SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 14, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Catterson, Richter, Abdus-Salaam, JJ.

527 In re Tateana R.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about July 11, 2008, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that she had committed acts, which, if committed by an adult, would constitute the crimes of petit larceny and criminal possession of stolen property in the fifth degree, and placed her on probation for a period of up to 12 months, unanimously affirmed, without costs.

On the morning of March 25, 2008, school safety officials at the New Day Academy, a public school in the Bronx, informed the school dean that an "irate" parent was at the school. The parent was complaining that appellant had borrowed her daughter's iPod

and refused to return it. The dean called appellant, then a 13-year-old student, into his office. It is undisputed that the dean's intentions were to locate the iPod and return it to its owner.

Coincidentally, two uniformed police officers assigned to a number of schools were visiting New Day Academy that morning. The dean asked one of those officers to "stick around," while he questioned appellant. However, the dean let the officers know that the mother did not come to the school to press charges, and that she just wanted her daughter's property returned. One officer sat in on the interview in the dean's office, and the other waited in the hallway.

The interview lasted approximately 45 minutes, during which time the dean asked appellant what she knew of the whereabouts of the iPod. He confronted appellant with conflicting statements made by other students and pointed out inconsistencies in her own statements. As the meeting progressed, the dean told appellant that her explanations were getting ridiculous, and he pleaded with her to give the iPod back. Appellant then stated, "I am not giving back the iPod." Until this point, the police officer was mainly observing the interaction. However, upon hearing this inculpatory statement he advised appellant that she could be arrested. Appellant's aunt, who was present at the school, also came in to the dean's office and asked appellant to give back the

property. Appellant denied that she had the iPod, refused to return it, and was placed under arrest.

Appellant moved to suppress her inculpatory remarks, on the ground that they were the product of a custodial interrogation, conducted in the absence of her parents and without *Miranda* warnings. After holding a hearing on the suppression motion, the Family Court denied suppression.

The record supports the court's finding that appellant was not subjected to a custodial interrogation. It is uncontested that the dean brought appellant to his office to address the complaints of a fellow student's mother. The dean's actions were consistent with the school's policy in addressing problems between students, and his goal in calling appellant to his office was to elicit the relevant information to recover the missing iPod. The presence and minimal activity of a police officer during the dean's questioning did not "create a police dominated custodial atmosphere," such to require the dean to administer *Miranda* warnings (*People v Ray*, 65 NY2d 282, 286 [1985] [*Miranda's* protections are only invoked upon a showing that a public servant is involved in law enforcement activity, or that a civilian is acting cooperatively or under his or her direction]; *Matter of Angel S.*, 302 AD2d 303 [2003]). The interview was not instigated by the police, nor was it in furtherance of a "police designated objective" (*Ray*, 65 NY2d at 286). The observing

officer provided minimal input to the dean, and his participation was not directed towards obtaining a confession, but, instead, to help locate the missing iPod (*id.* at 286-287; *see Angel S.*, 302 AD2d at 303).

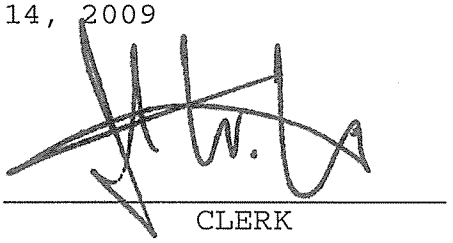
Even if we were to assume the requisite degree of state action in the dean's office to invoke appellant's constitutional protections, the record supports the court's finding that the appellant was still not subject to a custodial interrogation warranting *Miranda* warnings. First, the dean's office is ordinarily not considered an additional restraint for a student, "who is not literally 'free to leave' without permission during school hours" (*Angel S.*, 302 AD2d at 303). In addition, the test for a "custodial interrogation" is whether a reasonable 13 year old, innocent of any crime, would have thought that her freedom of movement had been significantly restricted (to a degree equivalent to a formal arrest) while she was in the dean's office answering his questions (*Matter of Kwok T.*, 43 NY2d 213, 219-220 [1977]; *see also People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]; *Doe v Bagan*, 41 F3d 571, 574 n 3 [1994] [principal's office interview not custodial]).

The record does not support appellant's contention that suppression was warranted here. Being summoned to the dean's office is an unpleasant but not unusual occurrence for any student, and the presence of the officer in the dean's office did

not transform the school disciplinary encounter into a custodial interrogation (*see Angel S.*, 302 AD2d at 303-304). Furthermore, there is no evidence that the officer in the hallway acted so as to convey the impression he was restricting appellant's freedom of movement. Accordingly, the Family Court properly denied suppression of appellant's inculpatory statements. Because the evidence at the fact-finding supported the findings of petit larceny and fifth degree criminal possession of stolen property, we affirm the order appealed.

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

ENTERED: JULY 14, 2009



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

4714 Regal Construction Corporation, et al., Plaintiffs-Appellants, -against- National Union Fire Insurance Company of Pittsburgh, PA, Defendant-Respondent, URS Corporation, Defendant. Index 601155/07

Melito & Adolfsen P.C., New York (Louis G. Adolfsen of counsel), for appellants.

Law Offices of Green & Lavelle, Brooklyn (Erika C. Aljens of counsel), for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered April 4, 2008, which, inter alia, denied plaintiffs' motion for summary judgment, granted defendant National Union Fire Insurance Co.'s cross motion for summary judgment, and declared that plaintiff The Insurance Corporation of New York (INSCORP) is obligated to defend and indemnify defendant URS Corporation (URS) in the underlying personal injury action, affirmed, with costs.

The City of New York engaged URS as the construction manager for the Rikers Island Renovation Project. By written agreement dated March 22, 1999, URS hired plaintiff Regal Construction Corporation (Regal) to serve as the prime contractor for general construction and to perform construction services, including

demolition and renovation, at the project. INSCORP issued to Regal a commercial general liability policy that provided additional insured coverage. This appeal involves the interpretation of the additional insured clause.

Regal's duties as prime contractor included the demolition and rebuilding of a modular building at Rikers Island. The task required Regal to engage subcontractors and oversee their work. Ronald LeClair was Regal's project manager for the Rikers Island Renovation Project. His duties included the coordination of the subcontractors' work.

