SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 7, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Andrias, Moskowitz, Renwick, JJ.

74 Industry City Management, et al., Index 114330/05
Plaintiffs-Appellants,

-against-

Atlantic Mutual Insurance Company,
Defendant-Respondent.

Weg and Myers, P.C., New York (Joshua L. Mallin of counsel), for appellants.

Litchfield Cavo LLP, New York (Mark A. Everett of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Walter B. Tolub, J.), entered October 25, 2007, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment declaring that defendant is obligated to indemnify plaintiffs Industry City Management, 1-10, Industry Associates, LLC, 1-10, and Industry Associates Corp. (collectively Industry) in the amount of $250,000 for their portion of the settlement paid in the underlying personal injury

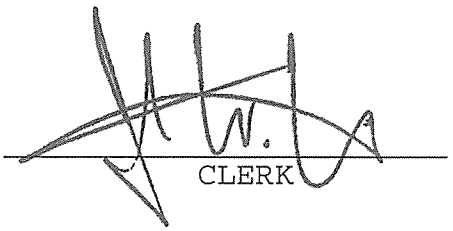
action, and granted defendant's cross motion for summary judgment declaring that it was not obligated to defend and indemnify plaintiffs in the underlying action, unanimously reversed, on the law, without costs, defendant's cross motion denied and plaintiffs' motion granted, and it is declared that defendant is obligated to indemnify Industry in the amount of $250,000.

Industry correctly argues that a March 2005 letter to defendant, written on Industry's behalf by its own insurer's claims administrator, seeking coverage for Industry as an additional insured, constituted timely notice to the insurer within the meaning of Insurance Law § 3420(a)(3), and as such required a timely disclaimer from defendant (*see JT Magen v Hartford Fire Ins. Co.*, __ AD3d __, 879 NY2d 100 [1st Dept. 2009]; *Bovis Lend Lease LMB, Inc. v Garito Contr., Inc.*, 38 AD3d 260, 261 [2007]; *Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 89-90 [2005]). Because defendant's disclaimer of coverage, which was based on Industry's allegedly untimely notice, was not issued until seven months later, it was untimely and therefore ineffective (*see* Insurance Law § 3420[d]; *West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co.*, 290 AD2d 278 [2002], *lv denied* 98 NY2d 605 [2002]; *Consolidated*

Edison Co. of N.Y. v United States Fid. & Guar. Co., 263 AD2d 380, 381 [1999]; *Thomson v Power Auth. of State of N.Y.*, 217 AD2d 495, 497 [1995]).

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

ENTERED: JULY 7, 2009



Gonzalez, P.J., Tom, Sweeny, Buckley, Acosta, JJ.

460N Moussa Diane, Index 102740/99
Plaintiff-Respondent,

-against-

Ricale Taxi, Inc., et al.,
Defendants,

Thomas Joseph,
Defendant-Appellant.

George Bassias, Astoria, for appellant.

Manuel A. Romero, P.C., Brooklyn (Jonathan M. Rivera of counsel), for respondent.

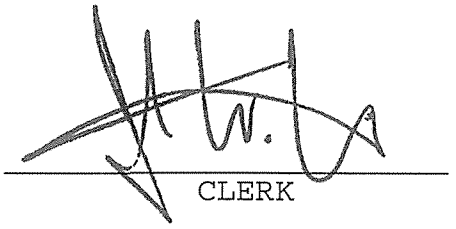
Order, Supreme Court, New York County (Milton A. Tingling, J.), entered June 6, 2008, which, in an action for personal injuries sustained when a taxi rear-ended plaintiff's vehicle and left the scene, denied defendant-appellant's motion to vacate a default judgment and dismiss the action as against him, unanimously modified, on the law and the facts, to grant the motion to the extent of vacating appellant's default in appearing, and otherwise affirmed, without costs.

Plaintiff fails to show that a judgment was ever issued, much less served on appellant. The only exhibits attached to plaintiff's opposition are an order granting a default judgment and directing an inquest, with no notice of entry or affidavit of service, and a copy of this Court's subsequent order (291 AD2d 320) involving another defendant and containing no references to

any judgment in any amount against appellant. Accordingly, it does not appear that appellant's one-year time limit under CPLR 5015(a)(1) to move for relief from a judgment or order ever began to run, and appellant's motion should not have been denied as untimely. For present purposes, appellant, who was named a defendant only because he was one of two employees who regularly drove the taxi involved in the accident, comes forward with sufficient evidence that he could not have been the driver since the accident occurred at night while he worked only days. Indeed, the possibility that appellant had nothing to do with the accident would, given a reasonable excuse, warrant vacatur of the default judgment in the interest of justice even if the one-year time limit had run (*see Johnson v Minskoff & Sons*, 287 AD2d 233, 236 [2001]). We accept appellant's excuse that he did not understand the import of the legal documents he was receiving and trusted his employer's assurances that it would take care of the matter for him.

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

ENTERED: JULY 7, 2009



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

4620N RM Realty Holdings Corp., Index 603683/06
Plaintiff-Appellant,

-against-

Peter Moore, et al.,
Defendants-Respondents.

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Eric B. Levine of counsel), for appellant.

Ganfer & Shore, LLP, New York (Mark A. Berman of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 14, 2007, which, in this breach of contract action, granted plaintiff's motion to reargue and, upon reargument, vacated its prior order dismissing the complaint without prejudice and granted defendants' motion to dismiss the complaint with prejudice, affirmed, without costs.

Plaintiff is the owner of the penthouse unit (Unit 8) in a condominium building. Outside the penthouse is a 3,200 square-foot terrace. Pursuant to the offering plan, the terrace is a limited common space to which plaintiff has exclusive access. At the same time plaintiff closed on the purchase of the penthouse from defendant 145 Americas LLC, it entered into a "Development Rights Agreement" (DRA) with it and its managing member, defendant Peter Moore. Moore, who owns Unit 4 in the building, also owns all of the building's air rights. Paragraph 1 of the

DRA transferred 2,000 square feet of those air rights to plaintiff "immediately adjacent to the terrace on the same level of Unit 8." The DRA expressly reflected the parties' understanding that the purpose of the air rights transfer was to facilitate plaintiff's plan to increase the interior space of the penthouse. The DRA further provided, in paragraph 5, that plaintiff's "authorization will be required in case other owners of air rights want to build in the area immediately adjacent to his unit."

Six months after the DRA was executed, defendants sold certain air rights not transferred by the DRA to a developer that was planning to construct a high-rise hotel on property located west of the condominium building. Between the footprint of the planned hotel and the condominium building is a 50-foot wide public plaza, which the parties appear to agree cannot be developed. Accordingly, when construction of the hotel is complete, its eastern wall will be at least 50 feet away from the western wall of the condominium building.

Sometime after learning of the sale of air rights to the hotel developer, plaintiff commenced this action for breach of contract. It alleged that, among other things, defendants violated paragraph 5 of the DRA by not obtaining plaintiff's authorization before selling air rights to the hotel developer.

Defendants moved to dismiss the original complaint on

several grounds, including that they could not have breached paragraph 5 of the DRA because the documentary evidence established that the hotel developer did not intend to "build in the area immediately adjacent to [plaintiff's] unit." In response to the motion, plaintiff served an amended complaint that withdrew all of the claims except the breach of contract cause of action. According to the amended complaint, plaintiff and defendants "intended and agreed that the right of refusal pursuant to paragraph 5 of the [DRA] would apply to all property and buildings immediately adjacent to Unit 8, including the relevant property owned by [the hotel developer]."

Notwithstanding the amendment, the motion court considered the motion to dismiss, and granted it. The court found the words "immediately adjacent" to be unambiguous and that the hotel, when built, would not be "immediately adjacent" to either plaintiff's existing penthouse apartment or the terrace appurtenant to it. Plaintiff moved to reargue, stating that, at oral argument of the original motion, the court erroneously adopted defendants' counsel's statement that, as a limited common element, the terrace appurtenant to plaintiff's penthouse is something in which "everyone in the building shares and shares alike." Thus, plaintiff surmised, the court must have concluded that, because another unit owner in the building could have built on the terrace, DRA paragraph 5 must have been intended to apply to that

eventuality. Plaintiff argued that because as a "limited common element" it had exclusive use of the entire terrace, and no unit owner could have built on it, DRA paragraph 5 must have referred to the hotel.

The court granted reargument but adhered to its original decision and dismissed the complaint with prejudice. It stated that counsel for defendants did appear to misstate the definition of the term "limited common element" but it made clear that the original order dismissing the complaint did not rely on that definition. Instead, the court held that plaintiff's contention that the term "immediately adjacent" extended to the air rights over the hotel property was "absurd and contrary to the [DRA] as a matter of law."

A written agreement is ambiguous only if it is *reasonably* susceptible of more than one interpretation (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). In deciding whether an agreement is ambiguous we should

> "'examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought'" (*Kass v Kass*, 91 NY2d 554, 566 [1998], quoting *Atwater & Co. v Panama R.R. Co.*, 246 NY 519, 524 [1927]).

