beneficiary. Any other bank served with the creditor process *is not obliged to act* with respect to the process." (emphasis added).

The Ungars assert that the plain meaning of the provision is that it allows a bank to honor the process if it so chooses but it does not always have to honor that process.

Their contention is supported by the rationale for the UCC 4-A provisions which the Official Comment explains is that "in

particular, intermediary banks are protected." McKinney's Cons. Laws of N.Y., Book 62½, Uniform Commercial Code § 4-A-503, Official Comment at 685 (2001 ed.). A federal court decision written barely a year after adoption by New York of the UCC is illuminating on the issue. In Manufacturas Intl. Ltda. v. Manufacturers Hanover Trust Co., (792 F.Supp. 180 (E.D.N.Y. 1992), aff'd, 47 F.3d 1159 (1995), cert. denied, 515 U.S. 1132, 115 S.Ct. 2557, 132 L.Ed.2d 811 (1995)), an intermediary bank agreed to seize funds in response to a court order. The plaintiff brought an action to hold the bank liable. The court held that no such liability was justified. It observed:

> "[S]ection 4-A 503 of the UCC [...] recognizes that banks have an obligation to respond to court orders [...] The Official Comment states that 'intermediary banks are protected' meaning that since the time in transit for funds transfers is brief, intermediary banks cannot be expected to comply with injunctions by creditors [...] The Comment suggests that intermediary banks should not be exposed to liability under article 4-A for declining to stop funds transfers where creditors are seeking funds. In the instant case, the opposite situation is presented. Plaintiffs wish to hold the intermediary banks liable for agreeing to seize the funds. No such liability is justified." Id. at 194 (E.D.N.Y. 1992) (internal citations omitted).

In this case, in fact, the PMA discontinued its claim against the BNY, essentially agreeing that BNY cannot be held liable for choosing to restrain wire-funds transfers.

The more relevant, although much more perplexing, issue is

that of ownership of the funds. In its first order of October 2005, the court, upon a lengthy analysis of the 17 transactions and based upon the testimony and evidence presented at the four-day August 2005 hearing, determined that the funds did not belong to the PA, the PLO or the PMA, but to private banks. It further held that the PMA was correct in arguing that pursuant to UCC 4-A once the PIB executed PMA's payment orders, title to any funds associated with those payment orders transferred to the PIB as the correspondent bank holding the account with the BNY. Similarly, argued the PMA, it did not have title to funds that were being transferred to the PMA as designated beneficiary, and which the BNY placed in the suspension account.

Based on a strict reading of our determinations in Norilsk and Bank of Nova Scotia, the court would be correct. Further, there is no direct conflict with any specific statute as there was in Winter Storm Shipping v. Tpi (310 F3d 263 (2d Cir. 2002), cert. denied, 539 U.S. 927, 123 S.Ct. 2578, 156 L.Ed.2d 605 (2003)) (conflict between Admiralty Rules for maritime attachment and UCC 4-A-503). See also, Sigmoil Resources v. Pan Ocean Oil Corp. (Nigeria), 234 A.D.2d 103, 104, 650 N.Y.S.2d 726, 727 (1st Dept. 1996) lv. dismissed, 89 N.Y.2d 1030, 658 N.Y.S.2d 245, 680 N.E.2d 619 (1997) ("[n]either the originator who initiates payment nor the beneficiary who receives it holds title to the

funds in the account at the correspondent bank").

As the Official Comment to section 4-A-502 states "[a] creditor of the originator can levy on the account of the originator in the originator's bank before the funds transfer is initiated" but "[t]he creditor of the originator cannot reach any other funds because no property of the originator is being transferred." McKinney's Cons. Laws of N.Y., Book 62½, Uniform Commercial Code § 4-A-502, Official Comment at 683-684. Indeed, while contrary to the intuitive assumption that funds are transferred from bank to bank, there is no actual tangible property being passed on down the line that may be intercepted along the way. That is because what the originator owns as a customer maintaining an account is neither money nor funds; rather the customer is owed a debt by the bank. Matthew Bender: 1-2 The Law of Electronic Funds Transfers §2.08 (6), citing to exposition in U.K. case, Foley v. Hill, 2 H.L. Cas. 28, 9 Eng. Rep 1002 (1848).