In March 2001, Regal was supervising the demolition of the building's bath and shower area as well as the replacement of flooring in the main area. On March 6, 2001, LeClair was walking through the facility with his superintendent and an employee of Regal's demolition subcontractor. As the area was under demolition, the flooring consisted of temporary sheets of plywood spread over steel floor joists. LeClair stepped from the plywood onto a joist in order to point to a wall that was to be demolished. Unbeknownst to LeClair, the joist had been freshly painted and its slipperiness caused him to fall and sustain injury. At a deposition, LeClair testified that he had heard that a URS employee painted the joist.

In January 2003, LeClair brought the underlying action against the City and URS in the Supreme Court, Bronx County. By

letter dated February 19, 2003, URS demanded a defense and indemnification by Regal and/or INSCORP and enclosed a copy of LeClair's verified complaint. URS based the demand on its claimed status as an additional insured under the policy issued by INSCORP to Regal. In April 2003, INSCORP responded to URS by letter indicating that the matter was being reviewed. By the same letter, INSCORP also reserved its right to disclaim coverage at a later date should it be determined that URS was not entitled to the benefits of the policy. Because its tender had not been accepted, URS brought a third-party action against Regal in February 2004. By another letter dated March 11, 2004, INSCORP did accept URS's tender, and URS's third-party action against Regal was discontinued.

Nevertheless, on April 9, 2007, Regal and INSCORP commenced this action against URS and its insurer, National Union, for a declaratory judgment. In denying plaintiffs' motion for summary judgment and granting defendants' cross motion for the same relief, Supreme Court declared that INSCORP is obligated to defend and indemnify URS in the *LeClair* action. As this appeal has been withdrawn with respect to plaintiffs' claims against URS, the pivotal issue, as framed by the complaint, is whether URS is an additional insured under Regal's policy with INSCORP.

INSCORP's policy provided for additional insured coverage "only with respect to liability arising out of [Regal's] ongoing

operations performed for that [additional] insured." As explained by the Court of Appeals in *Worth Constr. Co., Inc. v Admiral Ins. Co.* (10 NY3d 411 [2008]), which involved a similarly worded additional insured provision, the phrase "arising out of" means "originating from, incident to, or having connection with" (*id.* at 415 [internal quotation marks omitted]). The policy in *Worth* was issued to Pacific Steel, Inc., a subcontractor that had been engaged for the fabrication and installation of a staircase consisting of steel pan stairs and hand railings. After Pacific installed the stairs but before it installed the hand railings, the job was temporarily turned over to a concrete subcontractor for the purpose of filling the pans. The plaintiff was injured when he slipped on fireproofing that had been applied to the stairs by a subcontractor other than Pacific. After noting that the focus of the clause "is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained" (*id.* [internal quotations marks omitted]), and that Pacific was not on the job site at the time of the accident and had nothing to do with the application of the fireproofing, the Court characterized the staircase installed by Pacific as "merely the situs of the accident," and ruled that there was no connection between the accident itself and Pacific's work, the risk for which coverage was intended (*id.* at 416).

The facts of the instant case are not analogous because

Regal, the prime contractor at the Rikers Island project, had responsibilities that encompassed all of the demolition and construction work to be done. As such, Regal's tasks cannot be viewed in isolation as were those of Pacific, the staircase subcontractor in *Worth*. LeClair even testified that it would have been Regal's responsibility to paint the floor joists if instructed to do so by URS. Hence, there was a causal connection between LeClair's injury and Regal's work as a prime contractor, the risk for which coverage was provided. The dissent places unwarranted emphasis on the fact that the *LeClair* complaint does not set forth allegations of negligence on part of Regal. "Generally, the absence of negligence, by itself, is insufficient to establish that an accident did not 'arise out of' an insured's operations" (*id.*). "The focus of a clause such as the additional insured clause here is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained" (*id.* [internal quotation marks omitted]).

Accordingly, Supreme Court correctly found that INSCORP is obligated to defend and indemnify URS in the *LeClair* action. We reject, however, National Union's argument that INSCORP should be estopped from denying coverage because it accepted URS's defense without a reservation of rights and controlled that defense until its denial of coverage in 2007. On the contrary, as noted above,

11 months before accepting URS's defense INSCORP reserved its right to disclaim coverage at a later date.

All concur except Nardelli and McGuire, JJ. who dissent in a memorandum by McGuire, J. as follows:

McGUIRE, J. (dissenting)

Ronald LeClair, the plaintiff in the underlying action, was injured during the course of his employment with plaintiff-appellant Regal Construction Corp., the primary general contractor for a construction project at Rikers Island. Specifically, he was injured when he slipped and fell on a steel floor joist during a "walk-through" of the job site during which he was pointing out required demolition work to Regal's demolition subcontractor. The joist had just been painted by defendant URS Corp., the construction manager, after it removed plywood covering. URS is an additional insured under the policy Regal obtained from plaintiff-appellant The Insurance Corporation of New York (INSCORP) "only with respect to liability arising out of [Regal's] ongoing operations performed for [URS]." LeClair's complaint in the underlying action alleges only that he was injured as a result of the negligence of URS and its codefendant, the City of New York, which engaged URS as the construction manager. The complaint is bereft of allegations that Regal was liable in any way for LeClair's fall or injuries. Of course, however, any such allegations would be pointless as LeClair did not and could not sue his employer to recover for the injuries he sustained as a result of the accident (*see* Workers' Compensation Law § 11).

URS tendered the defense and indemnification of the

underlying action to INSCORP shortly after LeClair commenced the action. INSCORP, through its claims representative, responded that it was investigating URS' coverage request and stated that it "reserves its rights to disclaim coverage at a later date" if it determined that URS was not entitled as an additional insured to the benefits of the policy it had issued to Regal. Just over a year after the underlying action was commenced, counsel for URS advised INSCORP's claims representative that it had served Regal and INSCORP with a third-party complaint. One month later, by a letter dated March 11, 2004, INSCORP "agreed to accept [URS'] tender demand ... for coverage as an additional insured" under the Regal policy.[1] URS thereafter was represented in the underlying action by counsel selected by INSCORP.