Here, the interpretation of paragraph 5 of the DRA offered

by plaintiff, that the hotel will be "immediately adjacent" to its penthouse (or even the edge of the terrace), is not reasonable. Had the parties intended to give plaintiff the right to block the construction of a building 50 feet away from the edge of the terrace, it is perhaps plausible that they would have referred to that property as being simply "adjacent" to "the unit," whether "the unit" meant the penthouse alone or the terrace as well. However, it defies logic that they would have added the modifier "immediately," which implies an absence of appreciable space between "the unit" and the structure that is to be "built." Moreover, if, as plaintiff contends, the parties were referring to the hotel, they presumably would have specifically said so in the agreement.

It also strains credulity that defendants would have given plaintiff perpetual carte blanche to block potentially lucrative transfers of air rights to developers in the trendy Soho neighborhood where the condominium building is located. The dissent claims that this "ignores basic economics" and that had plaintiff *not* insisted on the right to approve the sale of any of Moore's air rights it would have behaved as an "economics rube." However, the dissent then acknowledges the possibility that, if its interpretation of paragraph 5 is correct, plaintiff "got the better of the deal by becoming an equal partner in those air rights." In other words, the dissent recognizes that Moore may

have been an "economics rube" by granting plaintiff the unfettered and eternal right, not even limited by the requirement that plaintiff act reasonably, to forever block the sale of any of his air rights. The dissent ultimately disposes of the issue by calling it "irrelevant." However, it is not irrelevant. It is probative as to whether plaintiff's proposed interpretation of the DRA is reasonable.

In any event, an examination of the DRA reveals that its clear intention was to transfer to plaintiff the air rights necessary to permit it to construct an addition to its penthouse apartment. Reading the DRA "as a whole" (*Kass*, 91 NY2d at 566), it is quite evident that paragraph 5 was included to ensure that defendants would not permit other condominium owners to impede plaintiff's ability to build on the terrace. That no other condominium owner could have built on the terrace due to the terrace's status as a limited common element to which plaintiff had exclusive use does not change the conclusion that paragraph 5 of the DRA is not ambiguous. The only alternative meaning which plaintiff ascribes to paragraph 5, that a hotel 50 feet away is "immediately adjacent" to the terrace, is simply not a reasonable one, and this does not render the provision ambiguous. It is far more reasonable to interpret paragraph 5 as an additional assurance to plaintiff that its right to use the terrace area was inviolate, and that no one could build in the area in which,

pursuant to paragraph 1, it was purchasing the air rights.

Nor is discovery necessary. Any such discovery would simply be an opportunity for plaintiff to uncover parol evidence to attempt to *create* an ambiguity in an otherwise clear and unambiguous agreement. Unless this Court were to find an ambiguity, such parol evidence would be inadmissible at trial or on a subsequent motion for summary judgment (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 163 [1990], citing *Intercontinental Planning v Daystrom, Inc.*, 24 NY2d 372, 379 [1969]).

The dissent's parsing of the phrase "the area immediately adjacent to [its] unit" in paragraph 5 of the DRA is, in contravention of well-settled canons of contract interpretation, an exercise in elevating form over substance (*W.W.W. Assoc.*, 77 NY2d at 163). In concluding that those seven words could express the parties' intention that plaintiff had the ability to block the sale of air rights to the hotel's developer, the dissent fails to follow the rule that "courts examining isolated provisions 'should then choose that construction which will carry out the plain purpose and object of the [agreement]'" (*Kass v Kass*, 91 NY2d at 567, quoting *Williams Press v State of New York*, 37 NY2d 434, 440 [1975], quoting *Empire Props. Corp. v Manufacturers Trust Co.*, 288 NY 242, 249 [1942]). No matter how vociferously the dissent argues that the term "immediately adjacent" has no "definite and precise meaning," it cannot escape

the fact that the alternative meaning it ascribes to the term is simply not reasonable. Again, ambiguity in a written agreement only exists if there is more than one reasonable interpretation of the language at issue (*see Chimart Assoc. v Paul*, 66 NY2d at 573).

Further, the dissent's statement that paragraph 5 would, under defendants' interpretation, be superfluous, does not require that we determine the DRA to be ambiguous. The clause may have been superfluous to the extent it was not necessary to secure plaintiff's rights. It did not, however, negate *another* provision in the DRA. In *Bretton v Mutual of Omaha Ins. Co.* (110 AD2d 46 [1985], *affd* 66 NY2d 1020 [1985]), cited by the dissent, the interpretation urged by the plaintiff would have required that a clause in the subject insurance policy expressly limiting coverage to "certain specified losses" be completely ignored. This Court held that if it accepted the plaintiff's construction, it would violate the rule that "[a] court, no matter how well intentioned, cannot create policy terms by implication or rewrite an insurance contract" (*id.* at 49). Here, accepting defendants' interpretation of paragraph 5 does not alter the purpose of the DRA nor render any other provisions of the DRA meaningless.

The plain purpose of the DRA was to ensure that plaintiff would have an unfettered right to expand the penthouse. Defendants' interpretation of paragraph 5 promotes that purpose.

Plaintiff's interpretation does not. Indeed, given that both paragraph 1 and paragraph 5 of the DRA utilize the term "immediately adjacent," it is unreasonable to interpret paragraph 5 as creating an obligation that has nothing to do with plaintiff's plan to expand its living space.

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

McGUIRE, J. (dissenting)

Plaintiff purchased the penthouse unit of a Manhattan building. Defendant 145 Americas LLC was the sponsor of the condominium offering in the building and defendant Moore was the managing member of 145 Americas. The unit occupied the northeast portion of the roof of the building and a terrace took up the remaining area of the roof. Pursuant to the relevant "declaration of condominium," plaintiff had sole use of the terrace.

On the same date plaintiff purchased the unit, the parties entered into a "Development Rights Agreement" (the agreement). The agreement provides, in relevant part:

> "Whereas, [plaintiff] is purchasing condo unit 8 ('Unit 8') . . .;
>
> "Whereas, [Moore] is purchasing condo unit 4D ('Unit 4D') . . .;
>
> "Whereas, the development and air rights for the Building (the 'Development Rights') are appurtenant to Unit 4D;
>
> "Whereas, Moore is a manager of the Sponsor;
>
> "Whereas, as an inducement to [plaintiff] to purchase Unit 8, Moore is granting to [plaintiff] a portion of the Development Rights . . .
>
> "1) Effective the date on which [plaintiff] closes on the purchase of Unit 8, Sponsor and Moore hereby grant to [plaintiff] 2,000 square feet of Development Rights (the 'Air Rights') immediately adjacent to the terrace on the same level of Unit 8.
>
> "2) It is understood that the grant of Air Rights described in the above paragraph 1 is for the purpose

> of allowing [plaintiff] . . . to increase the interior square footage of Unit 8 and, if [plaintiff] has not built within such Air Rights increasing the surface of Unit 8, the Air Rights will be assignable to third parties both within or without the area immediately adjacent [to] Unit 8 . . .
>
> "5) [Plaintiff's] authorization will be required in case other owners of air rights want to build in the area immediately adjacent to his [*sic*] unit."

The agreement gave plaintiff two benefits: 2,000 square feet of air rights "immediately adjacent to the terrace" and the power to determine whether to permit another "owner[] of air rights . . . to build in the area immediately adjacent to [plaintiff's] unit."

Approximately six months after plaintiff purchased the unit and entered into the agreement, defendants entered into a contract with a third party, Bayrock, pursuant to which defendants sold approximately 27,000 square feet of air rights around the building to Bayrock. Bayrock purchased the rights to increase the size of its building on the lot adjacent to the lot of the building containing plaintiff's unit.

Plaintiff commenced this action against defendants seeking damages for breach of the agreement. Plaintiff claims that under paragraph five of the agreement, defendants needed (but failed to obtain) its authorization to transfer the air rights to Bayrock because it is an "owner[] of air rights [and] want[s] to build in the area immediately adjacent to plaintiff's unit." Plaintiff alleges that once Bayrock completes construction of its building the views from plaintiff's unit will be substantially reduced,

thereby diminishing the unit's value. Defendants moved to dismiss the action under CPLR 3211(a)(1) and (7) on the ground that Bayrock's building is not "immediately adjacent to [plaintiff's] unit." Supreme Court granted the motion and dismissed the complaint "without prejudice." The court subsequently granted plaintiff's motion to reargue and, upon reargument, vacated its original decision and granted the motion to dismiss "with prejudice." This appeal by plaintiff ensued.

This appeal turns on the meaning of the phrase "the area immediately adjacent to [plaintiff's] unit." Plaintiff argues that the "area" includes the space over Bayrock's building because Bayrock's parcel is immediately adjacent to the building containing plaintiff's unit. Alternatively, plaintiff argues that dismissal of the action on a CPLR 3211 motion is inappropriate because the phrase is ambiguous and its meaning turns on extrinsic evidence that must be evaluated by the trier of fact. Defendants maintain that the phrase "immediately adjacent" is unambiguous and means the area *abutting* the walls of plaintiff's condominium. Thus, in defendants' view, "the terrace is what is 'immediately adjacent' to [plaintiff's] Commercial Unit." Because plaintiff's unit (so defined to exclude the terrace) is approximately 100 feet away from Bayrock's building, defendants assert that Bayrock will not build a structure "in the area immediately adjacent to [plaintiff's] unit."