> "[W]hen the originator's bank executes the originator's payment order, it debits the originator's account in discharge of the originator's obligation to the originator's bank. From that point on, the debt owed by the originator's bank to the originator has been discharged to the extent of the amount debited, so that with respect to such amount, no originator's property exists anymore in the hands of the originator's bank, or anywhere else. Similarly, having executed the payment order sent to it by the originator's bank , the first intermediary bank becomes

> entitled to payment from the originator's bank. Such payment can be obtained by means of a debit to an account of the originator's bank maintained on the books of the first intermediary bank. At that point it is not the property of the originator, but rather, the property of originator's bank in the form of a debt owed to the originator's bank by the intermediary bank." Id., at §2.08 (6) referencing UCC 4-A-402(c) and 4-A-209(a).

In a regular transaction, BNY would have accepted and executed the wire transfer by sending a payment order to either a correspondent bank with the BNY or to another intermediary bank and then would have debited the amount from the PIB's account. In this case, the BNY did not issue a payment order but rather "debited" the amount by freezing it in suspense account, thus interrupting the usual transfer of rights and obligations. Thus, the debt owed appears to be to the PIB, not the PMA.

Here, however, a further step is required that was not required in Norilsk before determining that title passed to the PIB, that is, to ascertain the relationship between the PMA and the PIB: If the PIB, under the correspondent bank relationship with BNY, is merely an agent for collection for its depositors then, title did not pass to the PIB. See Sidwell & Co., v. Kamchatimpex, 166 Misc. 2d 639, 641, 632 N.Y.S.2d 455, 457 (Sup. Ct., N.Y. County 1995) (TRO served was irrelevant "if [foreign bank] is an agent for collection, thus never obtaining title to the funds in [its] account").

In the PMA's June 6, 2005 order to show cause, the PMA annexed the affidavit of the Governor of the PMA asking for a preliminary injunction directing the BNY to release the block on all funds resulting from transfer orders by the PIB on behalf of the PMA and "to honor all pending and future incoming and outgoing transactions by the PMA through the PIB or *any other agent* designated by the PMA." (emphasis added).

Testimony at the August hearing established only the following: that the PIB opened its correspondent account with the BNY in 2001 and that the PMA opened its account with the PIB in 2003. A regulation issued by the PIB to all the banks in the Palestinian Territories states that the PIB is authorized/ accredited as a clearing bank to clear all transactions in dollars, shekels and the reserve in euro. All banks working in the Palestine Territories have to cover their current accounts in dollars by remittance to the account of the PMA at the PIB at the BNY. The PIB settles the PMA's dollar transactions through the PIB's account at BNY.

An exhibit attached to the Ungars' posthearing memorandum was an excerpt from The Economist Intelligence Unit found on the internet, dated June 25, 2004, and read as follows:

> "The Palestinian leader Yasser Arafat, is considering the appointment of a new governor and board of the Palestinian Monetary Authority [...] following a call by the Palestine

> Legislative Council for the dismissal of the current governor[...] The call came after a PLC investigation accused Mr. Haddad of corruption and mismanagement in his administration of Palestine International Bank. *The PMA assumed control over the bank in 1999.*" (emphasis added.)

Nevertheless this is insufficient evidence as to the true nature of the financial arrangements between the PIB and its depositors such as the PMA. The burden of coming forward and demonstrating that the PIB obtained title to the funds in the PIB account rests with the PMA.

Ultimately, the PMA has the burden of proof on the issues of its separate juridical entity status, its assertions that the PA had no property interest in the PMA profits, that it does not hold or control any funds of the PA and that it owes no debts to the PA or the PLO, as well as on the issue of the PIB obtaining title to the fund transfers restrained by the BNY. Additionally, a related issue is the underlying obligation between the originating party and beneficiary and whether it has been satisfied pursuant to UCC 4-A 406(2). Here, the burden is also on the PMA to demonstrate the frozen funds are anything other than the assets of the PMA. In the light of the foregoing, the Ungars must be permitted to conduct full discovery on these issues.