In April 2007, however, Regal and INSCORP commenced this action against National Union and URS seeking, among other things, both a declaration that URS is not entitled to coverage under the Regal policy as an additional insured and to recover the defense costs INSCORP incurred in defending URS. In relevant part, Regal and INSCORP allege that discovery in the underlying action "has shown that the liabilities alleged therein do not arise out of Regal's operations performed for URS at the jobsite." Later that month, INSCORP's claim handler notified URS

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[1]The letter, sent by INSCORP's claims administrator, went on to state that "the Third Party Action against Regal ... will be discontinued."

and its claim handler that it was withdrawing from the defense of the underlying action. After URS moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), Regal and INSCORP cross-moved for summary judgment seeking a declaration that (i) URS was not an additional insured and thus was not entitled to a defense or indemnity in the underlying action, (ii) National Union afforded primary liability insurance coverage to URS, and (iii) INSCORP was entitled to reimbursement of defense costs from National Union and URS or, alternatively, National Union was a co-insurer with INSCORP of URS for the claims against URS in the underlying action. National Union also cross-moved for summary judgment seeking, among other things, a declaration that INSCORP was obligated to defend and indemnify URS in the underlying action on a primary basis, and a declaration that INSCORP was estopped from disclaiming coverage on the eve of trial of the underlying action.

Supreme Court denied Regal and INSCORP's cross motion for summary judgment and, in relevant part, granted National Union's cross motion for summary judgment and directed the entry of a judgment declaring that INSCORP is obligated to defend and indemnify URS in the underlying action.[2] Regal and INSCORP now appeal; pursuant to a stipulation, the appeal is taken against

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[2]After oral argument, counsel for the parties advised the court that the underlying action had settled.

National Union only.

In *BP A.C. Corp. v One Beacon Ins. Group* (8 NY3d 708 [2007]), the Court of Appeals construed an additional insured endorsement identical to the one at issue in this appeal and rejected the contention that the liability of the named insured had to be determined before the additional insured was entitled to a defense. But it does not follow that the potential liability of the named insured is irrelevant. The complaint in BP's underlying action alleged that the named insured had breached its duty to keep the work site safe and that this breach caused the plaintiff's injuries. As the Court of Appeals stated, "[t]hese allegations form a factual [and] legal basis on which [the insurer] might eventually be held to be obligated to indemnify [the additional insured]" (8 NY3d at 715 [internal quotation marks omitted]). Here, by contrast, there are no remotely comparable allegations against Regal in the underlying action. If LeClair's complaint alleged only that he tripped and fell as a result of banana peels carelessly left on the joist by an employee of URS, it is hard to see how INSCORP could be required to provide URS with a defense and thereby confer a windfall on URS' own insurance carrier, defendant-respondent National Union Fire Insurance Co. LeClair's actual complaint, however, cannot be distinguished from that hypothetical complaint because it alleges only the negligence of URS and the City and

does not allege any conduct by Regal on the basis of which Regal's liability to LeClair might be found.

In *Worth Constr. Co., Inc. v Admiral Ins. Co.* (10 NY3d 411 [2008]), the plaintiff in the underlying action slipped and fell on a staircase installed by Pacific Steel, Inc., a subcontractor and the named insured. The fall occurred, however, when the plaintiff, who was employed by another subcontractor, slipped and fell on fireproofing applied to the stairs by yet another subcontractor; Pacific played no role in contracting for or applying the fireproofing (10 NY3d at 414). When Worth, the general contractor and the putative additional insured, was sued by the plaintiff, it brought both a third-party action against Pacific seeking contribution and indemnification, and a declaratory judgment action against Pacific's insurer seeking defense and indemnification in the underlying action. Thereafter, however, Worth admitted that its claims of negligence against Pacific were without merit, thus negating "any significant connection between Pacific's work and the accident" (10 NY3d at 416). As the Court of Appeals stated, "by admitt[ing] that its claims of negligence against Pacific were without factual merit, [Worth] conceded that the staircase was merely the situs of the accident (*id.*).

In this case, the complaint in the underlying action makes

no claim of negligence against Regal,[3] or any other theory of its liability, that could be negated. INSCORP does not contend, however, that URS is not entitled to coverage as an additional insured because of the absence of any allegations of negligence or other liability on the part of Regal. In my view, the distinct ground upon which it relies -- that LeClair's injuries, and any resulting liability, arose out of URS' operations, not Regal's operations -- requires the conclusion that URS is not entitled to coverage in the underlying action as an additional insured. As INSCORP argues, the Court of Appeals made clear in *Worth* that "[t]he focus of a clause such as the additional insured clause here is not on the precise cause of the accident but the *general nature of the operation* in the course of which the injury was sustained" (*id.* [internal quotation marks omitted; emphasis added]). The only relevant evidence submitted on the summary judgment motions established that LeClair fell on a freshly painted floor joist, and URS was responsible for removing the plywood covering and painting the joist. Accordingly, URS' liability arose out of its, not Regal's, operations. Just as the staircase in *Worth* was the "mere situs" of the accident, the

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[3]The record does not include the third-party complaint brought against Regal by URS, but it appears that INSCORP agreed to provide a defense because of the allegations in that complaint. As Justice Sullivan has stated, "[t]he undocumented assertions contained in correspondence from a purported insured are sufficient to trigger the duty to defend" (*Federated Dept. Stores Inc. v Twin City Fire Ins. Co.*, 28 AD3d 32, 37 [2006]).