The principles of contract law we must apply in resolving this appeal are well settled. "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" without reference to extrinsic evidence (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). "A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion" (*id.* [internal quotation marks and citations omitted]). Conversely, a contract is ambiguous if on its face it is reasonably susceptible of more than one interpretation (*see Chimart Associates v Paul*, 66 NY2d 570, 573 [1986]). Where a contract is ambiguous, extrinsic evidence of the parties' intent may be submitted by the parties and evaluated by the trier of fact (*see Greenfield*, 98 NY2d at 569; *Amusement Bus. Underwriters, a Div. of Bingham & Bingham, Inc. v American Intl. Group*, 66 NY2d 878, 880 [1985] ["when a term or clause is ambiguous and the determination of the parties' intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact"]). Whether a contract is ambiguous is a question for the court (*Kass v Kass*, 91 NY2d 554 [1998]), and if the court concludes that an ambiguity exists the contract cannot be

construed as a matter of law (*see Zuckerwise v Sorceron, Inc.*, 289 AD2d 114 [2001]).

The phrase "in the area immediately adjacent to [plaintiff's] unit" is, on its face, reasonably susceptible of more than one interpretation and therefore ambiguous. The word "area," which is not defined in the agreement, is a term of uncertain scope. "Area" means "a particular extent of space or surface or one serving a special function" (Merriam-Webster's Collegiate Dictionary, at 65 [11th ed 2006]); "any particular extent of space or surface," "a geographical region" and "the space or site on which a building stands; the yard attached to or surrounding a house" (Random House Webster's Unabridged Dictionary, at 110 [2d ed 2001]). Equally imprecise is the phrase "immediately adjacent," which modifies the "area" that is the subject of paragraph five of the agreement, and it also is not defined in the agreement. "Adjacent" means "lying near, close, or contiguous; adjoining; neighboring" (*id.* at 25), and "immediately" is defined as "with no object or space intervening," "closely" (*id.* at 957). As is obvious, the phrase "area immediately adjacent to" has no definite and precise meaning.

The phrase "[plaintiff's] unit," which is the measuring rod of the area affected by the agreement, also is ambiguous. Plaintiff contends that under paragraph five its "unit" includes

the terrace, of which plaintiff has sole use under the "declaration of condominium." Under plaintiff's view of the word "unit" in paragraph five, defendants were required to obtain its authorization to transfer air rights that are "in the area immediately adjacent" to the condominium unit itself and the terrace. Defendants contend that the word "unit" means the condominium exclusive of the terrace, and under paragraph five of the agreement plaintiff's authorization was required only "if the transfer of air rights was effectuated in order to build a structure that abutted [plaintiff's unit] or the [building housing the unit]." Notably, in several places in the agreement the parties refer to plaintiff's condominium as "Unit 8" and make separate references to "the terrace." In paragraph five, and only paragraph five, the parties refer to plaintiff's "unit" -- the "u" is lower-case and the numeral "8" is omitted -- thus indicating that "the unit" in paragraph five denotes something other than the condominium unit itself (*see NFL Enters. LLC v Comcast Cable Communications, LLC*, 51 AD3d 52, 60-61 [2008, Gonzalez, J.] ["The use of different terms in the same agreement strongly implies that the terms are to be accorded different meanings"]). Accordingly, the phrase "in the area immediately adjacent to [plaintiff's] unit" is reasonably susceptible of more than one interpretation.

Another problem plagues defendants' construction of the

agreement. Under defendants' construction of paragraph five, "the area immediately adjacent to [plaintiff's] unit" is the terrace and the terrace alone. Plaintiff, however, already enjoyed exclusive use of the terrace under the "declaration of condominium," and under defendants' construction of paragraph five plaintiff only obtained a right to prevent another from building on the terrace -- a right plaintiff already had under the "declaration of condominium." Thus, as defendants' construction renders paragraph five superfluous, it is "unsupportable" (*Suffolk County Water Auth. v Village of Greenport*, 21 AD3d 947, 948 [2005], citing *Lawyers' Fund for Client Protection of State of N.Y. v Bank Leumi Trust Co. of N.Y.*, 94 NY2d 398 [2000]). As we have stated, an agreement's "terms should not be assumed to be superfluous or to have been idly inserted" (*Bretton v Mutual of Omaha Ins. Co.*, 110 AD2d 46, 50 [1985, Sullivan, J.], *affd* 66 NY2d 1020 [1985]).

The majority writes that:

> "the interpretation of paragraph 5 of the [agreement] offered by plaintiff, that [Bayrock's building] will be 'immediately adjacent' to its penthouse (or even the edge of the terrace), is not reasonable. Had the parties intended to give plaintiff the right to block the construction of a building 50 feet away from the edge of the terrace, it is perhaps plausible that they would have referred to that property as being simply 'adjacent' to 'the unit,' whether 'the unit' meant the penthouse alone or the terrace as well. However, it defies logic that they would have added the modifier 'immediately,'

> which implies an absence of appreciable space between 'the unit' and the structure that is to be 'built.'"

This is pure wordplay, with the majority simply switching one ambiguous phrase for another. The majority holds that the phrase "immediately adjacent" unambiguously excludes a building 50 feet from plaintiff's terrace (the majority implicitly concedes, as it must, that a reasonable construction of the term "unit" in paragraph five includes the terrace) because an "appreciable space" exists between the building and plaintiff's unit. To repeat: the phrase "appreciable space" is no less ambiguous than the phrase "immediately adjacent." The phrase "appreciable space" is unambiguous only if it "has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Greenfield,* 98 NY2d at 569 [internal quotation marks and citation omitted]). Obviously, it has no such "definite and precise meaning." The majority implicitly concedes the point, even as it writes that I make it "vociferously," by wholly failing to supply a "definite and precise meaning."

The majority claims that it "strains credulity that defendants would have given plaintiff perpetual carte blanche to block potentially lucrative transfers of air rights to developers in the trendy Soho neighborhood where the condominium building is

located." This ignores basic economics. The majority ignores the economic reality that the value of the unit defendants were seeking to sell to plaintiff (and thus the amount plaintiff would pay to defendants) would be reduced if defendants *retained* carte blanche to sell all the development and air rights for the building. Thus, only an economics rube would have allowed defendants to retain perpetual carte blanche authority over the sale of air rights that could significantly reduce the value of the property (unit eight, including the terrace) defendants were offering to sell. What makes more sense is precisely what from a plain reading of paragraph five apparently did occur: the parties agreed to share the right to transfer the air rights. Whether plaintiff got the better of the deal by becoming an equal partner in those air rights (or, more accurately, in a subset of those air rights, as plaintiff's authorization is not required to the extent other owners of air rights do not want to build in the area "immediately adjacent" to its unit) cannot be determined on this record and is irrelevant in any event. The majority also ignores that a rational party in plaintiff's position would have an economic incentive to agree to a future sale of air rights if its equal share of the sale proceeds exceeded the decline in value of the unit that would result from the transfer of the air rights. Of course, there is no reason to think that defendants ignored that incentive in agreeing to make plaintiff an equal

partner with respect to the sale of certain of the air rights (and thus no reason to think that paragraph five represents economic folly by defendants).

The majority also writes that:

> "In any event, an examination of the [agreement] reveals that its clear intention was to transfer to plaintiff the air rights necessary to permit it to construct an addition to its penthouse apartment. Reading the [agreement] as a whole, . . . it is quite evident that paragraph 5 was included to ensure that defendants would not permit other condominium owners to impede plaintiff's ability to build on the terrace. That no other condominium owner could have built on the terrace due to the terrace's status as a limited common element to which plaintiff had exclusive use does not change the conclusion that paragraph 5 of the [agreement] is not ambiguous. The only alternative meaning which plaintiff ascribes to paragraph 5, that a [building] 50 feet away is 'immediately adjacent' to the terrace, is simply not a reasonable one, and does not render the provision ambiguous. It is far more reasonable to interpret paragraph 5 as an additional assurance to plaintiff that its right to use the terrace area was inviolate, and that no one could build in the area in which, pursuant to paragraph 1, it was purchasing the air rights" (internal citation and quotation marks omitted).

The majority is able to conclude that as a matter of law the sole intent of the agreement "was to transfer to plaintiff the air rights necessary to permit it to construct an addition to his penthouse apartment," only by effectively reading paragraph five out of the agreement. That is exactly what the majority does in reducing paragraph five to "an additional assurance to plaintiff

that its right to use the terrace was inviolate, and that no one could build in the area in which . . . it was purchasing the air rights." Because plaintiff already had an inviolate right to use the terrace under the "declaration of condominium," this "additional assurance" is vacuous. Moreover, under the majority's construction of paragraph five, plaintiff would have had no ground for complaint if Bayrock "want[ed] to build in the area" six inches from plaintiff's terrace. Not surprisingly, the majority does not take issue with me on this point. Although the majority pays lip service to the obligation to read the agreement as a whole, it flouts that obligation by rendering paragraph five nothing more than surplusage.