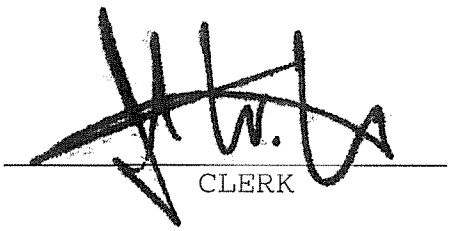
Accordingly, the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 21, 2005, which

inter alia modified a restraining order to delete the restraint against the Palestine Monetary Authority, granted the PMA's motion for a preliminary injunction, and directed the Bank of New York to release a restraint on all funds resulting from transfer orders on the PMA's behalf and to honor all the PMA's pending and future transactions, and the order and judgment (one paper) of the same court and Justice, entered April 10, 2007, to the extent that it granted the PMA's motion for summary judgment, declared that it is a separate juridical entity from the Palestinian Authority and that the restrained funds should be released, and which dismissed the judgment creditors' counterclaims and their cross claims against the Bank of New York for a turnover of the restrained funds should be reversed, on the law, with costs, PMA's motions denied, the counterclaims and cross claims reinstated and the matter remanded for further proceedings consistent herewith.

All concur.

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

ENTERED: FEBRUARY 17, 2009



CLERK

THE FOLLOWING DECISION/ORDER WAS ENTERED AND FILED ON FEBRUARY 10, 2009

Lippman, P.J., Tom, McGuire, Freedman, JJ.

4091 Joseph Brunetti, Index 601769/01
Plaintiff-Appellant,

-against-

Rami Musallam, et al.,
Defendants-Respondents,

Stephen Zimmerman, et al.,
Defendants.

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Labaton Sucharow LLP, New York (Mark S. Arisohn of counsel), for appellants.

Katten Muchin Rosenman LLP, New York (Robert W. Gottlieb of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered April 1, 2008, which granted the motion by defendants Musallam, Klener and ThruPoint to amend their answer and by ThruPoint for summary judgment, and denied plaintiff's cross motion to amend his complaint, modified, on the law, to the extent of vacating the credit allocated to the nonsettling defendants under General Obligations Law § 15-108, and otherwise affirmed, without costs.

Plaintiff asserts that he was induced to transfer shares of ThruPoint stock to defendants Musallam, Zimmerman, Nachtigal and Klener and nonparty Rich as a result of their breach of fiduciary duty and fraud. The complaint further alleges that plaintiff's

employment with ThruPoint was wrongfully terminated. Rich settled with plaintiff by returning the shares that he had received, and Zimmerman and Nachtigal settled with plaintiff for $25,000 each. Musallam, Klener and ThruPoint were permitted to amend their answer to include an affirmative defense under General Obligations Law § 15-108, which "reduces a nonsettling tortfeasor's liability to the injured party by the greater of the amount of consideration the settling tortfeasor paid for its release or, alternatively, the amount of the settling tortfeasor's equitable share of the damages under CPLR article 14" (*Chase Manhattan Bank v Akin, Gump, Strauss, Hauer & Feld*, 309 AD2d 173, 174 [2003]).

Supreme Court held that the nonsettling defendants are entitled to a credit equal to 61.5% of any damages that plaintiff might be awarded at trial, representing the percentage of the shares of ThruPoint stock that plaintiff transferred to the settling transferees. Because their culpability cannot be assessed in the absence of a verdict, and because additional findings are needed before the credit to be assigned to the nonsettling defendants under General Obligations Law § 15-108 can be calculated, the award of a credit equal to 61.5% of the transferred shares was erroneous.

The equitable share of damages attributable to released tortfeasors under General Obligations Law § 15-108 is "determined

in accordance with the relative culpability of each person liable for contribution" (CPLR 1402) and is calculated using one of two methods. Where appropriate evidence is presented at trial, it is preferable to assess the fault of both settling and nonsettling defendants (*see Williams v Niske*, 81 NY2d 437, 440, n 1 [1993]). This approach simplifies the allocation of liability in that "the question of what constitutes the 'equitable share' attributable to a defendant does not arise. In this instance, the equitable share is simply the percentage fault allocated to each defendant" (*Matter of New York City Asbestos Litig. [Brooklyn Nav. Shipyard Cases]*, 188 AD2d 214, 221 [1993], *affd for reasons stated below* 82 NY2d 821 [1993]). Essentially, the nonsettling defendants receive a credit equal to the greater of the amount of the consideration paid by the settling tortfeasors, in the aggregate, or, if greater, that portion of the verdict determined by the percentage fault allocated to the settlers. Likewise, if the culpability of all settling tortfeasors cannot be assessed, "the aggregate method of computing offsets under General Obligations Law § 15-108(a) should be used" (*Matter of New York City Asbestos Litig. [Brooklyn Nav. Shipyard Cases]*, 82 NY2d 342, 353 [1993]). In this instance, a nonsettling defendant's equitable share of damages is calculated by reducing the verdict by the total consideration received by way of settlement and applying the percentage share of the defendant's fault to the result (*see*

*Vazquez v City of New York*, 211 AD2d 475, 476 [1995]).