"walk-through" of the job site by LeClair was the mere occasion of the accident. As in *Worth*, there is no "connection between [LeClair's] accident and the risk [i.e., Regal's work] for which coverage was intended" (*id.*).[4]

Given its conclusion that INSCORP was obligated to defend and indemnify URS without contribution from National Union, Supreme Court had no reason to resolve that branch of National Union's motion contending that INSCORP should be estopped from disclaiming coverage on the eve of the trial. I would deny that motion. The mere fact that INSCORP did not reserve a right to disclaim coverage in the March 11, 2004 letter is not dispositive (*see Federated Dept. Stores*, 28 AD3d at 36-37). More critically, National Union failed "to establish a key element of common-law estoppel: prejudice caused by [INSCORP's] allegedly belated disclaimer" (*id.* at 37). Indeed, in the affirmation National Union submitted in support of this branch of its motion, it offered only a conclusory assertion that URS had detrimentally relied on INSCORP's control over its defense, and claimed only that INSCORP's control over the defense "*may* estop INSCORP from

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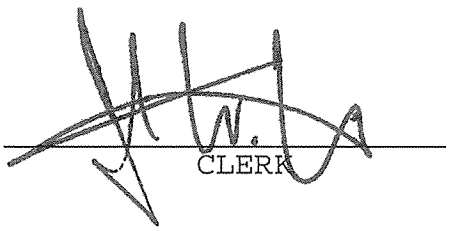
[4]The majority asserts that I place "unwarranted emphasis on the fact that the *LeClair* complaint does not set forth allegations of negligence on the part of Regal." This assertion is puzzling, as I expressly acknowledge that INSCORP does not rely on the absence of any allegations of negligence or other liability on the part of Regal and I expressly state my position that INSCORP should prevail on "the distinct ground" upon which it relies.

abandoning URS Corporation on the eve of trial" (emphasis added).

For these reasons, I would modify the order of Supreme Court so as to declare that URS is not entitled to coverage in the underlying action as an additional insured under the INSCORP policy. As my position does not carry a majority, it would be pointless for me to address INSCORP's contentions that the order also should be modified to declare both that National Union is obligated to defend and indemnify URS in the underlying action and that INSCORP is entitled to reimbursement in the amount of the defense costs and indemnity payment it incurred on behalf of URS.

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

ENTERED: JULY 14, 2009



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Andrias, J.P., Friedman, Buckley, Acosta, DeGrasse, JJ.

544 John Evans, Index 114498/01
Plaintiff-Appellant,

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

Kreisberg & Maitland, LLP, New York (Jeffrey L. Kreisberg of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (John Hogrogian of counsel), for respondents.

Order, Supreme Court, New York County (Paul George Feinman, J.), entered August 17, 2007, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff failed to make a prima facie showing of discrimination pursuant to Executive Law § 296(1) (*see Matter of McEniry v Landi*, 84 NY2d 554, 558 [1994]). While he demonstrated that he suffered from a mental impairment, he failed to present evidence sufficient to raise an inference that he could perform his job with reasonable accommodations (Executive Law § 292[21]; *Pimentel v Citibank, N.A.*, 29 AD3d 141, 146 [2006]), *lv denied* 7 NY3d 707 [2006]). Nor did he show that he proposed a reasonable accommodation that defendant refused to make (*see Pimentel* at 148). In any event, defendants demonstrated that their actions were motivated by legitimate nondiscriminatory reasons, and plaintiff presented no evidence from which to infer that those

reasons were pretextual (*see McEniry*, 84 NY2d at 558).

Plaintiff's claim for constructive discharge similarly failed, since he did not establish that defendants' actions resulted in a workplace atmosphere "so intolerable as to compel a reasonable person to leave" (*Morris v Schroder Capital Mgt. Intl.*, 7 NY3d 616, 622 [2006]; *Spence v Maryland Cas. Co.*, 995 F2d 1147, 1156 [2d Cir 1993]).

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

ENTERED: JULY 14, 2009

CLERK

Mazzarelli, J.P., Saxe, Nardelli, Renwick, Freedman, JJ.

569 In re Delores Tucker, Index 400367/08
Petitioner,

-against-

New York City Housing Authority,
Albany Houses,
Respondent-Respondent.

Harriette N. Boxer, New York, petitioner.

Sonya M. Kaloyanides, New York (Byron S. Menegakis of counsel), for respondent.

Determination of respondent New York City Housing Authority, dated February 13, 2008, terminating petitioner's tenancy on the ground that she failed to report household income, unanimously modified, on the law, to vacate the penalty of termination and remand the matter to respondent for imposition of a lesser penalty, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Kibbie F. Payne, J.], entered April 28, 2008), is otherwise disposed of by confirming the remainder of the determination, without costs.

Respondent's finding that petitioner violated its rules by failing to report household income is supported by substantial evidence and has a rational basis in the record (*see Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]). However, while petitioner's documented and unchallenged mental disability did

not excuse her actions, it has great bearing on the appropriateness of the penalty. Petitioner established that she suffers from bipolar disorder and borderline personality disorder. Her psychotherapist stated that these conditions ordinarily create "insurmountable problems" for people with those diagnoses. Petitioner further demonstrated that her score on a Global Assessment and Functioning analysis performed by her psychiatrist is predictive of an inability to function in society without "significant limitations." We further note that petitioner's 27-year tenancy in the subject building is otherwise unblemished and that she has taken steps to pay the rent that she would have been required to pay had she not misrepresented her household income. Under the circumstances, the penalty of petitioner's eviction from public housing, where she has lived all her life, "shocks our sense of fairness" (*Matter of Turner v Franco*, 237 AD2d 225, 225 [1997]).

THIS CONSTITUTES THE DECISION AND ORDER
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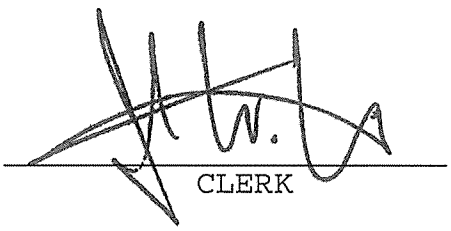

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Tom, J.P., Friedman, Catterson, Moskowitz, Renwick, JJ.

594 Susan Rowley, Index 301471/06
Plaintiff-Respondent,

-against-

Mark J. Amrhein,
Defendant-Appellant.

Mark J. Amrhein, appellant pro se.

Annette G. Hasapidis, South Salem, for respondent.