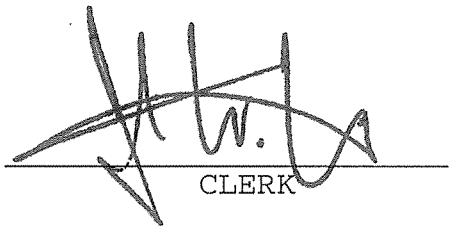
Finally, the majority errs in asserting that plaintiff's construction of paragraph five "creat[es] an obligation that has nothing to do with plaintiff's plan to expand its living space." The value of the expanded living space that plaintiff was contemplating unquestionably would be affected adversely by, for example, construction of a towering hotel on the adjacent lot. For that reason, just as unquestionably, the obligation plaintiff contends it negotiated for -- the obligation the majority reads right out of the agreement -- cannot reasonably be divorced from those expansion plans.

In sum, the phrase "in the area immediately adjacent to [plaintiff's] unit" is, on its face, reasonably susceptible of

more than one interpretation and therefore ambiguous. Because the agreement cannot be construed as a matter of law on this appeal from an order dismissing the complaint on a pre-answer motion to dismiss (*see e.g. Hambrecht & Quist Guar. Fin., LLC v El Coronado Holdings, LLC*, 27 AD3d 204 [2006]; *Hirsch v Food Resources, Inc.*, 24 AD3d 293 [2005]), I would reverse the order dismissing the complaint "with prejudice," reinstate the complaint and remand the matter for further proceedings.

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

ENTERED: JULY 7, 2009



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Andrias, J.P., Saxe, Acosta, Renwick, JJ.

53 Madison Third Building Companies, LLC, etc., Plaintiff-Respondent, Index 603999/04

-against-

David Berkey, et al., Defendants-Appellants.

Zeichner Ellman & Krause LLP, New York (Stephen F. Ellman of counsel), for appellants.

Itkowitz & Harwood, New York (Donald Harwood of counsel), for respondent.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered July 17, 2008, which denied defendants' motion for summary judgment dismissing the complaint as untimely, unanimously reversed, on the law and the facts, without costs, and the matter remanded to Supreme Court to decide defendants' motion on its merits.

Inasmuch as defendants' attorney reasonably interpreted a court attorney's oral directive at a post-note of issue conference that summary judgment motions "be made in accordance with the CPLR," to mean that the time to make a summary judgment motion had been extended from the 45 day deadline set in two pre-note of issue conference orders to the 120-day outer limit permitted by CPLR 3212(a), such excuse was reasonable under the

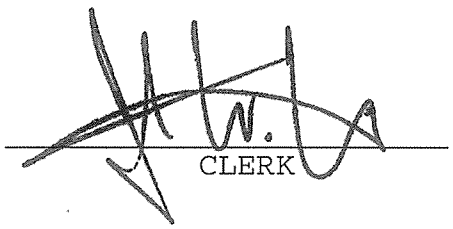
circumstances and the motion should have been considered on its merits.

M-1155 - ***Madison Third Building Companies, LLC v David Berkey, et al.***

Motion seeking a stay of trial pending appeal dismissed, as moot.

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

ENTERED: JULY 7, 2009



Saxe, J.P., Buckley, McGuire, DeGrasse, Freedman, JJ.

190 Vanessa Lawson, Index 20900/05
Plaintiff-Respondent, 85504/06

-against-

Riverbay Corporation,
Defendant/Third-Party
Plaintiff-Appellant,

-against-

Proto Construction & Development Corp.,
Third-Party Defendant-Respondent.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for appellant.

Kerry B. Stevens, White Plains, for Vanessa Lawson, respondent.

Bivona & Cohen, P.C., New York (Michael Seltzer of counsel), for Proto Construction & Development Corp., respondent.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about August 22, 2008, which denied defendant's motion for summary judgment dismissing the complaint and granted third-party defendant's motion for summary judgment dismissing the third-party complaint, unanimously affirmed, without costs.

On March 4, 2005, at approximately 6:00 p.m., plaintiff Vanessa Lawson was injured when she tripped and fell over a concrete block situated in a pedestrian walkway under a scaffolding, or construction bridge, adjacent to the residential apartment buildings at Co-Op City, owned and operated by defendant Riverbay. According to the assistant director of

construction for Riverbay, the scaffolding had been installed years earlier, in contemplation of facade work planned for, but not yet performed on, the adjacent building. The concrete block in question, and others like it, had been placed along the roadway at the time of the initial construction, to prevent vehicles from entering the area in front of the building entrance. When the scaffolding was erected, it was simply put up around the blocks, leaving them in place, although it is apparent from the photographs that the scaffolding itself creates a pedestrian walkway and serves to prevent vehicles from entering the area. Accordingly, as long as the scaffolding was in place, the blocks in question would not serve their intended purpose -- or any purpose other than as a possible obstacle for pedestrians.

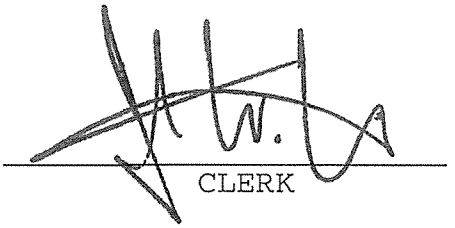
Defendant's assertion that the large cement block situated in the center of the walkway was an open and obvious hazard is not the end of the necessary discussion, since the open and obvious nature of an obstacle simply negates the property owner's duty to warn of a hazard; it does not eliminate the property owner's duty to ensure that its property is reasonably safe (*see Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72-73 [2004]; *Cohen v Shopwell, Inc.*, 309 AD2d 560 [2003]). A question of fact is presented as to whether the block's location in the middle of the walkway constituted an unreasonably dangerous condition warranting amelioration by the landlord.

Plaintiff's recognition that she knew the blocks were there, and had even warned her daughter to be careful of them, does not preclude a finding of liability. According to her deposition testimony, it was dark in that spot under the covered walkway at approximately 6:00 p.m. on March 4, 2005, with the two nearby light bulbs not functioning, and an inspection report confirms the fact of broken light fixtures on that date. Plaintiff, carrying two bags of groceries, had just turned to warn her daughter to avoid the other large cement block on the right, when she herself tripped over the block in her path. This evidence creates a question of fact as to whether plaintiff's own negligence caused the accident.

As to the third-party complaint, the motion court correctly granted Proto Construction's motion in view of the absence of evidence supporting the assertion of liability against it.

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

ENTERED: JULY 7, 2009



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

358 Leo Schechter, et al., Index 18138/07
Plaintiffs-Appellants,

-against-

3320 Holding LLC, et al.,
Defendants,

Imperial Elevator Corporation,
Defendant-Respondent.

Bruce Montague & Partners, Bayside (Bruce Montague of counsel), for appellants.

Faust Goetz Schenker & Blee LLP, New York (Marisa Goetz of counsel), for Imperial Elevator Corporation, respondent.

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered December 24, 2008, which denied plaintiffs' motion for summary judgment on the issue of liability, reversed, on the law, without costs, the motion granted, and the matter remanded for further proceedings.

Plaintiffs live in a building owned by defendant 3320 Holding LLC and managed by defendant National Management (the building defendants). The building has one elevator. To enter the elevator cab, a person must pass through two doors: the elevator door on the floor on which the person is located and the door to the cab itself. The door to the cab opens automatically when the cab is stopped at a particular floor and, once the cab is stopped, the elevator door on that floor will unlock and a person can open it if she wishes to get in the cab. A safety

device, an interlock, locks the elevator door on each floor when the cab is not stopped at that floor, preventing a person from opening the elevator door. Thus, the purpose of the interlock is to prevent people from falling down the elevator shaft.

On July 16, 2007, plaintiff Leo Schechter sustained personal injuries when he fell down the elevator shaft from the lobby floor to the basement. Mr. Schechter, erroneously believing that the cab was stopped on the lobby floor, pulled the door to the elevator, stepped forward and fell down the shaft.

Mr. Schechter and his wife commenced this action against the building defendants and Imperial Elevator Corp. (Imperial Elevator), the company that serviced the elevator, asserting causes of action for common law negligence and negligence based on res ipsa loquitur. The theory of plaintiffs' lawsuit is that the interlock failed to work, allowing Mr. Schechter to open the elevator door even though the cab was not at the lobby. Supreme Court denied plaintiffs' motion for summary judgment on the issue of liability, and this appeal ensued.