Without an allocation of fault as to those transferees of plaintiff's shares who settled his claims against them, the credit to be assigned to the nonsettling defendants cannot be calculated as a percentage of the verdict. Significantly, plaintiff places most of the responsibility for inducing the transfer of his shares on one defendant, Musallam. Furthermore, the complaint seeks additional damages (for financial benefits accruing from plaintiff's ownership of the transferred stock and lost wages resulting from the improper termination of his employment with ThruPoint), and the extent to which each of the settling transferees bears responsibility for inducing the transfer of his stock or his termination, if any, is unclear. In any event, any damages consequent to plaintiff's lost employment are not amenable to apportionment according to the distribution of his shares of stock among the various transferees.

Our decision merely holds that no determination of the credit to which the nonsettling defendants are entitled can be made at this juncture. To sustain the motion court's summary allocation of fault, each transferee of plaintiff's ThruPoint shares would have to be held culpable for damages, including loss of earned income, in proportion to that tortfeasor's ownership of transferred stock, which further presumes that the equitable share of each settling tortfeasor can be determined. At this

early stage of the proceedings, such assumptions are speculative, prematurely resolving issues within the exclusive province of the trier of fact. In sum, we make no findings with respect to the computation or allocation of damages, which must be made at trial on the basis of the guidance afforded by the cited authority.

Plaintiff failed to raise a triable issue of fact to defeat ThruPoint's motion for summary judgment. Indeed, plaintiff did not allege that ThruPoint committed fraud or breached any duty owed to him, nor does the record support such claims. Furthermore, plaintiff did not contend that the shareholder defendants' alleged fraudulent scheme was carried out in furtherance of ThruPoint's interests (*see Solow v New N. Brokerage Facilities*, 255 AD2d 198 [1998]). Finally, none of plaintiff's stock was transferred to ThruPoint.

The court properly exercised its discretion in denying plaintiff's motion to amend the complaint to add a new theory of recovery, since such an amendment may not be "based on facts that would contradict [the] original theory" (*Peso v American Leisure Facilities Mgt. Corp.*, 277 AD2d 48, 49 [2000]). Notably, while plaintiff's original theory was that defendant Musallam acted on his own behalf and in concert with the other shareholders to defraud plaintiff, the proposed amended complaint completely contradicts that theory, alleging that Musallam's statements and actions were made in his capacity as ThruPoint's president and on

behalf of the company.

With regard to the new damage claims sought to be added, plaintiff failed to show that the proposed amendments had merit (*see Citarelli v American Ins. Co.*, 282 AD2d 494 [2001]), and he provided no valid reason for waiting until the eve of trial to propose the amendments (*see Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assoc.*, 4 AD3d 290 [2004]).

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

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

McGUIRE, J. (concurring)

I agree with the majority that Supreme Court correctly granted the moving defendants' motion for summary judgment dismissing the complaint against defendant ThruPoint and for leave to amend the answer of defendants Musallam and Klener to assert an affirmative defense under General Obligations Law § 15-108. I also agree that the court correctly denied plaintiff's cross motion to amend his pleadings. I agree as well that Supreme Court incorrectly determined the amount of the setoff under section 15-108 to which Musallam and Klener are entitled, but I disagree with the majority's reasoning.

In 1993 plaintiff founded Total Network Solutions, which later changed its name to ThruPoint, Inc. Plaintiff subsequently sought to expand the company's operations and invited defendants Musallam, Zimmerman, Nachtigal and Klener and nonparty Rich to join as shareholders; with the exception of Klener, who owned 14.583% of the shares, each of the remaining shareholders owned 17.083% of the shares. The shareholders entered into an agreement in January 1996 that provided, among other things, that each shareholder held a seat on ThruPoint's board of directors; each (except for Klener) was an employee of ThruPoint and entitled to a specified salary and annual bonus; and a shareholder-employee could be terminated only under limited, narrowly defined circumstances.