Judgment, Supreme Court, New York County (Saralee Evans, J.), entered March 12, 2008, granting plaintiff a divorce from defendant on the ground of constructive abandonment and incorporating the terms of a stipulation entered into October 30, 2007 settling the issues of maintenance and distribution of the parties' assets, unanimously modified, on the law, so much of the judgment as granted the divorce on the ground of constructive abandonment vacated, the matter remanded for further proceedings to determine the grounds for divorce and to adjudicate defendant's counterclaim, and otherwise affirmed, without costs.

Defendant's challenge to the judgment on the ground that it inaccurately reflects the stipulation of settlement by including terms that are inconsistent therewith is not preserved for appellate review since there is no record that defendant raised

any objection to plaintiff's proposed judgment, as required by 22 NYCRR 202.48(c)(2) (*see Salamone v Wincaf Props.*, 9 AD3d 127, 140 [2004], *lv dismissed* 4 NY3d 794 [2005]). Defendant's claim that he had no opportunity to object to plaintiff's proposed judgment because he was not properly served with a copy thereof is properly directed to Supreme Court in a motion to vacate the judgment pursuant to CPLR 5015(a)(1), not to this Court on appeal (*see McCue v McCue*, 225 AD2d 975, 976 [1996]; *Levy v Blue Cross & Blue Shield of Greater N.Y.*, 124 AD2d 900, 901 [1986]).

Defendant's challenges to the judgment on the bases that it grants plaintiff a divorce on a ground that he contests and fails to adjudicate his counterclaim allege substantive errors in the judgment that affect his substantial rights and not mere inconsistencies with the intentions of the court and the parties as demonstrated by the record. Thus, review may be obtained either through an appeal from the judgment or through a motion to vacate pursuant to CPLR 5015(a) (*Salamone*, 9 AD3d at 133-134). The record reveals that Supreme Court did not address the grounds for divorce or defendant's counterclaim. Accordingly, we remand the matter for further proceedings to determine these issues.

Defendant's contention that the stipulation disposing of the parties' economic issues is unenforceable against him is not properly before us, since defendant never moved in Supreme Court to set aside the stipulation (*see Garrison v Garrison*, 52 AD3d

927, 928 [2008]; *Hopkins v Hopkins*, 97 AD2d 457 [1983]). In any event, the terms of the stipulation were memorialized in a proposed preliminary conference order that the court reviewed during the October 30, 2007 proceedings, the stipulation was signed and initialed by both parties, and the court expressly informed the parties on the record that it was a binding contract. The stipulation contained no express reservation of the right not to be bound until the execution of a more formal agreement. To the contrary, all the essential terms and conditions of an agreement were set forth in the stipulation, and all that remained was their translation into a more formal document (*see Brause v Goldman*, 10 AD2d 328, 332 [1960], *affd* 9 NY2d 620 [1961]).

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

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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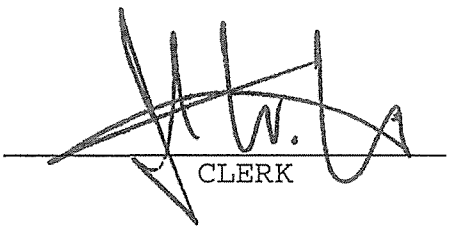


Tom, J.P., Saxe, Sweeny, Acosta, Abdus-Salaam, JJ.

708 The People of the State of New York, Ind. 1969/00
Respondent,

-against-

Richard Miller,
Defendant-Appellant.

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

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

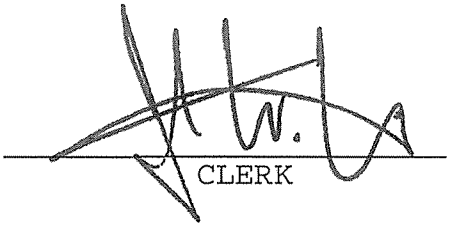
Order, Supreme Court, New York County (Edward J. McLaughlin, J.), entered on or about March 3, 2008, which denied defendant's CPL 440.10 motion to vacate, on the ground of ineffective assistance of counsel, a judgment of the same court and Justice, rendered March 28, 2001, as amended April 20, 2001, unanimously affirmed.

Although several aspects of the court's main and supplemental jury instructions were similar to language we disapproved in *People v Johnson* (11 AD3d 224 [2004], *lv denied* 4 NY3d 745 [2004]), the question here is not merely whether those instructions were improper, but includes whether trial counsel's failure to object to them -- and, indeed, his specific requests for one of those instructions -- in and of itself establishes a claim of ineffective assistance of counsel (*see People v Caban*, 5 NY3d 143, 152 [2005]).

We observe that, unlike the instructions given in *People v Johnson*, the trial court here highlighted the difference between facts and elements, and expressly told the jury that the reasonable doubt standard was the only standard that applied to the elements of the crimes charged. Particularly given that distinction, we conclude that the presence of the disapproved language in the charge did not misstate the constitutionally required standard of proof or compromise defendant's right to a fair trial, and that counsel's failure to object to the challenged portions did not amount to a deprivation of defendant's right to effective assistance of counsel (*see People v Alvarez*, 54 AD3d 612 [2008], *lv denied* 11 NY3d 853 [2008]; *People v Henderson*, 50 AD3d 525, 525-526 [2008], *lv denied* 10 NY3d 959 [2008]).

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

ENTERED: JULY 14, 2009



Saxe, J.P., Buckley, McGuire, Moskowitz, Acosta, JJ.

764 In re Joan G.
Petitioner-Appellant,

-against-

Robert G.
Respondent-Respondent.

Mavromihalis Pardalis & Nohavicka, LLP, Astoria (Joseph D. Nohavicka of counsel), for appellant.

Thomas Caruso, White Plains, for respondent.

Order, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about May 1, 2008, which sustained the Support Magistrate's order, dated December 4, 2007, terminating an order of support as of June 30, 2007, unanimously reversed, on the law, with costs, respondent's petition to modify the support order dismissed, petitioner's cross petition to enforce the support order granted, and the matter remanded to Family Court to compute the amount of child support owed by respondent to petitioner under the August 26, 2005 agreement between the parties.