Plaintiffs asserted before Supreme Court that both the building defendants and Imperial Elevator had a duty to maintain the elevator, particularly the interlock. Neither the building defendants nor Imperial Elevator challenged that assertion before Supreme Court. Similarly, on appeal, the same assertion by plaintiffs is not disputed by Imperial Elevator, the only

defendant to file a brief. Nor is there any dispute as to the issue of notice. Plaintiffs submitted evidence that both the building defendants and Imperial Elevator had notice that the interlock was not working properly and that the door to the elevator in the lobby would open when the cab was not at that floor. Neither the building defendants nor Imperial Elevator argued before Supreme Court that an issue of fact existed with respect to notice; Imperial Elevator does not assert in its brief that such an issue of fact exists. Thus, the disposition of this appeal turns on whether a triable issue of fact exists with respect to whether defendants breached the duty of care they each owed to Mr. Schechter, whether a triable issue of fact exists with respect to Mr. Schechter's comparative negligence, or both.[1]

Plaintiffs made a prima facie showing that the building defendants and Imperial Elevator were negligent in failing to maintain the interlock and that their negligence caused Mr. Schechter's accident. In addition to submitting the deposition testimony of Mr. Schechter, which demonstrated that the accident happened as described above, plaintiffs tendered the affidavit of an expert who averred that (1) when properly maintained, an

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[1]In their reply brief, plaintiffs state that their appeal is limited to that portion of the order denying them summary judgment on their common law negligence cause of action; plaintiffs do not seek reversal of that portion of the order denying them summary judgment on their cause of action based on res ipsa loquitur.

interlock prevents an elevator door from opening when the cab is not stopped on that floor, (2) the interlock on the elevator door in the lobby failed to work properly at the time of Mr. Schechter's accident because it had not been maintained properly, (3) Mr. Schechter was able to open the elevator door because the interlock did not work properly, (4) defendants' failure to ensure that the elevator door had a working interlock was a violation of Administrative Code of the City of New York § 27-994, and (5) the interlock did not fail due to fluids penetrating it because, if fluids had penetrated the interlock, an electrical short circuit would have occurred causing the elevator to shut down -- fluids penetrating the interlock "would not affect the opening of the door without the elevator being present." That plaintiffs met their initial burden on their motion of establishing a prima facie showing of entitlement to judgment as a matter of law is not in dispute; neither the building defendants nor Imperial Elevator argued before Supreme Court that plaintiffs failed to carry their initial burden, and Imperial Elevator does not assert in its brief that plaintiffs failed to do so.

Imperial Elevator does assert that the deposition testimony of its employee, Santiago, was sufficient to raise a triable issue of fact regarding its negligence. Imperial Elevator argues that Santiago's testimony raises a triable issue of fact as to

whether the interlock failed because Imperial Elevator failed to maintain the elevator in a reasonably safe condition or whether the interlock failed because fluids penetrated it and caused it to "freeze," i.e., prevented the pin in the lock from moving into position to lock the door. Santiago testified that the interlock failed to work properly because it was damaged by fluids that entered the interlock, not because of improper or negligent maintenance. The fluid that Santiago identified as the principal cause of the damage was urine, which both he and the building superintendent testified sometimes was present in the cab and elevator shaft because individuals in the building relieved themselves in the elevator. Santiago testified as well that mop water residue also penetrated the interlock and damaged it.

The merit of Imperial Elevator's position depends on whether Santiago is qualified to render an expert opinion on the cause of the failure of the interlock. Santiago testified that he was employed by Imperial Elevator as a "maintenance man" for 12 years and that his duties in that position were to "check for oil, check [and clean] the [inter]locks," "clean[] the motor room, clean[] the top of the ca[b], [and] clean[] the pit [beneath the elevator]." Although he had worked approximately 20 years for various elevator maintenance and repair companies, Santiago had no formal training in inspecting, maintaining or repairing elevators. Additionally, Santiago was not a certified elevator

mechanic and had no certifications or licenses of any kind with respect to elevator maintenance or repair. Santiago testified that he received all of his training concerning elevator maintenance and repair from a coworker at a prior employer; Santiago did not know whether that coworker possessed any licenses related to elevator maintenance and repair, and he did not elaborate on what that training consisted of.

For a witness to be qualified as an expert, the witness must possess the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable (*Matott v Ward*, 48 NY2d 455, 459 [1979]). Here, Santiago had no formal training or education, and does not possess any certification or license, with respect to elevator maintenance or repair. He was not, however, precluded from being qualified as an expert for lack of formal training and education; he could have been qualified if through "long observation and actual experience" (*Price v New York City Hous. Auth.*, 92 NY2d 553, 559 [1998] [internal quotation marks and brackets omitted]) he possessed sufficient skill, knowledge and experience in elevator maintenance and repair to support an assumption that his opinion regarding the cause of the interlock's failure was reliable. But Imperial Elevator failed to submit evidence demonstrating that Santiago possessed such skill, knowledge and experience (*see Rosen v Tanning Loft*, 16 AD3d 480 [2005], citing,

among other cases, *Hofmann v Toys "R" Us, NY Ltd. Partnership*, 272 AD2d 296 [2000]; *see also Hellert v Town of Hamburg*, 50 AD3d 1481 [2008], *lv denied* 11 NY3d 702 [2008]). No evidence was submitted demonstrating what on-the-job training Santiago received from the coworker at his prior employer; Santiago's duties as a "maintenance man" -- "check[ing] for oil, check[ing] [and cleaning] the [inter]locks," "cleaning the motor room, cleaning the top of the ca[b], [and] cleaning the pit [beneath the elevator]" -- do not suggest that he can render a reliable opinion regarding the cause of the failure of the interlock; and Santiago's deposition testimony does not demonstrate that he is familiar with the laws, rules, regulations, and accepted customs and practices in the field of elevator maintenance and repair (*cf. Efstathiou v Cuzco, LLC*, 51 AD3d 712 [2008]). Because Imperial Elevator failed to demonstrate that Santiago is qualified to render a reliable opinion regarding the cause of the failure of the interlock, it failed to raise a triable issue of fact with respect to the issue of its negligence.

Our dissenting colleague concludes that Santiago is qualified to render an opinion regarding the cause of the failure of the interlock because he worked on elevators for approximately 20 years and that work entailed, among other things, "checking" and cleaning interlocks, including the interlocks in the elevator of this building. We disagree that these factors establish that

Santiago was competent to render an opinion regarding the *cause* of the failure of the interlock. Evidence that a person has experience "servicing and repairing elevators," standing alone, does not establish that the person possesses the requisite skill, training, education, knowledge or experience from which it can be assumed that the person can render a reliable opinion regarding the *cause* of the failure of an interlock (*see Matott*, 48 NY2d at 459).

Dickman v Stewart Tenants Corp. (221 AD2d 158 [1995]), cited by our dissenting colleague, is distinguishable. In *Dickman*, we rejected the defendant's claim that the plaintiff's expert was not qualified to testify regarding the causes of the misleveling of an elevator. We did so because that claim was unpreserved. In dicta, we stated that "the expert was qualified to testify regarding [causation] as he had 44 years of experience in the installation, maintenance and repair of elevators, including his tenure as one of four Staff Field Engineers with Otis Elevator Company" (*id.* at 158-159); no mention was made of the expert's skills, training, education, knowledge or other experience. The briefs in *Dickman*, however, disclose that the expert had been found qualified to render an expert opinion regarding the maintenance and repair of elevators in numerous other cases in both state and federal courts; after more than 10 years as an elevator mechanic, he trained elevator mechanics for 21 years; he

had served as the vice president in charge of maintenance, modernization and repair of an elevator maintenance and repair company; and, for the 14 years prior to giving the testimony, he had operated an elevator consulting business. Thus, *Dickman* does not support our dissenting colleague's assertion that Santiago is similarly qualified.

At bottom, Imperial Elevator, the party seeking to qualify Santiago as an expert, bore the burden of establishing that he possessed sufficient skill, knowledge and experience in elevator maintenance and repair such that his opinion regarding the cause of the interlock's failure is reliable. The only evidence on this subject indicates that Santiago had been an elevator "maintenance man," a job that entails "check[ing] for oil, check[ing] [and cleaning] the [inter]locks," "cleaning the motor room, cleaning the top of the ca[b], [and] cleaning the pit [beneath the elevator]," for approximately 20 years. That he performed that type of work for that period of time does not, standing alone, establish that he can render a reliable expert opinion on the critical issue here -- the *cause* of the failure of an interlock (*see Dolan v Herring-Hall-Marvin Safe Co.*, 105 App Div 366, 370-371 [1st Dept 1905]; *see also Matott*, 48 NY2d at 459).

Imperial Elevator also asserts that a triable issue of fact exists regarding whether Mr. Schechter was comparatively

negligent because he knew from past experience that the elevator door in the lobby sometimes could be opened even though the cab was not stopped at that floor, and that he therefore should have checked to make sure the cab was in fact stopped in the lobby before he stepped through the elevator doorway into the shaft.

Twice in the six and a half months prior to the accident Mr. Schechter opened the elevator door in the lobby to find that the cab was not stopped at that floor. But on both occasions Mr. Schechter complained immediately to the building defendants of the condition and on both occasions the elevator was repaired. Moreover, Mr. Schechter rode the elevator from the lobby to another floor without incident only hours before the accident. Mr. Schechter testified that, immediately before the accident, he looked into the window of the elevator door before opening it and "observed a light in the window," indicating to him that the cab was stopped at the floor because the cab had a light and the shaft was otherwise dark. But Mr. Schechter also testified that both natural and fluorescent light in the lobby would reflect against the window, making it difficult to determine whether the light was from the lobby or the cab. Mr. Schechter, who was not talking on a cell phone, listening to headphones, carrying anything or wearing sunglasses, opened the door, stepped in the shaft and fell. In our view, no valid line of reasoning based on these facts permits the conclusion that Mr. Schechter was

negligent. Notably, Imperial Elevator does not cite a single case suggesting that an issue of fact exists under these circumstances and our own research has not uncovered any.

Accordingly, plaintiffs' motion for summary judgment on the issue of liability should have been granted.

All concur except Nardelli, J. who dissents in a memorandum as follows:

NARDELLI, J. (dissenting)

Since I believe that the record indicates the existence of questions of fact, as found by the motion court, I dissent and would deny plaintiffs' motion for summary judgment.