According to plaintiff, in April 1998 Musallam told plaintiff that ThruPoint needed financing and that Morgan Stanley, Musallam's former employer, agreed to provide it on the following conditions: (1) that plaintiff reduce his holdings in ThruPoint from 17% of the shares to 5%; (2) that plaintiff resign from the board; and (3) that plaintiff surrender his employment rights under the shareholders' agreement and become an at-will employee. Plaintiff claims that Musallam told him that, if plaintiff did not agree to those conditions, the financing could not be secured and ThruPoint would be unable to operate. Because he did not want to see ThruPoint cease operations, plaintiff agreed to the conditions and signed an agreement on April 22, 1998 amending the shareholders' agreement to reflect the conditions. Plaintiff was subsequently terminated effective January 31, 2001.

In April 2001, plaintiff commenced this action against Musallam, Klener, Zimmerman, Nachtigal and ThruPoint, asserting causes of action for breach of fiduciary duty and fraud. Plaintiff claimed, among other things, that Musallam's statement to him in April 1998 that Morgan Stanley would not provide financing unless plaintiff agreed to the conditions was false, that Musallam knew it was false, and that plaintiff relied on it in determining to agree to the conditions. Plaintiff also claimed that, as a result of the tortious conduct, he surrendered

70% of his shares, and lost both his seat on the board and his protected employment status. Plaintiff sought damages for the fair market value of the shares he parted with, the loss of the financial benefits of ownership of those shares under the original shareholders' agreement, and salary and bonuses he would have received had he not signed the April 1998 agreement, as well as punitive damages. A cause of action for rescission of the April 1998 agreement also was asserted.[1]

In October 2007, Musallam, Klener and ThruPoint moved for summary judgment dismissing plaintiff's cause of action for rescission and the complaint against ThruPoint. Musallam and Klener also sought to amend their answer to include as an affirmative defense the setoff afforded by General Obligations Law § 15-108. With respect to that portion of the motion seeking to amend their answer to include an affirmative defense under the statute, Musallam and Klener noted that, prior to commencing this action, plaintiff settled with nonparty Rich, who returned the shares plaintiff had transferred to him in exchange for plaintiff's promise not to sue him. Additionally, after the action was commenced, plaintiff settled with Zimmerman and Nachtigal, each of whom gave plaintiff $25,000.

Plaintiff cross-moved to amend his complaint to "clarify

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[1]Supreme Court granted defendants' motion for summary judgment dismissing the complaint in its entirety, but this Court reversed and reinstated the complaint (11 AD3d 280 [2004]).

[his] damage claims," and partially opposed Musallam, Klener and ThruPoint's motion. While plaintiff did not oppose that portion of the motion seeking summary judgment dismissing the cause of action for rescission, he did oppose that portion of the motion seeking to amend Musallam and Klener's answer to include an affirmative defense under General Obligations Law § 15-108 to the extent they sought any offset other than $50,000, the amount plaintiff received in settling with Zimmerman and Nachtigal.

Supreme Court granted Musallam, Klener and ThruPoint's motion in its entirety, dismissing the cause of action for rescission, dismissing the complaint against ThruPoint and allowing Musallam and Klener to amend their answer to include an affirmative defense under General Obligations Law § 15-108. Regarding the amendment to the answer, Supreme Court determined that:

> "It is the amount of the transferred stock received by each settling wrongdoer that provides the measure of the injury caused by each one with respect to [plaintiff's] claims for damages for breach of fiduciary duty and fraud. The only equitable way to apply the statute in this type of commercial tort case, where the alleged tortfeasors each benefitted from their alleged wrongdoing in a distinct and easily calculable manner, is to reduce any award of damages for the loss of [plaintiff's] ThruPoint stock by 61.5%[,the percentage of stock that plaintiff surrendered under the April 1998 agreement that was distributed to Rich, Zimmerman and Nachtigal, the settling tortfeasors]" (19 Misc 3d 1115[A], *3).

Plaintiff asserts that Supreme Court erred in permitting Musallam and Klener to amend their answer to include an

affirmative defense under General Obligations Law § 15-108 for any offset other than $50,000, because they waited too long to seek that relief. Plaintiff also asserts that the court misapplied the statute in granting Musallam and Klener a setoff of 61.5% of any damages award based on the percentage of stock plaintiff surrendered that was distributed to the settling tortfeasors; plaintiff claims that the statute requires an offset based on the greater of the amount of consideration paid by the settling tortfeasors or the amount of the settling tortfeasors' equitable shares of plaintiff's damages as determined by the finder of fact.