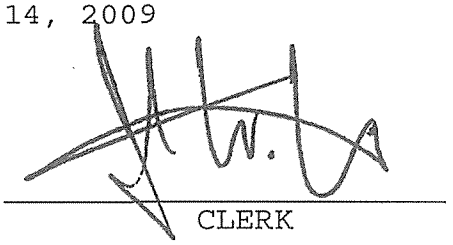
As Family Court correctly recognized in an earlier decision and order dated May 14, 2007, pursuant to an agreement between the parties entered into in open court on August 26, 2005, in exchange for petitioner's agreement to forgo her claim for arrears, respondent agreed to continue paying child support in the amount of $800 per month until his daughter graduated from college provided that she remained a full-time student.

Accordingly, Family Court erred in granting respondent's petition to modify the support order and denying petitioner's cross petition to enforce the order.

Petitioner failed to establish that respondent's conduct warrants a sanction under 22 NYCRR 130-1.1. In this regard, petitioner offered insufficient evidence that respondent's claims are "patently frivolous" and that he engaged in "reprehensible behavior in this matter."

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

ENTERED: JULY 14, 2009



CLERK

Tom, J.P., Nardelli, Catterson, Renwick, Richter, JJ.

780 In re Marcela A.,
Petitioner-Appellant,

-against-

Knight L.,
Respondent.

Louise Belulovich, New York, for appellant.

Karen Freedman, Lawyers for Children, New York Doneth Gayle of counsel), Law Guardian.

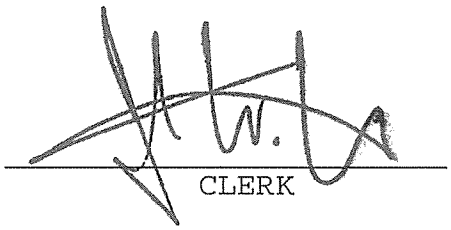
Order, Family Court, New York County (Marva A. Burnett, Referee), entered on or about July 24, 2008, which dismissed appellant's petition for failure to state a cause of action, unanimously affirmed, without costs.

The petition was correctly dismissed since it does not seek any relief cognizable by Family Court. Although appellant cites the general proposition that "Family Court has broad discretion in fashioning a remedy in matters of custody and visitation" (*Matter of Wright v LaRose*, 271 AD2d 615 [2000]), her petition failed to request any specific remedy, and she failed to establish her entitlement to any relief in subsequent colloquy with the court. Moreover, the record suggests that the issues

about which she was complaining may already be moot, and will certainly be moot in September 2009, when the child turns 18.

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

ENTERED: JULY 14, 2009



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
James M. McGuire
Karla Moskowitz
Leland G. DeGrasse
Helen E. Freedman, JJ.

4495
Index 601638/07

x

In re Bernstein Family Limited Partnership, et al.,
Petitioners-Respondents,

-against-

Sovereign Partners, L.P., et al.,
Respondents-Appellants.

x

Respondents appeal from the order and judgment (one paper) of the Supreme Court, New York County (Kibbie F. Payne, J.), entered August 7, 2007, which granted petitioners' motion pursuant to CPLR 7510 to confirm an arbitration award.

Arnold & Porter LLP, New York (Erik C. Walsh and Stewart D. Aaron of counsel), for appellants.

McCausland Keen & Buckman, Radnor, PA (Glenn S. Gitomer of counsel), and Louis F. Burke, P.C., New York (Louis F. Burke and Lesli Wybiral of counsel), for respondents.

McGUIRE, J.

Petitioners commenced this proceeding pursuant to CPLR article 75 to confirm an arbitration award rendered in their favor against respondents. In opposition to the petition to confirm, respondents contended that they had complied in full with the award -- a contention vigorously disputed by petitioners -- and that the petition thus was moot. We hold that the parties' dispute over compliance is itself academic and that Supreme Court correctly granted the petition to confirm the award.

Supreme Court rejected respondents' contention that the petition was moot on two grounds. First, Supreme Court found that respondents "have not satisfied the award entirely." Although respondents advance several arguments in support of their position that this finding of fact was erroneous, if the other, legal ground on which Supreme Court relied is valid, then the factual finding was unnecessary and we need not address respondents' arguments challenging it. Second, Supreme Court concluded that the petition was not moot "[i]n any event, [as] petitioners are entitled to confirmation of the award despite complete compliance" (citing *Matter of Allstate Ins. Co. v Dental Health Care, P.C.*, 24 AD3d 437, 438 [2nd Dept 2005])."

Although petitioners correctly argue that *Matter of Allstate Ins. Co.* supports Supreme Court's determination that they are entitled to a judgment confirming the award even if respondents have complied completely with the award, respondents correctly argue that Supreme Court's determination is inconsistent with our decision in *Organization of Staff Analysts v City of New York* (277 AD2d 23 [2000]). For the reasons stated below, we conclude that we should not follow *Organization of Staff Analysts*.

CPLR 7510 states that the court "*shall* confirm an award ... unless the award is vacated or modified upon a ground specified in section 7511" (emphasis added); mootness is not one of the grounds specified in CPLR 7511. Accordingly, petitioners argue that the Legislature has mandated confirmation of an award under all circumstances --including those in which the petition is academic or is otherwise moot -- where, as here, the award is not vacated or modified.

Geneseo Police Benevolent Assn., Council 82, Am. Fedn. of State, County & Mun. Empls., AFL-CIO v Village of Geneseo (91 AD2d 858 [1982], *affd for reasons stated* 59 NY2d 726 [1983]), supports petitioners' position. In *Geneseo Police*, Supreme Court refused to confirm the arbitration award because the petition was premature. The Fourth Department reversed and confirmed the award. After noting that the "only purported ground ... for

resisting confirmation of the arbitration award was that it was premature," the Court stated that "[o]nly those grounds for resisting confirmation of an award specified in CPLR 7511 may be the basis for vacating or modifying an arbitration award ... Since the application to confirm the award was made within one year (CPLR 7510), and none of the grounds set forth in CPLR 7511 was advanced to vacate the award, Special Term erroneously refused to confirm the award" (*id.*). The Court of Appeals affirmed the Fourth Department's order for the reasons stated.