It is not disputed that the accident was caused by a malfunctioning elevator door interlock mechanism, a device that prevents an elevator door from opening when the elevator car is not on the same floor. What is at issue is what caused the malfunction, i.e., improper maintenance, as the majority concludes, or damage to the mechanism because of urination. Usually, such a conflict would create issues of fact warranting denial of the motion for summary judgment.

The majority, however, finds that there are no questions of fact by concluding, as a matter of law, that the individual who had been servicing the elevator in question for 12 years was not competent to render an opinion as to what caused the interlock to fail. I submit that such a conclusion is premature.

Ralph Santiago, the mechanic, testified at his deposition that he had been employed as a maintenance man by his current employer, Imperial Elevator, for 12 years, and had been performing similar work for 20 years. Among his duties was checking interlock devices, such as the one that failed in this case. He visited the building in question once or twice a month during his 12 years of employment with Imperial. His monthly

servicing duties included "checking the locks [and] cleaning the locks," but he also received calls to go to buildings because of "shut-downs, meaning the elevator ain't [*sic*] working." Every time he went to a building he would stay inside the elevator and check the mechanical arms to see if the door was functioning properly. He also testified that he inspected and serviced the locks, and had replaced interlock devices at the building twice.

Santiago testified that on the day of the accident he was called to the building, observed that the interlock was frozen, and unfroze the lock with WD-40. He surmised that the lock had frozen because of the presence of urine. According to Santiago, freezing of the interlock was a recurring problem, and he often applied extra grease to prevent the accumulation of moisture. The building superintendent also testified that urination by individuals in the elevators was a recurring concern that caused the interlock to malfunction. On the day of the accident, after Santiago sprayed the lock, the door began to function properly. He did not replace the interlock device at that time.

It is evident from Santiago's testimony that his job involved servicing and repairing elevators, including the interlock. He clearly had sufficient experience to render an opinion about the malfunction of the interlock.

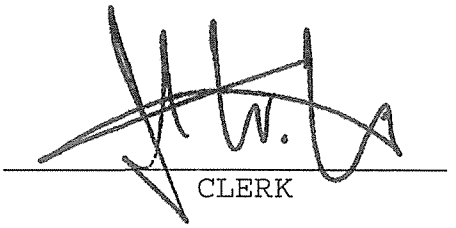
Nothing in the record indicates that a license is required of an elevator mechanic. Indeed, one can be qualified to testify

concerning the causes for elevator malfunction simply by virtue of years of experience (*see Dickman v Stewart Tenants Corp.*, 221 AD2d 158 [1995]. Concededly, the expert in *Dickman* had 44 years experience, while Santiago only has 20, but Santiago's credentials can be evaluated by the jury in assessing the weight to be given his testimony (*see Eagle Pet Serv. Co. v Pacific Empls. Ins. Co.*, 175 AD2d 471, 472 [1991], *lv denied* 79 NY2d 753 [1992]).

The fact remains that Santiago's duties included being called to job sites to repair malfunctioning elevators. Inherent in the skills necessary to repair an elevator must be the ability to draw a conclusion as to why the elevator malfunctioned. The jury may not accept his analysis, or find, regardless, that the "freezing" of the locks does not absolve defendant of liability. At this juncture, however, the summary rejection of Santiago's qualifications to opine on the failure of the interlock is unsupported.

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

ENTERED: JULY 7, 2009



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Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

408 Astoria Federal Savings & Loan Association/Fidelity New York FSB, Plaintiff, Index 133779/94 133781/94

-against-

Marilyn Lane, Defendant-Appellant,

Frances Turner, et al., Intervenors-Defendants-Respondents.

Marilyn Lane, appellant pro se.

Butler, Fitzgerald, Fiveson & McCarthy, P.C., New York (David K. Fiveson of counsel), for Frances Turner, respondent.

Thomas P. Malone, New York, for Marchena respondents.

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered December 9, 2008, which denied defendant Lane's motions to vacate two foreclosure judgments, unanimously affirmed, without costs.

In December 1994, plaintiff commenced foreclosure actions against Lane with respect to two Manhattan condominium units. Lane answered the complaints and asserted counterclaims for fraud and abuse of process. The counterclaims were dismissed on June 5, 1995 and Lane appealed that decision to this Court. In February 1996, Supreme Court struck Lane's answers and appointed a referee to compute the amount due plaintiff and report on whether the properties could be sold. In July, the referee recommended that both properties be sold. Supreme Court

subsequently confirmed the referee's reports, but stayed the foreclosure sales pending resolution of Lane's appeal. On November 14, 1996, this Court unanimously affirmed the dismissal of the counterclaims and rejected Lane's remaining contentions (*Fidelity N.Y. FSB v Lane*, 233 AD2d 181 [1996], *lv dismissed* 89 NY2d 1029 [1997]).

Shortly thereafter, in January 1997, Lane filed for bankruptcy, resulting in yet another stay of the foreclosures. The bankruptcy stay was lifted on April 10, and 19 days later plaintiff submitted proposed judgments of foreclosure to the court for signature. On May 9, only a week after the judgments were submitted, Lane filed a petition to remove the now-consolidated actions to federal court. Although it appears that a copy of the removal petition was given to someone in the County Clerk's office, there is no evidence that Lane served a copy of the petition on the trial judge assigned to the foreclosure matters.

On June 30, 1997, Supreme Court, apparently unaware of the removal petition, signed two judgments of foreclosure and sale, which were entered on July 10. Despite the fact that Lane received copies of the signed judgments 10 days later, she took no steps to challenge them. On July 25, the federal court issued an order summarily remanding the matter back to state court. In October 1997, the referee conducted the foreclosure sales, and

title to both properties was transferred to bona fide purchasers. Since that time, each of the subject properties has changed hands.

Now, more than 10 years after the properties were sold and without giving any excuse for her extraordinary delay, Lane seeks to undo the foreclosures, oust the current owners from their homes, and vacate the judgments. Lane's motions, presumably brought pursuant to CPLR 5015(a)(4), allege that Supreme Court lacked jurisdiction during the limited time period in 1997 between the filing of the removal petition and the federal court remand. Notably, Lane does not claim, nor could she, that Supreme Court did not have jurisdiction over the matter at any other time during the long history of this case. Lane offers no reason why her removal attempt was proper, nor does she present any viable defense on the merits of the foreclosure actions. And it is undisputed that at the time the properties were sold, the federal court had already remanded the matter to state court.

As a general rule, removal of an action divests the state court of its jurisdiction over the dispute while the removal petition is pending in federal court (*Matter of Artists' Representatives Assn. [Haley]*, 26 AD2d 918 [1966]). While no New York case has addressed the specific issue presented here, a number of other courts have carved out exceptions to the general rule focusing on situations where removal petitions were

frivolous, duplicative or abusive. For example, in *Motton v Lockheed Martin Corp.* (692 So 2d 6 [La App 1997]), after the defendant filed an improper removal petition but before the federal court remanded, the plaintiff filed a notice of appeal. The court denied the defendant's motion to dismiss the appeal, finding that the defendant's removal attempt was made to delay the plaintiff's right to move forward in the case.

In *Hunnewell v Palm Beach County Code Enforcement Bd.* (786 So 2d 4 [Fl App 2000]), a removal petition was filed three days before oral argument on appeal, and the federal court did not remand the case until several days after the appellate decision was rendered. The court concluded that because the removal to federal court was improper, the appellate court's decision was not void. That same court subsequently denied a petition for rehearing, finding that if on the face of a removal petition no colorable claim is made, the state court need not recognize the removal (*id.* [2001], *petition for review denied* 817 So 2d 847 [Fla 2002]; *see also Cok v Cok* (626 A2d 193 [RI 1993] [where the removal petition was without the slightest color of right or merit, the state court at no time lost jurisdiction]). Other courts have ruled similarly (*see Attig v Attig*, 177 Vt 544, 862 A2d 243 [2004]; *Heilman v Florida Dept. of Revenue*, 727 So 2d 958 [Fl App 1998]; *Farm Credit Bank of St. Paul v Ziebarth*, 485 NW2d 788 [ND 1992], *cert denied* 506 US 988 [1992]; *Farm Credit Bank of*

St. Paul v Rub, 481 NW2d 451 [ND 1992]; *Citizens State Bank v Harden*, 439 NW2d 677 [Iowa App 1989]).

We find that under the unique circumstances of this case, where the federal court found the removal petition to be frivolous on its face and where it was made in bad faith at the eleventh hour, following an unsuccessful appeal, the motion court was not required, more than a decade later, to vacate the judgments based on a claimed lack of jurisdiction. There is no question that Lane's removal petition was frivolous. In the order summarily remanding the matter to state court, the federal court concluded that the petition showed "no non-frivolous basis for jurisdiction" and that "it clearly appears on the face of the papers submitted that removal should not be permitted."