With respect to plaintiff's first contention, because "a party may amend its pleadings to raise General Obligations Law § 15-108 as a defense at any time . . . provided that the late amendment does not prejudice the other party" (*Whalen v Kawasaki Motors Corp., U.S.A.*, 92 NY2d 288, 293 [1998]), and plaintiff was not prejudiced by the amendment, Supreme Court providently exercised its discretion in allowing Musallam and Klener to amend their answer. Although plaintiff complains that Musallam and Klener knew about the settlements long before October 2007 and concomitantly should have moved to amend their answer much sooner, plaintiff incurred no change in position or hindrance in the preparation of his case as a result of the amendment. The gravamen of plaintiff's action is that his fellow shareholders,

particularly Musallam, engaged in fraudulent conduct and breached fiduciary duties owed to plaintiff, which caused him to part with shares in ThruPoint and lose both financial benefits of ownership in that entity and salary and bonuses; the amendment to Musallam and Klener's answer does not require plaintiff to steer a new course. As Supreme Court correctly observed, "th[e] affirmative defense's addition will not affect [plaintiff's] prosecution of this case, as it does not raise new issues [that] may require him to re-tune his legal strategy."

With respect to plaintiff's argument that Supreme Court erred in applying General Obligations Law § 15-108, subdivision (a) of that statute states that

> "When a release or a covenant not to sue . . . is given to one of two or more persons liable or claimed to be liable in tort for the same injury . . . it does not discharge any of the other tortfeasors from liability for the injury ... unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest."

In turn, CPLR article 14 provides that "equitable shares shall be determined in accordance with the relative culpability of each person liable for contribution" (CPLR 1402).

"CPLR 1402 uses the term 'culpability,' rather than 'fault,' because the right of contribution may be based on no-fault torts, such as strict products liability" (Alexander, Practice

Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 1402, at 543). The rule, however, is typically described in terms of fault (*id.*, citing *Garrett v Holiday Inns*, 58 NY2d 253, 258 [1983] ["Principles allowing apportionment among tortfeasors reflect the important policy that responsibility for damages to an injured person should be borne by those parties responsible for the injury, in proportion to their respective degrees of fault"]; *see Williams v Niske*, 81 NY2d 437, 440 n 1 [1993] ["Even though a defendant in a multi-defendant suit settles, proof as to the settler's fault may still be presented at trial and the settler's equitable share determined"]; 1B PJI3d 2:275C; *see also Whalen*, 92 NY2d at 292; *Hill v St. Clare's Hosp.*, 67 NY2d 72, 85 [1986] [the equitable share of the released tortfeasor under General Obligation Law § 15-108 is determined by assessing the damage inflicted by each tortfeasor]). "[C]ulpability . . . is expressed in terms of percentages, and the allocation is a task for the jury" (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 1402, at 543; *see Schipani v William S. McLeod, D.P.*, 541 F3d 158, 163 [2d Cir 2008, Wesley, J.]; 1B PJI3d 2:275C).

As discussed above, section 15-108 allows for a setoff of the greater of (1) the amount stated in the settlement, (2) the amount of consideration given by the settling party to the plaintiff for the settlement and (3) the amount of the settling

party's equitable share of the damages. Supreme Court concluded that, under the third category, Musallam and Klener were entitled to a setoff of 61.5% of any damages award because that was the percentage of the total number of shares plaintiff transferred under the April 1998 agreement to the settling tortfeasors, Rich, Zimmerman and Nachtigal.

Supreme Court erred in affording Musallam and Klener that setoff because the percentage of shares received by the settling parties does not represent the relative culpability, i.e., fault, of those parties. In fact, plaintiff claims that Musallam was principally (if not exclusively) at fault for defendants' tortious conduct because he made the false representations to plaintiff that led plaintiff to surrender the majority of his shares in ThruPoint and agree to terms of employment that were far less favorable to him than the terms of the original shareholders' agreement. Moreover, plaintiff does not claim that his damages were limited to the amount of shares he lost as a result of the April 1998 agreement. Rather, plaintiff seeks damages for the fair market value of the shares he parted with, the loss of the financial benefits of ownership of those shares under the original shareholders' agreement, and salary and bonuses he would have received had he not signed the April 1998 agreement. Merely because the settling parties possessed a certain percentage of the shares plaintiff surrendered does not