Respondents argue that *Geneseo Police* is distinguishable in that Supreme Court refused to confirm the arbitration award not because the petition was moot but because it was premature. As respondents argue in their reply brief, "[b]ecause the respondent in [*Geneseo Police*] had not yet satisfied the arbitration award, an open controversy still existed." We are thus invited to conclude that the possibility of compliance with an award does not render a petition to confirm premature, but the actuality of compliance does render such a petition moot. Respondents elaborate with argument that is of constitutional dimension. Indeed, their main brief begins with the assertion that "[t]his appeal concerns the trial court's failure to adhere to the fundamental principle of jurisprudence prohibiting courts from hearing a case in the absence of an actual controversy." When an

arbitration award has been complied with in full, respondents argue that judicial confirmation of the award is pointless, i.e., academic (citing, among other cases, *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713-714 [1980]). As the "principle[] which forbids courts to pass on academic, hypothetical, moot or otherwise abstract questions[] is founded both in constitutional separation-of-powers doctrine, and in methodological strictures which inhere in the decisional process of a common-law judiciary" (*id.*), respondents essentially argue that the word "shall" in CPLR 7510 should not be construed as a legislative mandate to the judicial branch to exercise its powers and confirm an award even when the petition is academic.

Regardless of whether the Court of Appeals might confine *Geneseo Police* to its particular facts (*see Matter of Seelig v Koehler*, 76 NY2d 87, 92 [1990], *cert. denied* 498 US 847 [1990]), we should not. The rationale of the Court of Appeals in *Geneseo Police* -- "[o]nly those grounds for resisting confirmation of an award specified in CPLR 7511 may be the basis for vacating or modifying an arbitration award" -- applies with equal force to this case. So, too, do the terms of CPLR 7510, which state that the court "*shall* confirm an award ... unless the award is vacated or modified upon a ground specified in section 7511" (emphasis added). Giving the word "shall" its ordinary meaning, we are

directed unequivocally by CPLR 7510 to confirm an arbitration award if a timely application is made whenever the award is not vacated or modified under CPLR 7511.

In *Matter of Allstate Ins. Co.* (24 AD3d 437), the Second Department, cited *Geneseo Police*, among other precedents, in reversing an order that dismissed a petition to confirm an arbitration award. After stating that the petition to confirm was timely and that the respondent had not advanced any of the grounds specified in CPLR 7511 for vacating or modifying the award, the panel held that "the court should have granted the petition to confirm the arbitrator's award, notwithstanding that the petitioner has already has paid the amount awarded" (*id.* at 438; citing, among other cases, *Matter of Ricciardi [Travelers Ins. Co.]*, 102 AD2d 871 [2d Dept 1984] [petition to confirm an arbitration award granted "notwithstanding the fact that respondent has already paid the amount awarded"]).[1]

As noted above, our decision in *Organization of Staff Analysts* (*supra*) comes to a different conclusion. In that case, we held that Supreme Court correctly granted a motion to dismiss a petition to confirm an arbitration award as academic because

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[1]As discussed below, the petitioner in *Matter of Allstate*, the party that paid the award, was the respondent in the arbitration.

"respondents had fully and completely satisfied the arbitration award" (277 AD2d at 23). As the record on appeal shows, we so held even though the petitioner-appellant relied on the provisions of CPLR 7510 and 7511 in arguing that the petition could not be dismissed as moot. We cited CPLR 3211(a)(7) and 404(a) in rejecting that argument (*id.*). The latter provision states that a respondent in a special proceeding "may raise an objection in point of law by setting it forth in [the] answer or by a motion to dismiss the petition"; its evident purpose is to permit a motion to be made on all grounds available in an action under CPLR 3211 (*see* McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C404.1, at 644 [1990]). The clear import of our citations to CPLR 3211(a)(7) and 404(a) is that the broad authority to raise an objection in point of law in either an answer or in a motion to dismiss is inconsistent with construing the word "shall" in CPLR 7510 to mandate confirmation whenever the petition is not modified or vacated in accordance with CPLR 7511. On this appeal, petitioners make the same argument based on CPLR 7510 and 7511 that we rejected in *Organization of Staff Analysts*.[2]

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[2]A treatise cited by respondents also supports their position that compliance with an award renders moot a petition to confirm the award (*see* 13 Weinstein-Korn-Miller, NY Civ Prac ¶ 7510.01, at 75-255 [2d ed] ["After the award is made, the parties

We decline to follow our decision in *Organization of Staff Analysts*. First, the parties in that case did not alert this Court to the fact that the Court of Appeals had affirmed in *Geneseo Police*. Second, our reliance on CPLR 404(a) was misplaced. The directive to confirm in CPLR 7510 is not qualified by the broad terms of CPLR 404(a) allowing the respondent in a special proceeding to raise an objection in point of law. CPLR 404(a) is a general provision applicable to all special proceedings while the directive of CPLR 7510 is one that applies specifically to petitions to confirm an arbitration award. That specific directive, accordingly, trumps the general provision (*see Matter of Brusco v Braun*, 84 NY2d 674, 681 [1994]). Third, CPLR 7510 does not require confirmation of an award only upon the application of a party who prevails in whole or in part in an arbitration; rather, it directs the court to confirm an award "upon application of *a party*" (emphasis added). Indeed, in *Matter of Allstate Ins. Co.*, the record on appeal reveals that the appellant, Allstate, brought the petition to confirm the award even though it was the respondent in the arbitration and the award was in favor of the respondent on the appeal, Dental Health Care, P.C., the petitioner in the

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may voluntarily comply with it, thus rendering any court proceeding to confirm the award moot"]).

arbitration (Brief for Petitioner-Appellant at 2; *see* 24 AD3d 438). In its brief, Allstate both noted that Dental Health Care (which, presumably because it got the money, did not file a brief in opposition to Allstate's appeal) had "seemingly objected" to confirmation of the award on the ground that Allstate had not explained why it was seeking to confirm an award that it had paid (*id.* at 7), and argued that it "was under no obligation to include any explanation for the petition in its moving papers" (*id.* at 8). The effect of accepting petitioners' mootness argument would be to rewrite the statute to limit the right to obtain confirmation of an award to a subset of the parties to an arbitration proceeding. Not only would a prevailing party be precluded from seeking confirmation whenever the adverse party had complied with the award, but a losing party also would be precluded whenever it, too, had complied with the award.