Moreover, Lane's removal petition was undeniably untimely. A notice of removal of a civil action must be filed within 30 days after receipt of a copy of the initial pleading (28 USC § 1446[b]). Here, the foreclosure actions were commenced in December 1994 and Lane's answers were struck in February 1996, yet the removal petition was not filed until May 1997. Therefore, in addition to asserting frivolous grounds for removal, the petition was time-barred and could not have caused the state court to lose jurisdiction (*see Booth v Stenshoel*, 96 Wash App 1019, 1999 WL 438888 [state court had jurisdiction to enter judgment after removal petition was filed on the day of

trial and 16 months after the action was commenced]; *Miller Block Co. v United States Natl. Bank*, 389 Pa Super 461, 567 A2d 695 [1989], *lv denied* 525 Pa 658, 582 A2d 324 91990] [state court not divested of jurisdiction upon filing of the removal petition where petition was undisputedly untimely]; *Ramsey v A.I.U. Ins. Co.*, 1985 Ohio App LEXIS 8157, 1985 WL 10329 [an untimely removal petition is a nullity and does not divest the state of jurisdiction]).

Lane's bad faith in filing her removal petition is apparent. After an unsuccessful appeal and the lifting of an appellate stay, Lane filed for bankruptcy and, as a result, obtained yet another stay of the foreclosure action, which already had been pending for several years. After the bankruptcy stay was lifted, plaintiff submitted proposed judgments of foreclosure. A week later, instead of taking any action in state court, Lane filed her frivolous removal petition. The only fair reading of the record is that Lane's actions in attempting removal were made in bad faith for the purpose of delaying the imminent foreclosures. Lane's bad faith litigation conduct persists to this day, as evidenced by her inexcusable delay in waiting more than 10 years to challenge the judgments despite being aware of their existence within weeks of their entry.

We recognize that some courts have concluded no exceptions should be created to the general rule and thus have invalidated

state court action taken after removal but before remand (*see e.g. South Carolina v Moore*, 447 F2d 1067 [4th Cir 1971]; *State ex rel. Morrison v Price*, 285 Kan 389, 172 P3d 561 [2007]; *People v Martin-Trigona*, 28 Ill App 3d 605, 328 NE2d 362 [1975]). These cases are not binding on us, and in any event, we decline to follow them under the egregious circumstances presented here. With no good reason, Lane waited over a decade before deciding to come back to court to challenge the foreclosures. Her abuse of the legal process, both in filing a bad faith petition and in failing to move to vacate the judgments she unquestionably knew about, cannot be countenanced, particularly in light of the harm that could befall the innocent purchasers of the properties. To hold otherwise would reward Lane for her inexcusable delaying tactics and would be entirely "inconsistent with any notion of fairness and justice" (*Farm Credit Bank of St. Paul v Rub*, *supra*, 481 NW2d at 457).

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

ENTERED: JULY 7, 2009

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

587 Mary Stevenson-Misischia, etc., Index 600122/07
Plaintiff-Appellant,

-against-

L'Isola D'Oro SRL, et al.,
Defendants-Respondents,

Atlantic International Products, Inc., et al.,
Defendants.

Mary Stevenson-Misischia, appellant pro se.

Smith & Krantz, LLP, New York (Wayne R. Smith of counsel), for respondents.

Order, Supreme Court, New York County (Leland G. DeGrasse, J.), entered August 7, 2007, which granted the motion of defendants L'Isola D'Oro SRL, Sud Pesca SPA and L'Isola D'Oro USA to dismiss the complaint against them for lack of personal jurisdiction, unanimously affirmed, without costs.

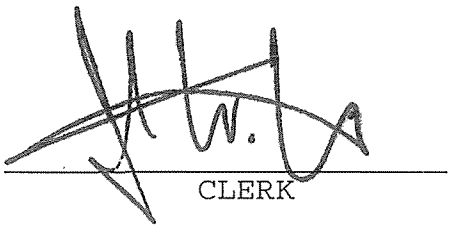
Contrary to plaintiff's claim, personal jurisdiction was not obtained over defendant L'Isola D'Oro USA by service under Business Corporation Law § 307. The record does not support a finding that defendant Casamento was acting as a managing or general agent for this New Jersey corporation at the time he was served, or that he was ever authorized by appointment or by law to receive service on its behalf (*see Low v Bayerische Motoren Werke, AG*, 88 AD2d 504 [1982]).

The action was also properly dismissed against the Italian

defendants, L'Isola D'Oro SRL and Sud Pesca SPA, for failure to show they had any business connections with New York or transacted any business here in any manner related to the allegedly tortious conduct (CPLR 301, 302; *see Landoil Resources Corp. v Alexander & Alexander Servs.*, 77 NY2d 28 [1990]; *McGowan v Smith*, 52 NY2d 268 [1981]).

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

ENTERED: JULY 7, 2009



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Tom, J.P., Saxe, Sweeny, Acosta, Abdus-Salaam, JJ.

696 Luis G., etc., et al., Index 101055/07
Plaintiffs-Respondents,

-against-

Chris Liminiatis, et al.,
Defendants-Appellants.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Deborah A. Kaplan, J.), entered on or about May 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 June 2, 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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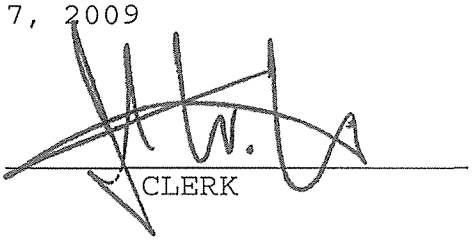

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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
James M. Catterson
Karla Moskowitz
Dianne T. Renwick, JJ.

597
Ind. 570106/06

x

542 East 14th Street LLC,
Petitioner-Appellant,

-against-

Charlene Lee,
Respondent-Respondent,

Cindy Lee, et al.,
Respondents.

x

Petitioner appeals from an order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered December 28, 2007, affirming (1) an order of the Civil Court, New York County (Kevin C. McClanahan, J.), entered December 22, 2005, after a nonjury trial, which dismissed the petition in a primary holdover proceeding, and (2) an order of the same court and Judge, entered on or about March 27, 2006, which denied petitioner's motion to vacate the attorneys' fees award, and modified a judgment of the same court and Judge, entered March 2, 2006, to the extent of reducing such fees.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for appellant.

David E. Frazer, New York, and Adam Leitman Bailey, P.C., New York (William J. Geller and Dov Treiman of counsel), for Charlene Lee, respondent.

TOM, J.P.

Respondent tenant's relocation to California for a period of nearly two years to care for her elderly parents constitutes a reasonable ground for her temporary absence from her rent-stabilized apartment, supporting Civil Court's decision that the premises continued to be maintained as tenant's primary residence. In view of the liberal discovery available in a nonprimary residence proceeding, petitioner landlord had the means to seek relevant proof regarding tenant's parents' infirmities, and the absence of such evidence is not a basis for disturbing the court's findings.

Tenant Charlene Lee occupies the subject apartment under a rent-stabilized lease entered into in September 1997 and periodically renewed thereafter. By timely notice, landlord terminated the tenancy effective October 31, 2002 on the ground that tenant had relocated to California, that she occupied the apartment less than 180 days a year and that her daughter, Cindy, was occupying the premises. When tenant failed to surrender possession, this holdover proceeding ensued. In her answer, tenant denied landlord's allegations, asserted that Cindy was entitled to succession rights and sought attorneys' fees. Landlord conducted examinations before trial of both occupants of the apartment, during which tenant explained that she went to

California to care for her ailing parents and that her daughter remained in the apartment to complete her studies at Stuyvesant High School, from which she graduated in 2003.

After trial, Civil Court dismissed the petition and awarded tenant attorneys' fees, finding that the evidence established that tenant had an ongoing substantial physical nexus to the New York apartment and a valid reason for her temporary relocation that did not, in and of itself, mandate a finding of nonprimary residence.

Landlord appealed to Appellate Term from the order issued after trial, the judgment on legal fees and the denial of landlord's motion for a new hearing on fees. Appellate Term affirmed the dismissal of the holdover proceeding and modified the fee award, revising it downward to $34,053 without elaboration (18 Misc 3d 98 [2007]). A dissenting Justice expressed dismay that tenant had left Cindy alone in New York, finding tenant's explanation for her absence from the premises to be pretextual and undertaken to obtain succession rights for her daughter.

Landlord appealed to this Court by permission of Appellate Term, asserting that tenant's extended absence does not fall into any recognized exception to the requirement that she use the leased premises as her primary residence. Landlord argues that

tenant failed to establish that the care she claims to have provided to her parents was required by any demonstrated medical condition, that her explanation for her absence was pretextual, and that the award for tenant's attorneys' fees, even as reduced, was excessive.