necessarily mean that they caused that percentage of the damages plaintiff sustained. At bottom, there is no correlation between the amount or the value of the shares received by each of the settling parties and the amount of damages, i.e., the equitable share of the damages, for which each of those parties is responsible. Rather, a jury must weigh the relative culpability of the various parties that participated in the tortious conduct and apportion fault among them. That jury determination is critical in determining the amount of the setoff to which Musallam and Klener are entitled under the relative culpability setoff. Accordingly, Supreme Court should have simply allowed Musallam and Klener to amend their answer to assert an affirmative defense under General Obligations Law § 15-108 without specifying the amount of the setoff.[2]

The majority writes that "[*i*]*f the culpability of all settling tortfeasors cannot be assessed*, 'the aggregate method of computing offsets under General Obligation Law § 15-108(a) should

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[2]Obviously, it is of course conceivable that at trial proof may not be offered with respect to a particular settling individual (Rich or defendants Zimmerman and Nachtigal) or even with respect to all of them. Under such circumstances, "the statute cannot be applied literally" (*Williams*, 81 NY2d 437, 440 [1993]) to determine the amount of the setoff. However, any verdict against the nonsettling defendants first would be reduced by the amount of the consideration plaintiff received from Rich, Zimmerman and Nachtigal, and Musallam and Klener each would be responsible only for his equitable share of the balance (*id.* at 445).

be used' (*Matter of New York City Asbestos Litig.* [*Brooklyn Nav. Shipyard Cases*], 82 NY2d 342, 353 [1993])" (emphasis added)]. Contrary to the assertion of the majority, the application of the aggregate method does not depend on the absence of, or the inability to assess, the culpability of settling tortfeasors. In the very case the majority cites, the jury apportioned fault among the nonsettling and the settling parties (*id.* at 347) and the Court of Appeals applied the aggregate rather than the "case-by-case" or individual method (*id.* at 351; *see also Matter of New York City Asbestos Litig.* [*Brooklyn Nav. Shipyard Cases*], 188 AD2d 214, 221 [1993] [applying aggregate method where "the jury apportion[ed] fault among all tortfeasors"], *affd for reasons stated below* 82 NY2d 821 [1993]; *id.* at 222 [applying aggregate method to hypothetical in which fault was apportioned by a jury among all settling and nonsettling tortfeasors]).

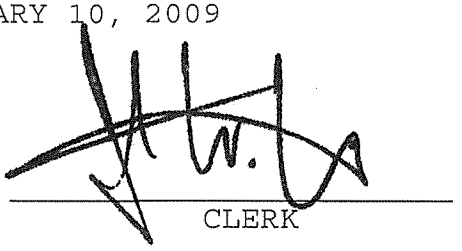
Finally, the majority states that "[t]o sustain the motion court's summary allocation of fault, each transferee of plaintiff's ThruPoint shares would have to be held culpable for damages, including loss of earned income, in proportion to that tortfeasor's ownership of transferred shares, which further presumes that the equitable share of all settling tortfeasors can be determined." This, too, is erroneous, as the motion court's allocation of fault could not be sustained even if the stated conditions could be determined and were satisfied. Suppose, for

example, that all the settling individuals were responsible for 61.5%, the percentage of the shares plaintiff transferred to the settling individuals, of all the damages, and that the percentage of responsibility for each of them and for each of the nonsettling defendants matched the percentage that each received of the shares plaintiff transferred. If the total amount that plaintiff received from the settling individuals in exchange for the releases they obtained (the sum of the $25,000 paid by Zimmerman, the $25,000 paid by Nachtigal and the value of the shares Rich transferred back to plaintiff, valued at the time they were transferred back) exceeded 61.5% of the damages awarded, the nonsettling defendants would be entitled to a credit that would exceed 38.5% of the total damages (*Matter of New York City Asbestos Litig.* [*Brooklyn Nav. Shipyard Cases*], 188 AD2d at 222). Because of this additional possibility, others readily can be hypothesized, the motion court's setoff could not be sustained in any event.

As for ThruPoint's motion for summary judgment dismissing the complaint against it, I agree that it was properly granted for the reasons stated by the majority.

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

ENTERED: FEBRUARY 10, 2009



CLERK