Although construing CPLR 7510 so as to read words into the statute that are not there ordinarily would be impermissible (*see Matter of Chemical Specialties Mfrs. Assn. v Jorling*, 85 NY2d 382, 394 [1995]), it might be reasonable nonetheless if doing so would avoid a serious constitutional question (*cf. Matter of Lorie C.*, 49 NY2d 161, 171 [1980]). Contrary to respondents' implicit contention, their construction of CPLR 7510 is not needed to avoid a serious constitutional question about the

authority of the Legislature to require the courts to exercise the judicial power to decide disputes in a moot proceeding. The Legislature could not so require the courts consistent with fundamental constitutional precepts (*cf. U.S. Bancorp Mtge. Co. v Bonner Mall Partnership*, 513 US 18, 21 [1994] ["Of course, no statute could authorize a federal court to decide the merits of a legal question not posed in an Article III case or controversy"]),[3] but that is irrelevant.

The key here is to recognize that the broad right CPLR 7510 confers on parties to arbitration proceedings to obtain confirmation of an award renders irrelevant both whether confirmation may affect the practical rights of the parties and whether compliance with the award has occurred. We are required to conclude that in determining to confer this right on both the prevailing and the losing party, and without conditioning it on whether compliance has occurred, the Legislature made a

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[3]*U.S. Bancorp* is not directly applicable here because New York's constitution does not contain a "case or controversy" clause (*Socy. of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772 [1991]). Nonetheless, as noted above, the "fundamental principle" of New York law (*Matter of Hearst Corp.*, 50 NY2d at 713) that "forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions, is founded both in constitutional separation-of-powers doctrine, and in methodological strictures which inhere in the decisional process of a common-law judiciary" (*id.* at 713-714).

considered decision (*see Farrington v Pinckney*, 1 NY2d 74, 88 [1956] ["the choice of measures is for the legislature, who are presumed to have investigated the subject, and to have acted with reason, not from caprice"] [internal quotation marks omitted]). No principle of law supports the proposition that courts are free to deny a party a statutory right on the ground that the right the Legislature chose to grant has no practical significance to the party. To the contrary, we are required not only to conclude that the Legislature made a considered choice but to give effect to the plain meaning of the statute (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]), which specifies that the court "*shall* confirm an award upon application of a party made within one year after its delivery to him, *unless* the award is vacated or modified upon a ground specified in section 7511" (CPLR 7510 [emphasis added]). The word "*shall*" reinforces the conclusion that the specified grounds for not confirming are exclusive, and the specification of those grounds reinforces the conclusion that the word "*shall*" is as peremptory as it appears to be (*cf. Uribe v Merchants Bank of New York*, 91 NY2d 336, 340 [1998]).

In short, it is irrelevant in a proceeding to confirm an award whether there is a dispute about whether the award has been fully satisfied. If there is no such dispute, the court simply

confirms the award. If there is such a dispute, the court ignores it and simply confirms the award. In either case, assuming of course that the respondent is not seeking to vacate or modify the award, the court is *not* exercising the quintessentially judicial power to resolve disputes. Rather, it is exercising a ministerial function at the behest of the Legislature. If either the petitioner or the respondent contends that the other party has not complied with the award, the party claiming noncompliance is not prejudiced in the slightest by confirmation of the award despite its claim. After all, that very compliance dispute is a pointless one unless there is a subsequent enforcement proceeding. If there is, whether the award has been satisfied in full necessarily will be in dispute (because if not, unless the appropriate remedy is in dispute, the enforcement proceeding will be moot) and the dispute can be resolved by that court. This view of a petition to confirm an arbitration award is consistent with the fact that it is a special proceeding, a "quick and inexpensive way to implement a right" that is "brought on with the ease, speed, and economy of a mere motion" (Siegel, NY Practice § 547, at 943 [4th ed]).

Matter of Rattley v New York City Police Dept. (96 NY2d 873 [2001]) and other cases dismissing as moot article 78 petitions challenging the denial of requests under the Freedom of

Information Law (Public Officers Law art 6 [FOIL]) are distinguishable. FOIL grants to the public a right of "access to the records of government in accordance with the provisions of [article 6]" (Public Officers Law § 84) and to "a person denied access to a record" the right to bring a proceeding pursuant to CPLR article 78 "for review of such denial" (Public Officers Law § 89[4][b]). No provision of FOIL or of CPLR article 78, however, purports to grant to a person requesting access to a record the right to a judicial declaration that the request is or is not one that should be granted. Accordingly, when a request initially is denied but the party thereafter receives the record (or the record does not exist), the party seeking the record has received all that he or she is entitled to under the law. For this reason, a judicial determination resolving a dispute over the lawfulness of an earlier denial of the request would entail an unnecessary exercise of the judicial power to decide disputes.

As noted above, respondents contend that Supreme Court's factual finding that "they have not satisfied the award entirely" is erroneous as a matter of law for several reasons. We need not detail respondents' arguments in this regard, or determine their validity, and instead simply vacate the finding as unnecessary and potentially prejudicial to respondents in a subsequent

enforcement proceeding (*see Matter of Excelsior 57th Corp. [Kern]*, 290 AD2d 329 [1st Dept 2002]). We note that in response to respondents' arguments that the issue of compliance is exclusively the province of the arbitrator and that petitioners have waived any claim of noncompliance, petitioners expressly acknowledge only that the question of whether it was impossible for respondents to comply with the award "may be properly raised as a defense to a petition for contempt."

Accordingly, the order and judgment (one paper) of Supreme Court, New York County (Kibbie F. Payne, J.), entered August 7, 2007, which granted petitioners' motion pursuant to CPLR 7510 to confirm an arbitration award, should be modified, on the law, to vacate the finding that respondents have not complied entirely with the award, and otherwise affirmed, without costs.

All concur.

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

ENTERED: JULY 14, 2009