The exemption from statutory protection for dwelling units not used by the tenant as a primary residence is a universal feature of the rent regulatory framework (*see Avon Bard Co. v Aquarian Found.*, 260 AD2d 207, 208 [1999], *appeal dismissed* 93 NY2d 998 [1999]). Thus, the governing statute provides that a landlord may recover possession of a rent-stabilized apartment if it "is not occupied by the tenant

. . . as his or her primary residence" (Rent Stabilization Code [9 NYCRR] § 2524.4[c]). "Primary residence" is judicially construed as "'an ongoing, substantial, physical nexus with the . . . premises for actual living purposes'" (*Katz Park Ave. Corp. v Jagger*, 11 NY3d 314, 317 [2008], quoting *Emay Props. Corp. v Norton*, 136 Misc 2d 127, 129 [1987]). Although the statutes do not define "primary residence," the Rent Stabilization Code does provide that "no single factor shall be solely determinative," and lists "evidence which may be considered" in making the determination (Rent Stabilization Code [9 NYCRR] § 2520.6[u]). Rent Stabilization Code § 2520.6(u)(3) refers to the safe harbor

protection of § 2523.5(b)(2) against loss of primary residence by reason of absence due to certain conditions such as active military duty, full time studies or hospitalization, plus "other reasonable grounds." Thus, the Code allows the court to apply the flexible definition of § 2520.6(u) or the "other reasonable grounds" clause of § 2523.5(b)(2) in determining primary residency. A tenant's provision of medical care to another person is not listed among the excusable factors (Rent Stabilization Code [9 NYCRR] § 2523.5[b][2]). Hence, to be considered a protected absence, it must come within the ambit of the statutory protection afforded to "other reasonable grounds" for alternative residence.

Whether a temporary absence to provide medical care to others constitutes a reasonable ground for residing elsewhere, thereby precluding a finding that a rent-stabilized primary residence has been abandoned, is a question that has not been decided by this Court. However, Appellate Term has ruled that a temporary relocation to care for an infirm parent does not compel a finding that a rent-stabilized apartment is not being used as a primary residence (*see e.g. Hudsoncliff Bldg. Co. v Houpouridou*, 22 Misc 3d 52, 53 [2008] [protracted absence to care for bedridden mother "in and of itself does not mandate a finding of nonprimary residence"]). In that case, "The trial evidence

established that while tenant temporarily relocated to care for her mother, she maintained an ongoing physical nexus to the subject apartment, returning for brief intervals, keeping her furniture and personal belongings in the apartment, and receiving mail there" (*id.*).

In the matter at bar, tenant maintained at least this nexus with the subject premises and, as noted by Civil Court, "left behind the most important person in her life," her daughter, then 16 years old. As this Court has noted, a reviewing court is obliged to defer to the findings of the trial court "unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses" (*Claridge Gardens v Menotti*, 160 AD2d 544, 544-545 [1990]). Civil Court's findings are amply supported by record evidence and will not be disturbed.

At trial, the building superintendent testified that he saw tenant only infrequently in 2001 and 2002 but regularly saw Cindy at the premises. Tenant testified that she left her position as a nurse at New York University Medical Center to provide regular care to her ailing parents in California on a daily basis from the spring of 2001 to December 2002. She explained that her father was almost 90 years old and suffered from various systemic

conditions, including lupus, hypertension, a herniated lumbar disc, lumbago, allergies and hearing loss, and that her mother, who was then recovering from knee surgery, was physically incapable of caring for her husband. Tenant tended to her parents' health needs by administering medication, checking their vital signs and managing their daily personal care. She also took her parents, who speak Mandarin, to medical appointments where, due to her proficiency in both English and Mandarin, she could facilitate communications between them and their physicians.

Tenant obtained employment doing research while in California to financially support herself and her daughter back in New York. She explained her need to obtain a California driver's license during her temporary stay in the state so she could commute to her job and take her parents to their doctors. Tenant explained that she never rented or owned any realty in California but had lived in makeshift quarters during her temporary stay there, first in a residence owned by her sister and brother-in-law and later at a friend's house. Her sister lived near her parents but could not take care of them due to the demands of her job. Tenant explained that she did not live with her parents on a full-time basis since they lived in a tiny one-bedroom unit in a senior care facility, and her residence

there would have violated the facility's rules. As to taxes, tenant listed the Manhattan apartment as her residence in connection with the returns filed for two of the three years provided. She never voted in California, maintained bank accounts in New York and provided all financial support for her daughter in New York. When her parents' conditions stabilized in late 2002, tenant returned to New York.

While tenant was in California, Cindy remained in the apartment while attending Stuyvesant High School, maintaining a perfect attendance record, graduating with a 3.9 grade point average and going on to attend Columbia University's Barnard College. Tenant returned to the apartment once every few months (staying between two to five weeks), maintained bank accounts listing the apartment as her residence, kept her furnishings and personal possessions there, and maintained the utility accounts at the premises.

The evidence presented in this case supports the trial court's findings that tenant maintained an ongoing substantial physical nexus to the New York apartment and that she did not abandon the subject stabilized premises but maintained it as her primary residence while she was temporarily in California caring for her infirm elderly parents.

The absence of medical and testimonial proof of the nature of the maladies afflicting tenant's parents does not support an adverse inference that their alleged infirmities were merely a pretext to excuse tenant's absence from the rent-stabilized apartment. While information concerning the diseases or conditions for which they were treated is protected by the physician-patient privilege (CPLR 4504), the fact of medical treatment, including the frequency and dates thereof, is not (*see Hughson v St. Francis Hosp. of Port Jervis*, 93 AD2d 491, 499 [1983]). Liberal discovery is provided to a landlord in a nonprimary residence proceeding (*Cox v J.D. Realty Assoc.*, 217 AD2d 179, 183-184 [1995]), and tenant's disclosure, during her pretrial deposition, that she went to California "to care for my very, very sick father" afforded landlord the opportunity to inquire further and to conduct such additional discovery as it deemed advisable. Having thus been put on notice of the reason for tenant's temporary relocation to California, landlord bears sole responsibility for its failure to make use of the available discovery devices, and its appellate contention that the trial court erred when it "accepted this newly interjected defense" is wholly devoid of merit. In any event, the quantum of proof adduced by tenant merely presents an issue in respect of the weight, not the sufficiency, of the evidence for resolution by

the trial court. Tenant's testimony concerning her parent's ailments is uncontroverted, and there is no basis for disturbing Civil Court's decision.

Finally, while not every parent faced with the unenviable choice of remaining in New York to care for a teenaged daughter or going to California to care for aged and infirm parents would choose temporary relocation, that choice was tenant's to make. While the propriety of her decision is not material to a determination of the merits of this case, we note that tenant's confidence in her daughter's maturity was well founded, as demonstrated by Cindy's perfect school attendance record and her high academic achievements.

As to attorneys' fees, the amount awarded is a matter of discretion that should not be disturbed absent an abuse thereof (*11 Park Place Assoc. v Barnes*, 220 AD2d 339 [1995]; *see also DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]). As this Court stated in *Jordan v Freeman* (40 AD2d 656, 656 [1972]), "The relevant factors in the determination of the value of legal services are the nature and extent of the services, the actual time spent, the necessity therefor, the nature of the issues involved, the professional standing of counsel, and the results achieved." Civil Court conducted an independent evaluation of

the factors bearing on counsel's fee request of $43,188.01, finding that it "on the whole was reasonable and adequate." After deducting $4,134 for some duplicated efforts, the court awarded $39,053. Appellate Term further reduced the fee award by $5,000 to $34,053.

Landlord maintains that the award, even as reduced, remains excessive, contending that it does not comport with the amounts invoiced, that seven associates worked on the case with each presumably having to gain familiarity with the file, that the firm double-billed by assigning two attorneys to the trial, and that the lead counsel's hourly rate was excessive and unreasonable. However, tenant presented invoices totaling $37,704.68. Civil Court approved as reasonable a capped rate for the lead attorney that it reduced from $350 per hour to $325 per hour. The record reflects that three associates assumed primary responsibility for the matter and that the other four billed a mere 8.45 hours for undertaking specific and limited tasks. To the extent any of the work was redundant, as landlord claims, we note that Civil Court had already reduced the amount sought and that Appellate Term further reduced the award. As to landlord's objection to some of the motion practice, particularly tenant's

unsuccessful summary judgment motion, an award of attorneys' fees does not require success at all stages of the litigation, only that "the claimant must simply be the prevailing party on the central claims advanced, and receive substantial relief in consequence thereof" (*Board of Mgrs. of 55 Walker St. Condominium v Walker St.*, 6 AD3d 279, 280 [2004]).

The findings of a trial court should not be disturbed where it has "considered the relevant factors in determining reasonable attorney fees . . . and [its] findings are supported by the record" (*1050 Tenants Corp. v Lapidus*, 52 AD3d 24, 248, 248 [2008]). Civil Court's award of legal fees to tenant has ample record support, and landlord has asserted no basis upon which the award, as reduced by the Appellate Term, should be vacated or reduced.

Accordingly, the order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered December 28, 2007, affirming (1) an order of the Civil Court, New York County (Kevin C. McClanahan, J.), entered December 22, 2005, after a nonjury trial, which dismissed the petition in a primary holdover proceeding, and (2) an order of the same court and Judge, entered on or about March 27, 2006, which denied petitioner's motion to vacate the attorneys' fees award, and

modified a judgment of the same court and Judge, entered March 2, 2006, which had awarded respondent tenant attorneys' fees of $39,053, to the extent of reducing the award to $34,053, should be affirmed, without costs.

All concur.

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

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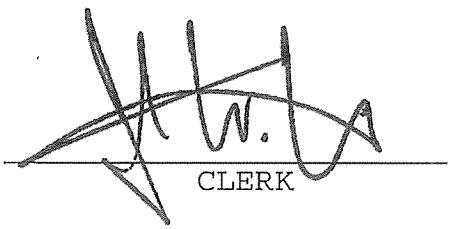

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